Environmental Sustainability as a Protected Collective Interest in International and EU Law

Collected essays

Edited by
GIUSEPPE PALMISANO

EDITORIALE SCIENTIFICA

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Editoriale Scientifica
Napoli

Volume pubblicato con il contributo assegnato al PROJECT PRIN 2022 (M4 C2. Investment 1.1.) "Intergenerational solidarity, collective human rights claims and environmental sustainability in international and European law" – MUR CODE: 2022F74F8T_001

Proprietà letteraria riservata

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via San Biagio dei Librai, 39 - 80138 Napoli
www.editorialescientifica.com info@editorialescientifica.com
ISBN 979-12-235-0681-3

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EXPLORING THE USE OF COLLECTIVE RIGHTS CLAIMS, THE PRINCIPLES OF SOLIDARITY AND COMMON CONCERN AS LEGAL TOOLS FOR ACHIEVING ENVIRONMENTAL SUSTAINABILITY

GIUSEPPE PALMISANO*

In recent decades, the planet's ecosystems have been impacted by a number of indisputable phenomena, including elevated levels of air and water contamination, deforestation, the decline of biodiversity, progressive depletion of non-renewable energy sources, climate change and global warming, which is increasing the frequency and intensity of extreme weather events worldwide and causing rising sea levels.

These facts make it clear that, as human beings, we must all be concerned and act if we wish to preserve the planet for our own benefit, as well as for the benefit of future generations and the survival and wellbeing of all the other living beings and elements with which we share it.

This awareness and concern forms the basis of the concept of environmental sustainability, which, put simply, requires that any economic and technological activities, social practices and regulations – including those essential to human development – respect the environment and natural resources, limiting their impact on environmental degradation as much as possible, also with a view to ensuring, in the long term, that new and future generations can continue to live on a planet that is ecologically sound and not deprived of natural resources.

Clearly, at an international legal level, concern for environmental sustainability is primarily an integral part of the objectives and purposes of rules and guarantees specifically designed to address global environmental issues. Rules and guarantees such as those set out in the 1992 Convention on Biological Diversity and

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the Framework Convention on Climate Change, or the 2015 Paris Agreement on global warming, as well as the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol. Or the rules and guarantees concerning the marine environment and biological resources, as set out in the UN Convention on the Law of the Sea, particularly in Section 2 of Part VII (on conservation and management of the living resources of the high seas), Part XII (on protection and preservation of the marine environment), and Section 1 of Part XI (on the general principles concerning the "Area", i.e. "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction").

It is equally evident that, at the international legal level, environmental sustainability constitutes a pivotal component of soft law instruments pertaining to sustainable development. We refer to well-known instruments such as the 1992 Rio Declaration on Environment and Development and the Agenda 21 (the non-binding action plan for sustainable development adopted at the UN "Earth Summit" in Rio), the 2002 Johannesburg Declaration on Sustainable Development, "The Future We Want" (the outcome document from 2012 Rio+20 Conference), and of course the 2030 Agenda for Sustainable Development and its 17 SDGs (Sustainable Development Goals). In this context, the concept of environmental sustainability is typically understood to denote the environmental dimension of sustainable development and is complementary to the economic and social dimensions of sustainability.

However, beyond the two legal areas of environmental protection and sustainable development, which for different reasons have not yet proven capable of significantly advancing States towards environmental sustainability, concern for environmental sustainability has progressively found space, consideration and relevance in other international and European legal frameworks in recent years.

A notable trend is the increasing use of international and European human rights instruments to enhance environmental protection and achieve a sustainable environment.

One example of this is the invocation of the right to a healthy

and/or sustainable environment as an "autonomous" human right within the framework of human rights monitoring systems such as the two International Covenants on human rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the European Convention on Human Rights and the European Social Charter. Another manifestation of this trend is evidenced by the expectation that States adopt measures protecting the environment when fulfilling their obligations to realise certain human rights, which are generally classified as economic, social or cultural rights (right to health, right to an adequate standard of living, right to food, right to housing, and the right of peoples to enjoy their natural wealth and resources), but also the more "individualistic" rights to life and to respect private and family life.

In this evolving practice, the assertion that States must implement measures of environmental protection is frequently advanced as a claim for the respect of a collective and shared interest for the protection and proper use of an essential "common good". In this sense, such claims are based, explicitly or implicitly, on a legal principle of "solidarity", which is invoked as a principle according to which all those who inhabit the same environment and share a common essential good have a duty to contribute to the realisation of the collective welfare and to ensure that all individuals have access to such good, and have a legitimate interest in the fulfilment of this duty. It is this legal conviction that underpins the requirement for States, within the framework of international human rights instruments, to enact environmental protection measures and make progress towards a sustainable environment.

It is important to note that the legal and judicial relevance of environmental sustainability as a human rights issue, based on the ideas of solidarity and common concern for the environment, including for future generations, has recently been identified and scrutinised by some of the most authoritative international bodies entrusted by States with the task of interpreting and applying international law and international human rights law. I am referring, of course, to the International Court of Justice's Advisory Opinion on the obligations of States in respect of climate change,

delivered on 23 July 2025. This opinion contains a number of noteworthy points regarding the adverse effects of climate change on the enjoyment of human rights, and the human right to a clean, healthy and sustainable environment. And I am also referring to the Advisory Opinion on the obligations of States in responding to the climate emergency, which was issued by the Interamerican Court of Human Rights at the end of May 2025, as well as to the General Comment 26 on economic, social and cultural rights and the environmental dimension of sustainable development, which the UN Committee on Economic, Social and Cultural Rights adopted in September 2025, after working on it for over seven years.

At the same time, the tendency to advance and recognise claims to environmental protection and achieve environmental sustainability is also manifesting in contexts other than bodies or mechanisms called to monitor respect of States' obligations enshrined in international and European instruments on human rights.

This is particularly evident in the areas of international trade and investment. In this regard, it is hardly necessary to recall the concrete relevance of the issue of legality and safeguard, within the WTO dispute settlement system, of domestic measures in furtherance of environmental protection and climate change action. Similarly, the practice of investment treaties is increasingly incorporating considerations of environmental protection and the combat against climate change, with the objective of supporting the achievement of sustainable development. There is an emerging body of cases and awards that address the merits of investment claims that target environmental sustainability or pro-climate measures taken by States.

Furthermore, concern for environmental sustainability plays a significant role in the context of the international regulation of corporate responsibility, as well as in climate or environmental litigation before national courts, where the application of international rules and standards is involved.

Additionally, the standpoint of environmental sustainability is emerging in various other domains that are subject to international legal regulations or that fall within the remit of internation-

al organisations. The domain of international peace and security, and the law of armed conflicts, provides examples of this. For instance, climate considerations are being progressively mainstreamed into the Security Council's practice, with the security dimensions of climate change being addressed not only in general discussions within the Council, but also in regional and country-specific resolutions. With regard to the law of armed conflict, it is sufficient to note that in July 2022 the International Law Commission adopted the "Draft Principles on the Protection of the Environment in Relation to Armed Conflicts".

Similar remarks could be made regarding the relevance of environmental sustainability concerns in the context of framing and applying international disaster law.

The tendency to address environmental sustainability issues based on the principle of solidarity and the notion of the environment as a common concern is also evident within the European Union system. Indeed, the EU's effective environmental law enforcement mechanisms make the EU legal order a privileged laboratory for recognising a collective interest in environmental sustainability.

Firstly, the European Commission's enforcement of EU environmental rules in Member States through the infringement procedure is of crucial importance. This "public" enforcement contributes to the strengthening of EU environmental standards within the EU territory, thereby ensuring environmental sustainability for EU residents. At the same time, the jurisprudence of the Court of Justice pertaining to the recognition of the direct effect of certain provisions enshrined in EU environmental legislation, paves the way for individuals to play an active role in the enforcement of environmental standards vis-à-vis Member States before national courts.

In this context, the evolutive interpretation of Article 37 of the EU Charter of Fundamental Rights, which refers to "Solidarity'" is also playing a role, with a view to elaborating the "collective right" dimension of the environmental protection rules enshrined in the provision. Two main features in the Court of Justice case law are noteworthy in this respect: one relates to the issue of access to justice, including the recent extension to envi-

ronmental associations of the right to take legal action; the other relates to the so-called environmental democracy, expressed in the enhancement of the rights of public participation in decision-making processes in matters of environmental importance. This case law appears to be in alignment with a vision that propounds the collective or common concern for environmental sustainability.

Such an approach is also reflected in recent reforms to EU environmental legislation, including the "Green Deal" strategy, the "New Circular Economy Action Plan" and the "Ecodesign" Directive. These EU initiatives all express an underlying principle of solidarity, intended as a normative value implying awareness of a shared interest and destiny, and of the mutual connection and interdependence between peoples: each peoples must be responsible to themselves, to others and also to future generations. Significantly, two recent acts of the European Union to implement the Green Deal introduce an external, global dimension to the solidarity principle, as outlined: the 2023/1115 Regulation on deforestation-free products and the 2024/1760 Directive on corporate sustainability due diligence.

Against this background, the present volume of collected essays aims to explore the pervasiveness and conditioning of concerns for environmental sustainability in diverse areas of international law and the EU system, extending beyond the scope of application of strictly environmental treaties and instruments. In particular, areas and emerging trends will be scrutinised where issues of environmental sustainability appear to be increasingly considered and addressed from the perspective of the protection of a common interest, on an underlying or explicit principle of solidarity.

It is evident that the examination of the topic does not aspire to be systematic nor exhaustive. The objective of the volume is rather to propose a substantial number of in-depth studies, systematically organised and distributed, with a view to enhancing understanding of the role and relevance of environmental sustainability concerns in international law and the EU system. The primary objective – and the *fil rouge* linking together the differ-

ent essays – is to evaluate the appropriateness and effectiveness of collective rights claims and the principles of solidarity and common concern as legal tools in various areas of international law and in the EU system, with a view to encouraging States to fulfil their environmental duties and achieve environmental sustainability.

In this perspective, the volume is articulated in six sections.

The first section commences with the presentation and discussion of several general concepts and issues that are pivotal to comprehending the legal implications and the role of environmental sustainability within the specific domains of international law and the EU system, which will be examined in the subsequent sections. These include the concept of the environment as a common good and the intergenerational dimension of sustainability (Marco Gestri), the diverse perspectives on environmental protection in international human rights law (Riccardo Pisillo Mazzeschi), and the significance of environmental sustainability and intergenerational solidarity within the EU legal order (Roberto Baratta).

Section Two provides a more detailed examination of the manner in which environmental sustainability is integrated within the legal framework of international human rights protection. A number of human rights mechanisms are examined in particular, including the International Covenant on Economic, Social and Cultural Rights and the European Social Charter system (Francesca De Vittor and Massimo Starita), the American and African systems for the protection of human rights (Federico Lenzerini), the jurisprudence of the European Court of Human Rights and the practice of the Human Rights Committee (Alfredo Terrasi), and the transversal issue of "diagonal" climate change claims before international human rights courts (Alessandra Sardu).

Section Three discusses the importance of environmental sustainability concerns in relation to regulations and litigation primarily pertaining to international trade, investments and corporations, as well as the economic operational activities of public authorities. Firstly, Carlo De Stefano examines the relevance of environmental sustainability in the context of international trade

and investment law. Patrizia Vigni then analyses the impact of environmental sustainability concerns on commercial activities in areas beyond national jurisdiction. Next, Adriana Macchia explores the role of environmental sustainability in the international regulation of corporate responsibility. Finally, Giorgia Berrino examines the relevance of intergenerational equity before national courts applying international rules and standards.

The fourth section of the volume brings together, on the one hand, issues relating to the consideration of environmental sustainability in the context of international peace and security and armed conflicts, and, on the other hand, its relevance to important social issues, such as disaster response and prevention, the governance of global food problems, and the emerging issue of sustainable urbanisation. To be more precise, the section comprises four chapters that address the following subjects: the engagement of the UN Security Council with environmental protection and climate change (Laura Di Gianfrancesco), the legal relevance of environmental sustainability in times of armed conflict and occupation (Andrea Carcano), the role of environmental sustainability in international disaster law (Eleonora Branca), the environmental and intergenerational dimensions of food sustainability in the practice of the United Nations and the FAO (Silvia Manservisi), and the international role of cities in advancing environmental sustainability (Mirko Sossai).

The sections of the volume specifically devoted to the European Union system start in Section Five, where the collective, democratic and participatory foundations of environmental protection are analysed and discussed, from both the normative and judicial standpoint. In this section, Francesco Munari examines the issue of access to justice and environmental litigation. Morgan Eleanor Harris then discusses public participation rights and their guarantees as applicable and applied to environmental matters. Finally, Marco Inglese examines the protection of consumers' collective interests in the environmental and food domains.

In the final section, the role and relevance of environmental sustainability are examined in relation to specific EU policies and legislation, including the energy policy (Viviana Sachetti), the "circular economy" (Andrea Barbano), the state aid law and

practice (Chiara Cellerino), and the EU external action and trade agreements (Flavia Zorzi Giustiniani).

In order to provide a more comprehensive context for the structure, perspective and specific topics of the present volume, as well as the authors of its chapters, it is important to note that it is the result of a research project of national significance that was approved in 2023 by the Italian Ministry of Universities and Research (PRIN 2022, Prot. 2022F74F8T). The research project was entitled "Intergenerational solidarity, collective human rights claims and environmental sustainability in international and European law", and it involved six Italian universities: Roma Tre, Genoa, Palermo, Parma, Siena and Modena-Reggio Emilia. Roma Tre University was leading and coordinating the project.

The objective of the project was to examine the emerging legal trend, both internationally and at the European level, of utilising the principle of solidarity and collective human rights to encourage States to address environmental issues and make progress towards environmental sustainability.

In line with the rationale and objective of the project as a whole, the research studies published in this volume have been conceived and finalised with the aim of advancing theoretical legal knowledge of the interrelation and interaction between human rights and environmental protection, and the normative value of the principle of solidarity. The studies also aim to raise awareness among legal professionals, practitioners, public authorities, economic operators, organised civil society and young people of the potential and specific features of collective human rights and the principle of solidarity as tools for claiming and obtaining environmental protection measures for the benefit of present and future generations.

As the editor of the volume and the principal investigator of the project, it is my personal hope that this book will fulfil the above-mentioned aims in an appropriate manner. And I would like to express my sincere gratitude to all the colleagues and friends who participated in the realisation of the project and contributed with their valuable studies to the present volume. It is only thanks to them and their commitment that my hope has good chances of becoming realised.

Section One
General concepts and legal issues

ENVIRONMENT AS A COMMON GOOD: SOLIDARITY, ENVIRONMENTAL SUSTAINABILITY AND THE INTERGENERATIONAL DIMENSION

MARCO GESTRI*

SUMMARY: 1. Introduction. – 2. Common Good, Common Heritage, Common Concern. – 3. Different Meanings of Solidarity in International Environmental Law. – 4. Legal Implications of the "Common Good" or "Common Concern" Perspective: The Duty to Prevent Significant Environmental Harm and Its *Erga Omnes* Nature. – 5. Obligations of International Cooperation and Assistance. – 6. Environmental Human Rights and Their Collective Dimension. – 7. Conclusions.

1. *Introduction*

In conceptual terms, the notion of the environment as a "common good" of humankind has deep historical roots and is, at present, widely regarded as self-evident. This notion derives from the fact that the environment, as affirmed by the International Court of Justice, "is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[1] Within the international community, the characterization of the environment as a common good gradually emerged in the late 1960s, when awareness of the progressive deterioration of the biosphere became widespread. More precisely, this conceptualization contributed to the development of legal principles such as the *common heritage of mankind* – which, as will be demonstrated, currently finds application exclusively with respect to areas and resources lying beyond the national jurisdiction of States – and the *common concern of humankind*. Embedded in this notion and in these legal

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[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29.

constructs is a principle of solidarity, which has evolved both in the context of relations among present generations (intragenerational solidarity) and within a broader intergenerational dimension (intergenerational solidarity).

This chapter seeks to examine whether the characterization of the environment – or of essential environmental resources, such as the climate or biodiversity – as a common good has relevance only at the conceptual level, or merely as a *façon de parler*,[2] or whether it also possesses a normative quality capable of acquiring legal relevance under international law by imposing obligations on States to address environmental challenges and to advance environmental sustainability. Naturally, in addressing this issue, due consideration must be given to the significant contribution made to environmental law by the recent advisory opinion of the International Court of Justice on the *Obligations of States in Respect of Climate Change*.[3] As will be shown, the Court makes important and meaningful references to the notions of common good and common concern in order to support and corroborate its interpretation of international law across a range of issues.

2. *Common Good, Common Heritage, Common Concern*

The concept that the international community shares a common interest in protecting the environment, conceived as inherently a common good, began to attract significant attention further to the United Nations (UN) Conference on the Human Environment, held in Stockholm in June 1972. The Preamble of the

[2] See M. Bothe, "Whose Environment? Concepts of Commonality in International Environmental Law", in G. Winter (ed), *Multilevel Governance of Global Environmental Change* (Cambridge, Cambridge University Press 2010), p. 547.

[3] *Obligations of States in Respect of Climate Change, Advisory Opinion*, *23 July 2025*, available at www.I.C.J.-cij.org. See also the other two advisory opinions recently rendered on climate change: International Tribunal for the Law of the Sea (ITLOS), *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, ITLOS Case No. 31, 21 May 2024; Inter-American Court of Human Rights, *Advisory Opinion OC-32/25 of 29 May 2025*, Series A No. 32.

Declaration adopted at the Conference proclaims that "To defend and improve the human environment for present and future generations has become an imperative goal for mankind".[4] The Stockholm Declaration is also clearly based on a principle of solidarity.[5] These ideas form the foundation of many principles outlined in the Declaration,[6] even though the latter does not appear to transform these ideas into a juridical notion of the common good or of the principle of solidarity from which specific legal consequences would derive.

During the 1980s, attempts were made, both in legal doctrine[7] and in the practice of States and international institutions, to extend the application of the principle of *common heritage of mankind* – developed in relation to the deep seabed through a series of UN General Assembly resolutions and subsequently enshrined as the cornerstone of Part XI of the UN Convention on the Law of the Sea[8] – to the environment or to environmental resources, even if located within the territory of States. Besides the recognition of the cultural and natural heritage as "the world heritage of mankind as a whole" in the 1972 UNESCO World Heritage

[4] *Declaration of the United Nations Conference on the Human Environment*: Report of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972 (A/CONF.48/14/Rev.1).

[5] R. Wolfrum, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law: General Course of Public International Law", in *Recueil des Cours de l'Académie de droit international de la Haye*, CDXVI (2021), p. 153 ff.

[6] See, e.g., Principle 1 (Man "bears a solemn responsibility to protect and improve the environment for present and future generations"). See L. B. Sohn, "The Stockholm Declaration on the Human Environment", in *Harvard International Law Journal*, XIV (1973), p. 423 ff.

[7] See in particular A. Kiss, "La notion de patrimoine commun de l'humanité", in *Recueil des Cours de l'Académie de droit international de la Haye*, CLXXV (1982) p. 75, pp. 99 ff. See also C. De Klemm, "Le patrimoine naturel de l'humanité", in R.J. Dupuy (ed), *The Future of the International Law of the Environment*, Workshop 1984, Hague Academy of International Law (Dordrecht, Nijoff 1985), p. 117; W.D Verwey, 'Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective', in *Leiden Journal of International Law*, VIII (1995), p. 37.

[8] UN Convention on the Law of the Sea, 10 December 1982, in *International Legal Materials*, XXI (1982), p. 1261 ff.

Convention[9] – which, in any event, upholds the sovereignty of the territorial State – a significant example of this trend can be found in the International Undertaking on Plant Genetic Resources, which was adopted at the 22nd session of the Food and Agriculture Organisation (FAO) Conference in 1983 through Resolution 8/83. The Undertaking is a non-legally binding instrument, aimed at ensuring that plant genetic resources of economic or social interest, particularly for agriculture, are explored, preserved, and made available for plant breeding and scientific purposes. Pursuant to its Article 1, the Undertaking "is based on the universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction". Yet, that philosophy, centred on the idea of common heritage and on freedom of access to plant genetic resources, immediately lost ground, with the enactment by many territorial States of national laws restricting access to plant genetic resources located within their territory.[10] After the adoption in 1992 of the Convention on Biological Diversity,[11] the 27th session of the FAO Conference decided to open international negotiations in order to revise the International Undertaking and to adopt a new regime in harmony with the Convention. On 3 No-

[9] Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, 1037 U.N.T.S. 15511, Preamble, 6th paragraph. See also UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 UNTS 240, Preamble, 2nd paragraph. See R. Wolfrum, "Common Heritage of Mankind", in *Max Planck Encyclopedia of Public International Law* (2009), available at www.mpepil.com; M. Gestri, "Teoria e prassi di un accordo pionieristico nella gestione di beni d'interesse generale: la Convenzione del 1972 sul patrimonio mondiale", in M.C. Fregni, M. Gestri, M. Santini (eds), *Tutela e valorizzazione del patrimonio culturale* (Torino, Giappichelli 2021) p. 113 ff.

[10] Even in the framework of the International Undertaking, a number of Annexes to the main document were in the following years adopted by the FAO Conference, limiting the application of the concept of free access. Of particular importance is the adoption in 1991 of interpretative Annex III which clarified that "the concept of mankind's heritage, as applied in the International Undertaking on Plant Genetic Resources, is subject to the sovereignty of the States over their plant genetic resources" (Resolution C3/91).

[11] UN Convention on Biological Diversity, Rio, 5 June 1992, 1760 U.N.T.S. 79.

vember 2001, the 31st session of the FAO Conference adopted an International Treaty on Plant Genetic Resources for Food and Agriculture.[12] In the latter treaty, any language hinting at the common heritage of mankind principle was avoided. Similarly to the Convention on Biological Diversity, it recognizes the sovereign rights of States over their own plant genetic resources and that "the authority to determine access to those resources rests with national government and is subject to national legislation" (Article 10); at the same time, in its Preamble, the Contracting Parties declare "that plant genetic resources for food and agriculture are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere". Indeed, the principle of common heritage of mankind, implying the prohibition of any national appropriation of the areas to which it refers as well as the collective management of their natural resources (by an international organization or at least under an international regime),[13] seems to be absolutely irreconcilable with the notion of territorial sovereignty.[14]

[12] 2400 U.N.T.S. 303. See G. Moore, W. Tymowsky, *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture* (Gand/Cambridge, IUCN 2005).

[13] See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, New York, 5 December 1979, in *International Legal Materials*, XVIII (1979), p. 1434 ff. (Art. 11).

[14] See M. Gestri, *La gestione delle risorse naturali d'interesse generale per la comunità internazionale* (Torino, Giappichelli 1996), p. 415; M. Bowman, "Environmental Protection and the Concept of Common Concern of Mankind", in M. Fitzmaurice, D. M. Ong, P. Merkouris (eds), *Research Handbook on International Environmental Law* (Cheltenham, Elgar 2010), pp. 500-501; N. Ronzitti, *Diritto internazionale*, VII ed. (Torino, Giappichelli 2023), p. 94. See also A.A. Cançado Trindade, "International Law for Humankind: Towards a New Jus Gentium, General Course on Public International Law", in *Recueil des cours de l'Académie de droit international de La Haye,* CCCXVI (2005), p. 388 ff.; R. Wolfrum, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", cit., pp. 168-169; D. French, "Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?" in M. Bowman, P. Davies, E. Goodwin (eds), *Research Handbook on Biodiversity and Law* (Cheltenham, Elgar 2016) p. 334 ff.; A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Envi-*

The 1992 Rio Conference on Environment and Development definitely expounded the idea of "global environmental responsibilities", reflecting the need for the international community to tackle by common action some major environmental problems.[15] The two major treaties adopted at the Conference – the Framework Convention on Climate Change and the Convention on Biological Diversity – respectively designate climate change[16] and biological diversity[17] as the *common concern of humankind*. Originally that concept emerged as a compromise formula,[18] formulated in order to rebut proposals for the characterization of the global atmosphere or of biological diversity as the common heritage of mankind. In effect, the principle of common concern signals the existence of a general interest of the international community with respect to a certain issue, without however bringing with it the idea of taking away some activities or assets from the sphere of national sovereignty. The concept, which has been included in a number of international instruments, found its most articulated expression in the Convention on Biological Diversity, whose general objectives are the conservation of bio-

ronment, 4th edn (Oxford, OUP 2021), p. 135. *Contra*, P. Taylor, "Commom Heritage of Mankind and Common Concern of Humankind", in L. Krämer, E. Orlando (eds), *Principles of Environmental Law, Elgar Encyclopedia of Environmental Law*, vol. VI (Cheltenham, Elgar 2008), p. 310.

[15] A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., p. 142.

[16] United Nations Framework Convention on Climate Change (UNFCCC), New York, 9 May 1992, in *International Legal Materials*, XXXI (1992), p. 849, Preamble, 1st paragraph ("acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind"). See also the Paris Agreement, Paris, 12 December 2015, Preamble, 11th paragraph, in *International Legal Materials*, 55 (2016), p. 740 ff.

[17] Convention on biological diversity, cit., Preamble, 3rd paragraph ("Affirming that the conservation of biological diversity is a common concern of humankind").

[18] See UN General Assembly, Resolution 43/53, *Protection of Global Climate for Present and Future Generations*, 6 December 1988, para. 1, "Climate change is a common concern of humankind, since climate is an essential condition which sustains life on earth". See F.L. Kirgis, "Standing to Challenge Human Endeavors that Could Change the Climate", in *American Journal of International Law*, LXXXIV (1990), p. 525 ff.

logical diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (Article 1). The Convention reaffirms the sovereign right of States to exploit their own resources (Article 3) and their authority to determine access to genetic resources (Article 15); on the other hand, it sets out a number of legal obligations as to the management of these resources.

According to the Convention, States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner. Of central relevance in the framework of the Convention is the concept of "sustainable use", referring to:

> the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations. (Article 2)

The Convention also requires parties to facilitate access to genetic resources for environmentally sound uses by other parties, which is in any case subject to the prior informed consent of the State providing such resources (Article 15). Importantly, as is the case with the Convention on Climate Change,[19] the Convention on Biological Diversity lays down a clear obligation on the developed country parties to provide "new and additional financial resources to enable developing country parties to meet the agreed full incremental costs" to them of implementing measures (Article 20).

The legal relevance of the concept of *common concern of humankind* has been the subject of debate in legal scholarship. It is generally recognised that the characterization of an environmental issue or resource as being of common concern implies that the issue, or the management of the resource, can no longer be regarded as falling exclusively within the domestic jurisdiction of States.[20] Such characterization also provides a normative basis

[19] Article 4, para. 3.

[20] See, e.g., R. WOLFRUM, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", cit., p.

for action by the international community. Beyond this core implication, however, a number of scholars maintain that no further legal consequences can be clearly derived from the concept, or that such consequences remain unsettled.[21] By contrast, other authors have sought to identify a set of legal effects that would typically characterize legal regimes expressing the principle of common concern of humankind, in the first place with regard to treaties that explicitly rely on that principle.[22] It must however be noticed that the concept has also been employed in order to characterize conventional regimes that do not expressly refer to it.[23] This expansion demonstrates that the principle may acquire a general nature. Furthermore, some scholars have gone so far as to argue that the notion of common concern of humankind may possess relevance at the level of customary international law, affirming that it could be applicable even to resources or ecosystems which, even if not governed by specific treaty regimes, are clearly regarded by the international community as of general and essential interest (such as forests).[24]

250. With specific regard to the atmosphere, see S. Murase, "First Report on the protection of the atmosphere", International Law Commission, sixty-sixth session, UN Doc. A/CN.4/667, 14 February 2014, para. 89.

[21] See P. Taylor, "Common Heritage of Mankind and Common Concern of Humankind", cit., p. 315 ff.; A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgewell's International Law and the Environment*, cit., p. 146.

[22] See M. Gestri, *La gestione delle risorse naturali d'interesse generale per la comunità internazionale*, cit., p. 140 ff., p. 396 ff.; A.A. Cançado Trindade, "International Law for Humankind: Towards a New Jus Gentium, General Course on Public International Law", cit., pp. 394-395; D. French, "Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?", cit., p. 334 ff. See also, in more prudent terms, M. Bowman, "Environmental Protection and the Concept of Common Concern of Mankind", cit., p. 503 ff.

[23] See, in particular, with respect to the regime concerning the ozone layer: R. Wolfrum, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", cit., p. 250; A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., p. 142; with regard to the UNESCO 1972 World Heritage Convention, F. Francioni, "Thirty Years On: Is the World Heritage Convention Ready for the 21st Century?", in *The Italian Yearbook of International Law*, XII (2002), pp. 23-24.

[24] H. Hohmann, *Precautionary Legal Duties and Principles of Modern In-*

In its advisory opinion on *Climate Change*, the International Court of Justice repeatedly emphasizes that the Framework Convention on Climate Change and the Paris Agreement have acknowledged that climate change is "a common concern of humankind".[25] The Court further underscores the relevance of this notion in relation to other multilateral treaties addressing global environmental issues, such as the protection of biological diversity[26] and of the ozone layer.[27] This latter reference is particularly significant, given that, as noted above, neither the Vienna Convention for the Protection of the Ozone Layer nor the Montreal Protocol contain any express reference to the notion of common concern of humankind.

Moreover, the advisory opinion refers to the concept of "common concern" even when it addresses the legal framework arising from *customary* international law with respect to climate change and other global environmental issues.[28] Importantly, the ICJ attaches significant legal consequences to this concept, which will be examined in the following paragraphs, after a brief discussion of the closely related principle of solidarity.

3. *Different Meanings of Solidarity in International Environmental Law*

Viewing the environment as a common good or as a common concern leads to the affirmation of a principle of solidarity *in*

ternational Environmental Law, (London/Boston, Graham & Trotman/Martinus Nijhoff 1994), p. 330; M. Gestri, *La gestione delle risorse naturali d'interesse generale per la comunità internazionale*, cit., p. 399; Id., "Transferts internationaux pour protéger des ressources d'intérêt commun: qui doit payer pour la préservation des forêts tropicales?", in M. Bothe, P. Sand (eds), *La politique de l'environnement. De la réglementation aux instruments économiques*, The Hague Academy of International Law (The Hague/Boston/London, Nijhoff 2003), p. 297 ff.

[25] *Obligations of States in respect of Climate Change*, cit., *inter alia* at p. 54, para. 155; p. 125, para. 440.

[26] *Ivi*, p. 98, para. 325.

[27] *Ivi*, p. 47, para. 126.

[28] *Ivi*, p. 88 para. 285; p. 95, para. 308; p. 107, para. 364.

subjecta materia.[29] As observed, solidarity is indeed grounded in a "sense of community or commonality".[30]

In international environmental law, the principle of solidarity has developed along a dual dimension, requiring solidarity among present generations while also entailing an intergenerational dimension. From an *intragenerational perspective*, the concept of solidarity implies "an understanding that every member of the community must consciously conceive of its own interests as being inextricable from the interests of the whole".[31] Furthermore, in the context of international environmental law, this perspective places particular emphasis on the need to take into account disparities in levels of development among States, as well as the fact that, historically, industrialized States have contributed to environmental degradation to a greater extent. This understanding has led to the recognition of the *principle of common but differentiated responsibilities*, as clearly articulated in Principle 7 of the Rio Declaration.

With regard to *intergenerational* solidarity, it is worth recalling that legal scholarship initially articulated this notion in connection with the concept of the common good. In her seminal 1988 work, Elizabeth Brown Weiss forcefully emphasized that all generations are inherently linked in their use of the *common patrimony* of the Earth.[32] The principle of intergenerational equity

[29] See R. Wolfrum, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", cit., identifying solidarity as a "structural principle" in international environmental law, p. 305.

[30] R. St. J. Macdonald, "The Principle of Solidarity in Public International Law", in *Etudes de droit international en l'honneur de Pierre Lalive* (Basel, Helbing & Lichtenhahn 1993), p. 275.

[31] *Ivi*, p. 301. See also B. Simma, "From Bilateralism to Community Interest in International Law: General Course of Public International Law", in *Recueil des cours de l'Académie de droit international de La Haye*, CCL (1994), p. 238 ff.

[32] E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Ardsley-on-Hudson, N.Y., Transnational Publishers 1988); Id., "Our Rights and Obligations to Future Generations for the Environment", in *American Journal of International Law*, LXXXIV (1990), p. 199.

has since found recognition in numerous instruments of international law, both non-binding and treaty-based,[33] generally in their preambles and, in some important cases, also in their operative provisions.[34]

International legal doctrine has long debated whether intergenerational solidarity possesses legal relevance as such. In this respect, there is little doubt that the idea of intergenerational equity has provided the conceptual premise for the development of more specific principles and rules; in other words, it operates as an underlying or *guiding principle* in the formation of concrete legal norms. In particular, since the 1992 Rio Conference, this idea has become a fundamental component of the principle of *sustainable development*, especially with regard to its environmental dimension, as well as of the principle of *precaution*.[35] Indeed, intergenerational equity entails the duty for States to take into account the long-term environmental effects of activities carried out within their territory or in the exercise of freedoms relating to the use of international spaces. It thus imposes, in particular, obligations concerning the rational and *sustainable use* of natural resources of essential interest.[36] As I have argued elsewhere, from a strictly legal-technical perspective such obliga-

[33] See A. Gianelli, "La tutela delle future generazioni nel diritto internazionale: regola, principio o valore?", in M. Frulli (ed), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea* (Napoli, Editoriale Scientifica 2023) p. 9 ff.; T. Scovazzi, "La dimensione temporale del diritto internazionale dell'ambiente: i diritti delle generazioni future", *Rivista giuridica dell'ambiente*, 2023, p. 221 ff.

[34] See in particular Article 2 of the Convention on Biological Diversity and Article 3 para 1 of the Convention on Climate Change.

[35] See M. Gestri, *La gestione delle risorse d'interesse generale per la Comunità internazionale*, cit., p. 434 ff.; M. Bothe, "Environment, Development, Resources", in *Recueil des cours de l'Académie de droit international de La Haye*, vol. CCCXVIII (2005), p. 487 ff.; M. R. Wolfrum, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", cit., p. 307, at p. 338. See also *Intergenerational solidarity and the needs of future generations, Report of the Secretary-General*, UN Doc. A/68/322, 15 August 2013 (intergenerational solidarity is "embedded in the concept of sustainable development", para. 2, 10).

[36] See, e.g., Article 2 of the Convention on Biological Diversity (see *supra*).

tions can only be conceived as obligations owed to other States.[37] In fact, in light of the current structure of the international community, it does not appear possible to recognize future generations as subjects of international law, not least because of the difficulty of precisely identifying the individuals to whom this concept would refer.[38] In other words, future generations may be regarded as potential beneficiaries of conduct whose corresponding obligations and rights are borne by States. Even if one were to accept that individuals belonging to future generations might hold substantive rights, significant difficulties would remain in identifying the entities entitled to claim such rights at the procedural level – apart, as already noted, from other States acting through the traditional mechanisms of international law. One possible solution would be to designate a third party to act as a representative or guardian of the rights of future generations, by analogy with certain developments in domestic legal systems; however, such a perspective appears both unrealistic and highly complex.[39]

[37] See M. Gestri, *La gestione delle risorse d'interesse generale per la Comunità internazionale*, cit., *passim*.

[38] See A. Gianelli, "La tutela delle future generazioni nel diritto internazionale: regola, principio o valore?", cit., p. 20, 45; B. Bonafé, "Interesse delle generazioni future come interesse collettivo?", in M. Frulli (ed), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea*, cit., p. 142 ff.; F. Salerno, "Conclusioni", *ivi*, p. 500. On the difficulty of defining a shared concept of future generations, see M. Frulli, "Introduzione", *ivi*, pp. 12-13; A. Nolan, "The Children are the Future – Or Not? Exploring the Complexities of the Relationships between the Rights of Children and Future Generations", in EJIL:Talk! (2022) available at www. www.ejiltalk.org

For a different view, see B. Nagy, "Speaking Without a Voice", in E. Agius, S. Busuttil (eds), *Future Generations and International Law* (London/New York, Routledge, 2013). p. 57 ff. See also *infra*, footnote 44 and corresponding text.

[39] See B. Bonafé, "Interesse delle generazioni future come interesse collettivo?", cit., p. 142 ff.; L. Pineschi, "Tutela dell'ambiente e del patrimonio culturale come strumenti per garantire i diritti delle generazioni future: il contributo degli organi internazionali giurisdizionali e non giurisdizionali", in M. Frulli (ed), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea*, cit. p. 102 ff. Some commentators have even taken the view that explicit reliance on the language of rights of future generations would be either counterproductive or, at a minimum, unnecessary: T. Scovaz-

In the debate on the relevance of the principle of intergenerational solidarity in contemporary international law, particular weight has been acquired by the two recent advisory opinions of the Inter-American Court of Human Rights and the International Court of Justice on climate change. In its advisory opinion on *Climate Change*, the latter characterises "intergenerational equity" as a *manifestation of equity in the general sense* and accordingly recognizes its legal relevance as a guide for the interpretation of applicable rules. In particular, according to the Court,

> considerations of intergenerational equity must play a role *infra legem*, without displacing or exceeding the limits of the applicable law. Due regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law.[40]

This reconstruction by the Court of the legal significance of intergenerational equity has given rise to differing assessments. It has been observed that the Court did not expressly articulate the existence of obligations owed by States to future generations, nor did it explicitly address the question of corresponding rights held by individuals not yet born. This aspect of the opinion has attracted particular attention in light of the terms of the General Assembly's request, which expressly invited the Court to consider States' obligations under international law towards "present and future generations," as well as the legal consequences of breaches of those obligations "with respect to … individuals of the present and future generations." In his separate opinion, Vice-President Sebutinde takes the view that the Court should have made clear, both in its reasoning and in operative paragraph 457, that the obligations identified are owed "not only to present

ZI, "La dimensione temporale del diritto internazionale dell'ambiente: i diritti delle generazioni future", cit., p. 234 ff.; S. HUMPHREYS, "Against Future Generations", in *European Journal of International Law*, XXXIII (2022), p. 1061 ff.

[40] *Obligations of States in respect of Climate Change*, cit., p. 55, para. 157.

generations but also to future generations".[41] Similar concerns have been expressed in the scholarly literature, notably regarding the part of the advisory opinion dealing with human rights, which does not expressly affirm the existence of legal rights vested in future generations.[42] In this respect, it has been noted that a degree of divergence remains between the Court's approach and that adopted by the Inter-American Court of Human Rights, which has recognized the collective dimension of the right to enjoy a healthy environment and its relevance for both present and future generations.[43]

In reality, the legal reasoning articulated in the advisory opinion with respect to intergenerational equity appears well-balanced and warrants a favourable reception. From a conceptual viewpoint, of great significance is the affirmation that intergenerational equity "is an expression of the idea that present generations are trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations".[44] As observed, the Court transposes that idea of present generations as trustees of humanity onto States themselves. Accordingly, the advisory opinion acknowledges that States have a duty to

[41] *Obligations of States in respect of Climate Change*, cit., Separate Opinion of Vice-President Sebutinde, p. 3, para. 7. She adds that the Advisory Opinion employs vague language, leaving it up to each State to take "[d]ue regard for the interests of future generations" in the formulation of its policies (*ibid.*).

[42] See C.E. Foster, "The 2025 International Court of Justice Advisory Opinion on Obligations of States in Respect of Climate Change", in *International and Comparative Law Quarterly*, published online, 2025, p. 20 ff.; H. Keller, "A Right to a Clean, Healthy and Sustainable Environment: Or Perhaps Not (Yet)?", *Völkerrechtsblog,* 05.08.2025, available at www.voelkerrechtsblog.org; J. Odermatt, "What the Court Didn't Say: The I.C.J.'s Climate Opinion and the Politics of Judicial Restraint", *Climate Law*, 30 July 2025, available at wwww.blogs.law.columbia.edu/climatechange. See also J. Rauber, "Custom, Entrenchment, Interpretation: How the I.C.J.'s Advisory Opinion on Climate Change Contributes to the International Law's Turn Toward the Future", *Völkerrechtsblog,* 05.08.2025. available at www.voelkerrechtsblog.org.

[43] C. E. Foster, op. ult. cit. (there is blue sky between the Court's view and that of the Inter-American Court of Human Rights). See *infra* footnote 91 and corresponding text.

[44] *Obligations of States in respect of Climate Change*, cit., p. 55, para. 156.

give due regard to the interests of future generations and to the long-term implications of conduct when they "contemplate, decide on and implement policies and measures" in fulfilment of their obligations under relevant treaties and, importantly, under customary international law. *Inter alia*, such considerations must inform the scope and content of States' obligations concerning the prevention of environmental harm, the exercise of due diligence and the duty of international cooperation. In sum, in the Court's reasoning the notions of intergenerational equity and common concern play a key role in grounding and strengthening obligations of prevention and cooperation, thereby emphasizing collective responsibility and solidarity, and recasting the conception of freedom underpinning State sovereignty.[45]

4. *Legal Implications of the "Common Good" or "Common Concern" Perspective: The Duty to Prevent Significant Environmental Harm and Its* Erga Omnes *Nature*

From the analysis carried out in the preceding paragraphs, and from a preliminary assessment of the International Court of Justice's advisory opinion on *Climate Change*, it emerges that the characterisation of the environment as a common good underpins the principles of the "common concern of humankind", solidarity (intragenerational and intergenerational), and environmental sustainability. These principles are closely connected. In its advisory opinion, the International Court of Justice underscores the importance of these principles for guiding the interpretation and application of relevant treaties and of customary law. Additionally, these principles have been capable of operating as drivers for the development of new, more stringent customary law rules.

In effect, it seems possible to single out some important legal developments which appear to have stemmed from the founda-

[45] See J. Jahn, N. Suchantke, "From Carbon Sovereignty to Trusteeship of the Climate Commons: The I.C.J. Advisory Opinion on Climate Change", *Völkerrechtsblog,* 18.08.2025, available at www.voelkerrechtsblog.org.

tional concepts of the environment as common good or common concern and from the principle of solidarity.

First, one may point to the crystallization of a *broad* interpretation of the *duty to prevent significant harm to the environment*, which may now be said to apply even beyond instances of cross-border damage. The International Court of Justice has expressly articulated this interpretation for the first time in its advisory opinion on *Climate Change*. Previously, the Court had referred to this duty only in the context of disputes between neighbouring States involving direct cross-border environmental impacts.[46] During the advisory proceedings on *Climate Change*, several participant States maintained that the obligation to prevent environmental harm had developed exclusively in relation to instances of direct transboundary harm and therefore did not apply to climate change or to other forms of harm that are global in nature and result from the cumulative effects of diffuse sources.[47]

The Court rejects this argument by recalling that, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, it recognized the existence of a general obligation of States "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control".[48] From this statement, the Court now infers that the duty to prevent significant harm to the environment is not confined to

[46] See, notably, I.C.J. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 706, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614, paras. 83 and 99.

[47] See, e.g., the Written Statements of Australia, para. 4.10; Denmark, Finland, Iceland, Norway and Sweden, para. 70; France, para. 59; New Zealand, paras. 96, 101-102; USA, paras. 4.5, 4.15-4.21. See also the Written Comments of the UK, para. 34.

[48] *Obligations of States in respect of Climate Change*, cit., p. 49, para. 134 (quoting *Legality of the Threat and Use of Nuclear Weapons*, cit., p. 242, para. 29)

instances of direct cross-border harm and that "it extends to global environmental concerns".[49] On this basis, the Court concludes that "the customary duty to prevent significant harm to the environment also applies with respect to the climate system and other parts of the environment".[50]

It should be emphasized, however, that the statement contained in the 1996 advisory opinion could equally be read as referring to instances of *direct cross-border environmental harm affecting areas beyond national jurisdiction* (such as the high seas), and that its applicability to climate change or other forms of global environmental harm had remained an open question.[51] Significantly for present purposes, the International Court of Justice appears to take this further step in its 2025 advisory opinion by drawing an *analogy between areas beyond national jurisdiction and global environmental concerns*.[52] In other words, rather than grounding its conclusion in an analysis of international practice, the Court derives it essentially from the consideration that the environment constitutes a common good.[53]

[49] *Ibid*.

[50] *Ibid*. The importance of this affirmation is rightly underlined by J. Brunnée, "The Advisory Opinion on Obligations of States in Respect of Climate Change: Harm Prevention under Customary International Law", *Völkerrechtsblog,* 06.08.2025, available at www.voelkerrechtsblog.org.

[51] See, among others, G. Gaja, "The Protection of General Interests in the International Community", cit., p. 178; L.-A. Duvic Paoli, *The Prevention Principle in International Environmental Law* (Cambridge, Cambridge University Press 2018); J. Brunnée, "Harm Prevention", in L. Rajamani, J. Peel (eds), *The Oxford Handbook of International Environmental Law*, 2nd edn (Oxford, OUP 2021), p. 281; P.-M. Dupuy, G. Le Moli, J.E. Viñuales, "Customary International Law and the Environment", *ivi*, p. 394 ff.

[52] This point is underscored by J. Jahn, N. Suchantke, "From Carbon Sovereignty to Trusteeship of the Climate Commons: The I.C.J. Advisory Opinion on Climate Change", cit. The International Tribunal for the Law of the Sea, in its 2011 advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, in *ITLOS Reports 2011*, maintained that the ICJ's "reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind", p. 10, para. 148.

[53] In the same vein, the EU argued in its Written Statement that while the

Secondly, the characterization of the environment as a common good has played a pivotal role in the development and consolidation of the *erga omnes* nature of international legal rules *in subjecta materia*. From a *logical* perspective, the recognition of the environment as a common good, coupled with the understanding of sustainability as a matter of global concern, would appear to entail that the core obligations of environmental protection are owed to the international community as a whole and therefore possess an *erga omnes* character. Indeed, a number of authoritative scholars have explicitly reached this conclusion on that basis.[54] Other commentators, however, have cautioned that, from a strictly legal standpoint, the determination of the scope of relevant customary obligations must rest on an assessment of State practice, often concluding that existing practice remains insufficiently consistent or conclusive to sustain such a finding.[55]

The International Court of Justice's advisory opinion on *Climate Change* clearly consolidated this trend. Indeed, the Court determines that States' obligations concerning the protection of the climate system and other components of the environment – and, in particular, the customary obligation to prevent significant environmental harm – constitute *erga omnes* obligations.[56] Significantly, the Court appears to have reached this conclusion not primarily through an empirical assessment of State practice, but rather by relying on an argumentative method grounded in the notion of common goods and the existence of a shared interest in

prevention obligation traditionally has been understood as applying in interstate contexts "it is widely recognized that general international law is evolving to enlarge the scope of the obligation to also include significant harm to the global commons as well as in areas beyond national jurisdiction".

[54] F.L. Kirgis, "Standing to Challenge Human Endeavors that Could Change the Climate", cit., p. 527 ff.; G. Gaja, "The Protection of General Interests in the International Community", cit., p. 178; A. Kiss, A. D. Shelton, *Guide to International Environmental Law* (Leiden, Brill-Nijhof, 2007), p. 15; D. French, "Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?", cit., p. 352 ff.

[55] M. Bothe, "Environment, Development, Resources", cit., p. 501 ff.

[56] *Obligations of States in respect of Climate Change*, cit., p. 125 ff., paras. 440-442.

their protection.[57] The Court expressly observes that "certain rules of international law relating to *global common goods* such as the climate system, may produce *erga omnes* obligations",[58] corroborating this statement with a reference to the commentary to Conclusion 17 of the International law Commission's Conclusions on *Jus Cogens*;[59] it then goes on to consider that "all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas".[60] In light of this, the 2025 advisory opinion adds that any State is entitled to invoke responsibility for breaches of such *erga omnes* obligations.[61] As noted in the legal literature,[62] this is the first time the International Court of Justice expressly acknowledges the legal standing of any State other than an injured State with respect to violations of *erga omnes* obligations under customary international law, making reference to Article 48, para. 1, b of the International Law Commission's Articles on State Responsibility.[63]

The advisory opinion however does not tackle the thorny is-

[57] See also *Obligations of States in respect of Climate Change*, cit., *Declaration of Judge Tladi*, para. 34 ("the Court identifies certain obligations under customary international law and the climate change treaties as having *erga omnes* and *erga omnes partes* character respectively insofar as they relate to common spaces, or 'global common goods'").

[58] *Obligations of States in respect of Climate Change*, cit., p. 125, para. 440 (emphasis added; in the French text, the Court refers to *biens communs mondiaux*).

[59] See Conclusion 17, para. 3 of the commentary, International Law Commission, *Conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)*, in *Yearbook of the International Law Commission*, 2022, Vol. II (Part Two), p. 66. In reality, the ILC in its commentary referred to "common spaces, in particular common heritage regimes" and not to "global common goods" (see also L. Pezzano, "Obligations Erga Omnes and Climate Change: Reflections on the I.C.J. Advisory Opinion, in *EJIL:Talk*! (2025) available at www. www.ejiltalk.org, (arguing that the point deserved more clarification by the I.C.J.).

[60] *Obligations of States in respect of Climate Change*, cit., p. 125, para. 440.

[61] *Ivi*, para. 442.

[62] C.E. Foster, "The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change", cit., p. 7.

[63] International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission,* 2001, vol. II (Part Two).

sue regarding the legal possibility for other States, even if not directly injured, to take countermeasures in order to induce the responsible State to comply with the *erga omnes* obligation. This issue could be for instance raised in relation to internal acts adopted in order to ensure the protection of resources of common concern yet evidencing possible instances of extraterritorial application of domestic law or of contrast with the rules on international trade.[64] Besides, unlike the Inter-American Court of Human Rights,[65] the International Court of Justice does not address whether the obligation to prevent environmental harm – or at least a core component of it – can be regarded as possessing *jus cogens* character.

With regard to the treaty context, the International Court of Justice's 2025 advisory opinion affirms that the treaty obligations arising under the UN Framework Convention on Climate Change and the Paris Agreement are obligations *erga omnes partes*, insofar as they "seek to protect the essential interest of all States in the safeguarding of the climate system, which benefits the international community as a whole".[66] As noted above, the Court supports this conclusion by referring to the characterisation of climate change in both treaties as a "global concern of humankind", which calls for "a global response".[67]

[64] See for instance Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No. 995/2010, OJ L 150/206, 9.6.2023. For an express reference, in this context, to the qualification of forests as a *common concern* and to the *erga omnes* character of the related obligations, see E. SANDULLI, "Forest Conservation as a Common Concern: EU Regulation on Deforestation-free Products in the Light of Public International Law", in *Review of European, Comparative & International Environmental Law*, XXXIV (2025) p. 89 ff.

[65] *Advisory Opinion OC-32/25 of 29 May 2025*, cit., para. 29.1

[66] *Obligations of States in respect of Climate Change*, cit., p. 125, para. 440.

[67] *Ibid.* In the legal doctrine, for the interconnection between the concept of "common concern of humankind" and the recognition of *erga omnes* obligations, see A. BOYLE, C. REDGWELL, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., pp. 145-146, 243-244.

5. *Obligations of International Cooperation and Assistance*

International legal scholarship has long debated the existence of a general obligation or principle of cooperation, both in general terms and in relation to environmental matters, as well as the scope of such a principle.[68] With specific regard to environmental protection, this principle has often been conceptually derived from the characterization of the environment as a common good or linked to the principle of common concern of humankind.

The duty to cooperate is clearly reflected, at treaty level, in the conventional regimes adopted to address global environmental problems, which also contemplate specific, and broadly parallel, obligations of cooperation of States parties. Such obligations appear to constitute one of the defining features of legal regimes dealing with problems or resources characterized as a common concern of humankind, notably of the agreements addressing climate change, biodiversity conservation, ozone layer protection, and desertification. With respect to these instruments, it is indeed possible to identify not only general obligations of cooperation in addressing such issues,[69] but also more specific obligations concerning *the transfer of financial resources and technologies* in favour of developing States, aimed at enabling the implementation of objectives of general interest.[70] In this context, such obligations notably represent an expression of the *principle of common but differentiated responsibilities*[71].

[68] See R. Wolfrum, "Cooperation, International Law of", in *Max Planck Encyclopedia of Public International Law* (2009), available at www.mpepil.com, paras. 28-30; M. Bothe, "Environment, Development, Resources", cit., p. 434 ff.

[69] See B. Mayer, *International Law Obligations on Climate Change Mitigation* (Oxford, OUP 2022), pp. 288-289.

[70] See M. Gestri, *La gestione delle risorse naturali d'interesse generale per la comunità internazionale*, cit., p. 148 ff.; M. Bothe, "Environment, Development, Resources", cit., p. 470 ff.

[71] M. R. Wolfrum, "Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law", cit., p. 166; J. Brunnée, "Common Areas, Common Heritage, and Common Concern", in D. Bodansky, J. Brunnée, E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford, OUP 2007) p. 566; P. Taylor, "Common Herit-

Some authors have gone further, suggesting the existence – within *customary* international law – of obligations of cooperation, particularly in the form of financial and technical assistance, with respect to the conservation of resources or the management of problems regarded as being of essential interest to the international community or of common concern to humankind.[72] While practice reveals a multiplicity and fragmentation of financing and assistance mechanisms,[73] it nonetheless appears possible to affirm that these mechanisms rest upon a common underlying principle.

This perspective has been significantly strengthened by the adoption of the International Court of Justice's advisory opinion on *Climate Change*, in which the notions of the environment as a common good or as a common concern of humankind, together with the principle of solidarity, expressly underpin the duties of international cooperation articulated by the Court.

The Court emphasizes that the duty to cooperate constitutes a central obligation under the climate change treaties and, more generally, under environmental treaties.[74] With specific regard to the UN Framework Convention on Climate Change, it observes that the rationale for cooperation is reflected in the treaty's preamble, which states in its sixth paragraph that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response".[75] The Court further stresses that, since climate change is a *common concern*, cooperation "is not a matter of choice for States but a pressing need and a legal obligation".[76]

age of Mankind and Common Concern of Humankind", cit., p. 319; S. Tahura Zaman, "Recognising Biodiversity Conservation as a 'Common Concern of Mankind': A Legal Appraisal", in *Environmental Policy and Law*, L (2020), p. 175 ff.

[72] M. Gestri, *La gestione delle risorse naturali d'interesse generale per la Comunità internazionale*, cit., p. 165 ff.

[73] See L. Boisson de Chazournes, "Financial Assistance", in L. Rajamani, J. Peel (eds), *The Oxford Handbook of International Environmental Law*, cit., p. 937 ff.; A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., pp. 632-634.

[74] *Obligations of States in respect of Climate Change*, cit., p. 50, para. 140.

[75] *Ivi,* p. 71, para. 216.

[76] *Ivi*, p. 95, para. 308.

Importantly, the 2025 advisory opinion unequivocally affirms that the obligation to cooperate in the context of climate change – and more generally in environmental protection – has a *customary* character.[77] The Court's legal reasoning in reaching this conclusion is of particular interest. On the one hand, it considers that the customary nature of the duty to cooperate for environmental protection has been established "in view of the related practice of States".[78] In this respect, the Court refers, as evidence of *opinio iuris*, to the numerous binding and non-binding instruments in which this duty is expressed, and it cites the ITLOS advisory opinion on *Climate Change* and the order of the same Tribunal in the *MOX Plant* case.[79]

On the other hand, the Court also derives the customary duty of cooperation from the principle that climate change and, more generally, the environment constitute *a resource shared by all States*. Notably, in paragraphs 301-302, the Court recalls its earlier jurisprudence emphasizing the importance of cooperation in relation to resources shared in a transboundary context by a limited number of States and then affirms that "this observation applies even more to the climate system, which is *a resource shared by all States*".[80]

Here again, with regard to the subject-matter under consideration, it may be observed that the Court relies on the characterization of climate change as a matter of common concern, and on the characterization of the climate – and more generally of the environment – as a shared resource or common good, in order to support the finding of the existence of rules of customary international law even in the absence of a consolidated practice. In

[77] *Ivi*, p. 50, paras. 140-142 and 30-308, See C.E. FOSTER, "The 2025 International Court of Justice Advisory Opinion on Obligations of States in respect of Climate Change", cit., p. 12 ff.

[78] *Obligations of States in respect of Climate Change*, cit., p. 50, para. 140.

[79] ITLOS, *Climate Change, Advisory Opinion*, cit., p. 110, para. 296; *MOX Plant (Ireland v. United Kingdom), Provisional Measures*, *Order of 3 December 2001*, in *ITLOS Reports 2001*, p. 110, para. 82.

[80] *Obligations of States in respect of Climate Change*, cit., p. 93, para. 140 (emphasis added). See also IACtHR, *Advisory Opinion OC-32/25 of 29 May 2025*, cit., p. 90, para. 253.

this respect, it may be recalled that authoritative scholarly writing has recently observed that, while obligations of cooperation may be regarded as consolidated under customary international law in the transboundary context, the perspective of cooperation "in a spirit of global partnership" remains largely confined to the conceptual plane.[81]

6. *Environmental Human Rights and Their Collective Dimension*

Acknowledging the environment as "the living space, the quality of life and the very health of human beings, including generations unborn"[82] has opened the door to significant developments from the perspective of international human rights law. This premise has led to the recognition that environmental protection "is a *precondition* for the enjoyment of human rights".[83] On this basis, international human rights monitoring bodies and courts have addressed ecological concerns even though the core universal human rights treaties do not expressly enshrine environmental rights,[84] and only a limited number of regional instruments do so, in diverse and fragmented ways.[85] One of the most significant trends in contemporary international law is thus the increasing reliance on human rights law as a vehicle to urge States

[81] P.-M. Dupuy, G. Le Moli, J. E. Viñuales, "Customary International Law and the Environment", cit., p. 399.

[82] I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, cit., p. 55, para. 155.

[83] I.C.J., *Obligations of States in respect of Climate Change*, cit., p. 109, para. 373 (emphasis added).

[84] See H. Tigroudja, "From the 'Green Turn' to the Recognition of an Autonomous Right to a Healthy Environment: Achievements and Challenges in the Practice of UN Treaty Bodies", in *American Journal of International Law*, CXVII (2023), pp. 179-183.

[85] See, generally, A., Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., p. 288 ff. As to the ECHR, the European Court of Human Rights has repeatedly stated that no article of the Convention is specifically designed to provide protection of the environment as such: see ECtHR, *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003. See, however, *infra*.

to address environmental degradation, particularly in relation to climate change, and to advance sustainable development. Importantly, the application of human rights law in the environmental and climate context allows individuals – who generally lack standing in traditional international dispute settlement mechanisms – to access international human rights monitoring procedures, regional human rights courts, and national courts applying international law, in order to challenge State conduct allegedly contributing to environmental harm.[86]

International human rights monitoring bodies and regional human rights courts have indeed recognised that environmental degradation may interfere with the effective enjoyment of a wide range of human rights, including the right to life, the right to health, the right to privacy and family life, and the right to an adequate standard of living, as well as other economic, social and cultural rights. In this regard, it is worth recalling that the Committee on Economic, Social and Cultural Rights has recently adopted General Comment No. 27 precisely in order to clarify the obligations of States parties to the ICESCR with respect to the environmental dimension of sustainable development.[87]

At the same time, the recognition of an autonomous *human right to a healthy environment* is increasingly advocated at both the international and domestic levels. For present purposes, it is important to note that this right is often articulated as a right having both an individual and a collective dimension.[88] While no universal human rights treaty expressly recognises such a right,[89]

[86] See I.C.J., *Obligations of States in respect of Climate Change*, cit., Separate Opinion of Judge Charlesworth, para. 12, quoting B. Mayer, *International Law Obligations on Climate Change Mitigation,* cit., p. 130.

[87] Committee on Economic, Social and Cultural Rights, *General comment No. 27 (2025) on economic, social and cultural rights and the environmental dimension of sustainable development*, UN doc. E/C.12/GC/27.

[88] On this "collective dimension", see *infra*. It is worth mentioning that the traditional understanding of collective rights in international law – identifying rights which are held by collective entities (peoples, minorities etc.) – does not appear to be central in this context, although it is sometimes referred to: see, e.g., A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., p. 287.

[89] At regional level, the right finds recognition in several conventions: Ad-

in 2022 the UN General Assembly adopted – by a recorded vote of 161 in favour, none against, and eight abstentions – a resolution recognising the right to a clean, healthy and sustainable environment as a human right, while emphasising its relationship with other human rights and with existing international law.[90] Notwithstanding this development, the existence of an autonomous right to the environment as a matter of positive international law remains contested.[91]

This issue has recently been addressed by both the Inter-American Court of Human Rights and the International Court of Justice in their advisory opinions on climate change. Within the Inter-American human rights system, the right to a healthy environment is expressly recognised in Article 11 of the Protocol of San Salvador.[92] However, this provision cannot be directly invoked by individuals before the Inter-American Court of Human Rights. Notwithstanding this limitation, the case-law of the Court has held that the right to a healthy environment is one of the

ditional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, Article 11; Arab Charter on Human Rights, League of Arab States, 22 May 2004, Article 38 (as a component of the right to an adequate standard of living); African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, Article 24 (right of peoples); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, 11 July 2003, Article VIII. See also Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, Article 1; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, Article 1.

[90] General Assembly resolution 76/300. However, a significant number of States that voted in favour of the resolution issued declarations expressly denying the existence of an autonomous right to a healthy environment under customary international law or treaty law. See P. Alston, "The Right to a Healthy Environment: Beyond Twentieth Century Conceptions of Rights", in *American Journal of International Law*, CXVII (2023), p. 167 ff.

[91] *Ibid.* See also A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment*, cit., p. 295 ff.; H. Tigroudja, "From the 'Green Turn' to the Recognition of an Autonomous Right to a Healthy Environment", cit.

[92] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988.

rights encompassed within the economic, social, and cultural rights protected under Article 26 of the American Convention of Human Rights.[93] Furthermore, although the Court has not explicitly affirmed the customary law status of the right to a healthy environment, it has characterised it as a "fundamental right for the existence of humankind", with both *individual* and *collective* dimensions, adding that, in its collective dimension, it constitutes a universal value owed to both present and future generations.[94] On this basis, the Court has further reasoned that, unlike other human rights, the right to a healthy environment protects environmental components – such as forests, rivers, and seas – as legal interests in themselves, even in the absence of certainty or evidence of direct harm to individuals.[95] This approach paves the way for the recognition of Nature as a subject of rights.[96] It has also led the Court to assert the *jus cogens* character of the obligation not to cause irreversible damage to the climate and the environment.[97]

As for the International Court of Justice, in its advisory opinion on *Climate Change* it has stated that, under international law, the human right to a clean, healthy and sustainable environment is inherent in, and essential for, the enjoyment of other human rights.[98] As noted by several judges[99] and early commentators,[100] however, the advisory opinion displays a degree of ambiguity, in-

[93] See *Advisory Opinion OC-32/25 of 29 May 2025*, cit., para. 270.

[94] *Ivi*, para. 272.

[95] *Ivi*, para. 273.

[96] E. Amor Vázquez, T. Amor-Jürgenssen, "The Bloom of Nature's Rights: On the IACtHR's Recognition of Nature's Legal Personality in AO-32/25", *Verfassungsblog*, 18 July 2025.

[97] *Advisory Opinion OC-32/25 of 29 May 2025*, cit., para. 287,

[98] *Obligations of States in respect of Climate Change*, cit., para. 393.

[99] *Obligations of States in respect of Climate Change*, cit., Separate Opinion of Judge Aurescu, paras. 27-26; Separate Opinion of Judge Bhandari, para. 3; Separate Opinion of Judge Charlesworth, paras. 8-12; Declaration of Judge Tladi, paras. 24-33.

[100] H. Keller "A Right to a Clean, Healthy and Sustainable Environment: Or Perhaps Not (Yet)?", cit.; R. Perera, "The I.C.J.'s Recognition of an Autonomous Right to a Clean and Healthy Environment," in *EJIL:Talk!,* 19 August 2025.

sofar as it does not unequivocally affirm the existence of a standalone right to a healthy environment under customary international law, nor does it clearly articulate the legal consequences that would follow from such recognition.

One of the most compelling and controversial questions arises at procedural level, in close connection with the application of the right of access to justice for victims of human rights violations. In particular it concerns the extent to which the recognition of the right to a healthy environment and to a stable climate as autonomous rights, endowed with a *collective dimension*, may contribute to a re-interpretation of rules on *active legal standing*.[101] This issue is especially relevant under regional human rights conventions, as well as under domestic and EU law, where such recognition could broaden opportunities for individual access to justice or allow for forms of collective or popular standing. Evidently, the solutions to these questions inevitably vary across legal systems. The contributions collected in this volume demonstrate that the legal framework in this field remains diverse, fragmented, and in constant evolution.

7. *Conclusion*

The analysis developed in this chapter demonstrates that the characterization of the environment as a common good cannot be dismissed as a merely rhetorical or descriptive formula. Rather, it has operated as a foundational premise for the emergence, consolidation, and expansion in positive international law of the principle qualifying the environment and its essential components as a "common concern of humankind". Grounded in the idea of "commonness," this principle has progressively transcended its original treaty-based settings and has come to inform the interpretation and development of customary international

[101] See D. R. Boyd, *The Right to a Healthy Environment: A User's Guide*, 2024, UN Human Rights Council, p. 33 ff. One may find significant considerations in this respect in the Inter-American Court of Human Rights *Advisory Opinion OC-32/25*, cit., paras. 546-551.

law, particularly in relation to resources or ecosystems not governed by specific conventional regimes but nonetheless regarded by the international community as being of global and essential interest.

The normative significance of this development emerges with particular clarity from the advisory opinion of the International Court of Justice on *Climate Change*. As shown in the preceding analysis, the Court relies on the notion of the environment as a common good to support an understanding of the duty to prevent significant environmental harm that extends beyond strictly transboundary contexts, to affirm the existence and scope of obligations of international cooperation and assistance under both treaty law and customary international law, and to qualify key legal obligations *in subjecta materia* as *erga omnes* obligations.

These conclusions are reached in a context in which international practice remains partly fragmented and unsettled. Against this background, the express reliance by the climate and biodiversity regimes on the notion of common concern of humankind, combined with their near-universal participation, enhances the role of those treaties as catalysts in the formation and consolidation of customary international law. More broadly, the "common good" perspective contributes to a relational reconfiguration of sovereignty, emphasizing shared responsibility and stewardship and reinforcing the legal foundations of environmental sustainability for the benefit of present and future generations.

The recognition of the environment as the common "living space … of human beings, including generations unborn"[102] has also shaped the practice of international human rights monitoring bodies, international courts, and domestic judges, which increasingly acknowledge that environmental degradation interferes with the enjoyment of fundamental human rights. This convergence between environmental protection and human rights law has now been authoritatively confirmed by the ICJ's advisory opinion on *Climate Change*. On the same basis, a self-standing human right to a healthy environment is increasingly advanced,

[102] *Legality of the Threat and Use of Nuclear Weapons*, cit., p. 241, para. 29.

even though its precise contours remain uncertain and its consolidation as a matter of positive international law is still debated.

By articulating environmental and climate harm through the language of human rights, individuals – who are generally excluded from traditional international dispute settlement – may gain standing to challenge State conduct before international, regional, and domestic human rights fora. In this context, the understanding of the environment and its essential components as common or shared goods, together with the principle of solidarity among peoples and generations, has supported the framing of environmental and climate-related human rights as rights possessing both an individual and a collective dimension.

The collective dimension does not operate primarily in the traditional sense in which international law refers to collective rights as rights vested in collective entities, such as States or peoples. Rather, it assumes decisive relevance insofar as it enables individuals, as well as representative bodies or associations, to be recognised as having standing to institute judicial proceedings for the protection of collective environmental interests, in their capacity as members of the affected community, even where the alleged harm is diffuse, widespread, and not susceptible of individualised proof. While the Inter-American Court of Human Rights has embraced a particularly expansive understanding of this collective and intergenerational dimension, the International Court of Justice has, to date, adopted a more cautious approach.

In practical terms, increased reliance on the collective dimension of environmental rights may facilitate a broader interpretation of existing rules governing the *locus standi* of individuals, or foster the development of new procedural standards, notably by permitting adjudicatory bodies to dispense with the requirement that applicants demonstrate direct and individual harm. Nevertheless, the practice of international, regional, and domestic bodies in this field remains heterogeneous and continues to evolve.

ENVIRONMENTAL PROTECTION IN INTERNATIONAL HUMAN RIGHTS LAW: FROM THE ENVIRONMENTAL IMPLICATIONS OF HUMAN RIGHTS OBLIGATIONS TO THE RIGHT TO A HEALTHY AND SUSTAINABLE ENVIRONMENT

Riccardo Pisillo Mazzeschi*

Summary: 1. Introduction. – 2. International Practice on the "Greening" of Human Rights. – 2.1. The Right to Respect for Private and Family Life. – 2.2. The Right to Life. – 2.3. The Right to Property. – 2.4. Minority Rights. – 3. The Progressive Development of an Autonomous Right to a Healthy Environment – 3.1. The First Phase. – 3.2. The Second Phase. – 3.3. The Third Phase. – 3.4. Latin American Recent Practice. – 3.5. African Practice. – 4. Merits and Demerits of the "Greening Approach" and of the Approach Favoring the Right to a Healthy Environment.

1. *Introduction*

In international law, interest in environmental protection first emerged at the interstate level. It gave rise, in the space of a few years, to numerous treaties and some customary norms designed to regulate relations between States. Thus, the interstate structure of international environmental law was not reconcilable with the legal regime of human rights, based primarily on the logic of relations between individuals (or groups of individuals) and States. This created, for some time, a kind of "barrier" between the field of international environmental law and that of human rights.[1] In essence, the two regimes developed, at first, as two separate areas of international law.[2]

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[1] R. Pisillo Mazzeschi, *International Human Rights Law. Theory and Practice* (Cham, Giappichelli/Springer 2021), p. 495.

[2] See D.K. Anton, D.L. Shelton, *Environmental Protection of Human Rights* (Cambridge, Cambridge University Press 2011), pp. 118-119; J.H. Knox, R. Pejan, "Introduction," in J.H. Knox and R. Pejan (eds), *The Human*

However, today there has been a *convergence and complementarity* between international environmental law and international human rights law[3]; and this leads to the softening of the old "barrier" of separation between the two regimes. Indeed, there is now a unanimous consensus that the environment has also become a human rights issue, *i.e.* that international human rights law should also deal with the protection of the environment.[4] It may be recalled, in this regard, as early as the 1990s, Judge Weeramantry's separate opinion in the International Court of Justice's judgment on the *Gabčikovo-Nagymaros Project*: "The protection of the environment is … a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights".[5]

This view, as we shall see, is now supported by an extensive practice of international human rights monitoring bodies and, most recently, by the advisory opinions of the International Court of Justice[6] and the Inter-American Court of Human Rights[7] on climate change.

Therefore, it can be concluded that human rights can be used as a tool for environmental protection. However, there are *two different general approaches* to using this instrument.[8] According to a first approach, that of the so-called "greening" of human rights, environmental protection can and should be achieved through an extensive interpretation of many existing and well-es-

Right to a Healthy Environment (Cambridge, Cambridge University Press 2018), p. 1.

[3] *Ibid.*

[4] Cf. P.-M. Dupuy, J.E. Viñuales, *International Environmental Law* 2nd ed. (Cambridge, Cambridge University Press 2018), p. 357.

[5] International Court of Justice, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, Separate Opinion of Judge Weeramantry, p. 91.

[6] International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, available at www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf, accessed 25 September 2025, paras. 369-393.

[7] Inter-American Court of Human Rights, Advisory Opinion *AO-32/25*, 29 May 2025, Series A No. 32.

[8] On this point see, for all, F. Munari, L. Schiano di Pepe, *Tutela transnazionale dell'ambiente. Principi, regole, problemi* (Bologna, Il Mulino 2012), pp. 114-123.

tablished human rights.[9] These are, in particular, the right to private and family life, the right to life, the right to property, minority rights, the right to justice, the rights to health, food, water, housing and an adequate standard of living. In contrast, a second approach considers the "greening theory" of human rights to be insufficient and advocates the existence of a new and *autonomous* human right to a safe, clean, healthy and sustainable environment (henceforth: healthy environment).[10]

These two approaches will be examined by this chapter. It will develop into a part devoted to international (judicial and quasi-judicial) practice on the "greening" of human rights (sec-

[9] See*, inter alia*, G. Handl, "Human Rights and the Protection of the Environment: A Mildly Revisionist View", in A.A. Cançado Trindade (ed), *Human Rights, Sustainable Development and the Environment* (San José de Costarica, Instituto Interamericano de Derechos Humanos 1992), p. 117 ff.; A. Boyle, "The Role of International Human Rights Law in the Protection of the Environment," in A. Boyle, M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford, Clarendon Press 1996), p. 63. But later, for a more flexible thesis, see A. Boyle., "Human Rights or Environmental Rights? A Reassessment", in *Fordham Environmental Law Review*, XVIII (2007), pp. 471-511, esp. p. 504 ff.; Id., "Human Rights and the Environment: Where Next?", in *European Journal of International Law,* XXIII (2012), pp. 613-642, at p. 627, and in B. Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford, Oxford University Press 2015), pp. 201-239, at p. 219. See also F. Munari, L. Schiano di Pepe*, Tutela transnazionale dell'ambiente*, cit., pp. 126-127.

[10] See*, inter alia*, P. Cullet, "Definition of an Environmental Right in a Human Rights Context", in *Netherlands Quarterly of Human Rights*, XIII (1995), pp. 25-40; J. Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law", in *Columbia Journal of Environmental Law,* XXV (2000), pp. 283-345, at p. 339; L. Collins, "Are We There Yet? The Right to Environment in International and European Law", in *McGill International Journal of Sustainable Development Law and Policy*, III (2007), pp. 119-153; R. Bratspies, "Do We Need A Human Right to a Healthy Environment?", in *Santa Clara Journal of International Law*, XXXI (2015), pp. 31-69; P.-M. Dupuy, J.E. Viñuales, *International Environmental Law*, cit. p. 375 ff.; V. Rossi, "Il riconoscimento del diritto universale a un ambiente sano: questioni aperte e percorsi evolutivi", in G. Cataldi (ed), *I diritti umani a settant'anni dalla Dichiarazione Universale delle Nazioni Unite* (Napoli, Editoriale Scientifica 2019), I, p. 178 ff.; D. Pauciulo, "Il diritto umano a un ambiente salubre nella risoluzione 76/300 dell'Assemblea generale delle Nazioni Unite", in *Rivista di diritto internazionale*, CV (2022), p. 1123.

tion 2), which will be followed by a part dedicated to the development of an autonomous human right to a healthy environment (section 3). Then an attempt will be made to assess the merits and demerits of the two approaches (section 4).

2. *International Practice on the "Greening" of Human Rights*

International practice on the "greening" of human rights, as noted above, is very extensive and cannot be examined exhaustively here. I will limit myself to the most significant cases, attempting to trace the process of progressive specification of *legal principles, State obligations and individual rights* derived from such cases. For systematic reasons, I will distinguish this practice, primarily, in relation to the main human rights involved and, secondarily, in relation to the different international monitoring bodies. The human rights that have been interpreted from an environmental perspective are numerous; but only those that have been most often applied will be considered here. They are: a) the right to respect for private and family life; b) the right to life; c) the right to property; and d) the rights of minorities.

2.1. The Right to Respect for Private and Family Life

The right to respect for private and family life has often been used by international human rights monitoring bodies to protect environmental concerns. This has occurred especially in the jurisprudence of the European Court of Human Rights and in the practice of the UN Human Rights Committee.

It is worth starting with the jurisprudence of the European Court of Human Rights, given its importance and richness. As is well known, the European Convention on Human Rights (ECHR) does not contain a specific rule on the right to a healthy environment. Nevertheless, the European Court has developed extensive case law related to the environment, using Article 8 of the ECHR.[11]

[11] Art. 8: "1. Everyone has the right to respect for his private and family

In this case law, the first principle, in chronological order, is that of the *abstract* possibility of linking the right to private and family life to environmental issues. This principle was affirmed in *Powell and Rainer v. United Kingdom*,[12] in which the plaintiffs complained of noise pollution damage caused by Heathrow Airport. The European Court ruled that there had been no violation of Article 8 in this case, but acknowledged the possibility that this article could protect private and family life in the event of pollution.[13]

The second principle, which has made concrete the relationship between Article 8 and environmental issues, is that *serious* environmental pollution can *actually* result in a violation of the right to respect for private and family life. This principle was first affirmed in the famous case *López Ostra v. Spain*,[14] which concerned pollution from a waste treatment factory. The Court held that there had been a violation of Article 8, because the national authorities had failed to take the necessary measures to protect the plaintiff's right to respect for her home and her private and family life;[15] and because the State had failed to maintain a fair balance between the city's economic interests and the plaintiff's

life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[12] European Court of Human Rights, *Powell and Rainer v. United Kingdom*, 21 February 1990. All the judgments and decisions of the Court are available at https://hudoc.echr.coe.int

[13] *Ivi*, para. 40: "In each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport. Article 8 … is therefore a material provision in relation to both Mr. Powell and Mr. Rayner."

[14] European Court of Human Rights, *López Ostra v. Spain*, 9 December 1994. According to the Court, "… severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health." (para. 51)

[15] *Ivi*, para. 55.

human right.[16] These principles were later reaffirmed in numerous cases.[17]

Another principle, which complemented that of the gravity of pollution established in *López Ostra*, concerns the more precise definition of the minimum level of pollution likely to constitute a violation of Article 8. In *Hardy and Maile v. United Kingdom*,[18] the case was about pollution from liquefied natural gas. The European Court stated:

> In cases concerning environmental pollution, pollution must attain a certain minimum level if the complaints are to fall within the scope of Article 8 … The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects.[19]

The issue of the minimum level of the pollution was taken up and further developed in *Dzemyuk v. Ukraine*,[20] concerning water pollution caused by the construction of a cemetery.

However, it should be noted that the European Court has always placed a limit on the principle that serious pollution can constitute a violation of Article 8 of the ECHR. In fact, it has

[16] *Ivi*, para. 58.

[17] For example, in *McGinley and Egan v. United Kingdom*, 9 June 1988, the European Court stated that it, in deciding whether there is a positive obligation under Article 8 relating to environmental matters, must apply the balancing of interests test: "In determining whether or not such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individuals, or individuals, concerned." (para. 98)

[18] European Court of Human Rights, *Hardy and Maile v. United Kingdom*, 14 February 2012.

[19] *Ivi*, para. 188.

[20] European Court of Human Rights, *Dzemyuk v. Ukraine*, 14 September 2014. According to the Court, "As regards health impairment, it is hard to distinguish the effect of environmental hazards from the effects of other relevant factors, such as age, profession or personal lifestyle. Also, as regards the general context of the environment, there is no doubt that severe water and soil pollution may negatively affect public health in general and worsen the quality of an individual's life, but it may be impossible to quantify its actual effects in each individual case, 'quality of life' itself being a subjective characteristic which does not lend itself to a precise definition." (para. 79)

ruled that pollution must produce detrimental effects on people's private and family lives and that, on the other hand, Article 8 does not provide for general protection of the environment as such. For example, in *Kyrtatos v. Greece*,[21] Greece's alleged responsibility related to landscape deterioration and noise pollution. The Court stated:

> Yet the crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private and family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such.[22]

This limit was later reaffirmed several times by the Court;[23] and it was spelled out in great detail in *Jugheli and others v. Georgia*,[24] concerning pollution from a thermal power plant.

So far, I have discussed the *substantive* obligations of the State in environmental matters, arising from Article 8. But the European Court, as early as the late 1990s, affirmed the principle, procedural in nature, that Article 8 requires the State to provide concerned individuals with essential *information* enabling them to assess possible risks from environmental accidents. This principle was first affirmed in the case *Guerra and others v. Italy*[25], in which the plaintiffs, who lived near an industrial chemical plant, complained that the Italian State, among other things, had failed to provide information on the risks and precautions to be taken in the event of accidents. The Court found that there had been a violation of Article 8: "In the instant case the applicants waited

[21] European Court of Human Rights, *Kyrtatos v. Greece,* 22 May 2003.

[22] *Ivi*, para. 52.

[23] See, *inter alia*, European Court of Human Rights, *Fadeyeva v. Russia*, 9 June 2005, paras. 68-70.

[24] European Court of Human Rights*, Jugheli and others v. Georgia*, 13 July 2017, paras. 62-63.

[25] European Court of Human Rights, *Guerra and others v. Italy*, 19 February 1998.

… for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident to the factory"[26].

The principle of the State's duty to inform was subsequently reaffirmed in several cases [27].

The *Guerra* judgment is also important in another respect, as the Court clarified the distinction (already alluded to in some earlier cases) between *negative and positive obligations* of the State, arising from Article 8 in environmental matters.[28] This distinction has been applied by the European Court in many subsequent cases, along with the other distinction, between *substantive and procedural* obligations of States, and thus between the corresponding rights of individuals. The latter distinction was well delineated in *Hatton and others v. United Kingdom*,[29] concerning noise pollution caused by air traffic; and has been reiterated in subsequent cases.[30]

[26] *Ivi*, para. 60.

[27] See, for example, European Court of Human Rights, *McGinley and Egan v. The United Kingdom*, cit., paras. 98-99; *Taşkin and others v. Turkey*, 10 November 2004, para. 119; *Öneryildiz v. Turkey*, 30 November 2004, paras. 89-90; *Roche v. The United Kingdom*, 19 October 2005, paras. 162 and 167; *Budayeva and others v. Russia*, 20 March 2008, para. 132; *Tătar v. Romania*, 27 January 2009, para. 88.

[28] European Court of Human Rights, *Guerra and others v. Italy*, cit. According to the Court, "… although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primary negative undertaking, there may be positive obligations inherent in effective respect for private or family life." (para. 58)

[29] European Court of Human Rights, *Hatton and others v. United Kingdom*, 8 July 2003. The Court stated: "The Court considers that in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinize the decision-making process to ensure that due weight has been accorded to the interests of the individual." (para. 99)

[30] See, for example, European Court of Human Rights*, Taşkin and others v. Turkey*, cit., para. 115; *Budayeva and others v. Russia*, cit., para. 131; *Flamembaum and others v. France*, 13 December 2012, para. 135.

As noted, in the *Guerra* case the Court had established the State's procedural duty to inform. Later, the Court greatly extended the principle that Article 8 imposes *procedural obligations* on the State in environmental matters and provided an extensive list of such obligations. In this respect, the ruling in *Taşkin and others v. Turkey*[31] is very important. In this case, the plaintiffs complained that permits granted for a gold mine and the related decision-making process had violated, among other things, Article 8 of the ECHR. The Court said that the State's decision-making process leading to interference measures must be fair and such as to allow due respect for the interests of the individual. More specifically, the views expressed by the individuals concerned during that process must be taken into account.[32] In addition, when the State has to determine complex environmental and economic policy issues, the decision-making process: a) must include appropriate investigations and studies to predict and assess in advance the effects of activities that may harm the environment; b) must allow public access to the conclusions of such studies and information to assess the danger; and c) must allow the individuals concerned to appeal to the courts against any decision if they feel that their interests have not been sufficiently considered during the decision-making process.[33]

These numerous and detailed procedural obligations of the State have been reconfirmed in several subsequent cases. One may cite, for example, the Court's judgments in *Di Sarno and others v. Italy*[34] and *Flamembaum and others v. France*.[35]

The general principle, stemming from *López Ostra*, that Article 8 imposes *substantive obligations* on the State, has also been developed and specified by the European Court, which has provided a detailed list of these obligations. The case of *Tătar v.*

[31] European Court of Human Rights, *Taşkin and others v. Turkey*, cit.

[32] *Ivi*, para. 118.

[33] *Ivi*, para. 119.

[34] European Court of Human Rights*, Di Sarno and others v. Italy,* 10 January 2012, para. 107.

[35] European Court of Human Rights, *Flamembaum and others v. France*, cit., paras. 137-138.

Romania[36] is exemplary in this regard. The plaintiffs had claimed that the technological process used by a company to exploit gold constituted, among other things, a violation of Article 8 of the ECHR. The Court stated that the general obligation of the State to take all reasonable and appropriate measures to protect the plaintiffs' rights, under Article 8 implies the following specific obligations:[37] a) the obligation to adopt a legislative and administrative framework designed to ensure the effective prevention of damage to the environment and human health; b) the obligation, in the case of complex issues of environmental policy and hazardous activities, to adopt regulations tailored to the specifics of the activity in question, and to determine the authorization, operation, safety and control of that activity; and c) the obligation to require all persons interested in that activity to take such practical measures as will ensure the effective protection of citizens exposed to the harm inherent in the activity in question.

The State's substantive obligations, arising from Article 8, have been reaffirmed by the Court subsequently, for example, in *Di Sarno and others v. Italy* and *Cordella and others v. Italy*.[38]

Furthermore, it is important to briefly mention the most important principles expressed in the Court's recent ruling in *Verein Klimaseniorinnen Schweiz and others v. Switzerland*.[39] The applicants complained that they were victims of a violation of, among other things, Article 8 of the ECHR, because they were particularly affected by the effects of climate change, especially greenhouse gas emissions. The Court held that the obligation to mitigate climate change is governed by Article 8 and that Switzerland had failed to take the necessary measures to fulfill this obligation.

This judgment is groundbreaking in many respects, which cannot be developed here.[40] However, two points should be em-

[36] European Court of Human Rights, *Tătar v. Romania*, cit.

[37] *Ivi*, para. 88.

[38] European Court of Human Rights*, Di Sarno and others v. Italy*, cit., paras. 105-106; *Cordella and others v. Italy*, 24 January 2019, para. 159.

[39] European Court of Human Rights, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, 9 April 2024.

[40] See, *inter alia*, C. Heri, "KlimaSeniorinnen and its Discontents: Climate

phasized. The first is the *novelty* of the issues posed to the Court, since previous environmental jurisprudence, as we have seen, concerned situations in which environmental damage emanated from specific sources of pollution and not from the more complex phenomenon of climate change. In fact, the Court expressly stated that, while taking into account certain principles already established in its own jurisprudence, it intended to adopt a new approach.[41] The most interesting aspect of this approach consists in a certain "attenuation" of the causal link between State conduct and the harm, or risk of harm, produced by that conduct.[42]

The second point concerns the issue of whether or not there is a *positive obligation on States to mitigate climate change*. The Court gave an affirmative answer and indicated some principles, relating to the content of both a general obligation and other more specific obligations. The content of the general obligation is very important: "… the Court derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change".[43]

Change at the European Court of Human Rights", in *European Human Rights Law Review*, IV (2024), p. 317 ff.; R. Pisillo Mazzeschi, "Diritti umani e cambiamento climatico: brevi note sulla sentenza KlimaSeniorinnen della Corte di Strasburgo", in *Diritti umani e diritto internazionale*, XVIII (2024), p. 383 ff.; M. Milanovic, "A Quick Take on the European Court's Climate Change Judgments", in *EJIL: Talk!*, 9 April 2024; A. Hefti, "Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation", in *Transnational Environmental Law*, XIII (2024), p. 610 ff.; A. Nollkaemper, "Causation Puzzles in International Climate Litigation", in *The Italian Yearbook of International Law*, XXXIII (2023), p. 25 ff.

[41] European Court of Human Rights, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 422.

[42] According to the Court, "In the context of climate change, the particularity of the issue of causation becomes more accentuated … the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution." (para. 439) On the broader issue of causation in climate litigation, see A. Nollkaemper, "Causation Puzzles," cit.

[43] European Court of Human Rights, *Verein Klimaseniorinnen Schweiz*

This general obligation to protect gives rise to other positive obligations on the part of States, such as that of adopting and effectively implementing regulations and measures capable of mitigating the existing and future effects of climate change[44], and those arising from international commitments such as the UN Framework Convention on Climate Change and the Paris Agreement.[45]

Finally, it is worth mentioning the decision of the European Court in *Duarte Agostinho and others v. Portugal and 32 others*,[46] in which the plaintiffs had invoked the responsibility of 33 European States for failing to take adequate measures to combat climate change, and had complained, among other things, of a violation of Article 8 of the ECHR. The Court declared the action inadmissible due to Portugal's failure to exhaust domestic remedies and lack of jurisdiction over the other States. However, it stated that the ECHR establishes certain positive obligations regarding climate change[47] and that each State bears its share of responsibility for the global challenges generated by climate change.[48] But the Court reiterated the principle that the ECHR is not designated to provide general environmental protection as such.[49]

Let me now turn to briefly examine the quasi-judicial practice of the UN Human Rights Committee. The Covenant on Civil and Political Rights does not contain a specific provision on the right to a healthy environment. Therefore, the Human Rights Committee had to use other provisions of the Covenant when it wanted to protect environmental concerns. Among these, Article 17, which protects the right to private and family life, is now relevant.[50] The pertinent practice of the Committee is not extensive;

and others v. Switzerland, cit., para. 544.

[44] *Ivi*, para. 545.

[45] *Ivi*, para. 546.

[46] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others,* 9 April 2024.

[47] *Ivi*, para. 42.

[48] *Ivi*, para. 193.

[49] *Ivi*, para. 201.

[50] Art. 17: "1. No one shall be subjected to arbitrary or unlawful interfer-

but it is significant. From this practice, one can derive some principles, which, although less numerous and detailed, coincide in part with those deduced from the jurisprudence of the European Court of Human Rights relating to Article 8 of the ECHR.

The first general principle is that *serious* environmental pollution can entail a violation of Article 17 of the Covenant. In *Portillo Cáceres v. Paraguay*,[51] concerning pollution by agrochemicals, the plaintiffs invoked, among other things, a violation of Article 17. The Committee stated that when pollution directly affects the right to private and family life, and the negative consequences of such pollution are severe because of its intensity or duration and the harm it produces, then the degradation of the environment may constitute a violation of the right to private and family life.[52]

Very interesting is the case of *Billy and others v. Australia*,[53] as it does not concern pollution from a specific source, but the general effects of climate change and environmental degradation. The plaintiffs complained, among other things, that the State had failed to take appropriate mitigation and adaptation measures to prevent the negative impacts of climate change.[54] In relation to Article 17 of the Covenant, the Committee stated:

> … when climate change impacts, including environmental degradation … have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home.[55]

ence with his privacy, family, home or correspondence, not to unlawful attacks on his honor and reputation. Everyone has the right to protection of the law against such interference or attacks."

[51] Human Rights Committee, *Portillo Cáceres v. Paraguay*, 25 July 2019, CCPR/C/126/D/2751/2016.

[52] *Ivi*, para. 7.8. For a recent similar case, see Human Rights Committee, *Pereira and the other members of the Campo Agua'ẽ Indigenous Community v. Paraguay*, 21 September 2022, CCPR/C/132/D/2552/2015.

[53] Human Rights Committee, *Billy and others v. Australia*, 21 July 2022, CCPR/C/135/D/3624/2019.

[54] In this respect, the *Billy* case is similar to the *Klimaseniorinnen* case.

[55] Human Rights Committee, *Billy and others v. Australia*, cit., para. 8.12.

2.2. The Right to Life

The right to life is another human right that has been frequently used by international human rights monitoring bodies in order to protect the environment. This is clear from the practice of the European Court of Human Rights, the Human Rights Committee, the Committee on the Rights of the Child, and the Inter-American Court of Human Rights. Once again, I will limit myself to indicating the most important principles that can be drawn from this practice.

In the jurisprudence of the European Court of Human Rights, the relevant provision is Article 2 of the ECHR on the right to life.[56] The Court, in deciding cases concerning environmental issues, has used Article 2 of the Convention less frequently than Article 8. This is due to a few factors. First, the Court has always regarded Article 8 as the provision most directly relevant to environmental issues. Second, according to the Court, Article 2 is applicable only when pollution is so serious as to affect or threaten the lives of persons.[57] Third, the Court said that the same principles apply, for the most part, in relation to Article 8 and Article 2.[58] Therefore, when the plaintiffs had invoked both articles, but the pollution was not so serious as to threaten people's lives, the Court decided to consider only Article 8. In this regard, one can cite, for example, the aforementioned cases of *Guerra*, *Taşkin*, *Di Sarno, Cordella*, and, more recently, the *Locascia* case.[59]

[56] Art. 2(1): "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[57] See*, inter alia*, European Court of Human Rights, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 536.

[58] See, *e.g.*, European Court of Human Rights, *Budayeva and others v. Russia*, cit.: "… in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlaps with those under Article 8 … Consequently, the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life." (para. 133)

[59] European Court of Human Rights, *Locascia and others v. Italy*, 19 October 2023, para 86.

Nevertheless, there are several cases, pertaining to the environment, in which the European Court has applied Article 2. The most important rulings are *Öneryildiz v. Turkey*,[60] *Budayeva and others v. Russia*,[61] *Kolyadenko and others v. Russia*,[62] *Özel and others v. Turkey*[63] and *Cannavacciuolo and others v. Italy*.[64] In these cases, the plaintiffs invoked State responsibility, respectively, for such events as a methane explosion at a waste dump, a mudslide caused by a dam, flooding caused by a sudden evacuation of water from a reservoir, an earthquake, and illegal dumping, burying and abandonment of hazardous urban waste. Several principles can be drawn from these cases as a whole.

Some of these principles pertain to the scope of Article 2: a) this provision covers not only situations where certain acts or omissions on the part of the State led to a death; but also situations where, although the plaintiff survived, there was clearly a risk to his or her life;[65] b) the term "real risk" requires the existence of a serious, genuine, and sufficiently ascertainable threat to life;[66] c) Article 2 applies both in the context of industrial activities[67] and in the case of natural disasters;[68] d) the rules developed by the European Court in relation to the use of lethal force also apply in the context of dangerous activities, when lives have been lost as a result of events that occurred under the responsibility of public authorities.[69]

[60] European Court of Human Rights, *Öneryildiz v. Turkey*, cit.

[61] European Court of Human Rights*, Budayeva and others v. Russia*, cit.

[62] European Court of Human Rights*, Kolyadenko and others v. Russia*, 28 February 2012.

[63] European Court of Human Rights*, Özel and others v. Turkey*, 17 November 2015.

[64] European Court of Human Rights*, Cannavacciuolo and others v. Italy,* 27 February 2025.

[65] European Court of Human Rights*, Kolyadenko and others v. Russia*, cit., para. 151; *Cannavacciuolo and others v. Italy,* cit., para. 375.

[66] European Court of Human Rights, *Cannavacciuolo and others v. Italy,* cit., para. 377.

[67] European Court of Human Rights*, Öneryildiz v. Turkey*, cit., para. 71.

[68] European Court of Human Rights*, Özel and others v. Turkey*, cit., para. 171.

[69] European Court of Human Rights, *Öneryildiz v. Turkey*, cit., para. 93.

Other principles concern the obligations that Article 2 imposes on States. They are more stringent, but not much different from those, already examined, deriving from by Article 8. Article 2 imposes a general obligation on States to take appropriate measures to protect the lives of persons under their jurisdiction.[70] This general obligation, which has both substantive and procedural aspects, includes some more specific State obligations: a) the obligation to put in place a legislative and administrative apparatus designed to constitute an effective deterrence against threats to the right to life;[71] b) the obligation to take appropriate operational preventive measures when State authorities knew or should have known that there was an immediate and real risk to the lives of persons;[72] c) the obligation to provide the public with all information related to the activity in question;[73] d) the obligation to conduct an official investigation, when lives were lost due to events that occurred under the responsibility of State authorities.[74]

The practice of the Human Rights Committee also contains cases in which the right to life has been used for environmental protection. The reference provision is Article 6 of the Covenant on Civil and Political Rights,[75] on which there is also a General Comment of the Committee.[76] The most important views were issued in *Portillo Cáceres v. Paraguay*[77] and *Billy et al. v. Australia*,[78] already examined, and in *Teitiota v. New Zealand*.[79] The latter case concerned a communication submitted by a Kiribati na-

[70] *Ivi*, para. 71.

[71] *Ivi*, paras 89-90; *Cannavacciuolo and others v. Italy,* cit., para. 380.

[72] European Court of Human Rights, *Öneryildiz v. Turkey*, cit., para. 101.

[73] *Ivi*, para. 90; *Cannavacciuolo and others v. Italy,* cit., para. 382.

[74] European Court of Human Rights, *Budayeva and others v. Russia*, cit., paras. 138-140.

[75] Art. 6(1): "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

[76] Human Rights Committee, *General Comment No. 36* (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right of life, CCPR/C/GC/36, 30 October 2018.

[77] Human Rights Committee, *Portillo Cáceres v. Paraguay*, cit.

[78] Human Rights Committee*, Billy and others v. Australia,* cit.

[79] Human Rights Committee, *Teitiota v. New Zealand*, 24 October 2019, CCPR/C/127/D/2728/2016.

tional, who claimed that climate change had forced him to migrate to New Zealand; and that the rejection of his asylum application constituted a violation of his right to life.

From these three cases, the following principles can be derived: a) the right to life includes the right of individuals to enjoy a dignified life and to be free from acts or omissions that could cause their unnatural or premature death;[80] b) States must take all appropriate measures to address general conditions in society that may give rise to threats to the right to life, and these conditions include environmental pollution;[81] c) Article 6 of the Covenant establishes this obligation even when the threats do not result in the loss of life; d) severe environmental degradation can lead to a violation of the right to life;[82] e) environmental degradation, climate change, and unsustainable development are some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.[83]

The Committee on the Rights of the Child has also had occasion to interpret certain rights guaranteed by the Convention on the Rights of the Child, including the right to life, in terms of environmental protection. In fact, the Committee, in *Sacchi et al. v. Argentina et al.*,[84] ruled on a complaint filed against five States accused of failing to prevent the causes of climate change. The plaintiffs alleged, among other things, a violation of the right to life under Article 6 of the Convention on the Rights of the Child.[85] The Committee declared the appeal inadmissible for failure to

[80] Human Rights Committee, *Billy and others v. Australia,* cit., para. 8.3.

[81] Human Rights Committee, *Portillo Cáceres v. Paraguay*, cit., para. 7.3; *Billy and others v. Australia,* cit., para. 8.3.

[82] Human Rights Committee, *Teitiota v. New Zealand*, cit., para. 9.5; *Portillo Cáceres v. Paraguay*, cit., para. 7.3.

[83] Human Rights Committee, *Teitiota v. New Zealand*, cit., para. 9.4; *Billy et al. v. Australia,* cit., para. 8.3.

[84] Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.,* 22 September 2021, CRC/C88/D/104/2019, paras. 10.6-10.9. The plaintiffs have submitted the same complaint against Argentina, Brazil, France, Germany and Turkey.

[85] Art. 6: "1. States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child."

exhaust domestic remedies, but accepted some of the appellants' arguments; and, in relation to the right to life, affirmed the following principles: a) climate change poses significant risks to the enjoyment of the right to life;[86] b) failure to take measures to prevent foreseeable harm caused by climate change may constitute a violation of human rights obligations;[87] c) climate change has an adverse effect on the enjoyment of human rights of individuals both within and outside the territory of the State;[88] d) the collective nature of the causes of climate change does not absolve the State from its individual responsibility, which may result from the harm that emissions originating in its territory may cause to children, whatever their location.[89]

Finally, it is worth examining the practice of the Inter-American human rights system. In that system, the question about the existence of a human right to a healthy environment is posed in different terms than in other human rights treaty systems. Indeed, it is true that even the American Convention of Human Rights does not contain a provision on the right to a healthy environment; but this right was later recognized by Article 11 of the Additional Protocol on Economic, Social and Cultural Rights (San Salvador Protocol).[90] However, the Protocol does not provide for the possibility of individual appeals to the Commission, based on an alleged violation of Article 11; therefore, this article is not actionable before the Inter-American Court. This limitation was overcome, by the Inter-American Court*, at first*, through the "greening approach", as the Court recognized the existence of a right to a healthy environment by using an evolutionary interpretation of certain rights expressly established in the Ameri-

[86] Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al.*, cit., para. 10.6.

[87] *Ibid.*

[88] *Ivi*, para. 10.9.

[89] *Ivi*, para. 10.10.

[90] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, art. 11: "Everyone shall have the right to live in a healthy environment… The States parties shall promote the protection, preservation, and improvement of the environment."

can Convention. But, as we shall see,[91] *at a later stage*, the Inter-American Court changed its approach and affirmed the existence of an autonomous right to a healthy environment.

In case-law related to the *first period*, a link between environmental protection and the right to life (Article 4 of the American Convention) can be found in *Kaliña and Lokono Peoples v. Suriname*,[92] concerning State responsibility for numerous violations of the rights of members of eight indigenous peoples' communities. The Inter-American Court held that environmental protection is the subject of an essential right, linked to the right to a dignified life.[93] In *Kichwa Indigenous People of Sarayaku v. Ecuador*,[94] the Inter-American Court found that the right to life of members of the Sarayaku community had been violated under Article 4 of the American Convention, because the State had failed to remove certain undetonated explosive materials from their lands. It should be noted that the reparation measures decided by the Court also included environmental restoration measures.

2.3. The Right to Property

The right to property has also been used in the practice of international human rights monitoring bodies in deciding cases with environmental implications. The jurisprudence of the European Court of Human Rights and that of the Inter-American Court of Human Rights are especially relevant in this regard.

The European Court has decided several cases in which State

[91] *Infra*, Section 3.4.

[92] Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, 25 November 2015, Series C No. 309.

[93] *Ivi*, para. 172: "… the Court has emphasized the importance of the protection, conservation and improvement of the environment contained in Article 11 of the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights … as an essential human right related to the right to a dignified life derived from Article 4 of the Convention, in light of the existing *corpus iuris* on the special protection required by members of indigenous communities …"

[94] Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 27 June 2012, Series C No. 245.

responsibility was invoked for failing to protect the plaintiffs' property from the harmful consequences of certain dangerous industrial activities or natural disasters. In these cases, the plaintiffs had invoked the violation of, among other things, their right to property under Article 1 of Protocol No. 1 to the ECHR.[95]

The most significant rulings are those in the *Öneryildiz*, *Budayeva* and *Kolyadenko* cases, which have already been examined in relation to Article 2 of the Convention.[96] The following principles can be drawn from these judgments: a) the effective exercise of the right to property may require positive protective measures;[97] b) in the context of the State's positive obligations regarding *hazardous activities*, the causal link between the negligence attributed to the State and the loss of life also applies to the loss of property;[98] therefore, when lives and property have been lost due to events occurring under the responsibility of public authorities, the latter must do *everything in their power* to protect the owner's interests;[99] c) on the other hand, *natural disasters*, which are beyond human control, do not require the same measure of State involvement, since the positive obligations of the State on the protection of property from natural disasters do not extend as far as those on dangerous activities of human origin;[100] therefore, in the case of environmental disasters, the obligation to protect property does not extend beyond *what is reasonable*

[95] Art. 1 (Protection of property): "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such law as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes of other contributions or penalties."

[96] European Court of Human Rights*, Öneryildiz v. Turkey*, cit.; *Budayeva and others v. Russia*, cit.; *Kolyadenko and others v. Russia*, cit.

[97] European Court of Human Rights, *Öneryildiz v. Turkey*, cit., para. 134; *Kolyadenko and others v. Russia*, cit., para. 213.

[98] European Court of Human Rights, *Öneryildiz v. Turkey*, cit., para. 135; *Budayeva and others v. Russia*, cit., para. 173.

[99] European Court of Human Rights*, Budayeva and others v. Russia*, cit., para. 173.

[100] *Ivi*, para. 174.

under the circumstances;[101] d) even the procedural obligation to conduct an independent investigation does not have the same significance with regard to the destruction of property as in the case of loss of life.[102]

The Inter-American Court of Human Rights has also used property rights as a tool to protect the environment. But in a different context than that of the European Court. In fact, it has decided numerous cases in which some indigenous peoples complained of violation of their right to property under Article 21 of the American Convention of Human Rights.[103] In these cases, the Court has held that there is a connection between the enjoyment of the right to property by these peoples and the environment in which they live. Thus, the right to a healthy environment is seen as closely functional to the enjoyment of the right to property. It follows that States must ensure the effective protection of the natural resources necessary for the subsistence of the peoples concerned, implement measures to prevent environmental damage, and ensure procedural remedies for the individuals affected.

The Inter-American Court, for example, in *Yakye Axa Indigenous Community v. Paraguay*, held that the close ties of indigenous peoples with their traditional lands and the native natural resources must be secured under Article 21 of the American Convention.[104] The cultural ties of indigenous peoples with their lands were illustrated, more extensively, in *Sawhoyamaxa Indigenous Community v. Paraguay*, in which the State's responsibility for failing to secure the Sawhoyamaxa community's ancestral property rights was discussed. According to the Court:

> The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relationship with their tradition-

[101] *Ivi*, para. 175.

[102] *Ivi*, para. 178.

[103] Art. 21(1): "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."

[104] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, Series C No. 125, para. 137.

> al lands and natural resources, not only because they are the main means of survival, but also because they form part of their worldview, of their religiousness, and consequently, of their cultural identity.[105]

As regards measures to prevent environmental damage, the case of *Saramaka Peoples v. Suriname* is significant, in which the Court mentioned, among such measures, those of assessing environmental impact.[106] Finally, mention should also be made of the important Inter-American Court judgment in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*.[107] In this ruling, the "greening approach" actually *coexists* with the approach favoring an autonomous right to a healthy environment. The plaintiffs complained that the State had failed to grant them effective title to their ancestral lands and had failed to take appropriate measures to prevent the environmental degradation of those lands. The Court found that Argentina had violated both Article 21 (right to property) and Article 26 (progressive development of economic, social and cultural rights with regard to the right to a healthy environment) of the American Convention.[108]

2.4. Minority Rights

Minority rights have also been used to protect environmental concerns. This happened indirectly with the above-mentioned

[105] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006, Series C No. 146, para. 118.

[106] Inter-American Court of Human Rights, *Saramaka Peoples v. Suriname*, 28 November 2008, Series C No. 172. The judgment reads: "… the Court considers that the logging concessions issues by the State … have damaged the environment and the deterioration has had a negative impact on lands and natural resources traditionally used by members of the Saramaka people … The State failed to carry out or supervise environmental and social impact assessments … all of the above constitutes a violation of the property rights of the members of the Saramaka people recognized under Article 21 of the Convention …" (para. 154)

[107] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 6 February 2020, Series C No. 400.

[108] See also *infra*, Section 4.

practice of the Inter-American Court regarding indigenous peoples, and more directly with the practice of the Human Rights Committee. In fact, in many cases involving environmental issues, the Human Rights Committee has applied Article 27 of the Covenant on Civil and Political Rights,[109] on the protection of minority rights, and has recognized as worthy of protection the cultural bond that ties indigenous peoples and certain other minorities to their natural environment.

In *Kitok v. Sweden*,[110] the plaintiff complained that Sweden arbitrarily denied the immemorial rights of the Sami minority. The Committee stated the following principle: "The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant."[111]

This principle was later reiterated by the Committee in other cases.[112] For example, in *Ominayak and the Lubicon Lake Band v. Canada*,[113] the Committee recognized a violation of Article 27 of the Covenant by Canada and said that certain historical inequities and more recent developments threaten the Lubicon Lake Band's way of life and culture and constitute a violation of Article 27. It is also worth mentioning the case of *Poma Poma v. Peru*, in which the plaintiff complained that the State had taken water from a piece of land, damaging the ecosystem and affecting the

[109] Art. 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[110] Human Rights Committee, *Kitok v. Sweden*, 27 July 1988, CCPR/C/33/D/197/1985.

[111] *Ivi*, para. 9.2.

[112] Human Rights Committee, *Ilmari Länsman and others v. Finland*, 26 October 1994, CCPR/C/52/D/511/1992, para. 9.2; *Jouni Länsman and others v. Finland,* 30 October 1996, CCPR/C/58/D/671/1995, para. 10.2; *Mahuika and others v. New Zealand,* 27 October 2000, CCPR/C/70/D/547/1993, para. 9.3.

[113] Human Rights Committee, *Ominayak and the Lubicon Lake Band v. Canada,* 26 March 1990, CPR/C/38/D/167/1984, para. 33.

inhabitants' sole livelihood. The Committee found a violation of Article 27 and stated it in rather solemn terms:

> Certain of the aspects of the rights of individuals protected under article [27] … may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of members of indigenous communities which constitute a minority … That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law … The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.[114]

3. *The Progressive Development of an Autonomous Right to a Healthy Environment*

As noted in the Introduction, the "greening approach" is very often contrasted with the view that asserts the existence of a new and *autonomous* human right to a healthy environment. The regulatory evolution of this new right has taken place over a period of about 50 years, mainly through a series of non-binding legal acts within the framework of the United Nations; but also through some conventional norms and regional practices. It is worthwhile now to review, in summary, this process of progressive development, which one can, roughly, divide into three stages.

3.1. The First Phase

The first phase begins in the early 1970s and lasts until the beginning of the 21st century. The human right to a healthy environment probably originates, albeit in an indirect and implicit way, in the 1972 Stockholm Declaration.[115] According to Princi-

[114] Human Rights Committee, *Poma Poma v. Peru*, 27 March 2009, CCPR/C/95/D/1457/2006, para. 7.2.

[115] Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972, A/CONF.48/14/Rev. 1 and Corr. 1.

ple 1 of that Declaration: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being …"

The next step is the 1982 World Charter for Nature.[116] It actually, rather than dealing with the human rights of individuals, proclaims a set of principles that States should follow to ensure respect for nature and its essential processes. However, it also contains a reference to the procedural rights of individuals in relation to environmental protection. Indeed, Article 23 of the Charter provides that all persons shall have the opportunity to participate in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.

UN General Assembly Resolution 45/94 takes up and clarifies the concepts expressed in the Stockholm Declaration, as it recognizes that all individuals are entitled to live in an environment adequate for their health and well-being.[117] Later, the 1992 Rio Declaration on Environment and Development[118] specifies the procedural rights of individuals.[119] Another milestone is the 2002 Johannesburg Declaration of the World Summit on Sustainable Development,[120] which considers environmental protection as one of the three pillars of sustainable development.

[116] GA Res. 37/7, World Charter for Nature, 28 October 1982, Art. 1.

[117] GA Res. 45/94, 14 December 1990, para. 1.

[118] Rio Declaration on Environment and Development, 14 December 1992.

[119] According to Principle 10 of the Declaration: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[120] Johannesburg Declaration of the World Summit on Sustainable Development, 4 September 2002, paras. 1, 5 and 13.

However, as has been noted,[121] some of these acts adopt cautious formulas, insisting on the commitment of States to protect the environment and sustainable development, rather than on the rights of individuals vis-à-vis the State.

Instead, a different and more "progressive" approach characterizes the work of the first Special Rapporteur on human rights and the environment, Mrs. Fatma Zohra Ksentini.[122] She submitted a note and four reports,[123] the most notable of which is the 1994 Final Report,[124] which also contains, as an annex, *Draft principles on human rights and the environment*.[125] Principle 1 states that all persons have the right to a secure, healthy and ecologically sound environment. Principle 4 introduces the concept of sustainable environment, as it states that "all persons have the right to an environment adequate to meet equitably the needs of present generation and that does not impair the rights of future generations to meet their needs equitably." Also important are a number of principles that deal in detail with the procedural rights of individuals: principle 15, on the right of concerned individuals to information relating to the environment; principle 18, on their right to participation in decisions that may have an impact on the environment; and principle 20, on their right to effective remedies in administrative or judicial proceedings for environmental harm.

However, the response of the (former) Human Rights Commission and of States generally was not favorable to the approach of the Special Rapporteur.

Outside the framework of the United Nations, at this early stage, the most interesting developments of the human right to a

[121] C. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, 3rd ed. (Oxford, Oxford University Press 2014), p. 151.

[122] She was appointed in 1990 by the (former) Commission on Human Rights to prepare a study on "Human Rights and Environment".

[123] A/CN.4/Sub.2/1990/12, E/CN.4/Sub.2/1991/8, E/CN.4/Sub.2/1992/7 and Add. 1, E/CN.4/Sub.2/1993/7, E/CN.4/Sub.2/1994/9.

[124] F.Z. KSENTINI, "Final Report, Human Rights and the Environment", Review of further developments in fields with which the Sub-Commission has been concerned, E/CN.4/Sub.2/1994/9, 6 July 1994.

[125] *Ivi*, p. 74 ff.

healthy environment took place in some regional treaties: the African Charter on Human and Peoples' Rights,[126] the San Salvador Protocol[127] and the Aarhus Convention.[128]

3.2. The Second Phase

The second phase opens, in the early years of the 21st century, when the process toward the recognition of an autonomous human right to a healthy environment accelerates. Again, this takes place mainly within the framework of the United Nations, but also in some regional human rights systems.

First, at the universal level, it is worth mentioning the new works of the special rapporteurs on human rights and the environment, which were taken up in 2012. The Human Rights Council has gradually appointed as special rapporteurs,[129] John Knox, David R. Boyd and Astrid Puentes Riaño. Their reports were, at least initially, more cautious, compared to the Ksentini reports, as they did not explicitly recognize the existence of a human right to a healthy environment. Indeed, in the *Framework Principles on Human Rights and the Environment*, presented by

[126] African Charter of Human and Peoples Rights, 27 June 1981. Article 24 of the Charter states: "All peoples shall have the right to a general satisfactory environment favourable to their development."

[127] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988. Article 11 (Right to a Healthy Environment) states: "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment."

[128] Convention on access to information, public participation in decision-making and access to justice in environmental matters, Aahrus, 25 June 1998. Article 1 states: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of the present Convention."

[129] Initially, John Knox was appointed as an independent expert.

Special Rapporteur Knox in his 2018 final report,[130] the duties of States were couched in terms of recommendations. Principle 1 states that: "States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfill human rights." Principles 7, 8, 9 and 10, on States' commitments regarding information, monitoring, public participation and access to remedies, are also formulated as recommendations, rather than obligations. However, the most recent reports are more "progressive". In fact, they argue that the United Nations should formally recognize the right to a healthy and sustainable environment. A report by Knox and Boyd states:

> The time has come for the United Nations to formally recognize the human right to a safe, clean, healthy and sustainable environment … the human right to a healthy environment is not an empty vessel to be filled; on the contrary, its content has already been exhaustively discussed, debated, defined and clarified over the past 45 years.[131]

In a subsequent report, Boyd writes that "In total, at least 155 States are legally obligated, through treaties, constitutions, and legislation, to respect, protect, and fulfill the right to a healthy environment".[132] It is also significant that the Human Rights Council changed the mandate of the special rapporteurs. The mandate, which was originally titled "Human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment", was changed in 2024 to "The human right to a clean, healthy, and sustainable environment". This change seems to reflect the shift from the "greening approach" to the approach favoring an autonomous right to a healthy environment.

Second, again at the universal level, the Human Rights Coun-

[130] J.H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HCR/37/59, 24 January 2018.

[131] J.H. Knox and D.R. Boyd, Report of the Special Rapporteur on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/73/188, 19 July 2018, para. 37.

[132] D.R. Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HCR/40/55, 8 January 2019, para. 16.

cil has adopted numerous resolutions on the topics of human rights and the environment,[133] human rights and climate change,[134] human right to a clean, healthy and sustainable environment,[135] and on related topics such as the realization of the rights of the child through a healthy environment.[136] The Council also initially showed a cautious attitude; but it has progressively taken more progressive positions. For example, in Resolution 37/8 of 2018, the Council stated that all States: "have the obligation to respect, protect and fulfill human rights … and to take measures to protect the rights of all, as recognized in different international instruments and reflected in the framework principles on human rights and the environment …"[137] But after two years, in Resolution 48/13 of 2021, the Council: "Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights."[138] Thus, the Council finally formally recognized the existence of a human right to a healthy environment; and paved the way for UN General Assembly Resolution 76/300.[139]

Third, outside of the UN framework, the most significant developments of the human right to a healthy environment have occurred with its incorporation in the Arab Charter on Human Rights[140] and

[133] See, for example, Resolution 34/20 of 24 March 2017, A/HRC/RES/34/20; Resolution 37/8 of 22 March 2018, A/HRC/RES/37/8; Resolution 46/7 of 23 March 2021, A/HRC/RES/46/7.

[134] See, for example, Resolution 44/7 of 16 July 2020, A/HRC/RES/44/7.

[135] See, for example, Resolution 48/13 of 8 October 2021, A/HRC/RES/48/13; Resolution 52/23 of 13 April 2023, A/HRC/RES/52/23.

[136] See, for example, Resolution 45/30 of 7 October 2020, A/HRC/RES/45/30.

[137] Resolution 37/8 of 22 March 2018, A/HRC/RES/37/8, Preamble, recital 16.

[138] Resolution 48/13 of 8 October 2021, A/HRC/RES/48/13, para. 1.

[139] *Infra*, Section 3.3.

[140] Arab Charter on Human Rights, Tunis, 22 May 2004. Article 38 states: "Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The State Parties shall take the necessary measures commensurate with their resources to guarantee these rights."

the Escazú Agreement.[141] It is also worth mentioning the ASEAN Declaration on Human Rights, which states that every person has the right to a safe, clean and sustainable environment.[142]

3.3. The Third Phase

The third phase starts with Resolution 76/300, adopted by the General Assembly on July 28, 2022,[143] which marks an important step in the process of affirming the human right to a healthy environment within the framework of the United Nations. The Resolution: "Recognizes the right to a clean, healthy and sustainable environment as a human right."[144] And further: "Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law."[145]

Thus, the Resolution is "progressive" where it explicitly recognizes the right to a healthy environment as a human right and where it links it to existing international law. However, the Resolution is more cautious in other respects. For it is silent in the operative part about the procedural rights of individuals; but only in the preamble does it recognize that the exercise of these rights is vital to the realization of a clean, healthy and sustainable environment. Moreover, what is more important, the Resolution avoids mentioning the international obligations of States that should correspond to the human right in question; but merely "call upon" States, international organizations and other relevant bodies to adopt policies and increase cooperation to enhance efforts to ensure a clean, healthy and sustainable environment.[146]

[141] Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018. Article 4(1) states: "Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human rights related to the present Agreement."

[142] ASEAN Human Rights Declaration, 19 November 2012, Principle 28(f).

[143] A/RES/76/300, 28 July 2022, "The Human Right to a Clean, Healthy and Sustainable Environment".

[144] *Ivi*, para. 1.

[145] *Ivi*, para. 2.

[146] *Ivi*, para. 4.

This language would lead one to construe the States' duties more as political commitments than as genuine international obligations. But this is at odds with the previous recognition of the human right to a healthy environment.[147]

That being said, one may ask whether Resolution 76/300 codifies in international law an *autonomous* human right to a healthy environment. I will return to this point.[148] Here it can be anticipated that, in 2025, this right has been recognized by the Committee on social, economic and cultural rights in its General Comment No. 27.[149] Moreover, both the International Court of Justice and the Inter-American Court of Human Rights, in two advisory opinions on climate change, have recognized an autonomous right to a healthy environment,[150] while also embracing the "greening approach".[151]

3.4. Latin American Recent Practice

The regulatory evolution of the right to a healthy environment, described above, which has mainly taken place within the framework of the United Nations, has been reinforced by the

[147] Another interesting aspect of the Resolution is that it speaks of a "sustainable" environment and makes several references to the concept of sustainable development. In particular, it recognizes that sustainable development and environmental protection promote well-being and the full enjoyment of human rights for present and future generations.

[148] *Infra*, Section 4.

[149] CESCR, *General Comment No. 27* (2025) on economic, social and cultural rights and the environmental dimension of sustainable development, UN Doc E/C.12/GC/27 (26 September 2025) para. 6.

[150] International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion, cit., paras. 388-393; Inter-American Court of Human Rights, Advisory Opinion AO-32/25, cit., paras. 270-278. However, some judges noted that the ICJ's language, in affirming the existence of an autonomous right to a healthy environment, was somewhat ambiguous. See Separate Opinion of Judge Bhandari, para. 3; Declaration of Judge Tladi, para. 25.

[151] International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion, cit., para. 393; Inter-American Court of Human Rights, Advisory Opinion AO-32/25, cit., para. 274. On the ICJ's adoption of both approaches, see the Declaration by Judge Tladi, para. 28.

most recent practice of the Inter-American human rights system. This practice is particularly interesting because it shows the *transition* from the "greening approach" to that favoring an autonomous human right to a healthy environment. To understand this transition, one must take into account the fact, already pointed out,[152] that Article 11 of the San Salvador Protocol, which provides for the right to a healthy environment, is not directly actionable before the Inter-American Court. Therefore, in the early stages, the Court held that this limit could not be exceeded and thus adopted the "greening approach".[153]

However, an important turning point came with the Inter-American Court of Human Rights' advisory opinion OC-23/17 of 2017,[154] in which the Court, while not rejecting the "greening approach", *also* declared the existence of an autonomous right to a healthy environment. According to the Court, this right derives from Article 26 of the American Convention, which must be regarded as incorporating Article 11 of the San Salvador Protocol.[155] This is because Article 26 must be interpreted alongside Article 29 of the Convention, which prohibits interpretations that would limit the effect of other international human rights instruments. Moreover, for the Court, the right to a healthy environment has two dimensions: a collective and an individual one.[156] In its collective dimension, this right constitutes a universal value that is owed to present and future generations. But it also has an individual dimension, as its violation can have an impact on the individual because of its connection to other rights. The Court then stated that: "… as an *autonomous* right, the right to a healthy environment, unlike other rights, pro-

[152] *Supra*, Section 2.2.

[153] *Supra*, Sections 2.2. and 2.3.

[154] Inter-American Court of Human Rights, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17, 15 November 2017, Series A No. 23.

[155] *Ivi*, paras. 56-57.

[156] *Ivi*, para. 59.

tects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment …"[157] It went on to say: "Thus, the right to a healthy environment as an *autonomous* right differs from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity."[158] Therefore, while the Court has moved beyond the "greening approach" in relation to the collective dimension of the right to a healthy environment, it has remained anchored to that approach in relation to the individual dimension of that right.

This original interpretation of the right to a healthy environment was reaffirmed by the Inter-American Court in its 2020 ruling in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*.[159] As we have seen,[160] the Court condemned the defendant State for violation of Article 21 of the American Convention. But the plaintiffs, an association of indigenous communities, also complained that Argentina had failed to take appropriate measures to prevent the environmental degradation of their lands. On this subject, the Court found that Argentina had violated Article 26 of the American Convention with regard to the right to a healthy environment. It stated that this right should be considered as one of the rights protected by Article 26 of the Convention, given the obligation of States Parties to ensure "integral development for their peoples."[161] As to the content of this right, the Court, referring to its Advisory Opinion OC-23/17, reiterated that it constitutes a universal value and that it is an autonomous right.[162] States have not only the obligation to respect this right, but also the obligation to prevent its viola-

[157] *Ivi*, para. 62 (emphasis added).

[158] *Ivi*, para. 63 (emphasis added).

[159] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, cit.

[160] *Supra*, Section 2.3.

[161] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, cit., para. 202.

[162] *Ivi*, para. 203.

tion.[163] Finally, the Court held that the principle of prevention of environmental damage is part of customary international law.[164]

A further step forward was taken with the Inter-American Court's ruling in *Inhabitants of La Oroya v. Peru*.[165] For the first time, the Court recognized the violation of the right to a healthy environment against a non-indigenous community. Moreover, the Court definitively affirmed the autonomy of this right, disassociating it from the right to property[166] and other human rights. Lastly, the Court even envisioned the possible peremptory nature of the obligation to protect the environment:

> The States have recognized the right to a healthy environment that entails an obligation of protection, which also concerns the international community as a whole. It is difficult to imagine international obligations with greater importance than those which protect the environment against unlawful or arbitrary conduct that causes serious, extensive, lasting and irreversible environmental damage … In view of this, international environmental protection requires the progressive recognition of the prohibition of such conduct as a peremptory norm (*jus cogens*) … [167]

The principles contained in *La Oroya* were recently reiterated by the Inter-American Court in *The Rama and Kriol Peoples, the Black Creole Indigenous Community of Bluefields et al. v. Nicaragua*[168] and in the Advisory Opinion AO-32/25 of 2025.[169]

[163] *Ivi*, para. 207.

[164] *Ivi*, para. 208.

[165] Inter-American Court of Human Rights, *Inhabitants of La Oroya v. Peru*, 27 November 2023, Series C No. 511.

[166] See L. D'Apote, "Diritto a un ambiente salubre e democrazia ambientale: il caso La Oroya tra dimensione locale e globale", in *SIDIBlog*, 10 February 2025, p. 3.

[167] Inter-American Court of Human Rights, *Inhabitants of La Oroya v. Peru*, cit., para. 129.

[168] Inter-American Court of Human Rights, *Case of the Rama and Kriol Peoples, the Black Creole Indigenous Community of Bluefields et al. v. Nicaragua*, 1 April 2024, Series C No. 522.

[169] Inter-American Court of Human Rights, Advisory Opinion *AO-32/25*, cit., paras. 270-276.

3.5. African Practice

African human rights practice, as an expression of an important regional system, has reinforced the regulatory development of the human right to a healthy environment. However, it is of less interest than the Inter-American practice, because it is based, from the outset, on the existence of an *ad hoc* norm in the Charter on Human and Peoples' Rights: Article 24, cited above.[170] Thus, the African Commission and Court, in contrast to the Inter-American Commission and Court, did not have to overcome limits related to the assertion of an autonomous right to a healthy environment. In fact, the supervisory bodies of the African system had no difficulty in applying Article 24 of the Charter.

A famous case, albeit an old one, is that of the Ogoni indigenous community (*Social and Economic Rights Action Center (SERAC) v. Federal Republic of Nigeria*),[171] in which the African Commission stated that Nigeria had committed numerous violations of the Ogoni community's human rights, linked to oil pollution of their lands. Among other things, the respondent State had violated the right to a healthy environment under Article 24 of the Charter. According to the Commission: "The right to a general satisfactory environment … imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".[172] In addition, the Commission listed some procedural obligations of States arising from Article 24 of the Charter:[173] a) to allow independent scientific monitoring of threatened environments; b) to publish preventive environmental impact studies; c) to inform communities exposed to environmental risks; and d) to allow participation of interested individuals in government decision-making processes.

[170] *Supra*, Section 3.1.

[171] African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) v. Federal Republic of Nigeria*, 27 October 2001, available at https://www.achpr.org

[172] *Ivi*, para. 52.

[173] *Ivi*, para. 53.

The African Court of Human and Peoples' Rights confirmed the existence of an autonomous human right to a healthy environment in *African Commission on Human and Peoples' Rights v. Republic of Kenya*.[174] The plaintiffs had not complained of a violation of Article 24 of the African Charter. However, the Court wished to clarify that nothing prevents the right to a healthy environment from being recognized, where necessary, for the ethnic groups and communities that make up the population of a State.[175]

Finally, it is worth mentioning that the ECOWAS (Economic Community of West African States) Court has also had occasion to affirm the existence of an autonomous human right to a healthy environment. In *SERAP v. Federal Republic of Nigeria*,[176] the Court found, among other things, that Nigeria had violated Article 24 of the African Charter. The Court said:

> The environment is essential to every human being. The quality of human life depends on the quality of the environment. Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, so that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development.[177]

4. *Merits and Demerits of the "Greening Approach" and of the Approach Favoring an Autonomous Right to a Healthy Environment*

At this point, it is worth reflecting on the merits and demerits of the two approaches to using human rights for environmental protection.

[174] African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, 26 May 2017, available at https://www.african-court.org

[175] *Ivi*, para. 199.

[176] Court of Justice of the Economic Community of West African States (ECOWAS), *SERAP v. Federal Republic of Nigeria*, 14 December 2012, available at https://www.courtecowas.org

[177] *Ivi*, paras. 100-101.

According to proponents of the "greening approach", the recognition of a new and autonomous human right to a healthy environment would not be necessary or even desirable.[178] Basically, for two reasons: a) because the content of such a right would be uncertain and ambiguous, and difficult or even impossible to define; b) because the creation of such an autonomous right would be unnecessary and redundant and would add nothing to the protection of the environment, which is already guaranteed by a broad interpretation of many existing human rights.

In addition, there would be some advantages to assessing environmental protection through the impact of harmful activities on already existing human rights. A first advantage would be the concreteness of such an approach, since with it, attention is focused on what individuals care most about: the loss of important and already protected rights and values due to uncontrolled environmental damage.[179] A second advantage would be that active holders of existing human rights can be easily identified, whereas environmental protection *per se* does not have a secure right-holder.[180] Finally, a third advantage would be that the "greening approach" has been confirmed and well-developed by extensive and detailed practice, which has clarified the many legal principles governing such practice, the content of State obligations and the rights of individuals.

However, the "greening approach" is usually understood to exclude the existence of an autonomous human right to a healthy environment. In this sense, it has a major limitation because it does not offer sufficient protection of the environment in all cases that cannot be brought back to an extensive interpretation of existing human rights. This is especially true when the aim is to protect the environment as such or as a public good. In addition, the "greening approach" has the shortcoming of being overly anthropocentric, because it seeks to ensure that the environment does not deteriorate to the point where some human rights are

[178] See *supra*, footnote 9.

[179] A. Boyle, "Human Rights," cit., p. 219.

[180] P.-M. Dupuy, J.E. Viñuales, *International Environmental Law,* cit., p. 359.

seriously impaired. Thus, the protection of the environment ends up being instrumental to the protection of people, rather than being a goal in itself.[181] Finally, the practice of "greening" derives from a variety of human rights instruments and a variety of human rights bodies, none of which are recognized as universally mandatory.[182]

On the other hand, the approach favorable to an autonomous human right to a healthy environment[183] also has merits and flaws. Among the merits, first and foremost is that recognition of such a right is likely to lend greater force to environmental protection *per se*. In other words, such recognition can focus more broadly and more explicitly on the quality of the environment.[184] This responds to the criticism that such recognition would be unnecessary and redundant. Second, such recognition is in line with the progressive development of international human rights law. Indeed, a consensus is emerging on the human right to environmental protection both in the domestic legal systems of many States and at the international level, as we have seen by examining the progressive normative development of this right. UN General Assembly Resolution 76/300 itself, although a non-binding act, can be regarded as indicative of an *opinio iuris* of the vast majority of States[185] and, as such, may have contributed to the development of a customary norm.[186] Further confirmation is provided by the already cited CESCR's General Comment no. 27[187] and the advisory opinions issued in 2025 by the International Court of Justice and the Inter-American Court of Human Rights.[188]

[181] D.K. Anton, D.L. Shelton, *Environmental Protection*, cit., p. 130.

[182] J.H. Knox, R. Pejan, "Introduction," cit., p. 5.

[183] See *supra*, footnote 10.

[184] See V. Rossi, "Il riconoscimento del diritto universale", cit., p. 179 ff., at pp. 181-182, 184.

[185] The Resolution was adopted with 161 votes in favour and 8 abstentions.

[186] See D. Pauciulo, "Il diritto umano a un ambiente salubre", cit., p. 1123.

[187] CESCR, *General Comment No. 27* (2025) on economic, social and cultural rights and the environmental dimension of sustainable development, cit., para. 6.

[188] International Court of Justice, *Obligations of States in respect of Climate*

However, the main objection remains, which concerns the content, considered vague, uncertain and indeterminate, of the human right to a healthy environment and of the corresponding obligations of States. This objection is serious, if it is claimed, as some argue, that the protection of this right imposes on States a generic obligation to guarantee people an *environment of a certain quality*[189] or an *environment used in the best possible way*.[190] Indeed, these definitions of the content of the right are too vague. Instead, I believe that the content of the right and of the corresponding State obligations should be derived from: a) the broad international practice on the "greening" of human rights; b) international environmental law, both customary and conventional.

About the first point, there is not much to say. If one considers the "greening approach" and that favoring an autonomous right to a healthy environment as *complementary*, rather than as alternatives, there is no difficulty in using all the many and rich indications offered by the practice on the "greening" of human rights. In this way, and even with all the precautions due to different contexts,[191] the content of the right in question can be specified. One may think of the detailed list of substantive and procedural rights of individuals, and the corresponding obligations of States, that can be gleaned from the practice on "greening". This practice is also useful if, in order to reconstruct the content of the right to a healthy environment, one wished to use only the *main* rights and obligations derived from that practice.[192]

As we have seen, the main obligations of States are as follows: a first (negative) obligation requires States to refrain from arbitrary or illegitimate interference with the exercise of those human rights that have environmental implications. A second (pos-

Change, Advisory Opinion, cit., paras. 388-393; Inter-American Court of Human Rights, Advisory Opinion AO-32/25, cit., paras. 270-278.

[189] D. Pauciulo, "Il diritto umano a un ambiente salubre", cit., p. 1120; P.-M. Dupuy, J.E. Viñuales, *International Environmental Law,* cit., p. 375.

[190] V. Rossi, "Il riconoscimento del diritto universale", cit., pp. 179-180.

[191] On the one hand, the environmental implications of some human rights and, on the other hand, the right to a healthy environment.

[192] See *supra*, Section 2.

itive and substantive) obligation requires States to take appropriate measures to prevent and reduce significant pollution phenomena, which may produce adverse effects on persons or property. This obligation has extended over time from individual pollution phenomena to the adverse effects of environmental degradation and climate change. A third (positive and procedural) obligation requires States to respect the principle of "environmental transparency"; that is, to ensure that concerned individuals, in the decision-making process regarding environmentally hazardous activities, have rights of access to information, public participation and justice.

The second point is more complex. But I believe, as I already mentioned, that a *convergence and complementarity* between the field of international environmental law and that of human rights have been realized today.[193] This makes it possible to argue that at least some norms in the former field can have an *impact* on the latter field, *i.e.*, that these norms are addressed not only to States but also to individuals.[194] For example, the customary norm that imposes on the State an obligation to prevent, reduce and control significant environmental harm[195] could today be interpreted as also having individuals as active holders. Therefore, it could generate a human right of the latter vis-à-vis the State.[196] The content of the customary interstate norm has now been well de-

[193] See *supra*, Section 1.

[194] See R. Pisillo Mazzeschi, *International Human Rights Law*, cit. p. 498.

[195] See *Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of 24 May 2005, Recueil des Sentences Arbitrales, vol. XXVII, p. 35 ff., at paras. 59 and 222. See also, for the customary obligation to prevent significant transboundary pollution, International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 226 ff., at pp. 241-242, para. 29; *Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, cit., p. 7 ff., at para. 53; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, p. 14 ff., at para. 193; *Obligations of States in respect of Climate Change*, Advisory Opinion, cit., paras. 272-273.

[196] See Inter-American Court of Human Rights, Advisory Opinion AO-32/25, cit., para. 276.

fined; and this could help to better specify the content of the human right in question as well.

A similar argument could be made for conventional environmental law. It now consists of a very large number of treaties that establish precise and detailed obligations among the contracting States regarding environmental protection, pollution prevention and remedies for environmental damage. It cannot be excluded that *some* of these obligations can be interpreted as obligations that are also addressed to individuals and are likely to create rights in their favor. Consider, for example, certain specific obligations to prevent environmental harm.[197] Those individual rights that can be derived from environmental law treaties can also serve to specify the content of the human right to a healthy environment.

Actually, the issue of the impact of international environmental law on human rights, and in particular on the right to a healthy environment, has not been fully explored; but it has sometimes been touched upon. For example, Special Rapporteur Boyd, in one of his reports, wrote: "Human right obligations are reinforced by international environmental law, as States are obliged to ensure that polluting activities within their jurisdiction or control do not cause serious harm to the environment or peoples of other States or to areas beyond the limits of national jurisdiction".[198]

The Inter-American Court of Human Rights, in the *Lhaka Honhat* judgment, when arguing about the existence of a human right to a healthy environment, affirmed the relevance of the principle of prevention of environmental damage, by saying: "…

[197] See, for example, the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Arts. I and II); the 1976 Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Art. 4); the 1982 Bern Convention on the Conservation of European Wildlife and Natural Habitats (Arts. 2, 3 and 4); and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Art. 4).

[198] D.R. Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/74/161, 15 July 2019, para. 66.

it should be stressed that the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment …"[199] The same Court, in its opinion OC-23-17 had stated that there is a broad recognition in international law of the interdependent relationship between environmental protection, sustainable development and human rights.[200]

Therefore, the problem of the content of the human right to a healthy environment can be solved with the help of the judicial and quasi-judicial practice on "greening" of human rights and the practice of international environmental law. If this solution is accepted, the major obstacle to the recognition of a customary norm on the human right to a healthy environment can be overcome. I believe that this norm has now become established or, at least, is in an advanced stage of formation, considering that the vast majority of States voted in favor of UN General Assembly Resolution 76/300; that many States have incorporated the right to a healthy environment into their domestic law;[201] and that the International Court of Justice and the Inter-American Court of Human Rights have also expressed their support for the existence of an autonomous right to a healthy environment.

In terms of its content, the right to a healthy environment can be considered as an umbrella right, encompassing other rights.

[199] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, cit., para. 208.

[200] Inter-American Court of Human Rights*, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion, cit., para. 52.

[201] See D.R. Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment", in J.H. Knox, R. Pejan (eds) *The Human Right to a Healthy Environment*, cit., pp. 19-23; Id., Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HCR/40/55, 8 January 2019, para. 16. However, for a more cautious approach to interpreting many State constitutions, see A. Boyle, "Human Rights or Environmental Rights?", cit., pp. 478-482.

In my view, it contains three rights of individuals: a) the right to have the State refrain from directly causing significant environmental damage; b) the right to have the State prevent and reduce significant environmental harm; and c) the right to obtain transparency in environmental matters. As will be noted, these three rights correspond, in essence, to the *main* obligations of States derived from the practice of "greening" of human rights.

In conclusion, the "greening approach" and the approach favoring an autonomous right to a healthy environment, rather than being alternative and opposed, should be *complementary*, because they are both necessary to define the content of the right to a healthy environment. After all, this conclusion reflects reality: the regulatory development of an autonomous right to a healthy environment has not undermined the growth of practice on the "greening" of human rights.

ENVIRONMENTAL SUSTAINABILITY AND INTERGENERATIONAL SOLIDARITY WITHIN THE EUROPEAN UNION LEGAL ORDER

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SUMMARY: 1. Introduction: Intergenerational Solidarity and the EU Environmental Law. – 2. Environmental and Climate Rights as Instruments of Intergenerational Solidarity. – 3. European 'Solidarism', Accountability, and the Role of the Public. – Conclusion.

1. *Introduction: Intergenerational Solidarity and the EU Environmental Law*

Intergenerational solidarity has increasingly emerged as a cornerstone of contemporary environmental discourse, highlighting the moral and legal responsibility of present generations to preserve the environment for those yet to come.[1] As the climate crisis deepens and biodiversity loss accelerates, philosophical and sociological debates converge on the urgency of acting not merely in the interests of the present, but also in the name of intergenerational solidarity.[2]

Legal systems are gradually reflecting this shift, notably through the recognition – be it explicit or implicit – of future generations' interests and rights in national constitutions and international jurisprudence. Illustrative examples of this are Arti-

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[1] S. BOOKMAN, M. WEWERINKE-SINGH, "Intergenerational Equity", in M. Wewerinke-Singh, S. Mead (eds), *The Cambridge Handbook on Climate Litigation* (Cambridge, Cambridge University Press 2025), p. 344 ff.; E. BROWN WEISS, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York, Transnational Publishers 1989), *passim*.

[2] J. RAWLS, *A Theory of Justice* (Cambridge Mass., Harvard University Press 1999), pp. 251-258; H. JONAS, *The Imperative of Responsibility*, (Cambridge Mass., Harvard University Press 1971), p. 271 ff.

cle 9(3) of the Italian Constitution – which sets out that the Republic shall safeguard the environment, biodiversity and ecosystems*, also in the interest of future generations* – as well as the recent Advisory Opinion of the International Court of Justice on the obligations of States in respect of climate change,[3] emphasizing the principle of preventing environmental harm as a rule of customary international law to safeguard both present and future generations.[4]

The EU legal order is no exception, as its legal framework can be construed in that perspective. This article argues for a purposive and systemic interpretation of environmental and climate rights within EU law, grounded in the Union's foundational values and in the principle of solidarity. At times, a narrow approach confines EU institutions, including the Court of Justice, to a literal interpretation of secondary legislation, detached from the broader normative framework of primary law.[5] It can be safely maintained that overall, the failure to embed environmental and climate (individual and public) rights within the foundational principles of the Union legal system risks marginalising, and potentially undermining, environmental protection for both present and future generations.

[3] ICJ, 23 July 2025, Advisory Opinion, *Obligations of States in respect of climate changes*. Although advisory opinions of the ICJ are not legally binding in a strict sense, they carry significant authoritative weight in identifying, interpreting, and applying international legal obligations. Their specific findings may also produce legal effects for third parties under customary international law. As a result, subjects of international law – including the EU and its Member States (Article 3(5) TEU) – are bound to give due consideration to the conclusions reached in ICJ advisory opinions.

[4] *Ivi*, pp. 85 ff., paras. 271 ff., in particular paras. 273, 313, 373, and 377. See also *e.g.* German Federal Constitutional Court, *Climate Change Act* judgment, 24 March 2021, 1 BvR 2656/18, esp. para. 193; Colombian Supreme Court, Judgment STC4360-2018 (Future Generations).

[5] Particularly illustrative is the debatable judgment (Grand Chamber) of 22 December 2022, C-61/21, *JP v Ministre de la Transition écologique*, in which the Court ruled that the air-quality directives do not meet the requirement of conferring rights on individuals for the purpose of establishing State liability.

2. *Environmental and Climate Rights as Instruments of Intergenerational Solidarity*

Environmental and climate rights should be aligned with the principle of intergenerational solidarity, a concept increasingly recognised as both a legal and normative principle within the Union legal order. The protection of future generations can – and, in my view, should – be valued through the interpretation and implementation of environmental rights, particularly where EU institutions, including the Court of Justice, adopt decisions with significant environmental or climate-related implications. While this perspective has not been applied consistently, the Court of Justice has on occasion endorsed it, notably in *Lesoochranárske zoskupenie VLK*, in which it underscored the need to ensure the effective protection of EU environmental law, holding that such law must not be interpreted in a manner that renders the exercise of rights conferred by EU law impossible or excessively difficult in practice.[6]

From this perspective, rights in environmental matters, such as, for example, procedural rights protected under the Aarhus Convention, serve not only democratic objectives but also function as safeguards against environmental harm and risks to human health, affecting both present and future generations.[7] This

[6] Judgment of 8 March 2011, C-240/09, *Lesoochranárske zoskupenie VLK*, para. 49.

[7] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998). See also to that effect *Principle 10* of the Rio Declaration, which sets out a crucial link between access to environmental information, public participation in decision-making, and the effective protection of the environment. Principle 10 of the Rio Declaration: UNGA Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992; Annex I Rio Declaration on environment and development, A/CONF.151/26 (Vol. I), p. 2). The same could be done for the preamble of the Aarhus Convention. The preamble and Article 1 of the Convention explicitly recognise the need to protect the right of "every person" of "present and future generations" to live in an environment adequate to his or her health and well-being. This reinforces the idea that procedural rights are not only tools for present use but also safeguards for intergenerational justice. Furthermore, procedural rights support long-term environmental accountability by enabling scrutiny of environ-

approach would better align environmental rights with the EU principles of transparency[8] and participatory democracy, explicitly enshrined in Article 11(1)-(3) TEU. Access to environmental information and public participation are thus not merely ancillary procedural tools, but essential components of the Union's democratic framework.[9]

More generally, the conceptualisation of environmental rights through the prism of intergenerational solidarity – understood as a foundational principle of European integration – becomes conceivable insofar as the issue is framed as a systemic construct within the EU legal order. Article 2 TEU establishes solidarity as one of the Union's pivotal values, while Article 3(3) TEU explicitly mandates the promotion of solidarity between generations. Article 37 of the Charter of Fundamental Rights further requires the Union to ensure a high level of environmental protection and to promote the improvement of environmental quality.[10] Al-

mental decisions whose consequences may unfold over decades. Public access to information on climate-related policies allows the public to challenge insufficient action on climate mitigation – a domain where delayed action disproportionately harms future generations.

[8] The principle of transparency (Article 15 TFEU) is further enshrined in the second paragraph of Article 1 TEU and in Article 298 TFEU and is reinforced by the right of access to documents under Article 42 of the Charter of Fundamental Rights. Openness enables citizens and non-profit organizations to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights (see recital 2 of the Transparency Regulation). After all, access to information is part of the principle of open society, and a strong corollary of the principle of democracy on which the EU is firmly grounded (Article 2 TEU). It seems also worth recalling that before the Lisbon reform in the Final Act of the Maastricht Treaty, the Member States incorporated a Declaration (No 17) on the right of access to information, stating that: "The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration."

[9] J. Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford, OUP 2011), p. 78 ff.

[10] Yet, the Court seems quite reluctant to refer to Article 37 of the Charter. Only Advocates General regard it at best as an interpretative tool of secondary

though not directly justiciable by individuals,[11] the normative weight of Article 37 should not be underestimated. Its placement within Title IV ('Solidarity') signals that EU institutions, when exercising their competences, must integrate a high level of environmental protection into all Union policies.[12]

At a minimum, this framework reflects a legal and ethical obligation to preserve the environment in a condition no worse than that inherited, thereby embodying the principle of intergenerational solidarity and providing a basis for EU institutional accountability.[13] Sustainable development itself may be regarded as an inherently intergenerational concept and a foundational objective of the Union.[14] Article 191(1) TFEU, which defines the aims of EU environmental policy, further confirms the long-term and global scope of EU action by referring to international measures addressing regional and worldwide environmental problems.

Arguably, taken together, these provisions encapsulate intergenerational solidarity as a substantive principle of mutual responsibility within the EU legal order. This principle imposes obligations on EU institutions – including the judiciary – to interpret and apply Union law in a manner that safeguards biodiversity, mitigates climate change, and promotes sustainability for the benefit of current and future generations.

law (*e.g.* Opinions of Advocates General Jääskinen in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2014:2324, para. 6, and Sharpston, Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, para. 68). Yet, recently the ECJ seems to initiate a new path: see judgment of 25 June 2024, C-626/22, *CZ and others v ILVA*, para. 105.

[11] F. Munari, L. Schiano di Pepe, *Tutela transnazionale dell'ambiente* (Bologna, Il Mulino 2012), pp. 82 and 125; J. Krommendijk, D. Sanderink, 'The Role of Fundamental Rights in the Environmental Case Law of the CJEU', in *European Law Open*, September 2023, p. 631.

[12] E. Morgera, G. Marín Durán, "Article 37", in S. Peers *et al* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing 2021), p. 1041 ff.

[13] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford, OUP 2020), regarding the principle of prevention (no harm), 85 ff.

[14] See in general World Commission on Environment and Development, *Our Common Future*, Brundtland Report, 1987.

3. *European 'Solidarism', Accountability, and the Role of the Public*

Within this framework, European 'solidarism' emerges as a multidimensional legal concept rooted in the Union's foundational values. It offers a *forward-looking vision* of the European *societas*, capable of enhancing the legal value of environmental and climate rights. Such a vision entails, it is maintained, the purposeful exercise of public authority to identify, protect, and preserve common goods – particularly the environment and the climate – as elements of the Union's shared heritage and as components of a *European common home* for present and future generations alike.[15]

The multifaceted nature of solidarity explains why the principle is capable of operating both vertically and horizontally. *Vertically*, it governs relations between the Union and the Member States. *Horizontally*, it is reflected in instruments such as, for example, the Corporate Sustainability Due Diligence Directive and the EU Deforestation Regulation.[16] Where necessary, Member States must also cooperate to ensure the achievement of the Union's environmental and climate objectives pursuant to Article 4(3) TEU.

[15] Encyclical Letter of the Holy Father Francis, *Laudato Si'. On Care for Our Common Home*, esp. p. 15 ff. As to the much-debated issue of *locus standi* of future generations see B. Lewis, "The Rights of Future Generations within the Post-Paris Climate Regime", in *Transnational Environmental Law*, VII (2018), pp. 69-87; M.E. Harris, 'Inter-generational interests in European environmental liability regimes', in *é-publica*, vol. 9, n. 3, pp. 261-293, available on line https://e-publica.pt/article/57635-inter-generational-interests-in-eurogimepean-environmental-liability-regimes.

[16] Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence: see A. Macchia, "Between Environmental Protection and Human Rights: Environmental Sustainability in the International Regulation of Corporate Responsibility" (in this volume). See also Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, OJ 9 June 2023, L 150, 206 ff. As regards, the responsibility of business cf. E. Morgera, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, "The imperative of defossilizing our economies", United Nations, General Assembly, A/HRC/59/42, p. 19-21.

Solidarity may, indeed, be considered as a quintessential principle of the EU construct, as demonstrated during the pandemic crisis.[17] It cannot be reduced to political rhetoric. A systemic reading of primary law reveals a principle with evolving and increasingly profound legal implications, grounded in the recognition of shared interests, mutual interdependence, and responsibility toward future generations. In this sense, *forward-looking* solidarity may be conceptualised as an *erga omnes* obligation: its indivisible nature entails that EU institutions and bodies, as well as national Governments and national authorities owe environmental protection to the other Member States, to existing individuals and to those yet to come. The 'interests of future generations' may be construed as public interests in environmental protection, insofar as such interests are common to and shared by the European *community* as a whole, thereby constituting an inherently public dimension of environmental protection. This construction articulates a collective interest in the enhanced preventive function of EU environmental law, aimed at averting environmental harm to those not yet born.

Recent developments seem to confirm this understanding. The Commission's 2022 Guidelines on State aid for climate, environmental protection and energy involve national governments

[17] V. Delhomme, T. Hervey, "The European Union's Response to the Covid-19 Crisis and (the Legitimacy of) the Union's Legal Order", in *Yearbook of European Law*, XLI (2022), p. 48 ff.; R. Baratta, "EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis: Looking at the 'Guidance' on Public Procurement Through the Prism of Solidarity", in *European Papers. European Forum*, 9 July 2020, pp. 1-9. See also the unprecedented measures adopted in 2020 to loosen controls over national budgets in order to deal with the health and economic crisis caused by the COVID-19 pandemic. That is an unprecedented action because the Union suspended the application of the Stability and Growth Pact and actively intervened with its own resources to combat the growing phenomena of national unemployment (SURE Regulation No 2020/672 based on Article 122 TFEU). In support of national economies, the Next Generation EU is also worthwhile to mention. It is composed of three main acts: the Own Resources Decision No 2020/335 (based on Article 311 TFEU), the Recovery Instrument set forth in the Regulation No 2021/241 (based on Article175(3) TFEU) and the Regulation No 2020/2094 (Article 122 TFEU) establishing a EU Recovery Instrument in the aftermath of the COVID-19 crisis up to an amount of euro 750 billion.

in funding green transitions,[18] while the Court's case law – ranging from the *OPAL* ruling in the energy sector[19] to asylum and migration[20] – demonstrates that solidarity operates across policy fields and is not mere theoretical rhetoric.

Individuals and associations, as subjects of the EU legal order,[21] are entitled to oversee environmental protection, even vis-à-vis their own national authorities.[22] Environmental protection could, at least in theory, be considered as part of individual legal heritage.[23] While access to judicial remedies remains constrained – most notably by the *Plaumann* test in public interest actions[24] – this does not diminish the legal significance of environmental rights or their role in holding institutions accountable.[25]

As a result, it seems not unreasonable to consider this under-

[18] Commission Communication, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C80/1. As regards the principle of solidarity underlying this Communication see R. Baratta, "Aiuti di stato e fragilità ambientali: i nuovi orientamenti della Commissione", in *Diritto e società*, 2022/3, p. 548, arguing that the public action taken by the Commission in this area of state aids "assume caratteri etico-utilitaristici in quanto volta a realizzare un fine superiore costituito dalla protezione della *societas* europea, della salute pubblica, ma anche delle future generazioni, perseguendo l'equità intergenerazionale."

[19] Judgment 15 July 2021, Case C-848/19 P, *Germany v Poland*, paras. 37 ff.; K. Huhta, L. Reins, "Solidarity in European Union Law and Its Application in the Energy Sector", in *International & Comparative Law Quarterly*, 72 (2023), pp. 771-791.

[20] Judgments of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, para. 291, and of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, paras. 80 and 181.

[21] Judgment of 5 February 1963, 26/62, *Van Gend & Loos*, p. 12, pointing out that the EU is a legal order the subjects of which comprise also the nationals of member states since it confers "upon them rights which become part of their legal heritage."

[22] Cf. Judgment of 8 November 2015, C-243/15, *Lesoochranárske zoskupenie VLK II*.

[23] Judgments of 6 June 2013, C-536/11, *Donau Chemie*, para. 20, and 19 November 1991, C-6/90 and C-9/90, *Francovich and Others*, para. 31; 20 September 2001, C-453/99, *Courage and Crehan*, para. 19.

[24] *E.g.* Judgment of 25 March 2021, C-565/19 P, *Armando Carvalho.*

[25] Judgment of 25 July 1963, 25/62, *Plaumann*.

standing as transcending the traditional dichotomy between rights and duties by introducing a third dimension: institutional accountability through law-making and policy justification.[26] Even assuming that future generations cannot hold enforceable rights in the present, intergenerational solidarity nonetheless imposes a *forward-looking obligation of care* upon institutions, enforced through public scrutiny by individuals and associations.[27] It requires EU public authorities to act today in ways that anticipates and protects the interests not only of today's but also of tomorrow's citizens, thereby ensuring that the exercise of public power remains sustainable, accountable, and oriented toward the long term, under the scrutiny of the civil society.[28]

Environmental and climate rights are central to this primary law framework. EU 'solidarism' manifests itself not only in substantive norms but also through the so-called procedural rights, which should be fully justiciable through the Aarhus Convention and related EU implementing instruments.[29] Intergenerational solidarity demands inclusive and participatory decision-making processes, empowering present generations to act as *guardians* for those yet to come.

[26] On the different notions of accountability, responsibility and liability, see C. Harlow, *Accountability in the European Union*, OUP, London, 2002, p. 6 ff.

[27] After all, no human action is exempt from duty and responsibility – particularly on the part of those entrusted with the governance of public goods (Cicerone, *I doveri*, Milano, Rizzoli 2018, p. 77); H. Jonas, *Il principio di responsabilità. Un'etica per la civiltà tecnologica* (Torino, Einaudi 2002). See also generally E. Fisher, *Environmental Law: A Very Short Introduction* (Oxford, OUP 2017).

[28] The European Green Deal, introduced by the European Commission in December 2019, intends to translate this intergenerational commitment into concrete policy. It sets the path towards climate neutrality by 2050, explicitly referring to the need to "improve the well-being of current and future generations". The adoption of the European Climate Law (Regulation (EU) 2021/1119) reinforces this trajectory by making the 2050 climate neutrality goal legally binding. The Regulation also requires the EU institutions and Member States to consider "the best available and most recent scientific evidence" and the social and economic impacts of the transition, which further supports long-term and equitable climate governance.

[29] Regulation (EC) No 1367/2006 (Aarhus Regulation).

As the legal instruments implementing the Aarhus Convention form part of the broader normative and institutional framework of EU law, they should be interpreted consistently with the Union's foundational principles.[30] Access to environmental information and other procedural rights enable individuals and civil society to monitor, influence, and challenge decisions with environmental consequences, ensuring transparency and accountability toward current and future stakeholders alike.[31] While the 'public concerned' enjoys no decision-making power, its role is in any event essential in ensuring that decisions are taken responsibly.

4. Conclusion

Framing environmental and climate rights within the principles of environmental sustainability and intergenerational solidarity is a normative requirement flowing from the European Union's constitutional framework. Such an approach ensures coherence with the Union's foundational values, reinforces democratic accountability, and secures a high level of environmental protection, including the protection of human health. From a doctrinal perspective, the EU legislator is therefore under an obligation to remedy existing lacunae in the legal framework and, pursuant to systemic interpretative view of primary law, to adhere to the principle of *non-regression* in the fields of environmental protection and climate change mitigation (Article 3(3) TEU and 191 TFEU), according to which legislative action must not result in a diminution of the level of protection once it has been attained. In parallel, the Court of Justice should adopt a less

[30] Judgment of 20 December 2017, C-664/15, *Protect Natur*, para. 54.

[31] For a different approach, suggesting that procedural rights set out in the AC are essential human rights tools in addressing climate change, because by integrating these rights into climate change policies and international agreements, governments and organizations can enhance transparency, accountability, and the effectiveness of climate action, see S. KRAVCHENKO, "Procedural Rights as a Crucial Tool to Combat Climate Change", in *Georgia Journal of International and Comparative Law,* XXXVIII (2010), pp. 613-648.

conservative approach when interpreting environmental and climate rights, much as it once placed individuals at the centre of the EU legal order and in its early environmental jurisprudence.[32]

Anchoring environmental and climate rights firmly in primary law justifies a more systemic and expansive judicial interpretation in light of the architecture of the EU legal order. Broadening the conceptual understanding of such rights is essential to uphold the Union's foundational values, ensure democratic accountability, and protect environmental interests for both present and future generations.

[32] Judgment of 7 February 1985, C-240/83, *ADBHU*. See generally as regards placing individuals at the centre of the EU legal order to shield them from the arbitrary power of public authorities, R. Baratta, *Institutions of EU Law* 2nd ed. (Milan, Wolters Kluwer 2024), pp. 2 and 277.

Section Two

The Human Rights Framework

THE PLACE OF SUSTAINABLE DEVELOPMENT IN THE PRACTICE OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Francesca De Vittor and Massimo Starita*

Summary: 1. Sustainable Development and Economic, Social and Cultural rights: A Close and Complicated Relationship. – 2. Environmental Sustainability in the Practice of the European Committee of Social Rights. – 3. Environmental Sustainability and Climate Change in the Practice of the Committee on Economic, Social and Cultural Rights (CESCR): Statements (2003-2020). – 4. The CESCR's Practice under the State Reporting Procedure (2015-2025): (a) Developing a List of Adverse Effects of Climate Change Phenomena on Covenant's Rights. – 5. (b) Conceiving the "Common but Differentiated" Responsibilities under the Paris Agreement as Functional to the Protection of the Covenant's Rights. – 6. (c) Respecting Covenant's Rights while Combating Climate Change. – 7. (d) Developing General and Specific Recommendations. – 8. General Comment No. 27 (2025): Consolidating the Reciprocal Relationship between Covenant's Rights and Environmental Sustainability through a Holistic Perspective. – 9. A Critical Analysis of General Comment No. 27 (2025): (a) The CESCR's Interpretative Method – 10. (b) The Possible Legal Effects of General Comment No. 27 (2025).

1. *Sustainable Development and Economic, Social and Cultural Rights: A Close and Complicated Relationship*

The interdependence between the protection of the environment and human rights has been stressed since the Stockholm Declaration of 1972. In the following decades, the impact of severe pollution on the enjoyment of civil rights – the so-called first

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generation rights – has been acknowledged by regional human rights courts.[1]

Furthermore, in recent years, both regional courts and treaty bodies have accepted to hear claims by victims of climate change (as well as by non-governmental organizations), and they have found that the State's failure to adopt measures of mitigation and adaptation aimed at alleviating the most serious or imminent consequences of climate change can involve the violation of the right to respect one's private life and the right to life.[2]

However, the impact of environmental degradation on economic and social rights (ESR) can be even deeper both in the short and long term. As the International Court of Justice (ICJ) observed in 2025, pollution of soil and water, desertification and land degradation are already having endangered the right to health and the right to an adequate standard of living, including the right to food and water.[3] To the examples given by the ICJ, others could be added. One could think of the rising tempera-

[1] See European Court of human rights, 9 December 1994, judgment in the case *Lopez-Ostra v. Spain*, Application no. 16798/90; Interamerican Court of Human Rights, 15 November 2017, Advisory opinion, Series A, No. 23 (2017), *The Environment and Human Rights (State Obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*; African Court on Human and Peoples' Rights, 5 September 2023, judgment in the case *LIDO & others v. Republic of Côte d'Ivoire*, Application No. 041/2016.

[2] European Court of Human Rights, 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, Application No. 53600/20, paras. 514-535, 538-574. See also European Court of Human Rights, 9 April 2024, *Duarte Agostinho and others v. Portugal*, Application No. 39371/20; Interamerican Court of Human Rights, *The Environment and Human Rights*, cit.; Human Rights Committee, 24 October 2019, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, para. 9.5; Id., 30 October 2018, *General Comment No. 36 on Article 6: right to life*, CCPR/C/GC/36, para. 62; International Court of Justice, 23 July 2025, Advisory Opinion in the case *Obligations of States in respect of Climate Change*, paras. 377-378.

[3] International Court of Justice, 23 July 2025, cit., paras. 379-380. See also Human Rights Council, 6 May 2016, A/HRC/32/23, Report of the Office of the United Nations High Commissioner for Human Rights, *Analytical Study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*.

tures which can endanger the workers' right to just conditions of work. Furthermore, given the accelerating pace of global environmental challenges, sustainable development can be considered a precondition for the enjoyment of ESR by future generations.

However, notwithstanding the documented adverse effects of climate change on ESR, robust public policies combating climate change with the aim of protecting future generations have been criticized for reducing perspectives of economic growth, with negative consequences on the enjoyment of ESR by present generations. Analogously, measures of international cooperation at the benefit of less developed States, in particular those whose populations are more vulnerable to the consequences of global environmental degradation, have been blamed for reducing the livelihood of the poor in the "donor" countries. Suffice it to recall here that President Trump's executive order starting the process of withdrawing the United States from the 2015 Paris Agreement on climate change begins with the proclamation that "the United States must grow its economy and maintain jobs for its citizens" and argues that international agreements in force "steer American taxpayer dollars to countries that do not require or merit financial assistance."[4]

Sustainable development is therefore characterized by a close but intricate relationship with the ESR, involving potential intragenerational and "intra-poor people" social conflicts, which can raise international legal disputes between States or between individuals and States. These brief considerations call for an analysis of the practices of the Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee of Social Rights (ECSR) on the place that the notion of sustainable development has in the interpretation of the two most important international binding multilateral instruments concerning the so-called second generation rights. The analysis will therefore focus precisely on the practice of the two treaty bodies mentioned above rather than on the interpretations proposed in academic literature to date.

[4] Putting America First in International Environmental Agreements, Executive Order 14162, 90 Fed. Reg. 8455 (Jan. 20, 2025).

2. *Environmental Sustainability in the Practice of the European Committee of Social Rights*

Since the early 2000s, the European Committee of Social Rights has progressively articulated the recognition of the right to a healthy environment through its interpretation of core social rights, most notably the right to protection of health under Article 11, and the right to safe and healthy working conditions under Article 3 of the European Social Charter. While the Charter itself does not expressly recognize a standalone environmental right, the Committee has interpreted the right to health as encompassing environmental determinants of health – such as air and water quality – thus functionally linking environmental protection with specific social obligations.

The Committee has outlined a range of measures to be adopted by national authorities in order to fulfil the obligation to remove the causes of ill-health arising from environmental threats. These include: (i) developing and regularly updating sufficiently comprehensive environmental legislation and regulations; (ii) taking specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at the local level and contribute to its reduction on a global scale; (iii) ensuring that environmental standards and rules are properly applied through appropriate supervisory machinery; (iv) informing and educating the public, including pupils and students, about both general and local environmental problems; and (v) assessing health risks through epidemiological monitoring of the groups concerned.[5]

In the landmark decision on the collective complaint *Marangopoulos Foundation for Human Rights v. Greece*, concerning air pollution produced by lignite mining and the use of lignite in coal-fired power stations, the Committee held that Greece had

[5] ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, Decision on the merits of 6 December 2006, para. 203. See, also for references to Conclusions in the framework of reporting procedure, Council of Europe, *Digest of the Case Law of the European Committee of Social Rights*, 2022, pp. 117-118; and *Manual on Human Rights and Environment*, 3rd edition, 2022, p. 120.

violated its positive obligations under Article 11 by failing "to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest."[6] While admitting that "overcoming pollution is an objective that can only be achieved gradually", the Committee stated that "States parties must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal."[7] It is worth mentioning that, to assess the reasonable standard for state efforts – i.e. the "reasonable balance" between competing interests – the Committee relied on the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and European Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading.[8] Taking into account the fact that Greece's National Allocation Plan for the relevant period was "much less demanding than the Kyoto Protocol target", and that even higher emission limit values for combustion plants were granted under a ministerial order, the Committee considered that Greece did not offer real evidence of its "commitment to improving the situation within a reasonable time or make such an outcome plausible."[9] Thereby, compliance with the emission-reduction targets established to mitigate climate change at universal level has been introduced by the Committee as a benchmark for assessing the adequacy of the measures adopted by the State

[6] ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, cit., para. 221. General interests invoked by the Government were energy independence, access to electricity at a reasonable cost, and economic growth.

[7] ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, cit., para. 204.

[8] ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, cit., paras. 205-207. The relevance of UNFCCC and of the goals set following the Kyoto Protocol for the assessment of state obligation to reduce environmental risks had been previously introduced, although only in general terms, in the framework of reporting procedure (Conclusions XV-2, *Article 11§3, Italy*, adopted and published on 31 December 2001, Doc. XV-2/def/ITA/11/3/EN).

[9] ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, cit., para. 207.

to enable everyone to enjoy the highest possible standard of health attainable under Article 11.[10]

In *International Federation of Human Rights Leagues (FIDH) v. Greece*, concerning harmful effects on local residents arising from the pollution of the water of the river Asopos, the Committee further clarified the scope of the precautionary principle, holding that "where there are threats of serious damage to human health, lack of full scientific certainty should not be used as a reason to postpone appropriate measures."[11]

Although the situations reviewed by the Committee generally concern localized and severe instances of pollution, producing current negative effects on the inhabitants and workers, the principles of prevention derived from this case law may find application in the perspective of long-term sustainability and for the benefit of future generations. Indeed, global environment degradation, loss of biodiversity and natural disasters due to climate change and ongoing non-sustainable development are already affecting the enjoyment of several rights enshrined in the Charter. In such a context, the Committee has the competence to contribute to the improvement of environmental protection through the protection of social rights, and vice versa.[12]

However, the Committee's most recent monitoring activity does not always appear to be fully consistent with this approach. Notably, within the framework of the simplified reporting procedure, the Committee examined the provisions of the European

[10] Such benchmark has been further adapted to the evolving international regulation. Only in its *Findings 2023 – Follow-up to decisions on the merits of collective complaints*, adopted in January 2024, ECSR acknowledge that under the revised Greek National Plan for Energy and Climate "a lignite phase-out plan has been developed for the withdrawal of all existing lignite-fired power plants and the corresponding mines by 2028", and concluded that the situation has been brought into conformity with Article 11 (*Findings 2023 – Greece*, p. 95).

[11] ECSR, *International Federation for Human Rights (FIDH) v. Greece*, Complaint No. 72/2011, Decision on merits of 23 January 2013, para. 145.

[12] G. Palmisano, "Intervention to the High-level Conference "Environmental Protection and Human Rights", 27 February 2020, available at https://rm.coe.int/palmisano-statement-environment-humanrights-27-02-20/16809cbfec.

Social Charter relating to the thematic group "Health, social security and social protection" in the context of the Conclusions 2021.[13] Although the list of issues was established immediately after the COVID-19 pandemic and specific attention was paid to the adequacy of the measures adopted to limit the spread of the virus among the population, as well as to those taken to treat persons affected by the disease,[14] no reference was made to the link between global environmental degradation and the spread of diseases, especially zoonosis.[15] In a targeted question concerning compliance with Article 11(3) of the Charter, the Committee requested information on the measures adopted to prevent exposure to air, water and other forms of environmental pollution, as well as on the measures taken to address the health problems of the affected populations.[16] Nevertheless, the focus remained primarily on local environmental issues, rather than on broader concerns related to global sustainability. Consequently, while some of the conclusions adopted refer to the need for the reporting State to better address air quality,[17] none of them mentions sustainability or climate change measures.

[13] Since 2019 the targeted and strategic approach to reporting procedure has been initiated by the ECSR and endorsed with the decision adopted at the 1363th meeting of the Ministers' Deputies on 11 December 2019, CM/Del/Dec(2019)1363/4.1c. Under this simplified procedure States are called to report focusing on issue-based questions on selected provisions. The procedure has been furtherly improved with the decision adopted at the 1444th meeting on 27 September 2022, CM(2022)114-final.

[14] ECSR, *Questions on Group 2 provisions (Conclusions 2021) - Health, social security and social protection*, available at: https://rm.coe.int/questions-to-states-parties-of-the-resc-conclusions-2021/16809f05c1.

[15] This approach was in conformity with the *Statement of Interpretation on the Right to Protection of Health in Times of Pandemic* previously adopted by the Committee on 21 April 2020, available at https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640.

[16] ECSR, *Questions on Group 2 provisions (Conclusions 2021)*, cit., p. 8, question *e*) on Art. 11(3) of the Charter.

[17] See for example: Conclusions 2021, *Albania, Article 11§3*, adopted on 31 December 2021, published on 3 March 2022, doc. 2021/def/ALB/11/3/EN; Conclusions 2021, *Georgia, Article 11§3,* adopted on 31 December 2021, published on 3 March 2022, doc. 2021/def/GEO/11/3/EN; Conclusions 2021, *Serbia, Article 11§3*, adopted on 31 December 2021, published on 3 March 2022, doc. 2021/def/SRB/11/3/EN. In other cases the Committee re-

By contrast, both in the targeted questions proposed in 2024 and 2025 on Group 1 articles,[18] including the right to safe and healthy working conditions (Art. 3), the Committee asked for information on national policies concerning "new and emerging risks, including […] jobs affected by climate change risks", and on the enforcement of health and safety regulations concerning vulnerable categories of workers such as those "exposed to environmental-related risks such as climate change and pollution."[19] Because of the very content of Article 3 of the Charter, limited to working conditions, the scope of the question does not concern climate change mitigation measures. Those issues are nevertheless addressed, even though marginally, in a question concerning the right to joint consultation under Article 6(1), where the Committee asked "if there has been any joint consultation on matters related to (…) the green transition",[20] this question shows that the approach of the European Committee is in line with the one adopted by the UN Committee, in particular with the idea that

vealed problems but asked for more information and deferred the question of conformity to the following report, see for example**:** Conclusions XXII-2, *Article 11§3, Poland*, adopted on 31 December 2021, published on 3 March 2022, doc. XXII-2/def/POL/11/3/EN; Conclusions XXII-2, *Article 11§3, Croatia*, adopted on 25 January 2022, published on 3 March 2022, doc. XXII-2/def/HRV/11/3/EN; Conclusions XXII-2, *Article 11(3), United Kingdom*, adopted on 31 December 2021, published on 3 March 2022, doc. XXII-2/def/GBR/11/3/EN.

[18] In 2024, the questionnaire was proposed to the States that had not accepted the collective complaints procedure, which require reporting every two years. In 2025, the questionnaire was proposed to the States that had accepted the collective complaints procedure, which require reporting every four years.

[19] ECSR, *Proposed questions from the European Committee of Social Rights for the next statutory report - Group 1 - To be submitted by States Parties not having accepted the collective complaints procedure by 31 December 2024*, 6 June 2024, available at https://rm.coe.int/appendix-questions-for-the-next-statutory-report-group-1-2024/1680b0e515, questions on Art. 3, p. 4 and 5; *Proposed questions from the European Committee of Social Rights for the next statutory report - Group 1 - To be submitted by States Parties having accepted the collective complaints procedure by 31 December 2025*, 5 June 2024, available at https:// https://rm.coe.int/questions-2025-eng/4880288419, questions on Art. 3, p. 4 and 5.

[20] *Ivi*, Question on Art. 6(1), p. 6.

environmental sustainability measures must be adopted in the full respect of social rights,[21] and particularly the right of workers to participate to the decision-making process.

The close relationship between climate and environmental sustainability and the effective enjoyment of social rights, as outlined in the formulation of the questionnaire, is confirmed and further developed by the Committee in its final Conclusions.[22] In its Conclusions concerning almost all States under review, the Committee includes some general statements which clearly delineates its interpretation of the Charter in conformity with environmental dimension of sustainable development. Starting from the premise that "climate change has had an increasing impact on the safety and health of workers across all affected sectors, with a particular impact on workers from vulnerable groups", and that "rapid environmental changes, caused by climate change, increase risks to working conditions and exacerbate existing ones", the Committee draws a series of consequences regarding States' obligations. Firstly, to comply with Art. 3 of the Charter, "States should take measures to identify and assess climate change risks and adopt preventive and protective measures. These risks and impacts should be addressed through appropriate policies, regulations, and collective agreements." Secondly, "States must effectively monitor the application of standards addressing climate-related safety and health risks, including through appropriate supervisory mechanisms, and should undertake these efforts in close consultation with employers' and workers' organisations." Thirdly, "risk assessment and prevention/protection plans should include measures aimed at mitigating the effects of climate change on the safety and physical and mental health of workers." Finally, the Committee "stresses the importance of providing guidance and training to employers and work-

[21] See *infra,* Sections 3, 6, 8.

[22] On 21 January 2026, the ECSR published its conclusions on the articles of the European Social Charter relating to "Labour Rights"; links to Conclusions concerning each State under review are available at https://www.coe.int/en/web/european-social-charter/-/the-european-committee-of-social-rights-publishes-its-conclusions-on-labour-rights-for-2025.

ers, as well as implementing awareness-raising activities, collection of data and carrying out of research concerning the impact of climate change."[23]

Concerning state obligation to promote joint consultation between workers and employers, the Committee has explicitly included the implementation of green transition among matters to be object of joint consultation under Art. 6(1) of the Charter. Indeed, the Committee applies to this matter the same definition of consultation used in its general interpretation of Art. 6 and underlines that general conferences and public debate, which do not include consultation between workers and employers, or the organisations that represent them, do not constitute joint consultations within the meaning of Art. 6[24].

The interdependence between the full enjoyment of social rights and environmental and climate justice finds some echoes also in the *Review on State parties Ad-hoc Reports on Social rights and the cost-of-living crisis*, where the Committee underlines that "cost-of-living crises exacerbate the disproportionate impact of climate change on marginalized communities as rising energy costs limit their access to clean, sustainable energy sources" and states that "an equitable transition to renewable energy systems is therefore necessary in order both to mitigate climate impacts and reduce the financial burden on disadvantaged groups, thus ensuring that energy is affordable and reliable for all."[25] Thus, the Committee recommends the "adoption of targeted policies and inclusive strategies to ensure an equitable transition to renewable energy systems, prioritising affordability and accessibil-

[23] ECSR, Conclusions 2025, *Andorra*, January 2026, p. 8; the same general statement is included in Conclusions 2025 concerning: Austria, Estonia, Germany, Hungary, Latvia, Lithuania, Malta, Moldova, Montenegro, Romania, Serbia, Slovak Republic, Turkey, Ukraine. The Committee made explicit reference to the CESCR *General comment No. 27 (2025) on economic, social and cultural rights and the environmental dimension of sustainable development*, UN Doc. E/C.12/GC/27 and to General Assembly Resolution 76/300, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300.

[24] See, for example, Conclusions 2025, *Azerbaijan*, January 2026, p. 11.

[25] ECSR, *Social rights and the cost-of-living crisis - A Review of State parties Ad-hoc Reports*, March 2025, para. 109.

ity for vulnerable/low-income groups" such as "providing subsidies, facilitating access to renewable energy, and transitioning from short-term crisis responses to sustainable and long-term support mechanisms."[26] Nevertheless, this statement remains rather marginal within the overall document, as the questionnaire submitted to the States parties did not include any specific questions on the impact of green transition or other climate change issues on the cost of living.[27]

In conclusion, the case law and the recent monitoring activities of the Committee demonstrate consistent integration of environmental considerations into the interpretation and enforcement of social rights under the European Social Charter. While early decisions focused on localized and acute environmental hazards affecting public health, more recent initiatives reveal the Committee's awareness of broader sustainability challenges, including climate change and its impact on workers and vulnerable population. This evolving approach underscores the Committee's potential role in bridging environmental protection and social rights obligations, thereby promoting a holistic vision of sustainable development. Nevertheless, the partial and sometimes inconsistent attention to global environmental risks in simplified reporting procedures suggests that further systematic incorporation of environmental sustainability into the monitoring framework is necessary to ensure that the enjoyment of social rights fully reflects the challenges posed by climate change and environmental degradation.[28]

[26] *Ivi*, para. 130.

[27] ECSR, *Questions to State Parties on ad hoc reports concerning the cost of living crisis.* available at https://rm.coe.int/appendix-ad-hoc-report-questions/1680abb137.

[28] Such an approach would be entirely in line with Recommendation CM/Rec(2022)20 on human rights and the protection of the environment, adopted by the Committee of Ministers of the Council of Europe on 27 September 2022, and with the urgency expressed by Council of Europe Heads of State and Government in the *Reykjavík Declaration Appendix V on The Council of Europe and the environment*, adopted on 17 May 2023.

3. *Environmental Sustainability and Climate Change in the Practice of the Committee on Economic, Social and Cultural Rights (CESCR): Statements (2003-2020)*

At the universal level, the CESCR has developed a comprehensive "theory" of the connections between the notion of sustainable development and the Covenant. The basic features of this approach can be summarized as follows: the acknowledgment of a variety of adverse effects that climate change has on almost all Covenant rights; the identification of the right to a clean, healthy and sustainable environment as protected under the Covenant; the enumeration of a wide range of obligations to combat climate change arising from the Covenant; the identification of two groups of climate change related obligations, some derived from Article 2 and the Covenant as a whole, while others from the specific rights protected by the Covenant; the establishment not only of obligations requiring that States adopt measures to combat climate change, but also of obligations whose aim is ensuring that these measures in turn respect and protect ESCR.

These various elements, taken as a whole, seem to outline a full-fledged "political program" for States parties. In other words, the CESCR seems to set out an overall "green" path that States parties should follow in the elaboration of their economic policies. However, the development of this approach to environmental sustainability did not come about overnight, but over a period of slightly more than twenty years, from the early 2000s to 2025. The Committee advanced its views on the issue through a number of statements[29] (which will be analyzed in this section) and in the examination of States parties' reports (which will be analyzed in sections 4-7). It finally confirmed and further developed its comprehensive approach in a General Comment adopted in September 2025 (which will be analyzed in sections 8-10).

[29] The objectives of the practice of adopting statements are summarized by the Committee as follows: "With a view to assisting States parties to the Covenant, the Committee adopts statements to clarify and confirm its position with respect to major international developments and issues bearing upon the implementation of the Covenant." See CESCR, *Report on the forty-fourth and forty-fifth sessions*, Supplement No. 2, E/2011/22, para. 59.

The Committee started to focus on specific articles of the Covenant and, in particular, on Article 12, protecting the right to the highest attainable standard of health. The first impulse to this progressive development was given by a Statement of 2002 to the Commission on Sustainable Development, in which the Committee declared that "the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries… affect sustainable development and also constitutes a breach of treaty obligations under the Covenant", mentioning Article 12 as the key Covenant article.[30]

The Statement relied on General Comment No. 14, in which the Committee, taking note of Principle 1 of the Stockholm Declaration of 1972 and Principle 1 of the Rio Declaration of 1992, had already established that Article 12(2)(b) obliges States parties to prevent and reduce "the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health."[31] Analogously, the Committee argued that Article 12(2) (c) requires "the promotion of social determinants of good health, such as environmental safety."[32]

Furthermore, the Committee started acknowledging the existence of more general links between the notion of sustainable development, the international legal norms protecting it, and the Covenant. After an early reference to this broad relationship in the aforementioned 2002 Statement,[33] ten years later, in a Statement adopted in the context of the Rio+20 Conference,[34] the Committee affirmed that a range of obligations could be inferred from the

[30] CESCR, *Statement of the Committee on ESCR to the Commission on Sustainable Development acting as the Preparatory Committee for the World Summit on Sustainable Development* (Bali, Indonesia, 27 May to 7 June 2002), adopted at the twenty-eighth session (27th meeting) of the Committee, para. 3, E/2003/22-E/C.12/2002/13, Annex VI.

[31] CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000, E/C.12/2000/4, para. 15.

[32] *Ivi*, para. 16.

[33] *Ivi*, para. 2: "The international commitments on human rights and on sustainable development should be considered in the light of their important points of convergence, and of the legally binding nature of human rights obligations."

[34] CESCR, *Statement of the Committee on ESCR in the Context of the*

Covenant in the area of sustainable development. In addition to the obligations arising from Article 12, the list included also obligations inferable from Article 7 (b) (the right to a healthy working environment); Article 11(2) (a) (the right to food and to water); and Article 15 (cultural rights of indigenous peoples). Furthermore, the Committee stated that some general obligations crossing horizontally the whole conventional text existed in the area of environmental sustainability, as far as international cooperation for the promotion of ESCR is concerned (Art. 2(1)) and with reference to the role of women in environmental conservation and proper use and management of natural resources (Articles 3 and 11). Therefore, the Committee invited the Rio+20 Conference to integrate a human rights dimension into the notion of sustainable development as well as into the new concept of green economy.

This final invitation revealed the existence, in the Committee's approach, of two dimensions in the relationship between sustainable development and ECSR, according to which not only are States obliged to combat climate change, but also to ensure the full enjoyment of Covenant rights of present generations when they design and implement policies aimed at realizing sustainable development goals. Both the dimensions of this relationship were furthered in a 2018 Statement on Climate Change and the International Covenant on ESCR.[35] On the one hand, the Committee, after indicating an enlarged list of ESCR affected by climate change,[36] qualifies these rights as entitlements of all human beings to respect and protection by the State against climate change. Therefore, States parties are requested "to refrain from the adoption of measures that could worsen climate change… to effectively regulate private actors to ensure that their actions do not worsen climate change… and to adopt policies that can channel modes of production and consumption towards a more environmentally sustainable pathway."[37] On the other hand, the Committee reminds States parties that they also have "to dis-

Rio+20 Conference (June 2012) on "The Green Economy in the Context of Sustainable Development and Poverty Eradication", 18 May 2012, E/C.12/2012/1.

[35] E/C.12/2018/1 of 31 October 2018.

[36] *Ivi*, para. 4.

[37] *Ivi*, para. 10.

charge their duties under the Covenant *in* the mitigation of climate change and adaptation to its unavoidable effects."[38] In other words, ESCR should be integrated in state policies aimed at achieving environmental sustainability.

Even though indirectly, this second dimension of the relationship between environmental sustainability and ESCR was confirmed in a 2019 Statement on the "2030 Agenda for Sustainable Development." The 2030 Agenda,[39] considers together human development and environmental sustainability goals. The Committee highlighted that this approach and the underlying concept of "leaving no one behind" in the 2030 Agenda, with the related commitment to prioritize the most disadvantaged and marginalized therein fully converged with the Covenant, under which "States parties are required to mobilize the maximum of their available resources towards the fulfilment of the Covenant rights, particularly for those who are most excluded, disadvantaged and marginalized."[40] Finally, a same pattern can be found in a statement adopted jointly in 2020 by the CESCR, the Committee on the Elimination of Discrimination against Women, the Committee on the Protection of the Rights of All Migrant Workers and their Families, the Committee of the Rights of the Child and the Committee on the Rights of Persons with Disabilities.[41]

4. *The CESCR's Practice under the State Reporting Procedure (2015-2025): (a) Developing a List of Adverse Effects of Climate Change Phenomena on Covenant's Rights*

The process leading the Committee to the development of a comprehensive theory on the connections between environmental sustainability, climate change and the enjoyment of ESCR also

[38] *Ivi*, para. 11. Italics added.

[39] *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, Un. Doc. A/Res/70/1.

[40] CESCR, *Statement by the Committee on ESCR on "The Pledge to leave no one Behind: The Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development"*, E/C.12/2019/1 of 5 April 2019.

[41] HRI/2019/1 of 14 May 2020.

passed through the reporting process under Articles 16 and 17 of the Covenant. In the concluding observations adopted since 2016, i.e. since the entry into force of the Paris Agreement on climate change, the notion of environmental sustainability has acquired a direct and autonomous relevance in the Committee's interpretation of the Covenant.

It must first of all be noted that not only the Committee has confirmed in its practice the well-established principle that pollution and other phenomena linked to environmental degradation can cause specific harms to Covenant's rights (in particular those protected under Articles 11 and 12), but it has also found, at first occasionally, then increasingly regularly, that the same rights can be endangered by the adverse effects of climate change and uses of natural resources contrary to the principle of "environmental sustainability".

As far as Article 11 is concerned, the Committee's practice is particularly rich, given the variety of rights protected therein (the right to food, the right to water, the right to sanitation…) and the diversity of climate change phenomena affecting them. One of the first examples is given by the concluding observations adopted in 2016 on the fifth report of the Philippines in which the Committee found that the "livelihood of small-scale fishers has been under threat owing to declining fish stocks in coastal areas as a result of climate change and the encroachment of commercial fishing vessels on fishing zones."[42] In the next years, the Committee has confirmed the adverse effects that climate change can have on the enjoyment of the rights protected by Article 11 in relation to severe and cyclical droughts in Cabo Verde;[43] heavy flooding in Sri Lanka;[44] the melting of ice in the Russian arctic region;[45] cyclones in Mauritius.[46]

Similar observations have been made with reference to Article 12,[47] and, even though more rarely, in relation to the right to a

[42] E/C.12/PHL/CO/5-6, paras. 45-46.
[43] E/C.12/CPV/CO/1, para. 8.
[44] E/C.12/LKA/CO/5, para. 55.
[45] E/C.12/RUS/CO/6, para. 43.
[46] E/C.12/MUS/CO/5, para. 9.
[47] See for example E/C.12/MNG/CO/5, para. 36.

decent working environment, with particular reference to dangerous temperatures in Cyprus and related risks for outdoor and agricultural workers.[48] Furthermore, in the Committee's practice a particular attention has also been given to the adverse effects of climate change on the indigenous people's right to use their land and their traditional livelihood within their homeland, under Articles 1(2) and 15.[49]

However, it is perhaps even more interesting to note that, with the passage of time, the Committee has started to find in its concluding observations that climate change phenomena have more general adverse impacts on *all* ESCR in the States parties concerned,[50] and that it has also found connections between ESCR and States Parties' unsustainable practices *beyond* their borders.[51] The risks posed by climate change-driven phenomena to the overall enjoyment of ESCR within and beyond States parties' borders have been confirmed by the frequent reference in

[48] E/C.12/CYP/CO/7, para. 45-46.

[49] See E/C.12/FIN/CO/6, paras. 9-10, concerning the Saami people's rights in Finland. In the previous round of the reporting procedure in relation to Finland, the Saami people's rights, while highlighted by the Committee, were not considered in the light of climate change: see E/C.12/FIN/CO/5, para. 20. See also E/C.12/CAN/CO/6, paras. 53-54.

[50] See E/C.12/BHR/CO/1, para. 10, founding that "desertification, degradation of arable land, droughts, dust storms, coastal degradation owing to oil spills, and lack of freshwater resources have a considerable impact on the enjoyment of economic, social and cultural rights in the State party." See also E/C.12/TCD/CO/4, para. 13, in which the Committee expressed its concerns under art. 1(2) about conflicts between farmers and herders, as well as intra- and intercommunity conflicts in Chad "linked to access to land and natural resources, loss of livelihoods, community displacement and food insecurity, exacerbated by droughts and climate change-related weather events."

[51] See for example E/C.12/CHN/CO/3, para. 24, underlying the "adverse impact on climate change beyond the State party's borders (art. 2(1)" of Chinese measures like "the increase in recent years in the construction of coal-fired power plants, abroad as well as within the State party, and the increase in licences and permits to construct coal-fired power plants." See for analogous observations E/C.12/ITA/CO/6, para. 15; E/C.12/IRQ/CO/5, para. 14. See also E/C.12/COD/CO/6, para. 20, in which the Committee generically highlights the negative effects of deforestation in the Democratic Republic of Congo on global climate change, without any specific reference to the situation of individuals residing in the country.

the concluding reports to Article 2(1), when the Committee expresses its concerns over the insufficient efforts made towards the fulfillment of obligations under the Paris Agreement.[52]

5. *(b) Conceiving the Common but Differentiated Responsibilities under the Paris Agreement as Functional to the Protection of the Covenant's Rights*

Since 2015 the Committee's concluding observations have been characterized by the inclusion of recommendations concerning climate change. This trend, which has intensified since 2021, has one fundamental feature that needs to be highlighted here: the Committee has derived from the Covenant (either from articles protecting specific rights or from "horizontal clauses") an obligation to make every effort to achieve the Paris Agreement's objectives as specified either in the nationally determined contributions (NDC) under the same Agreement or in adaptation plans adopted by States parties to fulfill adaptation obligations therein. In other words, the Committee has acknowledged that fulfilling the obligations arising from the Paris Agreement is functional to respecting, protecting and fulfilling the Covenant's rights.

A consequence of this approach is that the reporting procedure before the Committee ended up functioning as a mechanism to monitor compliance with the Paris Agreement, in addition to the mechanisms established therein. Not only is this feature implied in the consideration by the Committee of States parties' NDC and adaptation plans in its concluding observations, but also from the request that States parties provide details in their reports on NDC and the concrete steps taken towards fulfilling them in their following reports.[53]

The rationale of this approach seems quite easy to understand. On the one hand, the Committee's task of considering States parties' reports with reference to climate change is facili-

[52] See for example E/C.12/PRT/CO/5, para. 8; E/C.12/CYP/CO/7, para. 13.

[53] See for example E/C.12/KWT/CO/3, paras. 10-11.

tated by the existence of pre-established benchmarks against which it could measure state practice; on the other hand, any criticism based on the Committee's excessive freedom of interpretation and its lack of competence to create new obligations for States are weakened by the fact that States Parties themselves established these benchmarks, by an international treaty and related unilateral acts.

Be that as it may, the links established between the Covenant and the Paris Agreement (as well as other multilateral environmental treaties) have also led the Committee to build its concluding observations on the notion of "common but differentiated responsibilities", i.e. one of the principles of international environmental law underlying the Paris Agreement.

On the one hand, the Committee did not hesitate to invite developed countries to respect their obligations under the Paris Agreement and the Kyoto Protocol, in consideration of the positive effect that the implementation of these obligations has on the enjoyment of ESCR by individuals living either in their territory or abroad. In doing that, the Committee has focused on the mitigation efforts requested by the Paris Agreement.[54] It must also be recalled that the Committee has frequently affirmed the extraterritorial jurisdiction of these States under the Covenant over harmful impacts on the climate caused abroad by companies domiciled in their territory.[55]

On the other side, when examining less developed countries' reports, the Committee has first of all emphasized the special vulnerability of some States to climate change despite their neg-

[54] E/C.12/DEU/CO/6, paras. 18-19; E/C.12/BEL/CO/5, paras. 9-10; E/C.12/CHE/CO/4, paras. 17-18; E/C.12/NOR/CO/6, paras. 11; E/C.12/CZE/CO/3, paras. 8-9; E/C.12/BHR/CO/1, para. 11; E/C.12/ITA/CO/6, para. 18; E/C.12/PRT/CO/5, paras. 8-9; E/C.12/LTU/CO/3, paras. 16-17; E/C.12/QAT/CO/1, paras. 14-15; E/C.12/FRA/CO/5, paras. 8-9; E/C.12/SWE/CO/7, paras. 10-11; E/C.12/ISL/CO/5, paras. 10-11. See also E/C.12/AUS/CO/5, paras. 9-10 in which the Committee recommends that Australia take immediate measures aimed at reversing trends of increasing absolute emissions of greenhouse gases and pursue alternative and renewable energy production.

[55] See for example E/C.12/LUX/CO/4, paras. 10-11 and 12-13; E/C.12/CHN/CO/3, paras. 17-18.

ligible contribution to this global challenge[56]. This observation, together with the consideration of the overall economic and social situation of these countries has led the Committee to focus on the adaptation obligations under the Paris Agreement, in particular by recommending that States adopt adaptation plans.[57]

Another recurrent recommendation to these States is to more strictly regulate economic activities with high negative impacts on the environment as a whole, with a frequent emphasis on the need to carry out "environmental and human rights impact assessments."[58] Rarely has the Committee asked to close specific extractive activities posing irreversible damages to it.[59]

While it is true that the Committee has also recently considered less developed States' NDC and their mitigation obligations,[60] this development has been limited to the specific issue of international cooperation."[61]

This observation leads us to underline that a similar pattern of differentiating responsibilities can be found in the Committee's approach to the issue of international cooperation. On the one side, less developed States are encouraged to "seek international

[56] See for example E/C.12/BGD/CO/1, para. 13; E/C.12/MUS/CO/5, para. 9.

[57] E/C.12/BOL/CO/3, para. 11; E/C.12/UZB/CO/3, paras. 12-13; E/C.12/TJK/CO/4, paras. 50-51; E/C.12/MNG/CO/5, para. 37; E/C.12/YEM/CO/3, paras. 61-62; E/C.12/KHM/CO/2, paras. 12-13; E/C.12/ARM/CO/4, paras. 43-44; E/C.12/MRT/CO/2, paras. 40-41; E/C.12/MWI/CO/1, paras. 43-44. See also E/C.12/FRA/CO/5, paras. 8-9, recommending that France adopt specific adaptation plans for overseas territories, given the particular vulnerability to the adverse effects of climate change.

[58] See E/C.12/NER/CO/1, paras. 17-18, concerning uranium contamination of water sources in Niger; E/C.12/SEN/CO/3, paras. 34-45, with reference to the discharge of wastewater in urban and peri-urban areas in Cameroun; E/C.12/ECU/CO/4, paras. 11-12, regarding extracting activities in Ecuador. See also E/C.12/SLV/CO/6, para. 17; E/C.12/GTM/CO/4, paras. 16-17; E/C.12/ARM/CO/4, paras. 11-12.

[59] As in the case of some mining operations: E/C.12/MLI/CO/1, paras. 43-44.

[60] In 2024 the Committee recommended some States to take all measures necessary to meet their nationally determined contribution. See E/C.12/HND/CO/3, paras. 12-13; E/C.12/MWI/CO/1, paras. 11-12 and 13-14.

[61] E/C.12/MWI/CO/1, para. 43.

support and assistance in order to mobilize the financial and technological support to which it is entitled in mitigating and responding to the effects of climate change",[62] including under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts.[63] On the other side, when examining the reports of developed States parties, the Committee has been inclined to recommend that they increase their contributions to the Green Climate Fund, as a means to give effect to international cooperation obligations under Art. 2(1).[64]

The approach adopted by the Committee in the reporting process of upper-middle level of income States parties can be considered as a combination of the first two. While the Committee has recommended that these States take steps towards their NDC under the Paris Agreement;[65] it has at the same time been inclined to recommend that these States adopt or revise adaptation plans, in particular with a specific reference to particularly vulnerable groups or communities;[66] and reduce their reliance on coal or fossil fuel and promote alternative and renewable energy sources.[67] Furthermore, the presence in this third group of States of strong exporters of oil and gas led the Committee recommend that they do not increment existing licenses and concessions.[68]

[62] E/C.12/MUS/CO/5, para. 10.

[63] E/C.12/HND/CO/3, para. 49.

[64] E/C.12/DNK/CO/6, paras. 14-15; E/C.12/FIN/CO/7, paras. 10-11; E/C.12/SWE/CO/7, paras. 12-13.

[65] See E/C.12/ARG/CO/4, paras. 13-14, concerning large-scale exploitation of unconventional fossil fuel through hydraulic fracturing in Argentina; E/C.12/AZE/CO.4, paras. 16-17, recommending Azerbaijan to intensify its efforts to achieve its NDC under the Paris Agreements; E/C.12/BIH/CO/3, paras. 46-47, recommending that Bosnia and Herzegovina adopt legislative measures aimed at reducing air pollution in line with its obligation under the Paris Agreement. See also paras. E/C.12/SRB/CO/3, paras. 64-65; E/C.12/BRA/CO/3, paras. 17-18; E/C.12/ROU/CO/6, paras. 8-9; E/C.12/IRQ/CO/5, para. 15; E/C.12/ALB/CO/4, paras. 12-13.

[66] See for ex. E/C.12/IRQ/CO/5, para. 42-43; E/C.12/PER/CO/5, paras. 40-41.

[67] E/C.12/ROU/CO/6, paras. 8-9; E/C.12/IDN/CO/2, paras. 50-51.

[68] E/C.12/IRQ/CO/5, para. 15.

6. *(c) Respecting Covenant's Rights while Combating Climate Change*

The Committee's recommendations have not merely mirrored the obligations arising from the Paris Agreement and objectives set out in NDCs. On the contrary, the Committee has developed the idea that both the Paris Agreement and the NDCs have to be interpreted in the light of the Covenant's rights. Since 2023 the Committee has started to recommend that *all* measures taken for climate change mitigation respect ESCR, highlighting what we called in section 3 "the second dimension" of the relationship between climate change and ESCR.[69]

The need that States ensure the full realization of ESCR when they develop and implement both general plans and specific measures aimed at combating climate change is the rationale behind the adoption by the Committee of *horizontal* recommendations, whose adoption does not depend on the different level of development of the State party concerned. Perhaps the clearest example of horizontal recommendations is given by those derived from Articles 1 and 15, with reference to the right of indigenous peoples and traditional communities to meaningfully participate in decision-making concerning climate change policies. In this context, the Committee emphasized the principle of free, prior and informed consent to exploitation and extractive activities carried out on territories owned or traditionally used by these peoples.[70] Other horizontal recommendations have been addressed to States which, regardless of their level of development, have within their territory areas whose preservation is particular-

[69] See for example: E/C.12/PAN/CO/3, para. 9; E/C.12/MRT/CO/2, para. 41; E/C.12/KGZ/CO/4, para. 15.

[70] See E/C.12/NZL/CO/4, para. 9 (Maori people in New Zealand); E/C.12/FIN/CO/6, paras. 9-10 (Sami people in Finland); E/C.12/CAN/CO/6, para. 54 (indigenous peoples in Canada); E/C.12/MEX/CO/5-6, para. 14 (indigenous peoples in Mexico); E/C.12/BRA/CO/3, (Quilombolas and other traditional communities in Amazonia). See also E/C.12/SLV/CO/6, para. 17; E/C.12/KHM/CO/2, para. 13; E/C.12/SWE/CO/7, paras. 10-11 and 14-15 (Sami people in Sweden).

ly important for the climate balance of the planet, such as forests[71] or glaciers.[72]

However, the need to respect ESCR when adopting measures aimed at combating climate change can also be seen in non-horizontal recommendations. Thus, the Committee underlined that when the most developed States parties provide international development assistance, they are required not only to take into account sustainable development and mitigation objectives, but also to give full protection of all the rights enshrined in the Covenant.[73] On the other hand, when examining less developed States' reports, recurrent recommendations concern the necessity to carry out comprehensive impact assessments on environment and ESCR, before entering into investment and trade agreements or licensing investments and monitor the implementation of such agreement and licences.[74]

7. *(d) Developing General and Specific Recommendations*

Whereas the Committee's attitude analyzed in the preceding two sections clearly implies a certain intrusion in the States parties' energy and industrial policies, the level of precision of the Committee's recommendations can change.

The Committee has often confined itself to invite the most developed States parties to meet the objectives of reducing greenhouse gases emissions established in their NDC. However, in some cases, the Committee has specified the economic sectors

[71] See E/C.12/BRA/CO/3, para. 54, in which the Committee recommends that the State party take "all measures necessary to stop deforestation." See also E/C.12/BOL/CO/3, paras. 10-11, E/C.12/COD/CO/6, paras. 20-21; E/C.12/CYP/CO/7, para. 13-14.

[72] See E/C.12/RUS/CO/6, paras. 42-43, even though the recommendations of the Committee are quite vague.

[73] E/C.12/FRA/CO/4, para. 7.

[74] E/C.12/KAZ/CO/2, paras. 16-18; E/C.12. Furthermore, when indigenous peoples are affected, the Committee has highlighted the requirement to respect their rights to be consulted, receive compensation for damages or losses and receive a fair share of the profits from those activities. See, for example, E/C.12/CMR/CO/4, paras. 16-17.

which specifically run counter the Paris Agreement's targets for reduction of greenhouse gas emissions.[75] Furthermore, in still other cases, some concluding observations specify the *means* through which to achieve these objectives, such as increasing the taxation of emissions;[76] expanding the state emissions trading system;[77] suspending permissions to construct coal-fired power plants,[78] replacing fossil fuel in the state energy mix;[79] allocating more resources to existing adaptation plans.[80]

A similar pattern can be seen in the concluding observations adopted in the reporting procedures concerning less developed States parties. Indeed, while in some cases the Committee recommended that they take generic measures aimed at adopting "sustainable consumption and production patterns"[81] or at adopting adaption plans;[82] in other cases, the Committee expressed its concerns about specific risks, indicating the most appropriate measures.[83] Sometimes, the Committee invited these States par-

[75] See E/C.12/LVA/CO/2, paras. 10-11, stating that Latvian difficulties to meet its NDC are "particularly due to projected gas emissions caused by land use, land use change and forestry"; E/C.12/IRL/CO/4, paras. 12-13, recommending that Ireland focus its efforts in particular on the agricultural and land-use, land-use change and forestry sectors; E/C.12/CYP/CO/7, para. 13, focusing on forestry in Cyprus.

[76] E/C.12/CHN/CO/3, para. 25; E/C.12/ITA/CO/6, para. 18; E/C.12/IRL/CO/4, para. 13; E/C.12/POL/CO/7, para. 17.

[77] E/C.12/CHN/CO/3, para. 25.

[78] E/C.12/CHN/CO/3, para. 25.

[79] E/C.12/CHN/CO/3, para. 25; E/C.12/ITA/CO/6, para. 18; E/C.12/IRL/CO/4, para. 13; E/C.12/POL/CO/7, para. 17; E/C.12/CYP/CO/7, para. 13.

[80] E/C.12/CYP/CO/7, paras. 45-46.

[81] See for example E/C.12/MDA/CO/3, para. 69.

[82] See *supra*, Section 5.

[83] See for ex. E/C.12/IRQ/CO/5, paras. 42-43 (inviting Iraq to build "the resilience of its economy and society to water scarcity and environmental shocks" through "tree-planting programmes, the construction of desalination plants, increasing the number and capacity of wastewater treatment plants and strengthening engagement with neighbouring countries to ensure the fair and equitable use of the river courses within its territory"); E/C.12/HND/CO/3, para. 49 (recommending that Honduras adopt a full-fledged set of measures, including the development of early warning systems, resilient infrastructure; recovery plans, protecting coastal communities and densely popu-

ties to develop policies aimed at reducing the impact of climate change on particularly vulnerable groups of people.[84]

8. *General Comment No. 27 (2025): Consolidating the Reciprocal Relationship between Covenant's Rights and Environmental Sustainability through a Holistic Perspective*

Adopted in November 2025, General Comment No. 27 *on economic, social and cultural rights and the environmental dimension of sustainable development*[85] represents the apex of the process of consolidation of the comprehensive 'theory' of the connections between the notion of sustainable development and the Covenant, developed by the Committee over the past twenty years and analysed in the preceding sections. Through a holistic perspective, the Committee reaffirms the reciprocal and mutually reinforcing relationship between the enjoyment of economic, social and cultural rights and environmental sustainability, framing environmental protection as an inherent condition for the realisation of ESCR, while simultaneously recognising the fulfilment of these rights as integral to sustainable development. In this sense, General Comment No. 27 consolidates the Committee's evolving interpretative approach, providing coherence and clarity to principles that had hitherto been developed in a frag-

lated areas from sea level rise and flooding; proper managing waste and effluents, especially in remote, rural and coastal areas); preventing intra- and intercommunity conflicts exacerbated by droughts and climate change-related weather events (E/C.12/TCD/CO/4, paras. 13-14).

[84] E/C.12/PHL/CO/5-6, paras. 46 recommending that Philippines secure the small-scale fishers' livelihood under threat owing to declining fish stocks in coastal areas as a result of climate change and the encroachment of commercial fishing vessels on fishing zones"; E/C.12/CPV/CO/1, para. 9, recommending that Cabo Verde adopt measures aimed at improving the structural safety of houses and infrastructure; and regularly updating relocation plans. See also E/C.12/BGD/CO/1, para. 14; E/C.12/MUS/CO/5, para. 10.

[85] CECSR, *General Comment No. 27(2025) on economic, social and cultural rights and the environmental dimension of sustainable development*, 6 November 2025, UN Doc. E/C.12/GC/27.

mented and sector-specific manner, without departing from the established normative architecture of the Covenant.

However, General Comment No. 27 cannot be reduced to a mere restatement or summary of the Committee's previous positions. While remaining firmly anchored in the Committee's own interpretative practice, the General Comment engages in a form of systemic integration, drawing upon relevant normative and interpretative contributions emerging from other treaty bodies, international courts and international organisations, as well as from broader developments in international environmental law.[86] Thereby, the Committee situates its reading of the Covenant within a wider normative landscape, enhancing the coherence of its interpretative approach and consolidating the understanding of environmental sustainability and the protection of human rights as mutually reinforcing dimensions, to the benefit of present and future generations.

The Committee proceeds from the factual premise that "planetary environmental threats are driven by unsustainable levels of production and consumption" and that "at the current rate of resource exploitation, pollution and environmental destruction, without regard for the Earth's environmental limits, it is impossible to achieve the equal realization of Covenant rights for all."[87] In this context, the Committee's analysis suggests that the whole political and economic system should be reoriented by "placing the human dignity of present and future generations, together with environmental justice, at its centre."[88]

Against this background, the interpretative lens adopted by the Committee is grounded in the understanding that "the right to a clean, healthy and sustainable environment is an autonomous human right, indispensable for the effective enjoyment of all rights enshrined in the Covenant."[89] This explicit recognition marks a significant development in the Committee's interpretative practice. Going beyond earlier, indirect references to envi-

[86] See *infra*, Section 9.
[87] General Comment No. 27(2025), cit., para. 2.
[88] *Ivi*, para. 3.
[89] *Ivi*, para. 6.

ronmental factors in relation to specific Covenant rights, the Committee affirms, for the first time in a clear and autonomous manner, the normative relevance of this right within the framework of the Covenant. Complementing this approach, General Comment No. 27 introduces a more explicit "intergenerational perspective" into the interpretation of the Covenant, by framing the progressive realization of ESCR in terms of "the equitable sharing of rights, responsibilities and resources across generations".[90] While considerations of intergenerational responsibility were already implicit in the Committee's earlier practice, they had not previously been articulated with the same degree of clarity and explicitness. Finally, the principle of common but differentiated responsibilities, previously introduced in the Committee reporting procedures,[91] is fully integrated into the overall interpretation of the Covenant, serving as a parameter for differentiating obligations and responsibilities between developed countries, which have historically contributed most to environmental degradation, and poorer countries, which risk bearing its most severe consequences.[92]

Starting from these conceptual foundations, the Committee articulates its reasoning around four main axes: general obligations of States parties; obligations of States parties in relation to specific rights; obligations towards individuals and groups in particularly vulnerable situations; and remedies and accountability. It is not possible, within the scope of this contribution, to provide a detailed account of the entire content of the General Comment, nor of its impact on the application of each individual Covenant right. The analysis will therefore be limited to highlighting those elements that are particularly significant or innovative compared to its previous practice, with particular attention to statements of a general scope.

With regard to the first axis, the Committee derives from the general obligations to respect, protect and fulfil Covenant rights

[90] *Ivi*, para. 7.

[91] See *supra*, Section 5.

[92] General Comment No. 27(2025), cit., para. 2 and, more specifically, paras. 33-38 on international assistance and cooperation.

a set of more specific duties aimed at ensuring the full and effective enjoyment of ECSR in contexts of environmental degradation, as well as at preventing further degradation that would jeopardise their enjoyment in the future. In doing so, the Committee reiterates obligations already affirmed in its previous practice, while at the same time specifying them by elaborating their content and, above all, by systematising them within a coherent framework capable of addressing the "root causes of the interconnected crises of climate change, biodiversity loss and pollution."[93] Since the Committee expressly identifies "unsustainable patterns of production and consumption, and an economic model based on unlimited growth"[94] as the drivers of the climate and environmental crisis, it follows that the "transition to an economy that is centred on human rights and the well-being of the planet is imperative to ensure equal enjoyment of human rights within the Earth's ecological limits."[95] Such an explicit critique of the liberal economic system, coupled with the articulation of compulsory measures to be taken, constitutes a qualitatively novel and normatively ambitious feature of the Committee's approach.

The progressive realization of Covenant rights, under Article 2.1, must be guided by the principle of non-discrimination and equality; these principles also apply to the corollary prohibition of retrogression. From an intergenerational perspective, "the failure to consider the long-term impacts of environmental degradation on future generations may also amount to impermissible retrogression."[96] It follows that "States Parties must mobilize and allocate the maximum available resources for the progressive realization of Covenant rights, in a manner compatible with ecological limits and the objectives of sustainable development",[97] so as not to jeopardise the right to equitable sharing of natural resources of future generations and Indigenous Peoples.

[93] *Ivi*, para. 15.
[94] *Ibid.*
[95] *Ibid.*
[96] General Comment No. 27(2025), cit., para. 22.
[97] *Ivi*, para. 24.

At the same time, consistently with previous practice of the Committee, the prohibition of retrogression also applies to present generations. Thus, policies and measures adopted to safeguard fundamental environmental conditions "must be designed in full respect of Covenant rights, ensuring that they do not undermine the essential levels of their enjoyment."[98] This applies particularly to individuals and groups in vulnerable situations, who experience intersecting forms of disadvantage; as a consequence, States "must address structural and systemic discrimination and inequality, and safeguard such individuals and communities from human rights risks arising both from environmental harm and from measures taken in response."[99]

General Comment No. 27 further clarifies the scope of extraterritorial obligations in the context of environmental degradation. This includes both the obligation "to prevent foreseeable harm to the enjoyment of Covenant rights in other countries resulting from climate change, pollution or unsustainable development",[100] and "to prevent the activities of business enterprises under their jurisdiction from causing environmental harm that affects the enjoyment of Covenant rights in other countries."[101]

Once the framework of general obligations has been set out, the Committee proceeds to illustrate how environmental degradation and climate change directly affect the enjoyment of each specific right recognised by the Covenant, and to identify a wide range of concrete and targeted measures that States are required to adopt in order to comply with their obligations to respect, protect and fulfil those rights. Through this rights-specific analysis, the Committee highlights how environmental harm can undermine the enjoyment of these rights, while at the same time identifying corresponding duties of prevention, regulation and protection incumbent upon States parties. In this sense, this part of the General Comment provides indispensable guidance for the Committee's future practice, informing its assessment of the

[98] *Ivi*, para. 27.
[99] *Ivi*, para. 39.
[100] *Ivi*, para. 30.
[101] *Ivi*, para. 31.

implementation of specific Covenant rights in contexts of environmental degradation.[102]

The General Comment devotes particular attention to individuals and groups in situations of heightened vulnerability, recognising that environmental degradation and climate change have disproportionate impacts on those who are already exposed to structural forms of disadvantage.[103] Building on its previous practice, the Committee clarifies that States parties are required to take into account differentiated levels of exposure, sensitivity and adaptive capacity when designing and implementing environmental and climate-related measures. Special consideration is given to groups whose enjoyment of Covenant rights is often most severely affected by environmental harm: children,[104] indigenous peoples,[105] peasants, pastoralists, fishers and other people living in rural areas,[106] and environmental migrants.[107] Through this focus, the General Comment reinforces the centrality of substantive equality and non-discrimination, translating general obligations into targeted duties of protection for those in particularly vulnerable situations. It should also be emphasised that, the Committee further applies the principle of common but differentiated responsibilities, drawing from it – in an innovative manner – significant implications for the protection of human rights. This is particularly evident in the Committee's explicit recognition of the obligation to uphold the principle of non-refoulement to persons displaced across borders due to climate change, as well as to engage in international cooperation in order to ensure that affected individuals receive the necessary legal protection and support.[108]

In its final part, General Comment No. 27 addresses the issue

[102] For reasons of space, it is not possible to address the implications of this part of the General Comment for each specific right. Selected examples will therefore be mentioned *infra*, in Sections 9 and 10.

[103] General Comment No. 27(2025), cit., para. 76.

[104] *Ivi*, paras. 78-79.

[105] *Ivi*, paras. 80-82.

[106] *Ivi*, paras. 80-82.

[107] *Ivi*, para. 86.

[108] *Ibid.*

of remedies and accountability in direct relation to environmental harms affecting the enjoyment of Covenant rights. While confirming the justiciability of Covenant rights violated due to environmental degradation, the Committee introduces a number of particularly innovative elements. Most notably, it affirms that States parties must ensure access to justice also in the interests of future generations, including through collective legal standing for representatives acting on their behalf and through flexible evidentiary rules capable of overcoming procedural barriers for victims.[109] In addition, the General Comment makes clear that States parties' obligations to prevent and redress violations extend to environmental harm caused by non-State actors, including business entities subject to their jurisdiction or control, even when operating abroad.[110] Through these clarifications, the Committee significantly broadens the possibility for environmental strategic litigation at national level.

9. *A Critical Analysis of General Comment No. 27 (2025): (a) The CESCR's Interpretative Method*

The fact that General Comment No. 27 is much more than a guide to the interpretation of specific Covenant's articles – advancing, as it does, the thesis that the Covenant requests an overall state political program aimed at achieving the transition to a new and "green" economic order, while overcoming present structural inequalities – prompts us to examine the method of interpretation on which it is based (in this section), and the possible effects that it can have (in the subsequent section).

As far as interpretation is concerned, it must first be noted that the Committee seeks to locate its approach within the relevant rules of the 1969 Vienna Convention on the Law of Treaties, in particular Article 31(3)(c). In Section II of the General Comment, the Committee stated that: "when clarifying the obligations of States Parties to realize Covenant rights in relation to the

[109] General Comment No. 27 (2025), cit., para. 87.
[110] *Ivi*, para. 88.

environmental dimension of sustainable development, international environmental law must be taken into account, in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In turn, States Parties must fulfil their obligations under international human rights law, including the Covenant, when implementing their obligations under international environmental law."[111]

Reference to Article 31(3)(c) makes clear that the Committee considers its interpretative approach as fully respectful of the objective methodology enshrined in the Vienna Convention's "general rule of interpretation" (which is made of text, context, object and purpose). At the same time, it poses a particular accent on context, i.e. "systemic interpretation", requiring that "any relevant rules of international law applicable in the relations between the parties" be taken into account. The importance of focusing on context – i.e. the body of law applicable in the relations between the parties – more than text and even object and purpose of the treaty (Art. 31(1)), is conducive to the most ambitious interpretative outcome that the Committee aims to achieve, that is the inclusion of climate change mitigation and adaptation objectives within the Covenant.

Indeed, context is extensively used to justify that some obligations under the Paris Agreement are also due under the Covenant as "general obligations." This is in particular true for the obligation "to take all available measures, based on the best available scientific evidence, to reduce greenhouse gas emissions in line with the temperature goals set out in the Paris Agreement"; and for the obligation of developed States, provided for by Article 4 of Paris Agreement, "in line with the principle of common but differentiated responsibilities, to lead mitigation efforts and provide financial and technological assistance to developing States to enable their effective climate action."[112]

Analogously, the Committee extensively referred to context, when it affirmed the existence under the Covenant of general obligations corresponding to those set out in decisions of the

[111] *Ivi*, para. 9.
[112] *Ivi*, paras. 16 and 17. See also paras. 30 and 34.

Conference of the Parties to the Paris Agreement. This can be said for the obligation to "phase down the expansion of fossil fuel infrastructure… and phase out inefficient fossil fuel subsidies that do not address energy poverty or just transition", in line with a decision Decision 1/CMA.5.[113]

However, the Committee's recourse to systemic arguments is not limited to the Paris Agreement, but includes a wider range of international norms that, while not specifically addressing the subject matter of climate change, are nonetheless relevant, in the Committee's view, to the identification of obligations of States parties under the Covenant in the area of environmental sustainability.

This approach is in line with a clear trend in contemporary international jurisprudence and practice in all areas of international law, including international norms related to global environmental challenges. Clear examples can be found in human rights courts' jurisprudence and treaty bodies' practice,[114] as well as in the works of the International law Commission.[115]

The relevant legal context is made of norms coming from different sources. On the one hand, when the Committee identifies what it calls "general" obligations under the Covenant, it refers to international customary rules and general principles in the field of the protection of the environment and to the international jurisprudence recognizing them. This can be said for example for the rule on the environmental impact assessment (para. 14) and the principle of precaution (para. 11). In some cases, the Committee seems to refer to *trends* towards the formation of a general norm. This is the case of the right to a clean, healthy and

[113] *Ivi*, para. 17.

[114] See *supra*, footnote 2. See also Human Rights Committee, General Comment No. 36 (2018), cit., para. 62.

[115] See *Draft Guidelines on the protection of the Atmosphere*, 2021, Guideline 9 "Interrelationship among relevant rules": "The rules of international law relating to the protection of the atmosphere and other relevant rules of international law… should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration." (*Yearbook of the International Law Commission, 2021*, vol. II, Part two)

sustainable environment, which, as the Committee reminds, was "explicitly recognized by the General Assembly in 2022 and by the Conferences of the Parties to both the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity."[116] On the other hand, in the identification of obligations deriving from *specific* Covenant's rights, the Committee paid more attention to multilateral treaties than customary law.

It is also noteworthy that the Committee referred to multilateral treaties as interpreted by relevant international organizations and/or expert treaty bodies under their mandates. Therefore, the Committee assigned considerable weight to: resolutions and guidelines adopted at ILO tripartite meetings of experts, with reference to the right to work, the right to just and favourable conditions of work, the right to form and join trade unions, and the right to social security;[117] resolutions of the UN-Water and the UNESCO, with reference to the right to water;[118] guidelines elaborated by the FAO, as far as the right to adequate food is concerned;[119] reports of the Intergovernmental Panel on Climate Change for other aspect of the right to an adequate standard of living;[120] reports of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) in relation to the right to take part in cultural life and to enjoy the benefits of scientific progress, and so on.

Furthermore, the Committee did not consider the necessity to verify whether the referred recommendations, reports and guide-

[116] General Comment No. 27 (2025), cit., para. 6. See also the Committee's reasoning concerning the obligation to "incorporate an ecosystem approach that promotes the conservation, sustainable use and equitable sharing of natural resources, including access to land and water" and the obligation to "respect the vital role of Indigenous Peoples and traditional communities in maintaining biodiversity and ecosystems." In both cases, the Committee argued that the identification of these obligations is in line with the Conference of the Parties to Convention on Biological Diversity Decisions V/6 (2000) and X/33 (2010).

[117] General Comment No. 27 (2025), cit., paras. 49-57.

[118] *Ivi*, paras. 62-64.

[119] *Ivi*, para. 59.

[120] *Ivi*, para. 61.

lines have been acknowledged by States parties in their interpretation of the relevant treaties.[121] Nor it limited itself to pronouncements of those bodies which "built up a considerable body of interpretative case law, in particular through [their] finding in response to the individual communications which may be submitted to [them] in respect of States parties to the first Optional Protocol, and in the form of General Comments."[122] In other words, the Committee built its interpretation on a "system" whose development is, at least to a certain extent, beyond the control of States, being it made of also an interpretative practice which is neither directly generated nor expressly acknowledged by States.

The "legitimacy" of this approach is not specifically addressed by the Committee. However, it seems reasonable to argue that it is linked to two non-strictly legal interpretative arguments, to which the General Comment refers, that are the notions of urgency and justice. On the one hand, the Committee underscored that "urgent and sustained action" is needed, given the seriousness of present environmental challenges and their impact on ESCR,[123] and that a transition to an economy that is centred on human rights and the well-being of the planet is "imperative."[124] On the other hand, the General Comment is full of references to justice. Concepts like "equitable sharing of rights and responsibilities" or "fair distribution of the benefits" or "just transition" are clearly related to material justice (whereas they are reflected

[121] On the contrary, the International Law Commission affirmed that pronouncements of treaty expert bodies cannot as such constitute a subsequent agreement or practice in the interpretation of a treaty, but that they can give rise to an agreement by States parties regarding the interpretation of a treaty (*Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Conclusion No. 13, in *Yearbook of the International Law Commission, 2018*, vol. II, Part two). However, the ILC admitted that "this result is not easily achieved in practice." (*ivi*, p. 111)

[122] International Court of Justice, 30 november 2010, judgment in the case *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), I.C.J. Reports 2010*, p. 639, at pp. 663-664.

[123] General Comment No. 27 (2025), cit., para. 7.

[124] *Ivi*, para. 15.

– to a certain extent – in the obligation of equality and non-discrimination under Covenant's Articles 2 (2) and 3).[125]

One could think that the Committee is conscious that the particularly wide extent of the interpretative results proposed in General Comment No. 27 needed both added justification efforts (in particular, by using "moral" arguments as urgency and justice), and a lesser formalistic approach to legal interpretative arguments (in particular, with regard to "systemic" arguments).

10. *(b) The Possible Legal Impact of General Comment No. 27 (2025)*

The review undertaken in this contribution reveals that General Comment No. 27 resembles in many respects a 'political manifesto' that calls for a profound rethinking of the liberal international order in light of human dignity, environmental justice and planetary limits. The authors are fully aware that the current political landscape is largely unfavourable to the Committee's approach and that it is unlikely that such an approach will have a significant impact on the practice of strongly neo-liberal international structures, such as international investment tribunals. Nevertheless, the General Comment remains an interpretative instrument capable of exerting some impact on the future application of the Covenant.

Such an impact is likely to unfold along three main directions. First, the General Comment is expected to shape the Committee's own future practice, both within the reporting procedure and in the context of individual communications. Secondly, the General Comment may influence the practice of States parties at the domestic level, in particular by informing the reasoning of national courts in the context of the growing body of climate change and environmental litigation. Thirdly, the General Comment is likely to contribute to ongoing judicial dialogue and cross-fertilisation among universal and regional supervisory

[125] *Ivi*, paras. 39-41.

mechanisms and courts. The following analysis examines each of these dimensions in turn.

Regarding the first dimension, it is precisely the character of General Comment No. 27 as a wide political program that suggests its capacity to exert a decisive influence on the Committee's own future practice. If the purpose of the General Comment is, as expressly stated, "to provide guidance on implementing ESCR in a manner that respects ecological limits and the finite nature of natural resources",[126] it follows almost inevitably that the first actor expected to align itself with the guidance thereby articulated is the Committee itself. This is likely to occur, first and foremost, in the assessment of state reporting procedures, within which the Committee can reasonably be expected to confirm the function it has already assumed in recent years[127] as a complementary mechanism to monitor compliance with the commitments undertaken under Paris Agreement, and more generally for the scrutiny of the measures adopted by States to address environmental degradation and climate change. In carrying out this assessment, it is reasonable to expect that the Committee will evaluate both the suitability of such measures in relation to the objectives pursued, and their conformity with the principles of non-discrimination and progressive realisation of the Covenant's rights, as clarified in the General Comment. In doing so, the Committee will arguably integrate also the most innovative elements introduced by General Comment No. 27: the recognition of the right to a clean, healthy and sustainable environment, both as an autonomous human right and as an indispensable condition to the enjoyment of all Covenant rights; as well as the intergenerational perspective underpinning environmental protection. This impact, however, may remain relatively contained, insofar as it essentially consolidates a practice that the Committee had already been progressively developing.

The impact of General Comment No. 27 on the individual communications procedure may prove more significant. It should be recalled that the climate and environmental litigation that has

[126] *Ivi*, para. 4.
[127] See *supra*, Section 5.

so far engaged several international human rights bodies[128] has not yet involved the Committee on Economic, Social and Cultural Rights. However, the General Comment is likely to favor the development of such litigation, both from a procedural and from a substantive perspective. From a procedural standpoint, with regard to the admissibility of communications, the General Comment provides at least three interpretative tools capable of overcoming some of the principal procedural obstacles that have thus far hindered climate strategic litigation at international level: the intergenerational character of responsibility and the need to facilitate standing for collective entities representing the interests of future generations;[129] the extraterritorial scope of obligations relating to the prevention of environmental and climate harm;[130] the attribution to States parties of due diligence responsibilities in relation to the extraterritorial activities of business enterprises under their jurisdiction.[131] From a substantive perspective, the explicit and detailed articulation of specific obligations of prevention and reparation allows for a clearer identification of violations in respect of which legal action may be pursued. While it is true that the number of States that have ratified the Optional Protocol on individual complaints remains limited, it should nonetheless be noted that many of them are developed coun-

[128] See Committee on the Rights of the Child, *Sacchi et al. v. Argentina*, Communication No. 104/2019, Decision of 22 September 2021, UN Doc. CRC/C/88/D/104/2019; Human Rights Committee, *Daniel Billy et al. v. Australia (Torres Strait Islanders Petition)*, Communication No. 3624/2019, Views of 21 July 2022, UN Doc. CCPR/C/135/D/3624/2019; European Court of Human Rights (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20, Judgment of 9 April 2024; European Court of Human Rights (Grand Chamber), *Duarte Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20, Decision of 9 April 2024.

[129] General Comment No. 27 (2025), cit., para. 87. The General Comment refers to standing before domestic courts, rather than before the Committee itself; it may nevertheless be argued that the Committee is likely to favor representative legal standing in the interest of future generation also at its own international level.

[130] *Ivi*, para. 30.

[131] *Ivi*, para. 31.

tries,[132] bearing primary responsibility for current environmental degradation.

Turning now to the second dimension, it must be acknowledged at the outset that the impact of General Comment No. 27 on States parties' practice at the legislative and executive levels is likely to remain limited. This is due, on the one hand, to the non-binding nature of General Comments as instruments of treaty interpretation and, on the other, to the fact that, at least as regards to developed countries, the dominant and mainstream orientation continues to be that of a liberal economic model based on continuous growth. In the current landscape, calls for a more equitable distribution of resources and responsibilities at the global level, as well as for the full and effective protection of ESCR for all, are likely to receive limited political traction. Although it is difficult to expect that the General Comment gives rise to a generalised paradigm shift, this does not preclude it from exerting an appreciable influence on States with regard to the adoption of specific measures. This would be even more so if, within the framework of the reporting procedure or following the examination of an individual communication, the Committee clearly identified situations of non-compliance.

Moreover, General Comment No. 27 could have a more meaningful influence on State judicial practice. In particular, its detailed articulation of positive obligations may provide an authoritative interpretative reference for domestic courts called upon to adjudicate claims concerning the implementation of ESCR in the context of environmental degradation and climate change. In this sense, even in the absence of immediate legislative

[132] Among the States having ratified the Optional Protocol, Italy deserves particular mention. In the case "Giudizio Universale" the Tribunal of Rome held that Italian courts lack jurisdiction concerning the responsibility of the Government for failure to take appropriate action to protect the climate system (Tribunal of Rome, Second Civil Section, A Sud Ecologia e Cooperazione and Others v. Presidency of the Council of Ministers, Judgment No. 3552/2024, 26 February 2024). If the higher levels of judicial review were ultimately to confirm the lack of jurisdiction, the requirement of exhaustion of domestic remedies would be satisfied, and the conditions for a communication to the CESCR would be satisfied.

or policy reform, the General Comment may contribute to the gradual internalisation of its normative framework through judicial reasoning. This potential is especially evident in legal systems where courts have already demonstrated a willingness to rely on international human rights law and supervisory bodies' interpretations when assessing the adequacy of state action in environmental and climate-related cases.[133]

Nor should the impact on domestic judicial practice of specific statements formulated in relation to the protection of individual rights – only apparently marginal within the holistic and comprehensive context of the General Comment – be overlooked, especially where the Committee's statements build upon an evolutionary trend that is already emerging. This is illustrated by the Committee's express reference to the application of the principle of non-refoulement in the context of climate-induced migration, read in conjunction with the principle of common but differentiated responsibilities[134]. Such recognition may provide domestic courts with an additional interpretative basis for extending the right to asylum to situations in which climate-driven threats result in the inability to enjoy essential levels of ESCR.

Turning to the third dimension, General Comment No. 27 is also likely to play a relevant role within the broader process of judicial dialogue and cross-fertilisation among international and regional human rights bodies, that increasingly relied on each other's reasoning. By articulating a comprehensive and systemic reading of the relationship between ECSR and environmental sustainability, the Committee contributes to the consolidation of a shared normative framework. This dynamic is already embedded in the General Comment itself, which makes extensive use of the jurisprudence and interpretative practice of other international courts and human rights bodies.[135] Conversely, and limit-

[133] See for example: Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, Judgment of 20 December 2019; Federal Constitutional Court (Bundesverfassungsgericht), *Neubauer et al. v. Germany*, Judgment of 24 March 2021; Supreme Court of Ireland, *Friends of the Irish Environment v. Government of Ireland*, Judgment of 31 July 2020.

[134] General Comment No. 27 (2025), cit., para. 86.

[135] See *supra*, Section 9.

ing the examples to the practice of the European Committee of Social Rights examined in this contribution, it may be noted that the interpretation of social rights advanced in General Comment No. 27 has already been taken into account by the European Committee in its most recent conclusions, particularly with regard to States' obligations to consider the effects of climate change on working conditions.[136] In this perspective, General Comment No. 27 may be understood not only as a product of ongoing cross-fertilisation among international instances, but also as a potential catalyst for further convergence and mutual influence in the practice concerning the protection of human rights in the context of environmental emergency.

[136] See ECSR, *Conclusions 2025 - Andorra*, January 2026, p. 8; the same reference is included in Conclusions 2025 concerning: Austria, Estonia, Germany, Hungary, Latvia, Lithuania, Malta, Moldova, Montenegro, Romania, Serbia, Slovak Republic, Turkey, Ukraine.

THE RIGHT TO A SAFE AND HEALTHY ENVIRONMENT AS AN INDIVIDUAL AND AS A COLLECTIVE RIGHT IN THE AMERICAN AND AFRICAN HUMAN RIGHTS SYSTEMS

FEDERICO LENZERINI*

SUMMARY: 1. Introduction: The Propulsive Role of the Inter-American and African Human Rights Systems in Advancing the Positive Evolution of Human Rights. – 2. The Role of the Inter-American Human Rights System in Promoting and Affirming the Right to a Safe and Healthy Environment. – 3. The Role of the African Human Rights System in Promoting and Affirming the Right to a Safe and Healthy Environment. – 4. Conclusion.

1. *Introduction: The Propulsive Role of the Inter-American and African Human Rights Systems in Advancing the Positive Evolution of Human Rights*

Human rights are a dynamic concept. They require constant adaptation to the emerging needs of the members of the human family and to the cultural evolution of peoples.[1] This can certainly be achieved through the elaboration of new relevant legal instruments, but it especially occurs by means of the evolutionary interpretation of existing norms, attributing to them an extensive and innovative significance that most likely had not been considered when the aforementioned norms were drafted. This type of operation allows to guarantee the *effectiveness* of human rights, taking into consideration the real needs of individuals and human communities at a given time, hence allowing the rights themselves to rise from the status of mere proclaims of principles

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[1] On the relationship between human rights and culture see F. LENZERINI, *The Culturalization of Human Rights Law* (Oxford, Oxford University Press 2014).

and to achieve the purpose for which they exist. The process is apparently simple, consisting in adapting norms conceived to cover situations analogous to those at issue to the actual needs of human beings, through an analogical interpretation – as previously underlined – of evolutionary nature. In reality, this operation requires a substantial dose of courage and sensitivity, and above all the aptitude to go beyond the schemes apparently pre-established by the legal instruments of reference for the good of the people. Since several decades, the Inter-American and African human rights bodies have been at the forefront of such an approach, offering revolutionary understandings of a number of human rights standards that have concretely brought them closer to the people they were born to serve, responding promptly and effectively to the concrete needs of such people. In Africa, this methodology is inspired by "a humanist, cultural, way of understanding, encapsulated in an African proverb, '*ubuntu*', meaning – I am because we are."[2] In Latin America, it is grounded on the awareness that a static and rigid approach of human rights norms that would not consider the specific needs of the people, even when they appear to go beyond the limits apparently set by the formulation of the applicable standards, "would render protection under [human rights] … illusory for millions of persons."[3] A well-known example of the evolutionary jurisprudence of the Inter-American and African human rights bodies is represented by the recognition and enforcement of collective land rights of Indigenous peoples.[4] Another example is that relating to the ad-

[2] See the lecture held by Professor Rafaâ Ben Achour, Judge of the African Court on Human and Peoples' Rights, "The Right to a Safe Environment from an African Perspective", at the International Roundtable on "The Right to a Safe and Healthy Environment as a Solidarity Right. A Holistic Perspective", University of Siena, 17 November 2025.

[3] See Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Series C No. 146, Judgment of 29 March 2006 (Merits, Reparations and Costs), para. 120; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Series C No. 214, Judgment of 24 August 2010 (Merits, Reparations and Costs), para. 87; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Series C No. 245, Judgment of 27 June 2012 (Merits and Reparations), para. 145.

[4] As regards the Inter-American Court of Human Rights, it has developed

vancement of the right to a safe and healthy environment, which will constitute the object of the analysis that will be developed in the next sections.

2. *The Role of the Inter-American Human Rights System in Promoting and Affirming the Right to a Safe and Healthy Environment*

In Latin America, the right to a healthy environment is enshrined in Article 11 of the 1988 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*,[5] which provides that "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services". It should be emphasized, however, that this article is not enforceable before the Inter-American Court of Human Rights (IACtHR), and therefore individual complaints based on alleged violations of this provision cannot be submitted to the Inter-American Commission on Human Rights. This has not, however, prevented the Commission and the Court from establishing – through an evolutionary interpretation of certain provisions included in the 1969 *American Convention on Human Rights* (ACHR)[6] – the existence of a right to a safe and healthy environment that is fully enforceable within the Inter-American human rights system, initially in the context of the so-called *greening* of human rights and subsequently as an autonomous right.

In particular, on numerous occasions the IACtHR has estab-

an extensive jurisprudence on the subject, inaugurated by the famous *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, Judgment of 31 August 2001(Merits, Reparations and Costs). With respect to the African continent, the decisions that are most relevant in the field are *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 276/03, 25 November 2009 (African Commission on Human and Peoples' Rights), and *African Commission on Human and Peoples' Rights v. Republic of Kenya*, below n. 66 (African Court of Human and Peoples' Rights).

[5] OAS Treaty Series No. 69 (1988).

[6] OAS Treaty Series No. 36 (1969).

lished that a direct connection exists between the "physical" environment in which people live and the actual enjoyment of certain rights by them, underlining how the protection, conservation and valorisation of the environment constitutes the object of an "essential" right related to the right to a dignified life.[7] This is exactly a typical application of the method of the "greening" of human rights, by virtue of which it is acknowledged that environmental protection is indispensable for ensuring the effective realization of fundamental human rights, by means of an evolutionary re-interpretation of explicitly recognized rights. In other words, the right to a safe and healthy environment takes the form of an implicit right inherently enshrined in the relevant legal instruments, as a prerequisite for the effective enjoyment of a number of explicit rights, including the right to life, the right to health, and the right to private and family life.[8] This dynamic has been especially upheld with regard to the specific situation of Indigenous peoples, in light of their unique relationship with their ancestral lands.[9]

In terms of State obligations, this approach presupposes that

[7] See, in particular, IACtHR, *Case of the Kaliña and Lokono Peoples v Suriname*, Series C No. 309, Judgment of 25 November 2015 (Merits, Reparations and Costs), para. 172.

[8] On the "greening" of human rights see, among others, E. Bergeron, "Greening Human Rights", in *Natural Resources & Environment*, XXXVII (2022-2023), p. 36 ff.; M. Düwell, G. Bos, N. van Steenbergen (eds), *Towards the Ethics of a Green Future. The Theory and Practice of Human Rights for Future People* (Abingdon/New York, Routledge 2018).

[9] See *Case of the Kaliña and Lokono Peoples v Suriname*, para. 173 ("[t]he Court considers it important to refer to the need to ensure the compatibility of the safeguard of protected areas with the adequate use and enjoyment of the traditional territories of indigenous peoples. In this regard, the Court finds that a protected area consists not only of its biological dimension, but also of its socio-cultural dimension and that, therefore, it requires an interdisciplinary, participatory approach. Thus, in general, the indigenous peoples may play an important role in nature conservation, since certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies. Consequently, respect for the rights of the indigenous peoples may have a positive impact on environmental conservation. Hence, the rights of the indigenous peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights." (footnotes omitted)

governments must ensure the effective protection of natural resources (including forests and groundwater) necessary to ensure the subsistence of affected populations; they are also required to implement adequate measures to prevent environmental damage – especially through carrying out environmental impact assessment before realizing or authorizing any activity potentially detrimental for the environment – and to guarantee appropriate remedies for those who have been victims of harm related to the environment in which they live. These obligations are also accompanied by a series of individual procedural rights, particularly the right to information regarding possible environmental risks or projects and activities likely to have a significant impact on the environment, as a good of public interest, the right to effective participation in decisions taken on environmental matters, and the right to access to adequate judicial remedies.

With the Advisory Opinion 23/17 of 15 November 2017,[10] requested by Colombia, the IACtHR notably advanced its own approach in the field, especially through recognizing the *ecocentric* nature of the right to a safe and healthy environment, as well as through valorising its *collective* dimension. In particular, in addition to reiterating that "damage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment … [especially those] human rights [which] are more susceptible than others to certain types of environmental damage",[11] the Court also declared the existence of a right to a healthy environment of an

[10] Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) And 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), available at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf

[11] *Ivi*, para. 64. According to the Court, "[t]he rights especially linked to the environment have been classified into two groups: (i) rights whose enjoyment is particularly vulnerable to environmental degradation, also identified as substantive rights (for example, the rights to life, personal integrity, health or property), and (ii) rights whose exercise supports better environmental policymaking, also identified as procedural rights (such as the rights to freedom

autonomous nature, independent from other rights provided for by the American Convention and directly enforceable, which

> protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.[12]

It follows that "the right to a healthy environment as an autonomous right differs from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity.[13] This suggests that the right to a safe and healthy environment can be invoked judicially even in the absence of evidence indicating the existence of risks to specific individuals.

Regarding the obligations incumbent on States to ensure the full enjoyment of human rights in the context of environmental protection, according to the IACtHR they basically arise from the principle of due diligence, and are substantiated by the obligation of prevention of environmental harm,[14] the obligation to respect the precautionary principle,[15] the obligation of cooperation – which, in "the specific case of activities, projects or incidents that could cause significant transboundary environmental harm, [implies that] the potentially affected State or States require the cooperation of the State of origin and *vice versa* in order to take the measures of prevention and mitigation needed to ensure the human rights of the persons subject to their jurisdiction"[16] – and the obligation to guarantee procedural rights inherent in environ-

of expression and association, to information, to participation in decision-making, and to an effective remedy)."

[12] *Ivi*, para. 62.

[13] *Ivi*, para. 63.

[14] *Ivi*, para. 142.

[15] *Ivi*, para. 175 ff.

[16] *Ivi*, para. 182.

mental protection (especially public participation in environmental matters). The IACtHR also specified that the obligations of States related to the right to a healthy environment are not limited to the duty to respect it, but also include the obligation "to ensure [it, which] is projected beyond the relationship between State agents and the persons subject to the State's jurisdiction, and encompasses the duty to prevent third parties from violating the protected rights in the private sphere".[17] This duty of prevention

> includes all those measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that eventual violations of those rights are examined and dealt with as wrongful acts that, as such, are susceptible to result in punishment for those who commit them, together with the obligation to compensate the victims for the negative consequences.[18]

These obligations are particularly relevant for the protection of the rights of Indigenous peoples, particularly with regard to their relationship with ancestral lands. In fact, the

> connection between the territory and the natural resources that have been used traditionally and that are necessary for the physical and cultural survival of these peoples and for the development and continuity of their world view must be protected to ensure that they can continue their traditional way of life and that their cultural identity, social structure, economic system, and distinctive customs, beliefs and traditions are respected, guaranteed and protected by States.[19]

For Indigenous peoples the right to protection of their ancestral territories is actually owed "to the relationship that such lands have with their cultural identity, a fundamental human right of a collective nature that must be respected in a multicultural, pluralist and democratic society."[20]

Finally, "[i]n its *collective* dimension, the right to a healthy

[17] *Ivi*, para. 118.
[18] *Ibid*.
[19] *Ivi*, para. 169.
[20] *Ivi*, para. 113.

environment constitutes a universal value that is owed to both present and future generations."[21]

The approach adopted by the IACtHR in Advisory Opinion 23/17 was largely echoed in 2020, in the dispute between the Lhaka Honhat Indigenous Community and Argentina.[22] The applicants – an association of Indigenous communities – complained that the respondent government had failed to grant them effective ownership of their ancestral lands, neglecting, among other things, to prevent their lands from being occupied by peasants not belonging to the applicant communities. Furthermore, they argued that Argentina had failed to adopt appropriate measures to prevent environmental degradation of their lands due to activities carried out in those lands by entities external to the communities. The Court found that the respondent State had violated Articles 21 (right to property) and 26 (progressive development of economic, social, and cultural rights) ACHR; the latter, in particular, was infringed with regard to the right to a healthy environment and the rights to food and water, as well as the right of the applicants to participate in cultural life.

In the case at hand, the Court noted that the right to a healthy environment must be considered one of the rights protected by Article 26 of the American Convention,[23] and, relying on Advisory Opinion 23/17, reiterated that it constitutes a universal value, a fundamental right for the existence of humankind, as well as that, as an autonomous right, it protects the components of the environment as legal interests in themselves, "even in the absence of the certainty or evidence of a risk to individuals. This means that nature must be protected, not only because of its benefits or effects for humanity, 'but because of its importance for the other living organisms with which we share the planet'".[24] Furthermore, the IACtHR stressed that

[21] *Ivi*, para. 59 (emphasis added).

[22] *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Series C No. 400, Judgment of 6 February 2020 (Merits, Reparations and Costs).

[23] *Ivi*, para. 202.

[24] *Ivi*, para. 203.

> the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation.[25]

Among the measures that States should take to comply with this obligation, those of regulating, supervising and monitoring, requiring and approving environmental impact assessments, establishing contingency plans, as well as mitigating when environmental damage has occurred are included.[26]

About the aspect of reparation, the IACtHR did not significantly deviate from the approach generally adopted in cases concerning violations of Indigenous peoples' land rights, requiring the respondent State to guarantee multiple reparatory measures, structured in consideration of the specific violations ascertained by the Court itself. Some of these measures were aimed at specifically ensuring "restitution" of the right to a healthy environment, taking the form of reparations for environmental degradation of Indigenous peoples' territories. Specifically, the Court ordered the respondent State "to set up a community development fund … especially to redress the harm to cultural identity[, the right to access to food and to the right to a healthy environment] … considering that it also serves to compensate the pecuniary and non-pecuniary damage suffered. This Fund is additional to any other present or future benefit that corresponds to the communities based on the State's general development obligations."[27] The IACtHR also requested Argentina to draw up a report on the actions taken

> to conserve the surface and groundwater in the indigenous territor[ies and] … to avoid its contamination or to rectify any contamination that exists; … to guarantee permanent access to drinking water for all the members of the indigenous communities victims …

[25] *Ivi*, para. 208.
[26] *Ibid*.
[27] *Ivi*, para. 338.

> to avoid a continuation of the loss of, or decrease in, forestry resources in the said territory[ies], as well as to endeavor to ensure its gradual recovery, and … to provide permanent access to nutritional and culturally appropriate food to all the members of the indigenous communities victims …[28]

A very significant ruling of the IACtHR in the matter covered by this chapter is the one issued on 27 November 2023, relating to the case of the *Inhabitants of La Oroya v. Peru*.[29] In this judgment the Court held that Peru had breached its obligation to protect, among other rights, the right to a healthy environment of the community of La Oroya, by failing to defend the community from pollution emitted from a metallurgical smelter, based on the assumption that the respondent government had a duty to prevent human rights violations by private companies. In fact,

> States have the obligation to implement the necessary measures and use all means at their disposal to prevent activities carried out within their jurisdiction from causing significant damage to the environment, based on a due diligence standard that includes the duty to regulate, monitor and oversee such activities.[30]

In addition to reiterating the principles previously expressed in the Advisory Opinion 23/17, the majority of the judges advanced the idea not only that "the principle of prevention of environmental harm forms part of customary international law",[31] but even that

> international environmental protection requires the progressive recognition of the prohibition of [unlawful or arbitrary conduct that causes serious, extensive, lasting and irreversible environmental damage] as a peremptory norm (*jus cogens*), accepted by the inter-

[28] *Ivi*, para. 333.

[29] *Case of the Inhabitants of La Oroya v. Peru*, Series C No. 511, Judgment of 27 November 2023 (Preliminary Objections, Merits, Reparations and Costs).

[30] *Ivi*, para. 157.

[31] *Ivi*, para. 126.

> national community as a whole as a norm from which no derogation is permitted.[32]

The IACtHR also restated that "the right to a healthy environment is of universal interest and is a fundamental right for the existence of humankind … [which] comprises a set of substantive and procedural obligations", particularly relating to access to information, political participation and access to justice.[33] Furthermore, the Court reaffirmed that "States are … obliged to protect nature and the environment not only because of the benefits they provide to humanity, but also because of their importance to the other living organisms with which we share the planet".[34] For human beings, "the right to a healthy environment includes the right to clean air and water",[35] in the sense that "people enjoy the right to breathe air with pollution levels that do not pose a significant risk to the enjoyment of their human rights, particularly the rights to a healthy environment, health, personal integrity and life",[36] as well as that "individuals have the right to water that is free from pollution levels that pose a significant risk to the enjoyment of their human rights, particularly the rights to a healthy environment, health and life."[37] Another aspect to which the IACtHR dedicated its attention is the precautionary principle, in accordance with which States must act "in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in serious and irreversible damage to the environment, even in the absence of scientific certainty."[38] According to the Court, the

> precautionary principle in environmental matters is related to the duty of the States to preserve the environment in order to allow future generations opportunities for development and ensure the viability of human life. In this regard, the Court notes that the princi-

[32] *Ivi*, para. 129.
[33] *Ivi*, para. 118.
[34] *Ibid*.
[35] *Ivi*, para. 125.
[36] *Ivi*, para. 120.
[37] *Ivi*, para. 121.
[38] *Ivi*, para. 127.

> ple of intergenerational equity requires States to actively contribute through the creation of environmental policies aimed at ensuring that current generations leave behind a stable environment that will allow future generations similar opportunities for development.[39]

This intergenerational connotation of the right to a healthy environment, which directly connects it to the idea of *solidarity*, was interestingly elaborated by Judges Ricardo C. Pérez Manrique, Eduardo Ferrer Mac-Gregor Poisot and Rodrigo Mudrovitsch in their Concurring Opinion. They emphasized, among other things, that

> we must not lose sight of the fact that the environment is a collective and intergenerational asset; its diachronic nature means that it extends across human generations over time, and that is why the duty of sustainability is linked to the duty of solidarity. Thus, the present generations have limits to their freedom: their relationship with Nature can no longer be based on unfettered irresponsibility or disregard for the next generations, but rather on greater responsibility. This is further increased by the asymmetry that exists between present and future generations, since only the former can influence the situation of the latter and not vice versa: with their decisions, the present generation affects and influences future generations, who are forced to suffer the effects of decisions in which they have not participated and which are often irreversible. The future generations have no political power and their interests are only represented by the concern that current generations may have for them. It is therefore important that States guarantee the legitimacy of future generations to demand the protection of the environment, either through the present generations (children and young people), human rights defenders or through the role of the ombudsperson or other similar figures … States should be mindful that the division between present and future generations is less sharp than it sometimes appears to be, and that harmful consequences for the environment and other generations will not necessarily occur in a distant or very remote future, but may have an impact on people who already exist … Hence, when taking decisions related to development or that in any way involve the exploitation of the environment, we

[39] *Ivi*, para. 128.

must also be guided by the principle of the best interests of the child.[40]

This position, which echoes that taken in 2018 by the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,[41] gives concreteness and enforceability to the principle of intergenerational equity, as related to the right to a safe and healthy environment, through linking it to the rights of existing children.

The principles expressed in the cases (and advisory opinion) just described are now crystallized in the jurisprudence of the IACtHR. For instance, in the recent judgment concerning the Indigenous communities Tagaeri and Taromenane in Ecuador, the Court repeated that "que rige respecto al derecho al ambiente sano no solo la obligación de respeto, sino también la obligación de garantía prevista en el artículo 1.1 de la Convención, una de cuyas formas de observancia consiste en prevenir violaciones."[42] It also reiterated that "el principio de prevención de daños ambientales forma parte del derecho internacional consuetudinario",[43] that "los Estados están obligados a usar todos

[40] See *Case of the Inhabitants of La Oroya v. Peru*, Concurring Opinion of the Judges Ricardo C. Pérez Manrique, Eduardo Ferrer Mac-Gregor Poisot and Rodrigo Mudrovitsch, paras. 154-160 (footnotes omitted).

[41] See Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/37/58, 24 January 2018, para. 68 ("the division between present and future generations is less sharp than it sometimes appears to be. Concerns about future generations and sustainable development often focus on the state of the environment in particular years in the future, such as the year 2030 or 2100. Many people that will be living in 2100 are not yet born, and in that sense truly belong to future generations. But many people who will be living then are already alive today … It is critical, therefore, that discussions of future generations take into account the rights of the children who are constantly arriving, or have already arrived, on this planet. We do not need to look far to see the people whose future lives will be affected by our actions today. They are already here").

[42] See *Caso Pueblos Indígenas Tagaeri y Taromenane vs. Ecuador*, Series C No. 537, Judgment of 4 September 2024 (Preliminary Objections, Merits, Reparations and Costs), para. 269 (footnotes omitted).

[43] *Ivi*, para. 270.

los medios a su alcance con el fin de evitar que las actividades que se lleven a cabo bajo su jurisdicción causen daños significativos al medio ambiente",[44] as well as "que los problemas ambientales pueden darse con mayor intensidad en determinados grupos en situación de vulnerabilidad, entre los cuales se encuentran los pueblos indígenas."[45]

Even more recently, on 29 May 2025, the IACtHR issued an advisory opinion on "Climate Emergency and Human Rights".[46] After a very thorough examination of the topic brought to its attention, the Court reached a number of conclusions, which summarized the most important findings elaborated in its previous practice. First, after acknowledging that "the present situation constitutes a climate emergency due to the accelerated increase of global temperature, as a result of diverse activities of anthropogenic origin", the Court unanimously held that "[t]his climate emergency can only be addressed adequately by urgent and effective mitigation and adaptation actions, and by making progress towards sustainable development with a human rights perspective, coordinated around resilience." Secondly, on account of the general obligation to respect rights, the judges ruled that States must: a) refrain "from adopting any measure that obstructs or impedes access to the reliable, truthful, and complete information that the population needs in order to address the risks to human rights owing to the causes and consequences of the climate emergency"; b) "refrain from adopting retrogressive measures"; c) "refrain from acts or omissions that, directly or indirectly, obstruct, restrict or harm effective access, in equal

[44] *Ibid.*

[45] *Ivi*, para. 272.

[46] Advisory Opinion AO-32/25 of May 29, 2025, Requested by the Republic of Chile and the Republic of Colombia, Climate Emergency and Human Rights (Interpretation and scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of Man).

conditions, to the enjoyment of human rights of individuals affected by the climate emergency".[47] Thirdly, "[p]ursuant to the general obligation to guarantee rights, States have the obligation to act in accordance with the standard of enhanced due diligence to counteract the human causes of climate change and to protect the persons subject to their jurisdiction from climate-related impacts, in particular those who are most vulnerable". Fourthly, by virtue of "the general obligation to ensure the progressive development of the economic, social, cultural and environmental rights, States must allocate the maximum of available resources to protect individuals and groups that, because of their vulnerable situation, are exposed to the most severe impacts of climate change". Fifthly, "[p]ursuant to the general obligation to adopt domestic legal provisions, States should incorporate into their domestic legal framework the necessary regulations to ensure the respect, guarantee and progressive development of human rights in the context of the climate emergency". Sixthly, "[p]ursuant to the obligation of cooperation, States are obligated to cooperate in good faith to make progress in the respect, guarantee and progressive development of the human rights threatened or affected by the climate emergency". Furthermore, by four votes to three, the judges of the Court recognized that Nature and its components are subjects of rights, as well as that "the peremptory prohibition of anthropogenic conducts that could irreversibly harm the interdependence and vital equilibrium of the common ecosystem that makes the life of the species possible constitutes a norm of jus cogens". Also, the IACtHR affirmed the existence of a number of rights connected with environmental protection – corresponding to States obligations to guarantee and protect them – particularly the right to a healthy climate, the right to a healthy environment, the rights to life, personal integrity, health, private and family life, property and housing, freedom of residence and movement, water and food, work and social security, culture and education, the right to science and to the recognition of local, traditional and Indigenous knowledge, the right of ac-

[47] *Ivi*, paras. 221-223.

cess to information, the right to political participation, the right of access to justice, as well as the right to defend human rights. Last but not least, the Court held that "States have specific obligations in relation to situations of special vulnerability such as those faced by: (i) children; (ii) indigenous and tribal peoples, Afro-descendants, peasant farmer communities, and fishermen, and (iii) people who suffer differentiated impacts in the context of climate-related disasters".[48] Notably, the IACtHR besides reiterated that "the guarantee of intra- and intergenerational equity is essential for the interpretation and implementation of the obligations arising from the right to a healthy climate because this right, in its *collective* dimension, seeks the comprehensive protection of humanity as a whole",[49] as well as that, "given the collective nature of climate issues, States should move forward with the creation of procedural mechanisms … which may be used to request measures to protect the environment and the climate system, without the need to demonstrate an individual interest or impact."[50]

In synthesis, in the context of the Inter-American human rights system, the right to a safe and healthy environment is characterized by two dimensions. In its *collective* dimension, it constitutes a universal value that must be protected and safeguarded in the interest of both present and future generations. Instead, in its individual dimension, it materializes in situations in which its violation directly or indirectly influences the effective enjoyment by individuals of other rights that are explicitly recognized. Regarding this second dimension, it therefore seems that the IACtHR remains anchored to the greening approach of human rights, since – although it has solemnly proclaimed the right in question as a fundamental right for the existence of humankind – it has not explicitly recognized its autonomous character as an individual right.

[48] *Ivi*, Opinion, pp. 214-18.
[49] *Ivi*, para. 313 (emphasis added).
[50] *Ivi*, para. 549.

3. The Role of the African Human Rights System in Promoting and Affirming the Right to a Safe and Healthy Environment

In the African continent, the right to a safe and healthy environment is provided for by Article 24 of the *African Charter on Human and Peoples' Rights* (African Charter),[51] which states that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development". This right – inherently collective in nature – has been interpreted by African monitoring bodies through adopting a predominantly anthropocentric approach.

One of the most significant cases for our purposes remains still today the decision of the African Commission on Human and Peoples' Rights in the case of the Ogoni, an Indigenous community living in the Niger Delta region of Nigeria, although this decision was issued over twenty years ago, in 2001.[52] In that circumstance, the Commission found that the respondent government had committed numerous violations of the rights of the aforementioned community due to the oil pollution of their lands. In particular, the Nigerian government was held responsible for violating, among others, Articles 22 (right of peoples to freely dispose of their natural wealth and resources) and 24 of the African Charter. The Commission noted that the right to a general satisfactory environment, or right to a healthy environment – as provided for in Article 24 – "imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".[53] In concrete terms, the implementation of these obligations – according to the Commission – presupposes

> scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any

[51] *African Charter on Human and Peoples' Rights*, 1981, 1520 UNTS 217.

[52] Communication No. 155/96, *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria*, 27 May 2001.

[53] *Ivi*, para. 52.

> major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[54]

In the case at hand, the Commission admitted that the government of Nigeria had "the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken … and which would have protected the rights of the victims of the violations complained of was not taken".[55] Therefore, the Commission recommended Nigeria to ensure "that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry", as well as to provide "information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations".[56]

In 2012, the Court of the Economic Community of West African States (ECOWAS), in the case *SERAP v. Federal Republic of Nigeria*,[57] held the Nigerian government responsible for abuses committed by oil companies operating on its territory. Among other violations, the Court identified a breach of Article 24 of the African Charter. Specifically, the Court held that the environment "is essential to every human being. The quality of human life depends on the quality of the environment".[58] In terms of State obligations, governments are required to "take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustain-

[54] *Ivi*, para. 53.
[55] *Ivi*, para. 54.
[56] *Ivi*, Operative paragraph.
[57] *SERAP v. Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012.
[58] *Ivi*, para. 100.

able development".[59] According to the ECOWAS Court, the obligation enshrined in Article 24 of the African Charter is "both an obligation of attitude and an obligation of result".[60] This implies that the State is required to adopt "all the appropriate legislative, administrative and other measures … [to] ensure that vigilance and diligence are being applied and observed towards attaining concrete results",[61] particularly aimed at regulating "the extractive oil and gas industry and safeguard their effects on the environment".[62] However, the mere adoption of legislative measures, the creation of environmental protection agencies "inspired by the world's best models", or even the provision of economic resources

> may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability [of the persons responsible of violations], with the effective reparation of the environmental damage suffered.[63]

The Court therefore concluded "that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the 'other' measures required … to ensure the enjoyment of the right laid down in Article 24" of the African Charter.[64] It also acknowledged that "the continuous environmental degration [*sic*] in the Niger Delta Region produced devastating impact on the livelihood of the population; it may have forced some people to leave their area of residence in search for better living conditions and may even have caused health problems to many."[65]

More recently, in 2017, the existence of a human right to a healthy environment was confirmed by the African Court on Human and Peoples' Rights (ACtHPR), in the case of *African Com-*

[59] *Ivi*, para. 101.
[60] *Ivi*, para. 100.
[61] *Ivi*, para. 101.
[62] *Ivi*, para. 103.
[63] *Ivi*, para. 105.
[64] *Ivi*, para. 107.
[65] *Ivi*, para. 114.

mission on Human and Peoples' Rights v. Republic of Kenya,[66] concerning the Ogiek Indigenous people, which in 2009 had received an order of eviction from their lands within thirty days. In reality, in the case in question, the right to a healthy environment was not a direct aspect of the dispute. Nevertheless, the Court used the opportunity offered by this case to clarify that "nothing prevents other peoples' rights, such as the right to development (Article 22) […] or the right to a healthy environment (Article 24) from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a State".[67] With this *obiter dictum*, the Court traced the path that allows any communities that are victims of violations of the right to a safe and healthy environment to have recourse to it (as well as to other competent judicial bodies) in order to obtain justice.

However, the ACtHPR addressed the issue of the right to a healthy environment in more depth in 2023, in the case of the *Ligue Ivoirienne des Droits de l'Homme (LIDHO) and Others v. Côte D'Ivoire*,[68] concerning one of the most serious environmental disasters ever occurred in the African continent, caused by the dumping of toxic waste in Abidjan by the multinational company TRAFIGURA Limited, the third largest independent trader of oil and oil products in the world. The government of Côte d'Ivoire was found responsible by the Court for the breach of Articles 4 (right to life), 7(1)(a) (right to an effective remedy), 9(1) (right to receive information), 16 (right to enjoy the best attainable state of physical and mental health), and 24 (right to a general satisfactory environment conducive to development) of the African Charter, for not taking adequate measures to prevent the harmful effects arising from the activities of TRAFIGURA Limited (consisting especially in the dumping of toxic waste), resulting in serious illnesses for thousands of people and at least seventeen casualties. The ACtHPR found that, with regard to the

[66] Application No. 006/2012, Judgment of 26 May 2017.

[67] *Ivi*, para. 199.

[68] *In the Matter of Ligue Ivoirienne des Droits de l'Homme (LIDHO) and Others v. Republic of Côte D'Ivoire*, Application No. 041/2016, Judgment of 5 September 2023.

right to a satisfactory environment "the Respondent State had a duty to act not only to prevent the dumping of the waste without putting in place the necessary conditions, but also to ensure full and effective decontamination once the waste had been dumped."[69] In the instant case, "the Respondent State authorities failed to take appropriate legal, administrative and other measures to prohibit the importation of dangerous wastes on its territory … [and did] not demonstrate that it effectively and promptly cleaned up the polluted sites."[70] It was therefore considered responsible of the breach of Article 24 of the African Charter. Among the many measures of reparation established by the Court, it ordered the Respondent State "to amend its laws in order to provide for the responsibility of corporate entities, including multinationals, for acts in relation to environment and the handling of toxic waste."[71]

The foregoing clearly shows that, within the African human rights system, the right to a healthy environment can therefore be considered an autonomous right, fully enforceable before the competent judicial bodies. As previously noted, such a right is essentially perceived in an anthropocentric manner. It should be noted, however, that a significant exception to this approach was offered in 2012 by the East African Court of Justice, a judicial body of the East African Community, in the case *The Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare (ANAW)*.[72] This case concerned the protection of the ecosystem of Serengeti National Park for the benefit of future generations, whose interests were jeopardized by a road construction project within the park, which was potentially capable of causing irreparable damage to the environment. The case is relevant for our purposes (although the dispute was not based on Article 24 of the African Charter, but on the relevant provi-

[69] *Ivi*, para. 183.

[70] *Ivi*, paras. 184-85.

[71] *Ivi*, para. 247.

[72] Appeal No. 3 of 2011, Filed on 19 October 2011, Under EAC Treaty Articles 5, 8, 23, 27, 30, 35A, 39, 111, 112 and 114, Judgment of 15 March 2012.

sions of the Treaty establishing the East African Community) because the Court's Appeals Chamber held that, in the context of "disputes involving the environmental obligations and undertakings of the [East African Community] Partner States … a claimant or an aggrieved party does not have to demonstrate a personal tort, right, infringement, injury or damage specific to himself in order to refer the matter to this Court for adjudication."[73]

In very recent times there have been further developments concerning the practice of African human rights bodies in relation to the right to a safe and healthy environment. In particular, on 2 May 2025, the African Court of Human and Peoples' Rights received a request for an advisory opinion concerning the obligations of states in the context of climate change.[74] Specifically, the Court is requested to "interpret and lay down applicable custom and treaty law regarding state parties' obligations and duties in the context of climate change."[75] The Court is therefore invited to interpret Article 24 of the African Charter so as to establish what are the specific obligations arising from such a provision in the framework of climate change. The advisory opinion is expected to be released during the 2026 Session of the Court.

Also, in June 2025 the African Commission on Human and Peoples' Rights issued a resolution on the right to environment in Africa,[76] in which the Commission deplored, among other things, "the use of conservatory schemes and the lease to foreign investors of large swaths of territory for carbon trade scheme

[73] *Ivi*, p. 14.

[74] Request for Advisory Opinion No. 001 of 2025, In The Matter of a Request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Obligations of States with Respect to the Climate Change Crisis, Made under article 4 of the Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights, Rule 82(1) of the Rules of the African Court on Human and Peoples Rights and all enabling provisions of the law, available at https://www.african-court.org/cpmt/storage/app/uploads/public/68a/6ca/fb0/68a6cafb0e6f6880543145.pdf

[75] *Ivi*, para. 93(b).

[76] Resolution on Developing General Comment on the Protection and Promotion of the Right to Environment in Africa, ACHPR/Res.633 (LXXXIII) 2025, 3 June 2025.

leading to the dispossession of indigenous peoples, minorities and local communities of their ancestorial territories and depriving them of their livelihood and access to the resources on which they depend for their collective survival",[77] and underscored "the fundamental importance of the right to a general satisfactory environment … for the enjoyment of other human and peoples' rights of the African Charter",[78] tasking "the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to prepare a general comment on the right to environment outlining the measures necessary for respect for, protection, promotion and fulfilment of this right".[79]

In general, as regards the two dimensions of the right to a safe and healthy environment – the collective and the individual ones – the practice of African human rights bodies undoubtedly confirms the autonomous nature of the right in question in its collective connotation, similarly to what emerges from the jurisprudence of the IACtHR, while it does not offer sufficient evidence that allows this conclusion to be extended to the individual dimension of this right.

4. *Conclusion*

The practice that has developed in recent years within the Inter-American and African human rights systems with regard to the right to a safe and healthy environment has undoubtedly led to a very significant evolution of the matter. Its recognition as an autonomous right, especially in its *collective* connotation, is particularly significant, especially for the reason that the affirmation of a human right to a safe and healthy environment multiplies the opportunities for judicial enforceability of issues related to environmental protection, thus increasing the level of effectiveness of actions aimed at guaranteeing such a protection. Also, the position of the IACtHR consisting in recognizing the autonomous

[77] *Ivi*, Preamble.
[78] *Ivi*, para. 1.
[79] *Ivi*, para. 4.

legal status of nature, which is disconnected from any considerations related to the benefits that a safe and healthy environment provides to humanity or the effects that its degradation may have on other human rights, is certainly revolutionary, as it implies the existence of an autonomous *locus standi* in favour of nature itself, i.e. that the right to a safe and healthy environment can be invoked judicially even in the absence of evidence indicating the existence of risks to specific individuals. This position goes along with similar behaviours promoted by some countries at the domestic level, e.g. Bolivia in 2010 – with the *Ley de Derechos de la Madre Tierra*[80] – or New Zealand, which in 2017 recognized the Whanganui River as a legal person.[81] However, it must always be kept in mind that every coin has two sides. So, while apparently the idea of providing nature with an autonomous *locus standi* before courts does not seem to entail any significant collateral effects, it raises in reality a key question, i.e. who speaks on behalf of nature? How would it be possible to ensure that anyone who sets her/himself up as a champion of the rights of nature is not actually disinterested, and really intends to use nature to achieve her/his own interests? Even assuming the good faith of individuals or organizations acting to protect the inherent interests of nature, how would it be possible to ensure a correct balance of the different interests at stake in a concrete case, assuming, for example, that some of these interests are not adequately represented before the Court? Such a situation is far from being purely theoretical. One can think of an instance in which the entity acting on behalf of nature is an environmental association with "extreme" ideas, which is not willing to tolerate certain traditional practices of an Indigenous population, related for example to hunting or fishing, which are essential for the preservation of the cultural identity of such a population. Relevant interna-

[80] Ley Nº 071, Ley de 21 de Diciembre de 2010. *Ley de Derechos de la Madre Tierra*, available at https://www.planificacion.gob.bo/uploads/marco-legal/Ley%20N%C2%B0%20071%20DERECHOS%20DE%20LA%20MADRE%20TIERRA.pdf

[81] See K. Evans, "The New Zealand river that became a legal person", *BBC*, 20 March 2020, available at https://www.bbc.com/travel/article/20200319-the-new-zealand-river-that-became-a-legal-person

tional practice shows that, generally, such cultural values are considered prevalent over environmental concerns,[82] and to advance the interests of nature without considering this reality would be misleading with respect to the consideration that international law devotes to the values it protects. It is therefore a subject that must be handled with extreme care, and with the awareness that even the noblest proclamations of principle can lead to paradoxical effects if they are not accompanied by adequate rules to allow their correct implementation in the real world.

[82] See F. Lenzerini, "Indigenous Peoples' Cultural Heritage and International Law: A Tale of Wrongs and of Struggle for Survival and Renaissance", in *Michigan State University International Law Review*, XXXII (2024), pp. 71-2.

THE ROLE OF ENVIRONMENTAL PROTECTION UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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SUMMARY: 1. Introductory Remarks. – 2. The lack of Normative Parameters about Environment under the International Covenant on Civil and Political Rights and under the European Convention on Human Rights. – 3. The Protection of the Environment in the Case-law of the Human Rights Committee. – 4. The Protection of the Environment in the Strasbourg Court Case-Law prior to the *Klimaseniorinnen* Case. – 5. Climate Change and Large-Scale Environmental Harm before the Strasbourg Court. – 6. Conclusions.

1. *Introductory Remarks*

The climate change phenomenon is bringing the international community face to face with one of the greatest challenges of our time. As a consequence, more than a few Courts, either at the international or at the domestic level, are called upon to deal with environmental issues, in connection with the global warming emergency. In this framework, organs and courts in charge with the international protection of human rights are taking several decisions which address the impact of environmental harms on the enjoyment of individual rights.

Our attention will be focused on the practice of the Human Rights Committee (hereafter HRC or the Committee), on the one hand, and on the case-law of the European Court of Human Rights (hereafter the Court or the Strasbourg judges), on the other, dealing with environmental issues, in order to assess the very complex matter of the status of environmental protection within the two relevant human rights conventional systems, both shaped to guarantee civil and political rights.

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As we will try to demonstrate, in fact, the necessary dimension of such rights is strictly individualistic and anthropocentric, at least in the International Covenant on Civil and Political Rights (ICCPR or the Covenant) and in the European Convention on Human Rights (ECHR or the Convention) systems. On the contrary, the protection of the environment can be easily considered as a common good,[1] thus requiring for collective protection.

One more brief remark needs to be added: the Committee and the Strasbourg Court have often dealt with environmental issues since, at least, the end of the 20th century. It is worth noting that both organs usually take into account the effects environmental harm can provoke on the enjoyment of the right to life and the right to private and family life of individuals. The recent case-law on climate change, indeed, apparently did not bring to a paradigm shift in the judicial approach to environmental protection, at least as regards the substantive rights found applicable to the issue at stake, whilst some procedural issues, such as the victim status and the *locus standi* of legal persons were object of relevant deviation from the previously settled legal standards.

2. *The Lack of Normative Parameters about the Environment under the International Covenant on Civil and Political Rights and the European Convention on Human Rights*

Relying on the above considerations, it is necessary to examine whether the two conventional systems at stake encompass norms expressly directed to the protection of the environment or not. Indeed, it is not possible to find out any provision expressly

[1] The matter of the protection of general interests in the international community has been deeply analysed by G. Gaja, "The Protection of General Interests in the International Community: General Course on Public International Law", in *Recueil des Cours de l'Académie de Droit International de la Haye*, CCCLXIV (2011). As regards the notion of public common good as encompassing climate change adaptation measures, see A. Trivedi, L. Jolly, "Construing Climate Change Adaptation as Global Common Good under International Law: Problems and Prospects", in *Liverpool Law Review*, XLIV (2023), pp. 37-62.

directed to the protection of the environment in the two treaties. On the one hand, "the right to a clean and healthy environment is not protected *per se* under the ECHR";[2] on the other hand, the ICCPR "does not explicitly recognize the human right to a healthy environment".[3] Notwithstanding, both the Committee and the Strasbourg Court[4] took (and actually take) into consideration environmental issues, through the analysis of the impact of environmental harms on the enjoyment of the individual rights protected in the two systems.

The mentioned approach could seem a kind of *indirect protection* of rights which are not guaranteed as such in the Covenant nor in the ECHR through the protection of rights which are, on the contrary, encompassed in the two systems at stake. As regards the case-law of the European Court of Human Rights, the so-called *protection par ricochet* doctrine was developed in the field of the non-refoulement principle, based on the prohibition of torture and inhuman or degrading treatment or punishment. The undergoing idea is that a right which is formally guaranteed by the Convention can be interpreted in order to protect a right which has no conventional recognition. In some scholars' view,[5] such a technique is used by the Court in environmental matters, in so far as the Convention itself does not recognize the right to a

[2] B. Peters, "The European Court of Human Rights and the Environment", in E. Sobenes, S. Mead, B. Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (The Hague, Asser Press/ Springer 2022), p. 190.

[3] M. Mladenov, I. Serotila, "Human Rights' Approach to Environmental Protection - Practice of the Human Rights Committee", in *Pravo - Teorija I Praksa*, XXIX (2022), p. 53.

[4] As observed by M. Sancin, "The ECHR and ICCPR: a Human Rights-Based approach to the Protection of the Environment and the Climate System", in *European Convention on Human Rights Law Review*, V (2024), p. 192, "while the ECHR does not explicitly contain a specific right to a clean, healthy and sustainable environment, the ECtHR has already contributed a significant body of jurisprudence on the on the environment-human rights nexus."

[5] On the point, see S. O'Leary, "La contribution récente de la CEDH à la protection de l'environnement et des générations futures", in *Titre VII* (2024), available at https://droit.cairn.info/revue-titre-vii-2024-2-page-7?lang=fr, p. 8.

healthy environment but the Court usually gives relevance to environmental harms in a human rights perspective.

Such a reasoning could be misleading, if one considers that, when dealing with the non-refoulement principle, the Court derived a new individual right from a protected one; in environmental matters the Strasbourg Court did not find a new right to protect. On the contrary, the Court took into consideration specifical environmental harms to the extent that such harms could have an impact on conventionally guaranteed rights. In other words, no new rights have been somehow formulated by the Court.

The gordian knot is exactly the way environmental protection is considered by the Court and by the Committee, under the premise that the two conventional systems at stake do not provide for an *individual* right to environment nor for a *collective* right to the protection of the environment itself.

It is worth noting that, unlike the Convention and the Covenant, some other human rights treaties afford protection to the right to a clean and healthy environment, to a certain extent. It is true for the Inter-American system, in which art. 11 of the Protocol of San Salvador guarantees the individual right to a healthy environment[6], but also for the Inter-American Court of Human Rights which has derived an analogous but autonomous right from art. 26 of the American Convention on Human Rights (which is a progressive development clause). The African system of protection of human rights, quite similarly, provides for a right to a general satisfactory environment, under art. 24 of the African Charter on Human and People's Rights. The latter provision, in contrast with the former, recognizes a fully collective right,[7] due to peoples rather than to individuals.

One could wonder whether the formal recognition and protection of the environment, stemming from the African and the

[6] It has to be noticed that the rights enshrined in the Protocol of San Salvador cannot be claimed through individual petitions.

[7] Art. 24 reads as follows: "All peoples shall have the right to a general satisfactory environment favourable to their development." Clearly, the right holder is the people as a collective entity.

Inter-American systems, is coherent with the circumstance that both of them encompass a collective dimension of human rights or not. The Covenant and the Convention, on the other hand, do not provide for clauses which can be regarded as suitable for protecting the environment, as already mentioned, and such a lack is very significant if one considers that the treaties at stake are conceived to protect *individuals* (mainly natural persons) from the violation of their rights. In other words, the absence of a collective dimension of human rights in the two conventional systems at stake could make them unsuitable for protecting the environment as such or, at least, provide justification for the difficulties the relevant organs show when called upon to deal with environmental issues.

3. *The Protection of the Environment in the Case-Law of the Human Rights Committee*

The case-law of the HRC on environmental matters is really poor, if one considers that just a few individual communications brought to views somehow ascertaining that a violation of the rights protected by the Covenant stemmed from an environmental harm.

As already mentioned, in principle the Committee has handled the connection between human rights and the environment within the framework of already proclaimed civil and political human rights. More accurately, when dealing with the topic at stake, the HRC usually makes reference to four provisions of the Covenant: right of minorities, right to self-determination, right to life and right to privacy.

The influence of environmental factors on the right of minorities to enjoy their culture, especially indigenous people, in accordance with art. 27 ICCPR, has been frequently recognized by the Committee.[8] The norm at stake, indeed, includes rights which may be closely associated with the land, natural resources and

[8] For an accurate analysis of the topic, see D. SHELTON, "Human Rights and the Environment: What Specific Environmental Rights Have Been Recog-

the environment thereof.[9] In other words, the Committee admits that rights of minorities can be threatened by an environmental harm,[10] both from a substantive and from a procedural[11] point of view.

In 1990 the Committee dealt with the *Lubicon Lake Band v. Canada case*,[12] taking into account the severity of the harm suffered by the author of the communication and its group, considered the expropriation of the traditional land of the group for commercial purposes as a breach of art. 27, in so far as it undermined the right to freely use their own natural resources.

In *Angela Poma Poma v. Peru* case,[13] the HRC confirmed that state measures, which impair the enjoyment of indigenous people' natural resources, can be examined under art. 27 lens. In the abovementioned case, the diversion of the course of a river, causing the progressive drying of a wetland area, which was very important for the indigenous population, was considered by the HRC as a significant interference of Peru authorities with the plaintiff's rights to enjoy her culture under art. 27. Such an assessment, indeed, in line with *Lubicon Lake Band* views, was

nized", in *Denver Journal of International Law & Policy*, XXXV (2006), pp. 160-162.

[9] ICCPR General Comment No. 23: Article 27 (Rights of Minorities), adopted at the Fiftieth Session of the Human Rights Committee, on 8 April 1994 CCPR/C/21/Rev.1/Add.5. As clearly laid down in para. 7," culture manifests itself in many forms, including a particular way of life associated with *the use of land resources*, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law." (emphasis added)

[10] In this regard, see M. Mladenov, I. Serotila, "Human Rights' Approach to Environmental Protection", cit., p. 53.

[11] The above-mentioned General Comment underlines the necessity to let indigenous minorities to take part do decisions which could impact on the enjoyment of the natural resources: "The enjoyment of those rights may require positive legal measures of protection and measures to ensure the participation of members of minority communities in decisions which affect them." (para. 7)

[12] *Ominayak (Lubicon Lake Band) v. Canada*, CCPR/C/38/D/167/1984, views of 26 March 1990.

[13] *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, views of 27 March 2009.

based on the analysis of the severity of the harm for the population involved.[14] Moreover, the Committee recognized once again the relevance of the procedural facet of art. 27.[15]

Moreover, in several *concluding observations* on State periodical reports, the HRC underlined the relevance of state measures aimed at guaranteeing the environmental dimension of collective rights of the indigenous minorities.[16]

Moving to the right to self-determination, as enshrined in art. 1, par. 2, the *General Comment* no. 12 of 1984 emphasizes the relevance of the environmental facet of the economic dimension of such a right: "namely the right of peoples, for their own ends, freely to dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law".[17]

Answering to the initial report of France, dealing with Mururoa nuclear tests, the HRC stressed that the right to self-determination can be threatened by the pollution and exploitation of natural resources and, thus, France had to clarify how to reconcile the abovementioned tests with the right of the inhabitants to dispose of natural resources and to protect themselves from atmospheric pollution. Art. 1, obviously, cannot be invoked under

[14] In *Ilmari Lansman* case, the Committee decided the merits of the petition relying, once again, on the entity of the harm the indigenous population had to face. In such a circumstance, the HRC stated that state measures which have a "certain limited impact on the way of life of persons belonging to a minority" can be held consistent with the ICCPR (*Ilmari Lansman et al. v. Finland*, CCPR/C/52/D/511/1992, views of 26 October 1994, para. 10). As a consequence, the stone-quarrying Finnish authorities permitted in the Sami traditional land was considered lawful under art. 27.

[15] *Angela Poma Poma v. Peru*, cit., para. 7.2. The Committee underlined that, according to art. 27, States have to adopt specific measures in order to ensure "the effective participation of members of minority communities in decisions which affect them."

[16] On the point, see M. Mladenov, I. Serotila, "Human Rights' Approach to Environmental Protection", cit., p. 55.

[17] *ICCPR General Comment No. 12*: Article 1: Right to Self-determination, adopted at the Twenty-first Session of the Human Rights Committee, on 13 March 1984, para. 5.

the First Optional Protocol[18] and, therefore, there is no case-law based on individual communications.

Unlike art. 1, para. 2, and art. 27 ICCPR, the right to life and the right to private and family life – provided for in articles 6 and 17 of the Covenant, respectively – have been often invoked in the context of environmental degradation.

It is worth noting that the *General Comment* No. 36,[19] recently drafted, expressly affirmed that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law".[20] Such a finding is based on the states' duty to protect life, which implies an obligation to address the general conditions for guaranteeing to individuals the enjoyment of their right to life with dignity.[21]

The Committee has, thus, relied on art. 6 in defining measures that States are required to adopt to guarantee the sustainability of the natural resources management, to implement environmental standards and to provide procedures for accessing to information about the environment. Such a perspective can obviously

[18] The right to self-determination is a collective right and, therefore, the individual communication procedure cannot be used by peoples. Notwithstanding, the HRC can take into consideration such a right if its violation can have a significant impact on the enjoyment of another protected right. On the point, see D. Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge, Cambridge University Press 2015), p. 83.

[19] ICCPR *General Comment No. 36*, Article 6: Right to life, CCPR/C/GC/36, adopted at 124th session of the Human Rights Committee in 2018. For an accurate analysis of the GC in an environmental perspective, see G. Le Moli, "The Human Rights Committee, Environmental Protection and the Right to Life", in *International and Comparative Law Quarterly*, LIX (2020), p. 746.

[20] ICCPR *General Comment No. 36*, cit., para. 62.

[21] *Ivi*, para. 26.

bring to the recognition of positive obligations States are called to comply with, stemming from art. 6.

In so far as art. 6 guarantees individuals against acts of public authorities which can bring to a deprivation of life, the right to life can be directly impacted upon by environmental harms intentionally caused by States. However, it is unclear, following the HRC case-law, whether art. 6 covers all environmental harms or not, if one considers that the Committee often denies the victim status of the petitioners (as it will be explained below).

In *Bordes and Temeharo v. France*[22] and *Susila Malani Dahanayake et al. v. Sri Lanka*,[23] the HRC has recognized that the alleged State actions (nuclear tests in French Polynesia and a route development project) could bring to a serious environmental harm and that such a harm could impair the right to life of the authors. Nevertheless, in both cases the Committee declared not admissible the communications, on the grounds of the lack of victim status demonstration by the authors. In the former case, the HRC observed "that, on the basis of the information presented by the parties, the authors have not substantiated their claim that the conduct of nuclear tests between September 1995 and the beginning of 1996 did not place them in a position in which they could justifiably claim to be victims whose right to life and to family life was then violated or was under a real threat of violation". Following the case-law of the Committee under art. 1 of the First Optional Protocol on the status of victim, the claimant needs to prove that "an act or omission of a state party has already adversely affected his or her enjoyment of such right, or that there is a real threat of such result".[24] In the case of atomic bomb testing, indeed, it seems very difficult to deny that nuclear radiation can pose a real threat to the life of individuals who live within a certain distance from the test place. In other words,

[22] *Vaihere Bordes, Noel Narii Tauira and John Temeharo v. France*, CCPR/C/57/D/645/1995, Decision on admissibility of 22 Luly 1996.

[23] *Susila Malani Dahanayake et al. v. Sri Lanka*, CCPR/C/87/D/1331/2004, Decision on admissibility of 25 July 2006.

[24] *E.W. et al. v. The Netherlands*, CCPR/C/47/D/429/1990 (1993), decision on admissibility of 29 April 1993, para. 6.2.

bearing in mind the technical features of the environmental harm at stake, the HRC could have easily ascertained the victim status of the claimants, relying on scientific data.

Even in the *Susila Malani Dahanayake* case the Committee dismissed the communication in so far as the claimants did not demonstrate their victim status. In the case at hand, the building of an over 100 km expressway in the area where all the plaintiffs lived was challenged because of the harm it caused, without any prior environmental impact assessment. They supported the position that their right to life had to be interpreted in a broad manner, so as to include the right to a healthy environment (and that such a right implied the procedural facet of the participation to the decision process). The HRC ascertained the lack of victim status of the plaintiffs, relying on art. 2 of the ICCPR First Optional Protocol.[25] In the Committee view, the authors did not substantiate the claim that they were deprived of their right to a healthy environment, without any further analysis.[26] The Committee did not explain which threshold should have been met to admit the plaintiffs as victims under art. 1 of the abovementioned Protocol, once again. As a consequence, the legal standard required by the HRC to recognize the victim status in case of environmental harms remain unclear and such a confusion hinders the invocation of art. 6 in environmental matters.

Such a conclusion seems to be confirmed by the analysis of the individual communication in *Billy v. Australia*.[27] The HRC decision is very relevant in so far as the Committee was called upon for the first time to deal with the climate change impact on the enjoyment of the human rights protected by the Covenant.

[25] Art. 2 of the Protocol reads as follows: "subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration." In the Dahanayake case, indeed, the HRC found that the authors exhausted the domestic remedies they could rely on and, thus, the inadmissibility depends on the fact that the violation of the invoked right was ill-founded.

[26] See *Susila Malani Dahanayake et al. v. Sri Lanka*, cit., para. 6.4.

[27] *Billy and others v. Australia*, CCPR/C/135/D/3624/2019, Decision on merits of 21 July 2022.

The eight authors of the communication, inhabitants of the Torres Strait Islands provided evidence that the islands had been subject to severe flooding and waters warming, due to climate change. Such a change could bring the submersion of the islands and therefore, in the authors' submissions Australia should have been held responsible for the failure to implement adaptation and mitigation measures, thus violating their right to life, to privacy, children's rights and minority rights.

Whilst ascertaining a violation of art. 17 and 27, the Committee did not find that the omission of the measures at stake could impair the right to life of the plaintiffs.

As observed by Barrett, the decision by the majority of the Committee resulted in "an unduly constrained definition of the right to life."[28]

On the one hand, the HRC did not follow the principles enshrined in the *General Comment No. 36* and failed to take into account the notion of dignity as a component of the right to life. On the other hand, the Committee gave a strict interpretation of the right to life, comparing the situation at stake with a factually dissimilar situation dealt with in *Teitiota v. New Zealand*,[29] with the consequent recourse to a higher-than-necessary standard to determine the violation of art. 6.

The Committee, in fact, stated that a "real and foreseeable risk"[30] standard is required to find a violation of the right to life, just after the recognition of the theoretical applicability of a rea-

[28] N. Barrett, "Why Did the UN Human Rights Committee Refuse Broader Protections for Climate Change Victims?", in *Opinio Juris*, 2022, available at https://opiniojuris.org/2022/10/05/why-did-the-un-human-rights-committee-refuse-broader-protections-for-climate-change-victims/.

[29] *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, Views adopted on 24 October 2019.

[30] The HRC observed that "while the authors attest to feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or currently face adverse impacts on their own health or a *real and reasonably foreseeable risk* of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity." (para. 8.6 of the Views at stake; emphasis added)

sonable foreseeability threshold.[31] The former more severe standard is usually relied on by the HRC in refugee cases (such as *Teitiota*), where the author is required to demonstrate that, if returned to the country of origin, he would face a real and foreseeable risk to his life.[32] It is worth noting that in *Teitiota* case the HRC found that the deprivation of food is an example of real and foreseeable risk to life[33] and in *Billy* the authors alleged, inter alia, the loss of food sources.[34]

It remains unclear the reason why the Committee did not make recourse to the "reasonably foreseeable" standard, just as it did in the abovementioned *Portillo Caceres v. Paraguay* case. In the case at hand, the use of pesticides (dispersion of forbidden agrochemicals in large plantations by light airplanes and tractors) and their impact on the environment was considered a reasonably foreseeable threat[35] and, thus, brought the HRC to ascertain the violation of the plaintiffs' right to life.

One more brief remark can show the difficulty of the Committee, in dealing with environmental issues: it seems that a kind of new procedural rule has emerged, if one considers that, following the HRC reasoning, the same set of facts cannot be used to claim multiple violations of the Covenant.[36] It is not easy to find out a similar limitation in the previous case-law of the HRC.

[31] In para. 8.3, indeed, the Committee recalled its prior case-law (*Portillo Caceres et al. v. Paraguay*, CCPR/C/126/D/2751/2016, decision on merits of 25 July 2019, para. 7.3 and *Nell Toussant v. Canada*, CCPR/C/123/D/2348/2014, decision on merits of 24 July 2018, para. 11.3), affirming that "the obligation of States parties to respect and ensure the right to life extends to *reasonably foreseeable* threats and life-threatening situations that can result in loss of life." (emphasis added)

[32] *Ioane Teitiota v. New Zealand*, cit., para. 9.9.

[33] *Ivi*, para. 9.9.

[34] *Billy and others v. Australia*, cit., para. 8.6.

[35] *Portillo Caceres et al. v. Paraguay*, CCPR/C/126/D/2751/2016, decision on merits of 25 July 2019, para. 7.5.

[36] In para. 8.6 of the *Billy decision*, the HRC observed "that the authors' claims under article 6 of the Covenant relate mainly to their ability to maintain their culture, which falls under the scope of article 27 of the Covenant." Such a reasoning should bring to exclude that the same alleged facts can be considered as a breach of different rights protected by the Covenant.

Moreover, as observed in the separate opinion[37] to the Views, even if independence of facts was a requirement, the violation of art. 27 and 6 are qualitatively independent in this case.

The last ICCPR provision the Committee uses to ascertain whether a state measure dealing with environment is consistent with the Covenant or not is art. 17 (right to respect for private and family life). More precisely, the HRC has often dealt with environmental issues in cases related to the right to a home free from arbitrary or unlawful interference under art. 17.

In the already mentioned *Portillo Caceres* case, the HRC found a violation of art. 17 by Paraguay, noting that environmental degradation can pose a threat to the right to private and family life and home when the effects of the pollution reach a certain degree of seriousness.[38] Nevertheless, the Committee "had avoided answering the question of the role of environmental harm within the scope of article 17 ICCPR",[39] nor it took a clear position in the latest *Billy* case, in so far as the finding of the violation of art. 17 was based on the fact that the environmental degradation "may adversely affect the well-being of individuals and constitute violations of private and family life and the home".[40]

[37] In their joint partially dissenting opinion, the HRC members Bulkan, Kran and Sancin observed that "While the authors do discuss these violations as related, citing similar facts, the Committee's jurisprudence does not require that facts relating to different violations arise from different sets of facts. The risks to the authors' right to life are independent and qualitatively different from the risks to their right to enjoy their culture" (para. 4), thus confirming the difficulties in the reasoning of the Committee majority on the possible violation of the right to life by Australian authorities.

[38] As observed by the Committee, "when pollution has direct repercussions on the right to one's private and family life and home, and the adverse consequences of that pollution are serious because of its intensity or duration and the physical or mental harm that it does, then the degradation of the environment may adversely affect the well-being of individuals and constitute violations of private and family life and the home." (para. 7.8 of the already mentioned Portillo Caceres decision)

[39] G. Reeh, "Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect", in *EJIL: Talk!* available at https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/.

[40] *Billy and others v. Australia*, cit., para. 7.8.

From this necessarily brief overview of the case-law of the HRC on environmental issues it seems that the ICCPR system is not well equipped to examine environmental issues or, better, to find that environmental harm itself implies a violation of the Covenant. Nor the Committee has tried to guarantee an environmentally oriented interpretation of the relevant norms of the ICCPR. Moreover, the Committee did not attempt to give an autonomous notion of environmental protection.

4. *The Protection of the Environment in the Strasbourg Court Case-Law prior to the* Klimaseniorinnen *Case.*

Switching to the European Convention on Human Rights, the individualistic perspective of the system is even clearer than it is in the ICCPR. No collective rights are provided for by the Convention nor rights with a collective dimension can be found. Moreover, the conditions to apply to the Court are shaped keeping in mind the natural person as the typical plaintiff.

Notwithstanding, Strasbourg organs have made a very relevant effort in order to deduce, from the conventional rights, environmental protection elements. As we all know, the ECHR is conceived as an instrument whose main purpose is defining minimum standards of protection of fundamental rights. In doing so, the Convention has to be interpreted as a "constitutional instrument of European public order",[41] taking into consideration the international and domestic law context at a certain moment. This evolutive interpretation of the Convention has led the Court to widen the scope of several rights and that is exactly what happened with environment protection issues, as already pointed out in para. 2. In the foregoing analysis, I will take the *Klimaseniorinnen* case[42] – the first in which the Court dealt with climate

[41] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Grand Chamber judgement of 30 June 2005, para. 156 and *N.D. and N.T. v. Spain*. Applications nos. 8675/15 and 8697/15, Grand Chamber judgement of 13 February 2020, para. 110.

[42] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20, Grand Chamber judgement of 9 April 2024.

change – as a turning point in the evolution of the case-law on environmental issues, thus splitting such a case-law in prior and after the abovementioned Grand Chamber decision.

The starting point of the present analysis is the concept of protection of the environment the Strasbourg organs gave (unlike the Committee). As observed in an advisory opinion of 2022, "Environmental protection, in the wide sense, and, in this context, the more specific protection of the countryside and forests, endangered species, biological resources, heritage or public health are, for their part, included among the aims considered, to date, as relating to the "general interest" for the purposes of the Convention".[43]

Therefore, "the responsibility of the public authorities in this area should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective".[44] Such a notion is very broad, in order to encompass any kind of environmental harm. Moreover, the Court stated, even though not that clearly, that the protection of the environment has to be deemed as *a general interest* for the purposes of the Convention. What remains unclear is the width of the obligation, incumbent upon member States, to ensure the effectivity of the "statutory provisions" whose goal is the protection of the environment. In other words, the Court seems to refer to the necessity to guarantee the effectiveness of environmental protection measures, if the member State adopted any of them and not to the necessity of such measures.

If one considers what the Strasbourg Court held in the *Kyrtatos* case[45] – the Convention rights are not "specifically designed to provide general protection of the environment as such" – it

[43] Grand Chamber advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date, requested by the French *Conseil d'État* (Request no. P16-2021-002), para. 80.

[44] *Ibid*.

[45] *Kyrtatos v. Greece*, Application no. 41666/98, Judgement of 22 May 2003, para. 52.

could be difficult to derive from the abovementioned rights obligations upon States about the protection of the environment. Therefore, the key issue is to find a link between a state conduct (being it a commissive or omissive behaviour) and an environmental harm which impairs the enjoyment of a conventional right. In other words, as we will see in a moment, the circumstance that an environmental damage occurs does not necessarily imply a violation of the ECHR. For a conventional breach to occur, it is necessary that the damage at stake affects one or more rights guaranteed by the Convention itself.

Relying on such a premise, a short analysis of the Court jurisprudence[46] on the point is required. From the notion of jurisdiction as provided for in art. 1[47] onwards, the Court has examined environmental harm under several provisions of the Convention. Though it is not possible to give a complete overview of the relevant case-law, I will try to enlighten the most important facets of such a jurisprudence.

The Court inferred from the ECHR both substantive and procedural obligations upon States – mainly of positive nature[48] – applicable to environmental protection issues. From the former point of view, the most relevant provisions are art. 2, on the

[46] As Prof. Francioni observed, even an overview of the case-law at stake "reveals a considerable degree of progress towards the development of an environmental dimension of human rights, but also a degree of ambiguity and significant divergence of approaches in treating such dimension as connected either to individual rights or to the collective interests of the society." (F. FRANCIONI, "International Human Rights in an Environmental Horizon", in *European Journal of International Law*, XXI (2010), p. 48)

[47] On the point, see *Duarte Agostinho and Others v. Portugal and 32 Others*, Application no. 39371/20, Grand Chamber decision of 9 April 2024. The focus of the present paper is not the notion of State jurisdiction in case of environmental harm; notwithstanding, some elements can be found on climate change adaptation and mitigation measures in the above-mentioned case-law and in the *Klimaseniorinnen* case.

[48] With regard to the notion of positive obligation under the ECHR and to the distinction between affirming the existence of an obligation of such nature and ascertaining a breach of it, see V. STOYANOVA, "Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete", in *Human Rights Law Review*, XXIII (2023/3).

right to life, and art. 8, which protects the right to private and family right. Dealing with the latter facet, art. 6 is the core provision, as well as the procedural limb of the abovementioned art. 2 and art. 8. Nevertheless, many other conventional provisions have been used by the Court for environmental protection issues.[49] The case-law under art. 2 and art. 8 seems the most relevant in order to shape a trend in the Strasbourg Court jurisprudence, if one considers that even the more recent cases[50] – somehow requiring a not exclusively individual dimension – have been examined in the perspective of the right to life and of the right to private and family life. Consequently, the analysis below will focus on the abovementioned case law.

With regard to the right to life, it has to be observed that the Court has very seldom found that an environmental damage can impair such a right. This finding is a consequence of the very narrow shaping of the relevant conditions in order to claim the violation of the right protected under art. 2 ECHR.

The Strasbourg organs have derived a positive obligation upon States from the first sentence of art. 2, para. 1, deeming that public authorities have to take all appropriate steps to protect the lives of the individuals under their jurisdiction. Such an obligation, obviously, must be fulfilled by States independently from the nature and context of the activity which poses a risk to life. As a consequence, any environmental damage, which can constitute a threat for the right to life of individuals, involves the duty of member States to adopt the necessary measures. In the *Öneryıldız* case,[51] for instance, the methane explosion that took place in a landfill and caused a landslide, killing 39 persons in a slum, was considered a violation of the positive obligation of Tur-

[49] For a broad reconstruction of the Strasbourg Court jurisprudence in environmental matters, with particular regard to positive obligations, see B. Peters, "The European Court of Human Rights and the Environment", cit., p. 202 ff.

[50] We are referring to the already quoted *Klimaseniorinnen* case and to *Cannavacciuolo and others v. Italy*, Applications nos. 39742/14, 51567/14, 74208/14 and 24215/15, judgement of 30 January 2025.

[51] *Öneryıldız v. Turkey*, Application no. 48939/99, Grand Chamber judgement of 30 November 2004.

key to protect the life of individuals under art. 2. In such a case, the Grand Chamber attached importance to the fact that the waste collection is a *dangerous industrial activity*, thus implying certain technical security features.

Following the same approach, the Court developed its case-law on the consequences of industrial activities, encompassing a large number of situations in which individuals could rely on art. 2, such as toxic emissions from an agrochemical factory,[52] exposure to asbestos at a workplace,[53] the management of a reservoir in a monsoon-influenced region[54] or even atmospheric tests of nuclear weapons.[55]

Similarly, the right to life has been deemed applicable to natural disasters, "in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use"[56] (the Court examined, inter alia, the impact on mud-

[52] *Guerra and others v. Italy*, Application no. 14967/89, Grand Chamber judgement of 19 February 1998. It is worth noting that, in the case at stake, the Court considered unnecessary to examine the plaintiff's arguments under art. 2, in so far as a violation of the right to private and family life was ascertained (para. 62). As we are going to see afterwards, such a solution brings to a clear underestimation of the right to life and its relevance. Moreover, it seems that the Court prefers the art. 8 legal standard in so far as the requisites to call upon the right to private and family life are broader that the conditions stemming from art. 2.

[53] The Court dealt with the exposure to toxic substances in a company held by the public authorities in the *Brincat* case (*Brincat and others v. Malta*, Applications nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, judgement of 24 July 2014) and with the same situation in a private metallurgical company in *Laterza* case (*Laterza and D'Errico v. Italy*, Application no. 30336/22, judgement of 27 March 2025).

[54] *Kolyadenko and others v. Russia*, Applications nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, judgement of 28 February 2012.

[55] *L.C.B. v. United Kingdom*, 14/1997/798/1001 (the case is numbered following the system in use before the entry into force of Protocol 11), judgement of 9 June 1998. In the case at stake, indeed, a violation of art. 2 was not found in so far as the causal link between the nuclear radiations and the individual disease was not proved.

[56] *Budayeva and others v. Russia*, Applications nos. 15339/02, 21166/02,

slides[57] and earthquakes[58] on the right to life of the individuals involved).

It is worth noting that the right to life can be invoked in case of death of a person as a consequence of the member State behaviour[59] (which caused an environmental harm) or even in case such a harm exposed the individual to a risk to his or her life.[60] Obviously, in order to reach the applicability threshold of art. 2, a risk to life must have specific features. On the basis of the Strasbourg judges' case-law, the risk to life must be real and immediate. The *real* nature of the risk entails the existence of a threat to life which is "sufficiently serious, genuine and ascertainable".[61] Moreover, as regards the immediate nature of the risk, the Court pointed out that "the imminence of such a risk entails an element of physical proximity of the threat and its temporal proximity".[62]

To put it in other words, following the reasoning of the Strasbourg Court, in order to deem the positive obligations stemming from art. 2 applicable, an environmental harm has to pose a threat to the life of individuals which reaches a certain level of severity and that is temporally and physically close to them. Bearing in mind what has already been observed on the Committee case-law under art. 6, the interpretation given by the Court to the conditions for the applicability of art. 2 excessively shortens the scope of the right to life under the ECHR just as the former does to the right to life under the ICCPR.

Such a restrictive interpretation of the requirements to invoke art. 2 ECHR could be explained relying on the partial overlapping between the scope of the positive obligations stemming from the right to life, on the one hand, and from the right to pri-

20058/02, 11673/02 and 15343/02, judgement of 20 March 2008, para. 137.

[57] *Ibid*.

[58] *M. Özel and others v. Turkey*, Applications nos. 14350/05, 15245/05 and 16051/05, judgement of 17 November 2015.

[59] See the already mentioned *Öneryıldız v. Turkey* case.

[60] See, *inter alia*, *Osman v. United Kingdom*, (87/1997/871/1083), judgement of 28 October 1998 and *Budayeva and others v. Russia*, already quoted.

[61] *Cannavacciuolo and others v. Italy*, cit., para. 377.

[62] *Ibid*.

vate and family life, on the other, when an environmental harm is at stake. Bearing in mind the two most relevant environmental cases the Court faced in the nineties[63], it is worth noting that in both of them a violation of art. 8 was found. And, significantly, while in *Lopez Ostra* case the plaintiff assumed it suffered a violation of art. 3 as well as the right to private and family life, in *Guerra v. Italy*, the pollution in the area where the applicant lived brought him to claim the violation of his right to life, one the one hand, and his right to private and family life, on the other.

The Court, indeed, uses art. 8, since a right to a clean and healthy environment, as we saw, is not provided for by the Convention, where an individual is affected – in a direct a severe manner – by noise, pollution or nuisance. Therefore, the right to private and family life has become the umbrella under which the Court examines the environmental damages reaching a certain degree of seriousness.

As a consequence, one could wonder whether the Strasbourg Court relies on two different thresholds of severity of the environmental harm, the first one implying the evaluation of the State interference under art. 8 and the second (higher) one activating the exam of the measure under art. 2 or not. It has to be considered that, in the Court's view, even harms which are not concrete or physical[64] can undermine the enjoyment of the individual right to private life and home. Therefore, the scope of art. 8 encompasses both tangible and intangible threats, being the notion of home at the heart of the protection:

> a home will usually be a place, a physically defined area, where private and family life goes on. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to re-

[63] We are referring to *Lopez Ostra v. Spain*, Application no. 16798/90, judgement of 9 Dember 1994 and to *Guerra v. Italy*, already mentioned.

[64] In *Hatton* case, the Court dealt with the noise emissions by Heathrow airport, recognizing that, in principle, the right of a person to enjoy his own home implies a state positive obligation to protect such home from noise emissions (*Hatton and others v. the United Kingdom*, Application no. 36022/97, Grand Chamber judgement of 8 July 2003, para. 96.

> spect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.[65]

The right to home, stemming from art. 8 is, indeed, very frequently used by the Strasbourg judges to evaluate if a certain state measure, which is deemed to have an impact on the environment in which the plaintiff lives, is consistent with the Convention obligations. Moreover, when an environmental harm is at stake, the Court usually considers the applicability of art. 8 as an issue of admissibility of its jurisdiction *ratione materiae*.[66]

Just as in its case-law on the right to life in environmental matters, the Court has pointed out the conditions under which an interference in the right to private and family life can be examined, considering that a deterioration of the environment itself is not sufficient to engage art. 8 ECHR. As the Strasbourg judges clearly stated, the Convention does not protect a right to nature or to a clean and healthy environment and, thus, the right to home (as stemming from art. 8) can be invoked only if "a direct and immediate link"[67] between the environmental harm and the plaintiff's home or private and family life is established. Even with a different wording, it seems that the Court has fixed a legal standard coherent with the *Guerra* case one (where "a direct effect" of the environmental damage on the applicant's right was required).[68] If such a link is ascertained, "the first point for decision is whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, *to a suffi-*

[65] In this sense, *Kapa and others v. Poland*, Applications nos. 75031/13, 75282/13, 75286/13 and 75292/13, judgement of 14 October 2021, para. 148.

[66] See *Solyanik v. Russia*, Application no. 47987/15, judgement of 10 May 2022, para. 39 ff. The Court observed that the interference in the plaintiff's right to home has to reach a certain minimum level. In order to determine it, the concrete circumstances of the case, the physical and mental effects of the interference at stake and the general context of the environment must be taken into consideration.

[67] *Atanasov v. Bulgaria*, Application no. 12853/03, judgement of 2 December 2010, para. 66.

[68] *Guerra v. Italy*, cit., para. 57.

cient extent, the enjoyment of the amenities of his home and the quality of his private and family life" (emphasis added).[69]

Moreover, in the Court's view, the circumstance that the environment suffered a general deterioration is not sufficient in order to activate the protection under art. 8. Such a deterioration, on the contrary, must have a negative effect on an individual's private and family life.[70]

The abovementioned link between the environmental damage and the individual right to private and family life is necessary but not sufficient in order to deem a state measure as an interference in the right protected by art. 8 ECHR. To this end, the applicant must show that the interference at stake is serious enough to affect adversely the enjoyment of the right he relies on. Once again, the severity threshold takes prominence, when the Court has to deal with environmental issues and such a legal standard has been confirmed even in climate change cases, as it will be discussed below.

5. *Climate Change and Large-Scale Environmental Harm before the Strasbourg Court.*

Since 2024, the Strasbourg judges have dealt with very complex environmental issues, with a general scope rather than connected to specific harm. Such a case-law – in particular the *Klimaseniorinnen* case – needs to be examined in the framework of the so-called climate change litigation phenomenon. Since the early twenties of this century, indeed, individuals as well as associations have brought actions against public authorities for the failure to adopt adaptation and mitigation measures, in order to limit global warming. Such complaints are usually lodged both to domestic and international judges. Against this backdrop, the Court had to take position on the impact of climate change[71] on

[69] *Atanasov v. Bulgaria*, cit., para. 66.

[70] To this extent, see *Martínez Martínez et Pino Manzano v. Spain*, Application no. 61654/08, judgement of 3 July 2012, para. 42.

[71] Indeed, the Court defined climate change as a "polycentric issue", thus

conventionally protected rights. More precisely, the Court had to deal with a state party omission as regards the mitigation measures required by the Paris agreement[72] to keep the increase of average earth's temperature with respect to pre-industrial level under 2 degrees Celsius.

The analysis of the foregoing jurisprudence on art. 2 and art. 8, on the other hand, shows the necessity of a strict link between a specific environmental harm and the enjoyment of the conventional rights concerned. Consequently, the Court had to deal, for the first time, with a threat to the environment which is global itself.[73] The exceptional nature of the case at hand, indeed, is easy to grasp if one considers that the Strasbourg judges underlined that it raises "unprecedented issues before the Court". As a consequence, even relying on the previous case-law, "there are important differences between the legal questions raised by climate change and those addressed until now".[74]

The decision at stake is very complex and addresses an exceptional number of legal issues whose analysis would go beyond the scope of the present paper. Therefore, I will focus on two relevant points such as the victim status of the plaintiffs and the applicability of art. 2 and art. 8 ECHR to environmental large-scale harm.

It is well known that art. 34 ECHR requires being a victim of a violation of the Convention as a condition for the admissibility of an application before the Court. Therefore, the Strasbourg judges elaborated a case-law on the status of victim under art. 34. In the case at stake, the exam of this status has brought to some surprising conclusions as regards the *Klimaseniorinnen* association and the individual applicants. It is worth noting that the assessment on the plaintiffs' victim status was joined to the merits

requiring an "appropriate and tailored approach." (*Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 422)

[72] The Paris Agreement is an international treaty on climate change, adopted by 195 Parties at the UN Climate Change Conference (COP21) in Paris, on 12 December 2015. It entered into force on 4 November 2016.

[73] The Court clearly stated, on the point, that "there is no single or specific source of harm." (*Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 416)

[74] *Ivi*, para. 414.

and that, in substance, the Court gave the impression of overlapping the issue of the scope of the right to private and family life with the issue of the quality of victim. Such an issue is, obviously twofold, in so far as the determination of the status of legal and natural persons necessarily follows different paths.

As regards the individual claimants, it has to be observed that the Court found they lacked such quality. Generally speaking, the status of victim presupposes "a direct impact of the impugned action or omission on the applicant or a real risk thereof".[75] When climate change is at stake, indeed, a direct effect or at least a threat could be somehow ascertained with regard to any individual under the jurisdiction of a state party.[76] Consequently, the Court relied on the prohibition of *actio popularis* in the conventional system to exclude that individuals can claim to be victims of a violation of their rights deriving from the climate change and its consequences for human beings.[77] It is worth noting that the Court deemed the potentially high number of persons suffering a violation of their conventional rights as such quantity implied that a general and not individual interest was at stake. On the contrary, following the case-law of the Court, once ascertained that climate change can pose an interference in an individual right, such finding should be enough for the recognition of the victim status under art. 34 ECHR. Moreover, the Court formally excluded the relevance, in climate change matters, of the case-law on potential victims "under which victim status could be claimed by a class of people who have a legitimate personal interest in seeing the impugned situation being brought to an end",[78]

[75] *Ivi*, para. 483.

[76] The Court expressly recognized that "given the nature of climate change and its various adverse effects and future risks, the number of persons affected, in different ways and to varying degrees, is indefinite." (para. 479)

[77] With regard to the role of the action popularis prohibition in climate change matters, see J. HOHNERLEIN, "Who is afraid of actio popularis? On Separating Rights and Remedies in the ECtHR's Climate Judgment", in *Verfassungblog*, 2024, available at https://verfassungsblog.de/who-is-afraid-of-actio-popularis/.

[78] *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 485.

in so far as every person could deem to be concerned by the climate change effects and thus the legitimate personal interest criterion would not be useful to reduce the number of potential plaintiffs.

As a consequence, the Court lays down a specific notion of victim, applicable only if an individual claims that a member state climate change policies impair its conventional rights. In the Court's view, to this end two different circumstances are required: a) "the applicant must be subject to a high intensity of exposure to the adverse effects of climate change", and b) "there must be a pressing need to ensure the applicant's individual protection".[79] In other words, the Strasbourg judges fix an extremely high threshold which is almost impossible to reach. In effect, none of the individual plaintiffs was considered as satisfying such a threshold and thus was found as a victim in the sense of art. 34 ECHR.

One could wonder, on the one hand, whether the shaping of a substantially brand-new notion of victim, only suitable for climate change cases, is coherent with the rationale of art. 34 and, on the other hand, whether the abovementioned circumstances required by the Court for such cases should be examined from the viewpoint of the applicability of the invoked right rather than from the perspective of the victim status or not.

Turning now to the second issue relating to the quality of victim of the plaintiffs, the solution adopted by the Strasbourg judges is surprising as well. It has to be considered that whilst the individual applications were declared inadmissible for the abovesaid reasons, the victim status of the association who represented the individual applicants was recognized.

The starting point of the judicial analysis is the fact that legal persons cannot rely on the substantive limb of the right to life and of the right to private life to get the quality of victim. Notwithstanding, the specificity of climate change issues leads the Court to the recognition of associations *locus standi* as representatives of the individuals whose rights are allegedly affected. In other words, it is possible for an association to stand before the

[79] *Ivi*, para. 487.

Court even if it cannot claim to be the victim of a violation of conventional rights.

Moreover, the Strasbourg judges underline that climate change entails necessarily the promoting of intergenerational burden-sharing, even considering the potential irreversible character of climate change and the severity of its consequences. Furthermore, the Court seems to give relevance to the Aarhus Convention,[80] relying on the fact that art. 9, para. 2, of such treaty provides for a general recognition of non-governmental organizations' interest in accessing to justice in environmental matters.

It is worth noting that the Aarhus Convention encompasses a collective dimension of the environment and, as a consequence, aims to expand the ways individuals can participate to public debate and public decisions in environmental matters. In other words, it is a legal instrument whose rationale is the widening of the public opinion role when the protection of the environment is at stake. It is true that the Strasbourg judges can rely on treaties – and they usually do, if necessary – which are binding for the ECHR state parties, in order to interpret the Convention itself. Such a choice is undoubtfully coherent with the Vienna Convention on the Law of Treaties principles on interpretation (in particular art. 31, para. 3, let. c) and is based on a well-established case-law.[81] Nevertheless, the Court does not give relevance to the different – and perhaps irreconcilable – perspectives of the two conventions at stake, in so far as the individual rights dimension

[80] United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded in Aarhus on 25 June 1998.

[81] The Strasbourg judges have often made reference to international treaties, binding for the state parties, to interpret the right protected by the ECHR. See, *inter alia*, *S and Marper v. the United Kingdom*, Applications nos. 30562/04 and 30566/04. Grand Chamber judgement of 4 December 2008 (the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was used to interpret art. 8, while dealing with the necessity in a democratic society test) and *Pindo Mulla v. Spain*, Application no. 15541/20, Grand Chamber judgement of 17 September 2024 (the Court interpreted art. 8 and 9 ECHR in the light of art. 5 and 9 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine).

is crucial in the ECHR and almost irrelevant in the Aarhus Convention.

Conclusively, the Court "finds that the applicant association is lawfully established, it has demonstrated that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members and other affected individuals against the threats arising from climate change in the respondent State and that it is genuinely qualified and representative to act on behalf of those individuals who may arguably claim to be subject to specific threats or adverse effects of climate change on their life, health, well-being and quality of life as protected under the Convention".[82] Such a statement contains a sort of paradox, bearing in mind that the individuals, as members of the association at stake, are regarded as lacking the status of victim whereas the association itself is considered as *genuinely qualified and representative* of the persons which are under a threat for their conventional rights, stemming from the climate change. Nonetheless, the Court took this position, concluding that the *Klimaseniorinnen* claim *on behalf of its members* falls within the scope of art. 8,[83] thus confirming the complete overlapping between such a scope and the theoretically separate issue of the status of victim of the plaintiffs. More precisely, the Court absorbed the issue of admissibility under art. 34 in the completely different question of the applicability of the invoked substantive right to the claim at stake.

One more brief point has to be added: in substance, the Court did not deal with climate change effect on the right to life, dismissing the claim based on art. 2 ECHR and finding it "appropriate to examine the applicant association's complaint from the angle of Article 8 alone. That said, in its case-law analysis below it will have regard to the principles developed also under Article 2, which to a very large extent are similar to those under Article

[82] *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 524.

[83] In this sense, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., paras. 525-526.

8".[84] The Strasbourg judges further referred to the fact that they usually apply "the same principles as those set out in respect of Article 2 when examining cases involving environmental issues under Article 8".[85] One could wonder whether such an approach brings to undermine the protection individuals are guaranteed under art. 2 and, moreover, whether it is coherent with the already mentioned case-law which relies on the severity of the harm in order to ascertain the applicability of art. 2 *or* art. 8 to environmental issues or not.

Such a doubt could be reinforced by the way the Court dealt with the large-scale pollution in the *Terra dei Fuochi* case (the already mentioned *Cannavacciuolo* judgement). The violation of art. 2 was ascertained, in so far as the Italian authorities failed to demonstrate that they did all they could to protect applicants' lives.[86] At the same time, the Court observed that "considering that in respect of Article 8 the applicants relied essentially on the same arguments as those made in respect of their complaint under Article 2, the Court considers that it is not necessary to examine whether there has also been a separate violation of Article 8 on account of an alleged failure to protect the applicants' health and well-being".[87] What remains unclear is whether the *same arguments* by the plaintiff generally cannot be used in order to ascertain multiple violations of the Convention or if such restriction has to be applied to environmental harm which impairs both the right to life and the right to private and family life.

Climate change and large-scale pollution are obviously different issues,[88] even if very strongly related. Nevertheless, if one

[84] *Ivi*, para. 537.

[85] *Ivi*, para. 538.

[86] For abroad analysis of the legal issue at stake, see L. Acconciamessa, "Corte europea e Terra dei fuochi: la tutela pratica ed effettiva del diritto alla vita in caso di esposizione a fonti di inquinamento", in *Diritti umani e diritto internazionale*, XIX (2025), p. 343-371.

[87] *Cannavacciuolo and others v Italy*, cit., para. 469.

[88] As regards the distinction between climate change and large-scale pollution and its effects on direct and potential victims' notions, see P. Magi, "Considerazioni sulla legittimazione ad agire davanti alla Corte EDU in due recenti pronunce in materia di cambiamento climatico e danni ambientali gravi e diffusi", in *Osservatorio sulle fonti*, XVIII (2025), p. 451-453.

considers, on the one hand, the effects of such phenomena on the health of people and, on the other hand, the irreversibility of some of these effects, it is not that clear the reason why the Court found a violation of art. 8 in *Klimaseniorinnen* and a violation of art. 2 in *Cannavacciuolo*.

Moreover, it seems difficult to agree with the Court as regards the admissibility of the applications filed by associations and individuals. In the former case, indeed, the Court expressly excluded natural persons' claims, as already mentioned, taking into consideration the potentially indefinite number of applicants whose rights were at risk because of the climate change and recognized the *locus standi* of the claiming association. In the latter, on the contrary, no "exceptional circumstances"[89] or "special considerations"[90] were deemed existent by the Strasbourg judges, in order to admit the associations' application. Individual complaints were, vice versa, considered admissible.

Once more, the (too) strict separation the Court shaped between climate change cases and other environmental cases is at stake. In a concurring opinion to *Cannavacciuolo* judgement, Judge Krenc observed that "it is difficult to understand how an association can be considered the ideal body for taking judicial action in climate matters, but that this same finding does not apply in environmental matters, even where large-scale pollution affecting a wide area and large numbers of people is in issue".[91] Furthermore, such an approach "could, in addition, be detrimental because it implies a fragmentation in the procedural treatment of environmental matters".[92] If one considers the width

[89] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* Application no. 47848/08, Grand Chamber judgement of 17 July 2014, para. 112.

[90] *Verein Klimaseniorinnen Schweiz v. Switzerland*, cit., para. 475.

[91] *Cannavacciuolo and others v. Italy*, cit., Concurring opinion of Judge Krenc, para. 13.

[92] In this sense, H. Tigroudja, "Massive Pollution, States' Positive Obligations and Remedies Critical Appraisal of the European Court of Human Rights' Cannavacciuolo et al. v. Italy Judgment", National University of Singapore Centre for International Law, 2025, available at https://cil.nus.edu.sg/blogs/massive-pollution-states-positive-obligations-and-remedies-critical-ap-

of polluting phenomena in the Terra dei Fuochi, "it is anachronistic to stick to an individualistic definition of the quality of victims"[93] shaping a strict distinction between climate change and *other* environmental harms.

6. *Conclusions*

The human rights dimension of environmental issues is getting increasingly important. As a consequence, treaty-based courts and organs are frequently asked to take a position on the consistency of state measures directly or indirectly impairing the environment with the relevant conventional rights. As already noted in the introduction, the crucial point is the suitability of such organs to deal with issues which are necessarily *collective* by their nature.

It has to be considered, incidentally, that the protection of common goods, under international law, raises some complex issues, starting with the relevant notion itself. Even if such a topic goes beyond the scope of the present paper, it is worth noting that, in both the main potential notions of public goods, the protection of the environment is considered as included in the category at stake.[94]

praisal-of-the-european-court-of-human-rights-cannavacciuolo-et-al-v-italy-judgment/.

[93] *Ibid.*

[94] As observed by Nollkaemper, at least two different conceptualizations of public goods can be derived from the international practice. The strictly normative perspective, on the one hand, is based on the *erga omnes* nature of the obligations stemming from the norms aimed at protecting such goods. The second possible facet, on the other hand, "defines public goods in terms of their (under-) enforcement". In the latter meaning, "public goods present values that everyone has an interest in, yet individual states have insufficient incentives to protect them and tend to rely on the efforts of others." (A. NOLLKAEMPER, "International Adjudication of Global Public Goods: The Intersection of Substance and Procedure", in *European Journal of International Law*, XXIII (2012), p. 776) The environment as a common good is perfectly summed up in this notion, if one considers the way climate change litigation has taken. It is worth noting that even in 1980 Draft Articles on State Responsibility – Text of the Articles of Part 1 (Arts. 1-35) of the Drafts Adopted by

The foregoing case-law of both the Human Rights Committee and the European Court of Human Rights reveals a gap between civil and political rights protection, on the one hand, and the protection of environment, on the other. Such a gap is probably due to the irreconcilability between the individualistic and anthropocentric approach which characterizes the conventional systems at stake and the common good approach required to protect the environment from the dramatic threats of these days. The negotiations for the conclusion of a protocol to the European Convention on Human Rights on the right to a clean and healthy environment[95] could be seen as implicit confirmation that traditional instruments for the protection of civil and political rights are inadequate for ensuring effective environmental protection. This can easily be derived from the status of victims in the case law of both the Committee and the Court with regard to individuals and legal persons. As we have tried to demonstrate, the exclusion of the quality of victim in right to life cases is neither convincing nor coherent with the previous case-law of the organs at stake and the same could be inferred as regards the breadth of the scope of the individual rights invoked by the ap-

the Commission at its 25th to 32nd Sessions (1973-1980) (International Law Commission [ILC]) UN Doc A/35/10 – the protection of environment was deemed as a fundamental value, if one considers that under art. 19, para. 3, lett. d) of the 1980 drafting," a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas" could be classed as a crime.

[95] The Council of Europe Committee of Ministers adopted the recommendation CM/Rec(2022)20 of 27 September 2022, in order to promote the drafting of such protocol. The negotiations at stake were, at least apparently, impaired by the *Klimaseniorinnen* judgement, taking into account the reaction of the respondent state and third intervening state to such decision. For a wide analysis of the drafting and the technical features the protection of the right to a clean and healthy environment requires, F. Cerulli, "L'adozione di un protocollo addizionale alla CEDU sul diritto a un ambiente sano: prospettive e sfide", in *Diritti Umani e Diritto Internazionale*, XIX (2025), p. 557 ff. and N. Kobylarz, "A World of Difference: Overcoming Normative Limits of the ECHR Framework Through a Legally Binding Recognition of the Human Right to a Healthy Environment", in *Journal of Environmental Law*, XXXVII (2025), p. 23 ff.

plicants in each case. Such a conclusion can be held, *a fortiori*, as regards the climate change impact on the conventional rights guaranteed by the Covenant and by the Convention.

Conclusively, one could wonder whether the more and more frequent recourse to human rights institution in environmental matters is based on the effectivity of such systems (considering the way their decisions are implemented at domestic level) rather than on their attitude to encompass environmental protection within the systems themselves.

DIAGONAL CLIMATE CHANGE CLAIMS BEFORE INTERNATIONAL HUMAN RIGHTS COURTS

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SUMMARY: 1. Introduction. – 2. Existing Approaches to Extraterritoriality before Regional Human Rights Courts: Can They Accomodate Diagonal Climate Change Claims? – 3. The ECtHR's Stance: Climate-Change Claims Fall Outside Existing Bases of Extraterritorial Jurisdiction, and the Court Does Not See Grounds for Developing New Ones. – 4. The IACtHR's Stance: Traditional Categories Fall Short in Climate-Related Contexts, Leading the Court to Articulate New Jurisdictional Grounds. – 5. Conclusion.

1. *Introduction*

Nowadays it is largely uncontroversial to frame climate change as a human right issue,[1] and to address the impacts of environmental harm on individuals through a human-rights-based framework.[2] Scholars have used various expressions to describe this phenomenon, referring to the "greening of human rights",[3] the emergence of environmental rights within human rights law[4] or even "human rights expansionism in the field of climate change".[5]

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[1] B. MAYER, "Climate Change Mitigation as an Obligation Under Human Rights Treaties?", in *American Journal of International Law*, CXV (2021), p. 410 ff.

[2] V. BELLINKX, D. CASALIN, G. ERDEM TÜRKELLI, W. SCHOLTZ, W. VANDENHOLE, "Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind", in *Transnational Environmental Law*, XI (2022), p. 71.

[3] A. CHALABI, "A New Theoretical Model of the Right to Environment and its Practical Advantages", in *Human Rights Law Review*, XXIII (2023), p. 3 ff.

[4] J. KNOX, N. TRONOLONE, "Environmental Justice as Environmental Human Rights", in *Vanderbilt Journal of Transnational Law*, LVII (2024), p. 205 ff.

[5] V. KAHL, "A human right to climate protection – Necessary protection or

This process essentially involves either deriving environmental rights from existing human rights,[6] such as the right to health or life, through a progressive interpretation of pre-existing human rights norms,[7] or seeking recognition of an autonomous right to a healthy environment.[8] The former approach remains predominant since the major universal human rights treaties do not explicitly enshrine such a right,[9] although it has been affirmed in several national constitutions, recognized by the Human Rights Council's Resolution 48/13 del 2021,[10] and most recently by the International Court of Justice (hereinafter "ICJ") in its Advisory opinion "Obligations of States in respect of climate change", which characterized the right to a healthy environment as a precondition of every human rights.[11]

human rights proliferation?", in *Netherlands Quarterly of Human Rights*, XL (2022), p. 164.

[6] J. H. Knox, "Diagonal Environmental Rights", in M. Gibney, S. Sigrun (eds), *Universal Human Rights and Extraterritorial Obligations* (Philadelphia, University of Pennsylvania Press, 2010), p. 150 ff.

[7] V. Kahl, "A human right to climate protection – Necessary protection or human rights proliferation?", cit., p. 164.

[8] B. Lewis, "Environmental Rights or a right to environment? Exploring the nexus between human rights and environmental protection", in *Macquarie Journal of International and Comparative Environmental Law*, VIII (2012), p. 39 ff.

[9] A. Konadu, "Climate Change Litigation and Rights-Based Strategies: Why International Human Rights Approaches to Climate Change Are Not Easily Transplanted to the American Legal System", in *Stanford Environmental Law Journal*, XLI (2022), p. 204.

[10] Resolution adopted by the Human Rights Council on 8 October 2021, A/HRC/RES/48/13.

[11] International Court of Justice, Advisory Opinion of 23 July 2025 in *Obligations of States in respect of climate change*, where it has clarified at para. 393 that "based on all of the above, the Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right.

Against this normative background, cases in which individuals or groups bring climate-related human rights claims before international human rights courts or quasi-judicial bodies against States other than their own are steadily increasing.[12]

The growing number of such claims, often defined as "diagonal"[13] or "transnational",[14] is largely attributable to the inherently cross-border nature of climate change. Greenhouse gas emissions (hereafter "GHG emissions") generate complex, transboundary, and long-term effects[15] that may ultimately infringe upon the human rights of individuals located far beyond the territory of the emitting State. This dynamic gives rise to a particular legal tension: although States exercise effective control over the source of the risk or harm, namely, the activities within their territory that produce GHG emissions, they generally do not exercise control over the individuals who suffer the resulting impacts abroad. As a consequence, conduct that might be attributable to a State under the general rules of international law may nonetheless fall outside the scope of that State's jurisdiction under the relevant human-rights treaty. Indeed, while climate-related human-rights violations may occur anywhere in the world, States are not, under current human rights treaties, required to address such violations wherever they arise.[16] Their obligations remain confined, in prin-

The human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights."

[12] M. De Bellis, "Transnational Climate Litigation: Emergence and Limits of a Diagonal Protection of Fundamental Rights", in *Italian Journal of Public Law*, XVI (2024), p. 438.

[13] J. H. Knox, "Diagonal Environmental Rights", cit., p. 148.

[14] J. Peel, J. Lin, "Transnational Climate Litigation: The Contribution of the Global South", in *American Journal of International Law*, CXIII (2019), p. 696.

[15] European Court of Human Rights, Grand Chamber, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, Application no. 53600/20, 9 April 2024, § 129 ff.

[16] For a more in-depth analysis of this topic, see, *i.a.* J.H. Knox, "Climate Change and Human Rights Law, in *Virginia Journal of International Law*, L (2009), p. 163 ff.; A. Venn, "Rendering International Human Rights Law Fit for Purpose on Climate Change" in *Human Rights Law Review*, XXIII (2023), p. 1; S. McInerney-Lankford, "Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance", in M.B. Gerrad, G.E. Wannier (eds), *Threatened Island Nations: Legal Implications of*

ciple, to a limited category of rights-holders, namely, individuals who are within their territory or otherwise subject to their jurisdiction.[17] This reflects the classical architecture of international human rights law, historically conceived as operating along a "vertical axis",[18] defining the rights of individuals vis-à-vis their own governments and the duties owed by States to those under their authority. This paradox encapsulates one of the most challenging issues in contemporary international law: how to reconcile the predominantly territorial conception of State jurisdiction with the global and diffuse nature of climate-related harm.

From a procedural standpoint, the core difficulty lies in identifying, if at all, the legal basis upon which a State's extraterritorial jurisdiction may be established in diagonal climate change cases involving individuals located abroad who suffer the adverse consequences of climate change. Extraterritorial jurisdiction is not, of course, a novel question in international law; however, existing case law was not developed with climate change litigation in mind.

This contribution therefore seeks to determine whether the traditional categories of extraterritorial jurisdiction can meaningfully accomodate diagonal climate change claims, or whether the distinctive features of such litigation render those categories inadequate, thereby calling for the development of alternative jurisdictional models.

2. *Existing Approaches to Extraterritoriality before Regional Human Rights Courts: Can They Accomodate Diagonal Climate Change Claims?*

The extraterritorial application of human rights concerns situations in which a State bears obligations towards individuals

Rising Seas and a Changing Climate (Cambridge, Cambridge University Press 2013), p. 193.

[17] R. Wilde, "The Extraterritorial Application of the International Human Rights Law on Civil and Political Rights", in S. Sheeran, N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (London, Routledge 2013), p. 635 ff.

[18] J. H. Knox, "Diagonal Environmental Rights", cit., p. 149.

located outside its territorial boundaries.[19] Whether human rights treaties apply in such circumstances depends, in part, on the extent to which the instruments themselves define their territorial scope.[20] Many regional human-rights treaties contain general clauses specifying the spatial reach of the rights they guarantee.

A paradigmatic example is Article 1 of the European Convention on Human Rights (hereinafter "ECHR"), which requires Contracting Parties to secure the Convention rights to all persons "within their jurisdiction" of the Contracting Parties.[21] Similar formulations appear in the American Convention on Human Rights[22] (hereinafter "ACHR") and in other human rights treaties.[23] However, these instruments do not clarify what is meant by the term "jurisdiction". Its meaning has therefore been devel-

[19] P. Janig, "Extraterritorial Application of Human Rights", in C. Binder, M. Nowak, J.A. Hofbauer, P. Jang (eds), *Elgar Encyclopedia of Human Rights* (Cheltenham, Edward Elgar 2022), p. 1; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Priciples and policy*, cit., p. 8.

[20] P. Janig, "Extraterritorial Application of Human Rights", cit., p. 1.

[21] Cf. Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, www.echr.coe.int, which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[22] Article 1 of the ACHR establishes that: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[23] See *i.a.* the Convention on the Rights of the Child of 20 November 1989, www.ohchr.org, which in Article 2(1) provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status"; the International Covenant on Civil and Political Rights of 16 December 1966, which in Article 2(1) provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

oped primarily through judicial interpretation by courts and quasi-judicial bodies, as well as through scholarly analysis.[24] Broadly speaking, jurisdiction may be understood as denoting "a relationship of power, authority, responsibility or control of a state over certain circumstances, most importantly over a given person or space".[25] It is, however, a context-specific concept,[26] and the approaches adopted by different courts and human rights bodies are neither uniform nor fully coherent.[27]

Most human rights treaties are grounded in an essentially territorial conception of State jurisdiction.[28] As a result, extraterritorial application is treated as exceptional and requires specific justification,[29] since it entails the exercise of State authority beyond national borders.

[24] For an in-depth analysis of the concept of jurisdiction, see, among others, P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Torino, Giappichelli 2002); C. Ryngaert, *Jurisdiction in International Law*, (Oxford 2008); M. Akehurst, "Jurisdiction in International Law", in *British Yearbook of International Law*, XLVI (1972), p. 145; M. Dixon, *Textbook on International Law* (Oxford, Oxford University Press 2013), p. 148; M. Milanovic, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", in *Human Rights Law Review*, VIII (2008), p. 411 ff.; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, (Oxford, Oxford University Press 2011); J. Philipp, *Extraterritorial Application of Human Rights,* in C. Binder, M. Nowak, J.A. Hofbauer, P. Janig (eds), *Elgar Encyclopedia of Human Rights* (Cheltenham, Edward Elgar 2022), p. 180 ff.; K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden, Brill 2013); M.L. Banda, *Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm*, in *Minnesota Law Review*, CIII (2018), p. 1880 ff.

[25] P. Janig, "Extraterritorial Application of Human Rights", cit., p. 3.

[26] *Ibid.*

[27] P. Janig, "Extraterritorial Application of Human Rights", cit., p. 3 ff.

[28] C. Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (London, Bloomsbury 2020), p. 25; R. Jennings, A. Watts, *Oppenheim's International Law*, (Oxford, Oxford University Press 1996), p. 456; M. Milanovic, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", cit., p. 415.

[29] *Guide on Article 1 of the ECHR*, cit., paras. 11 ff. See also D. McGoldrick, "Extraterritorial Application of the International Covenant on Civil and Political Rights", in F. Coomans, M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia 2004), p. 44 ff.

Traditionally, extraterritorial jurisdiction has been recognised only in two overarching categories. The first is where a State exercises control over a particular area (the spatial model); the second concerns situations in which the State exercises authority over specific individuals (the personal model). Under the spatial model, jurisdiction is understood as the authority or control a State exercises over a defined space, with the consequence that the State must ensure the full range of treaty-based human rights obligations under the relevant treaty for all persons located there.[30] A classic illustration is the situation in which a State maintains effective control over a foreign territory through its military presence.[31] By contrast, the personal model conceptualises jurisdiction as arising from a State's authority or control over individuals, irrespective of where they are physically located.[32] This typically occurs when State agents operating abroad apprehend, detain, or otherwise exercise direct power over a person; in such circumstances, the individual falls within the State's jurisdiction even though the relevant conduct takes places entirely outside its territory.[33]

It is, however, evident that these traditional jurisdictional models were not devised with the specific features of diagonal climate change claims in mind. Yet the issue is no longer merely theoretical: questions concerning the extraterritorial application of human rights treaties in climate-related litigation have already been raised before several adjudicatory bodies.

Against this backdrop, two broad interpretative approaches have emerged. Some courts and human rights bodies continue to

[30] P. Janig, "Extraterritorial Application of Human Rights", cit., p. 3 ff.

[31] N. Wenzel, "Human Rights, Treaties, Extraterritorial Application and Effects", in *Max Planck Encyclopedia of Public International Law*, 2008, available at http://opil.ouplaw.com; M. Duttwiler, "Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights", in *Netherlands Quarterly of Human Rights*, XXX (2012), p. 149 ff.

[32] P. Janig, "Extraterritorial Application of Human Rights", cit., p. 3 ff.

[33] M. Duttwiler, "Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights", cit., p. 141 ff.

apply the traditional spatial and personal models, thereby excluding the extraterritorial application of human rights treaties in diagonal climate cases. Others have begun to articulate alternative interpretative approaches intended to accomodate the distinctive, transboundary nature of climate change.

The European Court of Human Rights (hereinafter "ECtHR") has followed the former approach,[34] whereas the latter has been adopted by the Inter American Court of Human Rights (hereinafter "IACtHR") and the Committee on the Right of the Child.[35]

3. *The ECtHR's Stance: Climate Change Claims Fall Outside Existing Bases of Extraterritorial Jurisdiction, and the Court Does Not See Grounds for Developing New Ones*

The ECtHR addressed a diagonal climate change claim for the first time in the recent case *Duarte Agostinho and Others v. Portugal and Others*.[36] The application was brought by six Portuguese youth who complained of the present and foreseeable severe impacts of climate change attributable both to their home State, Portugal, and to thirty-two other Contracting States. They alleged violations of Articles 2, 3, 8 and 14 of the ECHR, arguing that, for the purposes of their complaint, they fell within the jurisdiction of all respondent States under Article 1.

The issue of extraterritorial jurisdiction therefore arose in respect of all respondent States except Portugal, for which establishing territorial jurisdiction posed no difficulty, although the application against Portugal was ultimately declared inadmissible for failure to exhaust domestic remedies.

The Court's approach consisted in examining whether its established categories of extraterritorial jurisdiction, considered exceptional departures from the Convention's primarily territori-

[34] See *infra* para. 3 of this Chapter.

[35] See *infra* para. 4 of this Chapter.

[36] European Court of Human Rights, Grand Chamber, Judgment of 9 April 2024, *Duarte Agostinho and others v. Portugal and 32 others*, Application no. 39371/20.

al scope, could apply to the facts of the case.[37] In essence, the Court assessed whether any of the four criteria developed in its jurisprudence for establishing extraterritorial jurisdiction were met. These criteria may be summarised as follows:

(i) the spatial concept of jurisdiction or jurisdiction *ratione loci*, which occurs when a Contracting State exercises effective control of an area outside its national territory, usually as a consequence of lawful or unlawful military actions;[38]
(ii) the personal concept of jurisdiction or jurisdiction *ratione personae*, which arise when there is State agent authority or control over the victim;[39]
(iii) the existence of a jurisdictional link as regards the procedural obligation under Article 2, which implies the existence of proceedings before a national court concerning events that occurred outside the territory of that State, where a connecting link with that State exists;[40]
(iv) the existence of "exceptional circumstances" or "special features".

Unsurprisingly, the Court found no basis for establishing jurisdiction under any of the proposed tests. The first two models were quickly dismissed, as expected. In cases concerning the harmful effects of GHG emissions, there is little connection between those effects and any form of control exercised by the State over the territory affected by the pollution or over the victims themselves located above. As for the third criterion, the Court noted that the question whether, and to what extent, a jurisdictional link could be established by instituting domestic proceedings did not arise in the present case, since the applicants

[37] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 168 ff.

[38] *Ivi*, para. 171.

[39] *Ibid*.

[40] E. Kowalski, "L'interprétation de la notion de juridiction dans le contexte transfrontalier du changement climatique (Obs. soud Cour. eur. dr. h., Gde Ch., décision Duarte Agostinho et autres contre le Portugal e 32 autres Etats, 9 avril 2024)", in *Revue trimestrielle des droits de l'homme*, 2025/3, p. 810 ss

had not initiated any proceedings before the respondent States' courts.[41]

Unable to rely on any territorial connection with the respondent States other than Portugal, the applicants sought instead to identify exceptional factual and legal circumstances that could create a jurisdictional link between themselves and those States. Their position was that, because GHG emissions and the harm they generate inherently cross national borders, a person situated beyond a State's territorial limits but suffering the negative effects of that State's role in driving climate change, or its inaction in controlling such emissions, should nonetheless be treated as within that State's jurisdiction under the Convention.[42]

The applicants developed their argument extensively, identifying a series of special features of the case that, in their view, justify the establishment of extraterritorial jurisdiction. They emphasized the inherently multilateral nature of climate change,[43] noting that the respondent States' material contribution to global warming creates a real risk of harm to them. They further argued that the respondent States exercise a form of control, both over their own GHG emissions and over the applicants' Convention-protected interests, that is sufficient to trigger jurisdiction under the Convention. According to the applicants, the causal connection is also evident: the respondent States' emissions have materially contributed to the worsening of climate change, and the effects of those emissions stand in an equivalent causal relationship with the impact on their rights. Moreover, the respondent States had long been aware, and could reasonably have foreseen, the effects of climate change on the applicants' rights.[44] The applicants also stressed Portugal's limited capacity to protect their Convention rights acting alone, thereby underscoring the

[41] European Court of Human Rights, Grand Chamber, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 183.

[42] A. Ollino, "Qualche riflessione sul caso Duarte Agostinho e sulla nozione di giurisdizione come "controllo sull'esercizio dei diritti umani", in *Diritti umani e diritto internazionale*, XVII (2024), p. 403 ff.

[43] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 124.

[44] *Ivi*, para. 126.

need for effective human rights protection and the avoidance of any legal vacuum within the Convention system.[45] Finally, they argued that recognising extraterritorial jurisdiction in this context would be consistent with broader developments in international law concerning climate change and human rights.

In examining the various circumstances invoked by the applicants, the Court accepted only some of them as well-founded. It recognised, first, that States exercise "ultimate control" over the activities within their territories that produce GHG emissions, and that they have undertaken binding international commitments, most notably under the Paris Agreement, reflected in their domestic legislation, policies, and nationally determined contributions, as well as in certain positive obligations under the Convention. The Court further accepted that, despite the complexity of the causal chain, there exists "a certain causal relationship"[46] between national emissions and harm suffered by individuals outside national territory, given that climate change is a global phenomenon involving shared responsibility. Lastly, it acknowledged the "truly existential" nature of the climate threat, noting that any additional extraction or combustion of fossil fuels beyond net-zero levels inevitably increases global GHG concentrations and aggravates climate impacts.[47]

However, the Court did not draw logical conclusions from these considerations and, indeed, rejected virtually all the other arguments put forward by the applicants, which deserve attention here. First, the applicants contended that jurisdiction should arise from the positive obligations they sought to impose on States, given the grave impact of climate change on their Convention rights. The Court dismissed this reasoning, reiterating that although ECHR rights may, in certain contexts, be "divided and tailored"[48] when assessing extraterritorial jurisdiction, Article 1 remains a threshold requirement – a *conditio sine qua non*. A case must fall within a State's jurisdiction before any assessment of

[45] Ivi, para. 125.
[46] *Ivi*, para. 193.
[47] *Ivi*, para. 189.
[48] *Ivi*, para. 170.

compliance with Convention obligations can be made. The Court found no basis in its jurisprudence for the idea that the seriousness of the issue or the type of positive obligations involved could extend a State's jurisdiction to persons located beyond its territory or control. Nor could the applicants' EU citizenship establish such a link,[49] as this would distort EU law and impose Convention duties on States in situations where they exercise no authority over the relevant territory or individuals. Apart from Portugal, therefore, no special connection existed between the applicants and the respondent States capable of grounding jurisdiction.

Secondly, the applicants suggested that extraterritorial jurisdiction should be recognised to enable broader climate litigation. The Court rejected this as well, emphasising that the ECHR was not designed to serve as a general environmental protection instrument, a domain addressed by other branches of international and domestic law. Accepting the applicants' argument would represent a profound departure from the Convention's rationale, which is anchored chiefly in territorial jurisdiction and the principle of subsidiarity.[50]

Thirdly, the Court declined to rely on alternative tests for establishing extraterritorial jurisdiction. The applicants had invoked two such models: the "*control over the applicants' interests*" test and the "*control-over-the-source*" test. The latter will be examined in the next section, as it aligns with the approaches adopted by the IACtHR and the Committee on the Rights of the Child.[51]

The concept of jurisdiction understoods as "control over the exercise of Convention rights or interests" is not new in the Court's practice.[52] It has been invoked in previous cases, such as

[49] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 200.

[50] *Ivi*, para. 201.

[51] See *infra* para. 4 of this Chapter.

[52] A. Ollino, "Qualche riflessione sul caso Duarte Agostinho e sulla nozione di giurisdizione come 'controllo sull'esercizio dei diritti umani'", cit., p. 408 ff.

M.N. et al. v. Belgium[53] and *H.F. et al. v. France*,[54] to argue that a State's failure to act, despite having the capacity to influence the enjoyment of certain Convention rights by individuals abroad, should suffice to establish jurisdiction.[55] The Court has consistently rejected this view. In *Duarte*, albeit somewhat briefly, the Court reaffirmed its firm opposition to this approach. It noted that, under its settled case-law, extraterritorial jurisdiction within the meaning of Article 1 requires control over the person, not merely over the person's interests.[56] Except for the specific line of authority under Article 2 concerning intentional deprivation of life by State agents, the Court's jurisprudence provides no basis for adopting a criterion such as "control over the Convention interests". The Court further emphasised that expanding the concept of extraterritorial jurisdiction in this way would constitute a radical departure from the principles underlying Article 1.[57]

It becomes readily apparent that the ECtHR was concerned about the systemic implications that adopting such an approach would have for the ECHR's human rights framework. First, it observed that grounding extraterritorial jurisdiction on "control over an individual's Convention interests" would seriously compromise the foreseeability of the Convention's scope.[58] Given the inherently multilateral and transboundary nature of climate change, this criterion would allow virtually anyone, anywhere in the world, who suffers adverse effects from climate change could claim to fall within the jurisdiction of any Contracting State, merely by invoking that State's contribution to global emissions

[53] European Court of Human Rights, Grand Chamber, Judgment of 5 May 2020, *M.N. and Others v. Belgium*, Application n. 3599/18.

[54] European Court of Human Rights, Grand Chamber, Judgment of 14 September 2022, *H.F. and others v. France*, Applications nos. 24384/19 and 44234/20.

[55] *Ibid*.

[56] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 204 ff.

[57] *Ibid*.

[58] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 206.

or its climate-related omissions.[59] This would make it impossible for States to anticipate the extent of their Convention responsibilities, stretching Article 1 far beyond its intended limits. Nor would restricting such claims to the Convention's legal space, while permitting applicants to select particular respondent States, provide any principles or workable constraint. The global and diffuse character of climate change renders such an extension artificial, difficult to justify, and incompatible with the Convention's established framework. Secondly, extending jurisdiction on the basis of "control over the applicants' Convention interests" would create profoundly uncertainty for States. Any action or omission connected to ordinary activities influencing climate change could generate jurisdiction over individuals abroad who have no specific link to the State in question. This would result in an unlited expansion of Convention responsibilities, effectively transforming the Convention into a global climate-change treaty, an outcome unsupported by its text and purpose.[60]

4. *The IACtHR's Stance: Traditional Categories Fall Short in Climate-Related Contexts, Leading the Court to Articulate New Jurisdictional Grounds*

The IACtHR, in its Advisory Opinion *Environmental and Human Rights*, [61] expressed its view on the issue of jurisdiction in cases with a transnational dimension. It clarified that the traditional bases of extraterritorial jurisdiction recognised in international jurisprudence, namely, the exercise of authority or coercive power over individuals and effective control over territory, are ill-suited to situations involving transboundary environmental harm.[62]

[59] *Ibid*.

[60] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 208.

[61] Inter-American Court of Human Rights, Advisory Opinion of 15 November 2017 in *Environment and Human Rights*, OC-23/17, available at www.corteidh.or.cr, para. 20 ff.

[62] *Ivi*, para. 81.

The IACtHR held that, in order to determine the existence of extraterritorial jurisdiction in such contexts, the obligations arising under the ACHR must be interpreted in light of States' environmental duties under international law.[63] Among these, particular relevance is given to the obligation to prevent and regulate transboundary environmental pollution, established in numerous international environmental treaties.[64] The Court recalled that, under international law and consistent with the case law of the ICJ, States have a duty to ensure that their territory is not used for acts that violate the rights of other States. Applying this principle, the IACtHR affirmed that States must take all necessary measures to ensure that activities conducted within their jurisdiction or under their control do not cause environmental harm in other States or in areas beyond national jurisdiction.[65]

This interconnection between international environmental law and international human rights law has also been affirmed by the UN Human Rights Committee in its General Comment No. 36 on the right to life.[66] The Committee emphasized that responsibility for transboundary environmental harm is a cornerstone of international environmental law and that, under customary international law, all States have a duty to ensure that activities within their jurisdiction or control do not cause significant transboundary environmental damage to other States or to areas beyond national control. It is this very principle, the IACtHR noted, that should inform the scope of States' human rights obligations in cases of harm arising from environmental degradation.[67]

Building on these considerations, the IACtHR concluded that States have an obligation to prevent transboundary environmen-

[63] *Ibid*.

[64] *Ivi*, para. 96.

[65] *Ivi*, para. 97.

[66] United Nations Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018.

[67] *Ivi*, para. 62: "obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law."

tal harm that may infringe the human rights of persons located outside their territory.[68] When such harm occurs, namely where environmental damage originating in one State's territory affects individuals' rights abroad, the notion of "jurisdiction" under the ACHR must be interpreted as extending to those individuals, provided that a causal link exists between the act originating within the State's territory and the violation of the victims' human rights. [69]

In cases of transboundary environmental damage, therefore, jurisdiction is founded on the principle that the State in whose territory or under whose jurisdiction the harmful activities are conducted exercises effective control over those activities and is in a position to prevent them from causing cross-border harm that interferes with the enjoyment of human rights abroad. Accordingly, potential victims of the negative consequences of such activities are deemed to fall within that State's jurisdiction for purposes of establishing responsibility for failure to comply with its duty to prevent transboundary harm.[70] On this basis, the IACtHR concluded that, since the obligation to prevent transboundary environmental damage is recognized under international law, States may be held responsible for any significant harm caused to individuals outside their borders by activities originating in their territory or under their effective control, provided that a causal connection can be established between the harm suffered and the State's acts or omissions.[71]

Commentators have described this reasoning as the articulation of a "third and distinctive jurisdictional link",[72] under which extraterritorial jurisdiction may be recognized whenever a causal link exists between an act originating within a State's territory

[68] Inter-American Court of Human Rights, *Environment and Human Rights*, cit., para. 101.

[69] *Ibid*.

[70] *Ivi*, para. 102.

[71] *Ivi*, para. 103.

[72] G. Quattrocchi, "Applicabilità extraterritoriale della Convenzione americana dei diritti umani e prevenzione del danno ambientale transfrontaliero", in *Diritti umani e diritti internazionale*, XII (2018), p. 687 ff.

and the violation of the human rights of persons situated abroad.[73] In doing so, the Court effectively moved beyond the traditional spatial and personal models, which confined the establishment of jurisdiction to situations where a State exercised some form of control over individuals or territory abroad, and introduced a new standard based on *causality,* the so-called control-over-the source test or also *causality test*.[74] This approach better reflects the distinctive features of transboundary environmental harm, including that arising from climate change, as compared to earlier categories developed in international case law. In the IACtHR Advisory Opinion, regarding transboundary environmental harm, effective control is no longer tied to the victim's location or to control over the victims themselves. What matters instead is whether the source State exercised effective control over the harmful activities.[75]

In its recent Advisory Opinion "Climate emergency and Human Rights",[76] the IACtHR has reaffirmed the conclusions reached in its 2017 Advisory Opinion, thereby implicitly clarifying that the considerations expressed with regard to transboundary environmental harm can also be regarded as pertinent to climate change transboundary harm. Indeed, the Court reiterated that climate-related harm is, by its very nature, transboundary,[77] and that States are required to provide prompt, adequate, and effective redress to individuals and to other States that suffer transboundary damage resulting from activities carried out within their territory or under their jurisdiction. This obligation arises where there is a causal link between the damage caused and

[73] Inter-American Court of Human Rights, Advisory Opinion *Environment and Human Rights,* cit., para. 101: "if there is a casual link between the act that originated in its territory and the infringement of the human rights of persons outside its territory."

[74] *Recent Cases, Sacchi v. Argentina*, No. CRC/C/88/D/104/2019, in *Harvard Law Review*, 2022, 1985.

[75] M. Feria-Tinta, "Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions", in *Europe of Rights & Liberties*, III (2021/1), p. 57.

[76] Inter-American Court of Human Rights, Advisory Opinion of 29 May 2025 in *Climate Emergency and Human Rights*, AO 32/25.

[77] *Ivi*, para. 295.

the act or omission of the State of origin in relation to activities occurring within its territory or under its jurisdiction or control. Consequently, the Court emphasised that guaranteeing access to justice necessarily entails recognising the legal standing of persons and entities that do not reside within the State's territory.

The IACtHR's Advisory Opinion "Environment and Human Rights" has already had significant repercussions in the work of the UN Human Rights Committee, particularly regarding the interpretation of "jurisdiction" in Article 2(1) of the International Covenant on Civil and Political Rights. The Committee has affirmed that transboundary environmental harm may give rise to corresponding transboundary human rights obligations. Specifically, in General Comment No. 36, it held that States must ensure that all activities taking place wholly or partly within their territory, or elsewhere under their jurisdiction,[78] that have a direct and reasonably foreseeable impact[79] on the right to life of persons outside their territory do not violate that right.[80]

A first application of the *causality test* in a climate change-related case was provided by the Committee on the Rights of the Child in *Sacchi et al. v. Argentina et al.* [81] The Committee issued

[78] United Nations Human Rights Committee, *General Comment No. 36*, cit.

[79] This approach has been described in the literature as the "impact approach," as it focuses on the impact of a State's harmful activities on the human rights of individuals located elsewhere (D. Møgster, "Towards Universality: Activities Impacting the Enjoyment of the Right to Life and Extraterritorial Application of the ICCPR", in *EJIL:Talk*!, 2018).

[80] See United Nations Human Rights Committee, *General Comment No. 36*., cit: "to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with [the right to life]."

[81] Committee on the Rights of the Child, *C. Sacchi et al. v. Argentina*, UN Doc. CRC/C/88/D/104/2019, 22 September 2021. For an in-depth discussion of the case, see A. Nolan, "Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in Sacchi v. Argentina", in *EJIL:Talk!*, 20 october 2021, available at www.ejiltalk.org; M. La Manna, "Cronaca di una decisione di inammissibilità annunciata: la pe-

five decisions concerning communications filed by sixteen children against five States parties to the Convention on the Rights of the Child,[82] alleging violations of their rights to life,[83] health,[84] cultural participation,[85] and the best interests of the child due to the worsening climate crisis.[86] Although the communications were declared inadmissible for failure to exhaust domestic remedies,[87] the Committee interpreted the concept of "jurisdiction"

tizione contro il cambiamento climatico Sacchi et al. C. Argentina et al. non supera il vaglio del Comitato sui diritti del fanciullo", in *SidiBlog*, 15 november 2021, available at www.sidiblog.org; C. Bakker, "'Baptism of Fire'? The First Climate Case before the UN Committee of the Rights of the Child", in *QIL-Questions of International Law*, 2020, p. 5 ff.; E. Carpanelli, "Cambiamenti climatici e obblighi intergenerazionali dinanzi agli organi di controllo istituiti dai trattati sui diritti umani: alcune riflessioni alla luce della recente decisione di irricevibilità del Comitato dei diritti del fanciullo nel caso Sacchi et al. C. Argentina et al.", in P. Pantalone, *Doveri intergenerazionali e tutela dell'ambiente*, numero monografico de *Il diritto dell'economia* (2021), p. 102 ff.; L. Magi, "Cambiamento climatico e minori: prospettive innovative e limiti delle decisioni del Comitato per i diritti del fanciullo nel caso Sacchi e altri", in *Diritti umani e diritto internazionale*, XVI (2022), p. 157.

[82] Committee on the Rights of the Child, Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019, CRC/C/88/D/104/2019; Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 105/2019, CRC/C/88/D/105/2019; Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 106/2019, CRC/C/88/D/106/2019; Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 107/2019, CRC/C/88/D/107/2019; Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 108/2019, CRC/C/88/D/108/2019.

[83] See Art. 6, Convention on the Rights of the Child.

[84] See Art. 24, Convention on the Rights of the Child.

[85] See Art. 30, Convention on the Rights of the Child.

[86] See Art. 3, Convention on the Rights of the Child.

[87] For a detailed examination of the decisions, see M. La Manna, *op. cit.*; E. Carpanelli, *op. cit.*; L. Magi, *op. cit.*

in Article 2(1) of the Convention[88] as encompassing all the applicants, not only those residing within the respondent States' territories.[89]

Acknowledging that climate-related transboundary harm raises novel jurisdictional issues,[90] the Committee expressly adopted the *causality test* developed by the IACtHR.[91] It held that, where climate change causes transboundary harm, children located outside the emitting State's territory must nevertheless be considered within its jurisdiction if there exists a causal link between that State's conduct and the adverse impact on their rights.[92] Moreover, the harm must have been reasonably foreseeable to the emitting State at the time of the relevant acts or omissions.[93]

Scholars have noted that the Committee effectively operationalized the *causality test* through three cumulative elements: [94] (i) the emitting State's effective control over the sources of harmful emissions; (ii) a causal link between the State's conduct and the adverse effects of those emissions on the rights of children located abroad; and (iii) the reasonable foreseeability of the harm at the time of the State's conduct.

With respect to control, the Committee found that a State exercises such control when it regulates potentially harmful activities and can enforce compliance.[95] As to causation, it observed that scientific evidence establishes that GHG emissions originating in one State contribute to global climate change and can adversely affect human rights both within and beyond that State's

[88] Article 2(1) of the Convention provides that States Parties are required to respect and ensure the rights of every child within their jurisdiction. This provision is further specified in Article 5(1) of the Protocol, which states that the Committee is competent to receive communications submitted by individuals or groups of individuals who are within the jurisdiction of a State Party.

[89] L. Magi, *op. cit*., p. 160.

[90] Committee on the Rights of the Child, *Decision No. 104/2019*, cit., para. 10.4.

[91] *Ivi*, para. 10.7

[92] *Ibid.*

[93] *Ibid.*

[94] M. La Manna, *op. cit.*

[95] Committee on the Rights of the Child, *Decision No. 104/2019,* cit., para. 10.9.

territory.[96] In line with the IACtHR's approach, it further clarified that responsibility arises only when the harm is significant and the circumstances of the specific case warrant attribution.[97] Drawing on the principle of common but differentiated responsibilities in the Paris Agreement, the Committee emphasized that the collective nature of climate change does not absolve States of their individual responsibility for harm caused by emissions originating within their territories. [98]

Regarding foreseeability, the Committee considered it to be established *ipso facto* in light of the widespread and well-documented scientific evidence on the human rights impacts of greenhouse gas emissions, which States have long had access to.[99] Accordingly, actual knowledge is not required; rather, the general acceptance of such evidence suffices to render the harm foreseeable.[100]

The Committee thus adopted the same jurisdictional approach elaborated by the IACtHR, replacing the traditional *control* requirement with one based on *direct and foreseeable causality*.[101] This approach was strongly contested by respondent States, particularly France and Argentina, which argued that the applicants were neither under their effective control nor within their territories, making it impossible to establish the requisite causal nexus between State conduct and human rights violations resulting from climate-induced natural events occurring elsewhere.[102]

[96] *Ibid*.

[97] *Ivi*, para. 10.12.

[98] A. Nolan, *op.cit*.; Committee on the Rights of the Child, *Decision No. 104/2019,* cit., para. 10.10.

[99] Committee on the Rights of the Child, *Decision No. 104/2019*, cit., para. 10.10.

[100] M. La Manna, *op. cit*.; Committee on the Rights of the Child, *Decision No. 104/2019,* cit., para. 10.9-11: "it was generally accepted that greenhouse gas emissions contribute to climate change and that climate change has an adverse effect on individuals beyond any emitter's territory"… "each state party had known about the harmful effects of its contributions to climate change for decades".

[101] *Recent Cases, Sacchi v. Argentina, op. cit.,* p. 1988. CHECK per l'autore!

[102] M. La Manna, *op. cit.*

While these objections are understandable from a defensive standpoint, given the potentially expansive implications of the Committee's reasoning, they overlook the Committee's central premise in *Sacchi*: that climate change poses fundamentally new jurisdictional challenges. The most innovative aspect of this approach lies in the recognition that, in the face of such novel phenomena, the concept of jurisdiction in international human rights law is undergoing a gradual emancipation from the traditional notion of State sovereignty over territory and persons. As one commentator aptly put it, "Sacchi dealt with a scenario where no finding of State control over petitioners could credibly be argued: fossil fuels driving extreme weather are not state agents who bend the petitioners to their authority."[103]

As noted earlier, the ECtHR in *Duarte* rejected the extraterritorial jurisdiction test developed by the IACtHR, even though the applicants had expressly relied on it. The ECtHR, however, did not explain why the test developed by the IACtHR cannot be applied. It merely stated that the test is grounded in a different conception of jurisdiction, one that has not been accepted in the Court's own case law.[104]

5. *Conclusion*

From the foregoing analysis, it becomes clear that both the ECtHR and the IACtHR start from the same premise: climate change poses an existential threat to the protection of fundamental human rights and raises unprecedented legal questions. Yet they reach diametrically opposed conclusions as regards the admissibility of diagonal climate change claims. The ECtHR refuses to extend traditional categories of extraterritorial jurisdiction or to develop new ones, precisely because of the inherently transnational nature of climate change. By contrast, the IACtHR introduces a new "control-over-the-source" test, considering existing

[103] *Recent Cases, Sacchi v. Argentina, op. cit.,* 1986. CHECK per l'autore!

[104] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 212.

jurisdictional models inadequate to address climate change as a transnational phenomenon. In practical terms, this divergence is anything but neutral.

The position adopted by the ECtHR effectively precludes the Convention from serving as a jurisdictional basis for diagonal climate change claims. As a result, climate change can be litigated before the ECtHR only within the confines of territorial jurisdiction, giving the clear impression that domestic courts are expected to take the leading role in addressing diagonal climate-related disputes,[105] despite the well-known obstacles posed by State immunity, the limited effectiveness of remedies, and the uncertain standing of foreign applicants.[106] However, the substantive limitations of such a strictly territorial approach taken by the ECtHR are evident. This model inevitably privileges a European-centred perspective. It channels litigation towards the protection of individuals within the jurisdiction of States Parties to the ECHR while sidelining the interests and claims of the "Most Affected People and Areas" (the so-called MAPA). [107]

On the other hand, stands the approach of the IACtHR, which begins from the premise that the structural features of climate litigation render traditional categories of extraterritorial jurisdiction inadequate. The Court seeks to articulate a legal response to the concrete real-world problem that individuals, frequently those living in the poorest regions of the world, bear a disproportionate share of the human rights burdens generated by climate change. To this end, it develops a new jurisdictional test centred on the element of control over the source of GHG

[105] M. Milanovic, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", cit.

[106] For an overview of the proceedings followed before national courts see M. Gibney, *Extraterritoriality*, in M. Wewerinke-Singh, S. Mead (eds), *The Cambridge Handbook on Climate Litigation* (Cambridge, Cambridge University Press 2025), p. 221.

[107] K. Schayani, "No Global Climate Justice from this Court: A Critical Analysis on How the ECtHR's Rulings in the Climate change Cases Exclude the Most Affected People and Areas from Access to Climate Change Litigation", in *Völkerrechtsblog* (15 April 2024), available at https://voelkerrechtsblog.org/no-global-climate-justice-from-this-court/.

emission. It proceeds from the premise, one that, in the author's view, is entirely sound, that conventional obligations must be interpreted in light of international environmental law. The latter rests on a fundamental pillar: the obligation of States to prevent transboundary environmental harm. It is from this principle that the criterion of effective control is derived, a standard that becomes relevant only where a causal link and a harmful act are established. What is perhaps even more illuminating, however, is the application of this test by the Committee on the Rights of the Child in *Sacchi*.[108] In that decision, the Committee further clarified the operation of the test, offering an insightful account of the elements of causation, attribution, and foreseeability, precisely the most complex legal issues in cases involving transnational climate-related harm. Notably, the Committee underscores the centrality of scientific evidence in establishing both causation and foreseeability. The scientific record demonstrates that emissions originating in one State contribute to global climate change and adversely affect human rights both within and beyond that State's territory, and it has documented these impacts with a degree of certainty long available to States. With respect to attribution, and relying on the principle of common but differentiated responsibilities enshrined in the Paris Agreement, the Committee further emphasized that the collective nature of climate change does not absolve States of their individual responsibility for harm caused by emissions originating within their territories. It is against this structured and evidence-based reasoning that the ECtHR's cursory treatment of the issue in *Duarte* becomes difficult to reconcile. The ECtHR merely states that the IACtHR's approach reflects a jurisdictional model it has not adopted, without offering a substantive explanation for declining to follow it. Any reasons for this reluctance can only be inferred indirectly from the judgment. The ECtHR stresses that climate harms arise from a "complex" and "particularly diffuse" chain of effects, "unpredictable in terms of time and place," which makes it challenging to assess each State's specific contribution to adverse effects occurring

[108] See *supra* para. 4 of this Chapter.

abroad. This difficulty is said to stem from the multiplicity of States contributing to the harm in climate change litigation and from the inherent challenges in demonstrating a direct link between a given State's conduct and a specific victim.[109] The ECtHR is evidently referring to issues of attribution and causation that indeed complicate the determination of State responsibility in the context of diagonal climate change claims. Yet it provides no indication as to how these challenges might be addressed, nor does it explain why the IACtHR's approach could not be applied within the ECHR system. The risk inherent in the ECtHR's position is that a State could avoid responsibility for climate-related human rights harm merely because the consequences materialize beyond its territory, and that victims of the same harmful activities might be treated differently solely on the basis of where they happen to live. Conclusions that are not only unjust, but also difficult to reconcile with established principles of international law.

Another point in the ECtHR's reasoning, that appears difficult to endorse is its sharp distinction between what it calls "a system of objective human rights obligations"[110] and the international environmental law instruments invoked by the applicants, such as the United Nations Framework Convention on Climate Change, affirming in the Preamble the responsibility of States to prevent environmental harm beyond their jurisdiction, and the Articles on Prevention of Transboundary Harm from Hazardous Activites.[111] The Court considers these instruments irrelevant for establishing extraterritorial jurisdiction on the ground that they are fundamentally different from the Convention:[112] the latter is a human rights treaty not designed to provide general environmental protection; the former regulate inter-State relations, whereas the Convention establishes objective obligations owed

[109] A. Boyle, "Human Rights and Environment: Where Next?", in *European Journal of International Law*, XXIII (2012), p. 640

[110] European Court of Human Rights, *Duarte Agostinho and others v. Portugal and 32 others*, cit., para. 212.

[111] *Ivi*, para. 210 ff.

[112] *Ivi*, para. 212.

to individuals; and, moreover, norms addressing extraterritorial environmental harm do not, in the Court's view, bring affected persons within the jurisdiction of the State from which the harm originates. While the Court is certainly correct in observing that in human rights treaties the primary beneficiaries are not other States but individuals within a State's jurisdiction, its approach risks interpreting the ECHR in a vacuum.[113] Such an interpretation sits uneasily with Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, which reflects customary international law and requires that treaty provisions be interpreted in light of "any relevant rules of international law applicable between the parties."[114] In the climate change context, overlooking the systemic relationship between international human rights law and international environmental law appears particularly unpersuasive. The principle of systemic interpretation has also been affirmed by the ICJ in its Advisory Opinion on *Obligations of States in respect of Climate Change*, in which the Court stated that "international human rights law, the climate change treaties and other relevant environmental treaties, as well as the relevant obligations under customary international law, inform each other".[115] The ICJ made clear that, in implementing their human rights obligations, States must take into account their obligations under climate-change treaties, other relevant environmental treaties, and under customary international law.[116] Furthermore, the evolution of international law cannot be ignored.[117] In this regard, the broader international trend toward recognising and expanding States' extraterritorial human rights obligations in the context of climate change cannot be overlooked. This develop-

[113] M. Feria-Tinta, "Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions", cit., p. 59.

[114] *Ivi*, p. 60.

[115] International Court of Justice, *Obligations of States in respect of Climate Change*, cit., para. 404.

[116] *Ibid.*

[117] M. Feria-Tinta, "Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions", cit., p. 60.

ment has been endorsed not only by the IACtHR and the Committee on the Rights of the Child, as noted above, but also by the African Commission on Human and Peoples' Rights[118] and several other UN treaty bodies.[119] Against this backdrop, the ECtHR's position appears increasingly at odds with a growing global consensus on the need to address the inherently transboundary nature of climate-related human rights harms. Moreover, in its own case-law, the ECtHR has consistently held that the Convention must be interpreted in light of present-day conditions, a principle that should apply with particular force to the novel climate change claims now coming before the Court.[120]

More broadly, it appears that concerns relating to the preservation of the ECHR system and to institutional balance carried significant weight in *Duarte,* alongside strictly legal considerations. The ECtHR expressed caution that extending the concept of jurisdiction under Article 1 far beyond its intended limits could undermine the foreseeability for the ECHR's scope for States and risk creating an open-ended form of extraterritorial jurisdiction. Such systemic considerations are understandable, since the Court cannot reasonably be expected to assume the role of a global climate tribunal.[121] At the same time, the ECtHR remains one of the most effective human rights protection mechanisms in the world, and the issue raised by diagonal climate change claims are not the product of procedural strategy but reflects a substantive legal question: how to ensure that a State may be held accountable for its responsibility even when the consequences of a climate-related human rights harm materialize beyond its territory. Simply setting aside the inherently transbound-

[118] African Commission, "General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to life (Article 4)", 18 November 2015.

[119] "Joint Statement on Human Rights and Climate Change", 16 September 2019, available at https://digitallibrary.un.org/record/3871313?v=pdf

[120] M. Feria-Tinta, "Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and Other Key Underlying Notions", cit., p. 60.

[121] European Court of Human Rights, *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, cit., para. 449.

ary nature of climate change fails to address this real problem, which leaves many affected individuals without meaningful avenues for redress. In this context, the Court's approach is shaped by a degree of judicial restraint and by an awareness of the delicate equilibrium between law and politics in climate adjudication, as well as by the concern that an expansive interpretation of climate-related obligations could generate institutional tensions. These are developments the ECtHR has recently encountered in the migration field.[122] Such caution sits somewhat uneasily with the ECtHR's longstanding role in addressing complex and evolving human rights questions.

In its Advisory Opinion on the *Obligations of States in respect of Climate Change*, the ICJ could have offered much-needed clarification on whether States bear extraterritorial human rights obligations for climate-related harm occurring beyond their borders, yet it opted not to address the issue. Instead, the Court limited itself to observing that each human rights regime is constrained by the jurisdictional scope of its respective treaty.[123] This was a missed opportunity, as further guidance on these matters would have been of considerable value. The ICJ might also have engaged with the approaches developed by regional human rights courts, but its reasoning leaves no room for such comparative analysis. Despite this, the Court has provided an interesting

[122] In an Open Letter of 22 May 2025, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf, several Governments – at the initiative of Italy and Denmark – complained that the European Court of Human Rights had extended the scope of the Convention beyond its original intent, thereby limiting their ability to make policy choices in the field of migration to the detriment of domestic security. In one passage, they stated that "Whether the Court, in some cases, has extended the scope of the Convention too far as compared with the original intentions behind the Convention, thus shifting the balance between the interests which should be protected. We believe that the development in the Court's interpretation has, in some cases, limited our ability to make political decisions in our own democracies. And thereby affected how we as leaders can protect our democratic societies and our populations against the challenges facing us in the world today."

[123] International Court of Justice, *Obligations of States in respect of Climate Change*, cit., para. 402.

basis for further reflection. In paragraph 402 of the Advisory Opinion, the ICJ states that treaty law and customary international law must be analysed separately. This assertion is not further clarified. It has nonetheless been interpreted, persuasively, in our view, as suggesting that while the Court is unwilling to extend extraterritorial obligations under human rights treaties, it may be leaving space for such obligations to develop under customary international law, which is more flexible and better suited to addressing transboundary climate harm.[124] It remains to be seen whether this will constitute a significant factor in the evolution of the matter at issue.

In light of the considerations set out above, it would be unrealistic to assume that the approach developed by the IACtHR, although considerably more progressive than that of the ECtHR, could on its own overcome all the structural barriers inherent in diagonal climate change litigation within human rights law.[125] Conversely, even if the ECtHR had adopted a position favourable to the applicants in *Duarte*, the impact of such a ruling would inevitably have been limited, particularly with respect to identifying which States could be held responsible under the ECHR. It is evident, for instance, that major global emitters such as China and the United States would never fall within the jurisdiction of these regional courts.[126] This, in turn, illustrates the extent to which climate change litigation before regional human rights courts, effective though it may be in some respects, remains constrained by significant structural limitations.

[124] A. Jamali, "The ICJ's Cautious Approach to Extraterritorial Human Rights Obligations in the Climate Context", available at https://climaterights-database.com/2025/08/07/the-icjs-cautious-approach-to-extraterritorial-human-rights-obligations-in-the-climate-context/

[125] M. Gibney, *Extraterritoriality*, cit., 221.

[126] *Ibid*.

Section Three

Trade, Investments and Corporations

THE RELEVANCE OF ENVIRONMENTAL SUSTAINABILITY IN THE CONTEXT OF INTERNATIONAL TRADE AND INVESTMENT LAW

Carlo de Stefano*

Summary: 1. Introduction. – 2. The WTO Legality of Domestic Measures in Furtherance of Climate Change Action. – 3. A Case Study: The European Union's Carbon Border Adjustment Mechanism. – 4. The Interaction between International Investment Law and the International Climate Change Regime. – 5. The Scrutiny of States' Climate Measures under International Investment Law. – 6. Concluding Remarks.

1. *Introduction*

Environmental sustainability, as a general interest, is increasingly impacting also international trade and investment law. Upon reliance on the Brundtland Report of 1987,[1] environmental sustainability can be considered as the capacity to preserve the ecological balance of the planet earth planet's and exploit natural resources to support the wellbeing of mankind without compromising the ability and potential of future generations to meet their own needs. The present contribution focuses on environmental sustainability under the specific lens of the global fight against climate change.

The compelling character of human-induced climate change, as incontrovertibly established by scientific evidence, furthers its acknowledgment as the primary and most urgent contemporary global issue across the economic, social and political dimension ("*[c]limate change is the mother of all global commons problems*").[2]

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[1] Report of the World Commission on Environment and Development: Our Common Future, October 1987, *passim*, chapter I.3, para. 27.

[2] D. Bodansky, "Climate Change: Reversing the Past and Advancing the Future", in *AJIL Unbound*, CXV (2021), p. 80 ff.

Following the recognition of the "tak[ing of] urgent action to combat climate change and its impacts" among the 2015 Sustainable Development Goals (SDGs),[3] the Paris Agreement of 12 December 2015,[4] adopted multilaterally under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC)[5] and featuring 194 Parties, represents one of the greatest achievements of the international climate change regime (ICCR). Given its comprehensive scope, it provides a wide-ranging regulation of the gamut of legal aspects and processes that pertain to the fight against climate change, such as mitigation, adaptation, finance, technology, development and transfer, transparency of action, support and capacity building, loss and damage, as well as compliance.[6] The attainment of the ambitious goals[7] envisaged in the Paris Agreement demands international and national strategies and planning fostering unprecedented figures of "green" investment that are eligible to international protection under international trade agreements, notably the

[3] Sustainable Development Goals, UN Doc. A/RES/70/1 (2015), Goal 13.

[4] Paris Agreement, 12 December 2015, entered into force 4 November 2016. See D. Bodansky, "The Paris Climate Change Agreement: A New Hope", in *American Journal of International Law*, CX (2016), p. 288 ff.; L. Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics", in *International & Comparative Law Quarterly*, LXV (2016), p. 493 ff.; S. Maljean-Dubois, L. Rajamani, "L'Accord de Paris sur les changements climatiques du 12 décembre 2015", in *Annuaire français de droit international*, LXI (2015), p. 615 ff.

[5] United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 21 March 1994. See Ph. Sands, "The United Nations Framework Convention on Climate Change", in *Review of European Community & International Environmental Law*, I (1992), p. 270 ff.

[6] D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law* (Oxford, Oxford University Press 2017), p. 234.

[7] Paris Agreement, Art. 3: "(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".

World Trade Organization (WTO) covered agreements and international investment agreements (IIAs).

The fight against climate change, it being the imperative of present times, begets analysis and reflections about the traditional international economic law dichotomy between the protection of the economic rights of exporters and foreign investors, on one hand, and the legitimate vindication by States of non-economic policies, values and concerns, such as the preservation of the environment, the promotion of health standards and the guarantee of adequate labour conditions on the other hand.[8] Binding commitments stemming from international economic law, namely under the WTO covered agreements and especially IIAs, have been addressed as a factor of "regulatory chill" adversely affecting actual and potential States' climate change actions, including in relation to the *mise en oeuvre* of the Paris Agreement.[9] It remains controverted whether such an impairment of States' climate-friendly strategies and efforts is the inescapable consequence of the stipulation of international commercial agreements in and of themselves, rather than the result of (given) decisions – judicial, quasi-judicial and arbitral – interpreting and applying such treaties.[10] Significantly, the persuasive proposition of the *progressive climatization of international law* may be tested also in the field of international economic law.[11] To this extent, the overarching goal and the urgency of the fight against climate

[8] See G. Sacerdoti *et al.* (eds), *General Interests of Host States in International Investment Law* (Cambridge, Cambridge University Press 2014).

[9] E.g., K. Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement", in *Transnational Environmental Law*, VII (2018), p. 229 ff., p. 232 (outlining "three distinct varieties of regulatory chill: *internalization chill*, *threat chill*, and *cross-border chill*").

[10] E.g., *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award, 23 August 2022. The case concerned the Italian Government's general ban on offshore oil and gas exploration and production activity within the 12-mile limit of the coastline.

[11] S. Maljean-Dubois, J. Peel, "The Progressive 'Climatization' of International Law", in S. Maljean-Dubois, J. Peel (eds), *Climate Change and the Testing of International Law* (Leiden, Brill 2023), p. 3 ff.

change, pursuant to which the ICCR is established, may reframe the traditional dichotomy between economic and non-economic values that are furthered through the States' right to regulate.[12]

Of particular interest in this respect is the impact and reach of the "ambition cycle" envisaged under the Paris Agreement also *beyond* the ICCR. The "ambition cycle" consists in the combination of the expectation of progression of the States' climate efforts communicated through their Nationally Determined Contributions (NDCs) pursuant to Article 3, the global stocktake under Article 14, which is operative from 2025 and embodies the inventory mechanism for assessing the States' collective progress in the furtherance of climate change actions in the long-term perspective and the binding obligation of each Party to present NDCs every five years pursuant to Article 4 of the Paris Agreement.[13] In particular, pursuant to Article 3 of the Paris Agreement, "[a]s nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of" the Paris Agreement itself.[14] Moreover, it is established that "[t]he efforts of all Parties will represent a progression over time."[15] Pursuant to Article 4,[16] each Party "shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contribu-

[12] J. Trachtman, *The International Economic Law Revolution and the Right to Regulate* (London, Cameron May 2006).

[13] L. Rajamani, J. Werksman, "Climate Change", in L. Rajamani, J. Peel (eds), *The Oxford Handbook of International Environmental Law*, 2nd ed. (Oxford, Oxford University Press 2021), p. 492 ff., p. 503; L. Rajamani, D. Bodansky, "The Paris Rulebook: Balancing International Prescriptiveness with National Discretion", in *International & Comparative Law Quarterly*, LXVIII (2019), p. 1023 ff., p. 1026; A. Zahar, "Collective Progress in the Light of Equity Under the Global Stocktake", in *Climate Law*, IX (2019), p. 101 ff.

[14] Paris Agreement, Art. 3.

[15] *Ibid.*

[16] B. Mayer, "Article 4: Mitigation", in G. Van Calster, L. Reins (eds), *The Paris Agreement on Climate Change* (Cheltenham, Edward Elgar Publishing 2021), p. 109 ff.

tions".[17] Each State Party shall communicate every five years its NDCs and every successive edition thereof shall "represent a progression" and "reflect" the "highest possible ambition" of the issuing State (*self-differentiation*).[18] These obligations bind all Contracting Parties of the Paris Agreement, having regard to the "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." (CBDRRC-NC)[19]

The above mentioned "ambition cycle" posits that, but for a certain degree of flexibility and modularity, NDC commitments that are instrumental to the realisation of the goals of the Paris Agreement – first and foremost its temperature goal, the net zero target and the financial pledge – must not be overturned and, moreover, must be progressively strengthened. Within this legal framework, international economic law stands as a legal field that is "not primarily about climate change" but is fundamentally relevant to it especially in terms of "effective response to the problem".[20] The following sections will address the interactions between climate change related obligations under the ICCR, espe-

[17] Paris Agreement, Art. 4(2). See M. Doelle, "The Heart of the Paris Rulebook: Communicating NDCs and Accounting for Their Implementation", in *Climate Law*, IX (2019), p. 3 ff.

[18] Paris Agreement, Arts. 4(3) and 4(9). See L. Rajamani, E. Guérin, "Central Concepts in the Paris Agreement and How They Evolved", in D. Klein *et al.* (eds), *The Paris Agreement on Climate Change. Analysis and Commentary*, Oxford, 2017, p. 74 ff., p. 78: "[s]uffice it to say here that these expectations in relation to progression are of tremendous significance, as they are designed to ensure that, notwithstanding the national determined nature of contributions from parties, the regime as a whole is moving towards ever more ambitious and rigorous actions from parties. This ensures that there is a 'direction of travel' for the regime, as it were." See also D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, cit., p. 234: "[t]he standards of progression and highest possible ambition are arguably objective rather than self-judging."

[19] Paris Agreement, Arts. 2(2) and 4(3). See S. Maljean-Dubois, P. Moraga Sariego, "Le principe des responsabilités communes mais différenciées dans le régime international du climat", in *Les Cahiers de Droit*, LV (2014), p. 83 ff.

[20] S. Maljean-Dubois, J. Peel, *Climate Change and the Testing of International Law*, cit., p. 10.

cially as stemming from the Paris Agreement, and the WTO covered agreements (Sections 2 and 3). Notably, these sections explain the relevance of general exceptions as a viable justification for States' climate change action, provided that basic requirements of non-discrimination in the implementation and design of "green" measures are respected. Then, Sections 4 and 5 consider the interfaces between the ICCR and IIAs, especially having regard to the legality of climate change action and the substantive protection of "green" investments in those cases in which States may fail to implement climate change related commitments contained in their NDCs. As emphasised in the conclusions, the legal and policy analysis relating to WTO law and international investment law aims to verify the doctrinal thesis of the climatization of international economic law.[21] To this extent, it is also submitted that climate change action by States, including unilateral environmental measures, would be in principle lawful under WTO law and IIAs and can be adversely sanctioned in connection with a finding of discriminatory, arbitrary, unreasonable, selective or protectionist application.

2. *The WTO Legality of Domestic Measures in Furtherance of Climate Change Action*

The relationship between international trade law and international environmental law, including with respect to State-to-State dispute settlement, has been central in the practice of the WTO in the last decades,[22] as is currently the question of the interaction

[21] For a comparable exercise and investigation in the field of international human rights law, see C. Heri, "Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability", in *European Journal of International Law*, XXXIII (2022), p. 925 ff.

[22] E.g., Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*), adopted on 20 May 1996, WT/DS2/AB/R; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US – Shrimp*), adopted on 6 November 1998, WT/DS58/AB/R; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, adopted on 17 December 2007, WT/DS332/

between the world trade regime and the ICCR.[23] The World Trade Report 2022 has focused on the interlinkages between climate change and international trade by adopting a policy perspective in which international trade and trade rules can contribute to addressing climate change.[24] The Report submitted that leveraging trade to tackle climate change presents several development and growth opportunities and will require significant policy actions for States to advance a just transition towards a low carbon, inclusive and resilient future. Moreover, the Intergovernmental Panel on Climate Change (IPCC) recently noted that "policies to open up trade can have a range of effects on GHG emissions, just as mitigation policies can influence trade

AB/R. See P. Delimatsis, L. Reins (eds), *Trade and Environmental Law* (Cheltenham, Edward Elgar Publishing 2021), and H. Asmelash, "The Role of International Trade Law in the Energy Transition", in *Journal of World Investment & Trade*, XXIV (2023), p. 847 ff. In addition, the WTO Committee on Trade and Environment (CTE) was established in 1995 as a forum designed for confrontation between Member States on the environmental impact of trade policies. Notably, based on the mandate received in the Doha Round in 2001, the CTE hosted in its "Special Sessions" the negotiations regarding certain aspects of the connection between trade and the environment. The negotiations mainly focused on the relationship between the WTO rules and multilateral environmental agreements (MEAs), the collaboration between the WTO and MEA secretariats and the elimination of tariffs and non-tariff barriers on environmental goods and services.

[23] See H. van Asselt, "Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?", in I. Alogna, C. Bakker, J.-P. Gauci (eds), *Climate Change Litigation: Global Perspectives* (Leiden, Brill 2021), p. 433 ff.; K. Kulovesi, "Real or Imagined Controversies? A Climate Law Perspective on the Growing Links between the International Trade and Climate Change Regimes", in *Trade Law and Development*, VI (2014), p. 55 ff.; S. Grosbon, "Le droit du commerce international au défi des changements climatiques: lever les totems et les tabous", in S. Maljean-Dubois, J. Peel, *Climate Change and the Testing of International Law*, cit., p. 225 ff.; P. Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Cheltenham, Edward Elgar Publishing 2016); J. Pauwelyn, "Carbon Leakage Measures and Border Tax Adjustments under WTO Law", in G. Van Calster, D. Prévost (eds), *Research Handbook on Environment, Health and the WTO* (Cheltenham, Edward Elgar Publishing 2013), p. 448 ff.

[24] WTO, World Trade Report 2022, Climate Change and International Trade.

flows among countries"[25] and identified the liberalisation of trade in environmental goods and services as measures that "may both lower trade barriers and potentially bring about GHG emission reductions."[26]

At the level of lawmaking, States are progressively inserting provisions related to the fight against climate change and sustainability in general within the renegotiation of their existing trade agreements or in the stipulation of new treaties.[27] Moreover, the WTO Environmental Database (EBD) shows that a significant number of environment-related notifications by WTO members contain climate change-related trade measures.[28] Relevant examples are represented by the establishment of carbon markets, the introduction of renewable energy subsidies or support (as under the US Inflation Reduction Act of 2022), reforms of fossil fuel subsidisation schemes, import bans targeting carbon-intensive products, the regulatory and administrative application of "green" standards and labelling models and border carbon adjustments (BCAs). It is also appropriate to mention trade measures with a sectoral "green" scope through which States support the free movement of climate-friendly goods across borders by reducing tariff and non-tariff barriers that are applicable to their commerce. BCAs, such as the Carbon Border Adjustment Mechanism (CBAM) introduced by the EU in 2023,[29] pursue the objective of reducing the negative impacts of uneven climate policies at the global level and the consequent effects of carbon leakage by embedding optimal carbon prices into selected categories

[25] A. Patt *et al.*, "International Cooperation", in P.R. Shukla *et al.* (eds), *Climate Change 2022: Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, IPCC, 2022, p. 1451 ff.

[26] *Ibid.*

[27] *Ex multis*, EU-UK Trade and Cooperation Agreement (TCA), 30 December 2020, entered into force 1 May 2021, Preamble (paras. 1, 7 and 9) and Arts. 198, 299, 302, 340(3)(e), 393, 401 and 764.

[28] WTO Environmental Database, available at: <https://edb.wto.org/>. For example, in 2022, 207 notifications (out of 2250 in total) by Member States were categorised by the WTO Secretariat as pertaining to the objective of climate change mitigation and adaptation.

[29] Cf. *infra*, Section 3.

of imported goods and applying exemptions based on the availability of comparable or equivalent climate schemes in the country of origin. Among the objectives of BCAs, the prevention of carbon leakage, the levelling of the competitive field and the inducement to trade partners to strengthen climate efforts in an ambitious direction of travel are key.

The question of whether the WTO, and in particular its Dispute Settlement System (DSS), may constitute an appropriate venue for climate or climate-related litigation and trade adjudicators may act as "climate judges" remains the object of scholarly debate. Moreover, the same enquiry should be addressed in the context of the crisis of the DSS itself due to the paralysis of the Appellate Body since December 2019 and its disruptive impact on the effectiveness of dispute resolution at the WTO.[30] The DSS may scrutinise the WTO legality of both pro-climate and anti-climate measures (e.g., a program of subsidies for fossil fuels) affecting trade between WTO Members.[31] The challenged State measure may be represented by an act or an omission. An example of a relevant State omission is a Member State's failure to take adequate climate-friendly trade measures in furtherance of its own NDCs, or, based on the WTO covered agreements themselves, to comply with the general obligations to lower or eliminate tariff or non-tariff barriers to trade also with regard to environmental goods and services. In the latter case, the WTO complaint may be rooted in mere trade concerns in so far as a trade-restrictive measure negatively affects also climate goals and objectives.[32]

[30] *Ex multis*, G. VIDIGAL, "Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis", in *Journal of World Investment & Trade*, XX (2019), p. 862 ff.

[31] H. ASMELASH, "The WTO Dispute Settlement System as a Forum for Climate Litigation?", in *Review of European, Comparative & International Environmental Law*, XXXII (2023), p. 324 ff.

[32] While the legal analysis in this section focuses on violation complaints, it is also emphasised that the climate question may also be raised in a "non-violation complaint" alleging a distortion of the economic conditions of competition in terms of nullification or impairment of benefits (e.g., for goods and market-opening commitments in services) in the absence of the invocation of breach of a WTO covered agreement. Cf. Art. XXIII of the GATT 1994, Art.

It is submitted that positive measures by States imposing bans or restrictions affecting "brown" industries or providing incentives in favour of "green" productions may withstand the DSS scrutiny, but for a finding of discriminatory, selective or protectionist application. This conclusion is warranted by the regulation of environmental exceptions among the general exceptions under the WTO covered agreements, for instance under Article XX(b) and (g) of the General Agreement on Tariffs and Trade 1994 (GATT 1994), namely with respect to the protection of "human, animal or plant life or health" and the "conservation of exhaustible natural resources".[33] These provisions allow the DSS to recognise the sovereign right to regulate of WTO Members and to consider the application of the police powers doctrine in connection with the States' legitimate aim to protect a public interest. Moreover, the reference to customary rules of interpretation of public international law under Article 3.2 of the Dispute Settlement Understanding (DSU) entrusts WTO adjudicators sufficient techniques to integrate climate change and other environmental considerations pursuant to the hermeneutic canons of

64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Art. 26 of the DSU.

[33] Cf. G. Adinolfi, "Article XX. General Exceptions (Introduction)", in P.-T. Stoll., H. Hestermeyer (eds), WTO - *Trade in Goods, Commentaries on World Trade Law*, II (Leiden, Brill 2022), p. 126. In a case relating to its renewable energy local content requirements (LCRs), India did not rely on the typical environmental exceptions pursuant to Art. XX(b) and (g), but, without success, on Art. XX(d) of the GATT 1994, alleging that its measures were inter alia "necessary to secure compliance with laws or regulations" applicable at the domestic level. In particular, the Indian government argued that the LCRs at issue were necessary for it to comply with the Marrakech Agreement, whose preamble refers to the objective of sustainable development and the protection and preservation of the environment, as well as other international legal instruments relating to environmental protection and the fight against climate change such as the UNFCCC and the Rio Declaration on Environment and Development, adopted by the UN General Assembly on 12 August 1992. See Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules* (*India – Solar Cells*), adopted on 14 October 2016, WT/DS456/AB/R, paras. 5.97-5.115. Accord, Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (*Mexico – Taxes on Soft Drinks*), adopted on 24 March 2006, WT/DS308/AB/R, paras. 69-70 and 79.

systemic integration established under Article 31(3)(c) of the Vienna Convention on the Law of Treaties of 1969 (VCLT), which refers to "any relevant rules of international law applicable in the relations between the parties" that can be taken into consideration as *external context*[34] of the applicable treaty for the purposes of its interpretation.[35] At the same time, the *chapeau* of Article XX of the GATT 1994 prescribes that such "green" measures shall not be applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[36] This postulates that both the design and the implementation of domestic measures that further climate change action shall be driven by a genuine climate concern and not applied and executed as means of economic protectionism. Significantly, the same *Gestalt* is also found in Article 3.5 of the UNFCCC, pursuant to which "[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[37] This anti-protectionist provision borrowed its language from the *chapeau* of Article XX of the GATT 1947, which was conserved in the GATT 1994 and also provides a model for general exceptions clauses in IIAs, as illustrated below. Moreover, Article 3.5 of the UNFCCC posits a general parameter of legality of State measures adopted in furtherance of climate change commitments that affect foreign businesses.

The proposition that Member States' "green" measures may

[34] J.-M. Sorel, V. Boré Eveno, Commentary *sub* Article 31, in O. Corten, P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (Oxford, Oxford University Press, 2011), p. 825.

[35] *Ex multis*, C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", in *International & Comparative Law Quarterly*, LII (2005), p. 279 ff.

[36] E.g., Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, adopted on 18 June 2014, WT/DS400/AB/R and WT/DS401/AB/R, para. 5.291 ff.

[37] UNFCCC, Art. 3.5.

adjudicated by the DSS as being overall WTO compatible – except for a finding of protectionist application *de jure* or *de facto* – was confirmed by the twin panel reports dated 5 March 2024 and 10 January 2025, respectively, in the *EU – Palm Oil* cases.[38] Malaysia and Indonesia challenged certain measures enacted by the EU that applied restrictions on the importations of palm oil, as oil crop feedstocks, and oil palm crop-based biofuels (both complainant States are major world producers of palm oil).[39] Concerning the alleged violations of the GATT 1994, the panels found that certain of those measures were *prima facie* inconsistent with the EU's most favoured nation (MFN) and national treatment (NT) obligations pursuant to Articles I.1 and III.4 of the GATT 1994 because they accorded less favourable treatment to palm oil-based biofuel from Malaysia and Indonesia, whose competitive opportunities were diminished and eventually excluded, than that accorded to like products of local or foreign origin, such as rapeseed oil- and soybean oil-based biofuel, thus engendering a detrimental effect.[40] The EU further submitted as a defence that its measures pursued the long-standing and legitimate policy goals of the EU biofuels regime relating to "climate change mitigation, environmental and biodiversity objectives

[38] Panel Report, *European Union and certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia)* (*EU – Palm Oil (Malaysia)*), adopted on 26 April 2024, WT/DS600/R; Panel Report, *European Union and certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia)* (*EU – Palm Oil (Indonesia)*), adopted on 24 February 2025, WT/DS593/R. The proceedings in the latter case were suspended various times at the request of Indonesia following the circulation of the *EU – Palm Oil (Malaysia)* report on 5 March 2024. *Cf.* WT/DS593/13, WT/DS593/14, WT/DS593/15, WT/DS593/16, WT/DS593/17.

[39] In particular, the EU relevant measures were implemented within the schemes of the recast of the Renewable Energy Directive establishing a common framework for the promotion of renewable energy in the Union (RED II). Cf Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast).

[40] *EU – Palm Oil (Malaysia)*, cit., paras. 7-493, 7.1006, 7.1031, 7.1039; *EU – Palm Oil (Indonesia)*, cit., paras 7.1020, 7.1051.

and moral concerns."[41] In this respect, the panels found that the measures at issue related to the conservation of exhaustible natural resources and were made effective in conjunction with restrictions on domestic consumption or production within the meaning of Article XX(g), and were also necessary to protect human, animal or plant life or health within the meaning of Article XX(b).[42] Hence, they could be considered as being *prima facie* justified under the GATT 1994 in connection with a legitimate regulatory distinction. However, the panels also had to address the respect by the EU of the compulsory requirements of the *chapeau* of Article XX, which establishes that any Member States' measure – although being provisionally justified pursuant to a general exception – should not be applied arbitrarily or in discriminatory manner.[43] In this respect, the panels ultimately held that the measures at issue violated the *chapeau* of Article XX because the EU failed to conduct a timely review of the data used (as well as to provide a commenting process) to determine which biofuels were concretely associated with high risk of contribution to GHG emissions, and also because there were deficiencies in the design and implementation of the applicable criteria and certification procedure.[44] Therefore, it was overall impossible for the panels to justify ultimately the EU measures at issue.[45] At the same time, the binding *EU – Palm Oil* reports confirm the overall WTO compatibility of "green" measures in furtherance of the goals of the Paris Agreement, a conclusion that will be tested in

[41] *EU – Palm Oil (Malaysia)*, cit., para. 7.497; *EU – Palm Oil (Indonesia)*, cit., para. 7.512.

[42] *EU – Palm Oil (Malaysia)*, cit., paras 7.1081 and 7.1085; *EU – Palm Oil (Indonesia)*, cit., paras. 7.1085, 7.1089-7.1091, 7.1093.

[43] GATT 1994, Art. XX. See R. Wolfrum, "Article XX. General Exceptions [Chapeau]", in R. Wolfrum, P.-T. Stoll, H. Hestermeyer (eds), *WTO – Trade in Goods*, cit., 464.

[44] *EU – Palm Oil (Malaysia)*, cit., para. 7.1099; *EU – Palm Oil (Indonesia)*, cit., para. 7.1105.

[45] The panels in the *EU – Palm Oil* cases applied a comparable legal analysis and reached analogous conclusions in relation to the violations of the Technical Barriers to Trade (TBT) Agreement (Arts 2.1, 2.2, 2.9.2, 2.9.4, 5.1.2, 5.6.1, 5.6.2, 5.6.4).

relation to the application, design and implementation of the CBAM in the following paragraphs.[46]

The *EU – Palm Oil* decisions provide support to our proposition that States' climate change action, including in furtherance of the goals of the Paris Agreement, may be adjudicated under the DSS as being WTO compatible, except for a finding of protectionist application *de jure* or *de facto*. The foundation of this proposition remains unaffected by the current institutional paralysis of the WTO Appellate Body, which instead drastically undermines the procedural effectivity of the entire DSS. Furthermore, it may nevertheless be observed that the State-to-State dimension of WTO litigation entails that non-State actors such as individuals and nongovernmental organisations (NGOs) have no standing to present trade complaints, which may affect the likelihood of (pro-)climate litigation within the multilateral trading system. To this extent, the opinion that in international trade (law) matters "adjudication should be viewed as a complement rather than as a substitute for negotiation" of new or reformed climate-related commercial arrangements appears to remain persuasive.[47]

3. *A Case Study: The European Union's Carbon Border Adjustment Mechanism*

The EU Carbon Border Adjustment Mechanism (CBAM) is a climate measure aimed at reducing the risk of carbon leakage for

[46] The two *EU – Palm Oil* panel reports were not appealed and, therefore, were adopted on 26 April 2024 and 24 February 2025, respectively, by the Dispute Settlement Body (DSB), which recommended the EU to bring its measures into conformity with the WTO covered agreements (WT/DS600/10). The EU agreed with Malaysia on January 2025 and with Indonesia on July 2025 that the reasonable period of time under Art. 21.3(b) of the DSU to implement the panel reports will expire on 1 January 2026 (WT/DS600/11) and 24 February 2026 (WT/DS593/18), respectively.

[47] D. Bodansky, "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections", in *Arizona State Law Journal*, XLIX (2017), p. 689 ff., p. 693.

energy intensive and trade-exposed industries facing the cost of increased climate ambition, taking into consideration the global objective of reducing greenhouse gases (GHG) emissions in the EU and globally. From the point of view of international trade law, the CBAM stands as a unilateral trade measure primarily aimed at realising non-trade objectives, such as environmental protection and the furtherance of climate change adaptation and mitigation. The present section addresses the WTO legality (also under the lens of Article XX of the GATT 1994) of the CBAM established by Regulation (EU) 2023/956 of 10 May 2023.[48]

The CBAM embodies one of the main climate measures of the EU in the framework of its environmental agenda in the perspective of sustainability, as encapsulated in the "European Green Deal" of 2019.[49] It is part of the "Fit for 55" legislative package that constituted in 2021 the set of proposals for the adoption of the "European Climate Law", which established for the EU the binding reduction target for net GHG emissions of at least 55 % compared to 1990 levels by 2030 and fixed the objective of a climate-neutral Union by 2050 at the latest.[50] The CBAM Regu-

[48] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (CBAM Regulation). See M. Mehling *et al.*, "Designing Border Carbon Adjustments for Enhanced Climate Action", in *American Journal of International Law*, CXIII (2019), p. 433 ff.; I. Venzke, G. Vidigal, "Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)", in *Netherlands Yearbook of International Law 2020*, 2020, p. 187 ff.; A. Pirlot, "Carbon Border Adjustment Measures: A Straightforward Multi-Purpose Climate Change Instrument?", in *Journal of Environmental Law*, XXXIV (2021), p. 25 ff.; T. Meyer, T.N. Tucker, "A Pragmatic Approach to Carbon Border Measures", World Trade Review, XXI (2022), p. 109 ff.; I. Espa, "Reconciling the Climate/Industrial Interplay of CBAMs: What Role for the WTO?", in *AJIL Unbound*, CXVI (2022), p. 208 ff.

[49] European Commission, Communication "The European Green Deal", 11 December 2019. See also European Commission, Communication "Pathway to a Healthy Planet for All. *EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil'*", 12 May 2021.

[50] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 (European Climate Law). This legal framework is also completed by the Reg-

lation aims at reducing the risk of *carbon leakage* for European energy intensive and trade-exposed industries that may face the cost of increased climate ambition, taking into consideration the global objective of reducing GHG emissions in the EU and globally.[51] In light of the absence of uniform carbon pricing at the universal level, carbon leakage may be described as the "migration of CO2-intensive economic activities and associated emissions from countries with stringent regulations to those with more lenient ones".[52] The risk of carbon leakage is more significant for the productions having a higher degree of GHG emissions throughout their global value chain.[53] This explains the selection of the relevant products that are currently targeted by the CBAM Regulation, namely cement, electric energy production, fertilisers, iron and steel, aluminium and chemicals (hydrogen).[54] The gradual introduction of the CBAM in the next years (CBAM phase-in) is complementary to the intertwined reform of the allocation of free allowances under the EU Emissions Trading System (ETS) to support the decarbonisation of the EU industry, which should be correspondingly superseded through replacement (ETS phase-out).[55] Notably, the goods originating in countries that are either integrated (Iceland, Liechtenstein, Norway) or subject to a carbon pricing system that is fully linked (Switzerland) to the ETS are exempted from the application of the

ulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No. 995/2010 (Deforestation Regulation).

[51] CBAM Regulation, Art. 1(1) and Recital 9: "Carbon leakage occurs if, for reasons of costs related to climate policies, businesses in certain industry sectors or subsectors transfer production to other countries or imports from those countries replace equivalent products that are less intensive in terms of greenhouse gas emissions".

[52] G. Dolphin, G. Ferrucci, "The EU's CBAM: Implications for Member States and Trading Partners", IMF Working Paper WP/25/125, June 2025, p. 4.

[53] T. Nielsen *et al.*, 'The Risk of Carbon Leakage in Global Climate Agreements', in *International Environment Agreements*, XXI (2021), p. 147.

[54] CBAM Regulation, Art. 2(1) and Annex I.

[55] *Ivi*, Art. 1(2)-(3).

CBAM.[56] Apart from "the development of bilateral, multilateral and international cooperation", all other third countries are provided by the EU with the option to join a "Climate Club" of future creation, namely "a forum of countries with carbon pricing instruments or other comparable instruments."[57]

The Regulation crucially focuses on the carbon footprints that are embedded in the targeted products.[58] In this respect, the CBAM envisages a "fair price" on the carbon emitted during the production of carbon intensive goods that enter the EU single market, thus encouraging cleaner industrial production also in non-EU countries. That the CBAM Regulation has the purpose to foster decarbonisation, also through the transfer of technology, in third countries extraterritorially is expressly stated therein.[59] In particular, the aforementioned "fair price" comprises the embedding[60] of carbon emissions generated in the production of the concerned goods that are imported into the Union, hence ensuring through a sort of equalisation mechanism that the carbon price of imports is equivalent to the (otherwise higher) carbon price that is applied to domestic production.[61] Accordingly,

[56] Recital 16.

[57] Recital 72.

[58] Recital 8: "While the Union has substantially reduced its domestic greenhouse gas emissions, the greenhouse gas emissions embedded in imports to the Union have been increasing, thereby undermining the Union's efforts to reduce its global greenhouse gas emissions footprint. […]".

[59] Recitals 10 and 14.

[60] Art. 3(22): "'embedded emissions' means direct emissions released during the production of goods and indirect emissions from the production of electricity that is consumed during the production processes, calculated in accordance with the methods set out in Annex IV […]".

[61] Importers of the products listed in Annex I have the possibility to demonstrate a lower embedding of GHG emissions. Pursuant to Art. 9(1) of the CBAM Regulation, "[a]n authorised CBAM declarant may claim in the CBAM declaration a reduction in the number of CBAM certificates to be surrendered in order to take into account the carbon price paid in the country of origin for the declared embedded emissions. The reduction may be claimed only if the carbon price has been effectively paid in the country of origin. In such a case, any rebate or other form of compensation available in that country that would have resulted in a reduction of that carbon price shall be taken into account." In addition, the European Commission and the competent authorities established in each Member State may review CBAM declarations at

with the aim to level the playing field internally in the EU, the CBAM addresses the relevant local industries' concerns over competitive disadvantages associated with asymmetrical (lower) carbon prices in foreign countries.

The CBAM Regulation also regulates the procedure that is applicable to interested importers for applying for the status of authorized CBAM declarants,[62] the submissions of CBAM declarations in the CBAM registry starting from 2027,[63] as well as the calculation of embedded emissions[64] and the relevance of the payment of the carbon price in the country of origin of the imported goods.[65] In the framework of the first EU "Omnibus" packages of 26 February 2025, the European Commission proposed a set of changes to simplify the CBAM and enhance its effectiveness and efficiency.[66] One of the main amendments of the CBAM is predicted to consist in the exemption of small and occasional importers from CBAM obligations, mostly small-medium enterprises (SMEs) and individuals. This is meant to be implemented through the application of a *de minimis* cumulative annual threshold of 50 tonnes mass of embedded emissions per importer.[67] Moreover, while various rules and procedures under the CBAM will be simplified (e.g., the authorisation of CBAM declarants, the method for the calculation of embedded emissions, the reporting requirements, the management of regulated

a later stage (see Art. 19(1) of the CBAM Regulation). Pursuant to Art. 3(24) of the CBAM Regulation, "'CBAM certificate' means a certificate in electronic format corresponding to one tonne of CO2e of embedded emissions in goods".

[62] CBAM Regulation, Arts 5 and 17.

[63] *Ivi*, Arts 6 and 14. The application process to become an authorised CBAM declarant was launched on 31 March 2025 in the CBAM registry. This launch allows importers and indirect customs representatives to apply for the status of authorised CBAM declarant.

[64] Art. 7 and Annex IV.

[65] Art. 9.

[66] See Press Release, 26 February 2025, "Commission simplifies rules on sustainability and EU investments, delivering over €6 billion in administrative relief", at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_614.

[67] This is predicted to eliminate CBAM obligations for approximately 90% of importers, while still covering over 99% emissions in scope.

importers' financial liability), an envisaged legislative proposal is expected to extend the scope of the Regulation to other ETS sectors, downstream goods and indirect emissions.

In relation to its consistency with the WTO regime,[68] the CBAM has prompted criticism that it could be construed as a sophisticated instrument of "green" industrial policy aimed at protectionism in favour of domestic producers vis-à-vis foreign competitors rather than genuinely serving climate change action goals.[69] For instance, as mentioned above, the relevant goods (e.g., cement) imported in the EU from Iceland, Liechtenstein, Norway and Switzerland are exempted from the application of the CBAM.[70] Provided that the exemption from the application of the CBAM substantiates an "advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country", this constitutes origin-based discrimination between like imported products in violation of the MFN treatment pursuant to Article I:1 of the GATT 1994. Notably, the rule of outland or foreign parity between like, including directly competitive and substitutable, imported goods cannot be circumvented through regulatory distinctions based on the reference to non-product-related processes and production methods, such as with respect to the thresholds of embedded GHG emissions.[71] Accordingly, cements imported from Switzerland and, for example, from India would be considered "like" products based on the ordinary criteria (or groupings of potentially shared characteristics) of their physical properties,

[68] Recital 15 of the CBAM Regulation emphasizes "ensuring compatibility with World Trade Organization law".

[69] K. Aiginger, D. Rodrik, "Rebirth of Industrial Policy and an Agenda for the Twenty-First Century", in *Journal of Industry, Competition and Trade*, XX (2020), p. 189 ff.

[70] CBAM Regulation, Recital 16.

[71] P. Abel, "The Carbon Border Adjustment Mechanism: Reconciling the Principles of Sustainability and Free Trade in the EU's External Action?", in R. Wessel *et al.* (eds), *EU External Relations Law and Sustainability. The EU, Third States and International Organizations*, Global Europe: Legal and Policy Issues of the EU's External Action, IV (The Hague, TMC Asser Press 2025), p. 120.

end-uses, consumers' tastes and habits and tariff classification.[72] This entails that the factor of a different (higher) quantity of direct GHG emissions released during the production of goods (and indirect emissions from the production of electricity that is consumed during the production processes) cannot allow discrimination by the EU, including with respect to the obligation of WTO Member States to grant the MFN treatment under Article I:1 of the GATT 1994. This holds through also with regard to the obligation of the EU to guarantee national treatment on internal taxation and regulation (inland parity) pursuant to Article III of the GATT 1994 concerning the relationship between imported and like domestic products of national origin. Notably, under the GATT 1994, Article III:2 regulates "internal taxes or other internal charges of any kind",[73] whereas Article III:4 applies to "all laws, regulations and requirements" affecting imported products, namely their "internal sale, offering for sale, purchase, transportation, distribution or use."[74] Provided that it falls under the category of "laws, regulations and requirements" and its application engenders *less favourable treatment*, the CBAM Regulation is inconsistent with Article III.4 of the GATT 1994 in so far as it determines a detrimental impact on the competitive opportunities of the relevant imported goods in vis-à-vis the like domestic products. Finally, the CBAM Regulation may also be subject to scrutiny against the applicability of Article II:1 of the GATT 1994 concerning all WTO Member States' obligation relating to their schedules of concessions, in particular to respect *bound tariffs*.[75]

[72] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (*EC – Asbestos*), adopted on 12 March 2001, WT/DS135/AB/R, para. 101 (in relation to the interpretation of Art. III:4 of the GATT 1994). The Appellate Body described the four criteria as follows: "(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes."

[73] GATT 1994, Art. III:2.

[74] *Ivi*, Art. III:4.

[75] *Ex multis*, P. Van den Bossche, W. Zdouc, *The Law and Policy of the*

Having established that a WTO panel may ascertain that various provisions of the CBAM Regulation are *prima facie* inconsistent with the MFN and NT obligations of the EU under Articles I and III of the GATT 1994, the EU may nevertheless rely on its objective of climate change mitigation (for instance, through reducing direct and indirect GHG emissions globally) to invoke a general exception of environmental nature under Article XX of the GATT 1994 in order to justify its violations. Accordingly, the EU may successfully argue that the CBAM falls under the scope of measures legitimately aimed at the protection of "human, animal or plant life or health" under Article XX(b) and the "conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" under Article XX(g) of the GATT 1994. At the same time, as occurred in the *EU – Palm Oil* cases, which have been analysed above,[76] a panel is not likely to rely on the general exception of the protection of "public morals" under Article XX(a) of the GATT 1994.[77] Moreover, as to the general exception under Article XX(b) of the GATT 1994 (protection of human, animal or plant life or health), the CBAM shall further be held as "necessary" to fulfil its legitimate objective (*necessity test*). In this respect, the CBAM would not need to have an immediately observable or discernible impact on the objective to reduce GHG emissions. For instance, the Appellate Body in *Brazil – Retreaded Tyres* noted that "measures adopted in order to attenuate global warming and climate change… can only be evaluated with the benefit of time".[78] To such an extent, it would be sufficient for the EU to establish that the CBAM is apt to make a

World Trade Organization, 5th ed. (Cambridge, Cambridge University Press 2022), pp. 337-376.

[76] Cf. *supra*, Section 2.

[77] See *EU – Palm Oil (Malaysia)*, cit., paras 7.1089-7.1091; *EU – Palm Oil (Indonesia)*, cit., paras. 7.1097-7.1099.

[78] *Brazil – Retreaded Tyres*, cit., para. 151. In *US – Gasoline*, the Appellate Body held in the context of Article XX(g) of the GATT 1994 that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable". Cf. *US – Gasoline*, cit., p. 21.

material contribution to the *achievement* of that objective, which is in place "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue".[79] Further, to satisfy the necessity test the CBAM should not be considered as being *more trade restrictive than necessary* to attain the protection of human, animal or plant life or health. This entails the conclusion that less trade restrictive alternative measures should not have been reasonably available to the EU "to achieve its desired level of protection with respect to the objective pursued under Article XX of the GATT 1994."[80] In this respect, the burden to identify the alternative measures that the EU should have taken would be allocated to the complainant States. Only at that point, the EU would be required to demonstrate that less trade restrictive alternatives were not reasonably available "in the light of the interests or values being pursued and the party's desired level of protection."[81] To this extent, it would not be for the WTO DSS to second-guess the level of protection chosen by the EU because, as held by the Appellate Body, "the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context."[82] This would allow the EU to establish that the provisions of the CBAM Regulation (for instance, the exemption of the relevant goods imported from Iceland, Liechtenstein, Norway and Switzerland) that are inconsistent with the WTO covered agreements, as explained above, may nevertheless plainly meet the requirements for provisional justification under Articles XX(b) and XX(g) of the GATT 1994.

Finally, even in case of *prima facie* justification under a general exception of environmental nature under Article XX of the GATT 1994, the design and implementation of the CBAM may lend themselves to allegations of non-conformity with the man-

[79] *Brazil – Retreaded Tyres*, cit., paras. 145, 151, 210.

[80] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China – Publications and Audiovisual Products*), WT/DS363/AB/R, adopted on 19 January 2010, para. 318.

[81] *Ivi*, para. 319.

[82] *Brazil – Retreaded Tyres*, cit., para. 210.

datory requirements of the *chapeau* of Article XX of the GATT 1994 with respect to the tests of even-handedness and non-arbitrariness in its concrete application. Under the *chapeau* of Article XX of the GATT 1994, *prima facie* justified measures should not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade",[83] which represents a corollary of the principle of good faith.[84] Accordingly, the function of the *chapeau* is to prevent the trade distortive effects of a Member State's otherwise legitimate measure and, hence, its abuse of right.[85] The design and implementation of the CBAM may result in arbitrary effects, especially regarding the rules for calculation of the embedded GHG emissions associated with the concerned imported products, which should reflect adequately the real emissions in the exporting country.[86] For instance, in its request for consultations at the WTO the Russian Federation has submitted that the EU has

> the possibility to arbitrarily determine the number of CBAM certificates required to be purchased and surrendered in connection with imports into the EU of the covered goods, in particular, through the requirements to use default values (established by the EU) for the purpose of calculation of the relevant emissions and, consequently, the number of certificates to be surrendered. Such default values vary depending on, for instance, the country of origin of the covered goods or of the electricity generation.[87]

[83] GATT 1994, Art. XX, chapeau.

[84] *US – Gasoline*, cit., p. 22; *US – Shrimp*, cit., paras. 120, 151, 158; *Brazil – Retreaded Tyres*, cit., para. 224. See C. Riffel, "The Chapeau: Stringent Threshold or Good Faith Requirement", in *Legal Issues of Economic Integration*, 45 (2018), p. 141.

[85] Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products* (*Indonesia – Import Licensing Regimes*), adopted on 22 November 2017, WT/DS477/AB/R, WT/DS478/AB/R, para. 5.95.

[86] The relevant calculation methods should also correspond to the furthest extent to the ETS schemes applicable in the EU.

[87] *European Union and its Member States – Carbon Border Adjustment Mechanism* (*EU – CBAM*), Request for Consultations by the Russian Federation, 12 May 2025, WT/DS639/1, p. 4.

In this respect, the "rational relationship" between the CBAM itself and the accomplishment of the objective of climate change mitigation through the prevention of carbon leakage may be questioned.[88] While this could engender a creeping barrier to trade targeting major economic partners, the amendments of the CBAM announced by the European Commission in 2025 aims to simplify exactly the method for the quantification of the GHG emissions that are embedded in the regulated products. In addition, the CBAM shall not consist in the rigid and inflexible imposition of essentially the same programme of carbon pricing to all exporting Members, which should be allowed sufficient latitude to enact programmes that are *comparable in effects* to that of the restricting Member.[89] Finally, although the CBAM clearly is a unilateral measure by a WTO Member State, the EU should (continue to) pursue in good faith multilateral discussions at the diplomatic level concerning the harmonized implementation of BCAs and in general carbon pricing schemes with the third countries that are more significantly affected, for example in the context of the Conference of the Parties (COP) under the aegis of the UNFCCC.

At the same time, the *chapeau* of Article XX of the GATT codifies the qualifier that the arbitrary or unjustifiable discrimination (*de jure* or *de facto*) shall not occur "between countries where the same conditions prevail".[90] The term "countries" refers to the importing Member concerned *and* the exporting Members, as assumed by the Appellate Body in *US – Gasoline*.[91]

[88] *Brazil – Retreaded Tyres*, cit., paras. 227, 246.

[89] *US – Shrimp*, cit., para. 177; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* (*US – Shrimp (Article 21.5) – Malaysia*), adopted on 21 November 2001, WT/DS58/AB/RW, para. 144. For example, the UK is going to implement its own CBAM, which is expected to be rather similar to the EU CBAM.

[90] See G. Marín Durán, "Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes", in *International & Comparative Law Quarterly*, LXXII (2023), pp. 95-101.

[91] *US – Gasoline*, cit., pp. 23-24: "The reply of the United States was to the effect that it interpreted that phrase as referring to both the exporting countries and importing countries and as between exporting countries… At no

To assess whether the same conditions prevail in the EU and the exporting Member States (such as Brazil, China, India or South Africa),[92] the CBAM should preferably provide for a mechanism of "inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[93] The availability of such a mechanism would point to the absence of protectionist design in the structure of the CBAM itself. On these premises, a WTO panel may find discretely that the relevant imported products and productions that fall under the regulatory scope of the CBAM are not subject in the country of origin to adequate carbon pricing mechanisms that are at least comparable in effects to the application of domestic systems of allocation of allowances as under the ETS or taxation schemes.[94] This may constitute a persuasive ground substantiating that the CBAM does not violate the *chapeau* of Article XX of the GATT 1994 because *discrimination* would be applied between countries where the "same conditions" do *not* prevail. Therefore, provided that the CBAM is provisionally justified under a general environmental exception under Article XX(b) or (g), the discriminatory measures that would be found as inconsistent with the NT and MFN treatment obligations of the EU would be also compliant with the *chapeau* of Article XX of the GATT 1994. While the

point in the appeal was that assumption challenged by Venezuela or Brazil". See also *US – Shrimp*, cit., para. 150: "In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned".

[92] The bloc of the BASIC (Brazil, South Africa, India and China) is considered to be the main opponent of the CBAM. See, e.g., Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change hosted by India on 8 April 2021, para. 19: "Ministers expressed grave concern regarding the proposal for introducing trade barriers, such as unilateral carbon border adjustment, that are discriminatory and against the principles of Equity and CBDR-RC".

[93] *US – Shrimp*, cit., para. 165.

[94] As already noted, such a comparative analysis encompasses the assessment of the conditions prevailing in the EU as importing country, on one hand, and in the exporting countries whose relevant products and productions are exempted from the CBAM and all the other countries which would challenge the CBAM before the WTO DSS, on the other hand.

application of the rules for calculating the GHG emissions that are embedded in the relevant imported products remains controversial in terms of rationality, this reasoning would preserve the overall WTO legality of the CBAM.

Under the perspective of international environmental law, especially under the ICCR, the CBAM aims to fully realize the "ambition cycle" of the fight against climate change, notably in furtherance of the obligations established by the Paris Agreement. In this respect, while in international trade law commercial *discrimination* between States, as embodied in the MFN and NT rules, is in principle illegitimate, in international environmental law *differentiation* between countries has to be applied based on the notion of common but differentiated responsibilities (CBDR).[95] The CBDR principle is structural in international environmental law and is found in Principle 7 of the Rio Declaration on Environment and Development of 13 June 1992,[96] Article 3.1 of the UNFCCC (*common but differentiated responsibilities and respective capabilities* – CBDRRC)[97] and Article 2.2 of the Paris Agreement (*common but differentiated responsibilities and respective capabilities, in the light of different national circumstances* – CBDRRC-NC), whereby it is significantly rooted to equity.[98] Somehow reminiscent of the New International Economic Or-

[95] E.B. Weiss, "Common but Differentiated Responsibilities in Perspective", in *Proceedings of the ASIL Annual Meeting*, XCVI (2002), p. 366; D. French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities", in *International & Comparative Law Quarterly*, XLIX (2000), p. 35; L. Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", in *Review of European Community & International Environmental Law*, IX (2000), p. 120.

[96] UN Doc. A/CONF.151/26 (Vol. I), Annex I, Principle 7. See P. Cullet, "Principle 7: Common but Differentiated Responsibilities", in J. Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford, Oxford University Press 2015), p. 229.

[97] D. Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary", in *Yale Journal of International Law*, XVIII (1993), pp. 501-502.

[98] C. Voigt, "Equity in the 2015 Climate Agreement: Lessons from Differential Treatment in Multilateral Environmental Agreements", in *Climate Law*, IV (2014), p. 50. See also F. Francioni, "Equity in International Law", in *Max*

der (NIEO) doctrines,[99] the CBDR principle demands that developed countries should *take the lead* in combating climate change and its adverse effects in light of their historical records and current levels of GHG emissions. As held by the International Court of Justice in its advisory opinion of 23 July 2025,

> the principle of common but differentiated responsibilities and respective capabilities reflects the need to distribute equitably the burdens of the obligations in respect of climate change, taking into account, *inter alia*, States' historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social development.[100]

Therefore, non-industrialized States benefit from differential treatment in light of their low(er) figures of GHG emissions and respective capabilities and national circumstances.[101] Consequently, the burden of the efforts to fight climate change is shared unevenly between States under the ICCR based on the two markers of differentiation of the contribution to global environmental harm and capability.[102] Furthermore, the obligations established in multilateral environmental agreements (MEAs) are "differentiated on the basis of the differing socio-economic circumstances

Planck Encyclopedia of Public International Law (Oxford, OUP November 2020).

[99] P. Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations", in *European Journal of International Law*, X (1999), p. 566.

[100] International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion, 23 July 2025, para. 148.

[101] See C. Voigt, F. Ferreira, "Dynamic Differentiation: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement", cit., p. 301, who conclude that "the Paris Agreement adopts *a more diversified way of differential treatment*, allowing a wider array of parameters to be taken into account when parties determine their national contributions, while being set against the normative background of the UNFCCC." (emphasis in the original)

[102] J. Scott, L. Rajamani, "EU Climate Change Unilateralism", in *European Journal of International Law*, XXIII (2012), p. 477 (in relation to Art. 3.1 of the UNFCCC).

of different groups of States" (*national circumstances*).[103] The CBDR principle has three main operational applications.[104] Firstly, States' obligations may be qualified through *contextualization* based on their unequal capacity to address a given environmental problem.[105] Secondly, MEAs may provide tailored and more lenient *implementation* mechanisms for States with lower budgetary resources and capability to enforce treaty requirements[106] "such as delayed compliance schedules [grace periods], permission to adopt subsequent base years, delayed reporting schedules, and softer approaches to non-compliance".[107] Thirdly, non-capable countries may benefit from preferential aid from developed countries in the form of financial assistance technology transfer and other capacity-building programmes.[108]

[103] D. FRENCH, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities", cit., p. 53.

[104] J. PEEL, "Re-evaluating the Principle of Common but Differentiated Responsibilities in Transnational Climate Change Law", cit., p. 247.

[105] E.g., Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, entered into force on 22 September 1988, preamble ("Taking into account the circumstances and particular requirements of developing countries"), Arts. 2.2 ("in accordance with the means at their disposal and their capabilities") and 4.2 ("taking into account in particular the needs of the developing countries"); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, entered into force on 5 May 1992, preamble ("Taking into account also the limited capabilities of the developing countries to manage hazardous wastes and other wastes").

[106] E.g., Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, entered into force on 1 January 1989, Art. 5.1 (10-year grace period for developing countries).

[107] J. SCOTT, L. RAJAMANI, "EU Climate Change Unilateralism", cit., p. 478.

[108] E.g., UNFCCC, Art. 4.3; Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, entered into force on 17 May 2004, Art. 13.2; Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994, entered into force on 26 December 1996, Art. 20.2; Convention on Biological Diversity, 5 June 1992, entered into force on 29 December 1993, Arts 16 and 20; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, entered into force on 5 May 1992, Art. 10.3; International Tropical Timber Agreement, done at Geneva on 27 January 2006, entered into force on 7 December 2011, Art. 27.4; Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, entered into

With respect to the design of the CBAM, the principle of CBDR would require differential treatment by the EU to the benefit of the relevant imported products that originate from those States who have not historically contributed and are not currently contributing significantly to the global stock of GHG emissions.[109] Accordingly, LDCs, such as Small Island Developing States, should be offered preferential treatment in comparison to all other exporting States, including for example also recently industrialised countries, also due to the materially different impacts that may result from the application of the CBAM in light of the national circumstances. This might have been implemented in the CBAM through a waiver for LDCs or the provision of more favourable commercial treatment of the products and productions originating therefrom. The absence of any of these regulatory mechanisms in the CBAM is an indicator of its inconsistency with the CBDR principle under international environmental law. Consequently, the full-fledged loyalty of the EU to the Paris Agreement may be questioned since CBDR is a cardinal pillar in its legal architecture.[110] Furthermore, unlike under the CBAM Regulation, the revenues that are generated by the application of the CBAM itself should be invested directly in programmes of support to decarbonisation in LDCs.[111] The introduction of "a new own resource based on the revenues generated by the sale of CBAM certificates" to the benefit of these countries is only anticipated, but not yet implemented by the EU.[112] This would sup-

force on 22 September 1988, Art. 4.2; Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, entered into force on 1 January 1989, Art. 10A.

[109] P. Cullet, "Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps", in *Transnational Environmental Law*, V (2016), pp. 307-309.

[110] Cf. Paris Agreement, preamble, Arts 2.2, 4.3, 4.19.

[111] See also G. Marín Durán, "Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes", cit., p. 90.

[112] CBAM Regulation, Recital 74. Recital 73 of the CBAM Regulation generally provides that "it is desirable that the Union continue to provide financial support through the Union budget towards climate mitigation and adaptation in LDCs, including in their efforts towards the decarbonisation and transformation of their manufacturing industries."

port enhanced consistency of the CBAM with the ICCR, having regard to the CBDRRC-NC principle and equity in general.

The concept of differential treatment, which is the main corollary of CBDR in operational terms, is not alien to the multilateral trade regime.[113] In the preamble of the Marrakech Agreement, the WTO Members sought "both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[114] Moreover, WTO law allows non-reciprocal *special and differential treatment* (SDT or S&D)[115] in favour of LDCs at variance with the MFN rule.[116]

[113] G. Marceau, M. George, "Trade, Climate and Differentiation: An Analysis of the Interaction between the 'Principle of Common But Differentiated Responsibilities' and the WTO Agreement", in *Journal of International Dispute Settlement*, XVI (2025), p. 1 ff.; I. Venzke, G. Vidigal, "Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)", cit., p. 217 ff., who mention inter alia Art. 66 of the TRIPS Agreement, which establishes for its application a minimum grace period of 10 years for LDCs.

[114] Agreement establishing the World Trade Organization, done at Marrakesh on 15 April 1994, entered into force on 1 January 1995, preamble.

[115] R. Hudec, *Developing Countries in the GATT Legal System* (Cambridge, Cambridge University Press 2010).

[116] Cf. Contracting Parties to the GATT, Decision of 28 November 1979, "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries", L/4903 (Enabling Clause). The Enabling Clause constitutes the WTO legal basis for the Generalized System of Preferences (GSP), originally devised in 1968 under the aegis of UNCTAD. Under the GSP, developed countries could offer non-reciprocal preferential treatment (originally in relation to tariff barriers) to products originating in developing countries selected ad hoc. On 15 June 1999, the General Council of the WTO adopted the "Decision on Waiver regarding Preferential Tariff Treatment for Least-Developed Countries" (WT/L/304). This waiver, which has been progressively extended until 30 June 2019 (WT/L/759) and then 30 June 2029 (WT/L/1069), permits developing countries to offer preferential tariff treatment to products imported from LDCs. On 17 December 2011, the WTO Ministerial Conference adopted a waiver to enable developed *and developing countries* to provide preferential treatment to services and service suppliers of LDCs (WT/L/847). Cf. J. Pauwelyn, "The End of Differential Treatment for Developing Countries: Lessons from the Trade and Climate Change Regimes", in *Review of European Community & International Environmental Law*, XXII (2013), p. 29.

For example, SDT is found in Article 12 of the TBT Agreement, which includes a regulatory waiver from the application of "international standards, guides or recommendations",[117] and Articles 9 and 10 of the Sanitary and Phytosanitary Measures Agreement (SPS Agreement), also in relation to technical assistance.[118]

An amendment of the CBAM that establishes a regulatory waiver or more favourable treatment for the products originating from LDCs (for instance, in terms of quantification of the embedded emissions) would also survive the scrutiny of the WTO DSS against the applicability of the *chapeau* of Article XX of the GATT 1994, whose rationale is also found in Article 3.5. of the UNFCCC.[119] In this respect, the "discrimination" would *not* be in place between exporting WTO Members "where the same conditions prevail"[120] exactly because the different records of carbon footprints based on historical and current levels of GHG emissions would provide rational justification consistent with the CBDR principle on the basis of the multilateral accords adopted by the community of nations for the fight against climate change.[121]

4. The Interaction between International Investment Law and the International Climate Change Regime

The imperative of climate change action is of utmost concern also in international investment law and investor-State dispute settlement (ISDS).[122] Traditionally, scholars have suggested scep-

[117] TBT Agreement, Art. 12(1)-(10), especially Art. 12(4).

[118] SPS Agreement, Arts 9(1)-(2) and 10(1)-(4). Furthermore, see WTO, Special and Differential Treatment Provisions in WTO Agreements and Decisions–Note by the Secretariat, Committee on Trade and Development, WT/COMTD/W/27, 16 March 2023.

[119] Cf. *supra* Section 2.

[120] *Ibid*.

[121] Cf. *US – Shrimp*, cit., para. 164: "it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members." (emphasis in the original).

[122] S. SCHILL, "Do Investment Treaties Chill Unilateral State Regulation to

ticism about the potential of the international investment regime to promote climate change action[123] or acknowledged the "invisibility" of the climate question in investor-State renewable energy arbitrations.[124] While it has been traditionally argued that regulatory chill encroaching on genuine States' climate change actions is not necessarily engendered by the applicability of IIAs,[125] the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment rendered in 2023 a trenchant *pamphlet* advocating the ultimate irreconcilability of ISDS with adequate climate policies.[126] By noting inter alia that, out of the 12 largest internation-

Mitigate Climate Change?", in *Journal of International Arbitration*, XXIV (2007), p. 469 ff.; F. Baetens, "Combating Climate Change through the Promotion of Green Investment: From Kyoto to Paris without Regime-Specific Dispute Settlement", in K. Miles (ed), *Research Handbook on Environment and Investment Law* (Cheltenham, Edward Elgar Publishing 2019), p. 107 ff.; W. Ben Hamida, "Droit climatique et du droit des investissements: de la friction à la coordination", in *Revista Brasileira de Arbitragem*, XVIII (2021), p. 84 ff.; M. Gehring, J. Hepburn, "Climate, Trade and Investment Law in the Global Green Economy", in O.C. Ruppel, C. Roschmann, K. Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance. Volume I: Legal Responses and Global Responsibility* (Baden-Baden, Nomos 2013), p. 381 ff.; A. Boute, "Combating Climate Change through Investment Arbitration", in *Fordham International Law Journal*, XXXV (2012), p. 613 ff.

[123] F. Baetens, "Combating Climate Change through the Promotion of Green Investment: From Kyoto to Paris without Regime-Specific Dispute Settlement", cit., p. 107.

[124] S. Grosbon, "Investissements et changements climatiques: Le Chapitre 8 de l'Accord économique et commercial global (AECG/CETA) face aux impératifs de transition énergétique", in *Journal du droit international (Clunet)*, CXLVI (2019), p. 389. In the context of renewable energy arbitrations under the Energy Charter Treaty (ECT) against Spain, Italy, Czech Republic, etc., the invisibility of the climate question may be explained by the circumstances that "green" claimants directly relied on the protection of their economic rights pursuant to IIAs, without invoking the application of climate change law(s), while respondent States invoked nationwide budgetary constraints as basis for the withdrawal or modification of incentivising support schemes, such as feed-in-tariffs (FITs).

[125] S. Schill, "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?", cit., p. 477: "[i]nvestment treaties will not prevent state imposition of higher emission standards or product bans as such, but restrict their unreasonable or unforeseeable introduction."

[126] Report of the Special Rapporteur on the issue of human rights obliga-

al investment awards to date, 11 pertain to cases brought by fossil fuel and mining investors, the report assumes that "ISDS arbitration tribunals routinely prioritize foreign investment and corporate interests above environmental and human rights considerations."[127]

At the level of law-making, States are progressively including in new or reformed IIAs specific provisions that address environmental protection and the fight against climate change, so that investment treaty practice is firmly oriented to the objective of sustainable development. In terms of drafting techniques, such provisions may consist in express references to climate change in the preambular language and operative provisions of the treaty,[128] direct references to the Paris Agreement,[129] affirmation of the Parties' right to regulate[130] and non-relaxation clauses,[131] gen-

tions relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, "Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights", 13 July 2023, UN doc. A/78/168 (2023). The report contains a useful definition of "regulatory chill": "[r]egulatory chill occurs when a State responds to the potentially high costs associated with perceived or actual threats of ISDS arbitration by reversing, withdrawing, weakening or not enforcing legitimate regulatory measures to address the climate crisis, protect the environment or fulfil human rights." (para. 49)

[127] *Ivi*, para. 7.

[128] Energy Charter Treaty (ECT), Annex 1 to the Final Act of the Conference on the European Energy Charter, 17 December 1994, entered into force 16 April 1998, Preamble, para. 13, and Art. 19(3)(b); EU-Canada Comprehensive Economic and Trade Agreement (CETA), 30 October 2016, not yet in force, Art. 24.9(2).

[129] EU-China Comprehensive Agreement on Investment (CAI), Agreement in Principle (2020), Section IV, Sub-Section 2, Art. 6(a); Dutch Model BIT, 2019, Art. 6(6).

[130] CETA, Art. 8.9(1); Rwanda-UAE BIT, 1 November 2017, entered into force 17 January 2020, Art. 9(1); Norway Model BIT, 2015, Arts. 11-12.

[131] See Canada-Jordan BIT, 28 June 2009, entered into force 14 December 2009, Art. 11; Iran-Slovakia BIT, 19 January 2016, entered into force 30 August 2017, Art. 10(1); Barbados-BLEU (Belgium-Luxembourg Economic Union) BIT, 29 May 2009, not yet in force, Art. 11(2); Belarus-Hungary BIT, 14 January 2019, entered into force 28 September 2019, Art. 2(7); Rwanda-UAE BIT, 1 November 2017, entered into force 17 January 2020, Art. 9(2); Burkina Faso-Turkey BIT, 11 April 2019, not yet in force, Art. 5(4).

eral exceptions with regard to State environmental measures,[132] sectoral carve-out clauses regarding the investment in fossil fuels,[133] tailored carve-outs (e.g., with regard to the extent of the substantive prohibition of unlawful indirect expropriation)[134] and the codification of investors' commitments relating to the environmental protection by way of explicit reference or acknowledgement of corporate social responsibility (CSR) obligations of entrepreneurs investing abroad.[135] It is submitted that the references in IIAs to environmental protection and related concerns, although without expressly mentioning climate change, are nevertheless susceptible to being interpreted extensively as encompassing climate change action based on the application of general principles of treaty interpretation such as good faith and

[132] Iran-Slovakia BIT, 19 January 2016, entered into force 30 August 2017, Art. 11(1); Canada-Peru BIT, 14 November 2006, 20 June 2007, Art. 10(1); Canada-Ecuador BIT, 29 April 2016, entered into force 6 June 1997, terminated 19 May 2018, Art. XVII(3); Burkina Faso-Turkey BIT, 11 April 2019, not yet in force, Art. 5(1); Japan-Georgia BIT, 29 January 2021, entered into force 23 July 2021, Art. 15(1); China-Mauritius FTA, 17 October 2019, entered into force 1 January 2021, Art. 8.9(d).

[133] "Finalisation of the Negotiations on the Modernisation of the Energy Charter Treaty", Brussels, 24 June 2022. These ambitious objectives have to be discounted against the withdrawal from the treaty of various EU Member States, e.g. Spain, the Netherlands, France, Germany, Luxembourg and Poland. Italy had anticipated this tide by exiting the ECT in 2016.

[134] Regional Comprehensive Economic Partnership (RCEP), 15 November 2020, entered into force 1 January 2022, Annex 10B(4); Canada-Jordan BIT, 28 June 2009, entered into force 14 December 2009, Annex B.13(1)(c). Nearly the same language is adopted in the CETA in its Annex 8-A (Expropriation), which additionally specifies that such a clarification is formulated "[f] or greater certainty". See also India-Kyrgyzstan BIT, 14 June 2019, entered into force 5 June 2025, Art. 5(5).

[135] Iran-Slovakia BIT, 19 January 2016, entered into force 30 August 2017, Art. 10(3); Morocco-Nigeria BIT, 3 December 2016, Arts. 18(1) and (4) and 24(1). Other treaties emphasise the potential of the voluntary commitments of enterprises investing abroad to comply with CSR standards, including relating to climate change action, even beyond the binding scope of the applicable agreement or domestic laws. E.g., Argentina-Qatar BIT, 6 November 2016, not yet in force, Art. 12; Canada-Mongolia BIT, 8 September 2016, entered into force 24 February 2017, Art. 14; Serbia-Turkey BIT, 30 January 2018, not yet in force, Art. 11.

effectiveness.[136] Accordingly, commentators have remarked, for example, that "[c]ertainly climate change is an environmental concern"[137] and "*plusieurs traités d'investissement ont pris en considération la dimension environnementale. Cette prise en considération permet aux Etats d'agir avec flexibilité pour gouverner le changement climatique*".[138]

The ensuing section proposes a coordinated and integrated approach to the interaction of international climate change law and investment law, which should not be considered as competing norms. Notably, it will attempt to explain how the implementation of States' obligations under the Paris Agreement may be realised (also) through resort to international investment law and ISDS. To such an extent, international investment law may give "teeth" to the ICCR, thus contributing to the fulfilment of its ambitions,[139] also in terms of enforcement mechanisms,[140] which are particularly effective for the execution of arbitral agreements and awards and almost non-available for climate change related obligations.[141] In this scenario, investment awards through which climate change commitments can find implementation, be it direct or indirect, may be consequently recognised and enforced in almost all jurisdictions in the world.

[136] O. Dörr, "Article 31", in O. Dörr, K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin, Springer 2018), p. 567.

[137] V. Vadi, "Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals", in *Vanderbilt Journal of Transnational Law*, XLVIII (2015), p. 1344.

[138] W. Ben Hamida, "Droit climatique et du droit des investissements: de la friction à la coordination", cit., p. 92.

[139] De Stefano, "Giving 'Teeth' to Climate Change Related Obligations Through International Investment Law", in S. Maljean-Dubois, J. Peel, *Climate Change and the Testing of International Law*, cit., p. 251 ff.

[140] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, entered into force 14 October 1966, especially Arts. 53 and 54; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, entered into force 7 June 1959, especially Art. V.

[141] UNFCC, Art. 14; Paris Agreement, Arts. 15 and 24. See C. Voigt, "The Compliance and Implementation Mechanism of the Paris Agreement", in *Review of European Community & International Environmental Law*, XXV (2016), p. 161 ff.

5. *The Scrutiny of States' Climate Measures under International Investment Law*

The international obligations of States to promote and protect foreign investments pursuant to IIAs and their implementation or failure to implement commitments stemming from the ICCR may interact in manifold respects. National laws and regulations banning or restricting high-carbon industries (for instance, the phasing out of coal-fired power plants, the revocation of oil and gas exploration concessions, the denial of mining permits, the introduction of fracking bans and the enactment of legislation that strengthens the protection of water supplies)[142] are as a matter of principle justified either under the application of general exceptions codified in the applicable treaty or based on the general legitimate right to regulate of States.[143] The same would apply to measures incentivising low-carbon businesses also pertaining to foreign investments performed in the territory of the host State. However, the fact that States operate under the umbrella of a climate change accord, for instance the Paris Agreement, or a multilateral environmental treaty does not, in and of itself, preclude the possibility of incurring international responsibility under IIAs. Notably, the measure at issue shall not be applied in discriminatory, arbitrary or unreasonable manner, which would entail the violation of the various substantive standards of treatment under IIAs, as applicable, which may be relative (Most Favoured Nation (MFN) and National Treatment (NT) clauses) and absolute (fair and equitable treatment (FET) and the prohibition of unlawful indirect expropriations).

In January 2021, the German company RWE AG and its

[142] See, for instance, *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022 (claim eventually dismissed for lack of jurisdiction of the tribunal). See also the earlier case *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I)*, ICSID Case No. ARB/09/6, Award, 11 March 2011 (award embodying the parties' settlement agreement).

[143] C. Titi, "Police Powers Doctrine and International Investment Law", in A. Gattini, A. Tanzi, F. Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Leiden, Brill 2018), p. 323 ff.

Dutch subsidiary RWE Eemshaven Holding II BV lodged a request for arbitration at ICSID against the Netherlands for its ban of coal-fired power generation by 2030 implemented through the Law on the Prohibition of Using Coal in the Electricity Production,[144] which entered into force on 20 December 2019.[145] The Dutch government adopted this decision to meet its commitments under the Paris Agreement. However, the claimants have invoked the responsibility of the Netherlands under the Energy Charter Treaty (ECT), including for breach of FET and the prohibition of unlawful indirect expropriation, since practically no compensation was offered by the State, and emphasised that the coal ban targeted a sector in which only foreign investors were operating. A similar claim against the same ban was filed in April 2021 by the German energy company Uniper. In both cases, however, the investors eventually requested the discontinuance of the proceedings, in the first case as an effect of the anti-arbitration action pursued by the Dutch government before German courts with an affirmative ruling finally rendered by the *Bundesgerichtshof* and, in the second case, as a condition of the bailout accord reached with the German government.[146]

The legality of an environmental mining ban applied by Colombia formed the object of an arbitration brought by the Canadian corporation Eco Oro. Colombia adopted relevant regula-

[144] *Wet verbod op kolen bij elektriciteitsproductie*, *Staatsblad* 2019, No. 493.

[145] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

[146] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22. These initiatives undertaken by the Netherlands and Germany as EU Member States appears to be in line with the stance adopted by the European Commission and Member States with regard to intra-EU investment arbitration, especially in light of various judgments of the Court of Justice of the European Union (*Achmea*, *Komstroy*, *PL Holdings*, *Micula*). See "Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union", in particular point 4; Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, entered into force 29 August 2020, Art. 7.

tion to protect the high mountain ecosystem of Santurbán Páramo, an environmental conservation zone which in part covered the concession area, a gold and silver deposit, in which the investor had operated for decades. The arbitral tribunal, while acknowledging that "neither environmental protection nor investment protection is subservient to the other, they must co-exist in a mutually beneficial manner",[147] found by majority – Professor Sands dissenting – that the ban violated the minimum standard of treatment of aliens, including FET,[148] pursuant to Article 805 of the Canada-Colombia FTA (2008), notwithstanding the applicability of its general exceptions clause in Article 2201(3)[149]. This conclusion appears questionable in so far as it subverts the cardinal tenet upon which a governmental measure justified by a general environmental exception under the applicable IIA, as it was in the present case, or by legitimate right to regulate, and applied evenly and non-discriminatorily by a State shall not give rise to a violation of the treaty itself, including in relation to compensation.[150] The same conclusion remains applicable to climate

[147] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 828.

[148] A controversial finding of breach of the minimum standard of treatment, including FET, under Art. 1105 of the NAFTA was decided by majority in the *Clayton/Bilcon* case in relation to the environmental assessment decision by Canadian authorities to reject a project to develop and operate a quarry and a marine terminal in Nova Scotia significantly based on "community core values". See *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 588-604 and 733-741. *Contra*, *ibid*., Dissenting Opinion of Professor Donald McRae, 10 March 2015, especially para. 44 ff.

[149] This provision applied specifically to the investment chapter of the relevant FTA and preserved the adoption of "measures necessary: a. To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health; b. To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or c. For the conservation of living or non-living exhaustible natural resources". See Canada-Colombia FTA, 21 November 2008, entered into force 15 August 2011, Art. 2201(3)(a)-(c) and Annex 811(2)(b).

[150] For the tribunal's reasoning, cf. *Eco Oro Minerals Corp. v. Republic of Colombia*, cit., paras. 826-837. See also *Bear Creek Mining Corporation v. Repub-*

change action undertaken by States through domestic legislation and regulation. This is confirmed by other arbitral decisions that pondered in a more appropriate manner the competing societal objectives at issue. For instance, in *Chemtura v. Canada*, the tribunal considered that the ban adopted by the Canadian Pest Management Regulatory Agency (PMRA) with regard to the use of toxic agrochemical lindane on the basis of its health and environmental effects was subject to the provisions of the Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (LRTAP Convention)[151] and therefore necessary under the international treaty obligations assumed by the State.[152] Eventually, the tribunal did not find any breach of NAFTA and consequently did not award any damages to the claimant.[153]

State measures that provide incentives to "green" investment, for instance in the sector of renewable energies, are also in principle legitimate under international investment law.[154] However,

lic of Peru, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 477. The dissenting arbitrator in *Eco Oro v. Colombia* was of the opinion that "the approach taken by the majority failed to respect the text agreed by the drafters of the FTA, and is likely to undermine the protection of the environment". Cf. *Eco Oro Minerals Corp. v. Republic of Colombia*, cit., Partial Dissent of Professor Philippe Sands QC, 9 September 2021, para. 4. According to UNCTAD, the *Eco Oro* award "sheds doubt on the effectiveness of countries' efforts to rebalance IIAs by including explicit safeguards and exceptions to protect the State's right to regulate for the protection of the environment and climate adaptation". See UNCTAD, 'Treaty-Based Investor-State Dispute Settlement Cases and Climate Action', IIA Issues Note, No. 4 (September 2022), p. 2.

[151] Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, 24 June 1998, entered into force 23 October 2003.

[152] *Chemtura Corporation v. Government of Canada* (formerly *Crompton Corporation v. Government of Canada*), Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, para. 266.

[153] See also *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, especially Part IV, Chapter D, para. 7 (claim dismissed on the merits in relation to the Californian ban on the use or sale in California of the gasoline additive MTBE).

[154] W. Ben Hamida, "Droit climatique et du droit des investissements: de la friction à la coordination", cit., p. 90 ff.

such support schemes should not engender a breach of contingent non-discrimination standards under IIAs, namely the obligations of MFN treatment vis-à-vis investors of third countries and, especially, the NT vis-à-vis domestic undertakings. In *Nykomb v. Latvia*, a Swedish investor successfully complained about the refusal by Latvia to honour a promise of incentivisation, namely a double-tariff, for low-carbon electricity production on the basis of which its investment was made. The tribunal ascertained discriminatory treatment by the State under Article 10(1) of the ECT, since the administrator of the incentive schemes continued to support low-carbon installations operated by domestic investors, while refusing this benefit to foreign investors operating in comparable conditions.[155] This case law entails that national incentive schemes providing benefits to both foreign as well as domestic investors would not trigger international responsibility of the State under investment treaties.

Hitherto, an analysis has been provided on how positive measures by States imposing bans or restrictions on "brown" investments or providing incentives in favour of "green" investments may withstand the ISDS scrutiny, but for a finding of discriminatory, selective or protectionist application. In this respect, it is submitted that the furtherance of the objectives that are consubstantial to the fight against climate change may provide a sound and viable justification to such measures under both general international law and international investment law. The remaining paragraphs of this section will instead investigate to what extent the inaction of States in implementing climate change measures required under the umbrella of the ICCR may be sanctioned under IIAs for breach of non-contingent standards of treatment, in particular FET.[156] Notably, the analysis will address

[155] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, para. 4.3.2.

[156] For an effective FET analysis, see *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360. Concerning the substantive standard of the prohibition of unlawful expropriation measures, especially indirect, the adoption and even-handed implementation by States of climate change legislations and regulations would constitute a legitimate exercise of their police powers, especially if necessitat-

the relevance of climate change mitigation and adaptation measures to which a State commits through the unilateral issue of its NDCs.[157] While the previous analysis assumed a dimension of confrontation between international investment law and climate change law, this scenario posits a relationship of reciprocal benefit. In particular, the economic protection of a "green" business investing in the territory of the host State in reliance of the latter's unilateral NDC and in line with the objective to fully realise the climate "ambition cycle" of the Paris Agreement would be placed in alignment with rather than opposition to climate change concerns and objectives.

Under the Paris Agreement, a Party's substantive commitment pursuant to its NDC embodies an obligation of conduct rather than result,[158] which entails that the State is not bound to actually achieve its self-imposed targets, whereas it must proffer

ed by multilateral commitments, and would not result in a violation of IIAs. See, for example, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 272-307, especially 304 (taking into consideration the World Health Organization Framework Convention on Tobacco Control). Moreover, the measures at issue would not be sanctioned as unlawful under the relevant IIA, in case the latter contains an express carve-out clause. See CETA, Annex 8-A (*Expropriation*). Instead, it would be markedly speculative to submit that the State's failure to adopt specific climate change action on which the investor legitimately relied may embody an expropriatory act, notably for lack of the requirement of substantial deprivation of the value of the investment. See A. VanDuzer, "The Complex Relationship between International Investment Law and Climate Change Initiatives: Exploring the Tension", in P. Delimatsis (ed), *Research Handbook on Climate Change and Trade Law*, cit., p. 440.

[157] H. Hellio, "Les 'contributions déterminées au niveau national', instruments au statut juridique en devenir", in *Revue juridique de l'environnement*, Special Issue 2017, p. 33 ff.

[158] See B. Mayer, "International Law Obligations Arising in Relation to Nationally Determined Contributions", in *Transnational Environmental Law*, VII (2018), pp. 256-262; L. Rajamani, "The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations", in *Journal of Environmental Law*, XXVIII (2016), p. 354; D. Bodansky, "The Legal Character of the Paris Agreement", in *Review of European, Comparative & International Environmental Law*, XXV (2016), p. 146.

its best efforts to this goal within a bottom-up regime.[159] Instead, the Parties' procedural obligation to prepare, communicate every five years and maintain successive "progressive" NDCs is strictly binding, including the duty to provide mandatory informational requirements to track progress in their implementation and achievement.[160] It is hereunder examined whether substantive obligations under IIAs – especially non-contingent standards of treatment such as the FET – may be applied so as to reinforce qualitatively the binding scope of NDC related obligations under the Paris Agreement in terms of operationalisation of prescriptions and enforceability of contents. This analysis chiefly revolves around the protection of the legitimate expectations of foreign investors relying on a State's NDC for or in the making of its investment.

As affirmed by the *Total v. Argentina* tribunal, NDCs may embody a State's "previous publicly stated position, whether that be in the form of a formal decision or in the form of representation."[161] The substantiation of such a position may depend on the particularisation of the content of the individual NDC, which, as above illustrated, may vary based on the discretion of the communicating Party:[162] the more specific and clear the declaration to the addressees, the more compelling the case that the foreign investor in question was entitled to rely on it in good faith on the basis of a legitimate expectation. NDCs are not addressed by States only to single investors, but to the generality of stakehold-

[159] L. Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics", cit., pp. 500 and 511; D. Bodansky, "The Paris Climate Change Agreement: A New Hope", cit., p. 300; Y. Kerbrat, S. Maljean-Dubois, M. Wemaëre, "Conférence internationale de Paris sur le climat en décembre 2015: comment construire un accord evolutif dans les temps?", in *Journal du droit international (Clunet)*, CXLII (2015), p. 1115.

[160] Cf. Paris Agreement, Art. 13(7)(b).

[161] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 129.

[162] The notion of NDCs "by privileging sovereign autonomy, respecting national circumstances, and permitting self-differentiation, significantly reduced the sovereignty costs of a legally binding instrument". See D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, cit., p. 212.

ers, *in primis* to the other Parties of the Paris Agreement.[163] However, the general character of the source of the legitimate expectation does not fatally prevent a successful FET claim. Tribunals have found that general regulatory frameworks and legislation may also give rise to legitimate expectations especially if drafted with sufficient specificity and targeted at foreign investors in order to attract their commitments of resources in the host State.[164] To this extent, domestic laws and regulations on climate change, including those envisaged in NDCs,[165] which provide a defined legal framework for future "green" investment operations – for example, including the provision of support schemes and incentives – may create legitimate expectations based on specific commitments that are reliable to foreign investors.

NDCs can be considered among the variety of host States' unilateral acts or statements (or assurances, representations or declarations) that may represent a source of obligations with regard to the protection of foreign investments.[166] However, their degree of normativity depends on the clarity and specificity of their contents, which embodies the result of a State's commitment to climate change mitigation and adaptation. This conclusion is supported by Guiding Principle 7 of the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" adopted by the International Law Commission in 2006:

[163] B. Mayer, "International Law Obligations Arising in Relation to Nationally Determined Contributions", cit., p. 273.

[164] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 133; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 260 (referring to specific "legislative" undertakings); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 371.

[165] "Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat", 26 October 2016, FCCC/PA/CMA/2022/4, para. 104.

[166] M. Reisman, M. Arsanjani, "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes", in *ICSID Review – Foreign Investment Law Journal*, XIX (2004), p. 328 ff.

> A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligation, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[167]

The context and the circumstances in which the NDCs have been communicated by States comprise the applicable international instruments under the aegis of the ICCR, first and foremost the Paris Agreement. In particular, although the mitigation (and adaptation) targets stated in NDCs are not binding as to their result, the "ambition cycle" established by the Paris Agreement generates a reasonable expectation of progression in climate change action, which prevents the self-committing Party from abruptly reversing or repealing its representations and binds it to take appropriate steps for the attainment of such goals, decisively so in view of the presentation of its successive NDC.[168] This force of logic is even more mandatory in relation to countries characterised by an industrialised developed economy that has reached its peak of emissions consistent with the CB-DRRC-NC caveat. As a consequence, with determined conditions a foreign investor may rely on the State's specific unilateral statements formulated in NDCs and on accruing legitimate expectations that the latter would implement its climate change policy and action in an effectually incremental direction. Against

[167] International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 2006, Guiding Principle No. 7. The incorporation of the relevance of the context and the circumstances in which the unilateral declaration was formulated is consistent with the case law of the International Court of Justice. See *Case Concerning Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, 22 December 1986, I.C.J. Reports, 1986, p. 574, para. 40, and *Case Concerning Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, I.C.J Reports, 1974, p. 256, para. 34.

[168] L. Rajamani, D. Bodansky, "The Paris Rulebook: Balancing International Prescriptiveness with National Discretion", in *International & Comparative Law Quarterly*, LXVIII (2019), cit., p. 1026.

this background, the investments performed in furtherance of such expectations may fall under the scope of the substantive protections in IIAs. To such an extent, climate change multilateral agreements would constitute "any relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the VCLT and, therefore, may be systemically integrated in the BIT or IIA that is applicable in an investor-State dispute. The fact that a State is party to the Paris Agreement or other ICCR instrument does not "transform" the substantive standards under the IIAs to which it is also a Party (it is self-explanatory that "IIAs […] are not environmental treaties").[169] However, the *Allard v. Barbados* tribunal pertinently acknowledged in relation to the Convention on Biological Diversity (CBD)[170] and the Ramsar Convention[171] that "consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances".[172] This entails that ISDS adjudicators may well interpret the applicable IIA, including its external context, and substantiate the reach of the FET obligations contained therein having regard to the relevant climate change obligations binding on the Contracting Parties and the entire variety of aggregate consequences descending therefrom, including reasonable reliance of investors on the practicability of commitments formulated by States in their NDCs. This legal construct appears to be consonant with the

[169] A. Boute, "Combating Climate Change through Investment Arbitration", p. 662, quoting P. Cameron, *International Energy Investment Law: The Pursuit of Stability*, 1st ed., (Oxford, Oxford University Press 2010), p. 203.

[170] Convention on Biological Diversity (CBD), 5 June 1992, entered into force 29 December 1993.

[171] Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, entered into force 21 December 1975.

[172] *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, 27 June 2016, para. 244 (in the context of FPS analysis). In this case, the investor had unsuccessfully argued that the host State's approval of an environmental management plan (EMP) constituted a representation that it would act in a specific way. See G. Farnelli, "Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements", in *Journal of World Investment & Trade*, XXIII (2022), p. 907.

consideration of general principles of law recognised by the community of nations such as good faith, estoppel and *venire contra factum proprium*,[173] especially in cases where a host State's organ had prior willingly induced and attracted foreign "green" businesses by signalling a favourable investment climate. This conclusion would be even more viable if the applicable IIA requires the Contracting States to implement the commitments stated in their NDCs.[174]

6. Concluding Remarks

The present study has addressed the relevance of the environmental sustainability in the fields of international trade and investment law having regard to States' obligations stemming from the ICCR, notably from the Paris Agreement. Both the WTO multilateral system and the complex and fragmented conglomerate of IIAs were considered to be inadequately equipped to adjudicate climate or climate related disputes, especially with regard to pro-climate litigation, whereas "green" measures enacted by States, including those pursuing the objectives of the Paris Agreement, may legitimately form the object of a violation complaint before the WTO DSS by another Member State or a treaty-based claim before an arbitration tribunal by a protected investor. However, the progressive understanding of climate change as the most urgent and pressing global sustainability challenge of the present era is shared by States, especially on the basis of their historical record of climate footprints, and entrepreneurs and investors, which are increasingly committed, also on a voluntary basis, to climate objectives and environmental standards. This

[173] D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence", in *British Yearbook of International Law*, XXXIII (1957), p. 176 ff.: "[i]t is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of act, or as a necessary assumption of the risk of another party acting upon the statement".

[174] E.g., EU-China Comprehensive Agreement on Investment (CAI), Agreement in Principle (2020), Section IV, Sub-Section 2, Art. 6(a).

may have an impact on trade and investment regimes, including with regard to the resolution of disputes.

Concerning WTO law, an embryonic and possibly emerging line of case law supports the conclusion that unilateral domestic measures adopted by "pioneer" States (or by the EU) in furtherance of climate mitigation, adaptation and finance would be legitimate under the WTO covered agreements, if not designed and implemented arbitrarily, selectively, unpredictably, unreasonably, discriminatorily and as a way to foster economic protectionism rather than climate progress.[175] As shown above, the *EU – Palm Oil* panel reports, which were not been appealed "in the vacuum" (having regard to the paralysis of the Appellate Body), and therefore remain binding on the Parties, upheld this approach by preserving the overall WTO compatibility of domestic climate change mitigation measures. Indeed, such measures may well be justified as falling under the scope of environmental exceptions within the general exceptions pursuant to Article XX(b), with respect to the protection of human, animal or plant life or health, and Article XX(g), with regard to the conservation of exhaustible natural resources, of the GATT 1994. To this extent, legitimate States' climate change actions may ultimately withstand the scrutiny of the WTO DSS. In this perspective, the CBAM of the EU stands as a remarkable instance of delicate balancing between climate friendliness (climate-informed solutions) and trade restrictiveness (industrial policies and concerns) in unilateral State measures.

Concerning international investment law, the scarcity of awards directly addressing the merits of investment claims targeting pro-climate State measures does not at present permit principled reliance on arbitral precedents. This notwithstanding, it has been submitted herein that States' climate change action genuinely pursuing the goals of the Paris Agreement is as a matter of principle legitimate, viable, and, in any case, justified either under the application of general exceptions codified in the rele-

[175] See R. Bilder, "The Role of Unilateral State Action in Preventing International Environmental Injury", in *Vanderbilt Journal of Transnational Law*, XIV (1981), p. 51 ff.

vant treaty or based on the general legitimate right to regulate of States, but for a finding of discriminatory or unfair application, which would entail a breach of the applicable contingent or non-contingent substantive standards of protection. Moreover, due to its *ad hoc* connotation and the direct actionability of rights by natural and legal persons, investment dispute resolution may provide *in concreto* innovative and effective but tailored solutions addressing States' climate change action or inaction. Notably, "green" undertakings investing in reliance of States' unilateral NDCs may with given conditions invoke a violation of the FET standard, in so far as the climate related commitments communicated by States therein are sufficiently clear and specific. The insertion in IIAs of provisions requiring the Parties to implement the commitments voluntarily stated in their NDCs would corroborate the viability of this proposition.

Finally, trade and investment adjudicators' expertise in public international law, including in environmental and human rights matters, is required and would be conducive to the successful integration of international climate change law into international economic law with the view to realize the environmental sustainability.

THE IMPACT OF ENVIRONMENTAL SUSTAINABILITY ON COMMERCIAL ACTIVITIES IN AREAS BEYOND NATIONAL JURISDICTION

PATRIZIA VIGNI*

SUMMARY: 1. Introduction. – 2. Defining Environmental Sustainability in Areas beyond National Jurisdiction as a Public Interest. – 3. Physical and Legal Peculiarities of Areas beyond National Jurisdiction. – 4. Regulating Commercial Activities in Areas beyond National Jurisdiction. – 5. General Principles Ensuring Environmental Sustainability in the Public Interest. – 6. Enforcing International Obligations in Areas beyond National Jurisdiction. – 7. Conclusion.

1. *Introduction*

The need to ensure environmental sustainability at the global level is increasingly urgent due to the dramatic noxious impact of human activities on the global ecosystems.

States have so far adopted international obligations aimed primarily at regulating human activities taking place within their territory, in order to prevent its deterioration and the extension of damage to the territory of other States. In fact, States can better control private and public actors operating within their territorial jurisdiction.

However, the harmful impact of human activities is not limited to the territory under State jurisdiction. Significant damage has also been recorded in areas beyond national jurisdiction. Such damage results from the cumulative impact of human activities occurring in both the territories under State jurisdiction and the areas beyond that jurisdiction.

The present chapter aims at analysing whether existing international norms are effective at ensuring the environmental sustainability of human activities, particularly those of a commercial

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nature, which occur in the areas that are not subject to the authority of any State.

Current international obligations concerning environmental sustainability are not exclusively applicable in the areas under State jurisdiction. For example, the norms of the United Nations Framework Convention on Climate Change (UNFCCC)[1] and of the Convention on Biological Diversity (Biodiversity Convention)[2] do not exclude their application in areas beyond national jurisdiction. While international law has traditionally guaranteed the freedom of States in the latter areas, over the past sixty years, numerous obligations have been established to safeguard the integrity of such areas in the interests of all States and the humankind, as a whole. In fact, the conservation of the environment in areas beyond national jurisdiction has repeatedly been recognized as a collective interest under international law.

In order to ascertain whether the recognition of such a collective interest may affect the regulation of commercial activities taking place in areas beyond national jurisdiction, some concepts require to be defined.

First of all, the concept of environmental sustainability, which is strictly linked to the notion of sustainable development, calls for clarification due to the ambiguity that such notion has shown since its original formulation in the 1987 Brundtland Report.[3] Far from seeking to provide an in-depth analysis of the concept of sustainable development,[4] this chapter intends to assess whether the concept of environmental sustainability, as traditionally formulated, can be interpreted differently depending on the

[1] United Nations Framework Convention on Climate Change (UNFCCC), New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, p. 107.

[2] Convention on Biological Diversity (Biodiversity Convention), Rio de Janeiro, 5 June 1992, United Nations, *Treaty Series*, vol. 1760, p. 79.

[3] United Nations General Assembly, "Report of the World Commission on Environment and Development", 4 August 1987, A/42/427.

[4] For a thorough analysis of the concept of sustainable development and environmental sustainability see A. Boyle, D. Freestone (eds), *International Law and Sustainable Development. Past Achievements and Future Challenges* (Oxford, Oxford University Press, 1999).

diverse circumstances in which commercial activities take place in distinct areas beyond national jurisdiction. Moreover, environmental sustainability is strictly linked to the protection of public interests, such as equitable sharing of natural resources among human beings and intergenerational equity. For this reason, the concept of public interest requires a definition based on the various conventional regimes adopted in recent decades.

Furthermore, areas beyond national jurisdiction cannot be encompassed in a single category due to their different physical characteristics and, most significantly, their diverse status and destination under international law.

In addition, although commercial activities may include several types of human conducts that are carried out for lucrative purposes, the concrete possibilities of using land, marine, and space areas have increased in recent times.

Moreover, existing international norms establishing the obligation to ensure the environmental sustainability of human activities are very broad in scope. Therefore, the interpretation of such norms is essential to understand to what extent commercial activities taking place in areas beyond national jurisdiction can be considered sustainable.

Besides, to accomplish the goal of environmental sustainability, effective instruments for enforcing international norms are required. States can ensure such enforcement within their domestic jurisdiction. In the absence of supernational authorities that may effectively control and sanction the potential breaches of international rules dealing with environmental sustainability in areas beyond national jurisdiction, it is necessary to ascertain through which instruments international obligations may be enforced in those areas in order to prevent irreversible damage to the already alarming conditions of the global environment.

In short, to assess to what extent international norms dealing with environmental sustainability may have an impact on commercial activities in areas beyond jurisdiction, it is not sufficient to ascertain whether such norms exist, but the scope and effectiveness of such norms require to be delineated in concrete terms.

2. *Defining Environmental Sustainability in Areas beyond National Jurisdiction as a Public Interest*

According to the 1987 Brundtland Report,[5] sustainable development is the development of human beings that "meets the needs of the present without compromising the ability of future generations to meet their own needs." Similarly, environmental sustainability entails the ability to exploit the environment and its resources and, at the same time, to guarantee the same prerogative to future generations as it is sanctioned in Article 2 of the Biodiversity Convention.[6]

This definition appears to be quite vague. First of all, the legal nature of the concept of sustainable development and the obligation to guarantee environmental sustainability is unclear. While some authors recognise the legal and binding nature of the principle of sustainable development,[7] other legal tenets support the idea that sustainable development is merely a goal that may be achieved by carrying out human activities consistent with rules, such as the duties to prevent environmental damage or to carry out environmental impact assessment, which are binding under international customary and treaty law.[8]

Moreover, even assuming that there was an obligation to en-

[5] United Nations General Assembly, "Report of the World Commission on Environment and Development", cit.

[6] Article 2 of the Biodiversity Convention defines the term "sustainable use" as "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."

[7] For this view see K. Bosselman, *The Principle of Sustainability Transforming Law and Governance* (London, Routledge 2017). For a thorough analysis of the different views of legal doctrine relating to the concept of sustainable development see M. Montini, "L'interazione tra gli SDGs ed il principio dello sviluppo sostenibile per l'attuazione del diritto internazionale dell'ambiente", in *Federalismi.it*, IX (2019), pp. 11-12.

[8] For the view that the concept of sustainable development consists of the final goal that may only be accomplished by complying with the international procedural obligations dealing with environmental protection, see P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment*, (Oxford University Press, Oxford, 2009). For a thorough analysis of the concept of

sure environmental sustainability, its content would be extremely variable. Sustainable development, in fact, can be interpreted differently depending on the diverse interests that the international community or individual States wish to prioritise.[9] For example, the use of an area, such as the international sea, has so far been free. Instead, the use of areas, such as Antarctica and Outer space, is permitted only in a very restrictive manner.

Finally, the feasibility of achieving the goal of sustainable development and environmental sustainability should be assessed on the basis of objective criteria, such as scientific data that take into account the concrete impact of human activities on the environment.[10] In line with this scientific assessment, the international community and individual States should regulate human activities especially when these activities affect the areas of the planet that do not belong to any State, but to the international community as a whole.[11]

The pursuit of environmental sustainability also raises the question of whether this objective may be equated with public interest.[12] In fact, the obligation to preserve some common

sustainable development see PH. SANDS, *Principles of International Environmental Law* (Cambridge, Cambridge University Press 2003), p. 253.

[9] For the view that environmental sustainability and sustainable development are empty signifiers in which everybody may put different content according to the concrete situations to which this concept must be applied, see T.A. STOJANOVIC, C.J.Q. FARMER, "The Development of World Oceans and Coasts and Concepts of Sustainability" in *Marine Policy*, XLII (2013), p. 157, at p. 162.

[10] W.C. CLARK, N.M. DICKSON, "Sustainability Science: The Emerging Research Program" in *Proceedings of the National Academy of Sciences*, C (2003), p. 8059.

[11] For the view that the concept of sustainable development should be a guiding approach for States' political and economic choices, see F. FRANCIONI, "Sviluppo sostenibile e principi di diritto internazionale dell'ambiente", in P. Fois (ed), *Il principio dello sviluppo sostenibile nel diritto internazionale ad europeo dell'ambiente* (Napoli, Editoriale Scientifica 2007), p. 43.

[12] The interconnection between environmental sustainability and public interest can be inferred from the need to involve public decision-making processes and participation to accomplish both these goals. For this view see, M. MONTINI, "L'interazione tra gli SDGs ed il principio dello sviluppo sostenibile per l'attuazione del diritto internazionale dell'ambiente", cit., p. 11. See also J.M. HARRIS, "Basic Principles of Sustainable Development", Global Develop-

goods, the so-called global commons, such as climate change and biodiversity, is frequently associated with the interest of humankind as whole, even when these goods fall within State jurisdiction. Even more, States should guarantee the sustainable management of areas beyond national jurisdiction in the public interest because these areas belong to everyone equally. Therefore, it is necessary to understand to what extent such public interest is acknowledged within the diverse treaty regimes governing areas beyond national jurisdiction and how it impacts on the regulation of commercial activities in those areas.

Public interest is not understood in the same manner under international law. Some treaties only mention collective interests in their preambles declaring that a specific area must be preserved in the interest of humankind as a whole. However, such declaration does not entail the adoption of similar provisions in those treaties. For example, although the preambles of both the Antarctic Treaty[13] and United Nations Convention on the Law of the Sea (UNCLOS)[14] include such a declaration, the regimes that they establish result to be totally different. While the public interest in the conservation of Antarctica has led States Parties to exclude almost all commercial activities from the area, the UNCLOS allows for the free use of the international seas.

Other international legal instruments recognise a limited role

ment and Environment Institute, *G-DAE Working Paper No. 00-04* (2000), p. 1, at p. 10.

[13] Antarctic Treaty, Washington, 1 January 1959, in United Nations, *Treaty Series* vol. 402, p. 71. According to Article IV of the Antarctic Treaty, States Parties that used to claim sovereignty over Antarctic territories before the adoption of the Treaty still have the right to maintain such claims. States claiming sovereignty in Antarctica are seven. They are named "Claimant States" and include Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. Simultaneously, Article IV also recognises the right of the other Parties to the Treaty to deny sovereignty claims. In this manner, Claimant States cannot exercise their claimed sovereign rights with respect to other States and their nationals. Therefore, their sovereignty over Antarctic territories is defined as "frozen sovereignty". For a thorough analysis of this matter see D. R. ROTHWELL, "Sovereignty and the Antarctic Treaty", in *Polar Records*, XLVI (2019), p. 17.

[14] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series,* vol. 1833, p. 3.

to the public interest. For example, Principle 16 of the Rio Declaration on Environment and Development,[15] which is the provision recognising the polluter pay principle, states that the latter principle applies "having due regard to the public interest and without distorting international trade". Therefore, public interest and the distortion of international trade are two elements that may equally influence the application of the polluter pay principle without any legal (or at least moral) hierarchical relationship between them

In other circumstances, the public interest in managing an area represents the very object and purpose of a treaty regime. In these cases, such interest has been associated with specific legal concepts, such as the common heritage of (hu)mankind, to underline the global nature of the interest in that area. For example, Part XI of the UNCLOS and its implementing agreement,[16] which govern the management of the Area, i.e. the international seabed,[17] establish an institutionalised regime based on international rules, procedures, and bodies to safeguard the collective interests at issue.

Similarly, Article 11 of the Agreement governing the Activities of States on the Moon and other Celestial Bodies (Moon Treaty)[18] declares the Moon and celestial bodies as common heritage of (hu)mankind although it does not establish a specific international regime for the management of these areas.

The principle of the common heritage of (hu)mankind apparently ensures the protection of the public interest more effectively than other norms that identify goods and areas of global relevance for several reasons. First of all, it prohibits the appropria-

[15] United Nations General Assembly, "Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development", Annex I, 12 August 1992, A/CONF.151/26 (Vol. I).

[16] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, New York, 28 July 1994, United Nations, *Treaty Series*, vol. 1836, p. 3.

[17] Article 1(1) of the UNCLOS defines the Area as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

[18] Agreement governing the Activities of States on the Moon and other Celestial Bodies (Moon Treaty), New York, 5 December 1979, United Nations, *Treaty Series* vol. 1363, p. 3.

tion of such goods and areas; secondly, it provides for governance by an international body or under common obligations; and thirdly, it requires the equitable sharing of benefits deriving from such goods and areas. However, as Part XI of the UNCLOS and the Moon Treaty have demonstrated, the regimes inspired by this principle seem to provide overly rigid systems of governance that have proven difficult to enforce.[19]

For this reason, the principle of common concern of humankind has been formulated in most recent times. In particular, climate change and biodiversity are considered issues of common concern of humankind.[20] In this sense, this principle can be associated with the concept of public interest, because it concerns geographical areas and issues that fall within the interest of the international community as a whole.[21] The principle of common concern of humankind requires States to take collective measures to safeguard common interests, such as the climatic conditions and biodiversity of any areas of the planet, including areas beyond national jurisdiction, without resorting to the creation of an institutionalised international regime.[22]

A combination of the principles of the common heritage and the common concern of humankind has emerged in the Agree-

[19] For an in-depth analysis of the principle of the common heritage of (hu) mankind see J.E. Noyes, "The Common Heritage of Mankind: Past, Present, and Future", in *Denver Journal of International Law and Policy*, XL (2011), p. 447.

[20] See the Preambles of the UNFCCC and Biodiversity Convention. According to the International Law Association (ILA) "the proper management of climate system, biological diversity and fauna and flora of the Earth, (is) the common concern of humankind". See International Law Association, "New Delhi Declaration of Principles of International Law relating to Sustainable Development", Resolution 3/2002, Report of the Seventieth Conference, New Delhi (2002), para. 1.3.

[21] D. Shelton, "Common Concern of Humanity", in *Environmental Policy and Law*, XXXIX (2009), p. 83, at 84.

[22] For the view that international law provides for the obligation of States to take legislative and implementing measures to preserve areas and objectives that are of common concern, see Th. Cottier, "The Principle of Common Concern of Humankind", in Th. Cottier (ed), *The Prospects of Common Concern of Humankind in International Law* (Cambridge, Cambridge University Press, 2021), p. 3.

ment under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement).[23] Although Article 7(b) of this agreement mentions the principle of common heritage of (hu) mankind, it maintains that this principle just serves to guide States Parties in achieving the objectives of the BBNJ Agreement.[24] Therefore, the BBNJ Agreement appears to provide a new construction of the principle of the common heritage of (hu) mankind, which does no longer serve to recognise a specific legal status of a geographical area, but it ensures that States achieve the main objectives inherent in this principle, i.e. equitable access to and sharing of resources between present and future generations.

In sum, despite the different interpretations of the concept of public interest that may be provided under international law, the sustainable use of areas beyond national jurisdiction appears to fall within such interest and requires specific regulatory measures for all human activities taking place in those areas.

3. *Physical and Legal Peculiarities of Areas beyond National Jurisdiction*

Environmental sustainability of human activities cannot be assessed according to the same criteria and rules in all the areas beyond national jurisdiction. In fact, these areas do not share many common characteristics with each other, except the fact that they do not belong to any State.

As affirmed above, high seas have always been considered as open for free access and use by all States. Their environmental sustainability has for long time been guaranteed only by the gen-

[23] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement), New York, 19 June 2023, United Nations, certified copy C.N.203.2023.

[24] For this view, see Z. Taghizadeh, "Marine Genetic Resources as Common Heritage of Mankind under the BBNJ Agreement; The International Community toward a Pragmatic Benefit-Sharing Approach?", in *Biodiversity and Conservation*, XXXIV (2025), p. 131.

eral obligation to protect the marine environment. Most recently, some more detailed norms have been adopted with regard to the conservation of marine living resources that have been seriously affected by unregulated and, sometimes, illicit fishing. For example, the living resources of a very fragile area, such as the international waters of the Arctic Ocean, have been only recently safeguarded according to a specific treaty regime. Most precisely, Article 2 of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (Arctic Ocean Agreement)[25] compels States Parties to adopt precautionary conservation and management measures to ensure the sustainable use of fish stocks.

Similarly, Article 2 of the BBNJ Agreement states that its objective is "to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention (namely, the UNCLOS)". In light of this objective, the BBNJ Agreement established that States must adopt measures in order to guarantee that marine genetic resources are exploited sustainably and shared equitably among States in the interest of humankind as a whole.

An analogous regime applies to the Outer space that is explicitly declared as "province of all (hu)mankind" in Articles I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)[26] and 4 of the Moon Treaty. In particular, Article 7(1) of the Moon Treaty establishes the obligation of States Parties "to take measures to prevent the disruption of the existing balance of its environment". Still,

[25] Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (Arctic Ocean Agreement), Ilulissat, 3 October 2018, ST/10788/2018/INIT, European Union, *Official Journal*, L 73 (15 March 2019), p. 3. For a detailed exam of this agreement see E.J. Molenaar, "The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous Peoples", in *Marine policy*, CLXIV (2024), pp. 1-9.

[26] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty), London, Moscow and Washington, D.C., 27 January 1967, United Nations, *Treaty Series,* vol. 610, 206.

States must adopt measures to safeguard the common interest in the preservation of space areas and resources.[27]

In contrast, the Area and its resources are not only proclaimed common heritage of (hu)mankind, but they are also subject to an international institutionalised management regime in which the measures to be followed by State and private operators are adopted by international bodies.

Finally, although Antarctica is considered as an area beyond national jurisdiction for the purposes of this chapter, according to the Antarctic Treaty, which has governed this area for more than 65 years, some claims to sovereignty over certain territories of the Antarctic continent are permitted. For this reason, Antarctica has not so far generally been recognised as common heritage of (hu)mankind. However, Article 2 of the Protocol on Environmental Protection to the Antarctic Treaty (PEPAT),[28] recognises the status of Antarctica as a "natural reserve devoted to peace and science". As such, Antarctica must be preserved in the interest of humankind, as a whole.[29]

In sum, the goal of environmental sustainability for activities carried out in areas beyond national jurisdiction cannot be achieved under the same rules and obligations due to the different physical and legal characteristics of these areas. Therefore, while certain activities are banned in some of these areas, they may still be permitted in others.

4. *Regulating Commercial Activities in Areas beyond National Jurisdiction*

Commercial activities occurring in areas beyond national jurisdiction may have different characteristics and, consequently, different impact on the environment of such areas.

[27] For the importance of considering Outer space as a part of the environment that must be used in a sustainable manner see M. Byers, A. Boley, *Who Owns Outer Space? International Law, Astrophysics and the Sustainable Development of Space* (Cambridge, Cambridge University Press, 2023), p. 9.

[28] Protocol on Environmental Protection to the Antarctic Treaty (PEPAT), Madrid, 4 October 1991, in United Nations, *Treaty Series*, vol. 2941, p. 9.

[29] Preamble of the PEPAT, para. 8.

For instance, in addition to fishing and navigation that have traditionally been carried out in the international waters, other activities have recently taken place at sea although they are not yet thoroughly regulated under international law. As an example, the installation of offshore structures, such as wind turbine blades and platforms to carry out prospecting activities, are increasingly frequent.[30] Under the law of the sea, and, especially, UNCLOS norms regulating the management of the high seas, these activities are considered sustainable as long as they do not cause damage to the marine environment.[31] Therefore, the installation of offshore structures has been deemed to be consistent with the international law of the sea even though such installation entails the partial occupation of the international sea, which, by its very nature, should be excluded from public and private appropriation.[32]

Further, some activities, such as artificial carbon sequestration techniques at sea, have being considered by international fora to reduce the growing presence of carbon dioxide (CO2) in the atmosphere.[33] These activities entail the capture and storage of CO2 in the oceans and seabed.[34] Due to the high level of tech-

[30] For the view that an increasing industrialisation of the sea has taken place in the last decades see T.A. Stojanovic, C.J.Q. Farmer, "The Development of World Oceans and Coasts and Concepts of Sustainability", cit., p. 160.

[31] Article 87(d) of the UNCLOS allows States to establish artificial islands, installations, and structures in the high seas.

[32] For the view according to which modern activities carried out in the international waters entail a sort of colonisation of the seas, see T.A. Stojanovic, C.J.Q. Farmer, "The Development of World Oceans and Coasts and Concepts of Sustainability", cit., p. 161.

[33] For an example of support for the enactment of carbon sequestration mechanisms to mitigate the noxious impact of climate change on the oceans, see United Nations, Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, "Declaration on Our ocean, our future, our responsibility", Lisbon 17 June 2022, A/CONF.230/2022/12, para. 4.

[34] For the definition of carbon sequestration, see N. Eckley, E. Selin, "Carbon Sequestration", in *Encyclopaedia Britannica*, (16 January 2019), available at https://www.britannica.com/technology/carbon-sequestration.

nology and costs involved, they are at present primarily available to private companies. However, the long-term impact of these activities on the environment of the oceans and deep seabed remains uncertain. Therefore, despite the unquestionable usefulness of carbon sequestration activities in supporting global decarbonisation, such activities might prove harmful for the marine environment. For this reason, they have not yet been applied.

Commercial activities have not been permitted in the Area to date, both due to the restrictive regime established in Part XI of the UNCLOS and because of the impracticality of mining activities at extreme depths. However, the International Seabed Authority, which is the governing organisation of the Area under the UNCLOS,[35] is currently negotiating some regulations concerning the exploitation of mineral resources in the Area.[36] If these regulations were to come into force and mining activities were to be carried out in the Area, the impact of such activities could be devastating for the marine environment. For this reason, some concern has already been raised by the United Nations Special Rapporteur on the promotion and the protection of human rights in the context of climate change.[37] The Special Rapporteur has in fact suggested adopting a moratorium on mining activities in the Area in order to preserve the already compromised state of the oceans and the rights of the populations who depend on the use of the marine environment and resources for their survival.

In this regard, the International Seabed Authority has addressed the issue of the conservation of the marine environment of the Area in three regulations, adopted more than a decade ago, with regard to prospecting and exploration of mineral resources.[38] These regulations provide a detailed definition of ma-

[35] Article 157 of the UNCLOS.

[36] International Seabed Authority, Draft Regulations on Exploitation of Mineral Resources in the Area, 15 February 2026, ISBA/31/C/CRP.1/Rev.2.

[37] United Nations General Assembly, "Report of the Human Rights Council Special Rapporteur on the Promotion and the protection of human rights in the context of climate change, Professor Elisa Morgera, A human rights-based approach to the energy transition", 15 July 2025, A/80/188.

[38] International Seabed Authority, "Decision of the Assembly of the International Seabed Authority relating to the regulations on prospecting and ex-

rine environment, which encompasses "physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof."[39] This broad definition requires safeguarding all the components and conditions of the marine environment, which also seem to include marine currents and the existing state of ecosystems. Therefore, to comply with these requirements, commercial mining might be limited, if not completely prohibited, in the Area. In sum, even the regulations of the International Seabed Authority appear to reaffirm the conservative character of the regime that is established in Part XI of the UNCLOS.[40]

Strict regulations have not prevented commercial activities from taking place in the Outer space. Although the placement of satellites may still be considered to be a benefit for humanity even when carried out by private companies for lucrative purposes, this activity might still result in an obstacle to the equitable sharing of this area. In fact, the positioning of satellites somehow entails the occupation of the Outer space, which should be not allowed, considering that it is the common heritage of (hu)

ploration for polymetallic sulphides in the Area", 15 November 2010, ISBA/16/A/12/Rev.1, "Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area", 22 October 2012, ISBA/18/A/11, and "Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters", 22 July 2013, ISBA/19/C/17.

[39] International Seabed Authority, Regulation 1(3)(c) of the Regulations on prospecting and exploration for polymetallic sulphides in the Area, cit. All the three adopted regulations provide the same definition of marine environment, which is also mirrored in the Draft Regulations on the exploitation of mineral resources.

[40] For the relevance of the issue of the protection of the marine environment in new regulations of the International Seabed Authority see, T. SMAJIC, "Climate Change and Deep Seabed Mining: Implications of the COSIS Advisory Opinion" in *Ocean Development & International Law*, LVI (2025), p. 415, at p. 435.

mankind. In addition, since orbit shells are not infinite, their occupation will sooner or later exclude other public or private entities from using the Outer space to deploy their satellites.[41] Finally, satellite debris resulting from the destruction of satellites and remaining in space can jeopardise space expeditions and other satellites. In this regard, the European Union has condemned Russia's practice of intentionally destroying its inoperative satellites to test anti-satellite weapons.[42]

Most significantly, other private space activities, such as tourist expeditions do not appear to be consistent with the spirit of the Outer space and Moon Treaties, which declare these areas as province of all (hu)mankind.[43]

Finally, the global shortage of mineral resources could also encourage public and private entities to explore the Moon for the purpose of extracting its mineral resources. In this regard, some States have already adopted non-binding principles that envisage the possibility of exploiting space resources.[44] According to these States, the legitimacy of the exploitation of the resources of the Outer space might be inferred from the norms of both the Outer space and Moon Treaties. In fact, Article III of the Outer Space Treaty only requires States to ensure that the use of outer space is peaceful. To this end, according to Article 11(5) of the Moon Treaty, Parties must establish an international re-

[41] See M. Byers, A. Boley, *Who Owns Outer Space? International Law, Astrophysics and the Sustainable Development of Space*, cit., p. 69.

[42] High Representative of the Union for Foreign Affairs and Security Policy, "Statement on behalf of the European Union on the Russian anti-satellite test", 15 November 2021 as quoted by M. Byers, A. Boley, *Who Owns Outer Space? International Law, Astrophysics and the Sustainable Development of Space*, cit., p. 328.

[43] *Ivi*, p. 44.

[44] In this regard, see Section 10 of the Artemis Accords that were adopted by the National Aeronautics and Space Administration (NASA) in cooperation with the United States Department of State. The Artemis Accords provide guidelines for outer space activities and have so far been ratified by 56 States. National Aeronautics and Space Administration, "Artemis Accords. Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes", 13 October 2020, p. 4.

gime for regulating the exploitation of resources.[45] Therefore, if States succeed in establishing such a regime, the exploitation of space resources could become a reality. However, pending an international regime that ensures equitable benefit-sharing, it remains uncertain whether and for how long States will be able to continue to impose the general obligation to preserve the integrity of Outer space on private actors that have already undertaken commercial space activities.

Therefore, along with the physical environment, commercial activities occurring in the Outer space may also endanger the very spirit of the regime that has so far governed this area.

Further, commercial activities are prohibited on the Antarctic continent. Under the PEPAT, both Antarctic living and mineral resources may be exploited only for scientific purposes.[46] This is mainly because, as affirmed above, the PEPAT recognises Antarctica as a nature reserve that can only be used for peaceful purposes. For this reason, despite the global shortage of mineral resources, the Antarctic mineral reserves have so far remained intact. However, the norms of the PEPAT, including Article 7, which prohibits commercial mining, can be amended, pursuant to Article 25, fifty years after the entry into force of the PEPAT, i.e. 2048. The possibility of amending the PEPAT has led some States and private actors to believe that the Antarctic Treaty System (ATS), namely the regime originated from the Antarctic Treaty,[47] may permit the exploitation of Antarctic mineral re-

[45] For a thorough analysis of this issue see M. Byers, A. Boley, *Who Owns Outer Space? International Law, Astrophysics and the Sustainable Development of Space*, cit., p. 157.

[46] Article 7 of the PEPAT prohibits any mineral activities in the Antarctic continent but for scientific purposes. Article 3 of Annex II to the PEPAT on the conservation of Antarctic flora and fauna only allows exploitation of specimens under permit for scientific purposes. For an analysis of the exploitation of Antarctic resources see A. Press, A. Constable, "Conservation Law in Antarctica and the Southern Ocean: The Antarctic Treaty System, Conservation, and Environmental Protection", in *Australian Journal of International Affairs*, LXXVI (2022), p. 305.

[47] According to Article 1(e) of the PEPAT, the Antarctic Treaty System (ATS) encompasses "the Antarctic Treaty, the measures in effect under that

sources in the near future.[48] For this reason, the States Parties to the Antarctic Treaty have felt the need to reaffirm their commitment to prohibiting commercial mining in Antarctica.[49]

The only commercial activities permitted in Antarctica are fishing, which is regulated according to the Convention on the Conservation of Marine Living Resources (CCAMLR),[50] and tourism that has so far scarcely been addressed under the ATS because of the lack of consensus among the States Parties.[51] In this regard, the massive scale of both these activities has already significantly impacted the integrity of the Antarctic environment, as demonstrated by the dramatic melting of the ice and the decline of species.[52]

Therefore, the proliferation of commercial activities in areas, such as Antarctica and Outer space, does not only jeopardise the integrity of their physical environment, but it also conflicts with the founding principles of the treaty regimes governing these areas, according to which they should be used for the benefit of humanity, rather than for the lucrative and selfish interests of a few commercial operators.

Treaty, its associated separate international instruments in force and the measures in effect under those instruments."

[48] For the impact of Article 25 of the PEPAT on the prohibition of commercial mining in Antarctica see A.J. Press, A.W. Jackson, "Mining in Antarctica to 2048 and Beyond", in S. Scott, T. Stephens, J. McGee (eds) *Geopolitical Change and the Antarctic Treaty System* (Singapore, Springer Polar Sciences, 2024), p. 231.

[49] See, for example, Antarctic Treaty Consultative Meeting, Resolution 3 (2023), "Reaffirming ongoing commitment to the prohibition on Antarctic mineral resource activities, other than for scientific research", XLV Antarctic Treaty Consultative Meeting, Helsinki 2023.

[50] Canberra, 20 May 1980, United Nations, *Treaty Series* vol. 1329, p. 47. Article II(2) of the CCAMLR allows the "rational use" of marine living resources.

[51] Article 3(2)(a) of the PEPAT allows lawful human activities as long as they are "planned and conducted so as to limit adverse impacts on the Antarctic environment."

[52] For the impact of tourist activities on the Antarctic environment, see D. Liggett, E. J. Stewart, "Governance of Tourism in the Global Commons: The Case of Antarctica", in J. Saarinen, C. M. Hall (eds), *Handbook on Tourism Governance* (Cheltenham, Edward Elgar, 2025), p. 301.

5. *General Principles Ensuring Environmental Sustainability in the Public Interest*

The general principles of environmental sustainability have a very broad scope and are enshrined in both customary international law and treaty regimes applicable to various situations. Therefore, to determine how these principles can be applied to commercial activities carried out in areas beyond national jurisdiction to achieve sustainability goals, their concrete content must be ascertained. To this end, particular attention will be paid to three advisory opinions adopted by authoritative international bodies over the past 15 years, namely, the opinions of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the duties and responsibilities of States sponsoring mineral activities in the Area,[53] of the International Tribunal for the Law of the Sea on international law and climate change,[54] and of the International Court of Justice on the duties of States as to climate change.[55] The interpretation provided in these advisory opinions with regard to the general principles enshrining the protection of the environment and its sustainable use appears to be extremely effective because the judicial bodies involved based their reasoning on several instruments of international law.[56] In particular, the International Tribunal for the Law of the Sea that, by virtue of its mandate, should have limited its analysis to examining the provisions of the UNCLOS in order to determine the scope of the ob-

[53] International Tribunal for the Law of the Sea, Advisory Opinion of 1 February 2011, *Responsibilities and obligations of States with respect to activities in the Area*, ITLOS Reports (2011), p. 10.

[54] International Tribunal for the Law of the Sea, Advisory Opinion of 21 May 2024, *Request for an Advisory Opinion Submitted by the Commission of Small Island States* (COSIS) *on Climate Change and International Law*, Case n. 31, ITLOS Reports (2024), p. 7.

[55] International Court of Justice, Advisory Opinion of 23 July 2025, *Obligations of States in respect of Climate Change*, at https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf.

[56] For the relevance of the advisory power of international judicial bodies to determine the scope of international obligations, see S. Forlati, "La Corte internazionale di giustizia di fronte ai cambiamenti climatici: 'fra Scilla e Cariddi'?", in *Rivista di diritto internazionale*, CVIII (2025), p. 7.

ligation of States to preserve the marine environment in relation to climate change impacts,[57] instead delineated the scope of this obligation also in light of the provisions of the climate change regime, which includes the UNFCCC and Paris Agreement.[58]

The advisory opinion of the Seabed Disputes Chamber is the only decision that specifically addresses the issue of the environmental sustainability of commercial activities in an area beyond national jurisdiction, namely, mining in the Area. The other two opinions analyse States' obligations regarding climate change in any marine or terrestrial areas, regardless of whether they are located under or beyond State jurisdiction.

These advisory opinions define the scope of some general principles that identify the obligation of States to guarantee, and to ensure that private individuals guarantee, the environmental sustainability, in the interests of humanity, of every activity carried out in any area of the planet.

The first principle emerging from these advisory opinions is the principle of equity. This principle is twofold: on the one hand, equity affects the relationship between developing countries and industrialised States and, therefore, reaffirms the need for common but differentiated responsibilities, enshrined in the Rio Declaration on Environment and Development.[59] In light of this principle, in ensuring the environmental sustainability of human activities, developing States are not required to use the same measures and instruments available to industrialised countries.[60] In addition, developing States enjoy the right to be assisted by industrialised countries with scientific and technological support in order to gain sustainable access to resources.[61] However, the

[57] *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., paras. 67-82.

[58] Paris Agreement, Paris, 12 December 2015, United Nations, *Treaty Series*, vol. 3156, p. 79.

[59] Principle 7, United Nations General Assembly, "Rio Declaration on Environment and Development", cit.

[60] *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 69.

[61] *Responsibilities and obligations of States with respect to activities in the Area*, cit., para. 157.

status of developing country does not exempt a State from the obligation to preserve the environmental integrity of an area, whether under or outside its jurisdiction. For example, with regard to the regulation of mining activities in the Area, the Seabed Disputes Chamber has acknowledged the responsibility of developing States to control the conduct of private individuals operating under their jurisdiction in order to prevent commercial operators from choosing to organise their activities in conjunction with States that have little capacity for control and which could, therefore, be considered as "Sponsor States of convenience".[62]

On the other hand, equity implies intergenerational equity, that is a principle inherent to the concept of sustainable development. The principle of intergenerational equity was formulated in the Rio Declaration on Environment and Development[63] to guarantee the conservation of the environment in the interest of future generations. However, the current critical condition of the environment of our planet leads us to believe that this principle has been significantly neglected in recent decades. This is particularly true regarding the issue of climate change. Both the International Tribunal for the Law of the Sea and International Court of Justice have emphasised, in their advisory opinions, that the duty to preserve the environment also encompasses the obligation to prevent future threats and damage to it.[64] In particular, the International Court of Justice has considered the principle of intergenerational equity as a criterion of equity for determining whether State policies and measures are adequate to ensure compliance with the obligation to preserve the environment.[65]

Another principle that is aimed at regulating the environmental sustainability of human activities and which is strictly connected to the concept of intergenerational equity is the precautionary principle, or precautionary approach as defined in Prin-

[62] *Responsibilities and obligations of States with respect to activities in the Area*, cit., para. 159.

[63] Principle 3, United Nations General Assembly, "Rio Declaration on Environment and Development", cit.

[64] *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 197.

[65] *Obligations of States in respect of Climate Change*, para. 157.

ciple 15 of the Rio Declaration on Environment and Development. To comply with this approach, States might also be compelled to prohibit activities that appear to be seriously harmful to the environment in order to safeguard it in the interests of present and future generations. The relevance of this approach has been raised in all the above-mentioned advisory opinions. In particular, the International Tribunal for the Law of the Sea has repeatedly highlighted the duty to comply with the precautionary approach that is also explicitly included in the regulations on prospecting and exploration of mineral resources in the Area[66] and which it is implied in Article 194 of the UNCLOS sanctioning the obligation to prevent and control pollution of the marine environment.[67] Similarly, the International Court of Justice, recalling its decision on the *Pulp Mills on the River Uruguay* case,[68] has affirmed that, according to the precautionary approach, States must exercise due diligence both in adopting their measures to contrast climate change and in controlling the conduct of private persons.[69] Therefore, the precautionary approach appears to be an effective instrument to control human activities that are carried out within State jurisdiction, but that may have significant impact on areas beyond national jurisdiction.

Furthermore, the advisory opinions identify some procedural obligations falling within the general duty of cooperation that States must respect at the international and/or domestic level to give effect to the above-mentioned substantive principles.[70]

At the international level, States must cooperate with each other in international fora to adopt effective measures to ensure

[66] *Responsibilities and obligations of States with respect to activities in the Area*, cit., para. 125.

[67] *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 213.

[68] International Court of Justice, Judgment of 20 April 2010 on *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), in ICJ Reports (2010) p. 14.

[69] *Obligations of States in respect of Climate Change*, cit., para. 294.

[70] For the relevance of the duty of cooperation for the implementation of the obligation to protect the marine environment against the noxious effects of climate change see T. Smajic, "Climate Change and Deep Seabed Mining: Implications of the COSIS Advisory Opinion", cit., p. 428.

the sustainable use of the environment. Among the measures suggested, particular attention is given to adaptation measures, which, combined with mitigation tools that are aimed at preventing environmental damage, contribute to preserving and restoring the environment for future generations.[71] Adaptation measures also encompass area-based tools, such as the designation of protected areas within fragile ecosystems.[72] The designation of such areas appears to be particularly effective for ensuring the conservation of regions beyond national jurisdiction. For this reason, the ATS has adopted a regime for designating such areas in Antarctica.[73]

At the national level, States can fulfil their duty of cooperation by adopting domestic legislation that is consistent with international obligations and can oblige private parties to respect them. For example, according to the above-mentioned advisory opinions, the obligation to conduct an environmental impact assessment (EIA) does not only apply to States, but also to private actors who are required to carry out EIA when they plan to conduct activities, such as mining in the Area or tourist activities in Antarctica and the Outer space, that could be harmful to the environment.[74]

[71] For the view that Article 192 of the UNCLOS stating the general obligation to protect and preserve the marine environment also includes the duty to adopt adaptation measures, see *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 394. In addition, for the view that the Paris Agreement entails the obligation to adopt adaptation measures see *Obligations of States in respect of Climate Change*, cit., paras. 255-259.

[72] For the view that the designation of marine protected areas may be a "realist response strategy to climate change", see *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 438.

[73] See Annex V to the PEPAT on Area Protection and Management.

[74] For the view that the duty to carry out EIA procedures is implicit in the concept of precautionary approach see *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 353. Some authors believe that the obligation of EIA should also be applied to activities to be carried out in the Outer space, see M. Byers, A. Boley, *Who Owns Outer Space? International Law, Astrophysics and the Sustainable Development of Space*, cit., p. 108.

These obligations, whether of substantive or procedural nature, which are incumbent on States, are closely interconnected with the general interest underlying the protection of the environment for the benefit of present and future generations. In the two advisory opinions relating to climate change, namely the opinions of the International Tribunal for the Law of the Sea and the International Court of Justice, the general interest was represented by the need to protect a good of common concern, such as the climate,[75] through collective action. Besides, in the advisory opinion concerning mining activities in the Area, the Seabed Disputes Chamber has acknowledged the public interest in ensuring the environmental sustainability of such activities, given that the Area and its resources are common heritage of (hu)mankind. For example, when a Sponsoring State exercises its powers of control over private operators intending to carry out mining activities in the Area, that State is acting in the public interest, according to the Seabed Disputes Chamber.[76]

In sum, the general principles highlighted in the three advisory opinions in question entail both the obligation of States to comply with these principles and the duty to oblige private actors to do the same with the aim of safeguarding the public interest.

6. *Enforcing International Obligations in Areas beyond National Jurisdiction*

Commercial activities that affect the environmental integrity of areas beyond national jurisdiction originate either from such areas or from the territory of States. In the latter case, States can exercise their territorial jurisdiction to ensure that the activities of private persons comply with international obligations.

[75] *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 122, and *Obligations of States in respect of Climate Change*, cit., para. 440.

[76] *Responsibilities and obligations of States with respect to activities in the Area*, cit., para. 226.

Instead, when such activities take place in areas beyond national jurisdiction, no State and international body can exercise territorial sovereignty. Therefore, private persons operating in such areas may only be subject to the authority of the State of which they are nationals or, in case of vessels, of the State the flag of which they fly. Nationality (and flag State) jurisdiction has already been recognised as an effective jurisdictional link under international law to govern the activities that private persons carry out in all areas beyond national jurisdiction, such as international seas, Antarctica, and Outer space.[77] In addition, the UNCLOS recognises the power of control of Sponsoring States over the private operators with whom they plan to carry out mining activities in the Area. If a similar jurisdictional criterion, based on the factual connection between a State and private operators, were extended to other activities carried out in all areas beyond national jurisdiction, this would ensure more effective control over private actors, particularly when their State of nationality is unaware of the fact that they are organising activities jointly with another State. Similarly, the jurisdictional link recognising the power of control of port States would facilitate the surveillance over private activities that occur in areas beyond national jurisdiction, such as international seas and Antarctica, which may be very remote from the original State of departure. However, the jurisdiction of port States has so far only been recognised over vessels causing marine pollution and illicit harvesting of living resources in the high seas.[78]

[77] As to State jurisdiction based on nationality see Article XI of the Convention on International Liability for Damage Caused by Space Objects. Convention on International Liability for Damage Caused by Space Objects, London, Moscow and Washington, 29 March 1972, United Nations, *Treaty Series*, vol. 961, p. 187. As to flag State jurisdiction see Articles 217 of the UNCLOS and 2 of Annex IV to the PEPAT on prevention of marine pollution. *See also Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 204.

[78] Articles 218 of the UNCLOS and 23 of the Agreement for the implementation of the provisions of the United Nations Convention on the law of the sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. Agreement for the implementation of the provisions of the United Nations Convention on the law

According to the three advisory opinions mentioned above, States do not only enjoy the right to exercise their control over private persons, but they also have the obligation to exercise due diligence to ensure that these persons comply with the general principles establishing the environmental sustainability of human activities. For example, with regard to mining in the Area, Article 4(4) of Annex III to the UNCLOS on Basic conditions of prospecting, exploration and exploitation recognises the duty of the Sponsoring States to control the conduct of the private operators with whom they carry out mineral activities.[79]

Therefore, with regard to the environmental sustainability of commercial activities, States do not only have to comply with international provisions requiring them to adopt specific conducts, such as the enactment of appropriate domestic legislation. They are also held responsible for monitoring compliance by private individuals under their jurisdiction with national and international obligations, such as the obligation to carry out EIA procedures.

As affirmed above, all these obligations of States are owed to the international community and humankind, as a whole, by reason of the public interest in preserving the environmental integrity of the planet.

In light of the above, the above-mentioned advisory opinions have also upheld that the duty to ensure the environmental integrity of the planet entails an *erga omnes* obligation towards all States and the international community as a whole.[80] Accordingly, every State has the right to invoke the violation of this obliga-

of the sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, New York, 4 August 1995, United Nations, *Treaty Series*, vol. 2167, p. 3. See also *Request for an Advisory Opinion Submitted by the COSIS on Climate Change and International Law*, cit., para. 287. For a thorough analysis of port State jurisdiction, see E.J. Molenaar, "Port State Jurisdiction", in *Max Planck Encyclopedia of Public International Law* available at www.mpepil.com, para. 24.

[79] *Responsibilities and obligations of States with respect to activities in the Area*, cit., paras. 199-205.

[80] *Ivi*, para. 180 and *Obligations of States in respect of Climate Change*, cit., para. 442.

tion and to seek cessation and guarantees of non-repetition of such violation under Article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts, as a non-injured State.[81]

However, in some circumstances, States might act as the injured States of a violation of an international obligation that is owed to all States or a group of States. In fact, under Article 42 of the Articles on Responsibility of States for Internationally Wrongful Acts, this occurs when "the breach of an international obligation is of such a character as radically to change the position all the other States to which the obligation is owed with respect to the further performance of the obligation." For example, if a State Party to the Antarctic Treaty used or allowed private actors to use, Antarctic mineral resources for commercial purposes, for its or their own profit, such breach would undermine the very object and purpose of the ATS, which is to consider Antarctica as a natural reserve devoted to peace and science. Therefore, other States Parties to the ATS could be considered as injured States if they could demonstrate that they have always fulfilled their obligations under the ATS in good faith.

In sum, the public interest underlying the duty to ensure the environmental sustainability of public or private activities in areas beyond national jurisdiction seems to be better safeguarded through the action of States that possess the necessary powers to enforce international obligations both at the domestic and international level.

7. Conclusion

When sustainable development was recognised as a fundamental goal in the Rio Declaration on Environment and Devel-

[81] United Nations General Assembly, Resolution 56/83, 12 December 2001, "Responsibility of States for Internationally Wrongful Acts", A/56/49(Vol. I)/Corr.4. For the limited set of rights of non-injured States in case of breach of *erga omnes* obligations see J. Kammerhofer, "Obligations erga omnes", in *Max Planck Encyclopedia of International Law*, available at available at www.mpepil.com, para. 26.

opment, States believed that it would have been the most effective tool to ensure the environmental sustainability of all human activities in any geographical areas of the planet. Nevertheless, over the past three decades, global environmental degradation has increased dramatically, as demonstrated by the noxious effects of climate change, such as the melting of polar ice, ocean acidification, and sea-level-rise. These detrimental effects have not only affected the environment, but they have also severely disrupted human life. For example, some small Pacific island States are currently at risk of disappearing beneath the sea due to rising sea levels. Along with these islands, their populations and States will lose their territory and the rights associated with it.[82]

The failure of the international community to achieve the goal of environmental sustainability has led some legal and economic scholars to believe that the concept of sustainable development, as formulated more than thirty years ago, is no longer effective in ensuring the protection of the global environment. According to these legal authors, the goal of sustainable development would have required the establishment of a new legal, economic, and social order in which industrial and agricultural production, resource consumption, and way of life should have been aligned with the overall goal of ensuring the environmental sustainability of all human activities.[83] In this regard, some new legal tenets have been conceived, such as the doctrine recognising the autonomous rights of Nature or of some of its components[84] and the theory of ecological law, which upholds that human beings are

[82] For a recent comment to this matter see A. Green, M. Wewerinke-Singh, "State Continuity, Self-Determination and Sea-Level Rise", in *International and Comparative Law Quarterly*, LXXIV (2025), p. 1.

[83] M. F. Strong, "Beyond Rio: Prospects and Portents", in *Colorado Environmental Law Journal*, IV (1993), p. 21, at 26.

[84] The recognition of the theory of the rights of Nature has led some States to declare that components of Nature, such as rivers, lakes and territories, are legal persons. Therefore, under this theory, the rights of Nature should be protected regardless of whether they relate to the interests of a State or a group of individuals. See J. Gilbert, E. Jones, J. Dehm, E. Macpherson, "The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda", in *Netherlands Yearbook of International Law*, LII (2021), p. 47.

parts of the environment and, therefore, the need to protect the latter prevails over individual interests.[85]

Similarly, some economic scholars have argued that, given the limited availability of resources and energy, the change in the global economic and social system, which is deemed necessary to achieve environmental sustainability, should involve reducing resource and energy consumption through economic degrowth.[86] In this regard, limiting or banning certain human activities, such as tourist expeditions, seems justified when they occur in areas of common interest, such as Antarctica and the Outer space. In fact, these activities, which may significantly damage the environment, are only carried out for the benefit and profit of a few private persons. However, the implementation of the economic degrowth theory, which should be reserved for industrialised countries only,[87] is far from being immediately applicable because, to be effective and equitable, it requires that States and the international community clearly identify their priorities before abandoning the existing economic models.[88]

To respond to these doctrinal criticisms and, more significantly, to address the massive proliferation of certain unsustainable commercial activities, States should adopt effective measures, both at the international and national level. To this end, it is necessary to identify the specific obligations that States and private individuals must respect both within and outside State jurisdiction.

But above all, to ensure environmental sustainability, substan-

[85] The theory of ecological law moves from an anthropocentric to an eco-centric approach that aims at the holistic protection of the environment. See M. Montini, "Revising International Environmental Law through the Paradigm of Ecological Sustainability", in F. Lenzerini, A. F. Vrdoljak (eds), *International Law for Common Goods, Normative Perspectives on Human Rights, Culture and Nature* (Oxford, Hart Publishing, 2014), p. 271.

[86] G. Kallis, C. Kerschner, J Martinez-Alier, "The Economics of Degrowth", in *Ecological Economics*, LXXXIV (2012), p. 172.

[87] For the view that the economic degrowth theory should not be applied to developing countries see C. Okereke "Degrowth, Green growth, and Climate Justice for Africa" in *Review of International Studies*, L (2024), p. 910.

[88] G. Kallis, C. Kerschner, J Martinez-Alier, "The Economics of Degrowth", cit., p. 175.

tive obligations require effective enforcement. With regard to commercial activities carried out in areas beyond national jurisdiction, only States can ensure that private individuals conduct such activities in compliance with international obligations, due to the absence of international bodies capable of ensuring such enforcement in the interest of the international community. In this regard, a State exercising its powers, as a national, flag, or port State, to ensure the environmental integrity of areas beyond national jurisdiction, should not consider extending its sovereign authority over such areas. Rather, it should act as the steward of the public interest upon which the conservation of all areas beyond national jurisdiction is based.[89]

As a matter of fact, the irreversible environmental degradation of areas such as the oceans, Antarctica, and Outer space, due to unregulated commercial activities taking place there, does not only compromise the physical integrity of these areas, but it also jeopardises the ability of the humankind to pass on their uniqueness to future generations.

[89] For the theory of "stewardship" according to which States should act as the stewards of the public interest when they exercise their coercing powers to preserve areas and goods of common interest, see R. BARNES, "Stewardship Beyond the State: Implications for the Regulation of Marine Genetic Resources in Areas Beyond National Jurisdiction", in N. Krabbe, D. Langlet (eds), *Marine Bioprospecting, Biodiversity and Novel Uses of Ocean Resources. New Approaches in International Law* (Oxford, Hart Publishing, 2024), p. 9.

BETWEEN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS: ENVIRONMENTAL SUSTAINABILITY IN THE INTERNATIONAL REGULATION OF CORPORATE RESPONSIBILITY

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SUMMARY: 1. Introduction. – 2. Shifting Frameworks: From Corporate Social Responsibility as an Effort to Shape Corporate Conduct to Business and Human Rights as a "Quest for Accountability". – 3. The Rise of Environmental Sustainability as the Unexpected Protagonist of Corporate Responsibility. – 4. The Role of the Broader International Sustainability Landscape. – 5. Environmental Sustainability in Existing and Emerging Mandatory Corporate Due Diligence Frameworks. – 6. Recent Judicial Trends on Environmental Corporate Responsibility. – 7. Brief Considerations on the Prospective Developments of Environmental Corporate Responsibility.

1. *Introduction*

Traditionally, the international legal landscape on corporate responsibility has developed with a primary focus on the respect of human rights throughout business activities. However, in recent years, environmental and climate impacts have emerged as central issues, to the extent of framing environmental sustainability as the new – arguably *unexpected* – protagonist of corporate responsibility. Today, the concept of corporate responsibility is inextricably linked to environmental matters, with issues such as environmental footprint, circular economy and climate transition being put at the center of companies' expected – or, in certain instances, required – conduct.

Business-related environmental and climate concerns should be regarded as an integration and expansion of the pre-existent international legal framework governing corporate respect of human rights, by virtue of two main paths: (i) the development of

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autonomous environmental rights and responsibilities, exemplified, *inter alia*, by the recognition of the right to a safe, clean, healthy and sustainable environment[1] and (ii) an evolutive interpretation of human rights towards environmental and climate protection, addressed in literature as the "greening" of human rights,[2] where valuable examples can be found, *inter alia*, in the European Court of Human Rights' jurisprudence on Arts. 2 and 8 of the European Convention on Human Rights.[3]

As renowned, at the current state, corporations do not have international legal personality and cannot, in principle, be directly bound by international obligations.[4] The resulting obstacle to the direct applicability of international hard-law provisions on corporations, paired with a lack of sufficient international *consensus* for the elaboration of binding instruments specifically framing States' duties to regulate corporate activities,[5] led to the development of international regulation on corporate responsibility as a set of soft-law standards of expected business conduct. The development of such standards constituted a response to globalization, the rise of multinational corporations and instances of corporate misbehaviour, which led scholars and civil society to begin addressing the human rights impacts of transnational

[1] UN Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment* (5 October 2021) UN Doc. A/HRC/48/L.23/Rev.1.

[2] A. Chalabi, "A New Theoretical Model of the Right to Environment and its Practical Advantages", in *Human Rights Law Review*, XXIII (2023), p. 2 ff.

[3] See, *e.g.*, K*limaseniorinnen Schweiz and Others v Switzerland,* on climate change under Art. 2, European Convention on Human Rights (hereinafter: ECHR), and *Cannavacciuolo v Italy*, on environmental pollution under Art. 8, ECHR. Successful cases of human rights greening can also be found in other international human rights courts: see, *e.g.*, Inter-American Court of Human Rights, *Maya Indigenous Community of the Toledo District v Belize* (2004).

[4] J. Crawford, *Brownlie's Principles of Public International Law* (Oxford, Oxford University Press 2019), pp. 111-112.

[5] Reference can be made to the ongoing process for the adoption of "an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". UN Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* (14 July 2014) UN Doc A/HRC/RES/26/9.

business operations from a legal point of view already in the 1970s.[6]

Two are the main soft-law international instruments governing business activities' impacts: the OECD Guidelines for Multinational Enterprises (OECD Guidelines), first adopted in 1976 and regularly updated, with the last version being adopted in 2023,[7] and the UN Guiding Principles on Business and Human Rights (UNGPs), developed by the special rapporteur of the UN Secretary General, Prof. John Ruggie, and unanimously endorsed by the UN Human Rights Council in 2011.[8]

When addressing corporate environmental and climate sustainability, such instruments need to be read in conjunction with the broader international framework, which counts both hard-law and soft-law instruments, including, *inter alia*, the UN Framework Convention on Climate Change, the Paris Agreement and the UN Sustainable Development Goals.

In this context, international standards importantly interact with other normative levels, including regional and domestic legislation. Indeed, the above-described international soft-law standards have greatly influenced and inspired the adoption of domestic and regional legislation on corporate responsibility and mandatory corporate sustainability due diligence, which, in turn, contribute to the progressive "hardening" of the international standards.

This results in a multi-layered and inter-connected legal landscape, which has been eloquently described as a "galaxy of norms".[9] In the present contribution, such legal framework will be addressed as "international regulation of corporate responsi-

[6] A. Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability", in *Journal of Human Rights*, XIV (2015), p. 240.

[7] OECD, OECD Guidelines for Multinational Enterprises (2023) (hereinafter: OECD Guidelines).

[8] UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations' "Protect, Respect and Remedy" Framework* (21 March 2011) UN Doc A/HRC/17/31 (hereinafter: UNGPs).

[9] E. Groulx Diggs, M.C. Regan, B. Parance, "Business and Human Rights as a Galaxy of Norms", in *Georgetown Journal of International Law*, L (2019), p. 309.

bility", a term here intended to encompass international standards on corporate behaviour and other relevant international instruments fitting within the sustainability paradigm, *i.e.*, instruments which, by themselves or by virtue of evolutive practice – including judicial and quasi-judicial proceedings – contribute to the specifications of the "requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others".[10]

Considering the above, the present analysis, will, firstly, address the development of the international regulation of corporate responsibility, underlining the shift from corporate social responsibility (CSR) to the business and human rights (BHR) paradigm, and, subsequently, it will turn to the integration of environmental and climate standards into such framework. Consequently, the role of the broader international sustainability framework will be addressed. In line with the multi-level nature of the regulation of corporate responsibility, the emergence of mandatory corporate due diligence legislation at the regional and domestic level will also be acknowledged. Lastly, the main judicial trends on corporate environmental responsibility will be addressed. The work concludes with some brief considerations on the future development of the field.

2. *Shifting Frameworks: From Corporate Social Responsibility as an Effort to Shape Corporate Conduct to Business and Human Rights as a "Quest for Accountability"*

The origins of the international regulation of corporate responsibility can be traced back to the rise of the concept of CSR as an expectation of responsible business behaviour grounded in corporations' perceived role as qualified members of society. A

[10] United Nations Forum on Sustainability Standards (2013), p. 3; International Trade Centre, 'Sustainability: Paradigm for society's future' in *Sustainability Standards: A New Deal to Build Forward Better*, November 2021.

fundamental articulation of CSR can be found in the 1953 landmark publication by Howard Bowen, posing the question of "[w]hat responsibilities to society can [*businesspeople*] be reasonably expected to assume?".[11]

CSR is strictly based on a voluntaristic approach, focused on the relationship with stakeholders and pivoting on self-guided action. The measures and actions adopted by companies under the umbrella of CSR are inspired by a business-oriented approach, striving for the achievement of the so-called "social license to operate", *i.e.*, the acceptance or approval of the operations of a business entity by relevant communities and stakeholders.[12]

The theorization of corporate motivations for advancing CSR has identified three principal rationales: the business case, stakeholder relations and ethical responsibility. The business case construes social and environmental issues as financially material, both in their risk and opportunity dimension. Stakeholder theory, in turn, embeds the corporation into a societal network, redefining its purpose as value creation for customers, suppliers, owners, employees and communities. Ethical responsibility invokes, as expected behaviour, the corporate respect of values aligned with international human rights and environmental standards.[13]

Even if characterized by a voluntaristic approach, the theorization of CSR played a fundamental role in shaping corporate conduct and in grounding the expectation of companies' management of their impacts on society. For the first time, businesses were called to take responsibility for their qualified role and to strive to contribute to the well-being and progress of society beyond the boundaries of their own entity.[14]

[11] R. Howard, H.R. Bowen, *Social Responsibilities of the Businessman*, (New York, Harper & Row 1953).

[12] S.S.H. Ho, C.H. Oh, D. Shapiro, "Can Corporate Social Responsibility Lead to Social License? A Sentiment and Emotion Analysis", in *Journal of Management Studies*, LXI (2024), p. 445.

[13] A. Crane *et al*, *The Oxford Handbook of Corporate Social Responsibility* (Oxford, OUP 2008); E. Garriga, D. Mele, "Corporate Social Responsibility Theories: Mapping the Territory", in *Journal of Business Ethics*, LIII (2004), p. 51.

[14] N. Farcane, E. Bureana, "History of 'Corporate Social Responsibility'

CSR importantly inspired the adoption and institution of the first international instruments and initiatives on responsible corporate behaviour.

A strong multi-stakeholder approach to CSR inspired the adoption, in 1976, of the OECD Guidelines for Multinational Enterprises (OECD Guidelines). The OECD Guidelines constitute a set of recommendations addressed by States to multinational corporations aimed at encouraging their positive contribution to economic, environmental and social progress and to minimize adverse impacts that may be associated with an enterprise's operations, products and services. The OECD Guidelines are not mandatory for companies; however, they must be promoted by member States in respect to the corporations operating within their borders.

In their 1976 original version, the OECD Guidelines focused solely on labour standards. In the following years, the OECD Guidelines were periodically updated, and their scope was notably broadened, incorporating human rights in 2000 and corporate due diligence in 2011 and, as explored below, environmental and climate standards in 1999 and 2023, respectively. The OECD Guidelines constitute today a widely recognized standard on how companies and investors should manage their impacts on stakeholders and society as a whole.

The OECD Guidelines provide for an implementation system, resting on the network of National Contact Points (NCPs), non-judicial grievance mechanisms established by each adhering State to promote awareness and handle specific instances – complaints presented by interested parties (*e.g.* individual victims, trade unions and NGOs) alleging non-observance of the OECD Guidelines by a company. In such cases, NCPs facilitate mediation, dialogue, and resolution between the parties through the 'good offices' process.

Notwithstanding the persistent relevance of CSR and the related instruments, a fundamental turning point in the evolution of international regulation of corporate responsibility lies in the

Concept", in *Annales Universitatis Apulensis Series Oeconomica*, XVII (2015), p. 31.

emergence of the field of BHR as a "quest for corporate accountability" and, to a certain extent, a response to the perceived shortcomings of CSR.[15]

Rather than focusing on societal expectation of responsible behaviour and positive impact, the BHR paradigm was conceived around the idea of granting respect of core human rights obligations and holding corporations accountable in case of their infringement, with a victim-centered approach. The first attempts to regulate corporate activities and address the fundamental issue of holding corporations accountable for the negative impacts of their commercial endeavours can be traced to the early 1970s. Recently decolonized States were pushing for an improved control of the activities of transnational corporations for the sake of a "New International Economic Order".[16] Concurrently, scholars began to address the human rights impacts of transnational corporations in their global operations, focusing on the legal aspects rather than on the ethical ones, in an effort to turn from voluntary efforts to corporate accountability.[17]

The first attempt to establish a legal framework envisaging corporate duties in respect to human rights dates back to 1974, when the UN Economic and Social Council established a Commission on Transnational Corporations and tasked it with the drafting of a code of conduct for transnational corporations.[18] The UN Draft Code of Conduct, which was completed in 1992, explicitly provided that transnational corporations should respect human rights and fundamental freedoms in the countries in which they operate, but failed to be adopted due to the strong

[15] A. Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability", cit., p. 237.

[16] O. De Schutter, "Towards a Legally Binding Instrument on Business and Human Rights", CRIDHO (Cellule de recherche interdisciplinaire en droits de l'homme) Working Paper 2015/2, p. 6.

[17] A. Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights", cit., p. 237.

[18] ECOSOC, "The Impact of Transnational Corporations on the Development Process and on International Relations", Res 1913 (LVII) (5 December 1974) para. 1.

opposition of certain governments and irreconcilable differences between industrialized and developing countries.[19]

A second endeavour at establishing a body of norms governing business activities and human rights at the UN level was made *motu proprio* by an expert subsidiary body of the then Commission on Human Rights.[20] Following a wide consultation of relevant stakeholders,[21] on August 2003, the independent experts of the Sub-Commission on Human Rights presented the Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises (the Norms), a notable attempt at swinging towards the recognition of legally binding duties upon companies. The Norms ambitiously aimed to frame corporate respect of human rights as a legal duty under international law.[22]

Naturally, a number of critiques on the imposition of international legal responsibilities on businesses were raised. The main concern pertained to the general perception that the Norms, by trying to impose international human rights duties incumbent upon States on corporations, constituted a misstatement of the law.[23]

[19] K. Buhmann, "The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output", in R. Mares (ed), *UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, (Leiden, Brill 2011), p. 87.

[20] UN Human Rights Council, "Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations' 'Protect, Respect and Remedy' Framework", (21 March 2011) UN Doc A/HRC/17/31, para. 2.

[21] D. Weissbrodt, "UN Human Rights Norms for Business", in *International Law FORUM du Droit International*, VII (2005), p. 290, at p. 295.

[22] In particular, the Norms rested on the basis that "[E]ven though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights ". ECOSOC, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2, Preamble.

[23] J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, (New York, W. W. Norton & Company 2013), p. xvii.

Moreover, experts and stakeholders noted that a binding approach posed the risk of driving companies away from voluntary efforts and normalizing the implementation of bare minimum standards. Another highly divisive issue was the vagueness of certain notions, such as businesses' "sphere of activity and influence".[24]

Therefore, instead of acting on the proposal, in 2005 the Commission decided to establish a mandate for a Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises,[25] and Professor John Ruggie was appointed for the role.[26] During his mandate, Professor Ruggie noted that, despite the existence of a number of initiatives on corporate responsibility, the lack of a coherent and authoritative system prevented such initiatives from having a relevant impact.[27] Following extensive stakeholder consultation, the SRSG developed and presented to the Human Rights Council the "Protect, Respect and Remedy" framework,[28] which grounded the subsequent drafting of the UNGPs. The latter were unanimously endorsed by the Human Rights Council in June 2011, thus providing the universal and authoritative framework called for by the SRSG.[29]

In his work, Professor Ruggie rejected the bold approach of

[24] O. De Schutter, "Towards a Legally Binding Instrument on Business and Human Rights", cit., pp. 10-11.

[25] UN Human Rights Council, "Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie", cit. para. 3.

[26] J.H. Knox, "The Ruggie Rules: Applying Human Rights Law to Corporations", in R. Mares (ed), *UN Guiding Principles on Business and Human Rights*, cit., p. 51.

[27] UN Human Rights Council, "Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie", cit., para. 5.

[28] UN Human Rights Council, "Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie" (7 April 2008) UN Doc A/HRC/8/5.

[29] O. De Schutter, "Towards a Legally Binding Instrument on Business and Human Rights", cit., p. 13.

the Norms and recognized that, at the state of the law, corporations were not directly bound by international human rights law. For this reason, drafting the UNGPs, Professor Ruggie focused on the determination of States' legal duties to protect against human rights abuses through regulation of corporate conduct and elaborated a set of principles outlining corporations' responsibility to respect human rights, that, although not directly binding, aspired to provide guidance for the monitoring and remedy of corporate misconduct.[30] Their pragmatic approach and the intentional steering away from binding duties in favor of the notion of corporate responsibility determined a wide acclamation and acceptance of the UNGPs.

The UNGPs rest on three pillars: (i) the State duty to protect against human rights abuses by third parties, including business enterprises, (ii) the corporate responsibility to respect human rights and (iii) the access to effective remedy for the victims of business-related human rights abuses.

Under the UNGPs, the corporate responsibility to respect is twofold and it entails: firstly, avoiding the infringement on human rights and, secondly, addressing adverse human rights impacts in which business enterprises may nonetheless be involved. The UNGPs refer to "internationally recognized human rights" to be understood "at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."[31] Such wording, which explicitly provides for the non-exhaustiveness of the instruments mentioned therein, leaves room for the integration of the UNGPs with other standards and rights for the sake of the identification of businesses' responsibilities, including, as will be addressed below, environmental and climate concerns.

Corporate responsibility under the second pillar of the UNGPs is independent from States' ability or willingness to fulfil

[30] J.H. Knox, "The Ruggie Rules: Applying Human Rights Law to Corporations", cit., p. 52.

[31] Principle 12, UNGPs.

their own human rights obligations, and, as such, it is distinct from mere compliance with national laws and regulations protecting human rights.[32] In particular, to comply with such responsibility, "business enterprises should have in place policies and processes appropriate to their size and circumstances."[33] In this sense, the core of the second pillar of the UNGPs lies in the human rights due diligence process that companies should undertake in order to "identify, prevent, mitigate and account for how they address their impacts on human rights."[34]

The introduction of the concept of human rights due diligence clarified that corporate responsibility entails an ongoing process of identifying, preventing, mitigating, and accounting for business-related adverse human rights impacts. This includes engaging stakeholders and affected groups. Replacing the Norms' vague notion of "sphere of influence", due diligence provides for the management of risks across a company's supply chain and business relationships, covering impacts they cause, contribute to, or are directly linked to, in account, also, of the particular context and nature of their operations and business activities.[35]

The UNGPs inspired the inclusion of a risk-based human rights due diligence process in the OECD Guidelines, as well as the adoption of the OECD Due Diligence Guidance for Responsible Business Conduct[36] and the elaboration of sector-specific guidelines.[37] In particular, the OECD Due Diligence Guidance sets out a six-step due diligence framework, providing that companies adopt the following measures: (i) embed responsible business conduct into policies and management systems, (ii) identify and assess actual and potential adverse impacts associated with their operations, products or services, (iii) cease, prevent and mitigate adverse impacts, (iv) track implementation and results,

[32] Principle 11, UNGPs.

[33] Principle 15, UNGPs.

[34] Principle 15, UNGPs.

[35] Principles 11-17, UNGPs.

[36] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018).

[37] Available at: <www.oecd.org/en/topics/responsible-business-conduct.html#tools-for-practitioners> last accessed 31 January 2026.

(v) communicate how impacts are addressed and (vi) provide for, or co-operate in, remediation when appropriate.

Today, the OECD Guidelines and the UNGPs ground an authoritative universal and international soft-law framework, where both dimensions of CSR and BHR remain relevant and interconnected. The framework clarifies the responsibility of businesses in relation to their external impacts, with the due diligence process at its core. Moreover, both the UNGPs and the OECD Guidelines identify three different levels of corporations' engagement in adverse impacts, with different outcomes in terms of remediation: (i) causation of the impact, when the company produces the impact on its own, (ii) contribution to the impact, when the company produces the impact together with others, (iii) direct link to the impact, when the impact occurs within operations that are linked to the company by a business relationship.[38]

3. *The Rise of Environmental Sustainability as the Unexpected Protagonist of Corporate Responsibility*

As outlined above, the emergence of the international legal framework on corporate responsibility was driven by social and human rights impacts of business activities through their value chain, with the integration of environmental issues coming at a later stage. Such integration ensued in a gradual but consistent manner, to the point that, today, the discussion on corporate responsibility is inextricably linked to environmental and climate matters.

On the one hand, environmental sustainability has been incorporated in the corporate responsibility framework through the evolutive interpretation of existing human rights standards, a process commonly described as the "greening" of human rights, importantly led by the jurisprudence of international human rights bodies.[39] On the other hand, environmental protection has

[38] Principle 22, UNGPs; Chapter IV, para. 6, OECD Guidelines.

[39] *Daniel Billy and Others v Australia* CCPR/C/135/D/3624/2019 (UN HRC, 23 September 2022); European Court of Human Rights, *Klimaseniorin-*

been included through the recognition of environmental interests and, in particular, the emergence of an autonomous right to a safe, clean, healthy and sustainable environment.[40] While analytically distinct, both paths remain largely anthropocentric, ultimately framing environmental harm as legally relevant due to its impact on human well-being and the enjoyment of fundamental rights.[41]

Such twofold approach resulting in the inclusion of environmental sustainability and climate concerns in the international soft-law framework on corporate responsibility descended directly from the evolution of the international landscape towards a heightened focus on environmental and climate protection.

A fundamental step can be identified in the 1992 Rio Declaration on Environment and Development (the Rio Declaration), adopted at the United Nations Conference on Environment and Development (UNCED). Commonly known as the Earth Summit, the UNCED built on the 1972 Stockholm Declaration and the 1987 Brundtland Report, which framed the concept of sustainable development, addressing the interplay of environment, economy, and equity. The Rio Declaration comprises 27 principles enshrining human-centered sustainable development, the precautionary approach and intergenerational equity.[42] Alongside the Rio Declaration, the UNCED adopted the Agenda 21, an action plan on sustainable development outlining key com-

nen Schweiz and Others v Switzerland (9 April 2024); European Court of Human Rights, Cannavacciuolo *v Italy* (30 January 2025); Inter-American Court of Human Rights, *Maya Indigenous Community of the Toledo District v Belize* (2004).

[40] UN Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment* (5 October 2021) UN Doc. A/HRC/48/L.23/Rev.1.

[41] It should be noted, however, the existence of a push towards an alternative to anthropocentrism, notoriously emblematized by judicial cases recognizing autonomous rights vested in nature, such as the Caso *Vilcabamba River* in Colombia (Provincial Court of Justice of Loja, 2011) and the *Generaciones Futuras v Ministry of Environment and Others* (Colombian Supreme Court, 2018), recognizing, rights and the legal personhood upon, respectively, a river and the Amazonian Forest.

[42] Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/26 (Vol I).

mitments.[43] Notably, the Agenda 21 explicitly underlines the role of corporate actors in advancing environmental stewardship. By providing an early bridge between human rights, environmental issues and sustainable development, the Rio Declaration and the Agenda 21 greatly influenced the subsequent adoption of international instruments strengthening such connections.

Under the umbrella of CSR, the Rio Declaration and of the Agenda 21 inspired the institution of the 2000 UN Global Compact, a UN-Business partnership initiated by then UN Secretary-General Kofi Annan in 1999, relying heavily on business-driven voluntary efforts and a whole-of-society approach.

The UN Global Compact, with its then nine, now ten, principles, encourages companies worldwide to align their strategies and operations with universally accepted principles on human rights, labour, environment, and anti-corruption, thus providing for a benchmarking mechanism of business activities against international human rights and environmental standards. With the intention of getting businesses involved as a positive driver of CSR, the UN Global Compact provides enterprises with the possibility of voluntarily joining the mechanism. Participant companies are expected to publicly promote the UN Global Compact and its principles and are required to communicate on an annual basis about their own implementation process.

The UN Global Compact draws directly from the 1992 Rio Declaration and the Agenda 21 for its environmental principles, which reflect the precautionary approach, the no-harm rule and the role of corporations in advancing sustainable development through capacity-building and technological development.[44]

Moreover, the new focus on environment and sustainable development epitomized by the Rio Declaration also inspired a review and expansion of the OECD Guidelines. As a result, in 1991 a new specific chapter on environment was introduced.[45] In

[43] Agenda 21 (adopted 14 June 1992) UN Doc A/CONF.151/26/Rev 1 (Vol I).

[44] Principles 7-9, UN Global Compact.

[45] OECD, *The OECD Guidelines for Multinational Enterprises: Meeting the Challenge* (1997), p. 16.

particular, the addition urged enterprises to: (i) adopt environmental management systems (EMS), (ii) assess life-cycle impacts, apply precaution, and engage stakeholders, (iii) improve performance continuously via tools like audits and training. This marked a shift toward proactive prevention of environmental harm, in line with the precautionary approach. The environmental dimension was further expanded in the following years, with major revisions of the OECD Guidelines being adopted in 2000 and 2011. Such revisions expanded on environment and sustainable development and emphasized risk management, consumer awareness and disclosure requirements of non-financial data, embedding all the relevant elements in the due diligence process.

The last OECD Guidelines revision took place in 2023. Similarly to the 1991 expansion towards environmental concerns, the 2023 revision was inspired by the evolution of the international framework in respect to climate change (in particular: the 2015 Paris Agreement and the 2022 Kunming-Montreal Framework, both addressed below). The environmental chapter was consequently expanded and, *inter alia*, climate expectations were included, providing for the alignment of corporate strategies with 1.5°C goals and the adoption of climate-transition plans formalizing science-based GHG reduction targets.

The practice of the NCPs reflects the OECD Guidelines' new focus on the environment and the climate: the percentage of specific instances on the environmental chapter amounted to 27% in 2023 and 20% in 2024.[46] NCPs have played a fundamental role in operationalizing environmental sustainability within corporate responsibility. In particular, NCPs have increasingly interpreted climate and environmental due diligence as an integral component of responsible business conduct. Notably, in *Friends of the Earth v. ING Bank* (Netherlands NCP, 2023), the Dutch NCP held that financial institutions must align their lending and investment portfolios with the objectives of the Paris Agreement,

[46] OECD, *2023 Annual Report on NCP Activity*, Data Annex (2024); OECD, *2024 Annual Report on NCP Activity*, Data Annex (2025).

thereby recognizing climate change due diligence as inherent to the OECD Guidelines.[47] Similarly, in *Development YES – Open-Pit Mines NO Foundation v. Group PZU S.A.* the Polish NCP affirmed that insurers and investors are required to integrate climate risk assessment and transition planning into their due diligence processes.[48]

Even in the absence of a textual amendment, environmental and climate concerns have been included also in the UNGPs through a holistic and evolutive interpretation, leveraging on the "greening" of human rights and on the recognition of a human right to a healthy environment.[49]

With reference to the greening of human rights, the inclusion of environmental and climate impacts in the UNGPs' framework builds on the ascertained connection between environment, climate and fundamental human rights emerging from the jurisprudence of judicial and quasi-judicial international human rights bodies and from the work of UN treaty bodies. Indeed, due to this evolution, the main international human rights instruments are now deemed to include the environmental dimension, by virtue of the jurisprudence of the UN Human Rights Committee,[50] the ECtHR[51] and the IACtHR[52] and by the interpretative work of the Committee on Economic, Social and Cultural Rights (CESCR).[53]

[47] *Friends of the Earth Netherlands and Others v ING Bank* (Netherlands NCP, 19 April 2019) (final statement).

[48] Poland NCP, *Development YES – Open-Pit Mines NO Foundation v Group PZU SA* (Final Statement) (2019).

[49] See, *inter alios*, C. MACCHI, "The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'", in *Business and Human Rights Journal*, VI (2021), pp. 93-119.

[50] See *Daniel Billy and Others v Australia* CCPR/C/135/D/3624/2019 (UN HRC, 23 September 2022).

[51] See footnote 39.

[52] See footnote 39.

[53] UN Committee on Economic, Social and Cultural Rights, General Comment No 27 (2025) on economic, social and cultural rights and the environmental dimension of sustainable development (6 November 2025) UN Doc E/C.12/GC/27.

As a result, corporate responsibility to respect human rights should be read in conjunction with environmental and climate issues and the consequent human rights impacts. It follows that, under the UNGPs, businesses are called to conduct human rights due diligence which shall include human rights harms resulting from environmental damage, climate change, and biodiversity loss.[54] This approach has been confirmed by the framing of the UNGPs as a standard of conduct in climate litigation against corporations.[55]

As a result, the corporate responsibility framework, originally oriented exclusively towards social and human rights issues, is today characterized by an increasingly strong focus on environmental and climate concerns.

The rise of environmental sustainability as the unexpected protagonist of corporate responsibility is also evidenced by corporate practice, where environmental priorities now dominate corporate sustainability agendas,[56] with recent studies evidencing the profitability of a business strategy embedding environmental and climate concerns.[57]

To better contextualize this phenomenon, the next paragraph will explore the role of the broader international sustainability landscape in shaping corporate responsibility.

[54] See UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "Information Note on Climate Change and the Guiding Principles on Business and Human Rights" (2023); C. Macchi, *Business, Human Rights and the Environment: The Evolving Agenda* (The Hague, Springer-Verlag GmbH 2022), pp. 82 ff; UN Office of the High Commissioner for Human Rights, *Human Rights, the Environment and Gender Equality: Key Messages* (2021); UN Office of the High Commissioner for Human Rights, *Human Rights and Biodiversity: Key Messages* (2021); UN Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012).

[55] See *infra*.

[56] OECD, *Global Corporate Sustainability Report 2025* (2025) <<doi.org/10.1787/bc25ce1e-en>> last accessed 31 January 2026.

[57] World Benchmarking Alliance, *Exploring how Responsible Business Conduct Relates to Financial Performance and Supply Chain Standards: Discussion Paper* (November 2025)

4. *The Role of the Broader International Sustainability Landscape*

As described above, the international regulation of corporate responsibility rests on soft-law international instruments. The question of how such instruments and particularly the OECD Guidelines and the UNGPs, interact with the broader international sustainability landscape can be tackled through the "systemic integration" principle. Such principle, embodied in Art. 31(c) of the Vienna Convention on the Law of Treaties[58] provides for international instruments to be interpreted in conjunction with their normative environment.[59] It has been argued that the principle of systemic integration is not limited to treaty interpretation, as it should be used as a tool to achieve coherence and harmonization across international law.[60] As such, the systemic integration principle has already been authoritatively applied to corporate responsibility, providing a basis, with the necessary adjustments, to bridge the principles established in the OECD Guidelines and the UNGPs with the broader sustainability framework.[61]

Moreover, with particular emphasis on the environmental dimension, it has been noted that, considering the size, activities and resources of multinational corporations – which, in certain cases, may surpass those of many States[62] – their engagement is fundamental to achieve the goals set forth by the general sustainability framework.[63]

It follows that a consistent assessment of the current state of

[58] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

[59] M. Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversifications and Expansion of International Law", (2006) UN Doc. A/CN.4/L.682, para. 413; International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, para. 41.

[60] D.S. Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge, Cambridge University Press 2016), p. 160.

[61] C. Macchi, *Business, Human Rights and the Environment*, cit., p. 84.

[62] J. Crawford, *Brownlie's Principles of Public International Law*, cit., p. 111.

[63] R. Guerreiro Teixeira, J. Wouters, "ESG initiatives in international

the international regulation of corporate responsibility must take into account the broader international sustainability landscape. For that purpose, the present analysis will focus on the key aspects of the international regulation of: (i) sustainable development, (ii) biodiversity and (iii) climate change.

Today, the main reference for sustainable development lies in the 2015 UN Sustainable Development Goals (SDGs), a set of global commitments on identified economic, social, and environmental priorities, with the purpose of guiding specific action and results by 2030.[64] The SDGs envisage the concept of "sustainable development", building on a decades-long evolution, including, *inter alia*, the Rio Declaration and the Millenium Development Goals.[65] An early definition provided in 1987 by the UN Brundtland Commission framed sustainable development as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs", stressing its inter-generational value.[66] Even long before the adoption of the SDGs, sustainable development had already been recognized as a "principle with normative value" and an "integral part of modern international law", destined to play a major role in environmental cases.[67]

The SDGs focus on the equilibrium of the economic, social and ecological spheres,[68] in line with its so-called "5 Ps" principle: People, Planet, Prosperity, Peace and Partnership.[69] Al-

law" in T. Kuntz (ed) *Research Handbook on Environmental, Social and Corporate Governance* (Cheltenham, Edward Elgar 2024), p. 339.

[64] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015) UNGA Res 70/1 (hereinafter: SDGs).

[65] United Nations General Assembly, *United Nations Millennium Declaration* (8 September 2000) UNGA Res 55/2.

[66] World Commission on Environment and Development, *Our Common Future* (1987).

[67] International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry (25 September 1997), p. 86.

[68] W. Huck, *Sustainable Development Goals. Article-by-Article Commentary* (New York, C.H. Beck/Nomos/Hart 2022), p. 10.

[69] Preamble 2, SDGs.

though the primary responsibility for the follow-up, review and progress in the implementation of the goals is vested upon States, the SDGs are characterized by a whole-of-society approach and explicitly call for the engagement of the private sector.[70]

Despite their soft-law nature, the SDGs have significantly influenced corporate responsibility. A major indicator in this sense is the widespread corporate practice of voluntary non-financial reporting in reference to the SDGs.[71]

With respect to biodiversity, the 1992 Convention on Biological Diversity (CBD) anchors the international regulatory framework through its core objectives of conservation of biodiversity, sustainable use of its components and fair and equitable benefit-sharing from genetic resources.[72] The CBD has been implemented by the 2010-2020 Strategic Plan and Aichi Targets, later succeeded by the 2022 Kunming-Montreal Global Biodiversity Framework (GBF).[73]

The CBD mandates national biodiversity strategies that integrate biodiversity considerations across relevant sectors, thereby enabling indirect corporate responsibilities through domestic implementation and supply-chain accountability.[74] Echoing the SDGs' whole-of-society approach, the Kunming-Montreal Global Biodiversity Framework explicitly addresses business actors in regards to biodiversity risk assessment and disclosure.[75]

Turning to the international regulation of climate change, its foundations are provided by the 1992 United Nations Framework Convention on Climate Change (UNFCCC), which man-

[70] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (25 September 2015) UNGA Res 70/1, paras. 39-41.

[71] G. Nicolò, G. Zanellato, A. Tiron-Tudor, P. Tartaglia Polcini, "Revealing the Corporate Contribution to Sustainable Development Goals through Integrated Reporting: A Worldwide Perspective", in *Social Responsibility Journal*, XIX (2023) p. 829.

[72] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (hereinafter: CBD), Art. 1.

[73] Kunming-Montreal Global Biodiversity Framework (adopted 19 December 2022) CBD/COP/15/L.28 (hereinafter: GBF).

[74] Art. 6, CBD.

[75] Target 15, GBF.

dates all Parties to protect the climate system, coordinating international responses to climate change.[76] The UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), requiring developed countries – due to their historical emissions and resources – to lead in mitigation, adaptation, finance, and technology transfer.[77] As a fundamental implementation instrument, in 2015 the Paris Agreement was adopted, binding all Parties to develop and commit to Nationally Determined Contributions (NDCs), establishing GHG emissions targets aimed at limiting warming below 2°C compared to pre-industrial levels, pursuing 1.5°C efforts to minimize risks.[78] As such, NDCs shape corporate activity through regulatory requirements, market shifts and compliance pressure. Indeed, States implement NDCs through a number of measures, including emissions trading schemes (ETS), carbon taxes, renewable mandates, sector-specific regulations and reporting requirements (particularly Scope 1-3 emissions). Notably, the Paris Agreement expressly calls for the engagement of the private sector in the implementation of NDCs and in mitigation efforts.[79] The Paris Agreement system has determined the definition of a global standard integrating corporate due diligence standards, as shown by the proliferation of domestic climate litigation holding enterprises accountable for their climate policies *vis-á-vis* the objectives of the Paris Agreement.[80]

Businesses' engagement with the UNFCCC and climate objectives is coordinated on an institutional level by the UNFCCC Business & Industry Constituency (BIC), one of nine official observer constituencies, channelling inputs from over 1,000 business and industry associations.

A pivotal development of the international framework on cli-

[76] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (hereinafter: UNFCCC).

[77] Art. 31, UNFCCC.

[78] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740

[79] Paris Agreement, Arts. 6(4)(b) and 6(8)(b).

[80] See *infra.*

mate obligations is constituted by three recent Advisory Opinions issued by the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ).

In May 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion[81] at the request of the Commission of Small Island States on Climate Change and International Law (COSIS).[82] With a ground-breaking unanimous ruling, the ITLOS found that States Parties to the UNCLOS are under a "stringent" due diligence obligation to prevent, reduce and control the pollution of the marine environment by anthropogenic greenhouse gases (GHG) emissions. Such due diligence obligation notably includes the duty to regulate private activity through specific national legislation, risk-monitoring, and mandatory environmental impact assessments of any planned activity which may cause marine pollution by GHG emissions.[83]

Subsequently, on 3 July 2025 the Inter-American Court of Human Rights (IACtHR) issued its Advisory Opinion on "Climate Emergency and Human Rights",[84] which, for the first time at the regional level, clarified that States Parties have legal obligations under the American Convention on Human Rights to prevent, mitigate and remedy environmental harm that threatens human rights, affirming the right to a healthy climate as an autonomous right and embedding science-based due diligence standards within a human rights framework.

Finally, on 23 July 2025 the International Court of Justice

[81] International Tribunal for the Law of the Sea, *Advisory Opinion on the Request submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31 (21 May 2024) <itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf> last accessed 31 January 2026.

[82] COSIS, *Request for Advisory Opinion* (12 December 2022) <itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf> last accessed 31 January 2026.

[83] International Tribunal for the Law of the Sea, *Advisory Opinion on the Request submitted by the Commission of Small Island States on Climate Change and International Law*, cit., paras. 235-236, 247, 358, 367.

[84] Inter-American Court of Human Rights, *Climate Emergency and Human Rights (Advisory Opinion)*, IACtHR Series A No 32 (3 July 2025).

(ICJ), responding to a request submitted by the UN General Assembly, adopted its Advisory Opinion on the "Obligations of States in respect of Climate Change",[85] unanimously affirming that international law – including climate treaties, customary international law and human rights treaties as interpreted by international adjudicatory bodies – imposes binding duties on States to prevent significant harm to the climate system, including through cooperation and mitigation measures.

The ICJ's Advisory Opinion on Climate Change can be considered particularly relevant for the evolution of corporate responsibility in respect to climate change.[86] By affirming that climate change can give rise to human rights impacts – including impacts on the rights to life, health, an adequate standard of living and the rights of Indigenous peoples – the ICJ contributed to framing climate-related harm as a source of human rights risk, thereby reinforcing the relevance of climate impacts within the human rights-based international regulation on corporate responsibility. Moreover, the Opinion emphasizes that States are under an obligation to regulate the conduct of private actors in order to prevent and address climate harm, thus providing further legal grounding for domestic regulatory frameworks and litigation strategies that impose climate-related obligations on companies, including emission-reduction requirements, transition planning and the adoption of sustainable business models.

5. *Environmental Sustainability in Existing and Emerging Mandatory Corporate Due Diligence Frameworks*

The multi-level nature of the legal framework on corporate responsibility demands an analysis of existing and emerging

[85] International Court of Justice, *Obligations of States in Respect of Climate Change (Advisory Opinion)*, ICJ Rep 1 (23 July 2025).

[86] In this sense, see M. McVey, A. Savaresi, "The ICJ Advisory Opinion on Climate Change: A Business and Human Rights Perspective", in *Opinio Juris* (2025) <opiniojuris.org/2025/08/04/the-icj-advisory-opinion-on-climate-change-a-business-and-human-rights-perspective/> last accessed 31 January 2026.

mandatory corporate due diligence frameworks at the domestic and regional levels. Indeed, through their activities, companies are called to respect international standards, as well as regional and domestic regulation on negative impacts and responsible business conduct, when applicable. The interaction of the different normative levels reflects a dynamic process of "hardening" corporate responsibility into corporate duties, while preserving the influence of soft law, as evidenced by the number of domestic case law which directly refers to international standards.[87]

To exemplify this process, the present analysis will focus on the European context, where the domestic, regional and international level are strongly intertwined. In particular, the French and German experiences and the adoption of a EU directive on mandatory corporate due diligence will be addressed.

The universal understanding of core corporate responsibility issues – such as due diligence, supply chain accountability, stakeholder engagement, State duty to regulate corporate activity and key remediation principles – provided by the above-described international regulation propelled civil society's call for mandatory legislation with a new-found direction and consistency.

In the European context, the first domestic legislation imposing cross-sectoral mandatory corporate human rights and environmental due diligence was the 2017 French *Loi de Vigilance*,[88] which was adopted after six years of activism around the principles enshrined in the UNGPs.[89] The law revolves around the mandatory adoption, implementation and publication of a vigilance plan by certain large French companies, regardless of the

[87] See Debevoise & Plimpton LLP, "UN Guiding Principles on Business and Human Rights at 10: The Impact of the UNGPs on Courts and Judicial Mechanisms" (January 2021) <www.debevoise.com/-/media/files/pdf/full-report.pdf> last accessed 31 January 2026.

[88] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[89] For an overview of the civil society-led path towards the adoption of the French *Loi de Vigilance*, with NGOs and trade unions at the forefront, see G. Delalieux, "La loi sur le devoir de vigilance des sociétés multinationales: parcours d'une loi improbable", in *Droit & société: théorie et sciences sociales du droit*, CVI (2020), p. 649.

type of activity or industry, based on employee headcount.[90] Drawing extensive inspiration from the UNGPs and the OECD Guidelines, the *Loi de Vigilance* provides that in-scope corporations must identify, prevent and mitigate risks of serious human rights violations, environmental damage and health and safety risks, covering the company's own operations, those of the subsidiaries it controls directly or indirectly, as well as subcontractors and suppliers with whom the company has an established commercial relationship where risks are deemed to derive from such relationships (pursuant to a risk-based approach). Notably, this might include extraterritorial activities when it comes to global supply chains. The vigilance plan must include risk mapping, regular assessment procedures, appropriate mitigation measures, alert mechanisms, and monitoring systems.

Filling a void that could not be addressed by international soft-law standards, the French *Loi de Vigilance* contains specific provisions on accountability and remediation. In particular, the *Loi* provides for both a notice mechanism – through which an interested party can request a judicial injunction for the adoption or improvement of a vigilance plan by a breaching company – and a specific civil liability regime for harms caused by failures in the vigilance plan.[91]

A subsequent example of mandatory corporate due diligence legislation is the German *Lieferkettensorgfaltspflichtengesetz* (Supply Chain Due Diligence Act, LkSG), adopted in 2021 and entered into force in 2023. The German law, while also inspired by the UNGPs and the OECD Guidelines, takes a different approach, focused on public enforcement rather than on judicial remediation. The LkSG, which also applies in a cross-sectoral way, requires companies counting more than 1.000 employees to establish due diligence processes to identify and prevent human

[90] The *Loi de Vigilance* applies to companies that, for two consecutive financial years, have, alternatively: (i) at least 5,000 employees in their direct or indirect subsidiaries based in France; (ii) more than 10,000 employees if including direct and indirect subsidiaries globally (see Art. L. 225-102-4, French *Code de Commerce*).

[91] Art. L.225-102-5, French *Code de Commerce*.

rights and environmental risks within their supply chains. The related obligations include the adoption of a policy statement, the conduction of regular risk analyses, the establishment of preventive and remedial measures, including a complaints procedure, and reporting on compliance. Unlike the French *Loi de Vigilance*, as a result of a political compromise, the LkSG does not establish a specific civil liability regime for non-compliance. Instead, the German law relies on administrative enforcement, with the Federal Office for Economic Affairs and Export Control (BAFA) monitoring compliance and empowered to impose significant fines.[92]

Both laws represent a notable example of "hardening" international soft-law standards into national legislation, contributing to the gradual reshaping of corporate responsibility into legal duties.

The outlined evolution the international framework and the emergence of diverse domestic legislation on mandatory corporate human rights and environmental due diligence, paired with a strong civil society engagement, led the EU institutions to take a stance on corporate responsibility.

In particular, the fragmented nature of national legislations, combined with concerns about uneven regulatory burdens and competitive disadvantages within the EU market, grounded the EU effort to pursue a harmonized framework and creating a "level-playing field".[93] After extensive debates and negotiations, which reshaped and significantly downsized the originally proposed legal regime, the CSDDD was formally adopted in 2024 and, as of today, will be gradually applied starting from 26 July 2028.[94] To date, the CSDDD represents the most ambitious re-

[92] A. Rühmkorf, "The German Supply Chain Law: A First Step Towards More Human Rights in Global Supply Chains", in *European Company Law*, XX (2023), p. 6.

[93] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 COM(2022) 71 final, 2022/0051 (COD) (23 February 2022).

[94] Such date of application is the result of the recent postponement by

gional effort in mandating corporate human rights and environmental due diligence across global value chains.

Furthering the approach of "hardening" international soft-law standards, the CSDDD makes explicit reference to the UNGPs and to the OECD Guidelines as relevant international standards on "responsible business conduct", making reference to both the due diligence process and the remediation dimension.[95]

As for its scope of application, the CSDDD applies to large EU companies meeting certain employees, turnover and revenue thresholds and, notably, to non-EU companies generating significant turnover within the EU.[96] The inclusion of non-EU companies and the related broad extra-territorial reach of the regulation represent important innovations in comparison to the German and French legal frameworks, which, in turn, only apply to companies incorporated within their territories (albeit both legal regimes also cover in-scope companies' extraterritorial activities). This is coherent with the particular attention to global supply chains grounding the regulation[97] and with the goals set in the EU Action Plan on Human Rights and Democracy, which include the active promotion of the implementation of the UNPGs and the OECD Guidelines on a global scale.[98]

The CSDDD provides for two main sets of obligations: (i) the establishment and implementation of a human rights and due diligence process covering the operations of the company and of its subsidiaries and its chain of activities and (ii) the adoption and implementation of a transition plan for climate change mitigation in line with the objectives of the Paris Agreement.[99]

virtue of the "Stop the Clock" Directive, adopted within the Omnibus I simplification package (Directive (EU) 2025/794).

[95] Recitals 5 and 6, CSDDD.

[96] Art. 2(2), CSDDD. It should be noted that, at the time of writing, the CSDDD is undergoing a revision in terms of scope and main obligations.

[97] Recital 9, CSDDD and Art. 9, CSDDD.

[98] European Commission, Joint Communication to the European Parliament and the Council: EU Action Plan on Human Rights and Democracy 2020-2024 (COM/2020/5 final, 25 March 2020); Recital 14, CSDDD.

[99] Art. 1(1), CSDDD.

With regard to the due diligence process, the CSDDD points directly to the six-step process outlined by the OECD Due Diligence Guidance,[100] including public communication.[101] The due diligence process enshrined in the CSDDD covers the entire "*chain of activities*" of an in-scope company, thus including both upstream and downstream partners.[102]

As for the climate transition plan, Article 22 CSDDD provides that it should contain, *inter alia*, specific time-bound targets for 2030 and 2050, including emission reduction commitments and identification of appropriate key actions.

In terms of accountability and remediation, the CSDDD provides for both administrative overview through national supervisory authorities, with the possibility of imposing sanctions in case of breach,[103] and for a specific civil liability regime.[104] Notably, the specific provision on civil liability covers only harms related to non-compliance with the due diligence process, thus excluding cases of breach of the obligation to adopt and implement a climate transition plan.

As for the relationship with existing domestic frameworks, the CSDDD specifies that its implementation into member States' national law should not hinder the application or introduction of more stringent domestic provisions.[105]

The CSDDD represents a decisive step in consolidating cor-

[100] Recital 20, CSDDD.

[101] The public communication element of the due diligence process should take into account specific EU regulation on sustainability reporting, in particular the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15 (CSRD).

[102] Art. 3(1)(g), CSDDD. At the time of writing, such provision is undergoing a revision process that may result in a limitation of the due diligence obligation throughout the "chain of activities".

[103] Arts. 24-27, CSDDD.

[104] Art. 29, CSDDD. At the time of writing, the ongoing revision process of the CSDDD may result in the exclusion of the unified *ad hoc* civil liability regime, leaving at the discretion of each EU Member State, at the time of implementation, the provision of such a regime.

[105] Recital 31 and 91 and Art. 4(2), CSDDD.

porate due diligence into a legal duty within the EU legal order. Moreover, considering that the CSDDD is grounded in the UN-GPs and the OECD Guidelines and that certain EU member States have established specific frameworks on corporate duties towards human rights and the environment, the CSDDD exemplifies the dialectical interaction between international soft-law, regional regulation and domestic law.[106]

6. *Recent Judicial Trends on Environmental Corporate Responsibility*

Litigation has played a fundamental role in shaping corporate environmental responsibility and in "hardening" the international soft-law framework governing business conduct, operationalizing it at the domestic level by virtue of its judicial integration into domestic legal standards. It should be noted that corporate environmental cases often have transnational elements in relation to negative impacts occurring outside of the governing jurisdiction, which historically has posed fundamental jurisdictional obstacles to effective remedy.[107] However, as will be explored below, recent jurisprudence on transnational corporate responsibility is determining a gradual erosion of traditional jurisdictional barriers, opening to redress in corporations' home-States.

In this sense, at the domestic level a main avenue for redress in case of negative environmental impacts can be found through civil liability regimes, where the responsibility for an environmental wrong is channelled upon the polluter.[108]

Indeed, domestic courts adjudicating claims against corporations for their negative environmental and climate impacts have increasingly relied on international instruments such as the UN

[106] B. J. Richardson, B. Sjåfjell, "Business and Industry", in L. Rajamani, J. Peel (eds), *The Oxford Handbook of International Environmental Law* 2nd ed. (Oxford, Oxford Academic 2021), p. 731.

[107] D. Bertram, "Environmental Justice 'Light'? Transnational Tort Litigation in the Corporate Anthropocene'", in *German Law Journal*, XXIII (2022) p. 738.

[108] B. J. Richardson, B. Sjåfjell, "Business and Industry", cit. p. 728.

Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises and the Paris Agreement as interpretative tools for defining the content and scope of corporate duties under domestic law, often as a means of integration of the standard of conduct under civil liability and duty of care regimes.

A paradigmatic example in this respect is the *Milieudefensie v. Shell* case, in which Dutch courts made explicit reference to the UNGPs, the OECD Guidelines and the Paris Agreement to integrate climate-related obligations into the duty of care under Dutch civil liability law. While the Court of Appeal in 2024 partially limited the emission-reduction order imposed by the Hague District Court in 2021, it nevertheless confirmed the relevance of such international standards in shaping corporate climate responsibility.[109]

Further clarification of the role of international standards in shaping corporate environmental responsibility is expected from other ongoing cases, including *Okpabi v. Shell* in the United Kingdom, concerning the duty of care of parent companies for environmental harm caused by subsidiaries abroad, and *Greenpeace v. Eni*, grounding corporate responsibility for aggregated global GHG emissions on civil liability, both of which have already overcome jurisdictional hurdles and proceeded to the merits phase.[110]

Additionally, domestic legislation on corporate responsibility and due diligence provides for relevant remediation avenues, as evidenced by the case law under the French *Loi de Vigilance*.

A first example can be found in the case *Envol Vert et al v Casino Guichard-Perrachon SA*, focusing on biodiversity loss and deforestation. The case was initiated by an international coalition of NGOs, which sued the French supermarket chain Casino for

[109] District Court of the Hague, *Milieudefensie et al v Royal Dutch Shell plc* (26 May 2021); Hague Court of Appeal, *Milieudefensie et al v Shell plc* (12 November 2024).

[110] UK Supreme Court, *Okpabi and Others v Royal Dutch Shell Plc* (12 February 2021) (pending on the merits), Italian Court of Cassation, *Greenpeace Italia and Others v. Eni SpA,* (21 July 2025) (pending on the merits).

its involvement in the cattle industry in Brazil and Colombia. In particular, the plaintiffs allege that Casino's supply chain in those areas includes cattle from deforested areas and claim the resistant's responsibility for the negative impacts related to deforestation and consequent biodiversity loss, from both an environmental and human rights perspective.[111] The case is still ongoing but has the potential to clarify the relationship between biodiversity loss, deforestation and human rights in the corporate responsibility framework.

In regards to climate corporate responsibility, a notable pending proceeding under the *Loi de Vigilance* is the case *Notre Affaire à Tous and Others v. Total Energies*, initiated by a group of NGOs against the Oil&Gas company, claiming that TotalEnergies' vigilance plan inadequately identifies and mitigates climate risks, failing alignment with the Paris Agreement's 1.5°C target. The case is still pending on the merits, but has importantly overcome the procedural exception of incompetence presented by the respondent. In particular, the pre-trial judge confirmed the jurisdiction of the judicial court,[112] as later confirmed by the Versailles Court of Appeal.[113]

The German experience has also provided valuable guidance in establishing home-States jurisdiction on cases of corporate responsibility for environmental harms characterized by a transnational dimension. In particular, the case *Lliuya v. RWE AG*, although concluded with a dismissal on the merits, confirmed, in principle, that a domestic court may exercise jurisdiction over claims concerning climate-related harms occurring abroad and that corporate emitters may be held proportionally liable (pro-quota) for transboundary environmental damage.[114]

The accruing effect of the above cases establishing domestic jurisdiction for transnational corporate-related environmental

[111] Tribunal of Saint-Étienne, *Envol Vert et al v Casino Guichard-Perrachon SA* (pending).

[112] Tribunal of Nanterre, *Notre Affaire à Tous and Others v TotalEnergies SE* (11 February 2021).

[113] Versailles Court of Appeal, *Notre Affaire à Tous and Others v TotalEnergies SE* (18 November 2021).

[114] Higher Regional Court of Hamm, *Lliuya v RWE AG* (28 May 2025).

harm has led to the recent filing, in the United Kingdom and in Germany, of two major cases against Oil&Gas corporations, initiated by local victims claiming respondents' corporate responsibility for specific extreme-weather phenomena by reason of their historic pro-quota contributions to climate change, with causation supported by scientific studies on climate attribution.[115]

7. *Brief Considerations on the Prospective Developments of Environmental Corporate Responsibility*

The outlined framework on international corporate responsibility, its integration with environmental concerns, its relationship with emerging *ad hoc* domestic and regional regulations and its judicial operationalization on the domestic level opens the way to the following considerations on the prospective developments of the field.

Firstly, the soft-law nature of the international regulation on corporate responsibility, far from being a weakness, has shown its adaptability and influence in practice. As eloquently put in authoritative literature, in certain instances "soft law instruments can be final products and not just intermediate steps. The best-known case is where a soft law instrument aspires to serve as a model for other instruments."[116] Arguably, the international regulation on corporate responsibility has fulfilled this role, inspiring the adoption of regional and national legislation aligned with international standards. Moreover, the flexibility provided by the

[115] UK High Court of Justice, *Casquejo and Others v Shell plc and Another* (pending); District Court of Heidelberg, *Pakistani farmers v RWE and Heidelberg Materials* (pending).

[116] L. Boisson de Chazournes, "The International Law Commission in a Mirror. Forms, Impact and Authority", in The United Nations (ed), *Seventy Years of the International Law Commission. Drawing a Balance for the Future* (Leiden, Brill Nijhoff 2020), p. 136. For a diverging perspective, see P. Weil, 'Towards Relative Normativity in International Law?', in *American Journal of International Law*, LXXVII (1983) p. 423, holding that soft law "might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose."

soft-law nature of the framework has allowed for a higher degree of flexibility and integration with other instruments as evolutionarily interpreted by international bodies. As such, the international regulation on corporate responsibility has provided global and authoritative standards which have been deemed capable of laying a foundation "towards the creation of binding international law".[117]

For these reasons, it appears that the regulation of corporate responsibility beneficiates from the "smart mix" of soft and hard law instruments adopted at different normative levels (international, regional and domestic).[118] This assumption is not negated by, nor should negate, the efforts underlying the ongoing process for the adoption of "an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises",[119] although obstacles affecting the treaty process should be taken into account.

Secondly, corporate environmental responsibility is destined to be increasingly influenced by the evolution of international law on environment and climate, with sustainable development as a core concept with the potential of playing a key role in bridging and systematizing the various dimensions of environmental protection, human rights and business activities.[120]

Finally, the evolution and operationalization of corporate re-

[117] R. McCorquodale, *Business and Human Rights* (Oxford, Oxford University Press 2024), p. 47.

[118] This is consistent with the model envisaged by Prof. John G. Ruggie, as outlined in the UNGPs, Principle 3, Commentary. For an analysis of the shortcomings and benefits of such a model, see C. Ahlborn, "Regulating Business and Human Rights through Soft and Hard Law: Lessons from International Nuclear Law", in *Vanderbilt Journal of Transnational Law*, LVII (2024), p. 411.

[119] UN Human Rights Council, "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights" (14 July 2014) UN Doc A/HRC/RES/26/9.

[120] UN Committee on Economic, Social and Cultural Rights, General Comment No 27 (2025) on economic, social and cultural rights and the environmental dimension of sustainable development, cit.

sponsibility, also at the judicial level, constitutes a significant impetus for the clarification and further development of the notion of "corporate accountability" emerging from the debate on global environmental governance. The concept of corporate accountability focuses on making businesses answer for their decisions and operations, based on participation – including policy-making –, transparency, review and stakeholder engagement. A development of corporate accountability consistent with corporate responsibility would entail a focus on the means as well as on the results of corporate conduct, determining a form of moral suasion that could potentially unlock businesses' role as positive social drivers benefiting from their position as qualified members of the society.[121]

[121] For an analysis on the relationship between corporate responsibility and corporate accountability see E. Morgera, *Corporate Environmental Accountability in International Law* (Oxford, Oxford University Press 2020), pp. 15 ff.

ENVIRONMENTAL SUSTAINABILITY BEFORE NATIONAL COURTS: INTERGENERATIONAL EQUITY AND ITS FUTURE AFTER THE ICJ ADVISORY OPINION ON CLIMATE CHANGE

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SUMMARY: 1. Introduction. – 2. Intergenerational Equity Before National Courts: Selected Cases. – 3. Preliminary Conclusions: The Application of Intergenerational Equity by National Courts. – 4. The Debate on the Nature of Intergenerational Equity in International Law. 5. The ICJ Advisory Opinion on the Obligations of States in respect of Climate Change. – 6. Prospective Conclusions: The Application of Intergenerational Equity by National Courts after the ICJ's Advisory Opinion.

1. *Introduction*

By its very nature, the concept of sustainable development is intrinsically intergenerational, as it requires assessing the legitimacy of choices made by present generations also in light of their effects on future generations.[1] The link between sustainable de-

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[1] As is well known, the expression "future generations" is used in different ways. It is sometimes employed to refer exclusively to unborn children (see the Preamble of "Declaration on Future Generations", annexed to the "Pact for the Future", adopted by the United Nations General Assembly, in Resolution 79/1, 22 September 2024, UN Doc. A/RES/79/1; for a reference in the scholarly literature in this sense, see A. DALY, "Youth Climate Activism and Its Impact on International Human Rights Law", in *Human Rights Law Review*, XXII (2022), p. 1 ff., p. 21). It is sometimes used to include existing children as well (see Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 24 January 2018, UN Doc. A/HRC/37/58, para. 68; see also, in this sense, S. SKOGLY, "The Right to Continuous Improvement of Living Conditions and Human Rights of Future Generations: A Circle Impossible to Square?", in J. Hohmann, B. Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges*, (Oxford, Hart 2021) p. 147 ff., p. 148). The lack of precision in the definition

velopment and the intergenerational dimension was first highlighted in *Our Common Future* – the 1987 Report of the United Nations World Commission on Environment and Development[2] – and has since consistently been reflected in subsequent international instruments.[3]

In the specific context of environmental sustainability, the intergenerational dimension has long been of particular importance. Environmental resources and conditions must indeed be managed in such a way as not to compromise the capacity of ecosystems to sustain human life over time.[4] From this perspective, the absence, on the part of States, of adequate mitigation

of "future generations" and its implications have been analysed in detail by A. Nolan, "Children and Future Generations Rights before the Courts: The Vexed Question of Definitions", in *Transnational Environmental Law*, XIII (2024), p. 522 ff. For the purposes of this contribution, future generations are understood to include both children not yet born and those already living.

[2] United Nations World Commission on Environment and Development, Report of the World Commission on Environment and Development "Our Common Future", 1987, UN Doc. A/42/247, which defines the concept of sustainable development as "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs" (see Chapter 2: Towards Sustainable Development, para. 1).

[3] See, for instance, the outcome document of the United Nations summit for the adoption of the post-2015 development agenda "Transforming our world: the 2030 Agenda for Sustainable Development", adopted by the United Nations General Assembly, in Resolution 70/1, 25 September 2015, UN Doc. A/RES/70/1, which states that: "The future of humanity and our planet lies in our hands. It lies also in the hands of today's younger generation who will pass the torch to future generations. We have mapped the road to sustainable development; it will be for all of us to ensure that the journey is successful and its gain irreversible" (para. 53).

[4] By way of example, see United Nations Conference on the Human Environment, "Declaration of the United Nations Conference on the Human Environment", 16 June 1972, UN Doc. A/CONF.48/14, which states that: "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate." (Principle 2) See also the United Nations Conference on Environment and Development, "Rio Declaration on Environment and Development", 12 August 1992, UN Doc. A/CONF.151/26, which states that: "The right to development must be fulfilled as to equitable meet development and environmental needs of present and future generations" (Principle 3).

and prevention measures addressing climate change, as well as the adoption of public decisions involving the intensive and irreversible exploitation of natural resources, are incompatible with environmental sustainability, since they entail a deliberate shifting into the future of the burdens and negative effects of climate change and environmental degradation, thereby generating a structural imbalance between generations. This imbalance results in a particular vulnerability of future generations, who are exposed to the consequences of conduct often driven by short-term interests and undertaken by past and present generations, thus making their protection necessary.

In light of the foregoing, it is unsurprising that intergenerational issues, which raise questions concerning the protection of future generations, have become one of the most significant themes in climate litigation, as well as in environmental disputes which, although not directly concerning climate policies in the strict sense, nonetheless have a significant impact on climate governance,[5] before national and international courts, including regional human rights courts.

In these contexts, judges are not so much called upon to determine whether the intergenerational dimension may have some relevance – a circumstance that is by now widely acknowledged, at least as a shared value – but rather to identify the criteria through which it may be concretely integrated into judicial reasoning, and whether and to what extent it may be used to assess the legality of State climate and environmental policies.

Within this framework, intergenerational equity assumes fundamental importance.

The expression "intergenerational equity" is used to refer to the idea of social justice between generations. Indeed, intergenerational equity requires a fair balance between the needs of present and future generations and demands that considerations of distributive justice be incorporated into the use of exhaustible resources, so as to preserve the diversity of the natural resource base and to ensure that each generation does not unduly limit the

[5] See P. Lawrence, *Justice for Future Generations: Climate Change and International Law* (Cheltenham, Edward Elgar 2014).

options available to future generations in meeting their own needs.[6]

Intergenerational equity thus allows for the protection of the interests of future generations irrespective of the ongoing debate concerning the possibility of regarding such generations – particularly those not yet born – as rights-holders.[7] It instead serves as an appropriate framework for conceptualizing present generations as bearers of specific responsibilities towards future ones.[8]

In this sense, intergenerational equity may also function as a benchmark through which national courts, in particular, can assess the compatibility of domestic policies with intergenerational concerns, thereby encouraging institutions to recalibrate their policies on the basis of the concept of "burden sharing", that is, a fair distribution of the burdens associated with the climate and environmental crisis among different generations.

[6] S. Bookman, M. Wewerinke-Singh, "Intergenerational Equity", in M. Wewerinke-Singh, S. Mead (eds), *The Cambridge Handbook on Climate Litigation* (Cambridge, Cambridge University Press 2025), p. 344 ff.

[7] This is a highly debated issue. While it is generally accepted that existing children can be considered rights-holders, this is far less clear with regard to unborn children. For diametrically opposed positions see S. Humphreys, "Against Future Generations", in *European Journal of International Law*, XXXIII (2022), p. 1061 ff., who criticizes the use of the future generations concept as a framework for climate responsibility. He argues that this abstract and indefinite notion obscures urgent responsibilities towards people living today and that considering future generations as rights-holders is legally problematic and not recognized. In contrast, M. Wewerinke-Singh, A. Garg, S. Agarwalla, "In Defence of Future Generations: A Reply to Stephen Humphreys", in *European Journal of International Law*, XXXIV (2023), p. 651 ff., assert that future generations can and should be considered rights-holders. They argue that this status is already recognized in various legal forums, as demonstrated by the jurisprudence of national and international courts, and that this constitutes an effective tool to promote climate justice and intergenerational equity. In this sense, see also P. Lawrence, "International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys", in *European Journal of International Law*, XXXIV (2023), p. 665 ff., who argues that – contrary to Humphreys' claim – the category of future generations is no more legally indeterminate than other protected vulnerable groups, such as "children".

[8] The trust model of intergenerational equity originates with E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York, Transnational Publishers 1989).

When national courts exercise judicial review over State policies with the aim of ensuring effective environmental sustainability, the application of intergenerational equity raises significant questions both as to its legal value and as to the degree of binding force that should be attributed to it. These questions directly affect the manner and intensity of judicial scrutiny exercised by national courts over domestic policies.

Against this background, the present contribution initially refers to the "concept" of intergenerational equity,[9] without qualifying its nature, and then seeks to analyze how it has been qualified and used by national courts in climate litigation, with attention to cases concerning climate change in the strict sense as well as to structurally related environmental disputes. Having outlined this framework, the analysis then turns to the recent Advisory Opinion delivered by the International Court of Justice on States' obligations in respect of climate change, with the aim of examining the potential effects that the Court's findings regarding the qualification and function of intergenerational equity may have on its use by national courts.

2. *Intergenerational Equity Before National Courts: Selected Cases*

In light of the premises outlined above, the paper moves on to explore how intergenerational equity has been qualified and used by national judges in cases concerning climate change, as well as, more broadly, in structurally related environmental disputes.[10]

[9] This reasoning reflects the approach already employed by M. Gervasi, "Equità intergenerazionale, tutela dei diritti umani e protezione dell'ambiente nel contenzioso climatico", in M. Frulli (ed), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea* (Napoli, Editoriale Scientifica 2023), p. 297 ff.

[10] The limits of the present contribution do not allow for an analysis of the direct or indirect references to intergenerational equity in international treaties and soft law, as well as in case law of international tribunals and regional human rights courts. For a comprehensive reconstruction of the issue, both in the environmental field and in other areas in which the protection of the inter-

Before turning to the decisions of domestic courts, it is necessary to make two preliminary remarks.

First, the large – and steadily growing – number of climate-related disputes[11] at the domestic level[12] necessarily required the research underlying this paper to be circumscribed to a selected sample of landmark decisions in the field of climate and environmental litigation. Only some of these decisions are discussed in this paper, as they are considered by the author paradigmatic in illustrating how national legal systems may qualify and make use of intergenerational equity. This analysis does not, however, claim to provide an exhaustive overview of the different domestic systems and related judicial practices, having been, as anticipated, confined to a limited sample of decisions.

Second, it should be noted that there is no consistency in the terminology employed by domestic courts with regard to "intergenerational equity". While some decisions invoke "intergenerational equity", others refer to "intergenerational justice" or "intergenerational responsibility", and still others frame the issue in terms of "protection of the interests or rights of future generations". Notwithstanding these terminological differences, such expressions point to a common underlying concern: the incorporation of an intergenerational dimension into judicial reasoning, enabling courts to assess the temporal distribution of the benefits and burdens arising from public action and inaction, including their impact on future generations.

The first case to be examined is the decision of 24 March 2021

ests of future generations has acquired normative relevance, see M. Marciante, "L'equità intergenerazionale nel sistema delle fonti del diritto internazionale", in *Federalismi.it*, 2025, p. 103 ff., available at www.federalismi.it. See also F. Cerulli, "Safeguarding Future Generations: The Legal Status of Intergenerational Equity in International Law", in *Netherlands Yearbook of International Law*, LV (2024), forthcoming.

[11] As noted by M. Gervasi, "Equità intergenerazionale, tutela dei diritti umani e protezione dell'ambiente nel contenzioso climatico", cit., p. 299, climate litigation represents a rapidly expanding trend and appears to constitute a new frontier in efforts to address climate change.

[12] On national case law, see, notably, P. Pustorino, "Cambiamento climatico e diritti umani: sviluppi della giurisprudenza nazionale", in *Ordine internazionale e diritti umani*, 2021, p. 596 ff., available at www.rivistaoidu.net.

of the German Federal Constitutional Court in the *Neubauer* case.[13]

The application was brought by a group of young citizens who challenged the constitutionality of the 2019 Federal Climate Change Act. According to the applicants, the Federal Climate Change Act violated the State's duty to protect the fundamental rights to life and physical integrity (art. 2(2) of the Basic Law), as well as the right to property (art. 14(1) of the Basic Law), from the risks posed by climate change. This duty of protection was argued to derive from a combined reading of the aforementioned provisions with art. 20a of the Basic Law, which requires the State to protect the natural foundations of life also in responsibility towards future generations, by providing that: «Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order». The applicants maintained that the Federal Climate Change Act failed to comply with the objective set out in the Paris Agreement, as it established emission-reduction targets up to 2030 that were insufficiently ambitious. Moreover, they complained about the absence of mitigation measures for the period beyond 2030, which, in their view, would result in an inequitable allocation of Germany's remaining carbon budget, allowing the present generation to consume a disproportionate share and thereby to transfer an excessive mitigation burden onto future generations.

In its decision, the Court expressly referred to art. 20a of the Basic Law. According to the Court, this provision, read in conjunction with fundamental rights, imposes on the State a duty of protection against climate-related risks. However, the Court held that the Federal Climate Change Act did not, as such, amount to a violation of that duty, recognizing that the legislature enjoys a wide margin of discretion in determining the necessary protective measures, and affirming that a breach would arise only in

[13] German Federal Constitutional Court, *Neubauer and others v. Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20, Order of the First Senate, 24 March 2021.

cases of complete inaction or of measures that are manifestly inadequate or wholly insufficient.

Nevertheless, the Court declared the Federal Climate Change Act to be partially unconstitutional, finding that it infringed fundamental freedoms from an intertemporal perspective. According to the Court, art. 20a of the Basic Law is not a mere statement of intent, but a binding and justiciable legal provision that imposes on the State an obligation to act for the protection of the climate, taking into account its responsibility towards future generations. Art. 20a therefore does not merely enshrine an abstract principle, but serves as a constitutional parameter for the interpretation of fundamental rights. From this perspective, fundamental rights themselves operate as intertemporal guarantees of freedom. This means that they protect present citizens against a future but highly likely excessive shifting of the burden of greenhouse gas reduction onto future generations. Consequently, the principle of intergenerational equity, enshrined in art. 20a, imposes on the legislature a concrete obligation to ensure a proportionate distribution of mitigation burdens over time, by adopting sufficiently precautionary measures so as to avoid placing almost the entire weight of the ecological transition on future generations. By failing to establish a clear emission-reduction pathway for the period after 2030, the legislature had thus created a concrete and disproportionate risk of shifting the primary mitigation burden onto future generations, with the consequence of a future drastic restriction of their fundamental freedoms.

The second decision to be examined is the landmark judgment of 30 July 1993 of the Supreme Court of the Philippines in *Minors Oposa v. Factoran*.[14]

The case originated from a class action brought, *inter alia*, by a group of minors, represented by their parents, against the Secretary of the Philippine Department of Environment and Natural Resources. The action sought the annulment of all timber license agreements covering virgin tropical forests, as well as an injunction preventing the issuance of new logging permits, with

[14] Supreme Court of the Philippines, *Oposa v. Factoran*, G.R. no. 101083, Judgment of 30 July 1993.

the aim of halting the large-scale deforestation taking place in the Philippines. Such deforestation was in fact causing irreparable damage to the ecosystem and violating the applicants' right to a balanced and healthful environment. This right was claimed on the basis of a number of domestic legal provisions, including art. II, sect. 16, of the Constitution, according to which "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature", and was interpreted by the applicants as corresponding to a correlative obligation on the part of the respondent to safeguard it. It should be noted that the applicants acted not only on their own behalf, but also in representation of their generation and of generations yet unborn.

The Regional Trial Court dismissed the action, holding, among other things, that the right invoked by the applicants could not be construed as a specific, individual and judicially enforceable right, but rather as a mere statement of principle or a State policy, which therefore did not give rise to a corresponding duty of protection on the part of the State.

However, the applicants appealed to the Supreme Court, which ruled in their favor, set aside the dismissal order, and remanded the case to the Regional Trial Court for a determination on the merits. The Supreme Court referred to art. II, sect. 16, of the Constitution. On the basis of this provision, the Court held that the right to a balanced and healthful ecology constitutes a fundamental, specific and fully justiciable right. Its explicit recognition in the Constitution imposes upon the State a solemn obligation to protect and promote it, together with a corresponding duty not to harm the environment.

On this basis, the Court recognized the applicants' standing to sue for themselves and in representation of future generations. The Court established that this standing derives from the concept of intergenerational responsibility, which is inseparable from the right to a balanced and healthful ecology. According to the Court, the rhythm and harmony of nature are central to this right and require that natural resources be managed and conserved to ensure they are equitably accessible to the present as well as future generations. In particular, the Court stated that:

"Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come".

The third decision examined is the order of 4 September 2015 of the Lahore High Court in *Asghar Leghari v. Federation of Pakistan*.[15]

The decision arose from an action brought by a Pakistani farmer against the Federal Government and the Government of Punjab. The applicant argued that the challenges and vulnerabilities associated with climate change had not been adequately addressed. Although a national climate policy had been adopted in 2012, together with an implementation framework covering the period 2014-2030, the applicant maintained that no concrete progress had been made in implementing the measures envisaged therein. Such governmental inaction therefore amounted to a violation of the applicant's fundamental right to life guaranteed by art. 9 of the Pakistani Constitution, which encompasses the right to a clean and healthy environment.

The Court upheld the applicant's concerns, recognizing climate change as one of the defining challenges of our time. In particular, it linked environmental protection and the fight against climate change to the core of constitutionally guaranteed rights. According to the Court, these rights provide the judicial tools necessary to address and monitor the government's response to climate change. Specifically, the Court held that fundamental rights – including the right to life (art. 9 of the Constitution) and the right to human dignity (art. 14 of the Constitution) – when read in conjunction with the constitutional principles of democracy, equality, social economy and political justice, incorporate within their scope and commitment international environmental principles, including inter- and intra-generational equity. On the basis of these principles, the Court concluded that

[15] Lahore High Court, *Asghar Leghari v. Federation of Pakistan*, Case No. 25501/2015, Order of 4 September 2015.

the State's failure to implement the climate policy and its corresponding framework violated the fundamental rights of citizens, which are required to be protected. Consequently, the Court imposed a series of concrete measures on the Government.

The fourth decision examined is the judgment of 2 June 2000 of the Sri Lanka Supreme Court in the *Eppawela* case.[16]

Some residents in the Eppawela region had filed a petition before the Supreme Court of Sri Lanka, alleging the violation of their constitutionally guaranteed right to a healthy environment, due to a proposed agreement between the government and a private company for large-scale phosphate mining in their region, which would have caused an environmental disaster.

The Supreme Court upheld the petition. In this decision, the Court explicitly and thoroughly addressed the concept of intergenerational equity, qualifying it as a fundamental principle of sustainable development. The Court clarified that the principle of intergenerational equity originates from sources of international law, referring in particular to the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio de Janeiro Declaration on Environment and Development. It also analyzed the legal nature of these declarations, recognizing that they fall into the category of "soft law" and are not, therefore, in themselves legally binding on a State in the same way as legislation enacted by Parliament. However, according to the Court, Sri Lanka, as a member of the United Nations, could not ignore these universally recognized principles, and declared that principles of international "soft law" become binding if they are expressly enacted or become part of the domestic law by adoption by the superior courts of record, and in particular by the Supreme Court, in their decisions. With this statement, the Supreme Court actively incorporates the principle of intergenerational equity into the Sri Lankan legal system through its own ruling, effectively making it a legally relevant criterion for assessing the legitimacy of governmental action.

[16] Supreme Court of Sri Lanka, *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others*, SC (FR) Application No. 884/99, Judgment of 2 June 2000.

The last decision to be examined is the judgment of 2 March 2006 of the High Court of Kenya in *Waweru v. Republic*.[17]

The case concerned a criminal action against property owners for polluting a public water source with sewage. The owners argued that the responsibility to provide an adequate sewerage system was not theirs, but that of the local public authorities, and that the criminal prosecution violated their constitutional rights.

The High Court granted the applicants' claim, quashing the criminal proceedings on the grounds of procedural defects and discrimination. However, the Court decided to go beyond the procedural aspects to address the substantive environmental issues raised by the case, deeming them to be of fundamental importance. The Court's decision is particularly noteworthy for the way in which it grounds intergenerational equity on a plurality of legal bases within a multi-layered legal framework, thereby conferring upon it considerable normative force. First, the Court identified the source of intergenerational equity in national legislation, specifically in the Environmental Management and Coordination Act of 1999. Section 3(5) of this Act lists the principles of sustainable development that must guide judicial interpretation, explicitly including "the principle of intergenerational equity". Second, and significantly, the Court elevated intergenerational equity to customary international law, stating that, beyond its codification in national law, it possesses an autonomous and binding status. Indeed, the Court declared: "[a]part from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognizance of them in all the relevant situations." This statement implies that judges have a duty to recognize and apply the principle of intergenerational equity not only because it is provided for by national law, but as an established norm of international law, thereby strengthening its binding nature and universal scope. Finally, the Court closely linked intergenerational equity to the public trust doctrine. In conclusion, the Court affirmed that the irreversible environmental damage to the public water

[17] High Court of Kenya, *Peter K. Waweru v. Republic*, Miscellaneous Civil Application No. 118 of 2004, Judgment of 2 March 2006.

resources, caused by unregulated development, constituted a breach of intergenerational equity and consequently issued a mandamus order to compel the competent public authorities to construct a wastewater treatment plant.

3. *Preliminary Conclusions: The Application of Intergenerational Equity by National Courts*

On the basis of the discussion in the previous paragraph, it is now possible to outline the theoretical framework that emerges with regard to the qualification and application of the concept of intergenerational equity by national courts.

Within the legal systems examined, intergenerational equity is unequivocally regarded as a binding normative reality, with the consequence that States are required to adopt an approach grounded in the assessment of long-term effects when adopting and reviewing public decisions of environmental and climate-related relevance.

In many legal systems, intergenerational equity is provided for by domestic legislation, often as a constitutional value or even as a genuine duty incumbent upon the State to protect the interests of future generations, usually in connection with environmental policies.[18] In such cases, intergenerational equity constitutes an internal parameter available to judges. As demonstrated in the *Neubauer* case, by virtue of its constitutional relevance, intergenerational equity has been sufficient in itself to support constitutional review of legislation that fails to safeguard the interests of future generations.

As further shown by the other cases analyzed, intergenerational equity may also be regarded as a binding normative reality

[18] See the list of constitutions created by the Centre for International Environmental Law, available at www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf. As noted by M. MARCIANTE, "L'equità intergenerazionale nel sistema delle fonti di diritto internazionale", cit., p. 144, States have thus chosen to bind themselves to environmental, social, fiscal and welfare policies that must be conceived from an intergenerational perspective.

even where it is not, at least expressly, enshrined in domestic law, and in particular at the constitutional level. In such systems, courts may derive the existence of intergenerational equity through different interpretative approaches.

First, judges may adopt an extensive interpretation of applicable domestic law, through which the existence of a principle of intergenerational equity is inferred on the basis of a systematic interpretation of the provisions of the internal legal order. This constitutes a static interpretation of domestic norms, whereby judges confine themselves to identifying a meaning that, although not expressly articulated, is nonetheless considered implicit within the legal system as a whole.[19] This approach was adopted by the Supreme Court of the Philippines in the above-mentioned case of *Minors Oposa v. Factoran*, where intergenerational equity was regarded as already inherent in the domestic law to be applied.

Intergenerational equity may, however, also be valued as a source of international law capable of influencing national legal systems.

In particular, it may be regarded as an external element for the interpretation of domestic law. In this case, an evolutionary interpretation is carried out, whereby the meaning of domestic law expands as a result of the influence of an external factor, understood as a change in the factual or legal context.[20] This approach was followed by the Lahore High Court in *Asghar Leghari v. Federation of Pakistan*, where intergenerational equity was considered a principle of international environmental law and, therefore, an element external to the domestic legal order. On that basis, the fundamental rights guaranteed by the Constitution were interpreted. Intergenerational equity thus came to "inform" domestic legal obligations.

Moreover, intergenerational equity may also acquire autonomous value within national legal systems, independently of domestic legislation. This is the case in *Eppawela*, where the Su-

[19] With regard to this mode of interpretation, see P. Turrini, *Teoria e prassi dell'interpretazione evolutiva nel diritto internazionale* (Napoli, Editoriale Scientifica 2018), p. 40, who defines it as "extensive".

[20] *Ibid*. Turrini defines this mode of interpretation as "evolutionary".

preme Court of Sri Lanka qualified intergenerational equity as a principle belonging to international soft law, capable of acquiring binding force when incorporated into domestic law or otherwise introduced into it through judicial decisions. Similarly, in *Waweru*, the High Court of Kenya qualified intergenerational equity as a rule of customary international law, with consequent binding force within the national legal order.

In conclusion, in legal systems that expressly provide for, or derive through the interpretation of domestic provisions, the existence of the principle of intergenerational equity, national courts already possess and make use of this principle. In such systems, the nature of intergenerational equity under international law therefore assumes reduced importance.[21]

Conversely, in legal systems in which the principle of intergenerational equity is neither expressly identified within domestic law nor otherwise perceived as inherent therein, the qualification of intergenerational equity under international law may instead become relevant, if not crucial.[22]

If intergenerational equity under international law amounts to something more than a mere ethical value, it may indeed be called upon to play a significant role in national judicial decisions, affecting both the intensity and the scope of judicial review, depending on the legal qualification attributed to it. It is therefore evident that identifying the exact nature of intergenerational equity within the international legal order is of primary importance, also in order to avoid the risk of fragmentation in national judicial decisions when courts rely on intergenerational equity as articulated under international law.

However, as will be further discussed below, and as already emerges from the national judicial decisions examined above, the nature of intergenerational equity has long remained controversial. The issue has received wide attention in the literature, espe-

[21] L. Magi, "Environmental Chronic Emergencies and Future Generations", in S. De Vido, D. Russo, E. Tramontana (eds) *Gendering International Legal Responses to Environmental Chronic Emergencies* (Cheltenham/Northampton, Edward Elgar 2026), p. 147 ff., p. 158.

[22] *Ibid*.

cially in the field of intergenerational environmental law, without any uniform view ever having emerged among scholars.

4. *The Debate on the Nature of Intergenerational Equity in International Law*

On the basis of the premises set out in the previous paragraph, it is now appropriate to briefly recall the scholarly debate concerning the nature of intergenerational equity in international law.[23]

Some authors have argued that intergenerational equity has not yet attained full legal expression and should therefore be understood solely as a moral value or obligation.[24] Others have included intergenerational equity among the elements of sustainable development.[25] Some have classified intergenerational equity as a programmatic principle, endorsed by the international community, though not immediately binding.[26] There are also authors who have maintained that intergenerational equity is not merely a meta-legal principle,[27] but has instead translated into a binding normative reality. Indeed, many scholars consider intergenerational equity to be a general principle of international law, although divergent views can also be identified in this respect.[28]

[23] For an overview on the issue, see L. Pineschi, "Equità intergenerazionale e diritto internazionale dell'ambiente: principio metagiuridico o regola di diritto?", in R. Bifulco, A. D'Aloia (eds), *Un diritto per il futuro: teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Napoli, Jovene 2008), p. 113 ff.

[24] P. Birnie, A. Boyle, C. Redgwell, *International Law & the Environment* (Oxford, Oxford University Press 2009), p. 120.

[25] P. Sands, J. Peel, *Principles of International Environment Law* (Cambridge, Cambridge University Press 2012), p. 207 ff.

[26] R. Pisillo Mazzeschi, A. Viviani, "General Principles of International Law: From Rules to Values?", in R. Pisillo Mazzeschi, P. De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Heidelberg, Springer 2018), p. 272 ff.

[27] Among the first scholars to argue that intergenerational equity is not merely a moral value, see L. Pineschi, "Equità intergenerazionale e diritto internazionale dell'ambiente: principio metagiuridico o regola di diritto?", cit., *passim*.

[28] The term "general principle of law" refers to a category that encompass-

Some view it as a general principle formed within the international legal system;[29] others interpret it as a general principle of law derived from national legal systems;[30] still others argue that it may be qualified both as a principle formed within the international legal system and as a general principle of law derived from national legal systems;[31] finally, it has also been argued that intergenerational equity has attained the status of customary international law.[32]

More recently, however, the uncertainty surrounding the legal qualification of intergenerational equity under international law has been overcome by the International Court of Justice, which, in its Advisory Opinion on States' obligations in respect of climate change – to be examined below – expressly addressed this issue.

es both general principles formed within the international legal system and general principles of law derived from national legal systems. This is the approach adopted by the International Law Commission, in its work of codification on the topic of general principles of international law: "General Principles of Law: Texts and Titles of the Draft Conclusions Adopted by the Drafting Committee on Second Reading" (2025), UN Doc. A/CN.4/L.1018, where, in Draft Conclusion 3 "Categories of General Principles of La*w",* it is stated that: "General principles of law comprise those: (a) that are derived from national legal systems; and (b) that may be formed within the international legal system". See also G. Gaja, "General Principles of Law", in *Max Planck Encyclopedia of Public International Law*, 2020, available at www.mpepil.com; F. Salerno, "Principi generali di diritto (Diritto internazionale)", in *Digesto delle discipline pubblicistiche*, vol. IX (Torino, Utet 1996), p. 524 ff.; G. Palmisano, *Fondamenti di diritto internazionale. Fenomenologia del diritto di un mondo di Stati* (Milano, Le Monnier Università Mondadori Education 2025), pp. 60-75.

[29] L. Magi, "Environmental Chronic Emergencies and Future Generations", cit., *passim*.

[30] A. Gianelli, "La tutela delle future generazioni nel diritto internazionale: regola, principio o valore?", in M. Frulli (ed), *L'interesse delle generazioni future nel diritto internazionale e dell'Unione europea* (Napoli, Editoriale scientifica 2023), p. 19 ff.

[31] F. Cerulli, "Safeguarding Future Generations: The Legal Status of Intergenerational Equity in International Law", cit.

[32] J.D.F. Quising, "Beyond OPOSA: Courts Reinforcing Intergenerational Equity as Customary International Law", in *European Law Journal*, XXIX (2023), p. 422 ff.

5. *The ICJ Advisory Opinion on the Obligations of States in respect of Climate Change*

In the light of the analysis conducted thus far, this contribution now seeks to assess the impact that the recent Advisory Opinion of the ICJ on the *Obligations of States in respect of climate change*,[33] delivered on 23 July 2025, may have on the application of intergenerational equity by national courts.

Before entering *in medias res* and examining the findings of the Court's Advisory Opinion, a preliminary remark is required. Among the numerous relevant decisions recently adopted by international courts and human rights treaty bodies in environmental matters,[34] the focus here is deliberately placed on the Advisory Opinion of the ICJ. This choice is justified by the fact that the Court's decisions – whether judgments or advisory opinions – are regarded as genuine turning points for the international community, marking a clear "before" and "after".[35]

[33] International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025. For a collection of early insightful contributions on the Advisory Opinion see M.A. Tigre, M. Bönnemann, A. De Spiegeleir (eds), *The ICJ's Advisory Opinion on Climate Change* (Berlin, Verfassungsbook 2025).

[34] Just to mention some of the most widely discussed decisions, see Inter-American Court of Human Rights, *Case of Inhabitants of La Oroya v. Peru*, Judgment of 27 November 2023; European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application No. 53600/20), Judgment of 9 April 2024; International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Case No. 31) Advisory Opinion of 21 May 2024; Inter-American Court of Human Rights, *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025.

[35] On this aspect, see A. Pellet, "Decisions of the ICJ as Sources of International Law?", in *Decision of the ICJ as Sources of International Law? Gaetano Morelli Lectures Series*, vol. II (Rome, International and European Papers Publishing 2018), p. 7 ff. In particular, the Author recognizes that the ICJ plays a crucial role in the progressive development of international law. Although the Court cannot be considered a legislator, it performs a function that is not limited to a mere mechanical application of the law, but involves an activity of interpretation and, at times, of specification and adaptation of the rules to the new needs of the international society. As expressly stated: "while

In particular, the Advisory Opinion on climate change had been widely regarded, from the moment the request was submitted to the Court,[36] as one destined to stand out in several respects.[37]

For the purposes of this contribution, one specific aspect deserves particular attention. As noted by Pineschi, the request for an advisory opinion on climate change submitted to the Court by the United Nations General Assembly was adopted by consensus; however, "divergences and unresolved tensions" remained, *inter alia*, with regard to "the nature and content of certain prin-

staying within the existing legal framework the Court constantly and consistently (even if rather prudently) adapts the law to the new circumstances and needs of the international society, notably when it is clear that a more orthodox interpretation would lead to a dead-end or is no longer acceptable by international society, or because there appears to be gaps in the existing applicable rules" (p. 42).

[36] United Nations General Assembly, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, 29 March 2023, UN Doc. A/RES/77/276.

[37] Indeed, immediately after the advisory opinion was adopted, it was characterized in academic literature as "the great reset". See M. Wewerinke-Singh, J. Viñuales, "The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts", in *EJILTalk!*, 2025, available at: www.ejiltalk.org. Among the aspects in which the Advisory Opinion stands out is the function it was called upon to perform. Some scholars have emphasized its "strategic function" for the implementation of international environmental law. See, in this regard, S. Meckievi, J. E. Viñuales, "The Search for Clarity; Resort to Advisory Opinions as a Strategy for the Implementation of International Environmental Law", in *The Italian Yearbook of International Law*, XXXIII (2023), p. 85 ff. At the same time, the role of the Advisory Opinion may also be understood within a logic of "lawfare". In this respect, the advisory function exercised by the ICJ could be regarded as reflecting a broader trend promoted by States and international organizations, whereby requests for advisory opinions are increasingly used as strategic tools within international legal and political processes. Especially when they concern issues with far-reaching political implications, such requests are not limited to seeking legal clarification. Rather, they aim to support specific, political positions, legitimize certain normative trajectories, and influence global debates by mobilizing the authority of international adjudication. On the advisory function as a form of "lawfare" see G. Adinolfi, M. Buscemi, C. Ragni, "*Quo Vadis* Advisory Function? An Introduction", in *The Italian Review of International and Comparative Law*, IV (2024), p. 5 ff., p. 7.

ciples and rules."[38] It was therefore evident that the Court's opinion was bound to be perceived as an *arbiter inter discordantes*. This is also true with regard to intergenerational equity, whose nature clearly fell within the "divergences and unresolved tensions" emerging from the scholarly debate, as discussed above.

As is well known, in some of its past decisions the Court had already addressed – albeit indirectly – the issue of intergenerational equity, essentially pointing to the need to interpret and apply international treaties also in the light of the protection of the interests of future generations.[39]

In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[40] the Court articulated a concept that has since become a cornerstone of environmental law – and that, as will be shown, was also recalled in the Court's recent Advisory Opinion of July 2025 – according to which "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[41] The Court further emphasized that, when applying the rules and principles of the law of armed conflict, due account must also be taken of environmental considerations, which limit the scope of military actions otherwise considered lawful under international law. Accordingly, the Court held that it was imperative, in its assessment, to take into account the unique characteristics of nuclear weapons, including their capacity to cause harm to future generations.

[38] L. Pineschi, "The Request to the International Court of Justice for an Advisory Opinion on Climate Change: Some Preliminary Remarks through the Lens of Statements Made upon the Adoption of Resolution 77/276", in *The Italian Review of International and Comparative Law*, IV (2024), p. 21 ff., p. 23.

[39] This is consistent with what has already been affirmed in various *fora* and across different fields – albeit predominantly in the environmental domain – since 1945. For an analysis aimed at identifying where the protection of the interests of future generations may be found as a tool for treaty interpretation, see A. Gianelli, "La tutela delle generazioni nel diritto internazionale: regola, principio o valore?", cit., pp. 21-30.

[40] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996.

[41] Para. 29.

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case,[42] the Court affirmed the obligation to interpret treaties in the light of the rules and standards contained in international agreements and soft-law instruments concerning environmental protection, which the Court regarded as reflecting a growing awareness of the risks that decades of human interference with the natural balance pose not only to present generations, but also to future ones.

Finally, in its 2014 judgment in the *Whaling in the Antarctic* case,[43] the Court, in interpreting Article VIII of the International Convention for the Regulation of Whaling – which allows contracting States to grant special permits for the killing of whales for purposes of scientific research – referred to the Convention's Preamble, emphasizing that it defines the object and purpose of the treaty. The Preamble expressly refers to the need to safeguard the interests of future generations.

In its Advisory Opinion of 23 July 2025, the ICJ, for the first time, expressly examined the concept of intergenerational equity, defining its nature and function. The Court's analysis is found in the section addressing the first question raised in the request for the advisory opinion, concerning States' obligations in respect of climate change.[44] In particular, in the part devoted to the "Applicable law", after reviewing the relevant treaty-based and customary sources, the Court turned to "Other principles", stating that it was necessary to determine whether such principles – including intergenerational equity – formed part of the applicable legal framework.[45]

With specific reference to intergenerational equity, the Court first observed that, irrespective of differing interpretations advanced in the various positions submitted by the participants, the relevance of intergenerational equity to climate obligations was

[42] International Court of Justice, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997.

[43] International Court of Justice, *Whaling in the Antarctic (Australia/Japan: New Zealand intervening)*, Judgment of 31 March 2014.

[44] Para 112 ff.

[45] Para. 146 ff.

"undisputable".[46] In support of this assertion, the Court referred to art. 3, para. 1, of the United Nations Framework Convention on Climate Change and to the Preamble of the Paris Agreement. The Court further noted that these provisions echo its own prior recognition in the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, according to which the environment cannot be regarded as an abstraction, but rather as encompassing the living space, quality of life, and the health of human beings, including future generations.[47]

From a substantive perspective, the Court describes intergenerational equity as an expression of the idea that present generations are "trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations".[48] In this context, the Court highlights the findings of the Intergovernmental Panel on Climate Change, which underscored the long-term and irreversible nature of climate change impacts across generations.[49]

That being said, what deserves particular emphasis here is that the Court clarified that intergenerational equity constitutes a manifestation of equity in a general sense.[50] Consequently, according to the Court, intergenerational equity possesses the same legal relevance as equity as such and serves as a guide for the interpretation of applicable rules.[51] The Court further stressed that the function of equity, as a legal principle, is not to replace the law or to exceed its limits and that, therefore, "considerations of intergenerational equity must play a role *infra legem*, without displacing or exceeding the limits of the applicable law."[52]

The Court then concluded by stating that

> [d]ue regards for the interests of future generations and the long-term implications of conduct are equitable considerations that need

[46] Para. 155.
[47] *Ibid.*
[48] Para. 156.
[49] *Ibid.*
[50] Para. 157.
[51] *Ibid.*
[52] *Ibid.*

> to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law.[53]

The role of intergenerational equity was reaffirmed by the Court both in the *Conclusion* to its analysis of the "Other principles"[54] and in the *Conclusion* of the entire section devoted to the "Applicable law"[55]. Moreover, in the immediately following part, specifically addressing the "Obligations of States under the climate change treaty framework", the Court reiterated the interpretative role of "other principles", including intergenerational equity, which, while not constituting standalone obligations under the climate change treaty framework, nevertheless guide the interpretation of treaty obligations.[56]

Overall, the position adopted by the ICJ in its Advisory Opinion on intergenerational equity unquestionably merits a positive assessment. The Court took a further step forward compared to its previous rulings.[57] As discussed above, in its earlier case law the Court had taken into account the protection of future generations; however, it had never reconstructed intergenerational equity as a general principle of international law. In the 2025 Advisory Opinion, the Court expressly addressed intergenerational equity, defining its status. In doing so, it conferred greater legal certainty and authority upon intergenerational equity[58] which,

[53] *Ibid*.

[54] Para. 161.

[55] Para. 172.

[56] Para. 178.

[57] In this sense, see R. Marconi, "L'equità intergenerazionale al vaglio della Corte internazionale di giustizia nel parere consultivo sul cambiamento climatico", in *Ordine internazionale e diritti umani*, 2025, p. 1420 ff., p. 1423, available at: www.rivistaoidu.net.

[58] Wewerinke-Singh underlined that "the Court's recognition of intergenerational equity is remarkable […]: a concept whose legal status was long debated is now affirmed as a manifestation of equity that must inform the application of both treaties and custom, ensuring 'due regard for the interests of future generations' across the board" (M. Wewerinke-Singh, "Harmonizing Sources, Hardening Duties: Inside the ICJ's Advisory Opinion on Climate Change", in M.A. Tigre, M. Bönnemann, A. De Spiegeleir (eds), *The ICJ's Advisory Opinion on Climate Change*, cit., p. 43 ff., pp. 51-52).

far from being a moral obligation or a political aspiration, constitutes a general principle of international law.

It is nonetheless true that, for the Court, intergenerational equity remains a guiding principle intended to orient the interpretation and application of the law, rather than a binding principle in the strict sense. From this perspective, the innovative scope of the Advisory Opinion with regard to the principle of intergenerational equity is somewhat reduced, as it was not accorded autonomous normative value.[59] The Court could undoubtedly have accorded greater space to intergenerational equity *tout court* as a general principle of international law and defined it in such a way as to render it more amenable to flexible application by national courts. Had the Court taken this approach, it could likely have acted as a catalyst – as will be examined below – for a broader and more incisive use of intergenerational equity by national case law as a general principle of international law.

6. *Prospective Conclusions: The Application of Intergenerational Equity by National Courts after the ICJ's Advisory Opinion*

Of course, only a few months after its release, it is too early to assess the concrete and effective impact of the ICJ Advisory Opinion.

[59] As noted by Odermatt, the ICJ avoided framing intergenerational equity as a foundation for concrete obligations and likewise sidestepped the issue of States' obligations towards future generations that will suffer the greatest harms from climate change, limiting itself to sporadic reference to those not yet born. See J. ODERMATT, "What the Court Didn't Say: The ICJ's Climate Opinion and the Politics of Judicial Restraint", in M.A. Tigre, M. Bönnemann, A. De Spiegeleir (eds), *The ICJ's Advisory Opinion on Climate Change*, cit., p. 291 ff., p. 301. Notwithstanding this, it should also be noted that, in the part of the Advisory Opinion devoted to States' preventive obligations – which cannot be examined here – the Court has undoubtedly charted a course that strengthens States' responsibilities and paves the way for a more effective deployment of certain legal concepts, which must likewise be oriented towards the protection of future generations. Overall, the Court's approach to safeguarding future generations is therefore more far-reaching than it may appear *prima facie*: while it adopts a cautious stance with respect to the role of intergenerational equity, it simultaneously imposes significant constraints through its examination of States' preventive obligations.

As recently emphasized by Pineschi, the "success" of an advisory opinion depends on several factors, including its reasonableness and persuasive strength, and the support of key States through their practice.[60]

In light of these criteria, Pineschi has observed that, even prior to the adoption of the Advisory Opinion on Climate Change, scholarly literature had expressed doubts as to the persuasive power of the opinion the Court was expected to deliver. Such doubts stemmed from the generality and vagueness of the norms involved, the Court's limited prior case law on environmental obligations, and the highly political nature of the issue, which inevitably affects States' willingness to comply with the ICJ's guidance.[61]

Notwithstanding this, Pineschi has pointed out that the Advisory Opinion may nonetheless exert a significant impact on States, notably through the action of national courts: should national judges align their decisions with the ICJ's findings, the "success" of the Advisory Opinion would be achieved.[62]

With regard to intergenerational equity in particular, it seems likely that national courts will follow the Court's *dictum*, thereby confirming the 'success' of the Advisory Opinion at least under this profile. This could have positive effects.

The recognition of intergenerational equity as a general principle of international law may be invoked by national courts when attributing State responsibility for inadequate, ineffective, or deficient policies. This holds true both in legal systems in which intergenerational equity is recognized in domestic legislation, in particular at the constitutional level, where national courts may reinforce their reasoning by expressly referring to the Advisory Opinion of the ICJ, and in legal systems that lack any reference in domestic legislation to future generations, where na-

[60] L. Pineschi, "The Request to the International Court of Justice for an Advisory Opinion on Climate Change: Some Preliminary Remarks through the Lens of Statements Made upon the Adoption of Resolution 77/276", cit., p. 28.

[61] *Ibid*.

[62] *Ivi*, p. 29.

tional courts may nonetheless rely on the Advisory Opinion in order to justify and legitimize their decisions through an interpretation of the law grounded in intergenerational equity as a general principle of international law.[63]

This may foster the initiation of a process of progressive harmonization of national courts' case law in the interpretation and application of intergenerational equity (also) as a source of international law, thereby strengthening its operability and effectiveness and contributing, over time, to the formation of a uniform body of jurisprudence of a transnational character.

That being said, the Court's statements also entail a critical dimension with respect to their potential effects on proceedings before national courts. By attributing to intergenerational equity, as a general principle of international law, a purely interpretative role, there is a risk that the Court may have restricted its future use by national courts.

As is well known, the function of general principles of international law is not limited to interpretation. They may fill normative gaps (suppletive function) and, in some cases, may even constitute the basis for autonomous legal obligations (self-standing normative function).[64] However, if national courts, when called

[63] As observed by R. MARCONI, "L'equità intergenerazionale al vaglio della Corte internazionale di giustizia nel parere consultivo sul cambiamento climatico", cit., p. 1427, at least in principle, intergenerational equity should strengthen the binding nature of international obligations in the field of climate change. Any commitment undertaken by States should therefore be interpreted as requiring the adoption of the most future-oriented solution.

[64] On the functions of general principles of international law, see the International Law Commission, in its work of codification on the topic of general principles of international law: "General Principles of Law: Texts and Titles of the Draft Conclusions Adopted by the Drafting Committee on Second Reading" (2025), UN Doc. A/CN.4/L.1018, where Draft Conclusion 10 («Functions of general principles of law») provides that: "1. General principles of law may contribute to the coherence of the international legal system. They serve, *inter alia*: (a) as a basis for substantive rights and obligations, as well as a basis for secondary and procedural rules; (b) to interpret and complement other rules of international law. 2. General principles of law are mainly resorted to when other rules of international law do not resolve a particular issue in whole or in part." However, in light of Draft Conclusion 3 (Categories of general principles of law), which refers both to principles derived from national legal

upon to assess whether a State has complied with its climate obligations, were to follow the *dictum* of the ICJ, they would not consider intergenerational equity in isolation as an autonomous legal basis, but solely as a means of interpreting and applying existing legal norms. In some cases, this might even result in a form of "regression" compared to the achievements reached by certain national courts; suffice it to recall the example of the High Court of Kenya in the *Waweru* case, where intergenerational equity was also recognized as a rule of customary international law and, accordingly, endowed with binding and autonomous normative value. By clarifying that the principle of intergenerational equity does not replace the law but forms an integral part of the correct method of interpreting it, the ICJ may therefore have weakened its impact within domestic legal systems, depriving it of some of the functions it could otherwise perform. This could prove particularly detrimental in legal systems that do not provide for any reference to intergenerational equity in domestic legislation and might therefore base their reasoning exclusively on intergenerational equity as a general principle of international law.

It will thus be necessary to await future decisions of national courts in order to verify how case law will evolve, and whether intergenerational equity as a general principle of international law may claim – as would be desirable – an even broader role in domestic judicial decisions than that explicitly recognized in the Advisory Opinion.

systems and to those formed within the international legal system, it remains unclear whether the functions identified in Draft Conclusion 10 apply to both categories of principles. See also International Law Commission, Report on the Work of the Seventy-sixth Session (2025), UN Doc. A/80/10, Chapter VI General Principles of Law, 2. Summary of the Debate, para. (k) Draft Conclusion 10, (Functions of general principles of law), which shows that an ongoing debate persists on the functions of general principles of international law based on States' practice and positions. For a comprehensive and authoritative scholarly account of the functions of general principles of international law, see generally G. Palmisano, *Fondamenti di diritto internazionale. Fenomenologia del diritto di un mondo di Stati*, cit., pp. 60-75.

Section Four

Security, Humanitarian and Social Issues

THE UN SECURITY COUNCIL AND CLIMATE CHANGE: SECURITISATION, CLIMATISATION AND SCHRÖDINGER'S EFFECTIVENESS

Laura Di Gianfrancesco*

Summary: 1. Introduction. – 2. The Security Implications of Climate Change: From Securitisation to Climatisation. – 3. The Scope of the Security Council's Responsibility and Powers under the UN Charter and the Potential Relevance of the Climate Issue. – 4. The Ambivalent Engagement of the Security Council with Environmental Protection and Climate Change. – 5. The Inconsistency of the Arguments against a Security Council's Role in Addressing Climate Change. – 6. Conclusion.

1. *Introduction*

Climate change has increasingly emerged as one of the defining challenges to international peace and security, compelling scholars and policymakers to reconsider the appropriate institutional fora for addressing its far-reaching consequences. While scientific assessments highlight the profound security implications of the problem, the question of whether and how the UN Security Council should intervene remains deeply contested. Over nearly two decades of intermittent engagement, the Council has oscillated between cautious acknowledgement of the climate-security nexus and hesitation to assume a more systematic role, mirroring a broader geopolitical divide within the international community. At the heart of these debates lies a tension between two competing conceptualisations, namely the long-standing critique of "securitisation", which warns against expanding security-based tools into environmental governance, and the more recent concept of "climatisation", which captures the integration of climate considerations into the security field, without necessarily transforming them into military threats.

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This chapter reconstructs the evolution and current limits of the Council's involvement with climate change and argues that the organ's ambiguous engagement reflects a deeper paradox. While the Council is criticised for being ill-suited to address climate change, opposition to a stronger role actually stems from the recognition that, if empowered to act, it possesses unique tools capable of shaping States' behaviour. The organ's effectiveness is therefore simultaneously feared and denied, a condition this chapter defines as the "Schrödinger's effectiveness" of the Security Council.

The chapter proceeds as follows. Section 2 outlines the debates on the security implications of climate change, from concerns about securitisation to the more recent trend of climatisation. Section 3 assesses the scope of the Council's mandate under the UN Charter and the potential relevance of climate change for its powers. Section 4 examines the Council's actual practice, illustrating both the gradual mainstreaming of climate considerations and the persistent obstacles to achieving a thematic outcome. Section 5 critically engages with the arguments advanced by States opposing to a more robust Council role and shows their inconsistency. Section 6 concludes by reflecting on the future prospects of the Council's engagement.

2. *The Security Implications of Climate Change: From Securitisation to Climatisation*

In 2021, naturalist David Attenborough, in a video message to the UN Security Council, warned that "climate change is the biggest threat to security that humans have ever faced."[1] This statement echoed the findings of the Intergovernmental Panel on Climate Change (IPCC), which already in 2014 concluded that "[h]uman security will be progressively threatened as the climate changes", given climate change's ability to undermine livelihood, compromise culture and identity and increase migration, chal-

[1] As reproduced in Security Council Report, "The UN Security Council and Climate Change", Research Report, 2021, p. 1.

lenging States' ability to provide the conditions necessary for human security.[2] Today, the negative implications of climate change for human security are widely accepted. For some, climate change constitutes a security issue in its own right, as it destabilises ecosystems and threatens human survival.[3] Others focus instead on the international security *implications* of climate change, such as displacement, social and political instability and even armed conflict.[4] While a direct causal link between climate change and armed conflict is still discussed,[5] some key consequences of climate change, such as extreme weather events and disasters, forced migration and States' potential extinction carry profound implications for international peace and security.

As climate change is progressively framed as a security concern, a vast literature has examined this nexus. Much of this literature warns, however, against the securitisation of climate change, namely the incorporation of environmental issues into the security agenda.[6] This criticism draws on the Copenhagen School of Security Studies' securitisation theory,[7] according to which issues do not intrinsically possess security characteristics, but are construed as security matters by certain actors through discoursive practices to justify the application of urgent, extraordinary, and often illiberal measures. According to these critiques,

[2] C.B. Field *et al.* (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability* – Part A: Global and Sectoral Aspects. Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge, Cambridge University Press 2014), p. 758.

[3] S. Dalby, *Rethinking Environmental Security* (Cheltenham, Edward Elgar 2022), pp. 171-180.

[4] R. Black *et al.*, *Environment of Peace: Security in a New Era of Risk* (Stockholm, Stockholm International Peace Research Institute 2022).

[5] See, however, recent empirical studies showing that climate variations are associated with higher levels of violence and conflict: K. Sakaguchi, A. Varghese, G. Auld, "Climate Wars? A Systematic Review of Empirical Analysis on the Links Between Climate Change and Violent Conflict", in *International Studies Review*, IXX (2017), p. 622 ff.

[6] A. Murphy, "Climate Insecurity: The Promise and Peril of Securitising Climate Change before the United Nations Security Council", in *Melbourne Journal of International Law*, XXIII (2022), p. 1 ff., p. 7.

[7] See, generally: B. Buzan, O. Wæver, J. de Wilde, *Security: A New Framework for Analysis* (Boulder, Lynne Rienner Publishers 1998).

framing climate change as a security threat risks triggering military responses, marginalising environmental agencies, and legitimising exceptional measures at the expense of mitigation and adaptation efforts.[8]

In response to the traditional critical securitisation literature, an alternative approach has emerged in recent years, which focuses on the notion of "climatisation". Climatisation describes "the process that defines a given issue as being part of the climate domain and relevant to the climate policies."[9] The climatisation theory illustrates how old phenomena are reframed as pertaining to the climate field, and how climate change becomes a lens through which global governance is organised. In the security field, climatisation entails that "existing security practices are applied to the issue of climate change" while "new practices from the field of climate policy are introduced into the security field."[10] Unlike securitisation critiques, the climatisation approach focuses on the positive transformations generated by integrating climate considerations into governance.[11] A climatisation approach to security actors allows to emphasise that, in today's interconnected world, no entity with governance responsibilities can legitimately ignore the effects of climate change. Instead of ques-

[8] D. Deudney, "The case against linking environmental degradation and national security", in *Millennium: Journal of International Studies*, XIX (1990), p. 461 ff.; R. Floyd, *Security and the Environment: Securitisation Theory and the US Environmental Security Policy* (Cambridge, Cambridge University Press 2010); B. Hartman, "Rething Climate Refugees and Climate Conflict: Rhetoric, Reality and the Politics of Policy Discourse", in *Journal of International Development*, XXII (2010), p. 233 ff.; N. Buxton, *A Primer on Climate Security: The Dangers of Militarising the Climate Crisis* (Amsterdam, Transnational Institute 2021).

[9] L. Maertens, "Climatizing the UN Security Council", in *International Politics*, LVIII (2021), p. 640 ff., p. 643.

[10] A. Oels, "From 'Securitization' of Climate Change to 'Climatization' of the Security Field: Compating Three Theoretical Perspectives", in J. Scheffran *et al.* (eds), *Climate Change, Human Security and Violent Conflict: Challenges for Societal Stability* (Verlag/Berlin/Heidelberg, Springer 2012), p. 197.

[11] L. Maertens, M.J. Trombetta, "Climate Change at the United Nations Security Council: Securitization, Climatization and Beyond", in M.J. Trombetta (ed), *Handbook on Climate Change and International Security* (Cheltenham, Edward Elgar 2023), p. 192.

tioning the legitimacy of security actors' intervention in the issue of climate change, the climatisation approach challenges the legitimacy of failing to do so.

Applied to the Security Council, climatisation helps explain the continued efforts of many States to integrate climate considerations into its work, and provides an alternative to the inherently negative assumptions associated with the notion of securitisation. Taking this approach into account, the following section illustrates how the question of climate change naturally falls within the scope of Security Council's Charter-based mandate and that its vast array of powers make it a potentially relevant and effective forum for addressing climate-related risks – which, in turn, will help explain the political resistance against its intervention.

3. *The Scope of the Security Council's Responsibility and Powers under the UN Charter and the Potential Action on the Climate Issue*

Article 24(1) UN Charter entrusts the Security Council with the "primary responsibility for the maintenance of international peace and security." To discharge this duty, the organ is endowed with specific powers, and notably those under Chapters VI and VII.

Chapter VI grants the Council recommendatory authority with respect to any dispute or situation, the continuance of which is "likely to endanger the maintenance of international peace and security."[12] These powers are thus essentially preventative in nature, allowing the organ to address root causes of conflicts or other potential threats to peace and security. Crucially, they do not require a prior determination that a threat to international peace and security has already materialised. Article 34 notably empowers the Council to "investigate […] any situation which might lead to international friction or give rise to a dispute, in

[12] Charter of the United Nations (24 October 1945) XV UNCIO 335, arts 33-34.

order to determine whether the continuance of the […] situation is likely to endanger the maintenance of international peace and security." Accordingly, nothing in the Chater prevents the Council from investigating climate change as a potential security threat and gathering additional information in order to make that determination.[13]

Building upon this investigative function, scholars have also suggested a potential role of the Security Council's quasi-judicial function, including the commissioning of national, regional or international fact-finding on the effects of climate change.[14] Others have even gone so far as to creatively conceive the Security Council as a potential climate litigation body, proposing recommendations for the settlement of future climate-related inter-State disputes,[15] or recommending measures of aid and assistance by the international community in favour of States particularly affected by the climate crisis.[16] In practice, the most plausible form of environmental action under Chapter VI concerns the possible integration of climate-related considerations and information into the activities of existing and future UN peace missions. As further elaborated in the following sections, a trend in this direction has already developed in the Council's most recent practice.

Significantly more far-reaching are the Council's powers under Chapter VII. Notoriously, the extensive and potentially binding powers under this Chapter can only be activated after the organ determines, either explicitly or implicitly, the existence of a threat to international peace and security. This prerequisite complicates resorting to Chapter VII to address climate change. Although climate change has been already accepted and de-

[13] Security Council Report, "The UN Security Council and Climate Change", cit., p. 4.

[14] S.V. Scott, C. Ku, "The United Nations Security Council as a Climate Litigation Body", in F. Sindico *et al.* (eds), *Research Handbook on Climate Change Litigation* (Cheltenham, Edward Elgar 2024), pp. 407-409.

[15] *Ivi*, 409 ff.

[16] M. Nevitt, "Is Climate Change a Threat to International Peace and Security?", in *Michigan Journal of International Law*, XLII (2021), p. 527 ff., p. 571.

scribed by States and UN organs as a "threat multiplier",[17] determining whether it can qualify *per se* as a threat to international peace and security remains contentious. The Charter does not provide a definition of what constitutes a threat to international peace and security, and traditional understandings of the notion linked it primarily to international armed conflict. Yet, since the end of the Cold War, the organ has exercised wide discretion in this respect, triggering its Chapter VII powers against a broad range of non-traditional threats, such as internal conflicts, humanitarian crises, including those connected to serious human rights violations, public health crises, international terrorism, the proliferation of weapons of mass destruction and the commission of international crimes. Notably, through its practice in the field of international terrorism and proliferation of weapons of mass destruction, the organ has already crystallised its ability to act against generalised threats that constitute structural causes of global instability.[18] Thus, despite the recurring concerns over the weakness of the causal nexus between climate change and conflict, the inherently global security consequences of climate change would make it the perfect candidate for an Article 39 determination.[19] Such conclusion finds support in the Secretary-General Ban Ki Moon's warning to the Council in 2011 that

[17] See, for instance: CNA Military Advisory Board, "National Security and the Accelerating Risks of Climate Change", CNA Corporation, 2014, p. 2.

[18] The Security Council already anticipated such an approach in older presidential statements, such as UNSC, Statement by the President of the Security Council, PRST/2001/5 (20 February 2001), where it held that "the quest for peace requires a comprehensive, concerted and determined approach that addresses the root causes of conflicts, including their economic and social dimensions." Yet, as noted by scholars, the Council's qualification of general issues as threats to international peace and security remains a delicate task, which often rests on its ability to gather "general acceptance" by the broader membership. See: N. Krisch, "Article 39", in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* 3rd edn (Oxford, Oxford University Press 2012), pp. 1291-1293.

[19] C.K. Penny, "Greening the Security Council: Climate Change as an Emerging 'Threat to International Peace and Security'", in *International Environmental Agreements*, VII (2007), p. 35 ff., p. 58; C.K. Penny, "Climate Change as a 'Threat to International Peace and Security'", in S.V. Scott, C. Ku (eds), *Climate Change and the UN Security Council* (Cheltenham, Edward El-

climate change "not only exacerbates threats to international peace and security; it is a threat to international peace and security".[20]

Should the organ determine that climate change is a threat to international peace and security, a wide range of measures would be available to tackle it. The most controversial response would be a military intervention authorised under Article 42. While this is theoretically possible,[21] it is largely contested in scholarship as a counterproductive strategy for addressing environmental degradation and climate change, given its likely harmful effects on cooperation efforts, the environment and human rights.[22] Besides being politically impracticable, a military response does not appear an ideal avenue for the Council to engage with climate change.

However, military action is only a residual possibility for the Council, which is endowed with a vast array of non-military powers under Article 41. Scholars have identified several potential climate-related measures. First, the Council could adopt sanctions on both States and non-State entities. It could, for instance, impose import/export bans on companies with environmentally unsustainable practices, ban products with a particularly high environmental footprint, or sanction States with high greenhouse

gar 2018), p. 34 ff.; M. Nevitt, "Is Climate Change a Threat to International Peace and Security?", cit.

[20] UNSC, 6587th meeting, S/PV.6587 (20 July 2011), p. 2. A similar remark has been made by Secretary-General António Guterres in 2017, who claimed that "[c]limate change is a direct threat in itself, and a multiplier of many other threats." See: UNSG, Secretary-General's remarks at the High-level Meeting on Climate Change and the Sustainable Development Agenda (23 March 2017).

[21] Some scholars have discussed the idea of an "ecological intervention", while still cautioning on the risks thereof: R. Eckersley, "Ecological Intervention: Prospects and Limits", in *Ethics and International Affairs*, XXI (2007), p. 293 ff.

[22] L. Elliott, "Imaginative Adaptations: A Possible Environmental Role for the UN Security Council", in *Contemporary Security Policy*, XXIV (2007), p. 47 ff., pp. 57-58; A. Murphy, "Climate Insecurity: The Promise and Peril of Securitising Climate Change before the United Nations Security Council", cit., pp. 13-14; M. Nevitt, "Is Climate Change a Threat to International Peace and Security?", cit., pp. 576-577.

gas emissions.[23] Following the International Court of Justice's Advisory Opinion on climate change,[24] sanctions could also represent a powerful tool to enforce compliance with the obligations of States identified by the Court. Commentators have further suggested the adoption of a 'legislative' resolution to impose new general obligations on all States to address climate change. This would not be a novel type of action for the Council, which in the past has already experimented a new law-making function by adopting resolutions on generalised threats, including terrorism and proliferation of weapons of mass destruction, imposing treaty-like obligations on all UN members.[25] On matters of climate change, a similar type of action might include imposing an obligation to introduce domestic legislation to reduce States' carbon emissions, potentially accompanied by the creation of a monitoring committee.[26] Finally, with a view to further enforcing this potential framework, scholars have discussed the possibility that the Council establishes an international environmental court to address climate change and environmental crimes, or that it re-

[23] See: C. Voigt, "Security in a "Warming World": Competences of the UN Security Council for Preventing Dangerous Climate Change", in C.M. Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Leiden, Brill 2009), pp. 307-308; S.V. Scott, "Implications of climate change for the UN Security Council: mapping the range of potential policy responses", in *International Affairs*, XCI (2015), p. 1317 ff., p. 1324; M. Nevitt, "Is Climate Change a Threat to International Peace and Security?", cit., pp. 573-574.

[24] ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025.

[25] On the "legislative" function of the Council, see: S. Talmon, "The Security Council as a World Legislature", in *American Journal of International Law*, XCIX (2005), p. 175 ff.

[26] S.V. Scott, "Implications of climate change for the UN Security Council: mapping the range of potential policy responses", cit., pp. 1323-1324; A. Boyle, J. Hartmann, A. Savaresi, "The United Nations Security Council's Legislative and Enforcement Powers and Climate Change", in S.V. Scott, C. Ku (eds), *Climate Change and the UN Security Council* (Leiden, Edward Elgar 2018); C.K. Penny, "Climate Change as a 'Threat to International Peace and Security'", in S.V. Scott, C. Ku (eds), *Climate Change and the UN Security Council* (Leiden, Edward Elgar 2018). However, some scholars warn that such a possibility should be treated with caution due to the expected legitimacy concerns it would raise: M. Nevitt, "Is Climate Change a Threat to International Peace and Security?", cit., pp. 575-576.

fers situations to the International Criminal Court in relation to environmental crimes.[27]

4. *The Ambivalent Engagement of the Security Council with Environmental Protection and Climate Change*

Despite the abstract possibility for the Security Council to intervene in several ways, its actual engagement with climate change has been modest. The Council's practice nonetheless reveals a gradual, albeit cautious, incorporation of climate considerations into its work. This section will illustrate what the Security Council has been able to achieve so far, and, at the same time, what type of actions it has been prevented from undertaking due to political opposition.

Security Council Debates on Climate Change

Despite being rooted from the outset in legitimacy contestation, climate change is not a new issue for the Security Council. Since its first debate on the relationship of energy, climate and security, convened in April 2007 at the initiative of the United Kingdom (UK), the Council has engaged in discussions on climate change for the past 18 years.

The 2007 debate saw the participation of 55 delegations. As anticipated by the UK concept paper, the meeting aimed to discuss the security implications of climate change, including border disputes, migratory flows, shortages of energy and other resources, societal stress and humanitarian crises.[28] The concept

[27] S.V. Scott, "Implications of Climate Change for the UN Security Council: Mapping the Range of Potential Policy Responses", cit., pp. 1322-1323; S.V. Scott, P.J. Keenan, C. Ku, "The Creation of a Climate Change Court or Tribunal" in S.V. Scott, C. Ku (eds), *Climate Change and the UN Security Council* (Leiden, Edward Elgar 2018); S.V. Scott, C. Ku, "The United Nations Security Council as a Climate Litigation Body", cit., pp. 417-419.

[28] UNSC, Letter dated 5 April 2007 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United

paper already introduced the idea that consideration of climate-related factors would represent a way to foster an integrated approach to conflict prevention, in line with the Council's recognition in resolution 1625 (2005) of the need to address the root causes of conflict.[29] It also envisaged the potential need for the Council to obtain better information from the Secretary-General on the risks that climate change poses to security.[30] The debate, however, exposed a clear divide between UN members concerning the appropriateness of a Security Council's involvement with the climate issue. Several States, including European and Pacific Islands States, welcomed the convening of the debate as an opportunity for the Council to implement its responsibilities in conflict prevention.[31] However, in a letter circulated prior to the meeting, China and the Group of 77 expressed their opposition to the debate and their hope that this would not set a precedent for further Council engagement.[32]

Since 2007, climate change has regularly reappeared on the Council's agenda, being increasingly often addressed in open debates and in Arria formula meetings.

The organ discussed the impact of climate change again in 2011, in an open debate convened at the initiative of Germany, which saw an increased participation of 64 delegations. On that occasion, the Secretary-General called on the Security Council to exercise its unique responsibility in addressing what it expressly qualified as a threat to international peace and security.[33] This qualification was not fully endorsed by member States, which rather described climate change as a "threat multiplier" that

Nations addressed to the President of the Security Council, S/20077186 (5 April 2007), pp. 3-4.

[29] *Ivi*, p. 5.

[30] *Ibid*.

[31] See particularly the comments by Slovakia, Ghana, Congo, France, Germany (speaking on behalf of the EU), the Netherlands and Papua New Guinea (speaking on behalf of the Pacific Islands Forum) in: UNSC, 5663rd meeting, S/PV.5663 (17 April 2007), respectively at 4, 7, 8, 12, 19, 21, and 28-29.

[32] UNSC, Letter dated 16 April 2007 from the Permanent Representative of Pakistan to the United Nations addressed to the President of the Security Council, S/2007/211 (16 April 2007).

[33] UNSC, 6587th meeting, S/PV.6587 (20 July 2011), p. 2.

could exacerbate other existing threats and tensions and increase the likelihood of conflicts.[34] At the end of the debate, the Security Council was eventually able to adopt a presidential statement which, to date, remains its only general thematic product on climate change and security. While important, the statement reproduced the ambiguity in the Council's view of its role regarding climate change. On the one hand, it reaffirmed the importance of strategies for conflict prevention in the context of the Council's primary responsibility for the maintenance of international peace and security. It also confirmed that climate change could fall within its responsibilities in three circumstances, namely when climate issues (i) are drivers of conflict, (ii) represent a challenge to the implementation of Council mandates or (iii) endanger the process of consolidation of peace. In this respect, the Council requested the Secretary-General to include conflict analysis and contextual information on the possible security implications of climate change in his reports to the organ. On the other hand, the statement clearly framed climate change as a development issue, the responsibility of which rests with other UN organs, notably the General Assembly and the Economic and Social Council (ECOSOC), and that such issues must be addressed in the context of the UN Framework Convention on Climate Change (UNFCCC). Crucially, the presidential statement remained ambiguous as to the qualification of climate change as an actual threat to international peace and security. Rather, it expressed the Council's "concern that possible adverse effects of climate change may, in the long run, aggravate certain existing threats to international peace and security",[35] thus indirectly embracing the notion of climate change as a threat multiplier.[36] The implementation of the presidential statement has been weak for

[34] *Ivi*, pp. 4, 11, 15, 29.

[35] UNSC, Statement by the President of the Security Council, S/PRST/2011/15 (20 July 2011).

[36] D. Dam-de Jong, "The UN Security Council and a Warming World: Coming to Terms with the Security Implications of Climate Change", in R. Lawson, R.A. Wessel (eds), *Unity in Diversity: Perspectives on the Law of International Organizations – Liber Amicorum for Niels M. Blokker* (Leiden, Brill 2025), p. 123.

several years,[37] in part due to the Secretary-General's superficial coverage of climate change in his reports.[38] However, more systematic integration of climate-security information began in 2017.[39] Since 2018, this has been further prompted by the creation of the Climate-Security Mechanism, a team within the Secretariat tasked with gathering information and analysis on the climate-security nexus, to be then integrated into prevention, peacebuilding and adaptation activities of the UN.[40]

The Council's engagement with climate change continued over the years through increasing debates and Arria formula meetings. Between 2015 and 2025, 12 additional open debates discussed the impacts of climate-related risks on international peace and security.[41] Since climate change has never been incor-

[37] Security Council Report, "The UN Security Council and Climate Change", cit., p. 6.

[38] K. Conca, J. Thwaites, G. Lee, "Climate Change and the UN Security Council: Bully Pulprit or Bull in a China Shop?", in *Global Environmental Politics*, XVII (2017), p. 1 ff., pp. 6-7.

[39] C.M. Scartozzi, "Climate Change in the UN Security Council: An Analysis of Discourses and Organizational Trends", in *International Studies Perspectives*, XIII (2022), p. 290 ff., p. 298.

[40] Security Council Report, "The UN Security Council and Climate Change", cit., p. 9.

[41] UNSC, 7499th meeting, S/PV.7499 (30 July 2015) on the peace and security challenges facing Small Islands Developing States; UNSC, 8307th meeting, S/PV.8307 (11 July 2018) on understanding and addressing climate-related security risks; UNSC, 8451st meeting, S/PV.8451 (25 January 2019) on addressing the impacts of climate-related disasters on international peace and security; VTC ministerial debate on climate and security of July 2020 (S/2020/751); VTC open debate on the humanitarian effects of environmental degradation and peace and security of 21 September 2020 (S/2020/929); VTC high-level open debate on addressing climate-related security risks to international peace and security through mitigation and resilience building of 25 February 2021 (S/2021/198); UNSC, 8864th meeting, S/PV.8864 (23 September 2021); UNSC, 9260th meeting, S/PV.9260 (14 February 2023) on sea-level rise: implications for international peace and security; UNSC, 9345th meeting, S/PV.9345 (13 June 2023) on climate and food insecurity; UNSC, 9547th meeting, S/PV.9547 (13-14 February 2024) on the impact of climate change and food insecurity on the maintenance of international peace and security. Two recent meetings were held in November 2025 on the environmental impact of armed conflict and climate-driven security risks and on conflict and

porated as a thematic issue on the Council's agenda, these meetings have been convened at the initiative of individual Council presidents. Arria formula meetings, by contrast, are not formal meetings; their goal is to provide a forum for dialogue between Council members and external actors, including third States as well as other international organisations and representatives of the civil society, allowing Council members to be appraised of the perspective of external participants on a given topic and potentially stimulate the organ's interest in key issues. Due to their limited formality and impact on the Council's activity, it is not surprising that these types of meetings have been a privileged setting to address the controversial climate change debates. Between 2013 and 2024, a total of 14 meetings, covering various aspects of climate security and environment-related issues, have been held under the Arria formula.[42]

Although the concrete impact of these increasing discussions is difficult to measure, they have provided an opportunity for the organ to engage more directly with scientific data brought by external actors with technical expertise.[43] Furthermore, they

food insecurity: UNSC, 10035th meeting, S/PV.10035 (6 November 2025); UNSC, 10045th meeting, S/PV.10045 (17 November 2025).

[42] These meetings covered: "Security dimensions of climate change" (February 2013); "Climate change as a threat multiplier for global security" (June 2015); "Food security and peace" (March 2016); "Water, peace and security" (April 2016); "Security implications of climate change: sea level rise" (April 2017); "Climate change: preparing for security implications of rising temperatures" (December 2017); "Water, peace and security" (October 2018); "Protection of the environment during armed conflict" (November 2018); "Protection of the environment during armed conflict" (December 2019); "Climate and Security Risks: The Latest Data" (April 2020); "Sea-level rise and implications for international peace and security" (October 2021); "Climate finance for sustaining peace and security" (March 2022); "Climate, peace and security: Opportunities for the UN Peace and Security Architecture" (November 2022); and "Stepping up Preventive Action: From Environmental Challenges to Opportunities for Peace" (July 2024).

[43] N. VON UEXKULL, H. BUHAUG, "Scientific Uptake in the United Nations Security Council Debates on Climate Change and Security", in *Climatic Change*, CLXXVIII (2025), p. 1 ff., p. 9. For instance, in the 2013 Arria formula meeting, interventions were made by the Secretary-General, the president of the German Advisory Council on Global Change, the Vice-President and Special Envoy on climate change of the World Bank, and the UN Un-

have provided impetus for the incorporation of climate change considerations and language into other presidential statements and resolutions.[44] A notable example in this regard is the presidential statement of 3 August 2023, which for the first time expressly included climate change among the causes of food insecurity.[45] Taken together, these contributions have been read by scholars as providing a decisive push to the progressive climatisation of the Security Council,[46] in line with the objective of "mainstreaming" climate change into the work of all UN bodies, i.e., adopting an environmental perspective in all its institutional activities.[47]

The Mainstreaming of Climate Considerations in Regional and Country-Specific Contexts and Peacekeeping Operations

The progressive mainstreaming of climate considerations into the Council's practice has been particularly evident since 2017, with the security dimensions of climate change being progressively incorporated in regional and country-specific resolutions.

On 31 March 2017, the Council adopted resolution 2349 (2017) on the security, humanitarian and developmental impacts of the Boko Haram crisis in the Lake Chad Basin region. The resolution recognised "the adverse effects of climate change and

der-Secretary-General for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. More recent Arria meeting saw the participation of the Under-Secretary-General for Political and Peacebuilding Affairs to intervene followed by representatives of the NGO International Crisis Group and the Stockholm International Peace and Research Institute (SIPRI).

[44] C.M. Scartozzi, "Climate Change in the UN Security Council: An Analysis of Discourses and Organizational Trends", cit., p. 293 ff.; Security Council Report, "The UN Security Council and Climate Change", cit., p. 8.

[45] UNSC, Statement by the President of the Security Council, S/PRST/2023/4 (3 August 2023).

[46] L. Maertens, "Climatizing the UN Security Council", in *International Politics*, LVIII (2021), p. 640 ff., p. 654.

[47] C.M. Scartozzi, "Climate Change in the UN Security Council: An Analysis of Discourses and Organizational Trends", cit., p. 294.

ecological changes among other factors on the stability of the Region, including through water scarcity, drought, desertification, land degradation, and food insecurity" and emphasised "the need for adequate risk assessments and risk management strategies by governments and the United Nations relating to these factors."[48] This explicit reference to climate-risk assessment was prompted by the Council's visiting mission to the Lake Chad Basin earlier that month, during which members witnessed the consequences of Lake Chad's shrinking, and heard directly from regional leaders that Boko Haram's rise was directly connected to the underlying environmental degradation.[49] First-hand exposure thus became an important driver of a more robust institutional response to the environmental dimensions of the crisis. Since then, the language utilised in resolution 2349 has become a model language to be included in other country-specific contexts, effectively acknowledging that there exists a correlation between regional or country stability and the effect of climate change, and confirming the Council's competence in addressing the matter.[50]

The incorporation of environmental and climate-related considerations has been particularly visible in the design of peacekeeping and peacebuilding missions since 2018, in line with the UN Environmental Programme's suggestion that "[a] strategic approach to natural resources is a necessary part of meeting the peace and security objectives of peacekeeping."[51] This development has manifested itself in three main ways.

First, the Council has increasingly acknowledged in the preambular sections of mandates the adverse effects of climate change on the stability of specific countries, together with the

[48] UNSC Res 2349 (2017), S/RES/2349 (31 March 2017), OP 26.

[49] Security Council Report, "The UN Security Council and Climate Change", cit., p. 8.

[50] A. Motzfeldt Kravik, "The Security Council and Climate Change – Too Hot to Handle?", in *EJIL:Talk!*, 26 April 2018.

[51] UNEP, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations* (UNEP 2012), p. 42.

need for adequate risk-assessment and risk-management strategies within missions.[52]

Second, on certain occasions, the Council has gone further by entrusting missions with explicit climate-related tasks in the operative sections of their mandates. The first example is the 2020 extension of the mandate of the UN Assistance Mission in Somalia (UNSOM). Resolution 2540 (2020) expressly mandated UNSOM to cooperate with Somalia's government, including through strategic advice, to respond to flooding, locusts and the COVID-19 pandemic.[53] It further requested the UN to consider the adverse implications of climate change and other ecological changes in their programmes in Somalia, including by undertaking risk assessment and developing risk management strategies to be subsequently reported to the Council by the Secretary-General.[54] As a follow-up, UNSOM recruited a Climate Security Adviser to help implement these tasks,[55] developed a Climate Change Risk Assessment toolkit to ensure program design includes climate risks considerations and trained its personnel and government officials on the links between climate and conflict in the country.[56] As a result, in 2021, the climate cooperation between UNSOM and governmental authorities contributed to reducing the impact of seasonal flooding.[57] Similarly, the UN Assistance Mission in Iraq (UNAMI) has been tasked with assisting the Ira-

[52] See, for instance: UNSC Res 2423 (2018), S/RES/2423 (28 June 2018) on MINUSMA; UNSC Res 2429 (2018), S/RES/2429 (13 July 2018) on UNAMID; UNSC Res 2431 (2018), S/RES/2431 (30 July 2018) on AMISOM's reauthorisation; UNSC Res 2461 (2019), S/RES/2461 (27 March 2019) on UNSOM; UNSC Res 2499 (2019), S/RES/2499 (15 November 2019) on MINUSCA; UNSC Res 2502 (2019), S/RES/2502 (19 December 2019) on MONUSCO; UNSC Res 2524 (2020), S/RES/2524 (3 June 2020) on UNITAMS; UNSC Res 2561 (2021), S/RES/2561 (29 January 2021) on UNFICYP; UNSC Res 2567 (2021), S/RES/2567 (12 March 2021) on UNMISS. All subsequent mission renewals maintained similar language.

[53] UNSC Res 2540 (2020), S/RES/2540 (28 August 2020), OP 5(l).

[54] *Ivi*, OP 13.

[55] On the role of the adviser, see: J. Russo, *The UN Environmental and Climate Adviser in Somalia*, International Peace Institute, October 2022.

[56] C. Hodder, "Climate Change and Security in the United Nations Assistance Mission to Somalia", Policy Brief, July 2021, p. 2.

[57] *Ivi*, p. 4.

qi government in tackling the adverse effects of climate change,[58] whereas, since 2022, the mandate of the UN Mission in South Sudan (UNMISS) includes the provision of gender-sensitive risk assessments on the adverse effects of climate change, as part of its efforts towards the creation of conditions conducive to the delivery of humanitarian assistance.[59] Since 2023, the Secretary-General has been requested to include in his reports on UNMISS an analysis of the risks associated with climate change that may adversely impact peace and security in South Sudan.[60] A similar request to report, *inter alia*, on the adverse effects of climate change now features in the mandate of the UN Interim Security Force for Abyei (UNISFA).[61]

Even beyond explicit mandates, other missions have autonomously followed this practice and implemented environmental peacebuilding initiatives. For instance, the UN Office for West Africa and the Sahel (UNOWAS) conducts trainings and field visits to mitigate the impact of climate change on peace and security.[62] The UN Peacekeeping Force in Cyprus (UNFICYP) has contributed to the establishment of a Technical Committee on Environment to exchange environmental expertise and identify key environmental projects for future implementation.[63] Incorporating environmental considerations in their activities also allows missions to better identify potential hotspots for violence

[58] UNSC Res 2576 (2021), S/RES/2576 (27 May 2021), OP 4(b)(iv).

[59] UNSC Res 2625 (2022), S/RES/2625 (15 March 2022), OP 3(b)(i). Generally, on the implementation of this climate mandate by UNMISS, see: CIVIC, "To Stem the Tide: Climate Change, UNMISS, and the Protection of Civilians", Report, August 2024.

[60] UNSC Res 2677 (2023), S/RES/2677 (15 March 2023), OP 32. Implementing this request, the Secretary-General transmitted his report on December 2023, reflecting on the connections between climate change and protection of civilians. See: UNSC, Letter dated 4 December 2023 from the Secretary-general addressed to the President of the Security Council, S/2023/955 (6 December 2023), paras. 16, 18, 85.

[61] UNSC Res 2760 (2024), S/RES/2769 (14 November 2024), OP 37.

[62] UNSC, Activities of the United Nations Office for West Africa and the Sahel, S/2025/187 (26 March 2025), paras. 58-60.

[63] UNSC, Mission of good offices in Cyprus, S/2021/634 (9 July 2021), Annex I, para. V.

and take appropriate preventive action. For instance, the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) deploys military patrols along transhumance migration routes – triggered, *inter alia*, by environmental changes – to prevent transhumance-related conflict.[64] The practice of appointing Climate, Peace and Security Advisors has also spontaneously expanded to a total of seven missions.[65] More generally, empirical studies have shown that the enhanced engagement of peacekeeping missions with the protection of the environment effectively contributed to improved environmental quality in host countries.[66]

Third, the Council has increasingly sought to reduce the environmental footprint of its own peace operations, to avoid harming the very communities they are meant to protect.[67] Indeed, peacekeeping mission generally have a significant environmental impact, due to the combination of the emissions and pollution generated by the movement of persons and vehicles,[68] the waste produced by the mission personnel, and the competition its creates with the local population over access to already scarce resources. The cholera outbreak in Haiti in 2010, triggered by improper wastewater disposal by the UN Stabilisation Mission in

[64] United Nations Peacekeeping, *Preventing, Mitigating & Resolving Transhumance-Related Conflicts in UN Peacekeeping Settings: A Survey of Practice* (New York, United Nations 2020), pp. 34-35.

[65] See the list at https://www.un.org/climatesecuritymechanism/en/support-analysis-and-action#:~:text=Climate%2C%20Peace%20and%20Security%20Advisors%20in%20UN%20missions:,Arab%20States%20(LAS)%2C%202021.

[66] Z. Bakaki, T. Böhmelt, "Can UN Peacekeeping Promote Environmental Quality?", in *International Studies Quarterly*, LXV (2021), p. 881 ff.

[67] D. Dam-de Jong, "The contribution of the UN Security Council to environmental peacebuilding", in D. Dam-de Jong, B. Sjöstedt (eds), *Research Handbook on International Law and Environmental Peacebuilding* (Cheltenham, Edward Elgar 2023), p. 195 ff.

[68] It was calculated that in 2008 that peacekeeping operations alone represented the 56% of the UN's total climate footprint, amount to around 1.75 million tons of CO2 equivalent per year. See: UNEP, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*, cit., p. 8.

Haiti (MINUSTAH),[69] exposed the consequences of inadequate environmental safeguards and underscored the reputational and operational risks associated with such failures. This tragic episode brought the environmental sustainability of UN missions to the spotlight, pushing for reformed practices that could address the ensuing criticism and reputational damage.[70] In response, the Council has progressively incorporated into missions' mandate the duty to consider and manage the environmental impact of their operations. Such practice was inaugurated with resolution 2100 (2013), in which the Council requested the Secretary-General "to consider the environmental impacts of the operations of MINUSMA when fulfilling its mandated tasks" and encouraged the mission to manage such impacts "as appropriate and in accordance with relevant General Assembly resolutions and United Nations rules and regulations".[71] Similar provisions now appear in the mandates of the UN-AU Hybrid Operation in Darfur (UNAMID), the UN Support Office in Somalia (UNSOS), the UN Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and MINUSCA. Missions have since adopted a range of good practices, including environmental impact assessments, baseline studies, the use of soil blocks in construction, water-efficient technologies, solar energy, energy-efficient vehicles, improved waste-management systems and transversal staff training,[72] which the Council acknowledged and encouraged in a 2017 press statement.[73] This practice, reflecting the

[69] UN, "Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti", 2011, 2-3. It should be noted that the incident occurred notwithstanding the fact that an internal environmental policy for UN field missions was already in place since 2009.

[70] L. Maertens, "From Blue to Green? Environmentalization and Securitization in UN Peacekeeping Practices", in *International Peacekeeping*, XXVI (2019), p. 1 ff., pp. 2-3, 8-9; L. Maertens, M. Shoshan, *Greening Peacekeeping: The Environmental Impacts of UN Peace Operations*, International Peace Institute, April 2018, p. 6.

[71] UNSC Res 2100 (2013), S/RES/2100 (25 April 2013), OP 32.

[72] UNEP, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*, cit., pp. 18-42.

[73] UNSC, Security Council Press Statement on Environmental Manage-

growing recognition of the environmental impact of peace operations and the consequent need to take measures to mitigate it, has also informed the International Law Commission's drafting of Principle 7 of its 2022 Draft principles on the protection of the environment in relation to armed conflicts, which provides that

> States and international organizations involved in peace operations established in relation to armed conflicts shall consider the impact of such operations on the environment and take, as appropriate, measures to prevent, mitigate and remediate the harm to the environment resulting from those operations.[74]

While not yet reflective of customary law,[75] the Principle codifies an emerging best practice to be voluntarily replicated in the design of future peace operations both within and outside the UN.

The Failed Adoption of a Thematic Resolution on Climate Change

Despite increasing debate and the gradual mainstreaming of environmental considerations in the Security Council's country-specific practice, the Council has yet to adopt a thematic resolution on climate change. Climate change has therefore become one of the longest-discussed issues in the Council without producing a dedicated thematic outcome.[76] An opportunity for the Council to adopt a resolution came in 2021, but failed due to structural political opposition.

ment of Peacekeeping Operations, SC/13134-ENV/DEV/1830-PKO/700 (21 December 2017).

[74] ILC, Draft principles on the protection of the environment in relation to armed conflicts, with commentaries, A/77/10 (2022), Principle 7.

[75] See the comments by States pointing at the non-customary nature of draft principle 7, as well as the Special Rapporteur's own recognition that the underlying practice consists mainly of policy considerations, not reflective of a legal obligation: ILC, Third report on protection of the environment in relation to armed conflicts, by Marja Lehto, Special Rapporteur, A/CN.4/750 (16 March 2022), paras. 72-73.

[76] N. von Uexkull, H. Buhaug, "Scientific uptake in the United Nations Security Council debates on climate change and security", cit., p. 1.

In December 2021, Ireland and Niger tabled a draft resolution on climate and security, co-sponsored by 113 member States. In its preamble, the draft resolution reaffirmed the Council's primary responsibility for the maintenance of international peace and security and linked it to the need for a comprehensive approach to peacebuilding that would address the root causes of conflict, while recalling the already existing country-specific engagement of the Council with the issue.[77] Building on these considerations, the draft sought to establish a framework for systematically integrating information on the security implications of climate change into all aspects of the Council's work. To this end, it requested the Secretary-General to (i) integrate climate-related security risks into comprehensive conflict-prevention strategies; (ii) submit reports on the security implications of climate change for all country or regional situations on the Council's agenda, including recommendations on how to address them; (iii) verify that UN peacekeeping personnel is appropriately trained on climate related security risks.[78] It also requested all missions, peacekeeping operations and UN country teams to consider the environmental impacts of their operations.[79] The resolution, which received the favourable vote of 12 Council members, was blocked by the Russian Federation's veto. India also voted against it, while China abstained.

The outcome of the vote, perhaps not surprising, was nonetheless disappointing, particularly given the limited scope of the proposed measures, which were widely described as "relatively mainstream".[80] As the Irish delegate acknowledged, the resolution would have represented a "modest first step", equipping the Council and the Secretariat with the tools to better understand the climate-related security risks connected to conflicts already on the Council's agenda, mirroring the action that the Council

[77] UNSC, draft resolution, S/2021/990 (13 December 2021), preamble.

[78] *Ivi*, OPs 2, 3, 8.

[79] *Ivi*, OP 13.

[80] M. McDonald, "Immovable objects? Impediments to a Security Council Resolution on Climate Change", in *International Affairs*, XCIX (2023), p. 1635 ff., p. 1650.

has already undertaken in specific contexts.[81] Similarly, the US delegate described it as "a small, practical and necessary step to combat the impacts of climate change."[82] Other States' delegation emphasised that introducing climate risk analysis in the work of the Security Council would have allowed the organ to better fulfil its conflict prevention function and enhance peacekeeping and peacebuilding efforts.[83]

Despite the modest nature of the proposed measures, the debate surrounding the vote made clear that opposition to the draft stemmed less from its substance and more from a deeper, structural resistance to any general and direct Security Council intervention on climate change. In explaining their position, the Russian Federation, India and China reiterated arguments already advanced ever since the first debate of 2007. More specifically, Russia held that the resolution would have established a general connection between climate change and international peace and security, thus "turning a socioeconomic issue into a politicized question" and "divert[ing] the attention […] from genuine, deep-rooted causes of conflicts".[84] It further warned that a generalised mandate on climate change would give the organ a pretext to "include virtually any country on the Security Council's agenda if it is deemed to be undesiderable by someone".[85] India and China also reiterated the argument that looks at climate change as a sustainable development issue, to be discussed in multilateral fora such as the General Assembly, ECOSOC and the UNFCCC, and approached through the principle of common but differentiated responsibilities, avoiding securitisation.[86]

As the following section shows, these arguments are not novel, and most can be rebutted or have, over time, already been disproved. However, reflecting on them also allows to highlight a broader conceptual divide within the international community

[81] UNSC, 8926th meeting, S/PV.8926 (13 December 2021), pp. 2, 5.

[82] *Ivi*, p. 11.

[83] See, for instance, the comments of Norway and Estonia, *ivi*, at pp. 8 and 14.

[84] *Ivi*, pp. 3-4.

[85] *Ivi*, p. 4.

[86] *Ivi*, pp. 7-8, 12.

on the role international law has to play in responding to climate change.

5. *The Inconsistency of the Arguments against a Security Council's Role in Addressing Climate Change*

Despite the Council's gradually expanding engagement with climate-related issues, it remains hesitant to assume a more systematic role due to the structural opposition of several member States. Since the first thematic debate in 2007, a persistent divide has characterised both the Council and the broader international community. European States, including the United Kingdom and France, the Small Island Developing States, and – albeit with fluctuations linked to changes in administration – the United States, have generally supported a Security Council involvement. By contrast, China, the Russian Federation, and a significant number of developing countries have consistently opposed such intervention, relying on variations of three main arguments.

The first and fundamental objection challenges the very link between climate change and security, especially in its international dimension. Over the years, the argument has been reiterated in virtually every relevant Council debate. Opposing States have described this connection "rather indirect",[87] "hypothetical"[88] and "yet to be fully tested against empirical and scientific analyses",[89] and have claimed that climate change is "not a universal challenge in the context of international security."[90] On this basis, they have warned against the risks of securitisation, arguing that security tools are inadequate to address such complex and multidimensional problem,[91] and fearing that accepting a Council role would justify resort to military action on dubious

[87] See the comment by Brazil in UNSC, 6587th meeting, p. 8. Similarly, see South Africa in UNSC, 5663rd meeting, p. 16.

[88] Comment by the Russian Federation in UNSC, 6587th meeting, p. 13.

[89] Comment by India, ibid., p. 18.

[90] Comment by the Russian Federation in UNSC, 8451st meeting, p. 16.

[91] UNSC, 6587th meeting, p. 8.

grounds.[92] This position, however, has become increasingly difficult to maintain. Besides the growing scientific evidence of the climate-security nexus, the Council's own practice has contributed to certifying the existence of the link, albeit in specific contexts. These developments have also contributed to a gradual softening of China's position since 2019. While the State continues to view climate change primarily as a development issue, it has acknowledged that it is "a major challenge that affects the future and destiny of humankind" and that "some consensus has emerged" within the Council on the climate-security nexus.[93] China now accepts that climate change may undermine peace and stability in certain regions and that the Council may, "under country-specific items", examine the issue and provide targeted responses.[94] A further counter-argument to this critique rests on the UN Charter itself. As above illustrated, the Council is not only concerned with *actual* but also *potential* threats, and is notably entrusted by Chapter VI with a mandate for addressing root causes of international insecurity. Recognising a role for the Council in relation to climate change does not predetermine a securitised or militarised approach; rather, it activates the full spectrum of tools available under the Charter, including information-gathering, prevention, and the mainstreaming of environmental protection into peace operations.

This last consideration also helps respond to the second recurring objection, namely the fear of a "mandate creep". Articulated for the first time in the letter circulated by China and the Group of 77 before the 2007 debate,[95] and reiterated ever since,

[92] UNSC, Letter dated 28 July 2020 from the President of the Security Council addressed to the Secretary-General and the Permanent Representatives of the members of the Security Council, S/2020/751 (30 July 2020), pp. 45, 56.

[93] UNSC, 8451st meeting, p. 15; UNSC, 9547th meeting, p. 21.

[94] UNSC, 9260th meeting, p. 23. See, more recently, Permanent Mission of the People's Democratic Republic of China to the UN, 'Remarks on Climate and Security by Ambassador Geng Shuang at the UN Security Council Briefing' (6 November 2025).

[95] UNSC, Letter dated 16 April 2007 from the Permanent Representative of Pakistan to the United Nations addressed to the President of the Security Council.

the argument affirms that the Council's involvement in climate change would unduly expand its mandate and encroach upon the competences of other UN organs, such as the General Assembly and the ECOSOC. Yet, as above discussed, addressing climate change does not overstep the Council's mandate. Moreover, the Charter does not establish an overly rigid separation of competences. The only limitation concerns the General Assembly's recommendatory powers on matters over which the Council is exercising its functions, but such limitation does not operate in reverse.[96] More broadly, UN organs' competences are largely understood as complementary.[97] Accordingly, States have emphasised that any Council intervention on matters of climate change would serve to complement, not to replace, other existing fora.[98] The General Assembly itself, in resolution 63/281, envisaged a complementary role of other UN organs, expressly inviting them "to intensify their efforts in considering and addressing climate change, including its possible security implications."[99]

Upon closer examination, these arguments appear largely pretextual, particularly when considered in light of the limited nature of the Security Council intervention proposals, which so far have merely insisted on allowing the Council to be better informed about the impact of climate change in order to adjust its activities. The real reason for opposing a Security Council role in this area seems, in fact, to lie in a fundamental disagreement among States regarding how, and to what extent, climate change deserves to be addressed. For China and some developing States in particular, climate change remains essentially a sustainable development issue, to be addressed in multilateral and democratic fora that safeguard the ability of these countries to pursue economic development without sacrificing their interests in the name of environmental protection. Ultimately, the true basis of

[96] Charter of the United Nations, art 12.

[97] See, for instance: ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151 ff., p. 163.

[98] UNSC, 6587th meeting, p. 15.

[99] UNGA, Climate change and its possible security implications, A/RES/63/281 (11 June 2009), para. 1.

resistance to any Security Council involvement lies precisely in the breadth and potential legal force of its powers, which could allow the Council to impose environmental protection standards on States that have no genuine intention of subjecting themselves to such obligations.

In this sense, the climate issue reveals a twofold paradox concerning the Council's capacity to fully carry out its Charter-based responsibilities in the face of current global challenges. On the one hand, its inaction is rooted in the structural limits associated with its composition and voting mechanisms, as demonstrated by the Russian veto of 2021. On the other hand, the Council's inability to act also stems from the recognition that, should such structural limits be overcome, it would be capable of addressing environmental challenges effectively. In essence, the Security Council is endowed with a kind of Schrödinger's effectiveness: depending on the perspective, the organ is simultaneously too effective and not effective enough. Yet this dynamic also reveals something about the international community's underlying political tensions surrounding the climate question, exposing the absence of a genuine political will to confront the problem beyond rhetorical commitments.[100]

6. *Conclusion*

The Security Council's role in addressing climate change remains fundamentally ambivalent. Structural constraints, such as entrenched geopolitical divisions, veto power, and the absence of consensus on the climate-security nexus, continue to prevent the Council from adopting a thematic resolution and establishing a coherent framework of action. At the same time, these constraints

[100] As noted in scholarship, it is not by chance that the major States opposing a Security Council role on climate change, namely the Russian Federation, China and India, are major contributors to global emissions and often play an obstructionist role in UNFCCC negotiations: M. McDonald, "Immovable objects? Impediments to a Security Council Resolution on Climate Change", cit., pp. 1648-1649.

exist precisely because, if empowered to act, the Council would possess uniquely transformative tools. The Council is therefore caught in the paradox of what this contribution has defined as Schrödinger's effectiveness: it is too powerful to be entrusted with climate governance, and at the same time not powerful enough to overcome the political obstacles that would allow it to take effective action.

This political tension also affects future prospects. Following the failed adoption of the 2021 resolution, scholars have noted that the chances of formally defining the Security Council's role in addressing the security implications of climate change appear bleak.[101] The 2021 veto demonstrated not only the persistence of long-standing objections, but also the depth of States' reluctance to allow the Council's authority to expand into a domain with potentially far-reaching consequences.

Yet this chapter has also shown that, despite these divisions and institutional challenges, the Council has already embarked on a path toward climatisation. This evolution is evident in both its formal and informal practice, from the progressive incorporation of climate-related analysis and tasks into peacekeeping missions, to the increasing use of climate language in regional and country-specific resolutions, and the repeated acknowledgement, across debates and reports, that climate change can constitute both a potential and an actual factor affecting peace and security. Far from establishing a comprehensive framework, these developments nonetheless reflect a gradual mainstreaming of climate considerations within the Council's daily work.

The result is a dual dynamic: a formal paralysis at the thematic level and a steady, practice-driven evolution at the operational level. Whether this incremental climatisation will eventually enable the Council to overcome political resistance will depend less on doctrinal approaches and more on the international community's willingness to translate rhetorical urgency into institutional action. Future developments might, in this regard, receive a useful push from the Secretary-General's 2023 New Agenda for

[101] *Ivi*, p. 1650.

Peace, which envisages a more integrated UN response to global risks, including the specific recommendation to the Security Council to "systematically address the peace and security implications of climate change in the mandates of peace operations and other country and regional situations on its agenda."[102] At present, the Council's engagement still remains suspended in the limbo of its unresolved, ambivalent effectiveness.

[102] UN, "Our Common Agenda: Policy Brief 9 – A New Agenda for Peace", July 2023, 21.

ON THE AMBIT AND NORMATIVITY OF ENVIRONMENTAL SUSTAINABILITY IN TIMES OF ARMED CONFLICT AND OCCUPATION

ANDREA CARCANO*

SUMMARY: 1. Introduction. – 2. The Ambit of Environmental Sustainability: From Idea to Principle. – 3. Environmental Sustainability in Armed Conflict: Direct Protection. – 4. Environmental Sustainability in Armed Conflict: Indirect Protection. – 5. The Sustainable Use of Natural Resources in Times of Military Occupation. – 6. Case Study: Sustainability in the Occupied Territories of Azerbaijan. – 7. Case Study: Sustainability of the Ramsar Sites in Occupied Ukrainian Territory. – 8. Conclusions.

1. *Introduction*

In the recent *Advisory Opinion on the Obligations of States in respect of Climate Change* (Advisory Opinion on Climate Change), the International Court of Justice (ICJ) provided a snapshot of the norms of contemporary international law that apply to "the protection of the climate system and other parts of the environment."[1] Distilling from the wealth of arguments tendered by the numerous countries and international organisations appearing before it,[2] the ICJ crystallised, at least for the near future, a number of norms of customary international law and treaty law, along with a number of principles.[3] Considering its content and the authority of the body issuing it, this analysis is bound

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[1] International Court of Justice, Advisory Opinion of 23 July 2025, concerning the *Obligations of States in Respect of Climate Change*, General List No. 187, available at https://www.icj-cij.org/index.php/decisions.

[2] See Press Release No. 2025/36 23 July 2025, 96 States and 11 international organizations. See https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-pre-01-00-en.pdf.

[3] *Obligations of States in Respect of Climate Change*, cit., para. 172.

to become an unavoidable point of reference in the years to come. Whether endorsed or criticised, it cannot be ignored by judicial bodies or scholars engaging with the normative pillars of international environmental law.

And thus, one remains somewhat taken aback when learning that the ICJ did not discuss the relevance of the identified framework to times of armed conflict and occupation. At first glance, this omission might suggest that the subject of the present study lacks relevance. This view, however, would be excessive. In this regard, Judge Cleveland, in a declaration appended to the ICJ's opinion, stated that "it is well established that armed conflicts cause significant damage to the environment" including "direct harm to the climate system."[4] Moreover, the proliferation of armed conflicts and situations of occupation worldwide underscores the need to examine how environmental protection can be strengthened during hostilities.[5] This is all the more so because, as remarked in Principle 24 of the 1992 Rio Declaration "[w]arfare is inherently destructive of sustainable development."

The reason for the ICJ's silence is not a dearth of relevance but the narrower mission entrusted to the ICJ. Under the framework of the question posed by the United Nations General Assembly in Resolution 77/276,[6] the ICJ was required to render its opinion by paying "particular regard" to the specific legal instru-

[4] *Obligations of States in Respect of Climate Change*, cit., Declaration of Judge Cleveland, paras. 15 and 18.

[5] For a reference to recent practice see P. Pereira, W. Zhao, L. Symochko, M. Inacio, I. Bogunovic, D. Barcelo, "The Russian-Ukrainian Armed Conflict Impact Will Push back the Sustainable Development Goals", in *Geography and Sustainability*, III (2022), pp. 277-279.

[6] General Assembly Resolution n. 77/276 reads "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment", General Assembly Resolution 77/276, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, UN Doc. A/RES/77.276, 4 April 2023, p. 3.

ments listed in that Resolution, which are mainly designed to apply in peacetime. In any case, it is settled ICJ practice in advisory proceedings to identify "the most directly relevant applicable law" governing the question before it, rather than undertaking a *tour d'horizon* of international law as a whole.[7]

That clarified, it matters also that the ICJ pointed out that its inquiry was conducted without "prejudice to other pertinent rules of international law".[8] Indeed, it expressly acknowledged that, "depending on circumstances", other branches of international law could also be "relevant in the context of climate change" including "international trade law, international investment law, and international humanitarian law".[9] Moreover, the ICJ did not structure its analysis around a sharp dichotomy between the law of peace and the law of war, as if the law applicable in peacetime would necessarily be irrelevant in wartime. Nor, given the limits of its mandate, can the advisory opinion be regarded as the final word on all that pertains to environmental sustainability.

Keeping all the foregoing in mind, this paper focuses on the content and normative status of the concept of environmental sustainability in times of armed conflict and occupation. This inquiry can be disentangled into two sub-issues. On one hand, there is the somewhat *vexata quaestio* of whether treaties, such as those belonging to international environmental law, designed primarily for peacetime, also apply in situations of armed conflict. It may be argued that environmental sustainability permeates the field of international humanitarian law (IHL) through the continued application of relevant international environmental law treaties, subject to the definition of the proper ambit of the *lex specialis* principle.[10] Framed in this way, the inquiry con-

[7] International Court of Justice, Advisory Opinion of 8 July 1996, concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports 1996(I), p. 243, para. 34.

[8] Advisory Opinion on Climate Change, *supra* note 1, para. 173.

[9] *Ibid*.

[10] C. Bruch, C.R. Payne, B. Sjöostedt, "Armed Conflict and the Environment", in L. Rajamani, J. Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press 2021), p. 865. The In-

cerns the identification of the appropriate rules of coordination between international environmental law and IHL, and the determination of which norm of the two regimes should prevail in case of conflict.

On the other hand, there is a more challenging and foundational question: how much space should be accorded to environmental concerns within a field still largely dominated by the exigencies of military necessity.[11] This concerns the shaping of the substantive content of the primary rules governing environmental protection in times of armed conflict and occupation. As known, most of the relevant IHL treaties were drafted at a time when environmental concerns were largely absent from international discourse, that is, in Paul Szasz's words, when "environmental protection was not yet even a glimmer in the consciousness of the international community."[12] While this paper takes both perspectives into account, it accords priority to the latter. Indeed, this issue has recently been addressed by the International Law Commission in a significant study that culminated in the adoption of a set of principles on the protection of the environment in relation to armed conflicts.[13]

ternational Law Commission determined that treaties relating to the international protection of the environment are among those treaties "the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict", International Law Commission, "Draft articles on the effects of armed conflicts on treaties, with commentaries", (2011), in *Yearbook of the International Law Commission*, 2011 vol. II, Part Two, pp. 108 and 114.

[11] See in regard: R. Falk, "The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime", in I.E. Austin, C.E. Bruch (eds), *The Environmental Consequences of War* (Cambridge, Cambridge University Press, 2000), pp. 137-150; K. Hulme, "Using International Environmental Law to Enhance Biodiversity and Nature Conservation During Armed Conflict", in *Journal of International Criminal Justice*, XX (2022), pp. 1155-1165.

[12] For a broader perspective, see also M.N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict", in *Yale Journal of International Law*, XXII (1997), pp. 7-15.

[13] International Law Commission (ILC), "Draft principles on protection of the environment in relation to armed conflicts 2022", Report of the International Law Commission (UN Doc. A/77/10, 18 April-3 June and 4 July-5 August 2022), in *Yearbook of the International Law Commission II*, 2 (2022),

To pursue this inquiry in a structured manner, this paper first examines the legal dimension of environmental sustainability and its normative function; it then explores its applicability in times of armed conflict and occupation; and finally, it reflects on its relevance in relation to two recent situations of armed conflict and occupation.

2. *The Ambit of Environmental Sustainability: From Idea to Principle*

Environmental sustainability is, in a first approximation, an idea that harbors a long-term goal of the international community: a sustainable Earth. It represents the destination of a journey to be pursued through adherence to the principle of sustainable development and the implementation of the goals set by Agenda 2030.[14] A sustainable planet Earth is one that endures as a source of wealth and enrichment for present and future generations notwithstanding the mounting threats it faces.[15] In this sense, environmental sustainability functions as an abstract ideal or policy objective, akin to peace and security or the protection of human rights.

At the same time, environmental sustainability is a political and ethical concept reflecting what the international community

pp. 90-187. Note the UN General Assembly adopted them in 2022: General Assembly Resolution 77/104, *Protection of the environment in relation to armed conflicts*, UN Doc. A/RES/77/104, 7 December 2022 (Draft Principles). For an analysis of the development and assessment of the content of the Draft Principles see D. Dam-de Jong, B. Sjöstedt, "Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles", in *Loyola of Los Angeles International and Comparative Law Review*, XLIV (2021), pp. 129-156.

[14] See General Assembly Resolution 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 21 October 2015, para. 33 (Agenda 2030). And see The Sustainable Development Goals Report 2025 at https://unstats.un.org/sdgs/report/2025/The-Sustainable-Development-Goals-Report-2025.pdf., pp. 38-39.

[15] R. Costanza, B.C. Patten, "Defining and Predicting Sustainability", in *Ecological Economics*, XV (1995), p. 193.

has gradually come to regard as no longer deferrable: the use of natural resources in a manner commensurate with the planet's long-term ecological limits.[16] This understanding is grounded, in part, in the insight articulated by Edith Brown Weiss that humanity acts as "a custodian or a trustee of the planet for future generations and a beneficiary of its fruits."[17] It is also driven by scientific knowledge that highlights the grave risks that planet Earth faces. For these reasons, sustainability should not be conceived merely as an aspirational ideal, but rather as an ethical constraint on human interaction with the natural environment.[18]

Within the language of international law, the closest operational expressions of environmental sustainability – understood as possessing sufficient concreteness to guide conduct and carry normative authority – are to be found in both the principle of the sustainable use of natural resources and the principle of sustainable development. A review of the recent academic literature and international practice reveals a tendency to subsume the former within the latter.[19] This approach is fully understandable considering that sustainable development is much broader in scope and certainly more far-reaching than sustainability alone, encompassing a wide range of human activities, as Agenda 2030 makes clear.[20] Nevertheless, it is not exhaustive.

From the perspective adopted in this study, reliance on the concept of sustainable development may constitute somewhat of a limitation. Armed conflict is, in many respects, the antithesis of sustainable development. It is primarily in times of peace that economic development occupies a central place in the conduct

[16] D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law* (Oxford, Oxford University Press 2017), p. 54.

[17] E. Brown Weiss, "In Fairness to Future Generations and Sustainable Development", in *American University International Law Review*, VIII (1992), p. 17.

[18] A. Holland, "Sustainability: Should We Start from Here?", in A. Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford, Oxford University Press 1999), pp. 46-52.

[19] See in this regard M. Dupuy, C. Viñuales, *International Law and the Environment* (Cambridge, Cambridge University Press, 2021), pp. 3-23.

[20] *Transforming our World: the 2030 Agenda for Sustainable Development*, cit., pp. 3-27.

of States, accompanied by the need to balance such development with environmental sustainability. By contrast, during armed conflict the environment itself becomes a tool either to inflict damage on the other party or to shield one's own party from damage. Nevertheless, if the protection of the natural environment is to be taken seriously, it is essential to reconcile all forms of human activity, including wars and occupations, with the demands of environmental sustainability.

With this consideration in mind, it is worth recalling that sustainable development is, after all, an aggregate concept.[21] It is the product of a process of weaving together various normative threads developed over a number of years (indeed decades), which, at a minimum (depending of course on differing scholarly constructions) include the following constitutive elements: (i) the principle of intergenerational equity;[22] (ii) the sustainable use of natural resources; and (iii) the principle of integration of economic and social development with environmental protection.[23]

While constitutive of the principle of sustainable development, the principle of sustainable use of natural resources also operates as a stand-alone obligation endowed with a certain degree of normativity. International practice provides various examples in this regard, some of which may be briefly recalled here.

Principle 2 of the 1972 Stockholm Declaration on the Human Environment provides that "the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded

[21] P. Sands, J. Peel, *Principles of International Environmental Law* (Cambridge, Cambridge University Press 2018), pp. 206-208. N. Schrijver, "The Evolution of Sustainable Development in International Law: Inception, Meaning and Status", in *The Hague Academy Collected Courses Online*, CCCXXIX (2007), p. 366; P.M. Dupuy, C. Viñuales, *International Law and the Environment* (Cambridge, Cambridge University Press 2021), p. 92.

[22] E. Brown Weiss, "Intergenerational Equity", in *Max Planck Encyclopedia of Public International Law* (last updated April 2021), available at https://opil.ouplaw.com/home/mpil.

[23] *Declaration of the United Nations Conference on the Human Environment (*Stockholm Declaration*),* adopted at the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 13.

for the benefit of present and future generations through careful planning or management, as appropriate."[24]

The Preamble to the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat refers to "the need to stem the progressive encroachment on and loss of wetlands now and in the future."[25] The Preamble to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora recognises that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come."[26] The 1982 World Charter for Nature recommends that the use of natural resources must aim at "the preservation of species and ecosystems for the benefit of present and future generations."[27] The Preamble to the 1983 International Tropic Timber Agreement encourages the "sustainable utilization and conservation of tropical forests and their genetic resources."[28] The Preamble to the 1992 Convention on Biological Diversity further recognises that States Parties are responsible for "conserving their biological diversity and for using their biological resources in a sustainable manner" while Article 2 of that Convention defines "sustainable use" as use "in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."[29] Likewise, the Preamble to the 1995 UN Fish Stocks Agreement refers

[24] *Ivi*, Preamble.

[25] Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971 (Ramsar Convention), in United Nations, *Treaty Series*, vol. 996, p. 245, Preamble.

[26] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington D.C., 3 March 1973, in United Nations, *Treaty Series*, vol. 243, p. 993, Preamble.

[27] General Assembly Resolution 37/7, *World Charter for Nature*, UN Doc. A/RES/37/7, 29 October 1982.

[28] International Tropical Timber Agreement, Geneva, 18 November 1983, in United Nations, *Treaty Series,* vol. 1393, p. 671, Article 1(m).

[29] Convention on Biological Diversity Preamble, Rio de Janeiro, 5 June 1992, in United Nations, *Treaty Series*, vol. 1760, pp. 143-46, Preamble and Article 2.

to "measures to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks."[30]The 2002 New Delhi Declaration of the International Law Association makes clear that States are "under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way" so as to contribute to "the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems."[31]

Article 9 of the 2010 Nagoya Protocol to the Conference on Biological Diversity provides that States Parties "shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components."[32]

Finally, Article 2 of the 2023 Agreement concerning the "Use of Marine Biological Diversity of Areas beyond National Jurisdiction", which recently entered into force (19 September 2025) requires States to "ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term."[33]

While the precise meaning of the terms employed in each instrument may vary, it nevertheless appears clear that, taken to-

[30] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in United Nations, *Treaty Series*, vol. 2167, p. 3.

[31] "New Delhi Declaration of Principles of International Law Relating to Sustainable Development", adopted at the 70th International Law Association Conference, New Delhi, 2-6 April 2002, reprinted (with an introductory note by N. Schrijver) in *Netherlands International Law Review*, XLIX (2002), pp. 299-305.

[32] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in United Nations, *Treaty Series*, vol. 3008, p. 3.

[33] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, New York, 19 June 2023, C.N.203.2023. TREATIES-XXI.10, Article 2.

gether, they reveal a common core. The principle of sustainability also, more precisely, referred to as the principle of conservation and sustainable use of natural resources, emerges as the minimum common denominator underlying all of the instruments mentioned. Moreover, this principle has received significant scholarly recognition. Nico Shriver, for example, calls the duty of sustainable use of natural resources as a "general norm of international law."[34] Similarly, Ulrich Beyerlin argues that the principle of sustainable use of natural resources may "have become a self-contained norm in international law" while noting that it "only gains normative quality if linked with a defined object of use."[35] Alan Boyle and Catherine Redgwell likewise argue in their well-known textbook that the "conservation and sustainable use of natural resources and ecosystems" has evolved "into an independent norm of international law."[36]

In the view of the present writer, however, the obligation to use – and conserve – natural resources in a sustainable manner is more appropriately described as a principle rather than a norm because it encapsulates a rather open-ended standard governing the treatment of natural resources, the concrete content of which depends on the specific treaty in which it is embedded and, thus, may translate into a series of distinct courses of conduct and actions. It could also be argued that sustainable use constitutes a general principle of customary international law capable of being situated within Article 38 of the ICJ's Statute; however, such a conclusion would require further analysis in the practice of States than can be undertaken here.

[34] N. Schrijver, "The Evolution of Sustainable Development in International Law: Inception, Meaning and Status", cit., p. 366.

[35] U. Beyerlin, "Sustainable Development", in *Max Planck Encyclopedia of Public International Law* (2013), available at https://opil.ouplaw.com/home/mpil.

[36] A. Boyle, C. Redgwell, *Birnie, Boyle, and Redgwell's International Law and the Environment* (Oxford, Oxford University Press, 2021) p. 140. Suggesting that "the principle of sustainable use is today one of the basic tenets underlying the obligation of an occupant" see also D. Dam-de Jong, "International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations", in *Cambridge Studies in International and Comparative Law*, CXXI (2015), p. 228.

Support for interpreting the obligation of sustainable use as a principle *tout court* may be found in the *Advisory Opinion on Climate Change,* in which sustainable development is characterised as a principle. According to the ICJ, "[g]iven its continuous and uncontested universal recognition", the principle of sustainable development "guides the interpretation of certain treaties and the determination of rules of customary international law."[37]

Placing sustainable use within the category of principles rather than in that of norms does not necessarily diminish its normativity. As a principle, sustainable use operates across a range of contexts: by prescribing, independently or in conjunction with other principles (such as intergenerational equity) a given course of conduct, by guiding the interpretation of international legal rules or by being incorporated into binding treaty norms, thereby producing concrete legal effects. On this basis, sustainability could also have normative relevance in situations of armed conflict, operating alongside – and potentially limiting – considerations of military necessity. How and to what extent, the principle of sustainable use of natural resources can play a normative role in times of war and occupation will be the subject of the inquiry undertaken in the next sections.

3. *Environmental Sustainability in Armed Conflicts: Direct Protection*

From an analytical perspective, the protection afforded to the natural environment under IHL may be divided into two categories: direct and indirect protection.[38] The former seeks to shield the environment from the effects of hostilities by treating it as a value in and of itself. The latter operates through a process of interpretation of existing norms – or the development of new ones – with the aim of bringing the environment within the scope

[37] Advisory Opinion on Climate Change, cit. *supra* footnote 1, para. 147.

[38] See in this regard C. Bruch, C.R. Payne, B. Sjöostedt, "Armed Conflict and the Environment", cit., pp. 872-873.

of non-military objects, notably civilian objects, thereby securing its protection as such.

As this section demonstrates, however, the extent of the concrete specific protection granted to the environment under IHL remains largely unsatisfactory.[39] Because the contemporary body of IHL was developed well before the emergence of international environmental law, the process of "greening" IHL remains unquestionably a hurdle.[40] Taking this into due account, a reflection on the existing IHL framework is therefore warranted.

Direct protection of the environment is provided through the 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques (ENMOD Convention) and Articles 35(3) and 55 of Additional Protocol I to the Geneva Conventions, adopted in 1977. Prepared in 1976 by the United Nations Committee of the Conference on Disarmament and entering into force on 5 October 1978, the ENMOD Convention commits States Parties not to "engage in military or any other hostile use of environmental modification techniques having widespread, long-term or severe effects as the means of destruction, damage or injury to any other State Party."[41] Accordingly, it prohibits the deliberate manipulation of natural phenomena, such as defoliation, earthquakes, cyclones, tsunamis, and changes in weather patterns or ocean currents. What is pro-

[39] See in this regard A. Roberts, "The Law of War and Environmental Damage", in J.E. Austin, C.E. Bruch (eds), *The Environmental Consequences of War* (Cambridge, Cambridge University Press 2000), pp. 47-57. M. Bothe, C. Bruch, J. Diamond, D. Jensen, "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities", in *International Review of the Red Cross*, XCII (2010), p. 572; M. Sassòli, *International Humanitarian Law* (Cheltenham, Edward Elgar 2025), pp. 628-629.

[40] See in this regard S.-E. Pantazopoulos, "Greening the Law of Environmental Protection in Armed Conflicts", in D. Dam-de Jong, F. Amtenbrink (eds), *Greening the Law of Environmental Protection in Armed Conflicts (Netherlands Yearbook of International Law 21)* (The Hague, T.M.C. Asser Press 2021), pp. 75-99. See also B. Krzan, "Protecting the Environment from the Perspective of the Law of Armed Conflict", in *International Community Law Review*, XXIII (2001), pp. 252-260.

[41] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, New York, 10 December 1976, UN A/Res./31/72, in United Nations, *Treaty Series*, vol. 1108, p. 151, Article 1.

hibited, therefore, is the *intentional* use of modification techniques. As the US Military Manual points out, "weapons or military operations" may incidentally cause "widespread, long-term or severe" environment effects; however, such harm, insofar as it is incidental rather than intended, does not fall within the scope of the prohibition.[42] The threshold employed for the assessment of the forbidden damage is pretty high (yet not as high as in Additional Protocol I, as we shall see): the required damage must be "widespread, long-term, or severe".

But, beyond the high threshold itself, a principal shortcoming in the protection of the environment lies in the limited adherence to the ENMOD Convention. At the time of writing, only 78 States are parties to the Convention, making it difficult to maintain that its provisions reflect customary international law, whether in whole or in part.[43]

Turning to Additional Protocol I, it is apt to remember that (like the ENMOD), Protocol I applies only to international armed conflicts. Consequently, no direct protection of the natural environment is afforded in situations of non-international armed conflict. Article 35(3) of Additional Protocol I forbids the use of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". Similarly, and with some degree of overlap, paragraph 1 of Article 55 provides that "[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage," further specifying that "[t]his protection includes a prohibition of the use of methods or

[42] United States of America: *Law of War Manual*, Department of Defense, June 2015, p. 378; See also, following a similar approach, the military manual of Denmark: *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, Danish Ministry of Defence – Defence Command Denmark, 1st ed., September 2016, pp. 356-357 (Danish Military Manual) and the German military manual: Federal Ministry of Defence, Law of Armed Conflict Manual, Joint Service Regulation (ZDv) 15/2, 1 May 2013, para. 436. See texts of these manuals at https://www.onlinelibrary.iihl.org/national-military-manuals.

[43] For the updated list of the States Parties see https://ihl-databases.icrc.org/en/ihl-treaties/enmod-1976.

means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."[44] Unlike Article 35(3), Article 55(1) thus requires that the environmental damage must also be detrimental to human health or to the survival of the population, regardless of the extent of environmental degradation. Finally, Article 55(2) explicitly prohibits attacks against the natural environment by way of reprisals.

What these two provisions share is that they prohibit both the possibility of attacks directed against the environment as such and any possibility of environmental harm occurring as collateral damage. However, such damage is forbidden only where an exceptionally high threshold is met.[45] Whether intentional or incidental, the damage must be of such gravity as to satisfy all three cumulative criteria of being "widespread, long-term and severe". Apart from the inherent difficulty of defining these terms, the logical and legal implication of this provision is that if the damage inflicted on the environment is not concomitantly widespread, long-term and severe, there is no violation of IHL and thus no State can be held accountable for damage to the environment that is "only serious". As a result, irrespective of how each term is interpreted, it seems fair to conclude that the natural environment receives protection against attacks only in the face of exceptional threats. This is regrettable, given that numerous forms of conduct may inflict very serious environmental damage. It is easy to imagine, as has been suggested, that the destruction by fire of the rain forests of the Amazon river basin would likely meet the threshold, whereas the destruction of a wetland ecosystem might not.[46] In this regard, recourse to the "latest scientific insights"

[44] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, in United Nations, *Treaty Series*, vol. 1125, p. 609, Articles 35(3) and 55.

[45] On the high threshold and the possibility of lowering it see K. Hulme, "Taking Care to Protect the Environment", in *International Review of the Red Cross*, XCII (2010), pp. 681-690.

[46] A.P. Rogers, *Law on the Battlefield* (Manchester, Manchester University Press 1996), p. 110.

into the diverse functions of ecosystems appears necessary to render the threshold somewhat more incisive and accurate.[47]

Last but not least, the problem remains of determining whether the prohibition of "widespread, long-term and severe damage" under Articles 35(3) and 55 has attained the status of customary international law. Such a conclusion appears premature. France has expressly rejected the customary nature of these provisions.[48] The United States has characterised the threshold as "too broad and ambiguous", a view echoed by Israel, while Canada has expressed reservations.[49] By contrast, Switzerland and the International Committee of the Red Cross maintain that Articles 35(3) and 55(1) of Additional Protocol I have reached customary status.[50]

Notably – and somewhat paradoxically – the threshold set out in Additional Protocol I was later incorporated into the Statute of the International Criminal Court (ICC Statute). Under Article 8(2)(b)(iv) of the ICC Statute, launching an attack that causes "widespread, long-term and severe damage to the natural environment" constitutes a war crime where it is carried out with intent and knowledge that such damage will be "clearly excessive in relation to the concrete and direct overall military advantage anticipated." While the criminalisation of such conduct may certainly be viewed as a step forward in environmental protection, it is disconcerting to remark that, decades later, the accountability threshold remains essentially unchanged from that articulated in Additional Protocol I in 1977. The drafters of the ICC Statute thus opted for an outdated and complex threshold, despite the adoption of the 1992 Rio Declaration on Environment and Development and the numerous environmental law treaties adopted prior to the 1998 Rome Conference, as well as all the scientific advances underscoring that much and very serious harm can be,

[47] International Law Commission, "Third report on protection of the environment in relation to armed conflicts, by Marja Lehto, Special Rapporteur", 16 March 2022, UN Doc A/CN.4/750, para. 153 (Third Report).

[48] *Ivi*, para. 150.

[49] *Ibid*.

[50] *Ivi*, para. 140.

intentionally or recklessly, inflicted on portions of the natural environment even when the ICC's Statute threshold is not met.

4. *Environmental Sustainability in Armed Conflict: Indirect Protection*

Turning now to what is commonly referred to as the "indirect protection" of the environment, the analysis will focus on the most recent restatement and interpretative effort concerning IHL applicable to environmental protection,[51] namely the already cited Draft Principles on the Protection of the Environment in Relation to Armed Conflicts. These principles were approved by the International Law Commission in July 2022 following three reports prepared by Finnish diplomat Marja Lehto in her capacity as Special Rapporteur.[52]

Proceeding from the pragmatic assessment that the negotiation of a new convention is unlikely to be feasible in current times, the Special Rapporteur sought to turn this limitation – the paucity of norms providing direct environmental protection – into an opportunity. To that end, and through consultations with States reflected in her reports, she developed a set of 27 principles designed to extend IHL norms traditionally aimed at the protection of civilians and civilian objects so as to encompass the natural environment.

The Draft Principles begin with renewed emphasis on the Martens Clause, a provision initially introduced more than a century ago in the Preamble to the 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land and subsequently incorporated into a number of IHL treaties. The Martens

[51] For a previous attempt to reconcile IHL and the environment, see International Committee of the Red Cross, "Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary", Geneva, September 2020. See also H.O. Gieseken, V. Murphy, "The Protection of the Natural environment under International Humanitarian Law: The ICRC's 2020 Guidelines", in *International Review of the Red Cross*, CV (2023), pp. 1180-1207.

[52] See Draft Principles, cit. *supra* footnote 13.

Clause is widely regarded as a normative tool that provides a degree of guidance in situations not expressly regulated by treaty law and, *inter alia*, assists in the interpretation of customary international law.[53]

Principle 12, entitled "Martens Clause with respect to the protection of the environment in relation to armed conflicts", provides:

> In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience.[54]

In discussing responses to this provision, the United Kingdom and Canada cautioned against an overly broad interpretation of the Martens Clause, arguing that such an approach would not be consistent with "the international humanitarian law's established understanding of the principle of humanity."[55] By contrast, Germany – while acknowledging that the "concepts of humanity and nature might become blurred" – suggested a sort of compromise, proposing that with respect to the principle of humanity, the Martens Clause should reflect an anthropocentric perspective, namely "the intrinsic link between the survival of civilians and combatants and the state of the environment in which they live", whereas the protection of the natural environment *per se* should fall under the category of "dictates of public conscience".[56] Other States, including France and Israel, expressed concern that such a broad interpretation would transform the Martens Clause into an "autonomous source of law".[57]

In light of these divergent views, it seems reasonable to conclude that expanding the scope of the Martens Clause constitutes an exercise in the progressive development of international law.[58]

[53] A. Cassese, "The Martens Clause", in *European Journal of International Law*, XI (2000), pp. 212-213.

[54] Third Report, cit. *supra* footnote 47, p. 149.

[55] *Ivi*, para. 131.

[56] *Ivi*, para. 132.

[57] *Ivi*, para. 133.

[58] *Ivi*, para. 135.

Rather than attempting to reshape all aspects of the Martens Clause, a more realistic approach could be to focus on the notion of the "dictates of public conscience". The environmental conscience of contemporary international opinion appears increasingly receptive to the protection of the environment during armed conflict including in order to continuing the numerous efforts undertaken in peacetime.[59]

Principle 13 of the Draft Principles, entitled "General protection of the natural environment during armed conflict", consists of three paragraphs. It provides that the environment shall be (i) "respected and protected" in accordance with applicable international law and, "in particular, the law of armed conflict"; (ii) that "care shall be taken to protect the environment against widespread, long-term and severe damage"; and (iii) that "no part of the environment may be attacked, unless it has become a military objective."[60]

The general duty to respect and protect the environment is welcome, but is tempered by the qualification that such protection must be exercised in accordance with the law of armed conflict.[61] As several States observed, the Third Report does not clarify how IHL and international environmental law are meant to interact concretely in this context.[62] Paragraph 2 stipulates that care must be taken to protect the environment against 'widespread, long-term and severe damage'. This reiterates the limited protection afforded by Additional Protocol I, but does not explain what concrete protection measures are required in situations where environmental damage is serious without reaching the threshold set out in the Protocol.

By contrast, paragraph 3 of Principle 13 is arguably the most innovative provision of the Draft Principles. It builds on the interpretation advanced in the ICRC Guidelines, according to which the natural environment is inherently civilian in nature and therefore benefits from the same protection under IHL as

[59] P. Sands, J. Peel, *Principles of International Environmental Law*, *supra* note 21, p. 832.

[60] Third Report, *supra* note 47, para. 151.

[61] *Ivi*, para. 137.

[62] *Ivi*, para. 139.

civilian objects. "Civilian objects" are defined as "all objects which are not military objectives", a distinction that is central to IHL, since attacks may lawfully only be directed against military objectives and not civilian objects.[63] This means that the destruction of any part of the natural environment is prohibited unless justified by imperative military necessity.[64]

By characterising the environment as inherently civilian, Principle 13 effectively accords it a level of protection equivalent to that afforded to civilian objects. As a result "the principles and rules on distinction, proportionality and precautions shall be applied to the environment, with a view to its protection."[65] Finally, Principle 13 clarifies that the natural environment retains its civilian character unless and until it is transformed into a military objective.[66] It is accepted, for instance, that a forest could itself become a military objective due to enemy use, such as for concealment, or because of its strategic location.[67]

Viewed as a whole, Principle 13 can be seen to rest on the equation between the natural environment and civilian objects. It stands to reason to say that anything that is not military is civilian. It is less straightforward, however, to treat the entirety of the natural environment as equivalent to civilian objects as though they were homogeneous. Lumping together in the same basket material goods and entities that have a life-span of their own is counterintuitive. That assimilation could be attenuated, for instance, by introducing some degree of differentiation within the broad concept of the natural environment. A model for so doing can be found, to a certain degree, in the treatment of civilian objects during armed conflict where some objects receive more protection than others during wartime.

[63] *Ivi*, para. 143.

[64] As stated in the France Military Manual: *Manuel de droit des opérations militaires*, Ministère des Armées, avril 2022, p. 133.

[65] Third Report, cit. *supra* footnote 47, para. 144.

[66] *Manuel de droit des opérations militaires, supra* note n. 64*,* para. 4.4.2., p. 132.

[67] Y. Dinstein, "Protection of the Environment in International Armed Conflict", in J.A. Frowein, R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (The Hague, Kluwer Law International 2001), pp. 534-535.

Take the example of cultural property. Objects qualifying as cultural property are undoubtedly civilian objects; and yet under the 1954 Convention on Cultural Property they enjoy special protection that is stronger than that accorded to "ordinary" civilian objects, in light of their unique architectural, artistic and historical value.[68] Even more importantly, the fact remains that during peacetime the natural environment is not treated as a uniform whole. States adopt specific conventions to protect particular natural habitats, flora and fauna. There is no conceptual reason preventing the adoption of such a differentiated approach also in wartime. It should be thought of as a corollary to preserve gains in the protection of some components of the environment obtained in peacetime.

From this perspective, the interpretative choice made by the Special Rapporteur may be seen as somewhat akin to settling for less in the face of the practical impossibility of devising *ad hoc* new rules and having them adopted by States. While that approach laudably seeks to make a virtue out of a vice, it is not immune from criticism. It also places the necessity behind the virtue, concealing the serious inadequacy of the protection behind a layer of indirect protection. Excessive generalisation in the protection of the natural environment could well make it more vulnerable to destruction, much as ordinary civilian objects frequently suffer collateral damage during armed conflict.

An example of the approach suggested here, based on differentiation rather than generalisation, can be found in the Military Manual of New Zealand. The manual instructs commanders, "wherever feasible", to avoid conducting combat operations in areas that constitute "rare or fragile ecosystems" or the "habitat

[68] On cultural property see A. CARCANO, "The Criminalisation and Prosecution of Attacks Against Cultural Property: from the ICTY to the ECCC *via* the Rome Statute and the 1999 Second Protocol" in F. Pocar, M. Pedrazzi, M. Frulli eds, *War Crimes and The Conduct of Hostilities: Challenges to Adjudication and Investigation* (Cheltenham, Edward Elgar, 2013), pp. 78-97. See also generally A.F. VRDOLJAK, "The Principle of Sustainable Development and International Cultural Heritage Law", in L. Pineschi (ed), *Cultural Heritage, Sustainable Development and Human Rights: Towards an Integrated Approach* (London, Routledge Taylor & Francis Group 2024), pp. 19-45.

of depleted, threatened or endangered species or other forms of marine life or wildlife."[69]

With respect to protected areas and the need for differentiation, Principle 17 provides that an area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective. This provision would include an area designated as such by an agreement expressed by the parties. According to the Special Rapporteur, such areas could include "endangered sites under the Ramsar Convention on Wetlands", sites listed as "World Heritage in Danger" under the World Heritage Convention, as well as areas identified in national biodiversity strategies pursuant to the 1992 Convention on Biological Diversity.[70]

The designation of areas of environmental importance echoes the regime of demilitarized zones as set out in Article 60 of Additional Protocol I, which prohibits parties to an armed conflict from extending military operations into such zones. The protected status of an area may be lost if it is used for specified military purposes.[71]

The difficulty, of course, lies in securing agreement among parties to an armed conflict. It falls on third parties, such as the governing body that supervises the implementation of a given convention, to exercise their monitoring and supervisory authority also in wartime so as to ensure respect for and protection of designated areas, including by belligerent States. DA QUI

5. *The Sustainable Use of Natural Resources in Times of Military Occupation*

A military occupation is an integral part of the hostilities that have generated it. It constitutes a phase of an international armed

[69] New Zealand: *Manual of Armed Forces Law, Vol. 4: Law of Armed Conflict*, New Zealand Defence Force, 2nd ed., August 2017, para. 8.11.5.

[70] Third Report, cit. *supra* footnote 47, paras. 188-189.

[71] *Ivi*, paras. 193-195.

conflict in which a State gains temporary military control over all or part of the territory of another State and is able to maintain that control for an indefinite period of time. Such control is considered effective when the occupying power possesses sufficient military strength to impose and implement its will throughout the occupied territory, notwithstanding possible pockets of resistance by the occupied people.

As a consequence of this effective control, the occupying power *de facto* substitutes its own authority for that of the displaced government, which has lost control over its territory.[72] Unlike the legitimate sovereign of the occupied territory, however, the occupying power's jurisdiction is strictly limited. It acts only as a temporary administrator of the occupied territory. In accordance with Article 43 of the Hague Regulations, the occupying power must respect the laws and institutions in force in the territory, while retaining the authority to safeguard its own security and the responsibility to administer the territory in a manner which is not detrimental to the occupied population, notwithstanding the exercise of military rule.

With the aim of incorporating environmental protection among the duties of the occupying power, the Draft Principles include three provisions "applicable in situations of occupation".[73] Of particular relevance to this study are Principles 19 and 20, which are examined in turn.

Principle 19 seeks to "green" the duties of the occupying power by establishing a three-fold set of obligations: (i) to "respect and protect the environment of the occupied territory in accordance with applicable international law" and to "take environmental considerations into account in the administration of such territory"; (ii) to "take appropriate measures to prevent significant harm to the environment"; and (iii) to respect the "law

[72] International Court of Justice, Judgment of 9 February 2022, in the case *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2022, p. 13, para 173, available at https://www.icj-cij.org/index.php/decisions.

[73] See in this regard, R.A. Pezzot, "IHL in the era of climate change: The application of the UN climate change regime to belligerent occupations", in *International Review of the Red Cross*, CV (2023), pp. 1071-1091.

and institutions of the occupied territory concerning the protection of the environment".[74]

These provisions reflect the recognition that the occupying power exercises a governance function in the occupied territory in lieu of the legitimate sovereign. Since environment protection is a "widely recognized public function of the modern State", the Special Rapporteur argues that a corresponding responsibility should fall upon the occupying power.[75] This analogy, however, has its limits. While it is reasonable to require the occupying power to maintain the *status quo* within the occupied territory so as not to deprive the civilian population of rights enjoyed prior to the occupation, it is quite another matter to expect it to act as a sort of environmental agency, let alone introduce *ad hoc* laws as if an occupation authority were equivalent to a peacetime government and adopt, for instance, new fiscal measures for the protection of the environment. A more balanced approach is reflected in Brazil's position, according to which "the Occupying Power has an obligation to respect the environmental legislation of the occupied territory", as well as in South Africa's view that the occupying power's obligation to protect the environment should "include respect for and continued implementation of the occupied territory's international environmental commitments".[76] By contrast, Malaysia has argued that the occupying power should be granted "great latitude" to "improve the environmental laws of the occupied territory where necessary".[77] Such an approach, however, risks transforming the occupying power into a legitimate government, despite its lack of a mandate from the affected population, and may ultimately undermine the occupied people's right to self-determination.

Principle 20 gives concrete expression to Principle 19 by providing guidance on how an occupying power should exercise its authority in a manner consistent with environmental protection.

[74] Third Report, cit. *supra* footnote 47, paras. 211-13.
[75] *Ibid.*
[76] *Ivi*, para. 229.
[77] *Ivi*, para. 231.

Entitled "Sustainable use of natural resources", Principle 20 provides that:

> To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the protect persons of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes harm to the environment.[78]

This provision is based on Article 55 of the Hague Regulations, under which the occupying power is regarded "only as administrator and usufructuary" of public property in the occupied territory. In commenting on Principle 20, several countries (Algeria, Belarus, the Netherlands, the Nordic countries and Ukraine) endorsed the view that the concept of sustainable use of natural resources can be seen as representing the modern counterpart of "usufruct", which is in essence a standard of good housekeeping.[79] Under this approach, the occupying power cannot exploit the natural resources of the occupied territory for its own domestic purposes; use of such resources is permissible only insofar as it is necessary to meet the costs of the occupation. For instance, in the case of the occupation of Iraq (2003-2005), Security Council Resolution 1483 granted the occupying powers the right to benefit from the sale of Iraqi oil, while indicating that the gains should be placed in the Iraqi Development Fund to be used for the benefit of the Iraqi people.[80]

The Netherlands further suggested that the notion of usufruct should today be interpreted as including the principle of "sustainable use" of resources inasmuch as a balance should exist between "the use of non-renewal resources and the need for society and future generations to be able to use natural and ecosys-

[78] See the last version of this principle in International Law Commission, "Draft principles on protection of the environment in relation to armed conflicts, with commentaries", 2022, UN doc. A/77/10, Principle 20.

[79] Third Report, cit. *supra* footnote 47, para. 235.

[80] United Nations Security Council, *Resolution 1483 (2003)*, UN Doc. S/RES/1483/2003, 22 May 2003, para. 12.

tems services."[81] Along the same lines, Cyprus stressed that the need for sustainability as a duty on the occupying power was justified because of the "increased environmental risk endangered from operations carried out in occupied areas."[82] Several countries supported the phrase "sustainable use", with the Nordic countries proposing language suggesting to be adopted in the Draft Principles stressing "the importance of ensuring sustainable use of natural resources and minimizing environmental harm during an occupation."[83] Jamaica likewise observed that Principle 20 "sought to bring the rules of usufruct into line with modern realities and developments in international law."[84] At the same time, some States cautioned that the abusive exploitation of natural resources in occupied territories constitutes a violation of the principle of permanent sovereignty over natural resources, which, in times of occupation, remains vested in the occupied people as an essential component of their right to self-determination.[85]

The interpretation put forward by the Special Rapporteur in Principle 20 and supported by various States finds confirmation in the very recent *Advisory Opinion on the Legal Consequences Arising from the Policies and Practices of Israel in the occupied Palestinian Territory*.[86]

In that opinion, the ICJ concluded that Israel had unlawfully exploited the natural resources of significant portions of occupied Palestinian territory in the West Bank (Area C), noting that it was "diverting a large share of the natural resources to its own population, including settlers."[87] The ICJ observed that "Israel exploits these natural resources, including water, minerals and other natural resources for the benefit of its own population, to

[81] Third Report, cit. *supra* footnote 47, para. 240.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ivi*, para. 237.
[86] International Court of Justice, Advisory Opinion of 19 July 2024, concerning *the Legal Consequences Arising from the Policies and Practices of Israel in the occupied Palestinian Territory, including east Jerusalem*, ICJ Reports 202.
[87] *Ivi*, para. 133.

the disadvantage, or even exclusion, of the local Palestinian population."[88] This exploitation was because "the use of natural resources in the occupied territory cannot be justified with reference to the needs" of the population of the occupying power.[89]

On this basis, the ICJ found that Israel had violated a twin set of obligations: (i) the obligation to "act as administrator and usufructuary" of the natural resources in the occupied territory;[90] and (ii) the obligation to respect the "Palestinian people's right to permanent sovereignty over natural resources".[91]

With regard to the first of these obligations, the ICJ reasoned that Article 55 of the Hague Regulations embodies a principle of customary international law according to which the occupying power "shall be regarded only as administrator and usufructuary of natural resources in the occupied territory, including but not limited to forests and agricultural estates" and is required to "safeguard the capital" of those resources.[92] And it added that: "the use of natural resources in the occupied territory must be sustainable and it must avoid environmental harm" as reflected in Principle 23 of the 1992 Rio Declaration on Environment and Development, which affirms that "[t]he environment and natural resources of people under … occupation shall be protected."[93] It supported this conclusion also by reference to Principle 20 of the Draft Principles.[94]

Although expressed concisely, these passages appear to contain two distinct determinations by the ICJ. First, the ICJ affirmed that Article 55 of the Hague Regulations reflects customary international law. Second, it clarified that the content of this customary principle includes a duty to ensure the sustainable use of natural resources in occupied territory. In so doing, the ICJ

[88] *Ivi,* para. 124.
[89] *Ivi,* para. 133.
[90] *Ivi,* para. 133.
[91] *Ibid.*
[92] International Court of Justice, Advisory Opinion of 19 July 2024, concerning the *Legal Consequences Arising from the Policies and Practices of Israel in the occupied Palestinian Territory, including east Jerusalem*, *cit.*, para. 124.
[93] *Ibid.*
[94] *Ibid.*

injected new lymph into an established norm of international law and by implication also baptised the resulting content of the refurbished Article 55 as a principle of customary law. Hence, the ICJ's interpretation may be regarded as a case in point of how the principle of sustainable use of natural resources can be employed to undertake an *infra legem* interpretation. The ICJ relied on this principle to interpret an established norm of international law in light of recent legal developments and contemporary demands. As a result, what emerges from the ICJ's reasoning is a normative principle prescribing sustainability in occupied territory, which appears readily applicable to comparable cases.

6. *Case Study: Sustainability in the Occupied Territories of Azerbaijan*

On 18 January 2023, Azerbaijan commenced an inter-State arbitration (the first of its kind) under Article 18(2) of the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).[95] Azerbaijan acceded to the Bern Convention on 4 June 1999, and Armenia became a party on 19 July 2000.

Azerbaijan holds Armenia responsible for the destruction of portions of Azerbaijan's environment and biodiversity that it alleges occurred during nearly 30 years (1994-2020) of Armenia's occupation of parts of its territory[96], and it seeks repara-

[95] Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, United Nations, *Treaty Series*, vol. 1284, p. 202.

[96] The European Court of Human Rights determined that "Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the 'NKR', that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the 'NKR' and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention." (European Court of Human Rights, Grand Chamber,

tion.[97] Azerbaijan's claims concern widespread deforestation, unsustainable logging, and pollution resulting from extensive construction and mining activities. Such activities also affected natural reserves and placed over 500 wildlife species in Azerbaijan at risk.[98]

According to a report of the United Nations Environment Program, the conflict-affected territories' of Azerbaijan suffered from the "collapse of the agricultural system and land degradation", a "dysfunctional water management system" and "deforestation in Forest Fund managed areas and protected areas."[99] Assuming these allegations are adequately proved in the course of the arbitration proceedings, a crucial legal question arises: whether the Bern Convention applies in situations of armed conflict and occupation. If it does, Armenia – having been a party to the Bern Convention for several years – could be found responsible for multiple breaches of its obligations, as alleged by Azerbaijan.

The Bern Convention does not contain any explicit provision regarding its applicability to situations of armed conflict or occupation. Nor does it address the possibility of any extraterritorial scope of its application. It is a regional rather than a universal instrument and the scope of its protection is essentially territorial, as it concerns specific flora, fauna, and natural habitats located within the territory of each State party. The general aim of the Bern Convention is to ensure the sustainable use of wild flora, fauna, and natural habitats by the State in which they are located, so that they may "be preserved and handed on to future generations."

Judgment of 16 June 2015, in the *case of Chiragov and Others v. Armenia*, Application No. 13216/05*,* para. 186)

[97] See Republic of Azerbaijan Ministry of Foreign Affairs, "Press Release on Arbitration filed by Azerbaijan against Armenia for Widespread Environmental Destruction", No. 015/23, 15 January 2023 available at https://www.mfa.gov.az/en/news/no01523

[98] *Ibid*.

[99] United Nations Environment Program (UNEP), *Report of the UNEP Environmental Scoping Mission to the Conflict-Affected Territories of Azerbaijan*, April 2022, pp. 8-13 available at https://eco.gov.az/frq-content/plugins/pages_v1/entry/20221223145000_59496900.pdf.

To ensure appropriate preservation, the need for sustainable management of these resources should logically continue during times of armed conflict and occupation. A denial of protection in such circumstances would undermine the object and purpose of the Bern Convention, facilitating the gradual extinction of the protected natural environment rather than its conservation. This conclusion appears even more compelling where the occupying power is itself a party to the Bern Convention. For these reasons, and in light of its object and purpose, it could be argued that the Bern Convention should be interpreted as applicable also during armed conflict and occupation. Moreover, a party to the Bern Convention should not be permitted to act extraterritorially in a manner that would be prohibited within its own territory.

Nevertheless, upon closer examination, this interpretation, however reasonable it may appear, is not free from legal difficulties. First, the obligations set out in the Bern Convention are framed as requiring States to take "steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats"[100] within their own territory.[101] These norms (particularly Articles 3, 4, 5 and 6 of the Bern Convention) are drafted in a manner that clearly presupposes territorial application and does not support an extraterritorial interpretation. Secondly, when these provisions are compared with treaties that have been recognised as having extraterritorial effect – such as the 1950 European Convention on Human Rights[102] and the 1966 International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights – a significant distinction becomes apparent. The latter instruments have been held to apply in occupied territories to individuals or peoples under the control of a State party, irrespective of the nation-

[100] Convention on the Conservation of European Wildlife and Natural Habitats, cit., Article 3.

[101] Articles 3-7.

[102] See among others European Court of Human Rights (Grand Chamber), Judgment of 7 July 2011, in the case *Al-Skeini and Others v. the United Kingdom*, application No. 55721/07, para. 150 and the analysis at paras. 131-142.

ality of the victim.[103] This interpretation derives not only from their object and purpose as human rights protection instruments, but also from the presence within those treaties of provisions indicating that a certain level of protection must be afforded to all individuals who, in one way or another, fall within the jurisdiction – broadly understood – of a contracting party. In the absence of any comparable norm in the Bern Convention, it is therefore difficult to sustain an argument for the extraterritorial application of that convention.

Leaving consideration of these arguments and the resolution of this conundrum to further analysis by the inter-State arbitral tribunal, it is nevertheless appropriate to reflect on whether the concept of sustainability could play any additional role in the protection of the environment in the part of Azerbaijan that was under occupation. The answer could be, it is submitted, in the affirmative. If the arbitral tribunal were to determine that Armenia was indeed an occupying power for a certain period in Azerbaijan territory, then Armenia could be found to have been bound by Article 55 of the Hague Regulations throughout that occupation. As a result, much of the environmental harm inflicted on the occupied part of Azerbaijan could, if proved, be regarded as unlawful under Article 55 of the Hague Regulations. It will also be necessary, however, to determine the critical date from which the revised interpretation of Article 55 may be considered reflective of customary international law.

7. *Case Study: Sustainability of the Ramsar Sites in Occupied Ukrainian Territory*

During its 14th meeting (5-13 November 2022), the Conference of the Contracting Parties to the Ramsar Convention on Wetlands adopted an unprecedented resolution condemning

[103] International Court of Justice, Advisory Opinion of 9 July 2004, concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, p. 136, para. 111 (ICCPR) and para. 112 (ICESCR).

Russia for damage to Ukraine's wetlands sites.[104] The Resolution denounced the "devastating impact of the Russian Federation's aggression on the environmental situation in Ukraine"[105] and condemned "all environmental damage to wetlands of international importance in Ukraine caused by the Russian Federation since the beginning of its aggression against Ukraine in 2014."[106]

Although it did not use the term *occupation*, the resolution determined that, as a result of its aggression against Ukraine, Russia temporarily controlled 16 wetlands of international importance, and, furthermore, conducted military activities within those Ramsar sites. It recognised that, because of the war, it was impossible to implement "conservation, management and wise use measures in respect of several Ramsar sites' located in areas of Ukraine, including Crimea and the Donetsk Region.[107]

Recognising the disruption of the ecological status of 16 Ramsar sites, the resolution called upon the "Russian Federation to respect in full its obligations arising from the Ramsar Convention", stressing that these obligations included "in particular to cease abuses preventing fulfilment by Ukraine of its exclusive sovereign rights to protect, restore and wisely use the Ramsar sites within its internationally recognized borders, extending to its territorial waters."[108]

Resolution XIV.20 mandated the Ramsar Secretariat to coor-

[104] Conference of the Contracting parties to the Ramsar Convention on Wetlands (COP 15), Resolution XIV.20, "The Ramsar Convention's response to environmental emergency in Ukraine relating to the damage of its Wetlands of International Importance (Ramsar Sites) stemming from the Russian Federation's aggression", adopted at the 14th Meeting of the Conference of the Contracting Parties to the Ramsar Convention on Wetlands, Wuhan and Geneva, 5-13 November 2022, available at https://www.ramsar.org/sites/default/files/documents/library/xiv.20_ukraine_e.pdf. See in this regard for a useful commentary M. Wang, "The Unprecedented Ramsar Resolution: Ukrainian Wetlands Protection in Armed Conflict", in *Netherlands International Law Review*, LXX (2023), pp. 323-357.

[105] Conference of the Contracting parties to the Ramsar Convention on Wetlands, cit., para. 12.

[106] *Ivi*, para. 13.

[107] *Ivi,* para. 10.

[108] *Ivi,* para. 14.

dinate assessments of affected Ramsar sites and to make recommendations on appropriate mitigation and restoration measures. The Secretariat subsequently produced a report assessing the damage caused by the war and formulating key recommendations. Presented at the meeting of the Contracting Parties to the Ramsar Convention held in Victoria Falls, Zimbabwe in July 2025,[109] the report found that the war had impacted 48 of Ukraine's 50 Ramsar Sites, with 31 directly affected, including four that had experienced major ecological changes, such as hydrological disruptions. The damage identified included contamination, pollution, deforestation and the destruction of infrastructure, as well as indirect impacts such as reduced management capacity and diminished ecosystem services.[110] Shortly thereafter, on 22 July 2025, Russia announced its withdrawal from the Ramsar Convention.

When reading the above-mentioned Resolution, it is striking that it did not impose obligations under the Ramsar Convention on Russia as an occupying power. However, this was because the relevant finding had not been made. Rather, it merely determined that Russia impeded Ukraine's exercise of sovereignty within its own territory. In light of this content, it is difficult to regard the Resolution as a precedent for the applicability of the Ramsar Convention in situations of occupation as it could have been.

Thus, while the governing body of the Ramsar Convention adopted an unequivocal position condemning Russia's conduct affecting sites protected under the Ramsar Convention, it did not identify the specific provisions of the Convention that Russia had violated. However, quite apart from the policy goals pursued by the Resolution which, evidently, consisted in condemning Russia as opposed to providing detailed legal determinations, the relevant normative fact remains that a significant portion of Ukraine

[109] Conference of the Contracting parties to the Convention on Wetlands (COP 15), "Assessment Report of environmental damage on Wetlands of international stemming importance in Ukraine stemming from the Russian Federation's Aggression", Ramsar, January 2025, pp. 2-6 available at https://www.ramsar.org/sites/default/files/202504/COP15_inf2_implementation_ResXIV20_assessment_report_e.pdf.

[110] *Ivi*, pp. 2-6.

has been occupied by Russian forces since 2022. Within this territory (broadly corresponding to the Donbass region in Eastern Ukraine) there are several Ramsar sites. Accordingly, irrespective of the unresolved question of the applicability of the Ramsar Convention in occupied territory – a matter requiring further analysis – the Russian Federation remains bound, for as long as it exercises the authority of an occupying power, by Article 55 of the Hague Regulations. Therefore, the circumstance that Russia withdrew from the Ramsar Convention does not relieve it of its obligation under customary international law to protect and sustainably manage the natural resources, that is the Ramsar sites located in territory under its effective control.

8. *Conclusions*

The analysis undertaken in this paper indicates that the direct protection afforded to the environment under IHL is largely insufficient. It is based on a number of very narrowly framed norms whose application is subject to a very high threshold.

Interpretative efforts aimed at expanding the scope of the fundamental principles of IHL, while valuable in themselves, are not without difficulty. They ultimately subsume environmental damage within the category of collateral damage that may be taken into account in the conduct of hostilities. Under this approach, the environment is classified as a civilian object and treated accordingly. Although this may be regarded as an adequate degree of protection, this paper argues that it constitutes only a *faute de mieux* remedy made necessary by the absence of any viable prospects of codification. The well-known fact remains that many "protected" civilian objects are nonetheless damaged or destroyed during armed conflict. Such a possible outcome appears clearly inadequate to ensure effective protection of the natural environment, particularly given that it concerns "the quality of life and the very health of human beings, including generations unborn."[111]

[111] See Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, cit., para. 29.

What is distinct from mere civilian objects should then be treated differently. Just as, for instance, hospitals or objects of cultural property are rightly considered deserving of enhanced protection in wartime due to the unique functions they perform, so too should certain components of the natural environment be subject to differentiated and heightened protection.

While one has to remain mindful of the magnitude of the legal challenge involved in devising an IHL that takes environmental sustainability seriously, this paper has suggested that IHL, as an integral part of international law, cannot be applied in isolation. Not only it would run against the principle of systemic integration, but the values protected by international law in the name of the international community cannot disappear *sic et simpliciter* in times of war, notwithstanding the demands of military necessity. This is all the more compelling in light of the extraordinary development of international environmental law in recent decades, which, as a matter of legal interpretation, cannot be neglected when applying an older body of law such as IHL. Accordingly, the concept of environmental sustainability permeates the traditionally impermeable domain of IHL through the normative principle of the sustainable use of natural resources. The latter is analytically distinct from sustainable development albeit often subsumed within it. The principle of sustainable use may serve as an *infra legem* interpretative tool to temper the exigencies of warfare and the structural biases of IHL by identifying limits to military necessity in the interest of affording special protection to, *inter alia*, elements of fauna, flora, and natural habitats. As a normative principle, sustainable use constitutes a standard on the basis of which it is possible to assess the conduct of an occupying power in the administration of natural resources. As interpreted by the ICJ, this standard is grounded in customary international law and therefore binds an occupying power irrespective of the applicability of treaty law. This is no small achievement in the arduous path towards environmental sustainability.

THE ENVIRONMENTAL AND INTERGENERATIONAL DIMENSIONS OF FOOD SUSTAINABILITY IN THE PRACTICE OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES

Silvia Manservisi*

Summary: 1. The Holistic Concept of Sustainable Development and Ecological Integrity as the Essence of Sustainability also in the Agrifood Sector. – 2. The Key Role of Sustainable Agriculture and Sustainable Food Systems among the Sustainable Development Goals of the *2030 Agenda*. – 3. The COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems, and Climate Action and the Key Role of Sustainable Agriculture and Sustainable Food Systems in Climate Resilience. – 4. The FAO Roadmap for Enhancing Sustainability in Geographical Indication Systems. – 5. Concluding Remarks, with Particular Reference to the FAO's Contribution to Bringing Sustainable Agrifood Systems to the Forefront of Climate Action at COP 30.

1. *The Holistic Concept of Sustainable Development and Ecological Integrity as the Essence of Sustainability also in the Agrifood Sector*

The environmental and intergenerational dimensions of the sustainability of agriculture and food systems have received widespread attention within the practice of the United Nations and its specialized agencies. These dimensions were articulated very clearly both before and after the adoption of the *2030 Agenda*,[1] which established 17 Sustainable Development Goals and 169 targets to be achieved by 2030. With a much broader scope, the *2030 Agenda*, replaced the Millennium Development

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[1] Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, 21 October 2015 *Transforming our world: the 2030 Agenda for Sustainable Development*.

Goals,[2] which comprised eight goals and applied differently to developed and developing countries. By contrast, the Sustainable Development Goals are universal and are grounded in the integration of the three dimensions of sustainable development: environmental, social and economic.[3]

These goals must be considered in close correlation with the holistic concept of sustainable development, which has a multidimensional scope, as incisively highlighted in legal scholarship.[4]

Food sustainability is closely linked to the concept of sustainable agriculture since the entire food system essentially depends on agriculture, which provides both products immediately us-

[2] *United Nations General Assembly Resolution* 55/2, 18 September 2000 (Doc. A/RES/55/2).

[3] T. Scovazzi, "I principi", in T. Scovazzi, S. Nespor (eds), *Corso di diritto internazionale*, vol. IV, *La protezione dell'ambiente*, (Giuffrè Lefebvre, Milano, 2024), p. 186.

Some authors (A. Fodella, "Il vertice di Johannesburg sullo sviluppo sostenibile", in *Rivista giuridica dell'ambiente*, XVIII (2003), p. 391; S. Marchisio, "Il diritto internazionale ambientale da Rio a Johannesburg", in E.R. Acuna (ed), *Profili di diritto ambientale da Rio De Janeiro a Johannesburg* (Torino, Giappichelli, 2004), p. 31; R. Dinuzzi, "La cooperazione internazionale in materia di risorse idriche da Johannesburg a Kyoto", in E.R. Acuna (ed), *Profili di diritto ambientale*, cit., p. 53) has incisively highlighted that the from final documents of the United Nations World Summit on Sustainable Development (WSSD) held in Johannesburg from 26 August to 4 September 2002, both in paragraph 2 of Chapter I of the *Plan of Implementation* and in point 5 of the *Johannesburg Declaration on Sustainable Development*, a "multidimensional" concept of sustainable development emerges, which includes not only economic development and environmental protection, but also a third component, "social development", which becomes the third of the "interdependent pillars" of the concept of sustainable development: the importance of strengthening the three pillars of sustainable development, which are equally important and interdependent, is therefore affirmed.

[4] F. Munari, "La tutela internazionale dell'ambiente", in S.M. Carbone, R. Luzzatto, A. Santa Maria (eds), *Istituzioni di diritto internazionale*, 2ª ed. (Torino, Giappichelli 2003), p. 423; S. Marchisio, "Il diritto internazionale ambientale da Rio a Johannesburg", cit., p. 31; R. Dinuzzi, La cooperazione internazionale in materia di risorse idriche da Johannesburg a Kyoto, cit. p. 53; K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Farham, Ashgate, 2008); T. Scovazzi, "I principi", cit., p. 184 ff.; S. Nespor, *La storia*, in T. Scovazzi, S. Nespor (eds), *Corso di diritto internazionale*, vol. IV, cit., p. 66.

able as food and raw materials for industrial or agricultural processing.[5] Agricultural producers are the "centripetal force" of the agrifood supply chain, and represent the central element of the production process, allowing the products supplied for cultivation and breeding to be transformed into finished products for the food market.[6]

Even prior to the adoption of the *2030 Agenda*, the FAO Council, in 1989,[7] in the absence of a globally recognized and endorsed definition, formulated its own definition of sustainable agriculture and rural development (SARD). SARD was defined as

> The management and conservation of the natural resource base, and the orientation of technological and institutional change in such a manner as to ensure the attainment and continued satisfaction of human needs for present and future generations. Such sustainable development (in the agriculture, forestry and fisheries sectors) conserves land, water, plant and animal genetic resources, is environmentally non-degrading, technically appropriate, economically viable and socially acceptable.

In line with this definition, the Policy Analysis and Networks Branch of the Division for Sustainable Development of the United Nations Department of Economic and Social Affairs emphasized, in 2009,[8] the central role of sustainable agriculture in achieving sustainable development. It described sustainable agriculture as "the capacity of agriculture over time to contribute to overall welfare by providing sufficient food and other goods and services in ways that are economically efficient and profitable, socially responsible, and environmentally sound". The same analysis further underlined that

[5] L. Costato, *Alimenti e diritto alimentare nell'Unione europea*, in L. Costato, P. Borghi *et al*., *Compendio di diritto alimentare*, 11th ed., (Milan, Wolters Kluwer 2025), p. 3 ff.

[6] S. Carmignani, "Filiera agroalimentare", in *Digesto, Discipline Privatistiche,* Aggiornamento, XI (2018), p. 226.

[7] FAO C 89/2-Sup.2: August 1989, page 6, para. 6.

[8] United Nations, 2009, "The Contribution of Sustainable Agriculture and Land Management to Sustainable Development", in *Sustainable Development Innovation Brief*, Issue 7.

> Although the abovementioned elements are often discussed separately, they are not mutually exclusive: sustainable agriculture meets environmental, economic, and social objectives simultaneously. In many cases, sustainable agriculture practices are not new, but draw on traditional knowledge and practices, many of which have now been positively evaluated by scientific methods.

Taken together, these definitions clearly illustrate that sustainable agriculture, like sustainable development more broadly, is a multidimensional concept grounded in three interdependent pillars: environmental protection, economic development and social development. Moreover, these definitions of sustainable agriculture highlight the close link between sustainable agriculture and food security, in the sense that a fundamental aspect of the concept of sustainable agriculture is to promote food security.

This connection is explicitly recognized in the *Johannesburg Plan of Implementation.* Paragraph 40 acknowledges that "agriculture plays a crucial role in meeting the needs of a growing global population and is inextricably linked to the fight against poverty, particularly in developing countries." The plan further emphasizes that "[s]ustainable agriculture and rural development are essential to the implementation of an integrated approach to increasing food production and enhancing food security and food safety in an environmentally sustainable way" among other provisions.[9]

In 1996, the Food and Agriculture Organization of the United Nations (FAO) formulated the definition of "Food security" which is currently the most comprehensive and widely accepted. It is contained in paragraph 1 of the FAO World Food Summit Plan of Action (13-17 November 1996, Rome) which states that "[f]ood security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their needs and food preferences for an active and healthy life."

[9] S. MANSERVISI, "I riflessi del diritto ambientale sulla PAC prima e dopo il Trattato di Lisbona", in L. Costato *et al* (eds), *Dalla riforma del 2003 alla PAC dopo Lisbona. I riflessi sul diritto agrario, alimentare e ambientale* Atti del convegno di Ferrara, 6-7 maggio 2011, (Napoli, Jovene, 2011), p. 245 ff.

This definition identifies four key dimensions of Food security: the physical availability of food, economic and physical access to food, food utilization, and the stability of these three dimensions over time. It emphasizes that, to effectively achieve food security objectives, all four dimensions – commonly referred to as the four pillars of food security – must be fulfilled simultaneously.

With regard to the stability of the three dimensions of Food Security over time, *the State of Food Security and Nutrition in the World (SOFI) 2025* report,[10] jointly released by the FAO, the International Fund for Agricultural Development (IFAD), the United Nations Children's Fund (UNICEF), the World Food Program (WFP), and the World Health Organization (WHO), identifies conflict, extreme weather events, and economic crises as main drivers of food insecurity.

The SOFI 2025 report also notes a decline in global hunger in recent years: in 2024, 8.2% of the world's population experienced hunger, compared to 8.5% in 2023 and 8.7% in 2022. However, this global figure masks stark regional disparities. Progress has been driven by notable improvements in Southeast Asia, South Asia, and South America, while hunger has continued to increase in most subregions of Africa and Western Asia. At the same time the report highlights that, while millions of people suffer from hunger, many others consume more than they need, with adult obesity rising from 12.1% in 2012 to 15.8% in 2022.

Finally, the SOFI 2025 report emphasizes that improving diet quality is essential and that healthy diets must become more accessible. In 2024, 2.6 billion people could not afford a healthy diet, illustrating the double burden of malnutrition – the coexistence of undernutrition alongside overweight and obesity.

In the outcome document *The Future We Want* of Rio+20,[11] the United Nations Conference on Sustainable Development

[10] FAO, IFAD, UNICEF, WFP and WHO, (2025) *The State of Food Security and Nutrition in the World 2025 – Addressing High Food Price Inflation for Food Security and Nutrition*, Rome. https://doi.org/10.4060/cd6008en.

[11] A/CONF.216/L.1, *The Future We Want*, 19 June 2012.

held from 20 to 22 June 2012 in Rio de Janeiro, sustainable agriculture, together with food security and nutrition, is identified as one of the seven thematic areas given priority attention.[12] Paragraph 111 of the document outlines the characteristics of sustainable agriculture, describing it as agriculture that "improves food security, eradicates hunger and is economically viable, while conserving land, water, plant and animal genetic resources, biodiversity and ecosystems and enhancing resilience to climate change and natural disasters." The document also recognizes the need to maintain natural ecological processes that support food production systems and affirms "the necessity to promote, enhance and support more sustainable agriculture, including crops, livestock, forestry, fisheries and aquaculture."

Alongside the three traditional pillars of sustainable development, a fourth pillar has emerged within the framework of the United Nations Educational, Scientific and Cultural Organization (UNESCO): culture. On 17 May 2013, in Hangzhou, Zhejiang Province, in China, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the "Hangzhou Declaration", calling on countries worldwide to place "culture" at the forefront of sustainable development policies. Subsequently, UNESCO developed a framework of thematic indicators for "Culture 2030", aimed to supporting and integrating the global indicators agreed under the 2030 Agenda in order to measure the contribution of culture to the national and local implementation of 17 the Sustainable Development Goals (*SDGs*). As highlighted in doctrine[13] with regard to the agrifood sector, the cultural dimension is particularly important in assessing the impact of products with indications of origin, since geographical indications are deeply rooted in local culture and traditional knowledge and have the potential to contribute significantly to the sustainability of their territories.

At the same time, it is essential to take into account the distinc-

[12] In Chapter V, paras. 108 to 118.

[13] A. Di Lauro, "Le denominazioni d'origine protette e le indicazioni geografiche protette di fronte alla sfida dello sviluppo sostenibile", in *Rivista di diritto agrario*, 2018/1, p. 395.

tion clearly emphasized in legal scholarship by Klaus Bosselmann[14] between *sustainability* and *sustainable development* and, more specifically, within the context of "sustainability", between the *concept* itself and the *term*. This distinction is necessary in order to avoid the possible and frequent misuse of the term "*sustainability*", which is used in such a variety of meanings that it risks becoming almost devoid of real and effective content. By contrast, the *concept* of sustainability, according to Bosselmann, is strong, penetrating and meaningful and continues to exert a fundamental influence on scientific and legal thinking. Within the broad doctrinal debate on the concept of sustainable development,[15] Bos-

[14] K. Bosselmann, *The Principle of Sustainability*, cit., pp. 9 and 25.

[15] On the origin of the concept of sustainable development and its subsequent evolution, see *ex plurimis* (in the Italian legal literature): S.M. Carbone, F. Munari, "Lo sviluppo sostenibile nel contesto degli scambi internazionali e delle regole di diritto internazionale ad essi relative", in *Il Diritto del commercio internazionale*, 1999, p. 35 ff.; S. Marchisio, "Il diritto internazionale dell'ambiente", in G. Cordini, P. Fois, S. Marchisio (eds), *Diritto ambientale. Profili internazionali europei e comparati* (Torino, Giappichelli 2005), p. 10; P. Fois (ed), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* XI Congresso 16-17 Giugno 2006, SIDI (Società italiana di diritto internazionale), (Napoli, Editoriale Scientifica, 2006).

See also extensively: P. Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law", in R.L. Revesz, P. Sands, R.B. Stewart (eds), *Environmental law, the Economy and Sustainable Development* (Cambridge, Cambridge University Press, 2000), p. 252 ff.; P. Birnie, A. Boyle, C. Redgwell, *International Law & Environment* 3rd ed. (Oxford/New York, OUP 2009), p. 115 ff.; K. Bosselmann, The Principle of Sustainability, cit.; M. Montini, "Evoluzione, principi e fonti del diritto internazionale dell'ambiente", in P. Dell'Anno, E. Picozza (eds), *Trattato di diritto dell'ambiente*, vol. I (Padova, Cedam 2012), p. 37 ff.; S. Manservisi, "Il principio dello sviluppo sostenibile: da Rio+20 al diritto dell'Unione europea e il suo fondamentale ruolo nel diritto agrario", in G. Sgarbanti, P. Borghi, A. Germanò (eds), *Il divenire del diritto agrario italiano ed europeo tra sviluppi tecnologici e sostenibilità*, Convegno organizzato in onore del prof. Ettore Casadei in occasione del suo 70° compleanno, Bologna-Rovigo, 25-26 Ottobre 2012, CNR-IDAIC series, (Milano, Giuffrè, 2014), p. 177 ff.; L. Pineschi, "I principi del diritto internazionale dell'ambiente: dal divieto di inquinamento transfrontaliero alla tutela dell'ambiente come Common Concern", in R. Ferrara, C.A. Gallo (eds), *Trattato di diritto dell'ambiente*, I (Milano, Giuffrè, 2014) p. 92 ff.

selmann's thesis[16] succeeds in capturing the holistic dimension, i.e., the multidimensional scope of the principle of sustainable development.

Bosselmann emphasizes that the inclusion of social and economic aspects within the concept of "sustainable development" does not therefore require any deviation from the ecological core.[17] On the contrary, it is precisely this core that makes it possible to relate the social and economic dimensions of sustainable development to a central point of reference.

Bosselmann characterizes sustainable development as a legal principle, arguing it derives both its meaning and its legal status from the principle of sustainability. This status, he contends, stems from the fact that sustainability itself constitutes a legal principle which he regards as "the most fundamental environmental principle, only equal to other fundamental principles of law such as freedom, equality and justice".[18] He defines the principle of sustainability as "the duty to protect and restore the integrity of the Earth's ecological systems". Bosselmann further underscores its normative character, noting that it reflects a fundamental ethical value grounded in respect for ecological integrity, entails obligations to act – namely the duties to protect and restore – and is therefore capable of producing legal effects, thereby fully meeting the criteria of legal principle.

Bosselmann also defines ecological integrity – the essence of sustainability – as the *Grundnorm* of international environmental law.[19]

From this perspective, the intergenerational dimension of sustainability in agriculture and food systems should be understood as inherent in the very concept of sustainability and particularly, in its ecological core, as reflected in Bosselmann's definition of

[16] K. Bosselmann, *The Principle of Sustainability*, cit., p. 53 ff.

[17] *Ibid*.

[18] K. Bosselmann, *The Principle of Sustainability*, cit., p. 57.

[19] K. Bosselmann, *The Principle of Sustainability. Transforming Law and Governance* 2nd edition (London/New York, Routledge 2017), p. 97 ff.; R. E. Kim, K. Bosselmann, "Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law", in *Review of European Community & International Environmental Law,* XXIV (2015), p. 194 ff.

sustainability as "the duty to protect and restore the integrity of the Earth's ecological systems."[20]

In this light, therefore, it is possible to fully agree with Scovazzi's incisive observation on the theory of intergenerational equity. While acknowledging that the theory seeks to protect genuine needs deserving of the most careful consideration, Scovazzi notes that it raises certain perplexities. In particular, he argues that "there is no strict need to invoke future generations to affirm the concept whereby current patterns of production and consumption, risk destroying life on Earth" and that "the problem exists in the present, even before it concerns the future, and the right to a balanced environment must be understood today as a fundamental human right belonging to all individuals, directly linked to the human rights to life and health." [21]

In fact, it should be noted that in the 2030 Agenda, there is no explicit reference to "intergenerational equity" in the formulation of the *SDGs*. In this regard, according to Spijkers,[22] meeting the needs of the present generation without compromising the ability of future generations to meet their own needs is intrinsic to the concept of sustainable development itself, which constitutes the overarching aim. Accordingly, all *SDGs* should be interpreted and applied in such a way as to help achieve this aim.

2. *The Key Role of Sustainable Agriculture and Sustainable Food Systems among the Sustainable Development Goals of the 2030 Agenda*

As FAO incisively highlighted in its 2016 report *Food and Agriculture: Key to achieving the 2030 Agenda for Sustainable Development*[23]

[20] K. Bosselmann, *The Principle of Sustainability* (2008), cit., p. 53.

[21] T. Scovazzi, "La dimensione temporale del diritto internazionale dell'ambiente: i diritti delle generazioni future", in *Rivista giuridica dell'ambiente*, 2023/1, p. 234; T. Scovazzi, "I principi", cit., p. 196.

[22] O. Spijkers, "Intergenerational Equity and the Sustainable Development Goals", in *Sustainability* (2018, 10, 3836).

[23] FAO, *Food and agriculture: Key to achieving the 2030 Agenda for Sus-*

> The 17 SDGs of 2030 Agenda aim at ending poverty and hunger while restoring and sustainably managing natural resources. They integrate the three dimensions of sustainable development – economic, social and environmental – with closely interwoven targets. The SDGs are indivisible – no one goal is separate from the others, and all call for comprehensive and participatory approaches. And they are universal – the 2030 Agenda is as relevant to developed as it is to developing nations.

Sustainable agriculture and sustainable food systems play a key role in the Sustainable Development Goals set by the 2030 Agenda. The latter establishes Goal 2, specifically focused on the need to end hunger, achieve food security, and improve nutrition and promote sustainable agriculture. In particular, target 2.4 emphasizes the need by 2030, to

> ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality.

"Food and agriculture are key to achieving the entire set of SDGs": in this sense, the FAO expressed itself incisively as early as 2016 in its report *Food and Agriculture: Key to achieving the 2030 Agenda for Sustainable Development*[24] and later in 2018 in *Transforming Food and Agriculture to Achieve the SDGs* (2018),[25] guidelines in which it underlined that food and agriculture are the essence of the 2030 Agenda and that the implementation of sustainable agriculture is a key factor in achieving many SDGs.

In the 2018 guidelines the FAO stresses that

> This includes ending poverty and hunger; ensuring sustainable use of natural resources; addressing inequalities; achieving gender equality and women's empowerment; promoting sustainable pro-

tainable Development (2016), p. 4, available on the website: www.fao.org.

[24] *Ivi,* cit. p. 6.

[25] FAO, *Transforming Food and Agriculture to Achieve the SDGs* (2018) p. 1, available on the website: https://openknowledge.fao.org/items/f579315d-69ee-4aef-a346-9bcd3b94ad2c

duction and consumption and healthy diets; reducing and removing the sources of vulnerability to conflict and crisis; mitigating and adapting to climate change; promoting accelerated and inclusive economic development; and building more just and peaceful societies.

3. *The COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems, and Climate Action and the Key Role of Sustainable Agriculture and Sustainable Food Systems in Climate Resilience*

During COP 28, held in Dubai from 30 November to 13 December 2023, the final text of the first *Global Stocktake* was issued on 13 December 2023, after almost two years of data collection, technical dialogues and political negotiations.[26] This report is designed "to assess collective progress towards achieving the purpose of the [Paris] Agreement and its long-term objectives." For the first time at a COP, para. 28, letter d) of the report clearly states the transition away from fossil fuels in energy systems in an orderly and equitable manner. It also calls for accelerated action in this critical decade to achieve net-zero emissions by 2050, in line with IPCC recommendations.

The *Global Stocktake* highlights that the countries are largely off track in meeting the objectives of the Paris Agreement and must submit new Nationally Determined Contributions (NDCs) by 2025. It indicates that greenhouse gas emissions must be reduced by 43% by 2030 and by 60% by 2035, compared to 2019 levels, in order to meet the 1.5°C target (Art. 27). From a mitigation perspective, it further calls for: tripling renewable energy capacity and doubling energy efficiency by 2030 (Art. 28, letter a); accelerating the phase-out of unabated coal (Art. 28, letter b); reducing methane emissions – mentioned explicitly for the first time – (Art. 28, letter f) and emissions from road transport (Art.

[26] J. J. Qi *et al.*, "Reflections on the first Global Stocktake of the Paris Agreement", in *Earth System Governance*, XXI (August 2024), p. 2, https://doi.org/10.1016/j.esg.2024.100212.

28, letter g); and gradually eliminating "inefficient" fossil fuel subsidies as soon as possible (Art. 28, letter h).

The synergy and interdependence between Goal 2 of the 2030 Agenda – to "end hunger, achieve food security and improved nutrition and promote sustainable agriculture" – and Goal 13, which calls for "urgent action to combat climate change and its impacts", and which underpin the objectives of the Paris Agreement and the first *Global Stocktake*, are reflected in the *COP28 UAE Declaration on Sustainable Agriculture, Resilient Food Systems, and Climate Action*, issued during COP28 in Dubai, staged from 30 November to 13 December 2023. For the first time at a COP, agriculture and food systems were placed in the forefront, highlighting both the key role they can play in climate resilience if made sustainable and the impact of global greenhouse gas emissions from the agrifood sectors.

Regarding the first aspect, the *COP28 UAE Declaration* recognizes the need to include agriculture and food systems in any pathway toward fully achieving the long-term goals of the Paris Agreement, the potential of agriculture and food systems to provide impactful and innovative responses to climate change and shared prosperity for all, and the fundamental role of agriculture and food systems in the lives and livelihoods of billions of people. On this basis, it emphasizes the need, in para. 1, the need to "pursue broad, transparent, and inclusive engagement, as appropriate within our national contexts, to integrate agriculture and food systems into National Adaptation Plans, Nationally Determined Contributions, Long-term Strategies, National Biodiversity Strategies and Action Plans, and other related strategies before the convening of COP30" and, in para. 4, the need to "Accelerate and scale science – and evidence-based innovations – including local and indigenous knowledge – which increase sustainable productivity and production of agriculture and related emerging domains."

Furthermore, the issuance of the *Declaration* although not legally binding and falling within the scope of soft law, is of considerable importance. It marks the first time at a COP that the key role of agriculture and food systems in climate resilience – if made sustainable – and the impact of global greenhouse gas

emissions from the agrifood sectors have been recognized at the global level, with the approval of 159 heads of state and government, representing over 80% of agricultural GDP [Gross Domestic Product], 70% of the world's farmers and 80% of emissions from agriculture.

With regard to the second aspect, data on the impact of global greenhouse gas emissions from intensive and unsustainable agriculture, forestry and land use are presented in the IPCC's Sixth Assessment Report,[27] which confirms that human activities, mainly through greenhouse gas emissions, have unequivocally caused global warming and that 22% of global greenhouse gas emissions come from agriculture, forestry and land use.

According to the FAO report, *Greenhouse Gas Emissions from Agrifood Systems – Global, Regional and Country Trends, 2001 –2023*,[28] published in 2025, agrifood systems account for approximately one-third of total anthropogenic greenhouse gas emissions. In 2023, these emissions reached 16.5 billion tonnes of carbon dioxide equivalent, representing a 21 percent increase since 2001. Over the same period, the share of agrifood systems in total global emissions fell from 38 to 32 percent. These emissions are generated in various ways: on-farm activities related to crop and livestock production; land use change driven by deforestation, biomass burning, and peatland degradation, often linked to agricultural expansion; and pre- and post-production processes, comprising the supply chain, including food manufacturing, retail, household consumption and food waste disposal.

During COP 28, the FAO also presented the *FAO Global Roadmap on Achieving SDG2 without Breaching the 1.5° C Threshold,*[29] a new global roadmap for achieving the SDG2

[27] *Climate Change 2023: Synthesis Report AR6*, issued on 20 March 2023, with which the IPCC concluded the publication of the Sixth Assessment Report on Climate Change (AR6).

[28] FAO, *Greenhouse gas emissions from agrifood systems – Global, regional and country trends, 2001-2023*. FAOSTAT Analytical Brief Series, No. 115. Rome (2025). See also FAO, *Greenhouse gas emissions from agrifood systems – Global, regional and country trends, 2000-2020*, FAOSTAT Analytical Brief No. 50, Rome (2022).

[29] FAO, *Achieving SDG 2 without breaching the 1.5°C threshold: A global*

("End hunger, achieve food security and improved nutrition and promote sustainable agriculture") without exceeding the 1.5°C temperature limit set by the Paris Agreement on climate change. This is a key tool for achieving sustainable development goals, launched as a concrete package of solutions, which is being implemented over a three-year period, spanning COP28, COP29 and COP30.

This publication represents the first report in a three-year process beginning with COP28 and continuing through COP29 and COP30. The FAO roadmap process outlines a global strategy covering the next three years and includes a diverse package of solutions in ten distinct areas of action (clean energy, crops, fisheries and aquaculture, food losses and waste, forests and wetlands, healthy diets, livestock, soil and water, and inclusive, data-related policies) and encompassing a total of 120 proposed actions. In this initial report, FAO underscores the urgent need to reform agrifood systems, not only to meet climate targets, but also to enhance food security and address malnutrition, a fundamental aspect of the right to food. The roadmap further includes creating a project repository, exploring financing mechanisms, and developing country-specific action plans by 2025 (COP30).

The first part of the report, released at the conclusion of COP28 presents a global vision for agrifood system transformation. The second part, issued in 2024, moves from a global to a regional perspective and advances from vision-setting to the definition of costs and financing needs. The final phase at the COP30 held in Belém, Brazil (11-22 November 2025), aims to establish country-level action plans and strengthen monitoring and accountability mechanisms, with a focus on regional adaptation, costing of actions, and exploration of financial options.

The need to promote renewable energy solutions within agrifood systems in order to achieve the SDGs and the objectives of the Paris Agreement on climate change – previously emphasized through the FAO and IRENA partnership in the 2021 agree-

roadmap, Part 1 – How agrifood systems transformation through accelerated climate actions will help achieve food security and nutrition, today and tomorrow, In brief. Rome (2023), https://doi.org/10.4060/cc9113en.

ment[30] – was consolidated in the renewed Memorandum of Understanding between FAO and IRENA (The International Renewable Energy Agency) in January 2025. This renewed agreement extends the partnership for an additional four years, through January 2029.[31]

In this context, UNDP (*United Nations Development Programme*), in its 2024 *White Paper Supporting Food Systems Transformation Towards Sustainability and Resilience,*[32] highlights that the interconnectedness of energy and food systems and the need for a joint approach to achieve the Sustainable Development Goals (SDGs) and those of the Paris Agreement on Climate Change. The paper notes that "food systems and climate change also contribute significantly to environmental degradation" and that "food systems alone are responsible for 31% of human generated GHG emissions globally". It then goes on to cite the latest IPCC Report (AR6), which identifies "land, water and food-related adaptation and mitigation options as offering the greatest potential for addressing the climate crisis." Implementing these measures – including reduced conversion of natural ecosystems and increased agricultural carbon sequestration – "will require a fundamental transformation in our food systems." The report further emphasizes that food systems account for 80 percent of global deforestation, 70 percent of biodiversity loss and 70 percent of all freshwater use.[33]

In its 2024 White Paper, UNDP emphasizes that "food systems are interconnected across various sectors and are linked to all the Sustainable Development Goals (SDGs). Consequently, they are crucial for achieving these goals, requiring multidimensional solutions to address them effectively." The paper concludes that energy is a crucial element, noting that "interventions that help food system actors reduce their dependence on fossil

[30] IRENA and FAO, *Renewable energy for agrifood systems – Towards the Sustainable Development Goals and the Paris Agreement,* Abu Dhabi and Rome (2021), https://doi.org/10.4060/cb7433en.

[31] V. https://www.fao.org/energy/news/news-details/en/c/1731916/

[32] United Nations Development Programme, *Supporting Food Systems Transformation Towards Sustainability and Resilience* (2024).

[33] UNDP, *Supporting Food Systems Transformation*, cit., p. 6.

fuels will have both climate change and economic (production cost) benefits."

The aim of assisting countries through systemic, country-led and tailored support to translate their commitments into effective actions toward achieving sustainable food systems by 2030 – while leveraging the broader capacities of the United Nations system – led to the establishment of the *UN Food Systems Coordination Hub*[34] following the first UN Food Systems Summit. This gathering was held during the United Nations General Assembly in New York on 23 September 2021 and concluded with the issuance of the UN Secretary-General's Chair Summary and Statement of Action of the same date. The Hub's specific function is to help countries translate their commitments into concrete actions, supporting them, as a coordination and liaison resource, countries in promoting their national pathways towards sustainable food systems and directly contributing to the achievement of the Sustainable Development Goals by 2030. The Hub also actively participates in the Conference of the Parties (COP) of the UN Framework Convention on Climate Change, promoting the integration of food systems transformation into global climate action and reaffirming the crucial role of sustainable and resilient food systems in achieving the goals of the Paris Agreement and the *SDGs.*

The holistic approach underpinning the 2030 Agenda – which closely interlinks the SDGs – their strong interaction with the objectives of the Paris Agreement on climate change, the findings of the first *Global Stocktake* at COP28, and the important commitments in the energy sector undertaken at COP29,[35] as highlighted in particular by FAO, other UN specialized agencies,

[34] The *UN Food Systems Coordination Hub* is hosted by FAO on behalf of the UN system, within the Office of the FAO Director General. It is managed under the operations of FAO's Office of Sustainable Development Goals. The Hub is a hybrid structure when it comes to working space, with some of its members located at FAO headquarters and others working remotely from other UN Agencies, Funds and Programmes. FAO provides overall administrative and programmatic support for the operations of the Hub.

[35] The *COP29 Global Energy Storage and Grids Pledge*, the *COP 29 Green Energy Pledge: Green Energy Zones and Corridors* and the *COP29 Hydrogen Declaration.*

and COP declarations, clearly demonstrates the key role of sustainable agriculture in building sustainable food systems, and consequently the fundamental role of both in advancing the ecological transition.[36]

4. *The FAO Roadmap for Enhancing Sustainability in Geographical Indication Systems*

In the context of its strong commitment to supporting the achievement of the SDGs and the targets of the 2030 Agenda by promoting the transformation of agrifood systems, FAO has long pursued a territorial approach aimed at recognizing the importance of local and regional policies for sustainability. This approach is a fundamental pillar in rural areas, where the economy is dominated by the agriculture and food sector.

The key instrument of this territorial approach is geographical indications (GIs), which enhance the quality and protect the reputation of certain products thanks to their specific geographical origin. By bringing together local producers and other local stakeholders and adding value to local products, GIs can stimulate social and economic development, improve the conservation of natural and cultural environments, and contribute to healthy diets.

Since 2016, FAO has been collaborating with the *Organization for an International Geographical Indications Network* (oriGin), developing several initiatives to highlight and strengthen the relationship between GI systems and sustainability. This collaboration led to the issuance of a *Sustainability Strategy for GIs*, endorsed by GI organizations worldwide at the 2017 oriGin

[36] On the ecological and energy transition, see extensively: L. Ammannati (ed), *La transizione energetica* (Torino, Giappichelli, 2018); P. D. Cameron, X. Mu, V. Roeben (eds), *The Global Energy Transition: Law, Policy and Economics for Energy in the 21st Century* (Oxford, Hart Publishing 2021); F. Vetrò, "Sviluppo sostenibile, transizione energetica e neutralità climatica", in *Rivista italiana di diritto pubblico comunitario*, XXXII (2022) p. 53 ff.; A. Bonomo, "Governare la transizione ecologica: tra nuovi interessi e nuovi conflitti", in *Rivista trimestrale di diritto pubblico*, 2024/3, p. 621 ff.; M. Brocca, N. Ferrucci (eds), *Diritto forestale e transizione ambientale* (Torino, Giappichelli 2025).

General Assembly, paving the way for GI organizations to undertake sustainability roadmaps adapted to local contexts and development needs.

In 2024, FAO and oriGIn issued the guidelines *"Developing a roadmap towards increased sustainability in geographical indication systems – Practical guidelines for producer organizations to identify priorities, assess performance and improve the sustainability of their geographical indication systems"*.

These *Sustainability Strategy Guidelines for Geographical Indications* (SSGI) provide practical guidance to GI organizations and are intended to help them develop their own participatory and inclusive processes to prioritize local challenges, assess the sustainability status of agreed priorities, and formulate their own improvement plans through cooperation and consensus. The guidelines also identify a series of practical steps that producer associations can follow to develop their own sustainability roadmap.

These guidelines offer a bottom-up approach that enables GI producer associations to address complex local realities and challenges.

The primary objective of the SSGI is to provide organizations working with geographical indications with a framework and tools to embark on a sustainability journey. The SSGI were developed after a careful review of existing sustainability initiatives and evaluation frameworks as well as the selection of their best elements.

The SSGI framework is organized around four pillars, including environmental integrity, social well-being, economic resilience and good governance:

– Environmental integrity refers to maintaining life support systems essential for human survival by minimizing negative environmental impacts and fostering positive ones.
– Social well-being concerns meeting basic human needs and providing the rights and freedoms necessary to pursue a better quality of life.
– Economic resilience: in a world plagued by crises, it is more important to focus on economic resilience than on economic development; this dimension is directly linked to the fulfillment of human needs.

A total of 22 sustainability themes are classified under these

four pillars (five under good governance, six under environmental integrity, four under economic resilience and seven under social well-being).

These themes comprise a total of 62 sustainability topics, offering a wide range of sustainability priorities to choose from. GI practitioners are encouraged to become familiarized with this structure of pillars, themes and topics, as well as with the standard definitions of each topic.

Sustainability indicators are used to assess sustainability performance across selected priority topics. In total, 442 indicators are organized across the various pillars, themes and topics: 135 indicators address the economic dimension, 116 the environmental integrity dimension, 89 the good governance dimension and 102 the social dimension. Each topic may be measured by one or more indicators. The SSGI sustainability indicators are drawn from several reputable sources, including *inter alia* SAFA, the SDGs and the Global Reporting Initiative (GRI).

FAO promotes the development of GI systems to ensure that this tool contributes effectively to multiple objectives. These include preserving food heritage, enhancing dietary diversity through the protection of traditional and biodiversity-related food products, and maintaining nutritional quality through traditional processing methods. Other objectives focus on to strengthening rural livelihoods by building inclusive value chains, conserving the natural resources used in GI production, and improving coordination between public and private actors in support of sustainable development. FAO observes and highlights, however, that GI organizations – producer groups responsible for applying for GI protection and implementing GI specifications – are often overlooked as key actors within GI systems.

5. *Concluding Remarks, with Particular Reference to the FAO's Contribution to Bringing Sustainable Agrifood Systems to the Forefront of Climate Action at COP 30*

FAO, continuing its incisive action at COP28 and COP29, strongly supported the *Global Climate Action Agenda* (GCAA)

of the COP30 Presidency at COP30, held in Belém from 10 to 22 November 2025. In particular, FAO supported the thematic axis "Transforming agriculture and food systems", which has as its key objectives land restoration and the promotion of sustainable agriculture, building more resilient, adaptable and sustainable food systems, and ensuring equitable access to adequate food and nutrition for all.[37]

The COP30 GCAA is "a renewed framework to accelerate action",[38] capable of mobilizing civil society, businesses, investors, cities, states, and countries to accelerate the implementation of what has already been negotiated. It builds on the results of the first *Global Stocktake* (GST-1) and responds to the need to accelerate, in particular, the implementation of the *Global Stocktake* and the full implementation of the Paris Agreement.

This focus on implementation is made explicitly in the *Global Mutirão: Uniting humanity in a global mobilization against climate change* decision.[39] In Chapter II ("From negotiation to implementation: Paris Agreement policy cycle fully in motion"), the Conference of the Parties "[r]esolves to decisively transition to a focus on the implementation of the Paris Agreement and decisions adopted since its first session" (paragraph 15). The acceleration of implementation is further emphasized in Chapter III "Responding to urgency: Accelerating implementation, solidarity and international cooperation."[40]

[37] *Global Climate Action Agenda at COP30 Outcomes Report*, 21 November 2025, Advanced Unedited Version.

[38] *Global Climate Action Agenda at COP30, Outcomes Report*, cit., p. 4.

[39] FCCC/PA/CMA/2025/L.24, 22 November 2025.

[40] In particular, see the establishment of the *Global Implementation Accelerator*, in paragraph 41 of the *Global Mutirão* decision, where the Conference of the Parties "Decides, in responding to urgency, gaps and challenges, accelerating implementation, solidarity and international cooperation, to launch the *Global Implementation Accelerator*, as a cooperative, facilitative and voluntary initiative under the guidance of the Presidencies of the seventh and eighth sessions (November 2026) of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to accelerate implementation across all actors to keep 1.5°C within reach and supporting countries in implementing their nationally determined contributions and national adapta-

At the same time, continuity between COP30 and COP28 is reflected in the *Global Mutirao* decision (seventh sentence of the Preamble: "Also recalling decision 1/CMA.5, on the outcome of the first global stocktake" which refers to the findings of the *Global Stocktake,* in particular Article 27. The preamble further recognizes that "limiting global warming to 1.5 °C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050."

Guided by *Global Stocktake* (GST) findings, the *Global Climate Action Agenda* (GCAA) is structured around six thematic axes,[41] covering mitigation, adaptation, and means of implementation and thirty key objectives, to be pursued through multiple solutions. The solutions being advanced through the COP 30 GCAA under each axis represent catalytic, cross-initiative efforts with the highest potential for system transformation; each responds to a clearly identified implementation gap and many are supported by a *Plan to Accelerate Solutions* (PAS), which are collective efforts by multiple initiatives to resolve barriers to implementation.[42]

tion plans taking into account the decisions referred to in paragraph 15 above, such as the United Arab Emirates Consensus."

Furthermore, paragraph 42 of the *Global Mutirão* decision provides for the launch of the *Belém Mission to 1.5*, stating that the Conference of the Parties "Also decides to launch, under the guidance of the Presidencies of the sixth, seventh and eighth sessions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, the 'Belém Mission to 1.5', aimed at enabling ambition and implementation of nationally determined contributions and national adaptation plans, to reflect on accelerating implementation, international cooperation and investment in nationally determined contributions and national adaptation plans across mitigation and adaptation, and requests those Presidencies to produce a report summarizing the work as they conclude the work by the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement."

[41] Transitioning Energy, Industry, and Transport; Stewarding Forests, Oceans and Biodiversity; Transforming Agriculture and Food Systems; Building Resilience for Cities, Infrastructure and Water; Fostering Human and Social Development; and the final cross-cutting axis of Unleashing Enablers and Accelerators, including on Finance, Technology, and Capacity Building.

[42] *Global Climate Action Agenda at COP 30, Outcomes Report*, cit., p. 5 ff.

FAO supports the COP30 Presidency's Global Climate Action Agenda (GCAA) under Axis 3 "Transforming agriculture and food systems" by promoting agrifood solutions for the climate action through a range of plans and projects, and by playing a central role in their implementation.

Among the initiatives focused on land restoration and the recovery of degraded lands, is the *New Finance Accelerator* RAIZ (*Resilient Agriculture Investment for Net-Zero Land Degradation*)[43] which aims to restore millions of hectares of degraded agricultural land worldwide and is designed to help countries unlock blended finance for large-scale agricultural land restoration. RAIZ supports governments in mapping degraded land, identifying investable solutions and assessing the investment needs, as well as designing optimal financing mechanisms that combine public, private, and multilateral capital. By convening governments and investors, through structured partnerships and shared learning, RAIZ helps countries replicate successful financing models – such as EcoInvest – and mobilize billions of dollars to restore farmland, while advancing climate, biodiversity, and food-security goals simultaneously. RAIZ is implemented under the *FAO FAST* (Food and Agriculture for Sustainable Transformation) *Partnership*, with technical support from the UNCCD G20 Global Land Initiative, the Food and Land Use Coalition, the Green Climate Fund (GCF), CGIAR, the World Bank and others partners.

The TERRA (*Together for the Expansion of Resilient and Restorative Agroforestry and Agroecology*) Plan[44] focuses on accelerating solutions for family farmers, cooperatives and producer associations, including through finance and technical assistance, with FAO support through the Forest and Farm Facility. The Plan sets out a coordinated global pathway to scale agroecology and agroforestry as solutions to the climate crisis, biodiversity loss and food insecurity. Centered on family farmers, Indigenous Peoples and traditional communities, the Plan aims to restore

[43] *Global Climate Action Agenda at COP 30, Outcomes Report*, cit., p. 23. See also https://climateaction.unfccc.int/assets/documents/80_.pdf.

[44] *Global Climate Action Agenda at COP 30, Outcomes Report*, cit., p. 24.

biodiversity, strengthen climate resilience, enhance food and nutrition security and generate decent rural incomes by accelerating the transition from conventional agrifood systems to resilient agroecological and agroforestry models. It also seeks to scale agroecological transitions, protect productive forest landscapes and position family farmers as central agents of climate mitigation, adaptation and sustainable development.

The *Bioeconomy Challenge*[45] is a global, multi-stakeholder platform aimed at translating bioeconomy principles into measurable actions and scalable solutions by 2028. It is a 3-year initiative designed to develop shared metrics, market frameworks, and financing mechanisms for the emerging global bioeconomy sector, with FAO supporting work on metrics and indicators.

Under Axis 2 – *Responsible management of forests, oceans and biodiversity*, the *Tropical Forest Forever Facility* (TFFF)[46] was presented at COP30. Supported by FAO, this Brazil-led financial instrument provides long-term payments to tropical countries based on hectares of standing tropical moist forests. It represents an innovative financing mechanism that seeks to reward countries and forest stewards for conserving and restoring tropical forests. The TFFF aims to deliver continuous long-term payments for hectares of standing forests, explicitly recognizing the full range of ecosystem services provided by such forests, such as climate cooling, water regulation and biodiversity benefits.

The *COP30 Plan to Accelerate Fertilizer Solutions*[47] has the key objective of achieving a global reduction in greenhouse gas emissions fertilizer production and optimizing global nutrient use efficiency (NUE) by 2035. It sets out concrete actions across policy, supply, and demand. Supporting organizations include CGIAR, FAO, the International Energy Agency, the Internation-

[45] *Ivi*, p. 54.

[46] *Ivi*, p. 16. See also G.M. Galbiati *et al*, "Climate-related development finance to agrifood systems – Global and regional trends" Report 2025 (FAO, Rome 2025), p. 124.

[47] *Global Climate Action Agenda at COP 30, Outcomes Report*, cit., p. 25. See also https://climateaction.unfccc.int/assets/documents/51_.pdf.

al Fertilizer Association, UNIDO, the World Bank, the World Resources Institute, and major industry and finance coalitions.

At COP30, FAO also presented a series of reports and publications demonstrating how sustainable agri-food systems are a solution to the climate crisis and highlighted the critical role of climate-related development finance for agrifood systems.

In its report "Climate-related development finance to agrifood systems – Global and regional trends. Report 2025",[48] as part of the *Food and Agriculture for Sustainable Transformation (FAST) Partnership Work Plan*, FAO first of all highlighted the crucial role of climate-related development finance for agri-food systems. It emphasized incisively that "agrifood systems are not just vulnerable to climate impacts – they are central to the solution. Every dollar invested in sustainable and resilient agrifood systems delivers on multiple fronts: strengthening livelihoods, ensuring food for all, lowering emissions, and protecting the biodiversity and environment we all depend upon"; yet current finance flows have failed to realize this potential.

The FAO report shows that agrifood systems continue to be severely underfunded, despite their potential:

> Sectors related mainly to food production – namely crop production, forestry, livestock and fisheries – continue to be underfunded, with their climate-related development finance declining by 14 percent in 2023 and accounting for only 4 percent of total climate-related development finance. The disparity is stark and unsustainable.[49]

Consequently, the report stresses the urgent need to close this financing gap, in particular through the FAST Partnership, as the most consistent COP-to-COP mechanism to engage on agrifood systems, in order to ensure that finance for agrifood systems is not marginal but placed at the center of the discussions at COP and the implementation of their outcomes.[50]

During the COP 30, FAO emphasized that science-based

[48] G.M. Galbiati, cit.
[49] *Ivi*, p. 21.
[50] *Ivi*, p. vi.

agrifood solutions can play a pivotal role in reducing emissions, enhancing carbon sequestration, restoring ecosystems, and strengthening resilience.

Particularly significant in this regard is the report published jointly by FAO, the Stockholm Environment Institute, Conservation International, and the Nature Conservancy, *Climate and ecosystem service benefits of forests and trees for agriculture* in 2025.[51] This report synthesizes the latest science on how forests and trees regulate climate, water and ecosystem functions that directly underpin agricultural performance and emphasizes that promoting synergies between forests and agriculture is essential for a sustainable transformation of the agrifood systems. It examines their positive influence on temperature, rainfall patterns, water availability, soil fertility, pollination and pest management across multiple scales. Unlocking these benefits requires integrated landscape approaches, cross-sector governance, and policies that recognize forest conservation, restoration and sustainable use as strategic investments in food security, public health and climate resilience. Promoting forest-agriculture synergies thus offers a pathway toward more productive, sustainable and equitable agrifood systems.

The report further highlights that forests and trees are powerful but often undervalued allies, for agricultural productivity and resilience.[52] It notes that restoring 50% of deforested land could reduce the Earth's surface temperature by 1 °C[53] and emphasizes that

> an integrated approach to landscape and natural resource management – forests and water – at various scales is essential for ensuring that the benefits of forests and trees for agriculture are optimized. Decision-support systems that consider trade-offs and synergies among the forest ecosystem services provided are emerging as key tools to facilitate this.[54]

[51] FAO, SEI, CI & TNC, *Climate and ecosystem service benefits of forests and trees for agriculture* (Rome, Stockholm, and Arlington 2025).

[52] *Ivi*, p. 1.

[53] *Ivi*, p. 38.

[54] *Ivi*, p. 53.

From this perspective, the *Highlights from the Extreme Heat and Agriculture Report*[55] published jointly by FAO and WMO (*World Meteorological Organization*), in 2025 and drawn from the forthcoming FAO-WMO report, explores the impact of extreme heat on agricultural producers and crops, livestock, fisheries, aquaculture, and forests worldwide. Drawing on recent scientific evidence and country case studies, the report highlights the independent and complex risks posed by extreme heat, emphasizes the urgency of mitigation measures, and presents pathways to strengthen resilience and sustainability in the agricultural sectors.

The 2025 *Highlights from the extreme heat and agriculture report*[56] incisively point out that while this report focuses on adaptation, the ultimate solution to the challenge of extreme heat lies in ambitious climate change mitigation. The impacts of extreme heat on agriculture create a dangerous feedback loop: heat-induced productivity losses and agricultural expansion increase land-use change emissions. Furthermore, extreme heat can turn natural carbon sinks such as forests into net carbon sources, as evidenced by increasing emissions from wildfires. This cycle, where the impacts of warming drive further emissions and thus more warming, underscores the reality that adaptation has hard limits. Without a decisive global effort to reduce greenhouse gas emissions, the agricultural sector will face challenges that no amount of adaptation can overcome, threatening the viability of the entire global food system.

Along these lines, the 2025 White Paper *Update on scientific findings on the interactions between agriculture, food systems and climate change*[57] reports the latest scientific findings relating to agriculture, food systems and climate change. It builds on the *Intergovernmental Panel for Climate Change (IPCC) Special Re-*

[55] FAO & WMO, "Highlights from the Extreme Heat and Agriculture Report (2025)", available on website: https://openknowledge.fao.org/handle/20.500.14283/cd7572en.

[56] *Ibid.*, p. 7.

[57] E. Milne *et al*, "Update on Scientific Findings on the Interactions between Agriculture, Food Systems and Climate Change", Environment and Natural Resources Management Working Paper No. 110 (Rome, FAO 2025).

port on Climate Change and Land and the contributions of Working Groups II and III to the *IPCC's Sixth Assessment Report*. Although not exhaustive, it examines what is new (since 2018) and what still needs to be researched in terms of agriculture and agrifood systems, including climate impacts, adaptation and mitigation. The paper aims to bring together, in one place, information that can be used by the Food and Agriculture Organization of the United Nations (FAO), other United Nations agencies, the global research community and the IPCC, with the objective of synthesizing information that could inform future IPCC reports on interactions between agriculture, food systems and climate change.

Overall, it can be noted that the practices of the United Nations and its specialized agencies, particularly the FAO, have contributed significantly to highlighting the environmental and intergenerational dimensions of the sustainability of agriculture and food systems, in close correlation with the holistic concept of sustainable development developed in the legal doctrine.

It is also important to highlight that the decision, *Global Mutirão: Uniting humanity in a global mobilization against climate change*, in paragraph 13, recognizes "the critical role of United Nations organizations, specialized agencies, the secretariat, regional and international support programs, bilateral and multilateral agencies, multilateral development banks and other financial institutions in fostering cooperation on and supporting the implementation of the Paris Agreement". In paragraph 39 (Chapter III, "Responding to urgency: Accelerating implementation, solidarity and international cooperation") it

> [w]elcomes the offer of technical assistance for the preparation and implementation of nationally determined contributions and invites relevant United Nations organizations, specialized agencies, the secretariat, including through its regional collaboration centers, regional and international support programs, and bilateral and multilateral agencies to enhance the provision of technical assistance and support to developing country Parties to facilitate their preparation and implementation of nationally determined contributions.

At the same time, these developments make it possible to out-

line the emerging leading role of sustainable agriculture and food systems in the implementation of the *SDGs,* as well as in the ongoing ecological transition – not only in mapping out pathways to be followed, but also in supporting and sustaining their implementation.

THE RELEVANCE OF ENVIRONMENTAL SUSTAINABILITY IN INTERNATIONAL DISASTER LAW

ELEONORA BRANCA*

SUMMARY: 1. Introduction. – 2. Defining Environmental Sustainability through Its Evolution. – 3. The Legal Nature of Sustainable Development and Environmental Sustainability. – 4. The Relevance of Disasters in the Discourse on Sustainable Development. – 5. The Relevance of Environmental Sustainability in International Disaster Law: Disaster Risk Reduction. – 6. The Relevance of Environmental Sustainability in International Disaster Law: Climate Change Adaptation. – 7. Conclusions.

1. *Introduction*

The Chapter explores the relevance and implications of environmental sustainability in International Disaster Law (IDL). First, the meaning of environmental sustainability will be elucidated. The study examines the notion of environmental sustainability highlighting how it has evolved within the broader discourse on sustainable development. Attempts will be made to analyse environmental sustainability in relation with interrelated concepts such as environmental protection and climate change, with the view of identifying whether they overlap or rather point at diverse notions. Then, the legal nature of environmental sustainability will be discussed in light of the evolution underwent in relevant international jurisprudence. Once the notion of environmental sustainability will be clarified, the analysis will move on to investigate whether this concept is relevant for international disaster law (IDL) and vice versa. The study will undertake a two-tiers approach. On the one hand, the article will explore what will be called the "sustainable development tier", examining whether the field of sustainable development has duly con-

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sidered the relevance of disasters. This part of the analysis will focus on the study of relevant documents such as the Brundtland Report, the 1992 Rio Declaration on Environment and Development and the Agenda 21, the Agenda 2030, and its Sustainable Development Goals as well as the 2022 United Nations General Assembly resolution that recognized the right to a clean, heathy and sustainable environment as a human right. On the other hand, the "disaster law tier" of the analysis will inquire whether environmental sustainability has been incorporated in IDL by examining relevant IDL legal frameworks, including the Hyogo Framework, the Sendai Framework the International Law Commission Draft Articles on the Protection of Persons in the Event of Disasters and the International Federation of Red Cross and Red Crescent Societies Guidelines on Disaster Risk Governance. Also, some elements of recent IDL practice will be considered, namely the Early Warning for All Initiative and disaster risk reduction actions known as "nature-based solutions". This "disaster law tier" will revolve around the analysis of two key concepts such as disaster risk reduction, the integration of climate change adaptation in disaster risk management (DRR). Conclusions ensue.

2. *Defining Environmental Sustainability through Its Evolution*

Environmental sustainability can be defined as one of the three dimensions of sustainable development, that also includes economic and social sustainability.[1] It has been argued that the meaning and scope of sustainable development is in constant evolution, depending on the development of the society.[2] For this

[1] Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21 October 2015, p. 1: "The 17 Sustainable Development Goals and 169 targets […] are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental."

[2] J.E. VINUALES, "The Rise and Fall of Sustainable Development", in *Review of European, Comparative and International Environmental Law*, XXII (2013), pp. 3-13; see also U. BEYERLIN, "Sustainable Development", in *Max*

reason, the present analysis aims at defining the concept under consideration by elucidating the main traits of its evolution.

The concept of sustainability first emerged in the context of international legal discourse through the prism of sustainable development. Its most authoritative formulation appeared in the 1987 Report of the World Commission on Environment and Development "Our Common Future", commonly known as the Brundtland Report. The Report defined sustainable development as the development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".[3] This definition has since been repeatedly reaffirmed in international declarations, resolutions, and judicial reasoning. The Brundtland Report did not elaborate specifically on the concept of environmental sustainability, rather the notion was mentioned only few times in the lengthy document at hand. For example, when dealing with the exploitation of natural resource in Latin America, the Report mentioned the fact that "the approach to the debt problem raises questions of economic political, and environmental sustainability."[4] Moreover, various concepts were associated in the Report with the issue of sustainable development and the environment, such as "the sustainability of ecosystems",[5] "the sustainability of forest exploitation" and "overall environmental and ecosystem conservation".[6]

Later in 1992, the Rio Declaration on Environment and Development, and its programmatic expression the Agenda 21, furthered the use of various notions associated with the protection of the environment for the purpose of achieving sustainable development. For example, Principle 4 of the Rio Declaration af-

Planck Encyclopedia of Public International Law (Oxford, OUP October 2013), N. SCHRIJVER, "The Evolution of Sustainable Development in International Law: Inception, Meaning and Status", in *Recueil des Cours de l'Académie de droit international de la Haye*, CCCXXIX (2007), pp. 217-412.

[3] Report of the World Commission on Environment and Development: Our Common Future, UN Doc. A/42/427, 4 August 1987 (Brundtland Report), p. 54.

[4] *Ivi*, p. 83.

[5] *Ivi*, p. 76.

[6] *Ivi*, p. 138.

firmed that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[7] Principle 7, which enunciated the key principles of cooperation and common but differentiated responsibilities affirmed that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities." The Agenda 21, that operationalized the concept of sustainable development and the principles elaborated in the Rio Declaration, focused on the notion of "environmentally sound management" of various resources, as for example, land, sea, mountains, forests and fresh waters.[8]

Sustainable development is commonly understood as encompassing two interdependent and foundational dimensions of equity, namely intergenerational and intragenerational equity. Intergenerational equity, corresponding to the "sustainable" component of the notion, lies at the heart of the definition articulated in the Brundtland Report. It requires that, in pursuing development, States preserve the environmental capital held in trust for future generations and ensure its transmission in conditions comparable to those in which it was received. Intragenerational equity, by contrast, gives substantive content to the "development" dimension of sustainable development and requires a fair distribution of the benefits and burdens of economic and social progress within the present generation, both domestically, within individual societies, and internationally, between developed and developing States. "Intergenerational equity is an expression of the idea that present generations are trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations."[9]

[7] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1., (Vol. 1), Annex I, 3-14 June 1992 (Rio Declaration).

[8] Agenda 21, UN Doc. A/CONF.151/26/Rev.l (Vol. l), Annex II, 3-14 June 1992.

[9] *Ivi*, para. 156.

In other words, until the 1990s, the idea of sustainable development *vis à vis* the environment was mainly associated with the exploitation of the Planet's resources for the benefit of human wellbeing. This exploitation (*rectius* "management") of natural resources had to be sustainable with the view of preserving the environment to be utilized also by future generations. In sum, environmental sustainability hardly emerged as an autonomous notion and was associated with other concepts such as environmental degradation, ecosystem preservation, and more broadly with environmental protection.

Despite its somewhat "predatorial" conception, the principle of sustainable development has had a great impact in the development of multilateral treaties on environmental protection and climate change.[10] The 1992 Convention on Biological Diversity makes various references to the sustainability and sustainable development, for example Article 1 included "the sustainable use of the components of biological diversity" among the Convention's objective.[11] Also, the United Nations Convention to Combat Desertification adopted in 1994, setting forth the general obligations of State parties under Article 4, affirms that due attention shall be given to "establishing an enabling international economic environment conducive to the promotion of sustainable development."[12]

As to climate change treaties, the United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1992, frames sustainable development as a guiding principle for State action, providing in Article 3(4) that Parties have a right to, and should, promote sustainable development, and that policies and measures to protect the climate system should be appropriate to the specific conditions of each Party and integrated with national

[10] On the critique of sustainable development and anthropocentrism see L.J. Kotzé, S. Adelman, "Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope", in *Law and Critique*, XXXIV (2023), pp. 227-248.

[11] United Nations Framework Convention on Climate Change, New York, 9 May 1992, UNTS vol. 1771, p. 107.

[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, UNTS vol. 2303, p. 162.

development programs. This approach was reaffirmed and operationalized in the Kyoto Protocol of 1997, whose Article 2(1), requires Annex I Parties to implement their emission limitation and reduction commitments in a manner that promotes sustainable development. The Paris Agreement of 2015 further consolidates this trajectory by explicitly situating sustainable development at the core of the climate regime: Article 2(1) identifies sustainable development and efforts to eradicate poverty as guiding considerations for the implementation of the treaty, while Article 4 links long-term temperature goals with nationally determined contributions formulated in the context of sustainable development.[13]

In 2015, with the adoption of the Agenda 2030 and the related 17 sustainable development goals (SDGs), the principle of sustainable development was mainstreamed in the public debate. On that occasion, the concept was structured in its three-fold dimensions, giving relevance to environmental sustainability. However, when examining the SDGs it shall be noted how environmental sustainability is considered a cross-cutting issue that merges with other notions linked to sustainable development, in general, and with environmental protection, in particular. Issues of environmental sustainability are not treated as an unicum, under a common goal but rather are scattered across multiple goals and targets, as for example SDG 6 on clean water and sanitation, SDG 7 on affordable and clean energy, SDG 8 on decent work and economic growth (target 8.4 on the preservation from environmental degradation), SDG 11 on sustainable cities and communities (target 11.6 on the reduction of the adverse per capita environmental impact of cities), SDG 12 on responsible consumption and production (target 12.2 on the achievement of the sustainable management and efficient use of natural resources), SDG 13 on climate action, SDG 14 on life below water and SDG 15 on life on land to "protect, restore and promote sustainable use of terrestrial ecosystems, sustainability manage forests, com-

[13] Paris Agreement, Paris, 12 December 2015, UNTS Paris Agreement, vol. 3156, p. 79.

bat desertification, and halt and reverse land degradation and halt biodiversity loss".[14]

One of the latest developments in the evolution of environmental sustainability is linked to the growing articulation of environmental protection as a human right. This "human rights turn" emerged from broader debates on the linkages between human rights and the environment, and consisted in a series of actions at the UN level as, for example, the appointment in 2015 of a Special Rapporteur on the human right to a healthy environment.[15] Also, in October 2021, the United Nations Human Rights Council adopted Resolution 48/13, formally recognizing the right to a clean, healthy, and sustainable environment as a human right and inviting States to implement it through policies and cooperation; the Resolution also affirmed that its promotion requires full implementation of multilateral environmental agreements under international environmental law principles. Building on this, in July 2022, the UN General Assembly (GA) adopted Resolution A/76/L.75, recognizing the human right to a clean, healthy, and sustainable environment and calling on States and other stakeholders to strengthen cooperation and policy measures to ensure this right.[16]

These normative developments have begun to influence judicial processes, giving rise to the field of strategic litigation in environmental and climate change matters. For example, in *Verein KlimaSeniorinnen Schweiz v. Switzerland* the European Court of Human Rights held that Switzerland violated human rights by failing to take adequate climate measures, marking an important instance of rights-based climate litigation, and advisory opinions

[14] R. Pavoni, D. Piselli, "The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation", in *Veredas Do Direito: Direito Ambiental E Desenvolvimento Sustentável*, XIII (2016), pp. 13-48; R. B. Swain, Y. Min (eds), *Interlinkages between the Sustainable Development Goals* (Cheltenham, Edward Elgar 2023).

[15] Human Rights and the Environment, UN Doc. A/HRC/RES/28/11, 7 April 2015; B. Peters, "Clean and Healthy Environment, Right to, International Protection", in *Max Planck Encyclopedia of Public International Law* (Oxford, OUP January 2021).

[16] UN Doc. A/HRC/RES/48/13, 8 October 2021.

by the Inter-American Court of Human Rights have articulated a human right to a stable climate with accompanying State obligations.[17]

3. *The Legal Nature of Sustainable Development and Environmental Sustainability*

Once the content and the evolution of the notion of environmental sustainability have been elucidated, some considerations as to the legal nature of the concept under consideration are warranted. It has been demonstrated that environmental sustainability is intrinsically linked to the notion of sustainable development, being one of the three dimensions thereof. The following analysis will centre on the legal nature of sustainable development.

It has been argued that sustainable development "does not fit within traditional categories of normativity", while it should be considered a powerful hermeneutical tool.[18] The contribution of the case law of the International Court of Justice (ICJ) and of arbitration tribunals has played a critical role in elucidating the legal nature of the notion under consideration. It will be shown how sustainable development has been considered in turn an ob-

[17] European Court of Human Rights (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application no. 53600/20, Judgment of 9 April 2024; Inter-American Court of Human Rights, Advisory Opinion OC-23/17, Environment and Human Rights (*State Obligations in relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity*), 15 November 2017. A.V. Rydberg, "Climate Change Litigation: General Perspectives and Emerging Trends", in *International Community Law Review*, XXVI (2024), pp. 347-366; M. Adigun, "Climate Change Litigation before International Human Rights Tribunals in Africa the Role of Advisory Opinions", in *International Community Law Review*, XXVII (2025), pp. 136-161.

[18] V. Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm", in *European Journal of International Law*, XXIII (2012), pp. 377-400, 378; R.E. Kim, "The Nexus between International Law and the Sustainable Development Goals", in *Review of European, Comparative and International Environmental Law*, XXV (2016), pp. 15-26.

jective to achieve, a general principle of international law and a principle that guides the interpretation of other international rules.

In the *Gabcíkovo-Nagymaros Project* case, the ICJ acknowledged the necessity of reconciling economic development with environmental protection, framing this requirement within the concept of sustainable development, while refraining from elucidating its precise legal status.[19] Subsequently, in the *Pulp Mills* case, the ICJ reaffirmed its recognition of sustainable development and characterized it as an "objective" of the international community, emphasizing the intrinsic interconnectedness between the equitable and reasonable utilization of shared resources and the need to strike a balance between economic development and environmental protection, which it identified as the core of sustainable development.[20] Moreover, in the *Arbitration regarding the Iron Rhine Railway* between Belgium and the Netherlands, the Tribunal affirmed that when development activities may cause significant environmental harm, there exists a duty to prevent, or at least mitigate, such harm, a duty which it held "has now become a principle of general international law."[21] Finally, the ICJ, with the recent *Climate Change* Advisory Opinion categorized sustainable development as a principle, functional to the interpretation of some environmental protection and climate change norms both of treaty and customary nature. In the words of the Court, "[g]iven its continuous and uncontested universal recognition, […] the principle of sustainable development guides the interpretation of certain treaties and the determination of rules of customary international law, including the duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment."[22] There is an aspect

[19] ICJ, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, 25 September 1997), ICJ Rep. 1997, 7, para. 140.

[20] ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentine v Uruguay)*, 20 April 2010, ICJ Rep. 2010, 14.

[21] *Arbitration regarding the Iron Rhine ('Ijyeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award 27 RIAA 35, 24 May 2005, paras. 35 and 59.

[22] ICJ, *Obligations of States in Respect of Climate Change (Advisory Opin-*

that remains unclear, namely the interplay between the principle sustainable development and the emergence of the human right to a clean, healthy and sustainable environment. In the *Climate Change* Advisory Opinion, the ICJ stated that "the effective enjoyment of a number of human rights cannot be fully realized if those who hold them are unable to live in a clean, healthy and sustainable environment."[23] However, as noted by several commentators, the Court has not recognized the right to a clean, healthy and sustainable environment as a human right.[24] Moreover, it shall be observed that the issue of the interplay between environmental sustainability and a human right to a sustainable environment remains unexplored both in the reasoning of the ICJ's Advisory Opinion and in the legal scholarship.

This brings us to consider what are the obligations generally associated with sustainable development. The International Law Association (ILA) 2002 Declaration of Principles of International Law Relating to Sustainable Development affirmed that States have a duty to ensure sustainable use of natural resources. Moreover, the principle of common but differentiated responsibilities was affirmed. Accordingly, States and relevant actors share a common duty to cooperate in achieving global sustainable development and environmental protection, but differentiation is warranted according to each State's contribution to environmental

ion), General List No 187, 23 July 2025 (*Climate Change* Advisory Opinion), para. 147. M. Wewerinke-Singh, "Harmonizing Sources, Hardening Duties Inside the ICJ's Advisory Opinion on Climate Change", in M.A. Tigre *et al.* (eds), *The ICJ's Advisory Opinion On Climate Change* (Berlin, Verfassungsbooks 2025), pp. 45-59; C.E. Foster, "The 2025 International Court of Justice Advisory Opinion on Obligations of States in Respect of Climate Change", in *International and Comparative Law Quarterly*, LXXIV (2025), pp. 1-35.

[23] *Climate Change* Advisory Opinion, cit., para. 389.

[24] C.E. Foster, "The 2025 International Court of Justice Advisory Opinion on Obligations of States in Respect of Climate Change", cit., pp. 14-15. See also H. Keller, "A Right to a Clean, Healthy and Sustainable Environment: Or Perhaps Not (Yet)?", in *Volkerrechtsblog*, 5 August 2025, available at www.volkerrechtsblog.de; R. Perera. "The ICJ's Recognition of an Autonomous Right to a Clean and Healthy Environment", in *EJIL:Talk!,* 19 August 2025, available at www.ejiltalk.org; C. Heri, "Human Rights in the ICJ's Climate Opinion", in *Verfassungsblog*, 1 August 2025, available at www.volkerrechtsblog.de.

problems, economic and developmental circumstances. Also, under the precautionary principle, States exercise sovereign rights to manage their natural resources but are concurrently responsible for ensuring that activities within their jurisdiction do not cause significant damage to the environment of other States or areas beyond national jurisdiction. This normative framework rests on a broader duty of cooperation, by which States must work jointly, in good faith, to eradicate poverty and advance equity in development opportunities, reflecting the collective pursuit of sustainable development.[25]

Against this backdrop, some conclusions can be drawn as to the content and legal nature of the concept of under consideration. Environmental sustainability can be defined as a component of the legal principle of sustainable development according to which the management and consumption of natural resources shall not preclude their exploitation and enjoyment by future generations. It represents one of the three dimensions of sustainable development, along with the social and economic aspects thereof. As a legal principle, it has played and keeps playing a crucial role both in generating and interpreting legal norms of treaty and customary nature in the field of international environmental protection and climate change law, as for example the duty of States to prevent and mitigate environmental harm, and the duty to cooperate for the protection of the environment. Taking into consideration the evolving nature of sustainable development, and thus of environmental sustainability, an hypothesis *de iure condendo* can be made that environmental sustainability may become in the future the object of a human right, namely a component of the right to a clean, healthy and sustainable environment. The principle of environmental sustainability therefore has a sectoral and functional character in international law. It focuses on environmental limits, ecosystem integrity, and long-term ecological resilience, while it supports broader sustainable

[25] International Law Association, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Resolution 3/2002, 2-6 April 2002.

development goals, it can also constrain human activities when they threaten environmental systems.

4. *The Relevance of Disasters in the Discourse on Sustainable Development*

The study will now consider, under the "sustainable development tier", whether the field of sustainable development has duly considered the relevance of disasters. This part will focus on the analysis of relevant documents such as the Brundtland Report, the 1992 Rio Declaration on Environment and Development, the Agenda 21, the Agenda 2023 and its Sustainable Development Goals.

The Brundtland Report noted the significant increase of "natural disasters", in particular floods and droughts, that occurred between the 1960s and the 1970s in Africa, India and Latin America, and identified the causes of these phenomena in the widespread deforestation and overcultivation.[26] The Report acknowledged the relationship between sustainable development and disasters, so much so that it resorted to the term "developmental disaster".[27] In this context, the document stressed the relevance of disaster prevention in the following terms:

> [a]ll major disaster problems in the Third World are essentially unsolved development problems. Disaster prevention is thus primarily an aspect of development and this must be a development that takes place within the sustainable limits.[28]

The linkages between sustainable development and disaster prevention and preparedness were also stressed by the UN General Assembly in the early 1991, in the context of human assistance, whereby resolution 46/182 affirmed that:

> Economic growth and sustainable development are essential for prevention of and preparedness against natural disasters and other

[26] Brundtland Report, cit., para. 15.
[27] *Ivi*, para. 19.
[28] *Ivi*, para. 17.

> emergencies. Many emergencies reflect the underlying crisis in development facing developing countries. Humanitarian assistance should therefore be accompanied by a renewal of commitment to economic growth and sustainable development of developing countries.[29]

The focus on disaster risk reduction also aligns with the "International Decade for Natural Disaster Risk Reduction", declared by the UN GA in December 1989 with resolution 44/236.[30]

In 1993, the Agenda 21 dealt with disaster prevention, especially as it concerned the improvement of human settlement planning and management, including land-use.[31] It promoted three types of activities in particular for disaster-prone countries, consisting of "the development of a 'culture of safety', pre-disaster planning and post-disaster reconstruction."[32] These three activities have shaped some of the key tasks at the core of international disaster law, such as disaster risk knowledge, disaster risk reduction and recovery, including the concept of build back better.[33]

Most of the concepts emerged from the documents at hand have been further elaborated, with a more contemporary lexicon in 2015, with the Agenda 2030. For example, target 1.5 of SGD 1 (end poverty in all its forms everywhere) indicated the need to "build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters." Also, SDG 11 (make cities and human settlements inclusive, safe, resilient and sustainable) kept

[29] Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, UN Doc UNGA Res. 46/182, 19 December 1991, Annex: Guiding Principles, para. 10.

[30] International Decade for Natural Disaster Risk Reduction, UN Doc. A/RES/44/236, 22 December 1989; see also the annexed International Framework of Action for International Decade for Natural Disaster Risk Reduction.

[31] UN Doc. A/RES/44/236, cit., para. 7.55.

[32] *Ivi*, para. 7.59.

[33] Cf. The Sendai Framework for Disaster Risk Reduction 2015-2030, UN Doc. A/CONF.224/CRP.1, 18 March 2015 (Sendai Framework) and IFRC, Disaster Risk Governance Guidelines, Geneva, 2024. See *infra* section 5.

the focus – already present in the Agenda 21 – on human settlement by setting two different objectives. Target 11.b foresaw the increase of "human settlements adopting and implementing integrated policies and plans towards inclusion, resource efficiency, mitigation and adaptation to climate change, resilience to disasters." Moreover, the target under consideration called on States to develop and implement "holistic disaster risk management at all levels", by referring to one of the key soft law instrument of international disaster law, namely the Sendai Framework for Disaster Risk Reduction 2015-2030.[34] Lastly, under SDG 13 (take urgent action to combat climate change and its impacts), target 13.1 indicated the objective of strengthening "resilience and adaptive capacity to climate-related hazards and natural disasters in all countries."

In sum, the study has highlighted how the relevance of disasters has evolved throughout the legal discourse on sustainable development over the last 30 years, while certain key concepts have emerged. First, disasters were mainly conceived as "natural" events, such as floods and droughts. Second, the link between unsustainable development, to be understood as unsustainable exploitation of natural resources (e.g. deforestation and intense cultivation), and disasters was identified. Third, to address disaster risk, the attention was initially placed on disaster prevention and preparedness to later encompass also other concepts as risk knowledge/awareness (the "culture of safety") and mitigation. Fourth, only with the Agenda 2030, the role of climate change was considered in relation to disasters, to the point of calling for an holistic approach to disaster risk management that has to include climate change adaptation to build disaster resilience, especially in the context of urban and human settlements. Fifth, environmental sustainability is not mentioned as an autonomous but interrelated concept of sustainable development.

[34] The Sendai Framework for Disaster Risk Reduction 2015-2030, UN Doc. A/CONF.224/CRP.1, 18 March 2015 (Sendai Framework).

5. *The Relevance of Environmental Sustainability in International Disaster Law: Disaster Risk Reduction*

The analysis conducted so far has demonstrated how the evolution of the debate on sustainable development has brought to the fore the notions of disaster risk reduction (DDR) and climate change adaptation (CCA). Building on this foundation, the study now turns to the "international disaster law tier" of the analysis to examine the extent to which, and the contexts in which, concepts associated with sustainability and environmental sustainability have been integrated into IDL. In particular, the analysis focuses on the two key concepts of DDR and CCA.

The relationship between IDL and sustainable development has been shaped by a significant shift in the conceptual understanding of disasters, gradually moving away from the notion of so-called "natural" disasters. As previously demonstrated, disasters were predominantly framed as natural disasters, with natural hazards – such as extreme weather events – perceived as the primary triggers of catastrophic events including floods, droughts, wildfires, volcanic eruptions, and tsunamis. Within this framework, disasters were commonly understood as inevitable calamitous events, often explained through concepts such as *force majeure* or "acts of God". At the same time, "technological" or "man-made" disasters, such as oil spills and nuclear accidents, were distinguished from natural disasters and understood as the unintended consequences of human activities and technological failures.

Progressively, the human footprint was recognized as ubiquitous both in increasing the exposure to existing hazards and in creating new hazards. The primary driver of this "Copernican revolution" can be identified in the global discourse on climate change and in the emergence of climate change law as an integral component of environmental protection law. This evolution is clearly reflected in the widespread use of the term "climate disasters" in the scholarly debate.[35] Thus, a progressive reconceptual-

[35] J. Peel, D. Fisher (eds), *The Role of International Environmental Law in Disaster Risk Reduction* (Leiden/Boston, Brill Nijhoff 2016); J. Peel, "Inter-

ization of disasters started, whereby they are increasingly understood as a combination of several factors, namely the features of a given hazard(s), the exposure and vulnerability of a given community to the hazard(s), combined with the coping capacities of the affected community.[36] Correspondingly, the core focus of international disaster law has gradually shifted from an emphasis on post-disaster response towards disaster risk reduction.[37] It has also been proposed to understand international disaster law as a continuum of required actions by States and affected communities, where the focus should rest on prevention and reconstruction, rather than on recovery only.[38] This section examines the notion of DRR and traces its evolution in international disaster law. In particular, the analysis will demonstrate how sustainable development and environmental protection concerns have shaped the development of DRR, influencing the relevant legal and policy frameworks.[39]

Disaster risk reduction can be defined as the systematic efforts aimed at preventing new and reducing existing disaster risk

national Environmental Law and Climate Disasters", in R. Lyster, R.R. Verchick (eds), *Research Handbook on Climate Disaster Law* (Cheltenham, Edward Elgar 2018), pp. 77-96.

[36] P. O'Keefe, K. Westgate, B. Wisner, "Taking the Naturalness out of Natural Disasters", in *Nature*, CCLX (1976), pp. 566-567; B. Wisner *et al.*, *At Risk: Natural Hazards, People's Vulnerability, and Disasters* (2nd ed., Abingdon/New York, Routledge 2004); G. Bartolini, "A Taxonomy of Disasters in International Law", in *Routledge Handbook of Human Rights and Disasters* (Abingdon/New York, Routledge 2018), pp. 10-26; R. Luporini, *Climate Change Adaptation, Disaster Risk Reduction and Human Rights in International Law* (Cham, Springer 2025). See also J. Hopkins, "Defining a Discipline. What is Disaster Law?", in D. Cubie (ed), *A Research Agenda for Disaster Law* (Cheltenham, Edward Elgar 2025), pp. 15-27.

[37] M. Aronsson-Storrier, "Environmental Destruction and the Root Causes of Disaster Risk. The Need for New Imaginaries in International Law", in D. Cubie (ed), *A Research Agenda*, cit., p. 154 ff.

[38] L. Bosher, K. Chmutina, D. van Niekerk, "Stop Going Around in Circles: Towards a Reconceptualisation of Disaster Risk Management Phases", in *Prevention and Management* (2021), pp. 525-537.

[39] A. Siders, "Resilient Incoherence: Seeking Common Language for Climate Change Adaptation, Disaster Risk Reduction, and Sustainable Development", in J. Peel, D. Fisher (eds), *The Role of International Environmental Law*, cit., pp. 101-126.

and managing residual risk, that is "aimed at preventing new and reducing existing disaster risk and managing residual risk, all of which contribute to strengthening resilience and therefore to the achievement of sustainable development."[40]

The intersection between disaster risk reduction and environmental protection first entered the international policy framework with the adoption of the 1994 Yokohama Strategy and Plan of Action for a Safer World and the Guidelines for Natural Disaster Prevention, Preparedness and Mitigation. These instruments explicitly recognised the central role of environmental protection in disaster governance, affirming that "[e]nvironmental protection […] is imperative in the prevention and mitigation of natural disasters."[41] This position was further reinforced in Principle 9 of the Yokohama Strategy, which provided that "[e]nvironmental protection as a component of sustainable development consistent with poverty alleviation is imperative in the prevention and mitigation of natural disasters." Building on this premise, the Yokohama Strategy further articulated the close relationship between disaster management and sustainable development, stating that "[d]isaster prevention, mitigation, preparedness and relief are four elements which contribute to and gain from the implementation of sustainable development policies. These elements, along with environmental protection and sus-

[40] United Nations Office for Disaster Risk Reduction, Sendai Framework Terminology on Disaster Risk Reduction, available at https://www.undrr.org/terminology/disaster-risk-reduction. Report of the Open-ended Intergovernmental Expert Working Group on Indicators and Terminology Relating to Disaster Risk Reduction, UN Doc. A/71/644, 1 December 2016, 16. For the analysis of the international law foundations of DRR, namely of the principles of prevention, mitigation and preparedness see M. Aronsson-Storrier, "Exploring the Foundations: The Principles of Prevention, Mitigation and Preparedness in International Law, in M. Aronsson-Storrier, K.N. Bookmiller (eds), *The Cambridge Handbook of Disaster Risk Reduction and International Law* (Cambridge, Cambridge University Press 2019), pp. 52-70.

[41] Yokohama Strategy and Plan of Action for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation, adopted at the World Conference on Natural Disaster Reduction, 23-27 May 1994, Introduction.

tainable development, are closely interrelated."[42] In sum, the 1994 Yokoama Strategy was very much focused on the concept of natural disasters, while linking the importance of disaster risk reduction to sustainable development, on the one side, and environmental protection, on the other side. At the time, the current idea of environmental sustainability as one of the components of sustainable development was not present; rather environmental protection was perceived as a distinct objective to be pursued to prevent natural disasters. It was not until a decade later that the 2004 Review of the Yokohama Strategy formally incorporated the concept of disaster hazards of natural, environmental, and technological origin.[43]

With the Yokohama's successor, the Hyogo Framework for Action 2005-2015, climate change emerged explicitly within the international disaster law discourse, while the linkage between disaster risk governance and environmental protection was further consolidated through the express identification of environmental degradation, climate variability, and climate change as key factors contributing to disaster risk.[44] In this context, the Hyogo Framework also called for "the sustainable use and management of ecosystems".[45] In other words, with this latter Framework the environmental dimension of sustainable development emerged with more clarity.

The recognition of the central role of environmental protection and sustainability in disaster risk governance articulated in the Hyogo Framework was subsequently strengthened and further developed in the Sendai Framework for Disaster Risk Re-

[42] *Ivi*, para. 2.

[43] Review of the Yokohama Strategy and Plan of Action for a Safer World, UN Doc. A/CONF.206/L.1, 20 December 2004, para. 48. T. KARIMOVA, "Sustainable Development and Disasters", in S.C. Breau *et al* (eds), *Research Handbook on Disasters and International Law* (Cheltenham, Edward Elgar 2016), p. 180.

[44] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, UN Doc. A/CONF.206/6, 22 January 2005.

[45] *Ivi*, para. 19 (let. b).

duction 2015-2030.[46] The Sendai Framework situated disaster risk reduction within the sustainable development agenda, affirming that "[e]ffective disaster risk management contributes to sustainable development."[47] It also acknowledged that "[t]en years after the adoption of the Hyogo Framework for Action, disasters continue to undermine efforts to achieve sustainable development."[48] This emphasis on coherence was further reinforced through specific priorities for action. Under priority 2 (Strengthening disaster risk governance to manage disaster risk), the Sendai Framework suggested a series of activities, including global and regional coordination to foster "the implementation and coherence of instruments and tools relevant to disaster risk reduction, such as for climate change, biodiversity, sustainable development, poverty eradication, environment, agriculture, health, food and nutrition and others, as appropriate."[49] Under priority 3 (Investing in disaster risk reduction for resilience), the document called upon States to "[s]trengthen the sustainable use and management of ecosystems and implement integrated environmental and natural resource management approaches that incorporate disaster risk reduction."[50] Thus, the Sendai framework marked the indissoluble bond between disaster risk reduction and sustainable development. However, uncertainty remains as to the precise relationship between DRR and the environmental dimension of sustainability whereby many sectors of environmental action are indicated, especially under priority two, as merely "relevant" to DRR. It can be suggested in this regard that the need for coherence advocated by the Sendai Framework should have been grounded on a more coherent approach to environmental sustainability where all the aspects indicated above (i.e. climate change, biodiversity, environment as such, and agriculture) are strictly interconnected, and are not only functional to DRR.

[46] The Sendai Framework, cit.
[47] *Ivi*, para. 3.
[48] *Ivi*, para. 10.
[49] *Ivi*, para. 28(b).
[50] Para. 30(n).

The last key document of this analysis are the 2016 International Law Commission (ILC) Draft Articles on the Protection of Persons in the Event of Disasters (Draft Articles), currently under review for the adoption of a multilateral convention by the UN General Assembly.[51] Although the Draft Articles are primarily concerned with disaster response, they explicitly extended their scope of application to DRR under Article 9: Reduction of the risk of disasters.[52] As clarified in the ILC Commentary,

> [w]hile the main emphasis of the draft articles is on the response to disasters, the dimension of disaster risk reduction also falls within their scope and is the subject of draft article 9. In doing so, the Draft Articles acknowledged the general recognition of the essential role of disaster risk reduction, within the international community, particularly evidenced by the Sendai Framework, adopted in 2015.[53]

The Draft Articles articulated the prevention and reduction of disaster risk as a legal obligation incumbent upon States that encompasses a range of concrete measures, including the conduct of risk assessments, the establishment of early warning systems, and the recognition of the right to access disaster risk infor-

[51] ILC, "Draft Articles on the Protection of Persons in the Event of Disasters 2016", *Yearbook of the International Law Commission*, 2016, vol. II, Part Two (hereinafter Draft Articles). With Resolution 79/129 the UN General Assembly decided to elaborate and conclude a legally binding instrument on the protection of persons in the event of disasters by the end of 2027, cf. UN Doc. A/RES/79/128, 12 December 2024; see G. Bartolini, "Toward a Universal Treaty on 'Protection of Persons in the Event of Disasters", in *EJIL:Talk!*, 17 December 2024, available at www.ejiltalk.org. For a comprehensive analysis of the ILC Draft Articles, G. Bartolini, "A Universal Treaty for Disasters? Remarks on the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters", in *International Review of the Red Cross*, XCIX (2017), p. 1103 ff.

[52] Draft Articles, Article 9: "1. Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters. 2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems."

[53] Report of the International Law Commission on the work of its sixty-eighth session, Chapter IV, Commentary to Article 2, para. 3.

mation. The ILC Commentary explicitly drew upon the normative influence of the Sendai Framework, which identifies as its overarching goal the need to "[p]revent new and reduce existing disaster risk through the implementation of integrated and inclusive economic, structural, legal, social, health, cultural, educational, environmental, technological, political and institutional measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and thus strengthen resilience."[54] It shall be noted that the Draft Articles did not mirror the existing interlinkages between DRR, sustainable development and environmental protection. One can find a limited reference to the Sendai Framework only in the Commentary of Article 9, while environmental measures are listed as just one of the many actions to be adopted by States in an integrated manner to increase the effectiveness of DRR. Also, climate change is not even mentioned. This leads us to consider the other notion associated with the evolution of sustainable development and IDL, namely climate change adaptation.

6. *The Relevance of Environmental Sustainability in International Disaster Law: Climate Change Adaptation*

Similarly to disaster risk reduction, also the idea of CCA was triggered by the evolution of the discourse of sustainable development, however, CCA was not elaborated as a concept pertaining IDL but rather within the context of environmental and climate change law. Climate change adaptation (CCA) has been defined by the Intergovernmental Panel on Climate Change as follows:

> In human systems, climate change adaptation is the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities. In natural systems, climate change adaptation is the process of adjustment to ac-

[54] The Sendai Framework, cit., para. 17, referred to by the ILC Commentary to Article 9, para. 3.

tual climate and its effects, noting that human intervention may facilitate adjustment to expected climate and its effects.[55]

The relationship between climate change and sustainable development was reflected both in the Preamble and in operative provisions of the Paris Agreement. Article 2(1) identifies the consolidation of "the global response to the threat of climate change, in the context of sustainable development" as a key objective, including through "[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience."[56] This aim is further reinforced by Article 7(1), which establishes a "global goal on adaptation", which entails "enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response."[57]

The progressive integration of DRR and CCA under international disaster law has been increasingly advocated both in the literature and in the practice of climate change organs and IDL actors.[58] Nevertheless, this call for coherence is currently far from

[55] Intergovernmental Panel on Climate Change, Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, 2012, Annex II, Glossary of Terms, available at www.ipcc.ch; see also IFRC, Disaster Risk Governance Guidelines, cit., p. 7.

[56] Paris Agreement, cit.

[57] *Ibid.*

[58] As to the literature, see A. Siders, "Resilient Incoherence", cit.; D. Cubie, T. Natoli, "Coherence, Alignment and Integration: Understanding the Legal Relationship between Sustainable Development, Climate Change Adaptation and Disaster Risk Reduction", in S. Flood *et al.* (eds), *Creating Resilient Futures: Integrating Disaster Risk Reduction, Sustainable Development Goals and Climate Change Adaptation Agendas* (Cham, Palgrave 2021); T. Natoli, "Improving Coherence between Climate Change Adaptation and Disaster Risk Reduction through Formal and Informal International Lawmaking", in *Journal of International Humanitarian Legal Studies*, XIII (2022), pp. 78-109, p. 87. As to the practice, see Intergovernmental Panel on Climate Change, Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation, 2012; Opportunities and Options for Integrating Climate Change Adaptation with the Sustainable Development Goals and the Sendai Framework for Disaster Risk Reduction 2015-2030, Technical Paper by the Secretariat, UN FCCC/TP/2017/3 (2017); European Environment Agency (EEA), Climate Change Adaptation and Disaster Risk Reduction in Europe:

being achieved, as demonstrated, for example, by the content of Draft Article 9. Also recently, the ICJ *Climate Change* Advisory Opinion only mentioned the term "disasters" three times, the lengthy pronouncement notwithstanding. In particular, when discussing the impairment of human rights caused by climate change, the Court included "natural disasters" among the adverse effects of climate change, along with sea level rise, drought and desertification, disregarding most of the recent debates on the interplay between DRR, climate change and sustainability.[59]

In the practice of disaster risk management, DRR and CCA are strictly correlated for example when it comes to the management of weather and climate-related hazards such as cyclones, floods, drought and heatwaves. Though, as highlighted by the 2024 IFRC Guidelines on Disaster Risk Governance, often DRR and CCA fall within the mandate of different ministries (e.g. internal affairs and environment) and depend on the implementation of diverse key legal documents such as the National DRR Strategy developed to implement the Sendai Framework, the National Adaptation Plan (NAP) and/or the National Adaptation Programme of Action (NAPA).[60] This gives rise to a series of issues on how to ensure coherence between the instruments and activities in each field, in order to fully realise synergies while also avoiding conflict, duplication and gaps. As noted in the literature, disciplinary boundaries and silos are still hampering effective action and coordination between the two closely linked issues.[61]

Enhancing Coherence of the Knowledge Base, Policies and Practices, EEA Report 15 (2017); 33rd International Conference of the Red Cross and Red Crescent, Resolution 7, Disaster Laws and Policies That Leave No One Behind, Doc 33IC/19/R7 (2019).

[59] ICJ, Advisory Opinion, cit., para. 376: "The Court is thus of the view that the adverse effects of climate change, including, inter alia, the impact on the health and livelihoods of individuals through events such as sea level rise, drought, desertification and natural disasters, may significantly impair the enjoyment of certain human rights. The Court will consider some of these rights, without attempting to be exhaustive."

[60] IFRC, Disaster Risk Governance Guidelines, cit., p. 31.

[61] J.I. Uitto, R. Shaw, *Sustainable Development and Disaster Risk Reduc-*

It is interesting to note that the United Nations have launched a relevant initiative that aims at bridging the gaps between DRR and CCA, especially in the field of weather-related hazards. The Early Warnings for All (EW4All) initiative was initiated in 2023 by the UN Secretary-General with the objective of ensuring that all people are protected from hazardous weather, water, and climate-related events through life-saving early warning systems by the end of 2027.[62] Also in the present case, however, the integration between climate change and environmental sustainability is limited. While the SDGs are recalled in the Executive Action Plan of the initiative presented by the SG to COP27, other sectors that have a relevant impact on DRR and CCA, such as ecosystem degradation, were disregarded.[63] Conversely, the EW4All initiative could have embraced a more integrated approach to encompass also actions associated with the protection of the environment and the sustainability perspective. An example could be taken form the 1992 Convention on Biological Diversity and the Kunming- Montreal Global Biodiversity Framework, adopted in December 2022, which called on States to "[m]inimize the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation, and disaster risk reduction actions.".[64]

Another element of UN practice that is worth considering

tion (Tokyo Heidelberg, Springer 2016), p. 1 ff.; see also J. HOPKINS, "Defining a Discipline. What is Disaster Law?", cit., p. 21.

[62] The initiative is structured around four foundational pillars that underpin both Early Warnings for All and effective multi-hazard early warning systems. These pillars are: i) disaster risk knowledge and management, led by the United Nations Office for Disaster Risk Reduction (UNDRR); ii) detection, observation, monitoring, analysis, and forecasting, led by the World Meteorological Organization (WMO); iii) warning dissemination and communication, led by the International Telecommunication Union (ITU); and iv) preparedness and response capabilities, led by the IFRC. Cf. www.earlywarningsforall.org/site/early-warnings-all.

[63] UN SG, Early Warnings for All. The Un Global Early Warning Initiative for the Implementation of Climate Adaptation Executive Action Plan, 2023-2027, available at: www.preventionweb.net/media/84612/download?startDownload=20251231.

[64] Kunming-Montreal Global Biodiversity Framework, Decision 15/4, 19 December 2022, UN doc. CBD/COP/DEC/15/4, Annex, p. 10.

consist of the so called "nature-based solutions" (NbS) that refer to actions aimed at the protection, sustainable management, and restoration of natural or modified ecosystems in order to address societal challenges, including disaster risk reduction, climate change, biodiversity loss, and environmental degradation. The concept was first theorised in the late 2000s, notably by the International Union for Conservation of Nature (IUCN), which formally introduced and promoted NbS as a framework capable of delivering simultaneous environmental, social, and economic benefits.[65] NbS have been progressively endorsed and operationalised by key international actors, including the United Nations Office for Disaster Risk Reduction (UNDRR).[66] In the IDL context, NbS are grounded in the Sendai Framework and have been advanced to work with natural processes to reduce hazard exposure and vulnerability while enhancing environmental sustainability. Measures include ecosystem conservation and restoration actions (e.g. replanting forests, mangroves, preserving wetlands and coastal reefs, as well as urban green infrastructures) that can function as natural buffers against floods, landslides, storm surges, and heatwaves, while simultaneously supporting biodiversity, carbon sequestration, and ecosystem services. As such, NbS reinforce the inextricable link between environmental protection, climate change adaptation, disaster risk reduction, and sustainable development.

Notwithstanding their considerable potential, NbS represent only one component of the broader practice of disaster risk management and, to date, have not succeeded in fully mainstreaming environmental sustainability within either the disaster risk reduction or climate change adaptation discourse. Accordingly, the study illustrated how the environmental dimension of sustainable development has been integrated into climate change adaptation in a limited and fragmented manner.

[65] IUCN, Defining Nature-based Solutions, Resolution WCC-2016-Res-069, 10 September 2016. Official information available at www.iucn.org/our-work/nature-based-solutions.

[66] UNDRR, Nature-Based Solutions for Disaster Risk Reduction. Words into Action, Geneva, 2021, available at: https://www.undrr.org/words-action-nature-based-solutions-disaster-risk-reduction.

7. Conclusions

The analysis has demonstrated that the fields of environmental sustainability and IDL have been subjected to a limited reciprocal integration. Environmental sustainability has been hardly considered, whereby other associated notions such as sustainable development, environmental protection and climate change adaptation have been preferred. One of the possible reasons of this missed integration could lay with the inner fragmentation of environmental law, whereby environmental protection law (e.g. issues of ecosystem preservation and biodiversity) are kept separate from climate change law. Hence, the focus on integration between CCA and DDR has absorbed most of the attention of the IDL debate, while it failed to trigger a broader reflection on the need to integrate all environmental sustainability concerns in disaster risk management. Another reason may be grounded in the rationale of sustainable development, whereby the very idea of sustainability is associated with a conception of environment as a sum of natural resources to be exploited, rather than grounded in an idea of nature – to which humans belong – to be preserved in itself. As it has been observed, international law treats nature as a separate object to be governed and regulated rather than opening up for explorations of humans' position within it. This limited vision of nature has been transferred into instruments on climate change, environmental protection and disaster risk reduction.[67]

As a consequence, international instruments addressing disaster risk and environmental degradation have predominantly focused on establishing and implementing soft or hard-law instruments, neglecting to rediscuss the human-nature relationship. Environmental sustainability could become a promising international law principle to interpret existing legal frameworks and

[67] M. Aronsson-Storrier, "Environmental Destruction", cit., pp. 156-157; C. H. Keskitalo, *Rethinking Nature Relations: Beyond Binaries* (Edward Elgar, 2023); U. Natarajan, J. Dehm, "Conclusion: Remaking International Law", in U. Natarajan, J. Dehm (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge, Cambridge University Press, 2022), pp. 375-378.

bridge the gap between DRR and environmental concerns, broadly speaking. Although the 2022 United Nations General Assembly resolution recognising the human right to a clean, healthy, and sustainable environment may represent a valuable step in this direction, it should be noted that the document entirely omits any reference to disasters. In sum, the development of an environmental sensibility, capable of exerting a positive influence on IDL, will require a more profound re-elaboration of the foundational premises of sustainable development and environmental law.

CITIES AND ENVIRONMENTAL SUSTAINABILITY: AN INTERNATIONAL LAW PERSPECTIVE

MIRKO SOSSAI*

SUMMARY: 1. Introduction: Urbanisation and International Law. – 2. The Special Place of Cities in the Sustainable Development Goals. – 3. The Relevance of the Urban Level for the Implementation of International Law on Sustainability. – 4. Cities as Laboratories: Developing Local Disaster Risk Reduction and Resilience Strategies. – 5. Cities as Urban Collectives: Integrating Human Rights and Environmental Considerations. – 6. Conclusion.

1. *Introduction: Urbanisation and International Law*

We are living in an era of rapid and unprecedented urbanisation. Today, more than half of the world's population resides in cities, a proportion expected to increase significantly in the coming decades.[1] Urban centres face a convergence of critical challenges, including ensuring access to adequate housing, addressing urban poverty, delivering essential public services, and safeguarding environmental sustainability. At the same time, new digital infrastructures and surveillance technologies are reshaping urban life on a global scale. Parallel to these developments, the urbanisation of warfare – where armed conflicts are increasingly fought in densely populated cities and towns – poses profound challenges for the application and enforcement of international humanitarian law: in urban conflict settings, the protection of civilians, the distinction between combatants and non-combatants, and the preservation of critical civilian infrastructure become particularly complex.[2]

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[1] UN Department of Economic and Social Affairs, Population Division, *World Urbanization Prospects 2018* (New York, United Nations, 2019).

[2] M. SOSSAI, "The Place of Cities in the Evolution of International Humanitarian Law", in *Italian Yearbook of International Law*, XXXI (2022), p. 227 ff.

Despite the centrality of cities to these contemporary transformations, international law scholars have long treated the urban as analytically peripheral. Cities have traditionally been understood as sub-national entities whose interests are mediated entirely through the State, and they have accordingly remained marginal to the structures, processes, and conceptual frameworks of the international legal order.

Over the past decades, however, cities have emerged as increasingly visible actors in international relations. Through climate negotiations, multilateral initiatives, and transnational municipal networks, urban authorities, including in the Global South,[3] have assumed a prominent role in articulating development priorities and implementing international policy agendas. Cities thus increasingly engage with one another across borders, cultivating what may be described as a renewed "global consciousness".[4] This development complicates established assumptions about the allocation of authority in international law, as cities occupy an ambivalent position: they continue to function as organs of the State, yet they also participate in regulatory processes in ways that may depart from, or even contest, national policy preferences, especially in the fields of climate change and sustainable development. In the view of Aust, cities are both part of the State and potentially non-state actors.[5]

Against this background, the question of whether cities possess international legal personality mostly depends on underlying theoretical assumptions about the nature of international society and the definition of international law itself. Despite the growing

[3] L. Eslava, G. Hill, "Global South Cities: Borderline International Legal Personality, Financialised Local Governance and Urban Resistance", in *International Journal of Law in Context*, published online (2025), p. 1 ff.

[4] J. Nijman, "Renaissance of the City as Global Actor: The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors", in G. Hellmann, A. Fahrmeir, M. Vec (eds), *The Transformation of Foreign Policy: Drawing and Managing Boundaries from Antiquity to the Present* (Oxford, Oxford University Press 2016), p. 209 ff.

[5] H. P. Aust, "The Shifting Role of Cities in the Global Climate Change Regime: From Paris to Pittsburgh and back?" in *Review of European, Comparative & International Environmental Law*, XXVIII (2019), p. 57 ff.

role of cities in international legal and political processes, a cautious approach continues to prevail. This new "visibility" has generally not been interpreted as signalling the emancipation of cities as autonomous subjects of international law, but rather as reflecting new modalities of action operating within the state-centred international legal order.[6]

Yet, focusing exclusively on the question of subjectivity risks obscuring the broader consequences of the interaction between urbanisation and international law. More fundamentally, international law is increasingly developed, interpreted, and operationalised in urban settings, while cities themselves are shaped and constituted through international legal norms and practices. This reciprocal dynamic – sometimes described as "the everyday impact of international law on urban life",[7] or even as the "urbanisation of international law"[8] – has significant normative implications. On the one hand, international law may furnish legal and institutional resources capable of addressing pressing challenges of urban governance. On the other, the direct projection of global legal regimes onto local urban contexts risks reproducing structural asymmetries of power, potentially marginalising local authorities and urban populations alike.[9] Understanding the place of cities within international law is therefore not merely a question of institutional status, but one that bears directly on the legitimacy, implementation and effectiveness, of the contemporary international law on environmental sustainability.

[6] G. Nesi, "The Shifting Status of Cities in International Law? A Review, Several Questions and a Straight Answer", in *Italian Yearbook of International Law*, XXX (2021), p. 17 ff.; Y. Blank, "International Legal Personality/Subjectivity of Cities", in H. Aust and J. Nijman (eds), *Research Handbook on International Law and Cities* (Cheltenham, Edward Elgar 2021), p. 103 ff.

[7] L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge, Cambridge University Press 2015).

[8] C. Swiney, "The Urbanization of International Law and International Relations: The Rising Soft Power of Cities in Global Governance", in *Michigan Journal of International Law*, XLI (2020), p. 227 ff.

[9] See the mandate of the newly established ILA Committee on Urbanisation and International Law, in https://www.urbanintlaw.com/documents.

2. *The Special Place of Cities in the Sustainable Development Goals*

The idea of the internationalisation of cities and the localisation of sustainable development continues to gain traction in both academic scholarship and international development policy, as urbanisation (and the injustices accompanying it) accelerates at an alarming pace in many regions of the world.[10] This trend has been described as a dual movement, whereby cities operate simultaneously as sites of top-down and bottom-up governance: they translate international norms into locally grounded policies, while leveraging local innovation and experience to influence international agendas and standards.[11]

This is particularly evident in the inclusion of an urban goal in the Sustainable Development Goals (SDGs),[12] which has been widely interpreted as marking the emergence of cities and city networks as a new category of actor on the international stage.

As cities have become increasingly internationalised and influential in areas such as climate change, human rights, urban development, and global governance, global city networks successfully lobbied for the adoption of an urban SDG. The outcome document of the United Nations Conference on Sustainable Development (Rio+20) in 2012, *The Future We Want*, recognised systematic urban development as a key driver of sustainability and identified a set of related sub-themes, which later formed the basis for the negotiation of SDG 11.[13] While there

[10] I.M. Porras, "The City and International Law: In Pursuit of Sustainable Development", in *Fordham Urban Law Journal*, XXXVI (2009) p. 537 ff.; A. du Plessis, "SDG 11: Make Cities and Human Settlements Inclusive, Safe, Resilient and Sustainable", in J. Ebbesson, E. Hey (eds), *The Cambridge Handbook of the Sustainable Development Goals and International Law* (Cambridge, Cambridge University Press 2022), p. 281 ff.

[11] See H.P. Aust, A. du Plessis, "Introduction: The Globalisation of Urban Governance - Legal Perspectives on Sustainable Development Goal 11", in H.P. Aust, A. du Plessis (eds), *The Globalisation of Urban Governance* (New York, Routledge 2019), p. 1 ff.

[12] UNGA, Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21 October 2015.

[13] UNGA, The Future We Want: Outcome Document of the United Na-

was broad agreement that urban issues ought to be addressed within the 2030 Agenda, significant debate surrounded the appropriate institutional form. In particular, it remained contentious whether urban concerns should be articulated through a stand-alone goal on cities or, alternatively, mainstreamed across the Agenda through a series of targets embedded in other substantive goals. Although some States expressed reservations about the necessity of a dedicated urban goal, they were ultimately persuaded by the majority position within the Open Working Group on SDGs.[14]

SDG 11 occupies a distinctive position among the seventeen SDGs. It is the only goal directed at a specific actor, framed as "cities and human settlements". Four key concepts animate SDG 11: inclusivity, safety, resilience, and sustainability. The point has been made that "[t]he goal is broadly framed, relates to various other SDGs, and speaks to all of the dimensions of sustainable development."[15] Others[16] stressed that SDG 11 needs to be read in conjunction with the UN's Habitat agenda, notably with the outcome of the Habitat III conference in 2016, the "New Urban Agenda".[17]

Both documents are not legally binding but they might be considered aspirational with respect to a certain vision of urban

tions Conference on Sustainable Development, UN Doc. A/RES/66/288, 11 September 2012, para. 134.

[14] H. Birkenkötter, "Make Cities and Human Settlements Inclusive, Safe, Resilient, and Sustainable", in I. Bantekas, F. Seatzu (eds), *The UN Sustainable Development Goals: A Commentary* (Oxford, Oxford University Press 2023), p. 799 ff., p. 808; N. Arajärvi, "Including Cities in the 2030 Agenda: A Review of the Post-2015 Process", in H.P. Aust, A. du Plessis (eds), *The Globalisation of Urban Governance*, cit., p. 17 ff.

[15] See H. P. Aust, A. du Plessis, "Good Urban Governance as a Global Aspiration: on the Potential and Limits of SDG 11", in D. French, L. Kotzé (eds), *Sustainable Development Goals – Law, Theory and Implementation* (Cheltenham, Edward Elgar 2018), p. 201 ff., p. 208.

[16] See H. Birkenkötter, "Make Cities and Human Settlements", cit., p. 800.

[17] Adopted at the UN Conference on Housing and Sustainable Urban Development (Habitat III) in Quito, Ecuador, on 20 September 2016 and endorsed by the UN General Assembly on 23 December 2016, UN Doc. A/RES/71/256. The New Urban Agenda consists of the Quito Declaration and the Quito Implementation Plan for the New Urban Agenda.

governance: "[C]ities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, are able to inhabit and produce just, safe, healthy, accessible, affordable, resilient and sustainable cities and human settlements to foster prosperity and quality of life for all."[18]

Within this framework, it is important to consider the related notions of sustainability and resilience: whereas "urban sustainability points at environmental, economic, and social sustainability in cities",[19] resilience refers to the ability of people, governance systems, and infrastructure to bounce back to a state of safety and sustainability.

Ten targets underpin SDG 11 and outline what is deemed necessary for its implementation. After a decade since the adoption of the 2030 Agenda, and with five years remaining to achieve the SDGs, the focus is increasingly on progress assessment. The analysis addressing the implementation of SDG 11 may be broadly organised around three interrelated thematic areas.

First, a substantial strand of the literature focuses on practical questions of implementation, examining the institutional, legal, financial, and governance-related challenges involved in translating the objectives of SDG 11 into concrete urban policies and practices at the local, national, and international levels. In this regard, many studies adopt qualitative methodologies and rely on in-depth case studies, often employing comparative approaches to highlight variations in institutional capacity, regulatory frameworks, and implementation strategies across different urban contexts.[20]

Secondly, a growing body of scholarship is concerned with the measurement and monitoring of progress under SDG 11. The SDGs Report provides annual stocktaking of global pro-

[18] *Ivi,* para. 11.

[19] A. du Plessis, "SDG 11", cit., p. 289.

[20] See A. Szpak, *Global City Diplomacy and International Law* (Cheltenham, Edward Elgar 2025); O. Fuo, C. Zengerling, D. Sotto, "A Comparative Legal Analysis of Urban Climate Mitigation and Adaptation in the Building Sector in Brazil, Germany, and South Africa", in *Climate Law*, XII (2022), p. 32 ff.

gress toward the 2030 Agenda for Sustainable Development.[21] The adoption of the SDGs marked the first time that a UN statistical reporting mechanism includes a clear subnational component in the promotion of sustainable development. This literature has examined the development, adequacy, and limitations of indicators and data collection methodologies used to assess advancement towards the goal's targets. Particular attention has been paid to questions of inclusion in data collection processes, notably the extent to which diverse cities – especially smaller cities and those lacking global economic status – are adequately captured by existing monitoring frameworks.[22]

Finally, the literature encompasses a range of critical perspectives that interrogate both the conceptual foundations of SDG 11 and the effectiveness of its implementation in practice. Within this strand, four principal concerns recur and are frequently identified as factors that may constrain the goal's implementation and overall effectiveness.[23]

First, SDG 11 employs broadly framed and universal language in referring to "cities," without clearly defining the territorial or functional scope of this concept. Second, it fails to address structural deficiencies in local governance – such as weak municipal institutions, inadequate governance frameworks, insufficient investment, poor financial management, corruption, and limited revenue generation – which constitute major obstacles to sustainable urban development in both the global North and South. Third, the generation and availability of reliable city-level data remain uneven and challenging, underscoring significant disparities both between and within world regions.[24]

[21] See *The Sustainable Development Goals Report 2025* (New York, United Nations 2025).

[22] S. Mokhles, K. Davidson, M. Acuto, "Unveiling Urban Governance Diversity: Clustering Cities Based on Mitigation Actions", in *Ambio*, LIII (2024), p. 1152 ff.

[23] See H.P. Aust, A. du Plessis, "Good Urban Governance as a Global Aspiration", cit.; T. Pogge, M. Sengupta, "The Sustainable Development Goals (SDGs) as Drafted: Nice Idea, Poor Execution", in *Washington International Law Journal*, XXIV (2015) p. 571 ff.

[24] J. M. Klopp, D. L. Petretta, "The Urban Sustainable Development

Fourth, cities and local authorities cannot achieve SDG 11's ambitious targets in isolation, given factors such as increasing privatization of urban functions, the central role of local politics and public participation, and the legal and financial dependence of cities on the State.[25]

3. *The Relevance of the Cities for the Implementation of International Law on Sustainability*

SDG 11 has been regarded as a particularly relevant marker of the cities' exposure to and engagement with international law, insofar as it expresses the necessity to provide for sustainable urban governance. Different sub-goals of SDG 11 relate to mitigation and adaption measures in the climate change. At the same time the contribution of cities has been acknowledged in the Paris Agreement,[26] alongside soft-law frameworks including the Sendai Framework for Disaster Risk Reduction.[27]

While welcoming "the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities", the COP 21 decision that adopted the Paris Agreement in 2015 invited "the non-Party stakeholders […] to scale up their efforts and support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change."[28] The identification of cities as key actors in the pursuit of sustainability and climate resilience finds confirmation also at the EU level.[29]

Goal: Indicators, Complexity and the Politics of Measuring Cities", in *Cities*, LXIII (2017), p. 92 ff.

[25] A. du Plessis, "SDG 11", cit., pp. 290-291.

[26] Paris Agreement under the United Nations Framework Convention on Climate Change (opened for signature 22 April 2016, entered into force 4 November 2016) 3156 UNTS p. 79 ss (Paris Agreement), Preamble.

[27] Sendai Framework for Disaster Risk Reduction 2015-2030, UN Doc A/CONF.224/ CRP.1, 18 March 2015. Endorsed by the UN General Assembly in Res 69/283, 23 June 2015.

[28] Decision 1/CP.21: Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/10/Add.1, 29 January 2016.

[29] Communication from the Commission to the European Parliament, the

This recognition is grounded, at least in part, in the status of cities as local governments, i.e. organs of the State. As such, they are bound to comply with the international legal obligations incumbent upon their respective States, notwithstanding the considerable variation in domestic arrangements governing the relationship between national and international law. UN Habitat noted that although "local action is indispensable for the realization of national climate change commitments agreed through international negotiations", yet "most of the mechanisms within the international climate change framework are addressed primarily to national governments and do not indicate a clear process by which local governments, stakeholders and actors may participate."[30]

At the same time, cities are increasingly asserting a more autonomous position. As Bakker observes, "cities are progressively claiming a role as normative global climate actors"[31] by developing and implementing climate-related laws and policies at the domestic level. In this regard, transnational municipal networks such as the C40 – comprising self-proclaimed city leaders in climate change governance – have claimed to be reducing per capita greenhouse gas emissions at a rate five times faster than the global average, thereby "proving that bold and inclusive action at the city level is both possible and effective."[32]

Still, the capacity of cities to deliver sustainable development objectives independently remains contested. As Porras noted,

Council, the European Economic and Social Committee and the Committee of the Regions: Forging a climate-resilient Europe - the new EU Strategy on Adaptation to Climate Change, COM/2021/82 final, 24 February 2021. See A. VAN DER BERG, "Climate Adaptation Planning for Resilient and Sustainable Cities: Perspectives from the City of Rotterdam (Netherlands) and the City of Antwerp (Belgium)", in *European Journal of Risk Regulation*, XIV (2023), p. 564 ff., p. 567.

[30] UN-Habitat, *Cities and Climate Change: Global Report on Human Settlements 2011 – Abridged Report* (London/Washington, Earthscan 2011).

[31] C. BAKKER, "Are Cities Taking Center-Stage? The Emerging Role of Urban Communities as 'Normative Global Climate Actors'", in *Italian Yearbook of International Law*, XXX (2021), p. 81 ff., p. 105.

[32] C40, "Yearly Offer of Action" (2025) https://www.c40.org/news/yearly-offer-of-action/.

"cities – with their economies of scale, relative concentration of wealth, people, businesses, and educational institutions – have much to contribute to the pursuit of sustainable development and to the response to climate change. Less clear is whether cities alone can deliver."[33]

Over the past two decades, city activities in the field of climate change governance and sustainable development have attracted particular attention, with scholarship converging around four core insights.[34]

First, cities constitute major sites of energy consumption, pollution, and waste generation,[35] over which local authorities frequently exercise functional regulatory powers – particularly in areas such as land use planning, transport, energy provision, and building regulation – thereby positioning municipalities as critical actors in climate mitigation, understood as the "human intervention to reduce emissions or enhance the sinks of greenhouse gases".[36]

Second, cities concentrate significant social and ecological vulnerability, as climate change exacerbates existing environmental challenges like the urban heat island effect, air pollution, and food and water security.[37] Yet, local governments are often best placed to articulate and address adaptation and transformation needs through inclusive, responsive, and accountable forms of governance.

Third, as democratic public institutions, cities are able to mobilise partnerships, facilitate stakeholder engagement and public

[33] I. M. Porras, "The City and International Law", cit., pp. 542-43.

[34] See A. Du Plessis, "Climate Change Law and Sustainable Development" in H.P. Aust, J. Nijman (eds), *Research Handbook on International Law and Cities*, cit., p. 187 ff., p. 191.

[35] See S. Pincetl, "Cities in the Age of the Anthropocene: Climate Change Agents and the Potential for Mitigation", in *Anthropocene*, XX (2017), p. 74 ff.; M. Hebbert, V. Jankovic, "Cities and Climate Change: The Precedents and Why they Matter", in *Urban Studies*, L (2013), p. 1332 ff.

[36] IPCC, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex I, Glossary, p. 126.

[37] IPCC, *Climate Change 2023: Synthesis Report*, cit., p. 35 ff., p. 48.

participation, and exert influence on national climate policy through advocacy, coordination, and experimentation.

From a conceptual perspective, the growing role of local governments in international law may also be justified by reference to the principles of subsidiarity and public participation. As Pavoni observes with respect to their role and interaction in the context of sustainable development, "local authorities constitute the level of government closest to, and most immediately representative of, their citizens. They are therefore best placed to assess the needs and interests of citizens, and are – to a greater or lesser degree – directly accountable to them in cases of regulatory failure."[38]

Finally, participation in transnational municipal networks has enabled cities to exchange knowledge, disseminate best practices, and promote innovative climate action. In turn, these networks have reinforced the increasingly visible role of cities, particularly in contexts where intergovernmental consensus remains limited or fragmented.[39] One aspect is the "turn of cities to international institutions", as city networks have started to interact with international organisations, attend international negotiations, and bring their ideas and concerns into the international

[38] R. Pavoni, "Sustainable Development", cit., p. 72. See also B. Oomen, "Subnational Authorities and Climate Change", in D. Ismangil, K. van der Schaaf, L. van Troost (eds), *Climate Change, Justice and Human Rights* (Amnesty International Netherlands 2020), p. 35 ff., p. 36: "one of the key challenges in combating climate change is the complexity of its causes and the vast array of potential ways to address them. The best fit will differ from sunny suburb to monumental town to tribal community. A strong role for subnational authorities allows for a focus on those measures that form an optimal fit with the people, place and purpose."

[39] H.P. Aust, "Shining Cities on the Hill? The Global City, Climate Change, and International Law", in *European Journal of International Law*, XXVI (2015), p. 255 ff.; J. Lin, "The Role of Transnational City Networks in Environmental Governance", in H. Aust, J. Nijman (eds), *Research Handbook on International Law and Cities*, cit., p. 201 ff.; see also D. Gordon, M. Acuto, "If Cities are the Solution, What are the Problems? The Promise and Perils of Urban Climate Leadership", in C. Johnson, N. Toly, H. Schroeder (eds), *The Urban Climate Challenge: Rethinking the Role of Cities in the Global Climate Regime* (New York, Routledge 2015), p. 63 ff.

realm.[40] An early example of this dynamic is the cooperation between C40 and the World Bank, formalised through a Memorandum of Understanding which entered into force on 1 June 2011.[41]

Such networks provide cities with platforms for various forms of informal cooperation through which they can amplify their collective voices. For example, in 2016 C40 has compiled approximately seventy categories of good practices for climate action in areas including energy, transport, solid waste management, urban planning, adaptation, and finance, with the aim of providing subnational authorities with roadmaps to address climate change more cost-effectively and with greater impact.[42]

In addition, a growing body of policy declarations has been adopted within transnational networks to articulate shared objectives: some of them are addressed to outside cities to join the coalition, others are addressed to governments to influence their policies, others demanded recognition of their cause from inter-governmental institutions. The concept of inter-city agreements has been used to identify some of these documents, including the Global Green New Deal adopted by C40 in 2019 and the Chicago Climate Charter (2017),[43] as an expression of the emergence of cities as "creators of international law",[44] to the extent that they propose new regulations.

[40] On the various forms of this interaction, see J.K. COGAN, "Cities in the Shadows of International Institutional Law", in *International Organizations Law Review*, XVIII (2021), p. 133 ff.

[41] Memorandum of Understanding Between International Bank for Reconstruction and Development, International Development Association, International Finance Corporation and the C40 Cities Climate Leadership Group on Cooperation Relating to Climate Action in Cities, 1 June 2011, https://documents1.worldbank.org.

[42] The text of the C40 Good Practices Guide is available at https://www.c40.org/good-practice-guides/.

[43] The Charter emerged from the North American Climate Summit, hosted by the City of Chicago in partnership with C40 and the Global Covenant of Mayors for Climate and Energy. This was the first time a US climate summit convened following President Donald Trump's decision to withdraw the United States from the Paris Agreement. In its first year, more than 80 cities signed the Chicago Climate Charter, affirming their commitment to addressing climate change at the municipal level.

[44] A. SZPAK, *Global City Diplomacy and International Law*, cit., Ch. 1.

Undoubtedly, best practices documents and policy declarations raise a common question concerning their function as mechanisms of international standard-setting. Their relevance and potential impact cannot be assessed solely through the prism of legal bindingness, a quality they manifestly lack. The articulation and dissemination of best practices may nevertheless approximate informal standard-setting where particular practices are endowed with credentials or associated benefits, thereby creating incentives for their adoption. Policy declarations, for their part, may be understood as embodying "norms of aspiration":[45] programmatic statements that articulate shared goals and rationales, and that may serve both as justificatory frameworks and as experimental sites for the gradual development of future legal norms.

4. *Cities as Laboratories: Developing Local Disaster Risk Reduction and Resilience Strategies*

There is growing recognition that cities, by virtue of their governance and policymaking competences, can function as "policy incubators" or "living laboratories." In this role, city administrations are able to experiment with innovative regulatory approaches, monitor and evaluate their impacts, disseminate best practices, and articulate alternative policy pathways, including in the field of climate change. As a result, city authorities are particularly well positioned to develop flexible and context-sensitive legal instruments that respond to local conditions and priorities, while addressing the needs and concerns of local communities, including vulnerable or marginalised groups.[46]

[45] Y. Takashiba, "Sources and Law-making", in H.P Aust, J. Nijman (eds), *Research Handbook on International Law and Cities*, cit., p. 121 ff., p. 126.

[46] See A. du Plessis, "Climate Change Law and Sustainable Development", cit., pp. 194-195; H. Bulkeley, G.A.S. Edwards, S. Fuller, "Contesting Climate Justice in the City: Examining Politics and Practice in Urban Climate Change Experiments", in *Global Environmental Change*, XXV (2014) p. 31 ff.; J. Evans, A. Karvonen, R. Raven (eds), *The Experimental City* (New York/London, Routledge 2016).

This understanding is reflected, for instance, in the European Urban Charter III, adopted by the Congress of Local and Regional Authorities of the Council of Europe in 2023, which devotes an entire section to "Sustainable Development, Protection of the Environment and Climate Change." The Charter provides important guidance for environmental sustainability policies at the urban level, calling on local authorities to "adopt multi-dimensional policies and streamline environmental protection and the fight against climate change into urban policies",[47] as well as to mitigate and reduce the impacts of climate change.

To fulfil their role, cities are able to deploy a wide range of legal and regulatory instruments. These include, *inter alia*, command-and-control measures such as local by-laws, ordinances, acts and decrees; strategic and spatial planning instruments, including comprehensive plans, master plans, land-use plans, development plans and zoning schemes; fiscal instruments and incentives, such as strategic budgeting, green finance mechanisms, subsidies, tax rebates and credits; environmental conservation and management tools, including biodiversity and water management plans; transport planning instruments; and more general disaster risk management and climate adaptation planning frameworks.[48]

In light of the profound physical, social, environmental and economic impacts of climate change, the concept of urban resilience has assumed a central role in cities' efforts to respond to, prepare for and adapt to changing climate systems. Urban resilience is increasingly understood not merely as the capacity to withstand climate-related shocks, but as a broader governance

[47] CoE Congress of Local and Regional Authorities, European Urban Charter III (2023): Urban Living in the Era of Transformations, CG(2023)45-20, 25 October 2023. See C. Binder, "Human Rights in the Face of the Climate Crisis: What Role for the Local Level? The Example of the European Urban Charter III (2023)", in *Zeitschrift für Menschenrechte*, XVIII (2024), p. 66 ff.

[48] R. Pavoni, "Sustainable Development", cit., p. 60; moreover, see J. Nel, A. du Plessis, W. du Plessis, "Instruments for Local Environmental Governance", in A. du Plessis (ed), *Environmental Law and Local Government in South Africa* 2nd edition, (Cape Town, Juta, 2021) p. 3-1 ff.

process through which cities seek to reorganise institutional, social and spatial arrangements in ways that reduce vulnerability and enhance long-term sustainability.[49]

Urban climate resilience is closely linked to the concept of climate adaptation.[50] In this regard, the International Court of Justice noted in its 2025 Advisory Opinion that "adaptation is one of the core objectives of the Paris Agreement," which seeks to enhance Parties' "ability to adapt to the adverse impacts of climate change and foster climate resilience" (Article 2(1)*b*). This linkage underscores the legal and policy relevance of adaptation measures at all levels of governance, including the urban level.[51]

Among many others, there is an aspect of the urban climate resilience that deserves attention. In recent years, there has been increasing awareness that climate-related hazards can escalate into disasters[52] depending on the exposure, vulnerability and adaptive capacity of affected communities. This has prompted growing convergence between climate change adaptation and disaster risk reduction,[53] a nexus in which cities play a particularly critical role. Urban vulnerability to disasters is rising, especially as economically disadvantaged populations are disproportionately pushed into high-risk areas. Moreover, urban planning and

[49] R. Bellinson, E. Chu, "Learning Pathways and the Governance of Innovations in Urban Climate Change Resilience and Adaptation", in *Journal of Environmental Policy and Planning*, XXI (2019), p. 76 ff.

[50] See A. van der Berg, J. Verschuuren, "Introduction to Climate Resilient Cities and the Law", in A. van der Berg, J. Verschuuren (eds), *Urban Climate Resilience* (Cheltenham, Edward Elgar 2022), p. 1 ff., p. 4.

[51] ICJ, *Obligations of States in respect of Climate Change* (Advisory Opinion), para. 255.

[52] On the notion of disasters under international law, see G. Bartolini, "A Taxonomy of Disasters in International Law", in F. Zorzi Giustiniani, E. Sommario, F. Casolari, G. Bartolini (eds), *Routledge Handbook of Human Rights and Disasters* (New York/London, Routledge 2018), p. 10 ff. In December 2024, The UN General Assembly adopted Res. 79/128, in which it decided to "elaborate and conclude a legally binding instrument on the protection of persons in the event of disasters, without prejudice to the legal effects of any particular provisions contained therein, by the end of 2027 at the latest." See also the chapter by Eleonora Branca in this volume.

[53] See R. Luporini, *Climate Change Adaptation, Disaster Risk Reduction and Human Rights in International Law* (Cham, Springer 2025).

development processes have often failed to adequately account for hazards such as earthquakes, hydro-meteorological risks and other climate-related threats.[54] These shortcomings highlight the need to more systematically integrate disaster risk reduction into urban governance structures and legal frameworks.

SDG targets 11.5 and 11.b explicitly address disaster risk reduction (DRR), with target 11.b making direct reference to the Sendai Framework for Disaster Risk Reduction 2015-2030, which was adopted only a few months prior to the 2030 Agenda. The Sendai Framework underscores the importance of empowering local authorities and communities to reduce disaster risk, including through the provision of resources, incentives, and decision-making responsibilities, as appropriate.[55]

The proportion of local governments that adopt and implement local disaster risk reduction strategies is a key indicator for assessing progress towards target 11.b. According to the most recent UN documentation, 110 countries have reported the existence of local DRR strategies. On average, 73 per cent of local governments within reporting countries indicate that they have such strategies in place.[56]

In addition, the United Nations Office for Disaster Risk Reduction (UNDRR) has launched a cross-stakeholder initiative entitled Making Cities Resilient 2030 (MCR2030), building on a decade-long global campaign on urban resilience. Its main stakeholders include several city networks (such as UCLG, C40, the Resilient Cities Network, ICLEI, and the World Council on City Data), the International Federation of Red Cross and Red Crescent Societies, alongside UN entities (UNDRR, UN-Habitat, and

[54] IPCC, *Climate Change 2023: Synthesis Report*, cit., p. 100.

[55] See M. Aronsson-Storrier, "Sendai Five Years on: Reflections on the Role of International Law in the Creation and Reduction of Disaster Risk" in *International Journal of Disaster Risk Science*, XI (2020), p. 230 ff.

[56] United Nations Office for Disaster Risk Reduction, *Global Assessment Report on Disaster Risk Reduction 2025: Resilience Pays: Financing and Investing for our Future* (Geneva, UNDDR 2025), p. 6. On earlier practice, see also R. Verchick, "Planning for Climate Change Disaster", in R. Lyster, R. Verchick (eds), *Research Handbook on Climate Disaster Law* (Cheltenham, Edward Elgar 2018), p. 187 ff.

the UN Office for Project Services, UNOPS), as well as the World Bank. The initiative primarily functions as a knowledge-sharing platform through which city governments can build awareness of disaster risk reduction, develop local DRR and resilience strategies, and ultimately implement them.[57]

5. *Cities as Urban Collectives and the Convergence of Environment and Human Rights*

In analysing the relationship between cities and environmental sustainability, the prevailing approach has so far been to consider the city primarily as a "local government", examining the ways in which it mirrors or imitates the behaviour of States. However, it is important to complement this analysis with a further dimension, namely the fact that cities are also "places" in which the people living in them suffer human rights violations, whether as a result of disasters or other forms of large-scale environmental degradation.[58] Pieterse has stressed that a peculiar element of these urban human rights violations is their collective character.[59] This "collective dimension" warrants closer consideration.

In its 2025 advisory opinion, the ICJ considered the adverse effects of climate change on the full enjoyment of human rights. Drawing on the findings of various UN human rights bodies, the Court assessed impacts on the right to life; the obligation of non-refoulement; the right to health; the right to an adequate standard of living, including access to food, water, and housing; the right to privacy, family, and home, which entails an obligation

[57] See Making Cities Resilient 2030, *Pathways to Resilience: Stories from MCR2030 Cities,* January 2026, https://mcr2030.undrr.org/publication/pathways-to-resilience-stories-from-mcr2030-

[58] On city as a "place", see K. Knop, "The Hidden City in International Legal Thought" in H.P. Aust and J. Nijman (eds), *Research Handbook on International Law and Cities*, cit., p. 442 ff.

[59] M. Pieterse, "Urban Collectives as Victims of International Human Rights Violations", in *European Journal of International Law*, XXXVI (2025), p. 531 ff.

to adapt to climate-related impacts; and the rights of women, children, Indigenous peoples, migrants, persons with disabilities, and other individuals in vulnerable situations.[60]

The Court could not, however, take into account the content of General Comment No. 27, adopted a few months later by the UN Committee on Economic, Social and Cultural Rights, which is devoted to the environmental dimension of sustainable development and contains explicit references to the urban dimension of climate adaptation measures, including urban planning, in relation to the enjoyment of the right to an adequate standard of living.[61]

Indeed, the protection of economic, social and cultural rights, in particular, constitute integral components of a resilient urban governance.[62] By way of example, the right to housing, as recognised in Article 11 of the 1966 International Covenant,[63] has the potential not only to inform and guide local policymaking but also to shape the very structuring of urban space. In this regard, since 2000, successive UN Special Rapporteurs on adequate housing have made a significant contribution to the normative development of the right to housing, both by elucidating its scope and content and by drawing attention to persistent implementation gaps that reveal the consequences of failures to realise this right in practice. For instance, the current UN Special Rapporteur has expressed concern that "[m]arginalized groups and persons are often left out of climate adaptation actions, more

[60] ICJ, *Obligations of States in respect of Climate Change*, cit., paras. 369-404.

[61] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 27 (2025) on economic, social and cultural rights and the environmental dimension of sustainable development", UN Doc. E/C.12/GC/27, 6 November 2025, para. 66.

[62] M. Cullen, J. Munro, "Preventing Disasters and Displacement: How Economic, Social and Cultural Rights can Advance Local Resilience", in *Nordic Journal of Human Rights*, XX (2022), p. 118 ff.; M. Pieterse, "Justiciable Socio-Economic Rights as Adaptive Law for Urban Resilience", in *Human Rights Law Review*, XXV (2025).

[63] See K. Martinez, "In the Face of Financialization: Cities and the Human Right to Adequate Housing", in *Italian Yearbook of International Law*, XXX (2021), p. 107 ff.

likely to be negatively affected by climate mitigation and (mal) adaptation, more vulnerable to climate events and less likely to benefit from relief and reconstruction."[64]

Attention to the conditions of vulnerable groups and communities thus provides a critical lens through which to assess the collective dimensions of urban suffering in the context of climate-related events. This perspective extends beyond the limited sphere of individual rights and interests, recognising that the totality of impacted interests exceeds the mere sum of their parts. In this context, the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, has used the notion of "sacrifice zone" to identify "a place where residents suffer devastating physical and mental health consequences and human rights violations as a result of living in pollution hotspots and heavily contaminated areas", in which "the burden of contamination falls disproportionately upon the shoulders of individuals, groups and communities that are already enduring poverty, discrimination and systemic marginalization."[65]

This reality stands in sharp contrast to the vision of "cities for all" articulated in the New Urban Agenda, which also invokes the idea of a "right to the city." This concept – enshrined in the national constitutions of several states, including Brazil, and reflected in local ordinances in cities such as Montreal and Mexico City[66] – suggests a collective orientation to the protection and realization of human rights in urban settings.

[64] "Towards a Just Transformation: climate crisis and the right to housing", Report of the Special Rapporteur on the Right to Adequate Housing, Balakrishnan Rajagopal", UN Doc. A/HRC/52/28, 23 December 2022, paras. 11-19.

[65] "The Right to a Clean, Healthy and Sustainable Environment: Toxic Environment", Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/49/53, 12 January 2022, para. 27.

[66] See B. Oomen, M. Baumgärtel, "Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law", in *European Journal of International Law*, XXIX (2018) p. 607 ff.; M. Grigolo, "Local

More than a decade ago, in concluding a comparative analysis of the jurisprudence of the European Court of Human Rights and the African and Inter-American systems, Francioni called for "a more imaginative and courageous jurisprudence"[67] that would take seriously the collective dimensions of human rights affected by environmental degradation and adapt the language and techniques of human rights discourse to the heightened risks posed by global environmental crises to society, and indeed to humanity as a whole.

His critique was directed primarily at the European Court of Human Rights, whose decisions of the early 2000s concerning Articles 2 and 8 of the European Convention on Human Rights remained grounded in a predominantly individualistic conception of rights.[68] In these cases, environmental harm was legally relevant only insofar as it interfered with rights held by identifiable individuals, while environmental integrity itself was not recognized as a value warranting protection for the affected community as such. By way of illustration, the mudslide that gave rise to the *Budayeva v Russia* case affected the entire town of Tyrnauz, located in a mountainous region of the central Caucasus, resulting in multiple fatalities and the destruction of numerous buildings. With regard to this "city-wide" human rights violation, the Court concluded that "there was no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk."[69]

Governments and Human Rights: Some Critical Reflections", in *Columbia Human Rights Law Review*, XLIX (2017), p. 67 ff.

[67] F. Francioni, "International Human Rights in an Environmental Horizon", in *European Journal of International Law*, XXI (2010), p. 41 ff., p. 55.

[68] See the chapter by Alfredo Terrasi in this volume.

[69] ECtHR, *Budayeva and others v. Russia*, App. nos. 1533/02, 21166/02, 11673/02 and 15343/02, 20 March 2008, para. 158. See V. Popovski, "State Negligence before and after Natural Disasters as Human Rights Violations", in C. Hobson, P. Bacon, R. Cameron (eds), *Human Security and Natural Disasters* (New York/London, Routledge 2014), p. 94 ff.; K. Cedervall Lauta, "Rights and Disasters", in M. Aronsson-Storrier, S. C. Breau (eds), *Research Handbook on Disasters and International Law* 2nd edition (Cheltenham, Ed-

It has been persuasively argued that, while collective interests may in some instances be adequately advanced through the aggregation of individual rights claims, there are contexts in which such interests can be meaningfully asserted only on behalf of the collective itself.[70] This is particularly the case in relation to structural, collective, and cumulative human rights violations, where harm is produced and experienced at the level of the urban population as a whole. In this regard, city networks have increasingly emphasised the role of local governments in strategic climate litigation – as a means to remove barriers to the city's climate ambition and bring about transformational change – insofar as they are well positioned to act as representatives of urban collectivities in such proceedings.[71]

There is certainly a promising trend towards an increase in domestic climate litigation involving cities. In this context, it is useful to distinguish between two broad categories of cases.[72] First, cases in which local governments act as respondents, either in actions brought by private corporations challenging climate mitigation or adaptation measures adopted by cities themselves, or in proceedings initiated by civil society organisations alleging a failure by cities to act adequately. Second, city-led litigation, in which cities have taken court actions against corporations as well as other levels of government. For instance, the United Nations Environment Programme (UNEP) has recently reported that, in the United States of America, state, local, and Tribal governments have filed more than thirty cases seeking damages, abatement, and other forms of relief from fossil fuel industry defendants for harms allegedly sustained as a result of climate change.[73]

ward Elgar 2024), p. 50 ff. On the human rights role of local authorities and the potential of the European Court of Human Rights as a promoter of this role, see M. Saul, "Local Authorities at the European Court of Human Rights", in *International Journal of Human Rights*, XXVIII (2024), p. 1060 ff.

[70] M. Pieterse, "Urban Collectives", cit., p. 537.

[71] C40, *Legal Interventions: How Cities Can Drive Climate Action*, July 2021.

[72] Sabin Center for Climate Change Law, "The Climate Litigation Database", https://www.climatecasechart.com.

[73] United Nations Environment Programme, *Climate Change in the Court-*

The principal obstacle to an active role for cities before international courts and tribunals is, of course, the question of standing. The European Court of Human Rights has consistently declared inadmissible applications submitted by local government bodies, on the ground that they are organs of the State rather than non-governmental organisations or representatives of groups of individuals.[74] In the more recent *Carême* case, the applicant argued that he was bringing his complaint before the Court in his capacity as the former mayor of Grande-Synthe, an area predicted to be severely affected by flooding. The Court found, however, that Mr Carême had no right to apply on behalf of the municipality of Grande-Synthe, referring to its "well-established case-law according to which decentralised authorities that exercise public functions, regardless of their autonomy *vis-à-vis* the central organs – which applies to regional and local authorities, including municipalities – are considered to be 'governmental organisations' that have no standing."[75]

Moreover, the applicant did not satisfy the requirement of victim status under Article 34 of the European Convention, as he had moved to Brussels and was no longer a resident or property owner in the affected area. In reaching its decision, the European

room: Trends, impacts and emerging lessons (Nairobi, UNEP 2025), https://wedocs.unep.org/20.500.11822/48518; on the US practice, see S.L. SWAN, "Plaintiff Cities", in *Vanderbilt Law Review*, LXXI (2018) p. 1227 ff.

[74] See e.g. *16 Austrian Communes and some of their councillors v Austria*, Appl. no. 5767/72, Commission decision on admissibility, 31 May 1974; *Commune Rothenthurm v Switzerland*, Appl. no. 13252/87, Commission decision, 14 December 1988. In *Danderyds Kommun v Sweden*, the Court held that it is not only the "central organs of the State that are clearly governmental organisations, as opposed to non-governmental organisations, but also decentralised authorities that exercise public functions, notwithstanding the extent of their autonomy vis-à-vis the central organs" (ECtHR, *Donderyds Kommun v Sweden*, Appl. no. 52559/99, decision on admissibility, 7 June 2001); see B. OOMEN, M. BAUMGÄRTEL, "Frontier Cities", cit., p. 622.

[75] ECtHR (GC), *Carême v France*, App No 7189/21, 9 April 2024, para. 85. See also O.W. PEDERSEN, "Disruption, Special Climate Considerations, and Striking the Balance", in *American Journal of International Law*, CXIX (2025), p. 129 ff.; B. ÇALI, "Framing Climate Remedies in European Human Rights Law: It is all about trust – in European democracies", in *The International Journal of Human Rights*, XXX (2026).

Court reaffirmed the principles of victim status laid out in *KlimaSeniorinnen*,[76] finding that the applicant did not demonstrate the required "high intensity of exposure" to climate-related harm, or a pressing need for individual protection. Central to the Court's reasoning was the concern that expanding the definition of "victim" to encompass individuals lacking a sufficiently direct connection to the alleged harm would "make it difficult to delineate the *actio popularis* protection – not permitted in the Convention system – from situations where there is a pressing need to ensure an applicant's individual protection from the harm which the effects of climate change may have on the enjoyment of their human rights."[77]

Comparable constraints can be observed in other universal and regional human rights regimes. Although these systems recognize that local government entities may incur in human rights violations, they have not yet developed a framework capable of acknowledging cities as legitimate representatives of the collective interests of their residents.[78]

6. *Conclusion*

The role of cities in advancing environmental sustainability reflects a mode of governance that follows a distinctly "polycentric pattern".[79] The Paris Agreement itself explicitly promotes such a multilevel and multi-actor approach, encouraging engagement by subnational authorities alongside States and other actors. Many urban initiatives represent more ambitious responses to the climate challenge than those adopted at the national level. However, as Maljean-Dubois and Peel have cautioned, the fragmented and often compartmentalized character of polycentric

[76] ECtHR (GC), *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, App No. 53600/20, 9 April 2024.

[77] ECtHR (GC), *Carême v France*, para. 84.

[78] M. Pieterse, "Urban Collectives", cit., p. 555.

[79] A. Jordan, D. Huitema, M. Hildén *et al.*, "Emergence of Polycentric Climate Governance and its Future Prospects", in *Nature Climate Change*, V (2015), p. 977 ff.

action carries the risk that different initiatives may operate at cross-purposes rather than in a genuinely complementary manner.[80]

While early discussions of cities' engagement with international environmental and climate governance focused primarily on so-called "global cities",[81] it has since become apparent that cities of all sizes are capable of engaging with environmental norms, human rights standards, and the SDGs. This engagement now extends well beyond the domestic implementation of international rules and policies. Through transnational cooperation and the articulation of shared standards and aspirations within municipal networks, cities increasingly contribute to the governance of climate change. Although such practices do not amount to formal law-making, they nonetheless shape expectations, influence policy trajectories, and may contribute to the gradual evolution of international legal standards, particularly in areas where intergovernmental consensus remains fragile or contested.

From the perspective of subsidiarity, it is tempting to conceptualize inter-municipal cooperation in the climate domain – as in other policy areas – as a form of "laboratory governance", capable of generating innovation and exercising a gradual influence on central governments. Yet this optimistic account warrants caution. It may not be coincidental that within networks such as the C40, power relations appear to reproduce hierarchies long familiar from the interstate system, raising questions about representation, inclusiveness, and agenda-setting authority.

These dynamics are increasingly acknowledged at institutional level. In his 2021 report *Our Common Agenda*, UN Secretary-General António Guterres emphasized the need for a stronger, more networked and inclusive multilateral system and called for enhanced collaboration with subnational authorities,

[80] S. Maljean-Dubois, J. Peel, "The Progressive 'Climatization' of International Law", in S. Maljean-Dubois, J. Peel (eds), *Climate change and the Testing of International Law / Le droit international au défi des changements climatiques* (Leiden/Boston, Brill/Nijhoff 2023) p. 3 ff., p. 27.

[81] See S. Sassen, *The Global City – New York, London, Tokyo* 2nd edition (Princeton, NJ, Princeton University Press 2001).

including through the creation of an Advisory Group on Local and Regional Governments.[82] Nijman and Aust have aptly observed that international organizations have begun "to strengthen their bottom-up approach to (informal) law- and policy-making, to organize feedback – e.g. on health regulations or ITU smart and sustainable city standards – from cities, and to include cities in their knowledge production practices."[83] This is reflected in initiatives such as the United for Smart Sustainable Cities (U4SSC), coordinated by International Telecommunication Union (ITU), the United Nations Economic Commission for Europe (UNECE) and UN-Habitat, with the support of fourteen other UN agencies and programmes.[84] How member States will respond when such ostensibly technical or operational engagements become more overtly politicized remains an open question. After all, even if international organizations and cities may wish to collaborate, they are not "natural partners":[85] cities are not members of international organizations, States are.

Finally, growing attention has been directed in recent years to the city as an urban collective: a social and political space in which environmental harm, climate-related disasters, and structural inequalities generate forms of suffering that cannot be adequately captured through an exclusively individualistic conception of rights. The convergence of environmental law and human rights law, as reflected in recent jurisprudence and UN practice, signals an emerging recognition of collective and cumulative

[82] *Our Common Agenda: Report of the UN Secretary General* (New York, United Nations 2021), p. 75.

[83] H.P. Aust and J. Nijman, "The Urbanisation of International Law – A Post-Cold War History", in E. Benvenisti, D. Kritsiotis (eds), *Cambridge History of International Law*, Vol. XII (Cambridge, Cambridge University Press, forthcoming).

[84] Interestingly, UNECE and ITU developed jointly a definition of a smart sustainable city, as "an innovative city that uses ICTs and other means to improve quality of life, efficiency of urban operation and services, and competitiveness, while ensuring that it meets the needs of present and future generations with respect to economic, social, environmental as well as cultural aspects". See *U4SSC – Connecting communities, empowering people*, October 2024, available at https://u4ssc.itu.int/publications/.

[85] J.K. Cogan, "Cities in the Shadows", cit., p. 134.

harms. Yet international and regional human rights systems remain poorly equipped to accommodate the representative role of cities as democratically constituted guardians of their residents' collective interests, particularly in the context of climate-related litigation.

Section Five

The EU normative and judicial framework

ACCESS TO JUSTICE AND ENVIRONMENTAL LITIGATION IN THE EU: SUSTAINABILITY AS A SOLIDARITY RIGHT?

Francesco Munari*

Summary: 1. On Rights, Climate, and Judges: Some Methodological Premises. – 2. Infringement Procedures against Member States for Non-Compliance with Environmental and Climate Regulations: A Wide-Ranging Action. – 3. The Court's Case Law on Member States' Failure to Comply with the Objectives of Directive 2008/50 on Air Quality: A Case Study also for Climate. – 4. Sanctions against Member States for Failure to Comply with EU Environmental Rules. – 5. Private Action before the Courts for Climate Protection. A Mere Support to Induce States to Respect Existing Rules, without Exceeding the Competences of the EU legislator. – 6. The Court of Justice's Preclusions Regarding the Admissibility of Compensation Claims. – 7. National Courts (and the ECHR) and Climate Litigation. – 8. More Recent Developments: Normative Openings and Fundamental Issues to Be Resolved.

1. On Rights, Climate, and Judges: Some Methodological Premises

At least since Immanuel Kant, our legal culture revolves around individual rights, and legal systems are constructed upon them. Thus, even regarding the relationship between humans and the environment, the idea of a right to the environment has long taken hold, arising from the generalized recognition of the necessity, for us humans, to live in an environmental context suitable to allow us to lead a life qualitatively consistent with other generally protected rights, from the right to life, to personal and family relationships, to health, and even to property. These are, as can be seen, primary rights, indeed, fundamental rights, as recognized in various regional conventions on fundamental

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rights, or in the constitutions of many States.[1] *Inter alia*, on July 28, 2022, the United Nations General Assembly adopted a resolution affirming that access to a clean and healthy environment constitutes a universal right. And in its Advisory Opinion of July 23, 2025,[2] the ICJ affirmed that the enjoyment of human rights is conditioned upon all States' obligations under international human rights law to protect the climate system and other parts of the environment.[3]

This is not the place to delve into the soundness or actual practicability of these "rights",[4] but it is a fact that, along this line of thought, even the climate, as a crucial aspect concerning the well-being of the Planet and living species, and therefore of humans as well, is the subject of particular attention within the frameworks that stem from "individual rights to the environment", in an attempt to theorize the existence of subjective legal positions that – individually or collectively – may be asserted to ensure an adequate fight against climate change.

Thus, it is also maintained that, precisely by virtue of such a "right", it is possible to bring a case before a judge in order to obtain, through judicial means, a ruling aimed at ascertaining whether such a "right" has been violated or may be violated, with consequent condemnation – mostly directed at the legislator – to a *facere*, that is, to adopt more stringent rules to combat climate change, or the recognition – and compensation – of possible damage arising from the violation of this "right".

This is the perspective of so-called climate litigation, which, as we shall see, finds increasing examples in various legal systems, both national and supranational;[5] among all, those of the Dutch

[1] Indeed, a more persuasive approach moves from a "responsibility" to protect the environment, rather than a "right" to enjoy a clean environment. See F. Munari, L. Schiano di Pepe, *Tutela transnazionale dell'ambiente. Principi, regole e problemi*, Bologna, il Mulino, 2012, 133 ff. This approach seems now confirmed also by the ICJ (below, footnote 3).

[2] https://news.un.org/en/story/2022/07/1123482.

[3] https://www.icj-cij.org/case/187/advisory-opinions.

[4] Above, footnote 1.

[5] M. Delsignore, "Il contenzioso climatico dal 2015 ad oggi", in *Giornale di diritto amministrativo*, 2/2022, p. 265 ff.; S. Valaguzza, "Liti strategiche: il

Supreme Court (Hoge Raad) in the well-known *Urgenda* case,[6] the order of the German Constitutional Court (*Bundesverfassungsgericht*) of March 26, 2021,[7] and, most recently, of the European Court of Human Rights, in the case concerning the so-called *Klima Seniorinnen*, decided on April 9, 2024.[8]

Such an approach, however, cannot be assumed in the simplistic terms mentioned above, and instead deserves more thor-

contenzioso climatico salverà il pianeta?", in *Diritto processuale amministrativo*, XIV (2021), p. 293 ff.; F. Fornasari, "La struttura della tutela inibitoria ed i suoi possibili utilizzi nel contrasto al cambiamento climatico", in *Responsabilità civile e previdenza*, LXXXVI (2021), p. 2061 ff.; U.S. Department of Justice, "Comprehensive Environmental Justice Enforcement Strategy", Memorandum May 5, 2022; J. Bonine, "Removing barriers to justice in environmental litigation", in *Rutgers International Law and Human Rights Journal*, II (2021), p. 100 ff.

[6] Hoge Raad (Netherlands Supreme Court) 20 December 2019, *Urgenda v The State of the Netherlands*, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007, on which L. Besselink, "The National and EU Targets for Reduction of Greenhouse Gas Emissions Infringe the ECHR: The Judicial Review of General Policy Objectives", in *European Constitutional Law Review*, XVIII (2022), p. 155 ff.; J. Krommendijk, "Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation", in *Review of European, Comparative & International Environmental Law*, XXXI (2021), p. 60 ff.; M. Meguro, "State of The Netherlands v. Urgenda Foundation", in *American Journal of International Law*, CXIV (2020), p. 730 ff.; E. Guarna Assanti, "Il ruolo innovativo del contenzioso climatico tra legittimazione ad agire e separazione dei poteri dello Stato. Riflessioni a partire dal caso Urgenda", in *Federalismi*, XVII (2021), p. 66 ff.

[7] Bundesverfassungsgericht [BVerfG], 24 March 2021, 1 BvR 2656/18, http://www.bverfg.de/e/rs20210324_1bvr265618en.html. See R. Krämer-Hoppe, "The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide", in *German Law Journal*, XXII (2021), p. 1393 ff.

[8] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, https://hudoc.echr.coe.int/eng/?i=002-14302. See C. Hilson, "The ECtHR's Klimaseniorinnen Judgment: The Meaning of Carbon Budget within a Wide Margin of Appreciation", https://blogs.law.columbia.edu/climatechange/2024/04/11/the-ecthrs-klimaseniorinnen-judgment-the-meaning-of-carbon-budget-within-a-wide-margin-of-appreciation/; F. Munari, "La battaglia per il clima delle Seniorinnen svizzere: diritti umani o altro?", https://www.ilsecoloxix.it/mondo/2024/04/15/news/seniorinnen_svizzere_diritti_umani_commento-14225110/.

ough consideration, especially by legal scholars. Specifically, the affirmation of rights in environmental matters, and the request for judicial review or protection with respect to them, strictly presupposes that, upstream, rules have been adopted that set precise environmental or climate standards. Therefore, and as will be discussed further below, a "right to the environment", or a "right to the climate", can exist only in the presence of environmental or climate standards established by law.

2. *Infringement Procedures against Member States for Non-Compliance with Environmental and Climate Regulations: A Wide-Ranging Action*

In the EU context, access to justice aimed at ensuring the effectiveness of environmental rules occurs along two different lines: borrowing expressions originating in other regulatory fields, such as antitrust, we may conventionally define these as public and private enforcement of environmental norms. By public enforcement, we refer to the application of EU environmental law by Union institutions against Member States, to induce the latter to comply with rules established at the Union level. By private enforcement, we refer to the instruments available for environmental protection against individuals or companies, or against institutions, whether national or European.

The infringement procedure constitutes, from the perspective of public enforcement, the privileged tool for the European Commission in carrying out its role as guardian of compliance with EU law. The 2017 communication *Delivering better results through better application*[9] sets certain priorities in the field of enforcement, which are supplemented by the Commission's commitment to ensuring effective application of the regulations relevant to the *Green Deal*[10] and to monitoring Member State initiatives. All this appears consistent and appropriate with re-

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX-:52017XC0119(01).

[10] COM(2019) 640 final.

spect to the need for monitoring the large number of secondary legislative acts adopted by the Union in this area.[11]

The Commission's action can be mapped both from the point of view of cross-sectoral initiatives within various areas of EU law, such as the incomplete or incorrect transposition of directives, or the failure to comply with judgments of the Court of Justice, and from the perspective of material priorities, as they relate to the three pillars of the *Green Deal*: circular economy, biodiversity, and zero pollution. More recently, and in clear connection with climate issues, procedures have been initiated in the field of energy, arising from the failure to transpose directives on energy efficiency and renewable energy.[12]

The Commission's enforcement on the above priorities has led to numerous infringement procedures: from 2019 to 2023, some 2,000 infringement procedures have been initiated in environmental matters against Member States, and this figure is constant over time, further demonstrating the difficulties encountered by Member States in achieving the objectives set by EU rules.[13]

As is well known, the failure of Member States to comply with the indications given by the Commission when it finds an infringement of (environmental) EU rules may result in contentious proceedings before the Court of Justice. In this regard, cases recently examined by the Court of Justice have concerned the following areas: (a) air quality protection;[14] (b) protection of bio-

[11] According to the EU taxonomy more than 1000 legislative acts encompass the environment. Additionally, one should recall that secondary EU law on climate change covers other sectors of EU law. For an overview on the above taxonomy see https://eur-lex.europa.eu/browse/directories/legislation.html?root_default=CC_1_CODED%3D15,CC_2_CODED%3D1510&displayProfile=allRelAllConsDocProfile&classification=in-force#arrow_1510.

[12] See Commission, Monitoring the application of European Union law 2021 Annual Report, 15.7.2022, COM (2022) 344 final, pp. 5-6.

[13] https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure/2023-annual-report-monitoring-application-eu-law/environment-2023_en.

[14] CJEU 19.12.2012, C-68/11, Commission v. Italy, EU:C:2012:815; 5.4.2017, C-488/15, Commission v. Bulgaria, EU:C:2017:267; 22.2.2018, C-336/16, Commission v. Poland, EU:C:2018:94; 24.10.2019, C-636/18,

diversity and conservation of habitats;[15] (c) protection of water and treatment of wastewater;[16] (d) waste management.[17] Particularly relevant, for the purposes of this contribution, is the case law on non-compliance with air quality standards, to which the following brief considerations are dedicated.

3. *The Court's Case Law on Member States' Failure to Comply with the Objectives of Directive 2008/50 on Air Quality: A Case Study also for Climate*

Ensuring that levels of harmful substances in the atmosphere comply with the standards adopted by the Union is a very challenging task for Member States, given the extreme complexity of the issue and the numerous causes that may interact with compliance with those standards. This is a matter which, apart from being relevant in itself as an element in combating climate change, shares much in common with the difficulties encountered in addressing that phenomenon, due to countless and complicated factors and contributing causes.

The relevant EU legislation, namely Directive 2008/50/EC,[18] provides, *inter alia*, for the setting of limit values for the presence of certain pollutants in the air (PM10, NO2, etc., Article 13), and

Commission v. France, EU:C:2019:900; 30.4.2020, C-638/18, Commission v. Romania, EU:C:2020:334;10.11.2020, C-644/18, Commission v. Italy, EU:C:2020:895; 4.3.2021, C-664/18, Commission v. United Kingdom, EU:C:2021:171; 3.6.2021, C-635/18, Commission v. Germany, EU:C:2021:437; 3.2.2021, C-637/18, Commission v. Hungary, EU:C:2021:92.

[15] CJEU 17.4.2018, C-441/17, Commission v. Poland (Puszcza Białowieska), EU:C:2018:255; 5.9.2019, C-443/18, Commission v. Italy (Xylella fastidiosa), EU:C:2019:676; 22.6.2022, C-661/20, Commission v. Slovakia, EU:C:2022:496.

[16] CJEU 27.2.2020, C-298/19, Commission v. Greece, EU:C:2020:133; 24.6.2021, C-559/19, Commission v. Spain (Deterioro del Espacio Natural de Doñana), EU:C:2021:512.

[17] Inter alia, CJEU 21.3.2019, C-498/17, Commission v. Italy, EU:C:2019:243.

[18] The consolidated text is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX %3A02008L0050-20150918.

the obligation, for Member States, to prepare, in case of exceeding those limit values, air quality plans aimed at ensuring that the period of exceedance is as short as possible (Article 23).

As with climate change, the objective of air quality can be achieved by intervening on a very large number of factors, which, on the one hand, broadens the theoretical choices available to States, but, on the other hand, makes it more difficult to identify which factors may most effectively contribute to compliance with the obligations of result imposed by the law. The numerous infringement procedures initiated by the Commission and then brought before the Court have led to case law worthy of consideration.

First of all, regarding the regime applicable to Member State liability for failure to comply with the relevant environmental standards, the Court has consistently clarified that the objective fact of non-compliance with the rule is in itself sufficient to establish an infringement of Union law, and that the subjective element (intent or fault) and any difficulties encountered by the Member State, including a particular socio-economic situation, are irrelevant,[19] unless a case of force majeure can be established.[20] Thus, the test of liability for Member States is essentially objective and is determined by the mere exceeding of the limits of the various pollutants provided for by the directive. It should be noted: the Court does not censure the mere exceeding of the threshold, which may occasionally occur for "exogenous" reasons reasonably beyond the control of States, but sanctions as non-compliant those States that do not adopt suitable solutions to ensure that such exceedance occurs for the shortest possible period.[21]

Furthermore, by functionally interpreting the issue of the so-called crystallization of the subject matter of the dispute, the Court allows the Commission to include in the action before it

[19] CJEU, C-336/16, Commission v. Poland, para. 101; C-636/18, Commission v. France, para. 85.

[20] CJEU, C-68/11, Commission v. Italy, paras 61-64.

[21] CJEU C-635/18, Commission v. Germany; C-637/18, Commission v. Hungary.

also the Member State's non-compliance after the delivery of the reasoned opinion, when the exceeding of the limit values in the Member State concerned continues.[22]

As for the existence of objectively justifying reasons for exceeding the limit values that Member States attempt to invoke to escape the "objective liability" provided for in the directive, again the Court's case law is rigorous. For example, it has been considered irrelevant for justifying non-compliance the circumstance that the breach was caused by the violation committed by another Member State.

Even more interesting – and deserving further analysis – is the Court's finding that a Member state cannot justify having exceeded the limit values in order not to restrict the fundamental freedoms (free movement of goods or persons) established by the TFEU, as well as the irrelevance of any possible contributory fault of Union institutions, which, according to the arguments of the States, may not have set sufficiently ambitious vehicle emission standards, thereby making it more difficult for States themselves to comply with the air quality limit values (i.e., acting on other possible emission vectors). Specifically, regarding the hypothesis of negligence on the part of the Commission in proposing effective rules to limit NO2 emissions from diesel vehicles, the Court held that, since this is not the only source of emissions, the State remains nonetheless obliged to comply with the obligation to respect the limit values set by the directive.[23]

[22] CJEU, C-488/15, Commission v. Bulgaria; C-336/16, Commission v. Poland; C-638/18, Commission v. Romania; 24.5.2011, C-52/08, Commission v. Portugal, EU:C:2011:337, para. 42; 10.9.2015, C-36/14, Commission v. Poland, EU:C:2015:570, para. 24; 26.6.2019, C-729/17, Commission v. Greece, EU:C:2019:534, para. 38; 27.2.2020, C-384/18, Commission v. Belgium, EU:C:2020:124, para. 20. See also A. Rigaux, "Recours en manquement - Manquement systématique et persistent", in *Europe*, XXX (2020), p. 183 ff.; K. Ward, "ECJ Rules that Poland Failed to Fulfil Obligations under Ambient Air Directive", in *European Journal of Risk Regulation*, (IX) 2018, p. 372 ff.

[23] CJEU, C-664/18, Commission v. United Kingdom; 19.11.2014, C-404/13, ClientEarth and the Queen v. The Secretary of State for the Environment, Food and Rural Affairs. See A. Ryall, "Enforcing EU Environmental Law against Member States: Air Pollution, National Courts and the Rule of Law", in *European Journal of Risk Regulation*, VI (2015), p. 305 ff.

4. *Sanctions against Member States for Failure to Comply with EU Environmental Rules*

Within the framework of the strict compliance with environmental rules required of Member States, Union public enforcement is also enriched by a powerful system of sanctions; indeed, the case law in this area serves as precedents to be applied in all situations where infringement procedures must also be followed by a sanction against the non-compliant State.[24] Tellingly, the landscape is very broad, with sanctions ranging from precautionary measures such as *astreintes* to definitive sanctions, which can themselves be structured both as lump sums and as penalty payments.[25] There is no doubt that this case law is and will be applicable also in cases of violations of climate rules.

The most emblematic case in this regard appears to be that concerning the *Białowieża Forest*,[26] in which, having found Poland's violation of the "Habitats" and "Birds" directives, and considering the seriousness and urgency of intervening to protect the environment, the Court had no hesitation in granting the Commission's request to suspend, by way of interim measures, the effectiveness of any management provision of the forest adopted by Polish authorities, with the addition of a daily penalty payment in case the non-compliance continued.[27] Regarding sanctions, the main pillar on which the Court bases its decision is above all to consolidate a "strong" and general use of Article 279

[24] See F. Munari, "Protecting the Environment through Union Sanctions. The Many Facets of the Enforcement of EU Environmental Law", in S. Montaldo, F. Costamagna, A. Miglio (eds), *EU Law Enforcement* (Abingdon-New York, Routledge 2021), p. 267 ff.

[25] CJEU, 22.2.2018, C-328/16, Commission v. Greece (Thriasio Pedio), EU:C:2018:98; 12.11.2019, C-261/18, Commissione c. Ireland (Derrybrien), EU:C:2019:955; C-298/19, Commission v. Greece.

[26] CJEU, order 20.11.2017, C-441/17, Commission c. Poland (Puszcza Białowieska), EU:C:2017:877. See P. Wennerås, "Saving a Forest and the Rule of Law: Commission v. Poland", in *Common Market Law Review*, 56 (2019), p. 541 ff.

[27] See also CJEU, 17.4.2018, C-441/17, Commission v. Poland (Puszcza Białowieska), EU:C:2018:255.

TFEU;[28] this provision can thus be applied to grant the Court the power to impose any interim measure it deems necessary to guarantee the full effectiveness of the final decision,[29] including the power to prescribe any measure aimed at ensuring compliance with the interim order, such as a penalty payment if the party concerned does not comply with the injunction.[30] It is on this provision, therefore, that the Court bases its sanctioning power, enhancing the sanctioning instruments available to it, in addition to those prescribed by Article 260 TFEU. In this way, the enforcement of EU environmental law (and not only) is significantly strengthened, compared to the typical paradigm of infringement procedures, in which (a) the Commission must first bring an action for non-compliance; (b) the Commission's position must be upheld by the Court; (c) the Court's judgment is not complied with, and (d) only at this stage the Commission may ask the Court to impose sanctions under Article 260 TFEU.[31]

Another interesting case is that of the *Turów Mine*[32]. Once again, the Court acts by way of interim measures, but this time at the request of another Member State (the Czech Republic) under Article 259 TFEU, which, again, is read in conjunction with Article 279 TFEU, and not with Article 260 TFEU. Persuasively,

[28] See M.F. Orzan, "The Provisional Features of Interim Relief Before the Court of Justice of the European Union", in F.M. Palombino, R. Virzo, G. Zarra (eds), *Provisional Measures Issued by International Courts and Tribunals* (The Hague, Asser Press 2021), p. 199 ff; M. Condinanzi, "La protezione giurisdizionale cautelare avanti al Giudice dell'Unione europea: l'efficacia e l'equilibrio", in *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne* (Torino, Giappichelli 2018), p. 190 ff.; K. Lenaerts, M. Radley, "Recent Case-law of the European Court of Justice in Interim Measures Cases", in *European Law Reporter*, 2016, p. 2 ff.

[29] CJEU, order 20.11.2017, C-441/17, para. 97.

[30] *Ivi*, para. 100.

[31] *Ivi*, paras. 101-102.

[32] CJEU, order 20.9.2021, C-121/21 R, Commission v. Poland (Turów Mine), EU:C:2021:752. See G. D'Agnone, "La Corte di giustizia condanna la Polonia al pagamento di una penalità di mora per non aver osservato le misure cautelari emesse riguardo alla miniera di lignite di Turów", in BlogDUE, https://www.aisdue.eu/giulia-dagnone-la-corte-di-giustizia-condanna-la-polonia-al-pagamento-di-una-penalita-di-mora-per-non-aver-osservato-le-misure-cautelari-emesse-riguardo-alla-miniera-di-lignite-di-turow/.

the Court maintains that if Member States have full standing to bring the main action for non-compliance, they must likewise be recognized as having standing to request interim measures.[33]

That being said, Article 260 TFEU, and in particular its paragraph 2, is instead used by the Court of Justice to establish its broad discretion in setting the sanction, compared to the measure proposed by the Member State. The classic criteria of adequacy, proportionality, and financial capacity of the Member State subject to the sanction are recalled,[34] in line with established Union case law on the matter.[35]

As for sanctions imposed definitively, it is now standard practice to combine penalty payments and lump sums in proceedings under Article 260.2 TFEU adopted in environmental matters. This choice dates back to the historic case *Commission v. France*,[36] also concerning environmental protection and specifically the biological resources of the sea, and has been reaffirmed in two recent judgments, respectively concerning deficiencies in urban wastewater collection systems in the *Thriasio Pedio* region of Greece[37] and violations of rules on environmental impact assessment relating to a wind farm in Derrybrien, Ireland.[38]

Regarding the combination of sanctions, the Court confirms its discretion in deciding to impose both the lump sum and the daily penalty, depending on the characteristics of the non-compliance, or on the conduct of the Member State following the finding of non-compliance under Article 260 TFEU. The Court

[33] See also article 160.2 of the Rules of Procedure of the Court. See M.F. Orzan, "Commento artt. 160-162 del Regolamento di procedura della Corte di giustizia", in C. Amalfitano, M. Condinanzi, P. Iannuccelli (eds), *Le regole del processo davanti al giudice dell'Unione europea* (Napoli, Editoriale scientifica 2017), p. 817 ff.

[34] See order 20.9.2021, C-121/21 R, para. 50.

[35] CJEU, 12.11.2020, C-842/19, Commission v. Belgium, EU:C:2020:915, paras. 63-64; 4.7.2000, C-387/97, Commission v. Greece, EU:C:2000:356, para. 92.

[36] CJEU 12.7.2005, C-304/02, Commission c. France, EU:C:2005:444.

[37] CJEU, 22.2.2018, C-328/16, Commission v. Greece; 27.2.2020, C-298/19, Commission v. Greece, paras. 39-54.

[38] CJEU 12.11.2019, C-261/18, Derrybrien; C-298/19, Commission v. Greece.

clarifies that "the imposition of a penalty is justified, in principle, only if the non-compliance regarding the failure to implement the previous judgment persists until the facts are examined by the Court."[39]

Regarding the amount, and as previously noted, the relevant criteria are adequacy and proportionality, taking into account in particular three factors: (a) the seriousness of the infringement, (b) its duration, and (c) the financial capacity of the non-compliant Member State, measured considering the recent evolution of its gross domestic product (GDP). Conversely, and once again confirming that sort of "strict liability" of the Member State previously discussed, the Court excludes that internal difficulties in executing the judgment may operate as a mitigating factor for the sanction,[40] while economic difficulties faced by the Member State[41] and the presence of external circumstances are relevant for the calculation of the sanction.[42]

The judgement on the *Derrybrien* wind farm[43] concerned once more the failure to comply with the obligation to carry out an environmental impact assessment for the construction of that infrastructure. In that case, it was deemed entirely irrelevant that the matter covered a renewable energy production facility, and that such facility had been in operation for some time; the Court therefore imposed the payment of both a lump sum and a penalty payment, still considering the infringement serious as it had been unremedied for 11 years, and thus also in conflict with the principle of loyal cooperation, which requires the Member State to remedy the infringement "as soon as possible." As for determining the penalty payment, the Court emphasized the "consequences of non-compliance on private and public interests as well as the urgency for the Member State concerned to comply with its obligations."[44]

[39] CJEU 22.2.2018, C-328/16, Commission v. Greece, para. 82.
[40] *Ivi*, para. 124.
[41] *Ivi*, paras. 103-108.
[42] *Ivi*, paras. 96-101.
[43] CJEU 3.7.2008, C-215/06, Commission v. Ireland, EU:C:2008:380.
[44] CJEU 12.11.2019, C-261/18, para. 133.

This significant variety of forms characterizing the Court's case-law highlights the ability to apply tailor-made measures according to the specific characteristics of individual cases. An example is the action under Article 260.2 TFEU brought by the Commission against Bulgaria for violation of rules on the prevention of air pollution, in which the Court was asked to order the payment of a minimum lump sum and, in addition, a penalty payment calculated to be multiplied for each area affected by exceeding the air quality limit values.[45] The Court closed the case by declaring the Commission's action inadmissible, as it lacked elements capable of clarifying when Bulgaria had failed to comply with its obligations following the finding of the initial infringement. However, the possibility of particularly "detailed" sanctions as proposed by the Commission remains open.

In conclusion, the application of the standards set by the Union legislator towards Member States is rigorous. This rigor is implemented according to discretionary and strongly deterrent criteria, with respect to which the discretion of the Court (and of the Commission itself in proposing sanctions) faces no limits, neither in terms of compliance with the principle of certainty of the penalty, nor in terms of its predictability. This appears, to some extent, consistent with the fact that, in this field – and particularly regarding climate change – even the costs of compliance, that is the "ecological transition", are difficult to quantify. In short, the relative indeterminacy of the sanction seems to constitute a further and autonomous element of deterrence against violations of the environmental standards imposed by EU law on Member States, thus increasing the effectiveness of enforcement.

5. *Private Action before the Courts for Climate Protection. A Mere Support to Induce States to Respect Existing Rules, without Exceeding the Competences of the EU Legislator*

If infringement procedures, with all their sanctioning apparatus, constitute a unique feature in the landscape of environmen-

[45] CJEU, C-174/21, Commission v. Bulgaria, EU:C:2023:210.

tal (and potentially climate) enforcement, the same cannot be said for judicial actions aimed at having the judge review the violation of environmental rules. Moreover, the fact that there is judicial control over the violation of rules is neither new nor particularly striking, being inherent to the very function of the judge. This analysis is also typical of EU law, insofar as, on the one hand, national judges contribute to ensuring "effective judicial protection in the areas covered by Union law" under Article 19.1, second paragraph, TEU; on the other hand, many environmental rules, and all those concerning climate, originate from the Union, and once adopted or transposed into the national legal order (as is the case with directives), they form part of the body of rules capable of establishing obligations, prohibitions, or responsibilities for recipients, the compliance with which is entrusted above all to national judges, whether civil, administrative, or criminal. In this sense, individuals, or groups of individuals, act in support of the Union legislator, viz. the Commission, as "guardian" of the Treaties, thus contributing to a "diffuse" protection of the rules and standards established by the EU legislator.

However, a quite different perspective occurs when before a judge "judicial protection" is sought with respect to an action by public authorities deemed insufficient for environmental protection or for combating climate change. Here, in fact, the judge is asked to identify "remedies" against "trajectories" of human activities, and – more precisely – of the rules that should govern them, since the underlying claim is that the existing rules are considered incapable of saving the planet from climate upheavals. From the point of view of the plaintiff, be it the individual or organized collective actors, this type of claim implies the existence of a right to have ascertained by a court the violation of an obligation on the part of the "State" (or, from the Union perspective, the EU itself) to adopt the rules deemed necessary to combat climate change.

As mentioned in the introduction, climate litigation presents very delicate issues, both methodological and substantive, and in the EU context a case law seems to have now consolidated that deserves consideration.

In abstract terms, in Union law, the "parallel" private enforcement action to infringement procedures appears to be the action for annulment under Article 263 TFEU, in relation to which, however, the well-known limitations on *locus standi* for non-privileged applicants set out in the fourth paragraph of the provision apply. These significant preclusions are only partially offset by the possibility of bringing the matter before the Court indirectly, that is, through preliminary references on validity.

6. *The Court of Justice's Preclusions Regarding the Admissibility of Compensation Claims*

In the previous paragraphs, we have seen that, when public enforcement is at stake, the Court's case law is very strict in verifying and sanctioning Member States that have not effectively implemented Union rules. Similarly, we have seen that, with equal clarity, the Court excludes that private parties can bring actions before the Union courts to demand "more protection" than that established by existing rules, even if, it is claimed, those rules are insufficient to counter environmental degradation or climate change.

It is now necessary to understand whether, once a violation of Union environmental rules by Member States has been established, in addition to the public enforcement consequences mentioned above, there is also room for private enforcement, and particularly for compensation actions by individuals or groups against the State.

This is, in fact, the "natural" aspect of private enforcement, understood as the action of private parties pursued alongside that of public institutions regarding the alleged violation of "public" rules. Given that, to date, there have been no actions before the Court specifically aimed at climate-related compensation claims against Member States, it is useful to see where the phenomenon of compensation actions by individuals for violations in general of EU environmental law attributable to Member States stands. These are violations of rules, to be clear, and not of "principles" or "objectives" as mentioned in the previous para-

graph. Also because these actions necessarily fall under the *Francovich* theory and its progeny,[46] which presuppose State liability for violation of Union law, which in turn requires the existence of very precise parameters, namely: "a right to compensation is recognized by [Union] law if three conditions are met, that is, that the legal rule violated is intended to confer rights on individuals, that the violation is sufficiently serious, and, finally, that there is a direct causal link between the violation of the obligation incumbent on the State and the damage suffered by the injured parties."[47]

The leading case in this area is the *JP v. Minister for Ecological Transition and Prime Minister* judgment,[48] concerning a request for compensation brought by a resident of the Paris urban area against the French State for health damages related to the State's failure, for at least a decade, to comply with the limit values for air pollution imposed by Union law. Despite the Advocate General Kokott's opinion, which, after an in-depth analysis, suggested that the Court should respond positively to the compensability of the damage suffered by individuals,[49] the Court developed a much more concise reasoning, leading to different outcomes.

Specifically, while it is established that, according to settled case law, the principle of State liability may arise not only in cases where provisions of Union law expressly confer rights on individuals that States have violated, but also in relation to positive or negative obligations that the same provisions impose in a well-defined manner both on individuals and on Member States

[46] CJEU 9.11.1995, C-479/93, Francovich et al. v. Italy, EU:C:1995:372; 5.3.1996, C-46/93 e C-48/93, Brasserie du pêcheur and Factortame, EU:C:1996:79; 24.11.2011, C-379/10, Commission v. Italy, EU:C:2011:775; 19.12.2019, Deutsche Umwelthilfe, C-752/18, EU:C:2019:1114; 18.1.2022, Thelen Technopark Berlin, C-261/20, EU:C:2022:33; 28.6.2022, C-278/20, Commission v. Spain, EU:C:2022:503. See A. Biondi, *The Right to Damages in European Law* (Alphen aan den Rijn, Kluwer 2009); A. Di Marco, *La responsabilità extracontrattuale dello Stato per violazioni del diritto dell'UE* (Napoli, Editoriale scientifica, 2017).

[47] CJEU 5.3.1996, C-46/93 e C-48/93, para. 55.

[48] CJEU 22.12.2022, C-/61-21, ECLI:EU:C:2022:1015.

[49] ECLI:EU:C:2022:359, paras. 33 ff. See F. Munari, "Public e private en-

and Union institutions, the Court asks whether the rules on air quality, although they are sufficiently clear and precise, can be interpreted as conferring rights "on individuals or categories of individuals."[50]

On this point, however, the Court's answer is negative, noting in particular that the rules in question, and more specifically the obligations imposed on Member States by the European legislation on air quality, "pursue… a general objective of protecting human health and the environment as a whole",[51] which therefore excludes the existence of the first of the three conditions for compensability of damage.

That said, appreciation remains for actions by private parties aimed at stimulating Member States to implement environmental (and climate) rules, thus contributing to respect for the principle of effectiveness, as well as openness to different solutions that may be identified at the national law level.

Apparently, therefore, the Court closes the door to the possibility of compensation actions for State violations of environmental rules, and in this perspective, a 'climate litigation' based on EU law also seems to preclude access to compensation actions. This is a choice that is also in line with the position taken by the Court regarding compensation actions brought against the Union itself, which, moreover, in climate matters holds a con-

forcement del diritto ambientale dell'Unione, *Quaderni AISDUE*, no 1, 2023; L. Calzolari, "Gone with the Wind: JP and the Right to Clean Air Under EU Law", in *European Papers*, IX (2024), p. 337 ff.; P. De Pasquale, "'Francovich ambientale'? Sarà per un'altra volta. Considerazioni a margine della sentenza *Ministre de la Transition écologique*", in *BlogDUE* 2023, available at https://www.aisdue.eu/wp-content/uploads/2023/01/De-Pasquale-BlogDUE.pdf; M. Fisicaro, "Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza JP c Ministre de la Transition écologique", in *European Forum*, VIII (2023), p. 131 ff.; M. Pagano, "Human Rights and Ineffective Public Duties: The Grand Chamber Judgment in JP v. Ministre de la Transition écologique", in *European Law Blog*, February 2023, https://www.europeanlawblog.eu/pub/human-rights-and-ineffective-public-duties-the-grand-chamber-judgment-in-jp-v-ministre-de-la-transition-ecologique/release/1?readingCollection=52ca3b00.

[50] CJEU 22.12.2022, C-/61-21, para. 56.

[51] *Ivi*, para. 55.

current and indeed absolutely predominant competence compared to the Member States in conceiving and then adopting rules: it should be recalled that, as a corollary to the *Carvalho* case,[52] the compensation action brought by the applicants was also declared inadmissible as it was deemed instrumental in obtaining a result similar to annulment, circumventing its limitations.[53] Consistently with the principles of equivalence (and effectiveness), the same conclusions would seem to apply when Member States are the parties concerned.

In fact, although the Court's decision has met with some criticism in the literature,[54] the choice to qualify the air quality rules as not conferring rights on individuals resolves at the root a whole series of possible doubts about the practicability of compensation actions based on the theory of State liability for violation of EU law, which, for example, the Advocate General Kokott had dwelled on at length.

And indeed, especially with regard to climate change, it must be emphasized that each of us is responsible in part for the environmental impact, and the main reason for this situation is constituted by lifestyles and the related enjoyment of rights that make human conduct unsustainable from an environmental perspective. True, some conduct, and therefore some subjects, may have greater impacts than others, just as it is true that some people, compared to others, may be more affected or harmed by climate change. But that said, it should not be forgotten that – as long as they are not prohibited by precise regulatory provisions – any conduct causing greenhouse gas emissions is lawful and indeed exercised in the enjoyment of rights; therefore, hypothesizing forms of State liability for not adequately "restricting" the rights of others seems an unconvincing option; all the more so considering that, precisely on the issue of climate change, and given the very different consequences it has on people, the entire system,

[52] CJEU 25.3.2021, C-565/19 P, Carvalho et al. v. European Parliament and Council, ECLI:EU:C:2021:252.

[53] CJEU 5.9.2019, C-447/17 P, European Union v Guardian Europe e Guardian Europe v European Union, ECLI:EU:C:2019:672, paras. 50-51.

[54] See above, footnote 49.

even at Union level, is moving towards identifying social and cooperative instruments, among which the Social Climate Fund, established by Regulation 2023/955, stands out. In this perspective, given the enormous costs that so-called decarbonization will impose on all of us, and especially on public budgets, the idea that individuals or groups of individuals could 'withdraw' from State coffers part of these resources as a result of compensation actions brought against the States themselves does not seem fair or just.

Moreover, imagining "conflictual" or litigious scenarios not only opens a strong and hardly understandable discontinuity with the (much more mature) solidarity and social approach just mentioned, but also appears inconsistent with the very structure of the 2015 Paris Climate Agreement, which wisely excluded from the relevant legal categories, hypotheses of "liability" or "litigiousness" in favour of transparency, cooperation, and international solidarity.

7. *National Courts (and the ECHR) and Climate Litigation*

In the case *JP v. Minister for Ecological Transition*, the Court denied the compensability of individual damage, even in the face of violations of environmental rules perpetrated by the State obligated to implement them. As mentioned, the Court did not exclude that different conclusions could be reached based on national law, and therefore before national judges, but it did exclude that the basis for a compensation claim could be found in the theory of State liability for violation of EU law, specifically for violation of environmental rules, since such rules are not suitable to confer rights on individuals, but rather identify as beneficiaries the general public, or the environment and human health as a whole. Even regarding climate rules, the conclusions should not change, as their content, if possible, is more clearly aimed at preserving not individuals, but future generations, the Planet in its habitability for the human species and other living species, biodiversity, and the safeguarding of natural resources. This does not mean, it should be noted, that the Union is not interested in the enforcement of climate rules. But as mentioned, the perspec-

tive is different (and, in my opinion, persuasively so) from that of 'climate litigation' aimed at making States pay for damages.

However, at the beginning of this contribution, it was mentioned that in other jurisdictions, the sensitivity appears different: perhaps the most emblematic case is the French saga *Association les Amis de la Terre*, in which, after a series of judgments progressively aimed at putting more and more pressure on the competent French authorities to implement effective tools to ensure compliance with air quality (i.e., the objectives of Directive 2008/50, which were the subject of much of the Union case law used in this contribution), and after deciding already, in a 2020 decision, to put these authorities on notice through the threat of a penalty payment, with a judgment of August 4, 2021, the Conseil d'État imposed non-symbolic sanctions in favour of a whole series of associations; moreover, they will likely be repeated if non-compliance with the environmental objectives that the institutions have still not been able to fulfil persists.[55] With a caveat, provided by the legal possibility, under French law, to grant standing to a "*personne morale de droit public ou d'un organisme de droit privé chargé de la gestion d'un service public*". It is not excluded that this approach may be followed by other Member States. Moreover, elsewhere, class actions are allowed for environmental claims,[56] as long as – let it be reiterated – specific and enforceable rules are deemed violated. That said, in the *Verein KlimaSeniorinnen* judgment[57], the ECtHR did not rule on damages, as the applicants did not request any compensation; however, it excluded the standing of individuals (the application was submitted both by an association and by individual persons), as they were not able to overcome the filters generally provided by

[55] Conseil d'État, decision 4 août 2021, no. 428409, FR:CECHR:2021:428409.20210804, at https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-08-04/, with further references to previous cases referred to in the text. For references to other national court cases see also ECtHR, above footnote 8.

[56] M. Krupnik, "EPA sued over lack of plan to regulate water pollution from factory farms", in *The Guardian*, 19 Oct. 2022, https://www.theguardian.com/environment/ 2022/oct/19/epa-lawsuit-water-pollution-factory-farms.

[57] Above footnote 8.

the Court's case law. It is difficult to establish whether this may have consequences in the future: certainly, insofar as associations can hardly claim to have suffered damage, and individuals have difficulty demonstrating their own locus standi, it is plausible to believe that compensation claims could be accepted only in truly extreme cases, and in Europe, such cases are hardly conceivable.

From the perspective of the European Union, I would nevertheless advise against departing from the teachings of the Court of Justice, for those reasons of fairness and solidarity that climate change imposes. The fight against climate change appears to be an objective achievable only if countless initiatives are implemented, and above all if this is done by all States: in the European context, even if one of the Member States were able to reach zero emissions, it would certainly not be able to prevent climate change, and the damages that each of us, some more than others, will have to suffer. Moreover, as mentioned, it is not possible to achieve environmental objectives without restricting existing rights, which makes the issue of judicial protection much more complex. Finally, authoritative non-legal scholars of these problems – while emphasizing the need to change the paradigms of human action (and therefore the rules that govern it) – have no claim, unlike the approach of too many legal scholars, to identify *the* trajectory capable of saving the planet from global warming, but rather propose a wide range of paths, each of which, even minimal on its own, can contribute to achieving ambitious results.[58]

Considering the above, perhaps it would be better to focus our efforts in other directions.

8. *More Recent Developments: Normative Openings and Fundamental Issues to Be Resolved*

The hypothesis previously made of limiting recourse to climate litigation on the compensatory level within the European

[58] See D. H. Meadows, D. L. Meadows, J. Randers, W. Behrens III, *The Limits to Growth*, 1972, also available at https://www.clubofrome.org/publication/the-limits-to-growth/.

context, however, has recently seen an important evolution both in case law and in European legislation.

With regard to case law, it is worth recalling the order of the Italian Court of Cassation no. 20381 of 21 July 2025,[59] confirming the jurisdiction of the ordinary judge in the case brought by *Greenpeace* and others to obtain compensation for damages caused by climate change linked to emissions.

The ruling is especially important on a systemic level, and for what will be said shortly, because it overrules previous decisions of the lower courts, in which, essentially following the "prudence" indications provided by the Court of Justice in the *JP* judgment, an absolute lack of jurisdiction was declared for compensation actions against the State regarding alleged climate inaction, as they were characterized by acts, measures, and conduct manifestly expressive of the function of political direction, consisting in the determination of the fundamental lines of development of the legal order and of the State's policy in the delicate and complex, undeniably emergency-related issue of anthropogenic climate change.

Conversely, in the case of a lawsuit brought against legal persons (ENI s.p.a.), or public bodies (MEF and Cassa Depositi e Prestiti), but in their capacity as shareholders of ENI, the Court of Cassation established that the rules of common law (Articles 2043, 2050, 2051, 2058 of the Civil Code) apply in the case of a compensation action based on the allegation of damage consisting in the violation of the right to life and respect for private and family life, whose injustice is claimed by reference, on the one hand, to the obligations deriving from Articles 2 and 8 ECHR, and on the other to the intervention duties provided by international sources on combating climate change.

The reference to Articles 2050 and 2051 of the Civil Code is intended to establish an objective or presumed liability of the aforementioned subjects, due to the intrinsic dangerousness of the activity carried out, which requires those who carry it out to

[59] https://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20250721/snciv@sU0@a2025@n20381@tO.clean.pdf.

adopt all measures suitable to avoid harm to third parties, with an obligation of custody and control for those who have the availability of potentially harmful materials.

ENI, therefore, is called to court as the operator of a dangerous activity, and MEF and Cassa Depositi e Prestiti as holders of a position of control (according to civil law) that allows them to intervene indirectly in the company's activity. Thus – concludes the Court of Cassation – the plaintiffs did not intend to assert, as in the previous case, the liability of the State in the political-legislative sphere, but a liability of the defendants, as subjects operating directly or indirectly in the sector of fossil fuel production and distribution, for the failure to adopt the necessary measures to reduce climate-altering emissions produced by the company's activity.

Thus set up, the case can be decided by the ordinary judge, who is called upon to verify whether the international and constitutional sources invoked are suitable to impose a duty of intervention directly on the defendants, such as to establish their extra-contractual liability, and thus to justify the award of compensation in specific form pursuant to Article 2058 of the Civil Code.

There is no doubt for the Supreme Court also regarding the jurisdiction of the Italian judge. If it is true that the place where the event generating the damage occurred – the Court explains – must be identified as the place where the climate-altering emissions are produced, the place where the damage to the identified and family life is realized is that where the plaintiffs reside. By applying this latter criterion, the Italian judicial authority, and in particular the Rome Tribunal, will have to decide on Greenpeace's compensation claims.

It remains to be seen whether, on the merits, these claims can be upheld. In fact, there might be some difficulties in identifying the rule that has been violated and the causal link between such violation and the damages suffered.

In this perspective, the new provision contained in the recast "Clean Air" Directive, no. 2024/2881, should also be read, whose Article 28 establishes that "Member States shall ensure that natural persons who suffer damage to human health caused by a violation of the national rules transposing Article 19(1) to (5) and

Article 20(1) and (2) of this Directive that has been committed intentionally or negligently by the competent authorities have the right to claim and obtain compensation for that damage." All this with the caveat of establishing rules that do not make it too difficult to bring such actions, while still allowing the possibility of setting limitation periods from the moment of knowledge or discoverability of the alleged relevant harmful event.[60]

Someone might argue that the Union is opening very broadly to climate litigation and in particular to climate claims. In reality, the cases for which the directive allows compensation claims are (fortunately) very precise, and concern intentional or negligent violations of the obligations to adopt and monitor Air Quality Plans and Air Quality Roadmaps (Article 19, para.para. 1-5), and Short-term Action Plans (Article 20): these are specific cases, in which the "political" assessment is upstream, and the competent authorities therefore have broad discretion in configuring the plans, whereas inaction or negligent monitoring are more easily assessed from the point of view of their "unlawful" nature.

That said, some critical points will certainly need to be addressed by the national legislators within the deadline for transposing the directive, i.e., November 2026. In particular, and in the first place, relevant will be to clarify the issue concerning burden of proof and causality: the directive establishes the right to compensation in cases of "intentional or negligent violation" of national rules. But how will negligence and the causal link between pollution and health damage be demonstrated? The individual claimant could face difficulties in proving that the regulatory violation concretely caused the health damage, especially when multiple environmental factors are involved.

Secondly, it will be necessary to assess the subjective scope of compensation: the right to compensation is recognized against the "competent authority" (or transposing authority). This means that responsibility falls on the State – more precisely, on the authority that should have implemented the directive – not neces-

[60] L. Calzolari, "JP est mort, vive JP! A new liability regime for – the competent authorities of – the Member States with regard to the protection of ambient air quality?", in *Quaderni AISDUE*, no 3, 2024.

sarily on individual private polluters. Member States will have to establish in their national legislation the procedures, time limits, and precise recipients of compensation actions.

Thirdly, also the material limits and temporality will have to be clearly addressed: it is unclear up to what point the right to compensation runs: for example, what is the limitation period, whether violations are ongoing, whether retroactive compensation is permitted, etc. Without clear national regulation, the right to compensation risks remaining theoretical, as it could be subject to procedural or limitation exceptions.

Fourthly, legislators shall carefully consider the integration of this regime with other protection instruments: the compensation regime provided by Article 28 integrates with other instruments: European infringement procedures, appeals to the administrative judge, protection under the ECHR (Articles 2/8 of the European Convention on Human Rights), and domestic civil liability law. There may be cases in which the injured party prefers to act under other sources (e.g., domestic civil law) or to combine multiple actions. The European regime strengthens, but does not necessarily exclude, other remedies.

Fifthly, one will need to consider, for any sake, the risk – or the opportunity – of a limited effect of this new remedy: if national doctrine or courts interpret Article 28 restrictively (e.g., subjecting it to very stringent conditions), the "substantive" effect of the rule could remain modest. For the right to compensation not to be a mere "nice declaration," it will be crucial how the transposing laws and judicial practices make it concrete.

Finally, and maybe most importantly, a balance shall have to be struck between environmental protection and regulatory stability: the introduction of compensatory liability could increase the financial exposure of States and public authorities, raising fears of "massive compensation claims." Member States could be incentivized to set limits, maximum amounts, or strict criteria, risking weakening the real effectiveness of the provision.

In essence, things are clearly set in motion, but solutions are manifold and shall have to be carefully envisaged.

PUBLIC PARTICIPATION RIGHTS AND FUNDAMENTAL RIGHTS IN THE EU

MORGAN ELEANOR HARRIS*

SUMMARY: 1. Introduction. – 2. Access to Environmental Information and the Freedom to Seek and Receive Information – 3. Participation in Environmental Decision-Making and Interferences with Fundamental Rights. – 4. Access to Justice in Environmental Matters and the Right to Effective Judicial Remedies. – 5. The Prohibition of Penalization, Harassment and Persecution of Environmental Defenders. – 6. Conclusions.

1. *Introduction*

While fundamental rights began to take shape in international law shortly after the end of the Second World War, environmental participation rights are a relatively recent development. The first international instrument to set out the principle of public participation was the 1992 Rio Declaration, yet it was not until the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention" or "AC")[1] that these rights were enshrined in a binding treaty.[2] Even if subsequent environmental treaties have frequently included public participation rights,[3] human rights instruments have not been

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[1] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 450.

[2] On the implementation of Principle X of the 1992 Rio Declaration in international law, see J. EBBESSON, "Principle 10: Public Participation", in J. E. Viñuales (ed) *The Rio Declaration on Environment and Development: A Commentary* (Oxford, Oxford University Press 2015), p. 287 ff.

[3] See, for example, Article XVI of Revised African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003, en-

revised to take account of this development. Nonetheless, international and supranational legal authorities, like the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), have found ways to respond to emergence of procedural environmental rights. Analysing the practice of these two courts can shed light on the relationship between environmental participation rights and the established fundamental rights framework in Europe.

There are several factors that may shape this relationship. Within the European Union, it is inevitably affected by the status of these rights within the legal of the Union. Both are found in primary law: the Union and its Member States are parties to the Aarhus Convention,[4] and fundamental rights are general principles of EU law enshrined in the Charter of Fundamental Rights (CFR),[5] the interpretation of which is closely connected to that of the European Convention on Human Rights (ECHR).[6] However, Aarhus Convention rights are also set out in numerous provisions of secondary law[7] and are the subject of soft law instru-

tered into force 23 July 2016) and Article 12 of the Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 3156 79.

[4] Under Article 216 TFEU, this means that the treaty is binding on both the Union and its Member States, Both the European Union and its Member States are parties to the treaty, and the Union has the task of ensuring not only its own compliance but also that of its Member States. On the status of international agreements in the legal order of the Union, see, *inter alia*, E. Neframi, "International Law as Law of the European Union", in E. Cannizzaro *et al.* (eds), *Mixed Agreements as a Source of European Union Law* (Leiden, Brill/Nijhoff 2012), p. 325 ff.; A. Pisapia, *Gli accordi misti nel quadro delle relazioni esterne dell'Unione europea* (Torino, Giappichelli 2019); R. Baratta, "Treaty Interpretation in the EU: Ensuring Consistency with the Bona Fide Principle and Jus Cogens", in *Italian Yearbook of International Law*, XXXII (2023), p. 47 ff.

[5] Charter of Fundamental Rights of the European Union, 2000/C 364/01 of 18 December 2000.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 2889 UNTS 213. On the relationship between the international, EU and ECHR legal orders, see J. Wouters, M. Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford, Oxford University Press 2021), pp. 212-312.

[7] On environmental participation rights in the secondary law of the Union,

ments.[8] As a result, within the Union, the relationship between fundamental rights and public participation rights is inevitably shaped by general principles regarding the hierarchy of sources. Nonetheless, the Union's judiciary may also draw upon interpretive methods, especially consistent or systemic interpretation, to increase the coherence between these bodies of rights.[9] The extent to which they have made use of such tools – and for what purposes – is a key concern of this study.

Thus, to understand how environmental participation rights and fundamental rights are linked in the European context, this chapter will examine the evolving practice in this area. First, it will discuss the various ways in which the first pillar of public participation – access to environmental information – may be connected to other fundamental rights (section 2). Next, it will discuss the potential intersection between these regimes in relation to participation in decision-making (section 3), access to justice in environmental matters (section 4) and other rights connected to public participation, such as the prohibition of penalization of environmental defenders, as well as the principle of equality (section 5). Lastly, conclusions are offered on the significance of these connections for the protection of fundamental rights connected to the environment (section 6).

see, *inter alios*, L. Krämer, "The EU and Public Participation in Environmental Decision-Making", in J. Jendrośka, M. Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice* (Cambridge, Intersentia 2017), p. 121 ff; G. Gattinara, M. Noll-Ehlers, *The Scope and Requirements of Public Participation in EU Environmental Law*, in B. Peters, E. J. Lohse (eds), *Sustainability through Participation?* (Leiden, Brill/Nijhoff 2023), p. 139 ff.; M. Eliantonio, J. Richelle, "Access to Justice in Environmental Matters in the EU Legal Order: The 'Sectoral' Turn in Legislation and Its Pitfalls", in *European Papers*, IX (2024), p. 261 ff.

[8] Notably, the Commission has used soft law to promote access to justice in environmental matters in the Member States; see Commission Notice on Access to Justice in Environmental Matters, C(2017) 2616 final of 28 April 2017.

[9] On the ACCC, see, *inter alia*, C. Pitea, "The Non-Compliance Procedure of the Aarhus Convention: Between Environmental and Human Rights Control Mechanisms", in *The Italian Yearbook of International Law*, XVI (2007), p. 85 ff.

2. *Access to Environmental Information and the Freedom to Seek and Receive Information*

The right of access to environmental information is enshrined in Articles 4 and 5 of the Aarhus Convention. Within the Union, it is also set out in numerous provisions of secondary law, above all the Aarhus Regulation no. 1367/2006,[10] which amends the Transparency Regulation no. 1049/2001,[11] and the Environmental Information Directive 2003/4/EC.[12]

This environmental participation right appears to be connected to the fundamental freedom of expression in its passive form, that is, the freedom to receive information.[13] Compared to this fundamental right, Article 4 of the Aarhus Convention sets out the right of access to environmental information in greater detail, including provisions on costs, an accelerated timeframe for a response and a restricted set of reasons that public authorities can invoke to deny requests. It also sets out a special right of access to justice to appeal any delay or denial in response to disclosure requests. These features would suggest that access to environmental information is *lex specialis* relative to freedom of expres-

[10] Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13 of 25 September 2006.

[11] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 43 of 31 May 2001.

[12] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/311/EEC, OJ L 41/26 of 14 February 2003.

[13] At an international level, the Human Rights Committee, in its General Comment 34(2011), interpreted the right to freedom of expression in Article 19(2) of the International Covenant on Civil and Political Rights as encompassing a right of access to documents, including in environmental matters. UNHRC, "General Comment No. 34. Article 19: Freedoms of Opinion and Expression", CCPR/C/GC/34, 12 September 2011 paras. 18-19. See also UNHRC, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression", A/68/362, 4 September 2013.

sion in its passive form.[14] According to the *lex specialis derogat legi generali* principle, in the case that two or more norms potentially apply to a given situation, priority should be given to those that are more specific. The principle is based on the idea that special rules take into account the particular features of a situation and thus produce a result that is both more equitable and better suited to the objectives pursued by the special instrument.[15]

Nonetheless, the practice of European courts is less clear about the relationship between these two rights.

As for the ECtHR, it has generally held that Article 10 ECHR does not give rise to a general right to access documents, including environmental information, held by public authorities.[16] The Grand Chamber, in *Magyar Helsinki Bizottsag v. Hungary*,[17] held that documents must be disclosed in two cases: when disclosure is mandatory under national law and the authorities have been ordered to do so by a court of law,[18] and when they contain information in the public interest and access is essential for the applicant to exercise their freedom to impart information.[19] Here the

[14] Interestingly, in the Latin American context, no distinction is made between the regime applicable to environmental information and other types of information held by public authorities: the principle of "maximum disclosure" is applicable to both. B. Orme, *Access to Information: Lessons from Latin America* (Paris - Montevideo, Oficina Regional de Ciencias de la UNESCO para América Latina y el Caribe, Oficina de UNESCO en Montevideo, 2017).

[15] ILC, "Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission", A/CN.4/L.702, p. 8-9. Notably, the applicability of a special rule does not necessarily exclude that of the general rule.

[16] See ECtHR, judgment (plenary) of 7 July 1989, *Gaskin v the United Kingdom*, app. no. 10454/83 para. 52; subsequently, in ECtHR, judgment of 10 July 2006, *Sdružení Jihočeské Matky v Czech Republic*, app. no. 19101/03, the Court held that Article 10 ECHR did apply to a request for documents held by public authorities when such access is guaranteed under national law and under the conditions set by the same.

[17] ECtHR, judgment [GC] of 8 November 2016, *Magyar Helsinki Bizottság v Hungary*, app. no. 18030/11 para. 156.

[18] Certainly, the legal basis for disclosure here could be provisions of national law adopted to comply with the Aarhus Convention.

[19] ECtHR, judgment [GC] of 3 April 2012, *Gillberg v Sweden*, app. no. 41723/06 para. 83-97; *Magyar Helsinki Bizottság v Hungary,* cit., para. 131.

role of the press as a "public watchdog" is given special consideration.[20] Instead, the Aarhus Convention sets out a presumption that access to environmental information should be provided in all cases, without regard to the purpose for which it is sought, and only exceptionally should such access be denied. Nonetheless, the ECtHR has not drawn upon the special features of the Aarhus regime in interpreting Article 10 ECHR.

The Court of Justice of the European Union typically resolves questions related to access to environmental information on the basis of secondary law alone,[21] without any explicit reference to fundamental rights, in particular the Environmental Information Directive 2003/4/EC for access requests presented to Member States' authorities[22], and the regime arising from the combination of the Aarhus Regulation[23] and the Transparency Regulation[24] for requests to EU authorities. Despite this, the Union's bodies have frequently observed that the right of access to information is an expression of the principle of transparency, and as such, is essential to the realization of the EU's foundational value of democra-

[20] *Magyar Helsinki Bizottság v Hungary*, cit., paras. 165-168; ECtHR, judgment of 14 April 2009, *Társaság A Szabadságjogokért v Hungary*, app. no. 37374/05 paras. 35-36.

[21] For example, in *Fish Legal and Shirley*, the question presented by the referring judge related to the interpretation of the notion of 'public authority', which the CJEU resolved solely on the basis of Directive 2003/4/EC, read in the light of the Aarhus Convention: CJEU, Judgment [GC] of 19 December 2013, case C-279/12, *Fish Legal and Shirley*, ECLI:EU:C:2013:853. Criticisms have been raised about this approach based almost exclusively on secondary law, given that Regulation 1049/2011 diverges from the requirements of the Aarhus Convention: see the contribution by R. Baratta in this volume as well as K. Lenaerts, "Quelques réflexions sur le droit d'accès aux documents", in R. Adam *et al.* (eds), *Liber amicorum in onore di Antonio Tizzano. De la cour CECA à la Cour de l'Union: Le long parcours de la justice européenne* (Torino, Giappichelli 2018), p. 495 ff.; P. Leino-Sandberg, "Environmental Information and 'External Pressure': Assessing EU Compliance with its International Obligations under the Aarhus Convention", in K. A. Armstrong *et al.* (eds), *EU External Relations and the Power of Law: Liber Amicorum in Honour of Marise Cremona* (Oxford, Hart Publishing 2024), p. 187 ff.

[22] Directive 2003/4/EC, cit.

[23] Regulation (EC) 1367/2006, cit.

[24] Regulation (EC) 1049/2001, cit.

cy.[25] In theory, the right of access to environmental information could be interpreted as inherent in the right to freedom of expression enshrined in Article 11 CFR,[26] as well as Article 42 CFR, which sets out the right of access to documents. Nonetheless, to the author's knowledge, this has not yet been explored in the case law of the CJEU.

The right of access to information has, however, been connected to rights other than freedom of expression.

In several cases, the ECtHR has found that respect for the right to private life, family life and home, enshrined in Article 8 ECHR, requires public authorities to gather and disseminate information regarding environmental hazards to which persons may be exposed. Although it has not directly connected such duties to rights enshrined in the Aarhus Convention, in practice they often coincide, at least in part. In the 1998 case of *Guerra v. Italy*,[27] the ECtHR found that public authorities must provide information that is essential for people to assess their potential exposure to environmental hazards and to make informed decisions about where to live.[28] The dispute concerned an industrial installation producing chemicals located in Manfredonia, Italy. Following failed safety inspections and a series of accidents, including one in which 150 people were hospitalized for arsenic

[25] *Ivi*, recital 2. In a case relating to the disclosure of information on chemicals, (Judgment of September 2015, case T-245/11, *ClientEarth and International Chemical Secretariat v ECHA*, ECLI:EU:T:2015:675, para. 192), the General Court held that, "The public's right to receive that information constitutes the expression of the principle of transparency…according to which openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to them and contributes to strengthening the principle of democracy."

[26] Indeed, the Explanations state that this right should be read as corresponding to Article 10 ECHR and, accordingly, "The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention." Explanations relating to the Charter of Fundamental Rights, OJ C 303 17 of 14 December 2007, p. 21.

[27] ECtHR, judgment [GC] of 19 February 1998, *Guerra and others v Italy*, app. no. 14967/89.

[28] *Ivi*, para. 60. Similarly, see ECtHR, judgment [GC] of 19 October 2005, *Roche v the United Kingdom*, app. no. 32555/96, paras. 155-156.

poisoning, the surrounding community sought information about the risks associated with the installation, which the local authorities failed to provide. The applicants claimed this was in breach of Article 10 ECHR, but the ECtHR disagreed,[29] deciding of its own initiative that Article 8 ECHR was applicable instead, given that the very existence of uncertainty about the potential impact of industrial accidents constitutes an interference with the peaceful enjoyment of home, private and family life.[30] Although the case pre-dated the Aarhus Convention, the principles the ECtHR set out in it reinforce the procedural rights later enshrined in the same.

More recently, in *Cannavacciuolo and others v Italy*,[31] the ECtHR held that public authorities must also actively gather and disseminate information regarding certain polluted sites. The case stemmed from the toxic legacy in the Campania region of decades of illegal industrial and hazardous waste disposal by criminal associations. The Court found that the failure of public authorities to identify and address the risk posed by such contamination amounted to a violation of their positive duties to safeguard human life, enshrined in Article 2 ECHR.[32] The judgment mentions Article 5 of the Aarhus Convention and its requirement that Parties gather and disseminate certain environmental information,[33] but the Court does not draw upon it in interpreting the positive duties of states under Article 2 ECHR.[34]

In theory, it would have been possible to interpret these fundamental rights systemically with the Aarhus Convention. International customary law, codified in Article 31(3)(c) of the 1969

[29] *Guerra and others v Italy*, cit., para. 53.

[30] *Ivi*, para. 57.

[31] ECtHR, judgment of 30 January 2025, *Cannavacciuolo and others v Italy*, app. no. 51567/14, 39742/14, 74208/14, 21215/15.

[32] *Ivi*, paras. 459-465.

[33] *Ivi*, paras. 181-182. Article 5(1) of the Aarhus Convention requires public authorities to have collect data on environmental quality "necessary to the performance of their functions," which includes protecting human health from environmental hazards.

[34] *Ivi*, paras. 390-391.

Vienna Convention on the Law of Treaties (VCLT), permits the interpreters of a treaty provision to draw upon other treaties in force between the parties.[35] The ECtHR applies its own variant of systemic interpretation, known as the 'consensus method', in which it looks towards international treaties and domestic practice to help interpret Convention rights, even beyond what would be permitted under Article 31(3) VCLT.[36] However, systemic interpretation is permitted but not required: it may well be that the ECtHR prefers to keep two treaty regimes distinct, even if this could result in normative fragmentation.

This hesitation of the ECtHR and the CJEU to draw upon the Aarhus Convention in interpreting the ECHR and secondary law risks creating a divergence between the information gathering and disclosure duties set out in Article 4 and 5 AC and those required to fulfil fundamental rights. It is true that the duties the ECtHR has derived from Articles 2 and 8 ECHR apply only where there is a direct link between the information and human health or peaceful enjoyment of home and family life, yet it may have been reasonable for the Court of Strasbourg to draw upon the Aarhus Convention in interpreting the positive duties of States in this area. In any case, it is clear that these two sets of duties are, for the time being, self-contained. Similarly, in the Union, the CJEU's exclusive reliance on secondary law in addressing questions relating to access to justice may lead to divergence between the letter of the law and the Union's international commitments, or its fundamental rights regime.

[35] O. Dörr, "Article 31. General Rule of Interpretation" in O. Dörr, K. Schmalenback (eds), *Vienna Convention on the Law of Treaties* 2nd edn (Berlin, Springer 2018) p. 559, at pp. 600-601.

[36] On the ECtHR's consensus method, see L. Wildhaber, A. Hjartarson, S. Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights", in *Human Rights Law Journal*, XXXIII (2013), p. 248 ff.; C. Djeffal, "Consensus, Stasis, Evolution", in P. Kapotas, V. P. Tzevelekos (eds), *Building Consensus on European Consensus* (Cambridge, Cambridge University Press 2019), p. 71 ff.; E. Polgári, "The Role of the Vienna Rules in the Interpretation of the ECHR", in *Erasmus Law Review*, XIV (2021), p. 82 ff.

3. *Participation in Environmental Decision-Making and Interferences with Fundamental Rights*

The right to participate in environmental decision-making may seem less obviously connected to fundamental rights compared to the right of access to environmental information. Nonetheless, courts have held this participation right to be a procedural requirement when fundamental rights affected by environmental degradation are at stake in public decision-making processes.

Preliminarily, it should be recalled that not all instances of environmental degradation amount to interferences with fundamental rights. The ECtHR has held since *López Ostra v. Spain*[37] that pollution can engage the responsibility of the state for the violation of Article 8 ECHR only when certain conditions are met.[38] Crucially, the pollution must directly affect the applicant's home, family or private life in a manner that reaches a certain minimum threshold of severity,[39] even if it is not necessary to

[37] ECtHR, judgment of 9 December 1994, *López Ostra v Spain*, app. no. 16798/90.

[38] On ECHR rights and environmental degradation see, *inter alia*, A. Saccucci, "La protezione dell'ambiente nella giurisprudenza della CEDU", in A. Caligiuri *et al.* (eds), *La tutela dei diritti umani in Europa* (Padova, CEDAM 2010), p. 493 ff.; A. Boyle, "Human Rights and the Environment: Where Next?", in *European Journal of International Law*, XXIII (2012), p. 613 ff.; O. W. Pedersen, "The European Court of Human Rights and International Environmental Law", in J. H. Knox, R. Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge, Cambridge University Press 2018), p. 86 ff.; T. Scovazzi, "L'interpretazione e l'applicazione 'ambientalista' della Convenzione europea dei diritti umani, con particolare riguardo al caso *Urgenda*", in *Rivista giuridica dell'ambiente*, 2019, p. 619 ff.; K. Morrow, "The ECHR, Environment-Based Human Rights Claims and the Search for Standards", in S. J. Turner *et al.* (eds), *Environmental Rights* (Cambridge, Cambridge University Press 2019) p. 41 ff.

[39] ECtHR, judgment of 2 December 2010, *Ivan Atanasov v Bulgaria*, app. no. 12853/03, para. 66-75. See, *inter alia*, S. Negri, "A Human Rights Approach to Environmental Health", in S. Negri (ed) *Environmental Health in International and EU Law: Current Challenges and Legal Responses* (Abingdon, Routledge 2020), p. 25 ff. On the contrary, the Convention does not apply to environmental pollution in general where it does not have an impact on individual rights: ECtHR, judgment of 22 May 2003, *Kyrtatos v Greece*, app.

demonstrate a link between the pollution and specific harm to health[40] or impacts the victim's "quality of life".[41]

When the existence of harm caused by pollution is established, the ECtHR must assess the legality of this interference with fundamental rights. If it is caused by a decision adopted by a public authority, such as development consent, it scrutinizes both the substance of the decision that interferes with the right and the procedure by which the public authorities arrived at it. First, as for the substance, the interference must serve one of the legitimate aims listed in the second paragraph of Article 8 ECHR.[42] Second, public authorities must give due weight to the interests of individuals affected.[43] When assessing whether they did so, judges must take into account, on a case-by-case basis, the type of policy or decision, the existence of procedural safeguards, and the extent to which the views presented by the public were actually taken into account. Specifically, in order to guarantee effective opportunities for participation, the decision must be preceded by appropriate studies that permit the authorities and the public to assess the potential impact of the proposal on the

no. 41666/98, para. 51-53; ECtHR, judgment of 10 January 2012, *Di Sarno and others v Italy*, app. no. 30765/08, para. 80.

[40] *López Ostra v Spain*, cit., para. 51; ECtHR, judgment of 9 June 2005, *Fadeyeva v Russia*, app. no. 55723/00, para. 88; ECtHR, judgment of 24 January 2019, *Cordella and others v Italy*, app. no. 54414/13, paras. 100-107; ECtHR, judgment of 11 October 2022, *Kotov and others v Russia*, app. no. 6142/18, para. 108.

[41] Where there is no clear injury, whether or not the pollution impacts the "quality of life" of an individual is difficult to determine due to the subjective, imprecise nature of this concept. See ECtHR, judgment of 26 October 2006, *Ledyayeva and others v Russia*, app. no. 53157/99, para. 90; ECtHR, judgment of 10 February 2011, *Dubetska and others v Ukraine*, app. no. 30499/03, para. 105-106; *Kotov and others v Russia,* cit., para. 101.

[42] The Court generally grants states a broad margin of appreciation in this regard. See ECtHR, judgment [GC] of 8 July 2003, *Hatton and others v the United Kingdom*, app. no. 36022/97, para. 100; ECtHR, judgment of 10 November 2004, *Taşkın and others v Turkey*, app. no. 46117/99, para. 116; ECtHR, judgment of 2 November 2006, *Giacomelli v Italy*, app. no. 59909/00, para. 82.

[43] *Hatton and others v the United Kingdom*, cit., para. 104; *Taşkın and others v Turkey*, cit., para. 118.

environment and fundamental rights.[44] Moreover, all concerned individuals must be able to challenge the decision if they hold that their interests were not sufficiently considered.[45]

Issues relating to participation in environmental decision-making and fundamental rights have arisen in several cases. In *Giacomelli v. Italy*, the Court of Strasbourg found that the continued operation of a facility for the storage and treatment of hazardous waste was a violation of the victims' right to private and family life under Article 8 ECHR.[46] Among the reasons for its decision, it noted that the installation in question had operated for seven years before any impact assessment was conducted and the facility had remained open despite repeated judicial decisions ordering it to cease operations. In these circumstances, "the procedural machinery provided for in domestic law for the protection of individual rights […] were deprived of useful effect."[47] Such 'procedural machinery' includes not only access to justice, but appropriate environmental assessment and participatory decision-making.[48]

Likewise, in *Grimkovskaya v Ukraine,*[49] the applicant had suffered harm from heavy metal contamination and poor air quality following the decision of the local authorities to re-route a major motorway through the road in front of her house. This decision was not preceded by an impact assessment or opportunity for the applicant to present her views, nor was she able to challenge the decision in court, which the Court noted was also required under the Aarhus Convention.[50] Accordingly, the Court concluded that the authorities had not struck a fair balance between her individ-

[44] ECtHR, judgment of 28 March 2006, *Öçkan and others v Türkiye*, app. no. 46771/99, para. 43.

[45] *Taşkın and others v Turkey*, cit., para. 119; *Öçkan and others v Türkiye*, cit., para. 43; *Giacomelli v Italy*, cit., para. 83.

[46] *Giacomelli v Italy*, cit.

[47] *Ivi*, para. 94.

[48] *Ivi*, paras. 82-84.

[49] ECtHR, judgment of 21 July 2011, *Grimkovskaya v Ukraine*, app. no. 38182/03.

[50] *Ivi*, para. 69.

ual rights and the general interests at stake.[51] On the contrary, in *Hatton and others v UK*, the Court took into account the fact that the applicants had enjoyed opportunities to present their views and eventually challenge the final decision to expand operations at Heathrow airport, concluding that the public authorities had achieved a fair balance between individual rights and general interests.[52]

While the ECtHR has, in these cases, assessed the effectiveness of public participation in decision-making, its analysis has not entered into technical questions about specific matters regulated in Article 6 of the Aarhus Convention, such as timeframes for notification, arrangements for public consultations, and methods of determining the "public concerned". However, in *KlimaSeniorennin,* the Court specified in great detail how it intends to assess whether the public has had meaningful opportunities to make its views heard on matters relating to climate change, including in matters of general climate policy, even going beyond the requirements of the Aarhus Convention or EU law.[53] In general, the approach of the ECtHR here appears to be more coherent with the Aarhus Convention compared to its understanding of access to environmental information, even if it is limited to cases where environmental degradation is sufficiently concrete and severe such that Article 8 ECHR applies.

To the author's knowledge, no cases raising issues relating to public participation and Article 7 CFR – which reflects Article 8 ECHR – have been brought before the CJEU. Should the CJEU be faced with a claim related to Article 7 CFR and participation, it is likely that it would look towards the ECtHR's jurisprudence in this area, even if it is certainly not bound by it. The fact that the EU has transposed the detailed requirements of Article 6 and

[51] *Ivi*, para. 72. Similarly, see *Taşkın and others v Turkey,* cit., paras. 119-125.

[52] *Hatton and others v the United Kingdom*, cit., para. 128.

[53] See ECtHR, judgment [GC] of 9 April 2024, *Verein Klimaseniorinnen Schweiz and others v Switzerland*, app. no. 53600/20 para. 553-554. Article 8 of the Aarhus Convention sets out a right to participate in generally binding acts in much broader terms, offering parties a wide margin of discretion to determine what constitutes 'appropriate' arrangements.

7 of the Aarhus Convention in secondary law – largely faithfully – no doubt offers more clear-cut grounds for legal claims when this procedural right is violated rather than relying on principles of Union law, including fundamental rights.

4. *Access to Justice in Environmental Matters and the Right to Effective Judicial Remedies*

The right of access to justice in environmental matters includes the right to challenge decisions and omissions relating to access to information requests, decisions subject to public participation within an environmental impact assessment procedure, and acts and omissions alleged to infringe environmental law.[54] Judicial or administrative review must offer adequate and effective remedies and, in accordance with Article 9(4) of the Aarhus Convention, "be fair, equitable, timely and not prohibitively expensive." Such language recalls the right to effective judicial remedies, enshrined in Article 47 CFR and Articles 6 and 13 ECHR.[55] However, the approaches of the CJEU and the ECtHR to access to justice in environmental matters diverge significantly.

Within the European Union, the connection between Article 9 of the Aarhus Convention and Article 47 CFR has been crucial in ensuring that this environmental participation right may be invoked before the EU judiciary. The issue is that the terms of

[54] See Article 9 para. 1, 2 and 3 of the Aarhus Convention respectively. On the right of access to justice in environmental matters, see, *inter alia*, J. Jendrośka, "Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas", in *Journal for European Environmental & Planning Law*, XVII (2020), p. 372 ff.

[55] Indeed, the ACCC has drawn upon the case law of the ECtHR in interpreting Article 9(4). For example, in relation to the requirement of timeliness, see ACCC, Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania, ECE/MP.PP/C.1/2015/10 of 11 December 2015 para. 86-88; in relation to equality of arms and the recoverability of costs, ACCC, Findings and recommendations with regard to communication ACCC/C/2015/131 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, ECE/MP.PP/C.1/2021/23 of 22 September 2021 para. 150.

Article 9 AC allow Member States a certain margin of discretion in setting criteria for standing, such that the CJEU has held that it the provision is not sufficiently precise and unconditional to produce direct effect.[56] As a result, where the Union lacks secondary law specifically setting out a right of access to justice,[57] the Aarhus Convention cannot be invoked on its own to fill the gap. Instead, the CJEU has developed an extensive case law bridging these two rights regimes by connecting the right of access to justice in environmental matters to the right to effective judicial remedies enshrined in Article 47 CFR.

The case of *Deutsche Umwelthilf*e *(Réception des véhicules à moteur)* is typical of the CJEU's approach to effective judicial protection in this area.[58] The case centred on the question of whether German restrictions on standing for environmental associations – which were not permitted to bring challenges regarding the approval of 'products' – were compatible with the requirements of Article 9(3) AC and Article 47 CFR. Specifically, the environmental association had sought to challenge the decision of the German Federal Motor Transport Authority (Kraftfahrt-Bundesamt) to approve modifications to diesel car emissions systems enacted to address the so-called 'Dieselgate' scandal. The environmental NGO Deutsche Umwelthilfe argued that the affected vehicles would still produce emissions above legal limits; thus, the case fell under Article 9(3) AC, as it was funda-

[56] In relation to Article 9 para. 3, CJEU, Judgment [GC] of 8 March 2011, case C-240/09, *Lesoochranárske zoskupenie*, ECLI:EU:C:2011:125 para. 45. Here the Court concluded that Article 9 para. 3 of the Aarhus Convention does not contain any clear and precise obligation regulating the position of individuals; moreover, Member States must adopt criteria for standing, so its effects are not unconditional. The Court's approach could be criticised for reading Article 9(3) in the sense that States must limit standing through adopting appropriate criteria, while the wording of the provision ('…criteria, *if any,* laid down in national law…') could also be understood as implying that adopting such criteria is a permitted, but not mandatory.

[57] M. Eliantonio, J. Richelle, cit., discuss the tendency of the Union to adopt a 'piecemeal' approach to implementing the right of access to justice.

[58] CJEU, Judgment [GC] of 8 November 2022, case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)*, ECLI:EU:C:2022:857.

mentally about the compliance of the approval with environmental law.

As was to be expected, the Court reaffirmed that the lack of direct effect of Article 9(3) AC precluded its use as a parameter for assessing national procedural rules that restricted the standing of the association.[59] However, it found that Article 47 CFR was still applicable, as the lack of direct effect of Article 9(3) AC "does not affect [Member States'] obligation to ensure a right to an effective remedy enshrined in Article 47 of the Charter [… which] is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such."[60] Moreover, the Court held that Article 47 CFR should be interpreted consistently with Article 9(3) AC.[61] In essence, the use of consistent interpretation here overcame the lack of direct effect. The result is that domestic judges must interpret national procedural rules so as to achieve a result consistent with Article 47 CFR read in the light of Article 9(3) of the Aarhus Convention and, if this should prove to be impossible, they must disapply contrasting domestic rules, such as those that, in this case, excluded access to justice for the applicant NGO.[62]

In short, here the fundamental right to an effective remedy is systemically interpreted in such a way as to 'absorb' the environmental public participation right, circumventing limitations on the direct effect of the same.

[59] *Ivi*, para. 37.

[60] *Ivi*, para. 79.

[61] *Ivi*, para. 76.

[62] *Ivi*, para. 77. However, it should be noted that the Treaties limit the potential impact of Article 47 CFR read consistently with Article 9 of the Aarhus Convention. In *Carvalho and others v Parliament and Council*, the CJEU ruled that even if these rules required the Union to provide access to justice to challenge legislative acts of the Union alleged to infringe environmental law, the Court was bound to respect the Treaties and could not ignore the strict criteria for standing in actions for annulment set out in Article 263 TFEU. If the letter of this provision is incompatible with the Charter, then this must be resolved through a process of revision of the Treaties. See CJEU, Judgment of 25 March 2021, case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2021:252 para. 69.

In contrast, the ECtHR has been far more circumspect in interpreting the right to effective judicial protection and fair trial, as set out in Article 13 and 6 ECHR,[63] consistently with the Aarhus Convention. In essence, it has held that the right to fair trial applies to environmental review proceedings only when the outcome is "decisive for the applicants' entitlement to protection against pollution" and the adverse impact on the applicant is "immediate and certain."[64] The applicant must demonstrate that they are exposed to a potential harm that is serious, specific and immanent[65] that the remedies requested through judicial proceedings are necessary to safeguard their rights.[66] Thus, if a suit is brought based on procedural flaws, the applicant must demonstrate that the outcome of judicial proceedings would have a decisive impact on other rights enshrined in the Convention, such as Article 8 ECHR, in order for the right to fair trial under Article 6 ECHR to apply.[67] This would exclude a large number of cases from the scope of Article 6 ECHR that individuals and en-

[63] On Article 6 ECHR see, *inter alia,* W. A. SCHABAS, "Right to a Fair Trial/ Droit à un procès équitable", in W. SCHABAS (ed) *The European Convention on Human Rights: A Commentary* (Oxford, Oxford University Press 2015) p. 264 ff.

[64] *Taşkın and others v Turkey*, cit., para. 133; *Ivan Atanasov v Bulgaria*, cit., paras. 91-95. In order for Article 6 ECHR to be applicable, it must be shown that there is a dispute, that the matter of the dispute concerns "civil rights and obligations," and that the outcome of the proceedings must be determinative for the rights at stake.

[65] ECtHR, judgment of 6 April 2000, *Athanassoglou and others v Switzerland*, app. no. 27644/95 para. 43; ECtHR, judgment of 30 November 2010, *Zapletal v the Czech Republic*, app. no. 12720/06.

[66] In a case concerning allegations of unsafe operating conditions at a nuclear plant, where the Court found this threshold was not met, see ECtHR, judgment [GC] of 26 August 1997, *Balmer-Schafroth and others v Switzerland*, app. no. 22110/93 para. 40.

[67] This contrasts with the approach taken by the ACCC, which has specifically held that Article 9 of the Aarhus Convention requires states to allow for review of both the substantive and procedural legality of acts, omissions and decisions relating to the environment: ACCC, Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, ECE/MP. PP/C.1/2010/6/Add.3 of 24 August 2011 paras. 123-125. Likewise, see CJEU, Judgment of 28 May 2020, case C-535/18, *Land Nordrhein-Westfalen*,

vironmental associations may validly bring in the exercise of rights conferred upon them by Article 9 AC.

In *Collectif stop Melox et Mox v France*, the Court softened this position somewhat by recognizing that associations may invoke Article 6 ECHR in relation to public interest litigation when they enjoy a right to bring such suits under national law.[68] In its decision, the Court observed that environmental associations have increasingly taken on an important role in civil society, including by bringing environmental lawsuits.[69] Therefore, where environmental associations enjoy such a right under domestic law, it must be deemed to constitute a "civil right" even when exercised in the public interest. The Court mentions the Aarhus Convention in its decision, yet it does so not to interpret the scope of Article 6 ECHR, but merely as a statement of fact that such rights, broadly enshrined in domestic law, may have their source in this international regime.

Even if Article 6 ECHR may apply to some proceedings brought by environmental associations, when it comes to cases brought on the basis of Article 2 or 8 ECHR, the requirement that applicant be deemed a "victim" under Article 34 ECHR has proven to be a significant barrier to environmental litigation. The case law is not entirely consistent on this point,[70] yet recently the ECtHR held that an association cannot rely exclusively on the

ECLI:EU:C:2020:391 para. 61; CJEU, Judgment of 15 October 2015, case C-137/14, *Commission v Germany*, ECLI:EU:C:2015:683 paras. 77-80.

[68] ECtHR, decision (admissibility) of 12 June 2007, *Collectif national d'information et d'opposition à l'usine Melox - Collectif stop Melox et Mox v France*, app. no. 75218/01, para. 4.

[69] *Ivi*.

[70] In ECtHR, judgment of 27 April 2004, *Gorraiz Lizarraga and others v Spain*, app. no. 62543/00 (para. 38) the Court recognized the "victim" status of an environmental association specifically created to bring judicial proceedings in defence of its members' rights to property and peaceful enjoyment of their homes. Cfr. ECtHR, judgment of 12 May 2009, *Greenpeace e.V. and others v Germany*, app. no. 18215/06; ECtHR, judgment of 29 June 1999, *Asselbourg and others v. Luxembourg*, app. no. 29121/95; ECtHR, judgment of 7 February 2006, *Bessau and others v France*, app. no. 58432/00.

substantive rights of its members, especially when those members may themselves bring legal proceedings directly.[71]

In its 2024 decision in the *Klimaseniorinnen* case, the ECtHR revisited the question, engaging more substantially with the right of access to justice in environmental matters.[72] The dispute concerned a claim that Switzerland had failed to take adequate action to mitigate its climate emissions, threatening the enjoyment of fundamental rights of both individuals and the members of the applicant environmental associations. However, unlike in *Melox and Mox*, the standing of the association under national law was contested by the respondent state, thus putting the burden on the NGO to prove that it could be deemed to be a 'victim' under Article 34 ECHR. On this point, the association argued that it was merely representing a group of individuals who could also claim victim status, and that bringing a collective application was the only means of enabling them to access judicial remedies, considering the complexity and cost of bringing individual cases.[73] The ECtHR accepted that there were special circumstances justifying the collective application, especially given

[71] See, recently, *Cannavacciuolo and others v Italy*, cit., para. 218.

[72] *Verein Klimaseniorinnen Schweiz and others v Switzerland*, cit. On the case, see A. Di Martino, "Corte Edu e obbligazione climatica in *Klimaseniorinnen*", in *Quaderni costituzionali*, XLIV (2024), p. 744 ff.; G. Grasso, "'Oltre' *KlimaSeniorinnen*: la Svizzera tra esecuzione della decisione della Corte EDU e processo decisionale democratico", in *Diritto pubblico comparato ed europeo*, XXVI (2024), p. 1007 ff.; A. Hösli, M. Rehmann, "Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change", in *Climate Law*, XIV (2024), p. 1 ff.; R. Pisillo Mazzeschi, "Diritti umani e cambiamento climatico: brevi note sulla sentenza *KlimaSeniorinnen* della Corte di Strasburgo", in *Diritti umani e diritto internazionale*, XLI (2024), p. 383 ff.; G. Winter, "Climate Protection before the European Court of Human Rights: The KlimaSeniorinnen and Duarte Agostinho Cases in Perspective", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, LXXXIV (2024), p. 457 ff.; A. Savaresi, "Verein KlimaSeniorinnen Schweiz and Others v Switzerland: Making Climate Change Litigation History", in *Review of European, Comparative & International Environmental Law*, XXXIV (2025), p. 279 ff.; K. Sulyok, "Verein Klimaseniorinnen Schweiz and Others v. Switz. (Eur. Ct. H.R.)", in *International Legal Materials*, LXIV (2025), p. 1 ff.

[73] *Verein Klimaseniorinnen Schweiz and others v Switzerland*, cit., paras. 306-307.

the inter-generational impacts of climate change on fundamental rights.[74] To support its conclusion, the ECtHR examined state practice, noting the wide ratification of the Aarhus Convention among ECHR parties and the broad recognition of the standing of environmental NGOs in domestic law.[75]

Here, again, while the Court found it was pertinent to have regard to the Aarhus Convention, it was careful to distance itself from the same, instead taking the position that there are fundamental differences in the "basic nature and purpose of the Aarhus Convention, which is designed to enhance public participation in environmental matters, and that of the Convention, which is designed to protect individuals' human rights."[76] Thus, the Court of Strasbourg set out its own set of criteria to be met for an environmental association to have standing for climate litigation.[77] Instead of an objective of environmental protection, as requested by Article 2(5) AC, the ECtHR requires that the association pursue objectives connected to the defence of human rights against climate change specifically. Moreover, the association must be deemed to be "genuinely qualified and representative", yet it does so on the basis of far more flexible and undefined criteria compared to similar tests applied in national law, such that it can only be determined on a case-by-case basis. This could lead to paradoxical situations in which an association could be denied standing for failing to meet national criteria set in accordance with Article 9(3) AC, yet still be entitled to bring a suit on the basis of Article 8 ECHR, or vice-versa.

In brief, while the ECtHR appears to look towards the Aar-

[74] *Ivi*, paras. 489-503, 525-526.

[75] Paras. 490-494.

[76] Para. 501.

[77] Specifically, it ruled that an environmental association like *KlimaSeniorinnen* may have standing to bring suits related to the human rights impacts of climate change, provided that three conditions are met. The association must: a) be lawfully established and enjoying legal capacity in a contracting State; b) pursue objectives relating to the defence of human rights; and c) be genuinely qualified to represent its members or other affected individuals who are subject to threats or adverse effects of climate change, or such that its standing must be granted "in the interests of the proper administration of justice" (para. 502).

hus Convention, its approach cannot be seen as a form of systemic interpretation. Indeed, in a subsequent case – *Cannavacciuolo and others v Italy* – it furthered the divergence between the two regimes by affirming that the *KlimaSeniorinnen* test is applicable only in matters of climate change,[78] even if it acknowledged that environmental associations may play a key role as public watchdogs and victim advocates in situations where public authorities have failed to protect the right to life against illegal toxic waste dumping.[79] Such an approach risks contributing to the fragmentation of these two regimes. Certainly, each of them has its own objects and purposes (arguably not as different as the ECtHR envisages in *Klimaseniorinnen*), yet systemic interpretation is called for precisely in such situations, as the CJEU has done in its approach to Article 47 CFR and Article 9 of the Aarhus Convention. The ECtHR's reluctance to do likewise is ultimately a missed opportunity to strengthen the normative coherence of these two fundamental rights regimes.

5. *The Prohibition of Penalization, Harassment and Persecution of Environmental Defenders*

The Aarhus Convention contains an important provision that serves to reinforce the fundamental rights enjoyed by environmental activists. Article 3(8) AC states that persons legally exercising their environmental participation rights, "shall not be penalized, persecuted or harassed in any way for their involvement."[80] The ACCC has specified that this protection applies to

[78] *Cannavacciuolo and others v Italy*, cit., paras. 220-221. In his Separate Opinion in the case (at para. 11), Judge Krenc expressed his view that the Court erred on this point. Among other reasons, he argued that the principle of subsidiarity would suggest that if a state has granted standing to an environmental association to bring a collective or public interest claim, the ECtHR should do as well.

[79] *Ivi*, para. 218.

[80] L. Stolle, "The Need for Protection of Environmental Defenders from Digital Intimidation: An Analysis of Article 3(8) of the Aarhus Convention", in *Opolskie Studia Administracyjno-Prawne*, XXI (2023), p. 199 ff.; T. Weber,

all persons that have exercised their environmental participation rights,[81] and includes persecution or harassment by both public authorities and by private parties.[82] To free itself of liability, the respondent state must demonstrate that their actions alleged to breach Article 3(8) AC were reasonable, proportional and in pursuit of a legitimate purpose.[83]

In applying Article 3(8) AC, the ACCC has extensively drawn upon the case law of the ECtHR. For example, in response to a communication from the public concerning the persecution of environmental activists in Belarus, it examined in detail whether the arrest, detention and ill-treatment of activists (such as refusing access to cancer medication while in detention) was in violation of their fundamental rights.[84] As Belarus is not a member of the Council of Europe, the activists brought their complaints to the ACCC instead of the Court of Strasbourg,[85] relaying on Article 3(8) AC to raise questions related to violations of their fundamental rights, so it is logical that the ACCC would look towards the case law of the ECtHR in addressing their complaints.[86] The introduction of an Aarhus rapid response mechanism to protect

"Are Climate Activists Protected by the Aarhus Convention? A Note on Article 3(8) Aarhus Convention and the New Rapid Response Mechanism for Environmental Defenders", in *Review of European, Comparative & International Environmental Law*, XXXII (2022), p. 67 ff.

[81] Specifically, for Article 3(8) AC to apply, there are four elements that must be met: 1) the victim must have exercised their participation rights; 2) they must have been penalized, persecuted or harassed; 3) the treatment was connected to their exercise of participation rights; 4) the public authorities have not fully redressed the harm caused by the penalization, persecution or harassment. See ACCC, "Findings and recommendations with regard to communication ACCC/C/2014/102 concerning compliance by Belarus", ECE/MP.PP/C.1/2017/19 of 24 July 2017, paras. 65, 70.

[82] *Ivi*, para. 153.

[83] *Ivi*, para. 69.

[84] ACCC/C/2014/102, cit., para. 68.

[85] Such allegations would have otherwise been dealt with by the ECtHR, which has developed an extensive case law on the unlawful detention or interference with freedom of expression and assembly of civil society activists.

[86] Unfortunately, the ACCC no longer has the possibility of acting as an alternative human rights forum for Belarusians, as Belarus formally withdrew from the Aarhus Convention in October 2022.

environmental defenders in 2022 has further expanded the potential role of Aarhus Convention bodies in safeguarding the fundamental rights of environmental activists.[87]

While Article 3(8) AC has neither been transposed into the secondary law of the Union nor, to the author's knowledge, mentioned in any decision of the CJEU, it is arguably sufficiently clear, precise and unconditional to produce direct effect. Nonetheless, distinction between legitimate suppression of anti-social forms of environmental activism and prohibited persecution is controversial. Many European countries have recently increased the penalties for unlawful assembly, interruption of public services, etc., in response to direct action by environmental activists.[88] This is quite a serious matter. As the ACCC has observed, "If members of the public are penalized, harassed or persecuted for exercising their rights under the Convention, it puts in grave jeopardy the implementation of the Convention as a whole by the Party concerned."[89] The use of interpretive tools to provide greater and clarity on this matter, both by the ACCC and European courts, is to be welcomed.

Some have argued that the Aarhus Convention should be interpreted more consistently with the European fundamental rights framework beyond situations falling under Article 3(8) AC. Several commentators have argued that there is a need to ensure all persons and groups should enjoy equal opportunities to exercise their environmental participation rights, as the failure

[87] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, "Decision VII/9 on a rapid response mechanism to deal with cases related to article 3(8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matter"s, ECE/MP.PP/2021/2/Add.1, 17 February 2022.

[88] See, recently, M. Lee, C. Armeni, "Participation and Protest Across Civic Space: An Environmental Law Story", in *Transnational Environmental Law*, XIV (2025), p. 582 ff.

[89] ACCC/C/2014/102 ACCC/C/2014/102, cit., para. 110; ECE/MP.PP/C.1/2025/15 ACCC, "Findings and recommendations with regard to communication ACCC/C/2018/161 concerning compliance by Bulgaria", ECE/MP.PP/C.1/2025/15 of 3 November 2025 para. 164.

to do so can worsen environmental inequality and injustice.[90] To this end, some have proposed an equality-oriented approach to public participation, which may require adjustments to the arrangements for participation, including identifying potential barriers to participation *ex ante*. Specific provisions to this end are found in the 2018 Escazú Agreement[91] as well as in the Maastricht Recommendations of the Aarhus treaty bodies.[92] It is argued that interpreting environmental participation rights in the light of the principle of equality – a core tenant of the European fundamental rights framework – could help fill the gap in the Aarhus regime and prevent the participation gap from worsening the condition of already vulnerable groups.

6. *Conclusions*

The degree to which European courts have recognized the connection between environmental public participation rights and fundamental rights, and the types of connections they have found, varies greatly. In general, within the European Union,

[90] L. Squintani, "The Aarhus Paradox: Time to Speak about Equal Opportunities in Environmental Governance", in *Journal for European Environmental & Planning Law*, XIV (2017), p. 3 ff.; L. Squintani, H. Schoukens, "Towards Equal Opportunities in Public Participation in Environmental Matters in the European Union", in L. Squintani *et al.* (eds), *Managing Facts and Feelings in Environmental Governance* (Cheltenham, Edward Elgar 2019) p. 22 ff.; C. Armeni, "Inequality and Environmental Justice in the EU Climate Transition", in C. Brière, A. Crespy (eds) *Inequality and the European Union* (London, Routledge, 2024) p. 126 ff. More recently, M. E. Harris, *Environmental Rights and Equality in the EU: Addressing the Aarhus Paradox* (London/New York/Torino, Routledge - Giappicchelli 2026) (forthcoming).

[91] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Carribean (adopted 4 March 2018, entered into force 22 April 2021) UNTC 3388C.N.195.2018. On the special arrangements for persons and groups facing barriers to participation in the Escazú Agreement, see M. E. Harris, *Environmental Rights and Equality in the EU*, cit.

[92] UNECE Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters prepared under the Aarhus Convention (Geneva, United Nations Publication 2015).

most Aarhus rights are specifically set out in secondary legislation, with the notable exception of Article 9(3) AC providing access to justice to challenge acts and omissions alleged to infringe environmental law. It should be no surprise that the CJEU has primarily drawn upon the fundamental rights framework to fill in this gap, but not in matters where secondary law is relatively precise, even when it diverges from the Aarhus Convention. The ECtHR, similarly, has acknowledged the importance of the Aarhus Convention, yet avoids drawing upon it to interpret ECHR rights, even when environmental public participation is at issue. Similarly, the ACCC has looked towards fundamental rights regimes to address complaints relating to persecution, penalization and harassment, notions that are not defined within the Aarhus framework.

Overall, the practice examined reveals several models of coordination between the two regimes.

First, the relationship between environmental participation rights and fundamental rights may take the form of *lex specialis*. The right of access to environmental information, for example, is arguably a special right compared to the general freedom of expression in its passive form. Similarly, it is reasonable to suppose that the right of access to justice in environmental matters is special compared to the general right of access to effective remedies. However, the judicial practice on participation rights in Europe here examined does not appear to frame the relationship between these rights in such terms.

Second, interpretative tools can be used to bridge the two regimes. In some cases, participation rights have been systemically interpreted in the light of fundamental rights, as the ACCC has done with regard to the prohibition of prosecution, penalization and harassment in Article 3(8) AC and other fundamental rights, or the notion of effective remedies found in Article 9(4) AC. The CJEU has primarily done so in relation to Article 9(3) AC, an area where the Aarhus Convention – and secondary legislation – leaves a margin of discretion to Member States.

Third, in some cases, the two regimes of rights are kept normatively separate but applied in a mutually reinforcing manner. For example, in relation to access to environmental information,

the ECtHR's interpretation of Articles 8 and 10 ECHR support and even reinforce participation rights, but without directly drawing upon the Aarhus Convention. Similarly, Article 6 AC is reinforced by the ECtHR's position that participation in decision-making is a procedural condition for interferences in fundamental rights.

Fourth, there are instances where conflict and fragmentation arise between the two regimes. This appears to be most frequent within the legal order of the European Union; indeed, the CJEU tends to draw solely upon secondary law implementing the Aarhus Convention in matters related to participation rights, instead of also looking to its fundamental rights Charter. In relation to the right of access to environmental information, the CJEU has missed opportunities to interpret the Aarhus Regulation and the Transparency Regulation consistently with either the Aarhus Convention or its fundamental rights framework, especially Articles 7 and 11 CFR, which should in turn be interpreted looking towards the ECtHR's case law. The result is a divergence between how this participation right is applied in the EU legal order, the requirements of the Aarhus Convention and, ultimately, the fundamental rights at stake. The ECtHR, too, has contributed to the fragmentation of these regimes in its approach to the standing of environmental associations in public interest suits. Its proposal of alternative standing criteria in *Klimaseniorinnen* is significant. It is true that the special structure of the ECHR system, and its requirement that only 'victims' can access this international remedy, may justify such an approach. Nonetheless, the result is a less coherent legal landscape for the numerous states that are party to both treaties.

When environmental participation rights and fundamental rights are coordinated, there are several potential benefits. For one, it can extend the remedies for violations of fundamental rights to breaches of environmental procedural rights, including offering compensation and emergency relief where appropriate. For another, it can help fill gaps in the rights framework. More broadly, it raises awareness that environmental participation rights are not merely the concern of environmental activists: they also strengthen the normative foundation of all environmental

rights, both procedural and substantive, enshrined across the Aarhus Convention and fundamental rights regimes.[93] It is argued that recognizing links between these two regimes would thus contribute to addressing some of the lingering contradictions inherent in the approach of European judicial bodies to fundamental rights connected to the environment.

[93] Indeed, as Ebbesson argues, in relation to the right of access to information, "By embedding Aarhus Convention issues in the human rights regime, transparency in environmental matters is given an even stronger normative foundation in the region, which may spill over to other issue areas involving public interests and human rights." J. EBBESSON, "Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public", in A. Bianchi, A. Peters (eds), *Transparency in International Law* (Oxford, Oxford University Press 2013), p. 66.

PROTECTING THE COLLECTIVE INTERESTS OF EU CONSUMERS IN ENVIRONMENTAL AND FOOD DOMAINS

MARCO INGLESE*

SUMMARY: 1. Introduction. – 2. The Individual Consumer. – 3. Consumers as a Collective Entity. – 4. Consumers' Collective Protection in the Environmental Domain: A New Path? – 5. Consumers' Collective Protection in the Food Domain: A Topic to Be Explored? – 6. Concluding Remarks.

1. *Introduction*

The protection of the collective interests of consumers is a long-lasting and inherent feature of the development of the European Union (EU) legal order.

It is well known that, originally, the European Economic Community (EEC) stemming from the Treaty of Rome[1] did not have any competence whatsoever in that domain, albeit it essentially pursued economic integration through the free movement of goods. It was only a matter of time before consumer protection reached the attention of the Court of Justice (or the Court). In the landmark *Cassis de Dijon*[2] judgment, it was indeed argued that the German restriction on importing *cassis* – a French liqueur having a particularly low alcoholic percentage – and selling it in supermarkets was aimed at protecting consumers' health.

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[1] Treaty establishing the European Economic Community (not published in the Official Journal).

[2] Court of Justice, judgment of 20 February 1979, case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42. For the legacy of this judgment in the EU legal order, see K. NICOLAÏDIS, "The Cassis Legacy. Kir, Banks, Plumbers, Drugs, Criminals and Refugees", in F. Nicola, B. Davies (eds), *EU Law Stories – Contextual and Critical Histories of European Jurisprudence*, (Cambridge, CUP 2017), pp. 278-300.

Although this ruling is famous for the creation of the principle of mutual recognition,[3] it is still worth noting that German authorities sought to restrict the free movement of goods, claiming that consumers' protection is a suitable ground to do so.[4] In general terms, thus, the Court was ready to accept this argument. Unsurprisingly, though, when tested against the principle of proportionality, the German restriction was deemed a hindrance to free movement and, consequently, the Court struck it down.

Consumers' protection, hence, entered into the narrative of EU law through the case law of the Court and, through the successive revisions, was later included in the Treaties. The Treaty of Maastricht[5] (ToM), indeed, for the first time, and after almost 20 years since *Cassis de Dijon*, introduced for the then Community a precise task, "the activities of the Community shall include (…) a contribution to the strengthening of consumer protection" (Article 3(s) EEC). In turn, the brand-new Title XI "Consumer Protection" affirmed that "The Community shall contribute to the attainment of a high level of consumer protection (…) and to provide adequate information to consumers" (Article 129(1)(b) TEC).[6] The Treaty of Amsterdam (ToA)[7] enriched that provision by adding references to "education and to organise themselves in order to safeguard their interests" (Article 129(a))[8]. The Treaty of Nice[9] did

[3] J. Snell, "Cassis de Dijon and the Principle of Mutual Recognition", in P. Craig, R. Schütze (eds), *Landmark Cases in EU Law – Volume 2: Substantive Cases* (Oxford/Portland, Bloomsbury 2025), pp. 35-55.

[4] This argument and its various nuances have been brought several times before the Court. An overview thereof is offered in G. Mathisen, "Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement", in *Common Market Law Review*, XLVII (2010), pp. 1021-1048.

[5] Treaty on European Union OJ C 191, 29.7.1992, pp. 1-112.

[6] R. Lane, "New Community Competences under the Maastricht Treaty", in *Common Market Law Review*, XXX (1993), pp. 939-979.

[7] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10.11.1997, pp. 1-144.

[8] J. Stuyck, "European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?", in *Common Market Law Review*, XXXVII (2000), pp. 367-400.

[9] Treaty of Nice amending the Treaty on European Union, the Treaties

not touch upon consumers' protection, whereas a decisive broadening thereof took place with the Treaty of Lisbon[10] (ToL).[11]

To start with, consumers' protection as such is not listed amongst the Union's objectives according to Article 3 TEU. However, arguably, one can reconnect it to the establishment of the internal market – of which, as it shall be seen, consumers are considered to be amongst the main actors – as well as to price stability. Consumers' protection now appears as an area of shared competence according to Article 4(2)(f) TFEU and as a horizontal clause as per Article 12 TFEU according to which "consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities"[12] echoing Article 169 TFEU as well as the formula introduced by the ToM. Lastly, Article 38 of the Charter of Fundamental Rights of the European Union (the Charter) reproduced that wording.

establishing the European Communities and certain related acts OJ C 80, 10.3.2001 pp. 1-87.

[10] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007, pp. 1-271. The Treaty of Lisbon, in turn, is divided into the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

[11] The evolution of consumer protection as a shared competence and, consequently, the analysis of the legal acts that the Community and, later the Union, adopted is a topic largely discussed in legal literature. M. Goyens, "Consumer Protection in a Single European Market: What Challenge for the EC Agenda?", in *Common Market Law Review*, XXIX (1992), pp. 71-92; B. Heiderhoff, M. Kenny, "The Commission's 2007 Green Paper on the Consumer Acquis: Deliberate Deliberation?", in *European Law Review*, XXXII (2007), pp. 740-751; G. Howells, T. Wilhelmson, "EC Consumer Law: Has It Come of Age?, in *European Law Review*, XXVIII (2003), pp. 370-388; A. Johnston, H. Unberath, "The Double-Headed Approach of the ECJ Concerning Consumer Protection", in *Common Market Law Review*, XLIV (2007), pp. 1237-1284; L. Krämer, "The Origins of Consumer Law and Policy at EU Level", in in H.-W. Micklitz (ed), *Making of Consumer Law and Policy in Europe* (Oxford/Portland, Bloomsbury 2021), pp. 13-30; X. Lewis, "The Protection of Consumers in European Community Law", in *Yearbook of European Law*, XII (1992), pp. 139-174; S. Weatherill, *EU Consumer Law and Policy*, 2nd edition (Cheltenham, Edward Elgar 2014).

[12] F. Casarosa, "The Inactive Integration Clause: Can Art. 12 TFEU Shape Future Sustainable Consumer Policies?", in *European Papers*, VII (2022), pp. 1431-1446.

So, all in all, *rebus sic stantibus*, the EU enjoys a shared competence in consumers' protection, is equipped with a specific legal basis[13] and considers consumers' protection as a fully-fledged fundamental right. This has been seen as a *fondamentalisation*[14] of consumers' protection, even though the value, interpretation and application of Article 38 of the Charter is still somewhat uncertain and has not find a precise place in the case law of the Court.

This primary law framework has been implemented through a vast production of secondary acts, either in the form of directives or regulations, thereby implying different level of harmonisation of substantive and procedural rules,[15] whose application and enforcement is crucially attributed to domestic jurisdictions in compliance with the principles of procedural autonomy, effectiveness and equivalence.

In this respect, two additional remarks need to be put forward. First, not every act – whatever its form be – is precisely conceived to strengthen consumers' protection as; rather, many of them pursue this objective by apparently doing something else, namely, achieving market harmonisation through Article 114 TFEU.[16] For instance, the so-called General Food Law Regulation[17] (GFL) not only created the European Authority for Food Safety (EFSA) but also ensured a uniform procedure to ensure

[13] S. Weatherill, "Competence Creep and Competence Control", in *Yearbook of European Law*, XXIII (2004), pp. 1-55.

[14] L. Pailler, "La fondamentalisation des droits du consommateur", in M. Combet (ed), *Le droit européen de la consommation au XXIe siecle. État des lieux et perspectives*, (Bruxelles, Bruylant 2022), pp. 57-68.

[15] F. De Cecco, "Room to Move? Minimum Harmonization and Fundamental Rights", in *Common Market Law Review*, XLIII (2006), pp. 9-30; M. Dougan, "Minimum Harmonization and the Internal Market", in *Common Market Law Review*, XXXVII (2000), pp. 853-885.

[16] T. M. Moschetta, *Il ravvicinamento delle normative nazionali per il mercato interno* (Bari, Cacucci 2018). See also R. Barents, "The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation", in *Common Market Law Review*, XXX (1993), pp. 85-109.

[17] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety OJ L 31, 1.2.2002, pp. 1-24.

the free movement of foodstuffs and, consequently, streamlining consumers' protection. The same reasoning could be applied to the Medicines Code Directive.[18] Similarly, these elements are present in the Health Claims Regulation[19] and the Nutritional Claims Regulation[20] as well as in the Greenwashing Directive.[21] Examples might continue but this approach epitomised the general goal to mainstream consumer protection in defining and implementing EU policies and activities in various domains. Second, genuine consumers' protection acts are present too, such as the Unfair Commercial Practice Directive (UCPD),[22] the Con-

[18] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use OJ L 311, 28.11.2001, pp. 67-128.

[19] Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 OJ L 304, 22.11.2011, pp. 18-63.

[20] Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods OJ L 404, 30.12.2006, pp. 9-25.

[21] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information OJ L, 2024/825, 6.3.2024.

[22] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') OJ L 149, 11.6.2005, pp. 22-39. See also G. Anagnostaras, "The Unfair Commercial Practices Directive in Context: From Legal Disparity to Legal Complexity?", in *Common Market Law Review*, XLVII (2010), pp. 147-171; J. Stuyck, E. Terryn, T. van Dyck, "Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market", in *Common Market Law Review*, XLIII (2006), pp. 107-152; J. Stuyck, "The Court of Justice and the Unfair Commercial Practices Directive", in *Common Market Law Review*, LII (2015), pp. 721-752.

sumer Rights Directive (CRD)[23] and the new Representative Actions Directive[24] which repealed the previous one.[25]

In light of the above, this Chapter wishes to examine the change in pace from an individual dimension of consumers' protection (section 2) to a collective one (section 3) assessing the latter in the environmental (section 4) and food (section 5) domains. Ultimately, it is argued that the collective protection of consumers' interest (section 6) is rapidly evolving, thereby cutting across several other Union's competences.

2. *The Individual Consumer*

Consumers' protection is generally understood as a legal mechanism aimed at counterbalancing the imbalance of power – inherent in a commercial transaction – between a trader and, obviously, a consumer. In other words, the former is in a better position – or, if one prefers, is simply stronger – than the latter. This imbalance of power, in turn, could be rooted in information asymmetries, economic resources, particularly advanced skills or aggressive selling techniques such as, but not limited to, pervasive and misleading advertisements, negotiations outside commercial avenues, omission of information about the quality of a

[23] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council OJ L 304, 22.11.2011, pp. 64-88. See also H-W. Micklitz, N. Reich, "*Crónica de una muerte anunciada*: The Commission Proposal for a 'Directive on Consumer Rights'", in *Common Market Law Review*, XLVI (2009), pp. 471-519; S. Weatherill, "The Consumer Rights Directive: How and Why a Quest for "Coherence" has (Largely) Failed", in *Common Market Law Review*, XLIX (2012), pp. 1279-1317;

[24] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC OJ L 409, 4.12.2020, pp. 1-27.

[25] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests OJ L 110, 1.5.2009, pp. 30-36.

product, etc. Consequently, this imbalance of power persuades the individual consumer to behave in the market, or to adopt a given decision, that they would not otherwise take, ultimately jeopardising their rights. This is even truer in so far as vulnerable consumers – i.e. elderly, children, patients, individuals subject to multiple and intersectional discriminations – enter the market arena.[26]

In light of the above, the *acquis* of consumer protection law is pivoted around the clash of interests between a trader and a consumer. So, by definition, the former is any person – be it natural or legal – acting for the purposes of their economic, commercial, professional or craft activity (Article 2(b) UCPD). By contrast, the latter is any individual acting outside those (Article 2(a) UCPD) or, simply put, to satisfy their basic needs.

From this scheme, it is intuitive to identify a first set of problems that the Court had to face in order to add flesh on the bones of consumer protection. To start with, even before interpreting unfair commercial practices prohibited by secondary law, the Court had to verify, in each case, whether the two counterparties were, respectively, a trader and a consumer. Despite the presence of a precise definition, it is never taken for granted that individuals act in their professional or consumeristic capacity. Moreover, markets evolve and their evolution shapes consumers' behaviour too.[27] Suffice it here to recall the profound changes brought by the digital revolution.[28] In this respect, it is worth noting that the bulk of consumer protection caselaw emerged between the '80s and the '90s, where, for instance, digitalisation was not even envisaged and, by contrast, the need to protect them was evident in

[26] J. Mulder, "What is Vulnerability Anyway? Tracing the EU Notion of the Vulnerable Consumer through the Eyes of EU Non-Discrimination Law", in *European Law Review*, XLVI (2021), pp. 719-745.

[27] A. Nordhausen Scholes, "Behavioural Economics and the Autonomous Consumer", in *Cambridge Yearbook of European Legal Studies*, XXV (2012), pp. 297-324.

[28] F. Battaglia, *Il consumatore digitale nel diritto dell'Unione europea* (Napoli 2023); A. Moskal, "Digital Markets Act (DMA): A Consumer Protection Perspective", in *European Papers*, VII (2022), pp. 1113-1119.

respect of health and food.[29] So, it is interesting to test whether that case law is still compelling.

In the seminal *Mars*[30] judgment, the Court relied, for the first time, on the notion of the "reasonably circumspect consumer"[31] as an individual who, in principle, ought not be misled by an increase in size of the packaging which, however, does not amount to an increase in weight of the famous chocolate bar. Of course, who a "reasonably circumspect consumer is" is open to be debated to the extent that that reasonable circumspection could vary in space and time, taking also into consideration not only the personal characteristic of the individual but also, and above all, the inherent features of the commercial transaction at stake. Furthermore, in *A-Punkt*,[32] the Court emphasised that even the good to be purchased – remarkably, silver jewellery – contributes to the assessment to be done by the relevant jurisdiction. In *Commission* v *Spain*[33] the Court held that altering the name of a given product – namely, chocolate – is not suitable to protect consumers; it is, by contrast, sufficient, informing them about its characteristics. In *Darbo*,[34] the Court expanded its formula and held that an "average consumer who is reasonably well informed and reasonably observant and circumspect"[35] could not be deceived by misleading indications – such as the natural purity – present in the label of a jam.

More recently, in *Kamenova*[36] the Court highlighted that an

[29] C. Macmaoláin, *EU Food Law. Protecting Consumers and Health in a Common Market* (Oxford 2007).

[30] Court of Justice, judgment of 6 July 1995, case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH., ECLI:EU:C:1995:224.

[31] *Ivi*, para. 24.

[32] Court of Justice, judgment of 23 January 2006, case C-441/04, A-Punkt Schmuckhandels GmbH v Claudia Schmidt, ECLI:EU:C:2006:141.

[33] Court of Justice, judgment of 16 January 2003, case C-12/00, Commission of the European Communities v Kingdom of Spain, ECLI:EU:C:2003:21.

[34] Court of Justice, judgment of 4 April 2000, case C-465/98, Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG., ECLI:EU:C:2000:184.

[35] *Ivi*, paras. 22 and 24.

[36] Court of Justice, judgment of 4 October 2018, case C-105/17, Komisia za zashtita na potrebitelite v Evelina Kamenova, ECLI:EU:C:2018:808.

individual who sells online second-hand watches could be considered as a trader if some non-exhaustive criteria are met, namely, whether the sell takes place in an organised manner, whether that sell generates profit, whether the seller has a specific technical expertise and information hence enjoying an advantage over the consumer. Lastly, in *Amazon*,[37] the Court pointed out that a trader, in order to ensure effective communication with consumers, might envisage electronic tools beyond the simple provision of a telephone number.

The analysis above – carried out by selecting some of the most relevant judgments for the purposes of this chapter – seems to point towards a two-prong evaluation. First, consumer protection evolved by taking into consideration the personal characteristics of an ideal person. In other words, the average and well-circumspect consumer, as emerging from the *Mars* formula and updated accordingly, is nothing more than the individual using their ordinary diligence to behave in the market and to make informed choices to satisfy their needs.[38] However, second, the transition from an individualistic understanding and application of consumer protection to, instead, its collective dimension, was

[37] Court of Justice, judgment of 10 July 2019, case C-649/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl, ECLI:EU:C:2019:576.

[38] Legal scholarship has constantly engaged with the idea of the average and well circumspect consumer, dissecting this abstract idea into several pieces. Amongst the major analysis, P. Cartwright, "The Consumer Image within EU Law", in C. Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar 2016), pp. 199-200; M. Dani, "Assembling the Fractured European Consumer", in *European Law Review*, XXXVI (2011), pp. 362-384; F. Ferretti, "The Consumer Image under EU Law: Average, Rationally Bounded and Dispositionally Vulnerable. What are the Prospects for Protection in Digital Markets?", in *Common Market Law Review*, LXII (2025), pp. 121-146; V. Rubino, "L'evoluzione della nozione di consumatore nel processo di integrazione europea", in *Il diritto dell'Unione europea*, XXI (2017), pp. 343-365; H. Schebesta, K. P. Purnhagen, "An Average Consumer Concept of Bits and Pieces Empirical Evidence on the Court of Justice of the European Union's Concept of the Average Consumer in the UCPD", in L. De Almeida *et al.* (eds), *Transformation of Economic Law: Essays in Honour of Hans-W. Micklitz* (Oxford/Portland, Bloomsbury 2025), pp. 13-27.

still far from being settled, as it was in other domains though.[39] Indeed, as it shall be seen in the next section, the case law on the Representative Action Directive neither is abundant nor consolidated. Nonetheless, it is important to be analysed to verify whether the transition from an individual to a collective understanding of consumer protection has consistently taken place.

3. *Consumers as a Collective Entity*

As anticipated, the change in pace has been dictated by the Representative Actions Directive, at first in its 2009 version as later repealed in 2020.[40] In this respect, it needs to be highlighted that the bulk of case law is mostly referred to the 2009 version whilst solely two judgments expressly refer to the 2020 one. However, some common trends could be identified and, in the next sections, they will be tested against the peculiar features of the environmental and food domains. In particular, there are still open questions about the *locus standi* of representative consumers' associations as well as what could be asked to domestic judges and, consequently, whether injunctions and redress are efficient to foster consumer welfare. A further point of discussion is the coordination between the Representative Actions Directive and private international law, especially for what concerns aspects of jurisdiction.[41]

In light of the above, two judgments bear a particular value albeit for different reasons. In chronological order, first, *Meta I*[42]

[39] C. Warin, "Individual Rights and Collective Interests in EU Law: Three Approaches to a still Volatile Relationship", in *Common Market Law Review*, LVI (2019), pp. 463-488.

[40] *Supra*, footnote 24.

[41] F. Battaglia, "Recenti novità in materia di azioni rappresentative a tutela degli interessi collettivi dei consumatori nell'Unione europea", in *Studi sull'integrazione europea*, XV (2021), pp. 335-362; B. Gsell, "The New European Directive on Representative Actions for the Protection of the Collective Interests of Consumers – A Huge, but Blurry Step Forward", in *Common Market Law Review*, LVIII (2021), pp. 1365-1400.

[42] Court of Justice, judgment of 28 April 2022, case C-319/20, Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Ver-

and, later, *Banco Santander*[43] are the first cases in which the Representative Actions Directive is explored although not applicable. Indeed, the two preliminary rulings – stemming from a German and a Spanish judge – were referred to the Court before the Representative Actions Directive entered into force.

In *Meta I*, the Court ruled that data subjects – as per the General Data Protection Regulation[44] – could be considered to be consumers for the purposes of injuncting the data controller to stop a treatment contrary to their rights. In doing so, associations are granted a general *locus standi* – obviously, before domestic judges – irrespective of the fact that i) there is a specific infringement of consumers' rights and ii) that they received a specific mandate by a given individual.

In *Banco Santander*, in dealing with investment contracts between two consumers and a bank, the Court affirmed that associations are granted the right to represent consumers' interests even if the contract entered into is of a speculative nature. In other words – relying once again on the controversial notion of the average consumer already explored and updated since the landmark *Mars* judgment onwards – a consumer never ceases to be a consumer as long as they keep on acting outside a business, craft or profession and even though they accept high financial risks. The rationale for this overstretching interpretation of consumer protection is the need to ensure that no unfair practices distort their behaviour in the market.

So, both in *Meta I* and *Banco Santander*, the Court highlighted that the consumers' collective interest is a genuine element of both data protection and financial transactions. Those domains represent a peculiar arena in which the consumers' collective in-

braucherverbände - Verbraucherzentrale Bundesverband eV, ECLI:EU:C:2022:322.

[43] Court of Justice, judgment of 16 January 2025, case C-346/23, Banco Santander SA v Asociación de Consumidores y Usuarios de Servicios Generales-Auge, ECLI:EU:C:2025:13.

[44] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L 119, 4.5.2016, pp. 1-88.

terests need to be protected, as it was correctly pointed out in legal scholarship.[45] On a side note, especially for what concerns consumers' contracts with banks, the Court has consistently held that domestic judges must interpret national law in conformity with Union's law and, in doing so, ensuring the principles of sincere cooperation, procedural autonomy, equivalence and effectiveness.[46]

The two judgments present some similarities and are prone to criticism, too. First, they seem to endorse an overly far-reaching interpretation of the notion of consumer, with different nuances, though. In particular, in *Meta I*, the idea that consumers overlap with data subjects and, ultimately, users of a given digital platform, is genuinely aimed at protecting their collective interest. In this sense, the Court effectively pursued a high level of consumer protection and, in doing so, contributed to shaping consumers' protection in contexts – such as digital spaces – where business practices could be particularly aggressive and, therefore, challenging to verify. By contrast, in *Banco Santander* a more robust clash of approaches seems to be visible. On the one hand, indeed, as emerging both in the judgment and in the order of the referring court, those contracts are particularly risky and, consequently, they hardly fit the narrative of being addressed to an ordinary consumer. On the other hand, it is anyway true that as long as an individual acts outside a business or economic activity they should be considered as a consumer. In this sense, a different outcome would have ultimately fragmented the bulk of EU consumer protection law.

[45] F. Zuidereven Borgesius, N. Helberger, A. Reyna, "The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law", in *Common Market Law Review*, LIV (2017), pp. 1427-1665. Consumer law has been linked to competition too, A. Albors-Lorens, "Competition and Consumer Law in the European Union: Evolution and Convergence", in *Yearbook of European Law*, XXXIII (2014), pp. 163-193; D.-P. L. Tzakas, "Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?", in *Common Market Law Review*, XLVIII (2011), pp. 1125-1174.

[46] Court of Justice (Grand Chamber), judgment of 9 April 2024, case C-582/21, FY v Profi Credit Polska S.A. w Bielsku Białej, ECLI:EU:C:2024:282.

Lastly, it could also be recalled that some public authorities could ask to domestic judges to protect the consumers' collective interest via other legal tools,[47] thereby conducting to a bifurcation between the public and private enforcement of consumers' protection. Indeed, crucially, in the former scenario the Representative Actions Directive does not come into play, and much is left in the hands of national authorities.

Against this background, what happens when one seeks to reproduce these considerations in the food and environmental domain? And, more specifically, would it be possible to detect some unfair commercial practices in contrast with the consumers' collective interests as per the Representative Actions Directive?

4. *Consumers' Collective Protection in the Environmental Domain: A Settled Issue*

Consumers' collective protection in the – broadly speaking – environmental domain has perhaps been the first stress test for the overall understanding of the consumers' collective interest. This is essentially due to its overlapping entrenchments with more genuine environmental aspects.[48] To clarify this entrenchment, a short overview is needed too.

Alike consumer protection, environmental protection was not included in the original Treaties.[49] Essentially, starting from the now famous *Waste oils*[50] *and Danish bottles*[51] judgments deliv-

[47] Court of Justice, judgment of 16 July 2020, case C-73/19, Belgische Staat and Directeur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD Economie, K.M.O., Middenstand en Energie v Movic BV and Others, ECLI:EU:C:2020:568.

[48] C. Kye, "Environmental Law and Consumer Protection", in *Journal of Envinronmental Law*, VII (1995), pp. 31-54.

[49] L. Krämer, "The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law", in *Common Market Law Review*, XXIV (1987), pp. 659-688.

[50] Court of Justice, judgment of 7 February 1985, case 240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU), ECLI:EU:C:1985:59.

[51] Court of Justice, judgment of 20 September 1988, case 302/86, Commis-

ered in the '80s by the Court, environmental protection made its way in the Union's legal order from the ToM onwards. So, nowadays, it is very well present in the legal architecture of the ToL: it is a shared competence (Article 4(2)(e) TFEU), a horizontal clause (Article 11 TFEU)[52] and a fundamental right (Article 37 of the Charter). Moreover, not only a specific legal basis is present (Article 192 TFEU) but the principles guiding the adoption of legislative acts are precisely laid down, that is, the precautionary principle, preventive action, rectification and source and polluter pays (Article 191(2)(a) TFEU).[53]

Against this background, in the last decades, the Union adopted several acts with the objective of ameliorating the environment, such as, but not limited to, habitat,[54] air,[55] water,[56] soil,[57] etc. More recently, following the holistic approach and the sustainable development turn enshrined in the Green Deal,[58] new legal acts have been adopted; amongst them perhaps the most visible political

sion of the European Communities v Kingdom of Denmark, ECLI:EU:C:1988:421.

[52] J. Nowag, "Article 11 TFEU and Environmental Rights", in S. Bogojević, R. Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Oxford/Portland, Bloomsbury 2018), pp. 155-176.

[53] E. Scotford, "Environmental Rights and Principles: Investigating Article 37of the EU Charter of Fundamental Rights", in S. Bogojević, R. Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Oxford/Portland, Bloomsbury 2018), pp. 133-154.

[54] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora Official Journal L 206, 22/07/1992 p. 7-50.

[55] Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe OJ L, 2024/2881, 20.11.2024.

[56] 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 L 327, 22.12.2000, pp. 1-73.

[57] Directive (EU) 2025/2360 of the European Parliament and of the Council of 12 November 2025 on soil monitoring and resilience (Soil Monitoring Law) OJ L, 2025/2360, 26.11.2025.

[58] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Green Deal, COM(2019) 640.

and legal manifesto of the Union's commitment to environmental protection is the Climate Neutrality Regulation.[59]

Nonetheless, on a closer inspection, it seems that the political agenda of the Commission, anticipated by the New Deal for Consumers[60] and continued with the Green Deal, changed the legislative approach to a certain extent. In particular, on the one hand, a robust refit exercise – i.e. verifying whether legislation already in force is still fit for purpose[61] – has been carried out, especially in respect of digital markets. On the other, and perhaps surprisingly, consumer and environmental protection started to overlap to the extent that consumers must be empowered to make sustainable choices and, consequently, contribute to the Union's green transition. In other words, one need could be pursued via the other and vice versa.

A clear example of this new legislative trend is the Directive on Common Chargers[62] which simultaneously protects the envi-

[59] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Law") OJ L 243, 9.7.2021, pp. 1-17.

[60] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – A New Deal for Consumers, COM(2018)183. See also M. Grochowski, "European Consumer Law after the New Deal: A Triptych", in *Yearbook of European Law*, XXXIX (2020), pp. 387-422. More recently, see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2030 Consumer Agenda and action plan for consumers in the single market "A new impulse for consumer protection, competitiveness and sustainable growth", COM(2025) 848.

[61] The refit exercise attracted several comments especially for what concerns its usefulness and whether, from this, new best practices could stem. C. Riefa, "The REFIT Process in the Area of Consumer Protection: Odds Stacked Against Consumers", in E. van Schagen, S. Weatherill (eds), *Better Regulation in EU Contract Law: The Fitness Check and the New Deal for Consumers* (Oxford/Portland, Bloomsbury 2019), pp. 13-36; E. van Schagen, "The Fitness Check of EU Consumer Law and the Impact Assessment for the New Deal for EU Consumers", in E. van Schagen, S. Weatherill (eds), *Better Regulation in EU Contract Law: The Fitness Check and the New Deal for Consumers*, cit., pp. 93-123

[62] Directive (EU) 2022/2380 of the European Parliament and of the Coun-

ronment – hence, less electric waste – and the consumers' collective interest – thus, no more than one charger for electronic devices and full interoperability amongst them. Furthermore, it is noteworthy to point out that some of those acts have been adopted following a purely internal market logic, essentially being based on Article 114 TFEU. Other potential examples could be relevant in the domain of circular economy,[63] a specific domain that intersects both environmental and consumer protection.[64] However, the use of Article 114 TFEU to pursue goals going beyond market harmonisation is not a novelty and has been endorsed by the Court too.[65]

For the purposes of this chapter, however, the Greenwashing Directive is the best example of this new legislative approach.[66] It is indeed based on Article 114 TFEU, and it aims at protecting consumers from misleading environmental claims of a given product. For these reasons it is interesting to verify potential convergences with the Representative Actions Directive. In this sense, a consumers' association could bring an action before a domestic judge to injunct a producer to stop advertising a product as "green".

So, the average consumer – whoever they be – is empowered to contribute to the environmental transition and, consequently, from a passive addressee of information now becomes an active player. They strive and contribute to make the Union greener

cil of 23 November 2022 amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment OJ L 315, 7.12.2022, pp. 30-43.

[63] M. Combet, "Droit européen de la consommation et économie circulaire", in M. Combet (ed), *Le droit européen de la consommation au XXI^e siecle. États des lieux et perspectives* (Bruxelles 2022), pp. 173-190.

[64] F. Munari, "L'economia circolare e le nuove regole dell'Unione europea sui rifiuti", in *Studi sull'integrazione europea* (XIII) 2019, pp. 77-88.

[65] Court of Justice (Grand Chamber), judgment of 8 June 2010, case C-58/08, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform., ECLI:EU:C:2010:321.

[66] S. Bogojević, "Regulating Greenwashing: Where Market Rules Meet Climate Action", in *Journal of Environmental Law*, XXXVII (2025), pp. 169-174.

and more sustainable. If these statements testify the *grandeur* of the Commission's priorities, how they are implemented and enforced, especially before domestic courts, is a totally different question. This approach has already attracted some criticisms in legal scholarship to the extent that consumers' choices, from a pure theoretical standpoint, should not be restricted[67] as long as they do not alter the consumers' behaviour on the market.

In the absence of any pending cases before the Court, it will be interesting to verify the joint scope of application and the coordination between the Representative Actions Directive and the Greenwashing Directive.

Partially similar considerations can be put forward in the food domain too.

5. *Consumers' Collective Protection in the Food Domain: A Topic to be Explored?*

In the food domain too, there are no pending cases or, rather, they have been treated as pertaining to the more traditional arena of the free movement of goods.[68] This could be due to a variety of reasons, two of which need to be highlighted beforehand.

First, looking at litigation, disputes do not necessarily concern the quality of a given product but, rather, certain immaterial characteristics, such as, but not limited to, name, origin, provenance and alike. Consequently, those disputes are not brought

[67] L. De Almeida, F. Esposito, "Consumers and the Green Transition between Saying and Doing: Promising Consumer Empowerment while Restricting Consumers' Choices is Dangerous", in *Yearbook of European Law*, XLII (2023), pp. 407-427. See also V. Monteillet, "Consommation et transition écologique. Quelle stratégie en droit de l'Union européenne ?", in M. Combet (ed), *Les nouveaux enjeux du droit européen de la consommation* (Bruxelles, Bruylant 2025), pp. 245-26.

[68] C. MacMaoláin, "Free Movement of Foodstuffs, Quality Requirements and Consumer Protection: Have the Court and the Commission Both Got It Wrong?", in *European Law Review*, XXVI (2001), pp. 413-428. See also O. W. Brower, "Free Movement of Foodstuffs and Quality Requirements: Has the Commission Got it Wrong?", in *Common Market Law Review*, XXV (1988), pp. 237-262.

before national jurisdictions for the collective interest of consumers but, instead, for the economic interest of business operators. Certainly, it could be argued – and, indeed, it is often so – that those immaterial qualities affect consumers' behaviour in the market and, ultimately, amounts to deceptive practices. However, again, business operators were more active than consumers and, anyway, the Representative Actions Directive is, obviously, not applicable to them.

Second, food is a highly regulated domain in the EU legal order, and those regulatory acts pursue a threefold goal, namely, ensuring food safety, safeguarding health, and protecting consumers. The slowly emergence of a peculiar food consumer has been proposed in legal literature too.[69] This has given rise to an intricate – and, to a certain extent, inextricable – net of legal provisions which, in turn, ought or ought not be applied to, given the factual circumstances of each case.

In this respect, it is sufficient to recall the case law of the Court on the identification of whether some pills – having the taste of garlic – should be considered to be garlic or, rather, medicine.[70] The same reasoning could be applied, *mutatis mutandis*, to understanding whether food for special dietary needs is, indeed, a food or a medicine. Those judgments, indeed, highlight the rather cautious approach endorsed by the Court, dictated not only by the need to protect the consumers' collective interests but also not to jeopardise their health, in compliance with the precautionary principle (Article 191(2)(a) TFEU). After all, it is well known that despite it was born in the realm of environ-

[69] M. Friant-Perrot, "La figure du consommateur d'aliments en droit de l'Union européenne", in M. Combet (ed), *Les nouveaux enjeux du droit européen de la consommation*, cit., pp. 37-72.

[70] Court of Justice, judgment of 15 November 2007, case C-319/05, Commission of the European Communities v Federal Republic of Germany, ECLI:EU:C:2007:678. See also Court of Justice, judgment of 9 June 2005, joined cases C-211/03, C-299/03 and C-316/03 to C-318/03, HLH Warenvertriebs GmbH (C-211/03) and Orthica BV (C-299/03 and C-316/03 to C-318/03) v Bundesrepublik Deutschland, ECLI:EU:C:2005:370; Court of Justice, judgment of 15 January 2009, case C-140/07, Hecht-Pharma GmbH v Staatliches Gewerbeaufsichtsamt Lüneburg, ECLI:EU:C:2009:5.

mental protection, its scope has been broadened and nowadays it is considered as a fully-fledged general principle of Union law.

Having said that, what is left of the consumers' collective interests in the food domain?[71] Perhaps some hints could be inferred, once again, through the Greenwashing Directive, with a caveat though. It is now widely acknowledged that, at least for the time being, the Commission will not propose any legislative act on food sustainability. So, one should look simultaneously in three directions, namely: i) specific consumer protection acts, such as the UCPD; ii) specific food-related acts, such as the Health or the Nutrition Claims Regulations or the Organic Labelling Regulation;[72] iii) the Greenwashing Directive in order to combine them for the purpose of applying the Representative Actions Directive. In this respect it is worth recalling once again that the scope of application of the latter is so wide as to encompass any potential violation of consumers' collective interests. Be that as it may, the central axis around which the entire discourse pivots around is always the correct information to be communicated.[73]

Nonetheless, the Court has not heard disputes on those topics so far, as it was already highlighted in respect of the environmental one. This could be due to two reasons.

First, the scope of application *ratione temporis* of the Representative Actions Directive is still limited. Despite Member States had to transpose it by December 2022, they were expected to apply those measures by June 2023 (Article 24). So, considering the length of a domestic litigation and the likelihood to submit a

[71] A. Di Lauro, "Politiques européennes de l'alimentation et durabilité", in M. Combet (ed), *Les nouveaux enjeux du droit européen de la consommation*, cit., pp. 105-130.

[72] Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 OJ L 150, 14.6.2018, pp. 1-92. See also Court of Justice, judgement of 4 October 2024, case C-240/23, Herbaria Kräuterparadies GmbH v Freistaat Bayern, ECLI:EU:C:2024:852.

[73] M. Cintrat, "Les enjeux de sécurité et d'information des consommateurs sur les denrées d'origine animale en droit de l'Union européenne", in M. Combet (ed), *Les nouveaux enjeux du droit européen de la consommation*, cit., pp. 87-104.

referral to the Court by national judges,[74] there are still no pending cases.[75] The lack thereof could even mean that national judges developed specific skills in consumer protection litigation and, consequently, they deem it not useful to submit a question of interpretation to the Court. However, present data is still insufficient to further substantiate this claim.

In parallel, and second, one might also wonder whether the lack of litigation pertains to the aforementioned limited scope of application *ratione temporis* of the Representative Actions Directive or whether, by contrast, other considerations might come into play. For instance, despite the Representative Actions Directive is rather favourable when it comes to the *locus standi*,[76] consumers themselves could be reluctant to use it for non-massive litigation. In other words, if one prefers, it seems that the Representative Actions Directive, at least in the food domain, could be triggered if massive scandal arise and, consequently, consumers' associations will be ready to engage in complex litigation.

However, for the sake of clarity and to pave the way for future research, an example could be made. Let us assume that a food manufacturer claims that its products are green and sustainable. According to the Greenwashing Directive such claims must be grounded on scientific evidence and, anyway, should never mislead consumers. Similarly, lacking any definition of what a sustainable food is, this claim, *per se*, would be misleading. Here the Representative Action Directive comes into play to the extent that a consumers' association could bring an action before the competent national judge to injunct the producer to stop that claim.[77] This hypothetical scenario could be also linked to the

[74] J. Werbrouck, E. Dauw, "The National Courts' Obligation to Gather and Establish the Necessary Information for the Application of Consumer Law – the Endgame?", in *European Law Review*, XLVI (2021), pp. 325-344.

[75] This data has been retrieved through the internal advanced search of the Court's website, as updated on 30 November 2025.

[76] G. Howells, H.-W. Micklitz, "Consumer Organisations in Europe", in H.-W. Micklitz, H. Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Oxford/Portland, Bloomsbury 2023), pp. 21-41.

[77] E. Beysen, V. Trsenjak, "European Consumer Protection Law: *Curia semper dabit remedium*?", in *Common Market Law Review*, XLIII (2011), pp.

developments brought by novel foods,[78] considering that EFSA's role, as dictated by the GFL Regulation, is precisely ensuring food safety while, at the same time, safeguarding consumers. This was a common theme already within the discourse on the evolution of food legislation.[79]

Nonetheless, at least for the time being, this scenario seems more theoretical than practical. On the one hand, as already pointed out, there are no pending cases before the Court; certainly, there could very well exist before domestic judges. On the other hand, following the examples discussed regarding environmental protection, it seems more likely that the Representative Action Directive will come into play should a massive scandal arise.

6. Concluding Remarks

The need to protect the consumers' collective interests has slowly but steadily emerged in the EU legal order, nowadays especially for what concerns environmental and food sustainability.[80] In parallel, although not directly explored in this chapter, the Union's legislator attempted, first, to use consumer protection to foster a healthy lifestyle.[81] Then, especially since the New Deal for

95-124; A. M. Romito, "I provvedimenti inibitori a favore del consumatore nella disciplina dell'Unione europea", in *Studi sull'integrazione europea*, VIII (2014), pp. 503-526.

[78] A. Santini, "La revisione della disciplina dei novel foods tra tutela di interessi generali e obiettivi economici", in *Il diritto dell'Unione europea*, XXI (2017), pp. 625-645.

[79] C. MacMaoláin, "Waiter! There's a Beetle in my Soup. Yes sir, that's E120: Disparities between Actual Individual Behaviour and Regulating Food Labelling for the Average Consumer in EU Law", in *Common Market Law Review*, XLV (2008), pp. 1147-1165.

[80] E. Terryn, "Can Consumer Law Be Sustainable?", in H.-W. Micklitz, H. Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe*, cit., pp. 159-186. See also G. Cattalano, G. Leray, "La durabilité en droit de la consommation", in M. Combet (ed), *Les nouveaux enjeux du droit européen de la consommation*, cit., pp. 191-216.

[81] A. Alemanno, A. Garde, "The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets", in *Common Market Law Review*, L (2013), pp. 1745-1786. *Amplius*, by the same authors, *Regulating*

Consumers onwards, the Union's legislator interpreted consumers' empowerment as a distinctive tool to enhance sustainable market choices. This now amounts to a settled legislative technique. However, it could also pose the risk of encroaching upon other (fundamental) rights,[82] such as, for instance, the freedom to conduct a business protected by Article 16 of the Charter.

Despite the Representative Actions Directive presents some points that the Court still needs to clarify, it arguably squared the circle of consumers' protection *acquis*. Indeed, on the one hand, consumers can rely on substantive norms as enshrined especially in the UCPD and in the CRD, while, on the other hand, they are now empowered to bring an action before domestic judges through their representatives, aiming at injuncting the stop of a given misleading practice or seeking redress. If this is a welcome development, the Representative Actions Directive still has some grey zones, as previously highlighted.

In particular, so far, it has been scarcely used and the reasons for that are evidently unknown. True, the scope of application *ratione temporis* could still constitute a barrier and national judges are quite well versed in solving consumers' disputes. However, these arguments seem to be more simplistic. So, the narrative about the scarce use – and, ultimately, the still unexplored potentials – of the Representative Actions Directive could jeopardise its own effectiveness. Surely, the bottleneck lies at the national level. However, it is also true that, at least in the last decades, no environmental or food scandal were under the spotlight. In other words, it cannot be entirely ruled out that the Representative Actions Directive is perceived by consumers' representatives as an *extrema ratio*, one that is necessary to be used solely where no other means of redress are available.

Only the subsequent case law – now, both at the national and the Union's level – will prove the veracity of this conclusion. But,

Lifestyle Risks. The EU, Alcohol, Tobacco and Unhealthy Diets (Cambridge, CUP 2015).

[82] A. Garde, "Freedom of Commercial Expression and Public Health Protection in Europe", in *Cambridge Yearbook of European Legal Studies*, XII (2010), pp. 225-256.

from another perspective, the protection of consumers' collective interest could be analysed also as a sign of the presence of a still dormant community of citizens, hence pointing towards a significant *demos*. Certainly, a *demos* which presumably could be educated and skilled enough to behave correctly in the internal market.[83] After all, the Greenwashing Directive empowers consumers to make sustainable choices.[84] This is an evolution which was unforeseen in the past years[85] and still deserves to be better explored. This is even more important given, for instance, the challenges brought in by the artificial intelligence for the protection from defective products.[86]

In light of the above, whether a renewed understanding of consumer protection could align the Union to its objective of being a highly competitive social market economy is yet to be seen,[87] but certainly the idea of empowering consumers to make sustainable choices is the path the Union's legislator keeps on pursuing. In parallel, the correct theoretical identification of the average and well circumspect consumer risks being fragmented once again in any different relevant market,[88] such as that for environmental or food products.

[83] E. Poillot, "Consumer Education in the EU", in H.-W. Micklitz, H. Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe* (Oxford/Portland, Bloomsbury 2023), pp. 105-137.

[84] M. Ilieva, "Le consommateur responsable", in M. Combet (ed), *Le droit européen de la consommation au XXI^e siecle. États des lieux et perspectives* (Bruxelles, Bruylant 2022), pp. 131-143.

[85] J. Stuyck, "The Transformation of Consumer Law in the EU in the Last 20 Years", in *Maastricht Journal of European and Comparative Law*, XX (2013), pp. 385-402; S. Weatherill, "Consumer Policy", in P. Craig, G. De Burca (eds), *The Evolution of EU Law* 3rd edition (Oxford, OUP 2021), pp. 874-901.

[86] A. Rosanò, "Dal produttore al consumatore al tempo delle macchine pensanti: profili di sicurezza alimentare nel diritto dell'Unione europea", in *Il diritto dell'Unione europea*, XXIX (2025), pp. 173-198.

[87] D. Damianovic, "The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy", in *Common Market Law Review*, L (2013), pp. 1685-1717.

[88] V. Mak, "How Can Consumer Interests be Protected When Consumer Identities are Increasingly Diffuse?", in H.-W. Micklitz, H. Twigg-Flesner (eds), *The Transformation of Consumer Law and Policy in Europe*, cit., pp. 43-63.

Section Six

EU policies and legislation

ENVIRONMENTAL SUSTAINABILITY: A GUIDING OBJECTIVE IN EU ENERGY POLICY

Viviana Sachetti*

Summary: 1. Introduction. – 2. The EU Energy Policy: Legal Framework and Core Objectives. – 3. The Legal Functions of Objectives in the Union Legal Order. – 4. Environmental Sustainability as a Conflict-Resolving Objective in EU Energy Law. – 5. Conclusive Remarks.

1. *Introduction*

"Anyone who wishes to change the world needs energy. Each action we undertake requires energy: to grow our food, heat our homes, power our phones and move ourselves. Energy is so omnipresent that we often paradoxically tend to forget its importance in our daily life."[1] This consideration effectively captures the structural centrality of energy in contemporary societies and, at the same time, the extent to which energy policy has progressively ceased to be a merely technical field, acquiring instead a decisive constitutional relevance within the legal order of the European Union (EU).

Indeed, energy is no longer only a sector of economic regulation. It has become one of the main arenas in which some of the most relevant objectives of the Union intersect and, at times, collide. As it has been observed, "energy emerges as a crossroads that crystallizes an ambitious goal of creating an internal market and the Union's commitment to sustainable development and reducing environmental impact."[2] This reflects a broader structur-

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[1] T. Pellerin-Carlin, "The European Energy Union", in R. Leal-Arcas (ed), *Research Handbook on EU Energy Law and Policy* 2nd edition (Northampton, Edward Elgar Publishing 2024), p. 69.

[2] A. Nzaou-Kongo, "Environment, Climate and Energy in EU Law: From

al feature of EU law: the internal market is not an end in itself, but a functional instrument for the achievement of the Union's objectives, among which environmental protection and sustainable development have acquired an increasingly prominent position.[3] Against this background, environmental sustainability no longer appears as an ancillary concern of EU energy law, but emerges as a structuring objective capable of shaping legislative choices, orienting institutional action, guiding the interpretation of secondary legislation and constraining Member States' discretion. Thus, EU energy policy has become a privileged testing ground for assessing the legal effects and systemic implications of environmental sustainability as an objective of the Union.

From this perspective, the present contribution examines the progressive consolidation of environmental sustainability within the constitutional framework of EU energy law, with a specific focus on its capacity to operate as a guiding parameter in situations of normative tension. The analysis addresses, in particular, the interaction between sustainability and other Union objectives, such as market integration, competition and security of supply, as well as its impact on the prerogatives retained by the Member States under Art. 194, para. 2, subpara. 2, of the Treaty on the Functioning of the EU (TFEU).

This paper will thus draw on the interpretation of primary law, the examination of key legislative developments and the analysis of the evolving case-law of the Court of Justice of the EU, with the aim of reconstructing the legal mechanisms through which environmental sustainability is progressively embedded in the EU energy sector. To this end, Section 2 outlines the constitutional framework and the core features of the Union's energy policy. Section 3 clarifies the function of objectives within the EU legal order, highlighting their programmatic, interpretative and operative dimensions. Building on this theoretical framework,

Duality to Complexity", in R. Leal-Arcas (ed), *Research Handbook on EU Energy Law and Policy*, cit., p. 105.

[3] M. Wasmeier, "The Integration of Environmental Protection as a General Rule for Interpreting Community Law", in *Common Market Law Review*, XXXVIII (2001), p. 159.

Section 4 examines how environmental sustainability operates as a criterion for resolving conflicts, both between different Union objectives and between EU action and Member States' prerogatives in the energy field. The concluding section draws together the main findings and reflects on the systemic significance of environmental sustainability as a guiding objective in EU energy law.

2. *The EU Energy Policy: Legal Framework and Core Objectives*

Before examining the sustainability objectives pursued within the framework of EU energy policy, it is first necessary to outline its main structural features. Energy constitutes a shared competence under Art. 4, para. 2, lit. i), TFEU and is governed by a specific primary law provision, namely Art. 194 TFEU, introduced for the first time with the Lisbon Treaty. Prior to that, legislative acts regulating particular aspects of the energy sector had been adopted relying on different legal bases, including those on the free movement of goods, competition law and State aid.[4] The growing importance of energy policy in the period leading up to Lisbon was already highlighted in a 2007 Commission Communication,[5] which emphasised the reciprocal interdependence of the Member States in this field and several emerging challenges, such as climate change and the potential cross-border effects of power failures. The Communication also stressed the Union's commitment to contribute to the global reduction of greenhouse gas emissions, a goal that the Commission then con-

[4] S. Garben, M. Kellerbauer, "Article 194 TFEU", in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* 2nd edition (Oxford, Oxford University Press, 2024), p. 2123. For a complete overview of these acts, see K. Talus, P. Aalto, "Competences in EU Energy Policy", in R. Leal-Arcas (ed), *Research Handbook on EU Energy Law and Policy*, cit., pp. 16-17.

[5] Communication from the Commission to the European Council and the European Parliament, *An Energy Policy for Europe*, 10 January 2007, COM(2007) 1 final.

sidered unattainable under the existing policy framework, which was explicitly described as "not sustainable".[6]

Art. 194, para. 1, TFEU establishes four objectives specific to EU energy policy.[7] In particular, acting in a spirit of solidarity,[8] the Union is to ensure the functioning of the energy market and the security of energy supply, while promoting energy efficiency and the development of new and renewable forms of energy, as well as the interconnection of energy networks. In pursuing these objectives, the Union must consider the need to preserve and improve the environment. According to the Court of Justice, the principle of solidarity constitutes the very foundation of the energy policy objectives, acting as a "thread that brings them together and gives them coherence."[9]

Through the ordinary legislative procedure, the European Parliament and the Council are required to adopt the measures necessary to achieve these aims. At the same time, Art. 194, para. 2, subpara. 2, TFEU requires that such measures be balanced against the Member States' right of permanent sovereignty over

[6] *Ivi*, p. 3. Other relevant considerations in implementing the energy policy concerned the excessive reliance on the import of energy from outside the Union, with the subsequent risk of supply failure especially for those Member States that relied on a single gas supplier, and the consequent lack of competitiveness for energy prices in the Union.

[7] The primary law framework for the energy policy is complemented by Art. 122, para. 1, TFEU, that allows the Council to adopt specific measures aim to counterbalance, in a spirit of solidarity, serious hardships in the supply of products, including energy, and by Art. 170, para. 1, TFEU, concerning the Union's contribution in setting-up, *inter alia*, energy infrastructures to strengthen the internal market.

[8] As clarified by the Court of Justice precisely with reference to the energy policy, the principle of solidarity implies reciprocity between the Member States and the Union, as it "entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it." (Court of Justice (Grand Chamber), Judgment of 15 July 2021, case C-848/19 P, *Germany* v *Poland*, ECLI:EU:C:2021:598, para. 49)

[9] Court of Justice, Judgment of 26 September 2024, case C-255/22 P, *Orlen* v *Commission*, ECLI:EU:C:2024:790, para. 91.

natural resources, a principle rooted in international law.[10] This entails the Member States' right to determine the conditions for exploiting their energy resources and for structuring energy supply, including their choice of energy sources. The limitations on the Union's regulatory autonomy are further reinforced by the special legislative procedure applicable to measures of a primarily fiscal nature under Art. 194, para. 3, TFEU, as well as to measures that significantly affect a Member State's choice of energy sources or the general structure of its energy supply, pursuant to a joint reading of Arts. 194, para. 2, subpara. 2, and 192, para. 2, lit. c), TFEU. In such cases, unanimity in the Council is required, following consultation of the European Parliament.[11]

As it has been observed, the constraints imposed on the Union's competence by Art. 194, para. 2, subpara. 2, TFEU imply a form of "*ex ante* subsidiarity assessment", which may substantially limit EU-level action, insofar as most measures may affect – at least indirectly – the Member States' prerogatives safeguarded by that provision.[12] However, such rights must be reconciled with the Member States' obligations under EU law, including those derived from the principle of sincere cooperation enshrined in Art. 4, para. 3, of the Treaty on European Union (TEU) and from the four freedoms of movement. It follows that the safeguarding clause laid down in Art. 194, para. 2, subpara. 2, TFEU must be interpreted restrictively and in the light of a balancing of interests, which may even "justify a form of an effect-based '*de minimis*' rule".[13]

The regulatory discretion of the EU institutions is subject to a

[10] K. Huhta, "The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector", in *International & Comparative Law Quarterly*, LXX (2021), p. 993. The principle was notably affirmed by the United Nations General Assembly in Resolution 1803 (XVII), *Permanent sovereignty over natural resources*, 14 December 1962.

[11] Furthermore, Art. 192, para. 2, TFEU requires the Council to also consult the Economic and Social Committee and the Committee of the Regions.

[12] K. Haraldsdóttir, "The Limits of EU Competence to Regulate Conditions for Exploitation of Energy Resources: Analysis of Article 194(2) TFEU", in *European Energy and Environmental Law Review*, VI (2014), p. 212.

[13] *Ivi*, pp. 212-213.

further constraint stemming from the international agreements concluded by the Union. Special reference must be made to the Paris Agreement,[14] ratified by both the Union and all its Member States. Adopted within the broader context of the United Nations Framework Convention on Climate Change (UNFCCC),[15] the Paris Agreement prompted the Union to translate international climate objectives into its internal legal order through the European Green Deal[16] and the subsequent 'Fit for 55' package.[17] The decarbonisation and efficiency-enhancement of the energy system were identified as core components of the Union's sustainability strategy, leading Member States to adopt national energy and climate plans in line with these targets already by the end of 2019.[18]

Following the Russian Federation's aggression against Ukraine in 2022 and the subsequent adoption of EU restrictive measures, the Union was forced to reassess an energy policy that had long been characterised by a strong dependence on Russian oil and gas imports. This prompted the Commission to rapidly launch the REPowerEU Plan,[19] which set as a priority the reduction of the

[14] Paris Agreement, adopted on 12 December 2015, entered into force on 4 November 2015. Significantly, as per its Art. 21, para. 1, the Agreement was to enter into force "on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession."

[15] United Nations Framework Convention on Climate Change, adopted on 9 May 1992, entered into force on 21 March 1994.

[16] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, 11 December 2019, COM/2019/640 final (hereinafter: Green Deal Communication).

[17] Which was based on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *'Fit for 55': Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality*, 14 July 2021, COM(2021) 550 final.

[18] Green Deal Communication, cit., para. 2.1.2.

[19] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *REPowerEU Plan*, 18 May 2022, COM(2022) 230 final.

Union's energy dependence on Russia, through the strengthening of interconnections between national energy systems, the diversification of external energy suppliers, and the acceleration of the transition from fossil fuels to renewable sources. In the wake of the REPowerEU Plan, several regulations on gas supply security were adopted in quick succession,[20] alongside new directives on energy efficiency[21] and on the promotion of renewable energy.[22]

The overall structure of EU energy policy thus brings to the fore the central role played by objectives in orienting both legislative choices and institutional action. This, in turn, warrants a more general inquiry into the function of objectives within the Union legal order, as a necessary premise for assessing the specific role played by environmental sustainability within this policy field.

3. *The Legal Functions of Objectives in the Union Legal Order*

The Union's general objectives are set out in Art. 3 TEU. The first four paragraphs of that provision concern the aims pursued within the internal dimension of Union action, while Art. 3, para.

[20] See, for instance, Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, O.J.E.U. 29 December 2022, L 335, pp. 1-35; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, O.J.E.U. 7 October 2022, L 261I, pp. 1-21; Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas, O.J.E.U. 8 August 2022, L 206, pp. 1-10; Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage, O.J.E.U. 30 June 2022, L 173, pp. 17-33.

[21] Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955, O.J.E.U. 20 September 2023, L 231, pp. 1-111.

[22] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, O.J.E.U. 31 October 2023, L 2023/2413, pp. 1-77.

5, TEU defines the objectives relating to the Union's external action.[23] Finally, para. 6 requires the Union to pursue its objectives by appropriate means and within the limits of the principle of conferral. The list of objectives laid down in Art. 3 TEU must be regarded as non-exhaustive. This is implicitly confirmed by the Treaties themselves, which identify additional aims in connection with specific policies, as exemplified by the four objectives expressly governing energy policy under Art. 194 TFEU.

Far from constituting mere statements of political intent, the Union's objectives play a concrete functional role in shaping the exercise of EU competences. This is most clearly demonstrated by Art. 352 TFEU, which introduces the so-called "flexibility clause". Under that provision, the Council, acting unanimously and with the consent of the European Parliament, may adopt appropriate measures on a proposal from the Commission where "action by the Union should prove necessary […] to attain one of the *objectives* set out in the Treaties, and the Treaties have not provided the necessary powers".[24] Declaration n. 41 annexed to the Lisbon Treaty[25] clarifies that the objectives referred to by Art. 352 TFEU are those set out in Art. 3, paras. 2, 3 and 5, TEU, thereby excluding the more open-ended formulation contained in Art. 3, para. 1, TEU, which refers generally to the promotion of peace, the Union's values and the well-being of its peoples. Nonetheless, the discretion conferred on the Union institutions by the flexibility clause remains notably broad,[26] which justifies the requirement of unanimity in the Council.

[23] As clarified by the Court of Justice, the basic principles of the Union's constitutional framework, including its objectives as enumerated in Art. 3, para. 5, TEU, also apply in the context of the common foreign and security policy (Court of Justice (Grand Chamber), Judgment of 10 September 2024, case C-29/22, *KS and KD* v *Council and Others*, ECLI:EU:C:2024:725, paras. 66-68).

[24] Emphasis added. As clarified by Art. 352, para. 4, TFEU, the flexibility clause cannot be invoked for the objectives concerning the common foreign and security policy.

[25] Declaration n. 41 on Article 352 of the Treaty on the Functioning of the European Union annexed to the Treaty of Lisbon, O.J.E.U. 7 June 2016, p. 350.

[26] M. Kellerbauer, M. Klamert, "Article 352 TFEU", in M. Kellerbauer,

A further confirmation of the normative relevance of objectives may be derived from Art. 216 TFEU, that sets out the grounds on which the Union may conclude international agreements. These include cases in which the Treaties or a legally binding Union act so provide, situations in which an agreement is likely to affect common rules, and, most relevantly for present purposes, cases in which the conclusion of the agreement is necessary in order to achieve one of the objectives set out in the Treaties.

Despite their central role, the function of objectives is not expressly clarified by the Treaties. Their nature and legal effects have therefore been progressively shaped through the case-law of the Court of Justice, which has identified several distinct functions.

A first one concerns their programmatic character. According to the Court, objectives serve to "lay down a programme", the implementation of which requires subsequent action by both the Union institutions and the Member States.[27] As a result, they do not constitute, *per se*, source of directly enforceable rights or obligations.[28] They cannot be relied upon as stand-alone legal bases, nor do they operate, as such, as autonomous parameters for the review of national legislation.[29]

In addition to this programmatic dimension, objectives also fulfil a clear interpretative function. In *Confédération paysanne*, the Court held that even in the fields of exclusive Union competence, such as the common commercial policy, the Union's action must be conducted in the light of the objectives laid down in the Treaties insofar as they are applicable to the policy concerned.[30]

M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, cit., p. 2726.

[27] Court of Justice, Judgment of 23 November 1999, case C-149/96, *Portugal* v *Council*, ECLI:EU:C:1999:574, para. 86.

[28] Court of Justice, Judgment of 24 January 1991, case C-339/89, *Alsthom* v *Sulzer*, ECLI:EU:C:1991:28, para. 9.

[29] M. Klamert, "Article 3 TEU", in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, cit., p. 43.

[30] Court of Justice (Grand Chamber), Judgment of 4 October 2024, case

Within the specific context of energy policy, this interpretative role was illustrated in *VEMW*.[31] In that case, the Court held that Directive 96/92,[32] which at the time established common rules for the internal electricity market, had to be interpreted as precluding national measures liable to undermine the functioning of a competitive market. In the Court's view, such an interpretation was the only one consistent with the very objective of the Directive, namely the transition from a monopolistic structure to an open and competitive electricity market.[33]

The same Directive had already been examined by the Court in a previous judgment, in which it was asked to assess the compatibility with Art. 30 of the Treaty of the European Community (TEC) of a German law imposing on undertakings the purchase of a certain proportion of their electricity supply from renewable sources. The Court held that the measure was compatible with Community law insofar as it pursued environmental protection and the reduction of greenhouse gas emissions, which already constituted a priority for the Community in light of its commitments under the UNFCCC.[34] The Court has since consistently confirmed that national measures aimed at promoting the use of renewable energy sources may justify restrictions on the free movement of goods under Art. 36 TFEU.[35] Environmental sus-

C-399/22, *Confédération paysanne*, ECLI:EU:C:2024:839, para. 46. See also, most recently, Court of Justice (Grand Chamber), Judgement of 29 April 2025, case C-181/23, *Commission* v *Malta (Citoyenneté par investissement)*, ECLI:EU:C:2025:283, para. 84; Court of Justice, Judgment of 3 April 2025, case C-701/23, *Swiftair*, ECLI:EU:C:2025:237, para. 25; Court of Justice, Judgment of 17 October 2024, case C-408/23, *Anwaltsnotarin*, ECLI:EU:C:2024:901, para. 29.

[31] Court of Justice (Grand Chamber), Judgment of 7 June 2005, case C-17/03, *VEMW and Others*, ECLI:EU:C:2005:362.

[32] Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, O.J.E.U. 30 January 1997, L 27, pp. 20-29.

[33] *VEMW and Others*, cit., para. 62.

[34] Court of Justice, Judgment of 13 March 2001, case C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160, paras. 72 ff.

[35] See, for instance, Court of Justice (Grand Chamber), Judgment of 1 July 2014, case C-573/12, *Ålands Vindkraft*, ECLI:EU:C:2014:2037, paras. 76-82.

tainability objectives pursued at the national level may therefore operate as legitimate grounds for derogating from the Union's fundamental freedoms.

Finally, the Court's case-law attributes an operational role to the Union's objectives. According to the Court, a potential threat to the attainment of the Union's aims is a relevant factor for assessing the seriousness of an infringement of competition law, alongside other more readily measurable elements, such as the conduct of the undertaking concerned, its role in the anti-competitive practice and the profit derived from it.[36] Significantly, the Court's reasoning has not confined this operational role to objectives strictly connected with the internal market.

With specific regard to sustainability, the relevance of objectives within the field of competition law has recently been further confirmed by the Commission. In its 2023 Guidelines on the application of Art. 101 TFEU,[37] the Commission interprets paragraph 3 of that provision extensively,[38] recognising that certain horizontal agreements between undertakings which pursue sustainability objectives[39] may fall outside the prohibition of Art.

[36] Court of Justice, Judgment of 14 October 2010, case C-280/08 P, *Deutsche Telekom* v *Commission*, ECLI:EU:C:2010:603, para. 274; Court of Justice (Grand Chamber), Judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission*, ECLI:EU:C:2005:408, para. 242.

[37] Communication from the Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 21 July 2023, O.J.E.U. 21 July 2023, C 259, pp. 1-125 (hereinafter: Horizontal Guidelines). For an analysis of the Horizontal Guidelines, see M. Colangelo, "Sustainability Agreements and Competition Law: A Comparative Perspective", in *European Competition Journal*, XXI (2025), p. 99.

[38] S.M. Carbone, "Sustainability Agreements and Article 101 TFEU", in *Roma Tre Law Review*, 2024/1, p. 33 ff.

[39] The Horizontal Guidelines identify the notion of sustainability objectives through a non-exhaustive list: "addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc." (para. 517)

101, para. 1, TFEU. The Commission identifies, *inter alia*, situations in which such agreements implement international obligations or comply with national due diligence standards,[40] are justified on grounds of corporate social responsibility,[41] or are necessary to conduct consumer-awareness campaigns concerning the adverse environmental impact of particular products.[42] The pursuit of these sustainability objectives must therefore be considered by the Commission when assessing whether an agreement restricts competition.[43] Similarly, the Commission may refuse commitments which, despite addressing competition concerns on the relevant market, would lead to a violation of the objectives laid down in Art. 194 TFEU.[44]

It follows from the foregoing that, although the Union's objectives do not constitute self-standing provisions capable of conferring individual rights, they nevertheless bind both the Union institutions and the Member States in the exercise of their respective competences. Beyond their programmatic dimension, objectives fulfil both an interpretative and a balancing function in legislative and adjudicatory contexts, and may operate as operational criteria within the internal market, in particular in the fields of competition law and of derogations from the fundamental freedoms.

A final consideration concerns the principle of consistency. Pursuant to Art. 7 TFEU, the Union is required to ensure coherence between its policies and activities, "taking all of its objectives into account". This provision imposes a duty on the Union institutions to consider the aims of other policies when acting within a specific field.[45] A holistic interpretation of the Union's objectives is therefore mandated by Art. 7 TFEU, raising the question of how conflicts between competing objectives are to be

[40] Horizontal Guidelines, cit., para. 528.
[41] *Ivi*, para. 529.
[42] *Ivi*, para. 531.
[43] *Ivi*, para. 533.
[44] *Orlen* v *Commission*, cit., para. 96.
[45] M. Klamert, "Article 7 TFEU", in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, cit., p. 382.

resolved. The issue will be examined below with specific reference to sustainability objectives in EU energy policy.

4. *Environmental Sustainability as a Conflict-Resolving Objective in EU Energy Law*

The need to consider environmental sustainability as one of the Union's objectives within the framework of its energy policy derives, first and foremost, from Art. 11 TFEU. Under that provision, requirements of environmental protection must be integrated into the definition and implementation of all Union policies and activities, "in particular with a view to promotion sustainable development". This requirement is closely mirrored by Art. 37 of the Charter of Fundamental rights of the European Union (CFR), which mandates the Union to ensure a high level of environmental protection in accordance with the principle of sustainable development. Art. 37 CFR thus enshrines a principle – rather than a right – which the Court of Justice has interpreted as a counterbalance to the fundamental rights affected by the emissions trading system and that, as such, must be taken into account by the Commission.[46] These horizontally applicable provisions must be read in conjunction with Art. 194 TFEU. While that provision does not expressly refer to sustainability, it nonetheless binds the Union, in implementing its energy policy, to preserve and improve the environment.

A question that naturally arises from these premises concerns the consequences of a potential conflict between the objective of environmental sustainability and another legitimate aim pursued either by the Union or by a Member State. The first case may involve tensions between sustainability and economic interests related to the internal market. The second, by contrast, may arise in connection with the derogations from the Union competence in the energy field laid down in Art. 194, para. 2, subpara. 2, TFEU.

[46] General Court, Judgment of 26 September 2014, case T-634/13, *Arctic Paper Mochenwangen* v *Commission*, ECLI:EU:T:2014:828, para. 72.

i) Conflicts between objectives within Union action

As regards the first scenario, Wasmeier has argued that a conflict between sustainability objectives and other aims pursued by the Union can scarcely be envisaged in the long term, as the former are likely to be regarded as prevailing, whereas such tensions may arise in the short term.[47] It is precisely these short-term conflicts that require legal attention. According to Wasmeier, environmentally detrimental consequences could only be justified by overriding requirements in the Union interest that would otherwise remain unattained, and only when no less environmentally harmful means are available to pursue them. Even in such cases, any justification of this kind would be admissible only on an exceptional and temporary basis.[48]

Such tensions have materialised, for example, in the field of competition law. As observed by Colangelo, "it is tempting to conceive of the relationship between antitrust and sustainability rather simplistically in terms of trade-off",[49] a narrative that is in fact contradicted by the practice of national competition authorities.[50] In this context, a short-term contrast among objectives may arise in relation to the protection of present consumers, who might be adversely affected by sustainability agreements that are primarily designed to benefit future consumers. To address this issue, the Commission's Horizontal Guidelines require that consumers receive a "fair share" of the benefits generated by a sustainability agreement, which must "outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral."[51]

Within the specific framework of energy policy, a similar ten-

[47] M. Wasmeier, "The Integration of Environmental Protection as a General Rule for Interpreting Community Law", cit., p. 163.

[48] *Ibid*.

[49] M. Colangelo, "Sustainability Agreements and Competition Law: A Comparative Perspective", cit., p. 102.

[50] See, for instance, the practice of the Italian Competition Authority, in A. Pezzoli, "Come era verde il mio cartello", in *Analisi Giuridica dell'Economia*, 2022/1, 327.

[51] Horizontal Guidelines, cit., para. 569.

sion is expressly contemplated by Directive 2019/944, which establishes common rules for the internal electricity market.[52] Art. 5 of the Directive requires Member States to ensure effective competition among electricity suppliers, which must be free to determine electricity prices (para. 1). At the same time, Member States are required to guarantee "the protection of energy poor and vulnerable household customers", including through public interventions in price-setting (paras. 2-3).[53] The Directive thus embodies a delicate balance between, on the one hand, the competitive functioning of the market, and, on the other, the social imperative of protecting vulnerable consumers. While the latter is clearly strengthened, the concrete calibration of this balance is ultimately left to the Member States.

These considerations resonate with the Court's own case-law. The Court has indeed held that a joint reading of Arts. 11 and 194, para. 1, TFEU, and 37 CFR imposes an obligation to preserve and improve the environment to such an extent that the Commission must declare State aid for certain economic activities in the nuclear energy sector incompatible with the internal market "without any other form of examination", where such activities threaten those provisions.[54] This confirms that competition objectives operate as instrumental means for the attainment of the Union's broader aims, including environmental sustainability.[55] Accordingly, a harmonious interpretation of these objectives, in line with the principle of consistency enshrined in

[52] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, O.J.E.U. 4 June 2019, L 158, pp. 125-199.

[53] Price setting by means of public intervention is conditional upon a number of criteria, including the pursuance of general economic interests and the non-discriminatory nature for consumers, which implies avoiding additional costs for other market participants (Art. 5, paras. 4-5, Directive 2019/944).

[54] Court of Justice (Grand Chamber), Judgment of 22 September 2020, case C-594/18 P, *Austria* v *Commission*, ECLI:EU:C:2020:742, para. 100.

[55] As appears to be also confirmed by the Court of Justice's case-law. See to this effect Court of Justice, Judgment of 22 December 2008, case C-487/06, *British Aggregates* v *Commission*, ECLI:EU:C:2008:757, para. 73: "environmental protection requirements must be integrated into the Community policies referred to in Article 3 EC, which include competition policy."

Art. 7 TFEU, allows for derogations from competition law justified on grounds of environmental protection.

A potential conflict between objectives pursued at Union level can also be identified in the measures adopted in response to the Russian Federation's aggression against Ukraine. In the aftermath of the invasion, environmental sustainability was reinforced as a structural objective of Union action, insofar as the crisis prompted a strategic reorientation towards alternative energy sources. The war and the ensuing restrictive measures led to an accelerated deployment of renewable energies and to increased investments in the energy transition, with the aim of reducing the Union's dependence on third countries.[56] At the same time, the immediate response to the crisis required a temporary reliance on energy sources such as coal and liquefied natural gas. These sources can only be regarded as sustainable on a transitional basis and under strict conditions. Therefore, they remain partially misaligned with the Union's long-term objectives of climate neutrality, while also failing the resolve the structural issue of dependence on third-country suppliers.[57] This crisis-induced rebalancing of objectives appears, in the present case, to be justified in light of the serious threat posed to the Union by the risk of energy supply shortages. In this context, the sustainability objective was temporarily outweighed by another fundamental aim of the Union, namely contributing to the maintenance of international peace and security while mitigating the immediate consequences of the war on energy supply. Notably, however, the compression of the environmental sustainability objective was limited to what was strictly necessary to address the emergency. Both the legislative framework developed within the broader RePowerEU Plan

[56] H.H. Nguyen, P.V. Nguyen, V.M. Ngo, "Energy Security and the Shift to Renewable Resources: The Case of Russia-Ukraine War", in *The Extractive Industries and Society*, XVII (2024), p. 4.

[57] M. Knodt, M. Ringel, N. Bruch, "Secure and Sustainable? Unveiling the Impact of the Russian War on EU Energy Governance", in C. Wiesner, M. Knodt (eds), *The War Against Ukraine and the EU* (Cham, Palgrave Macmillan 2024) pp. 139-140. See also pp. 136-138 for an overview of the sanctions adopted and the specific energy sources targeted by the Union against Russia.

and the subsequent Regulation 2023/435,[58] adopted to implement such strategy, clearly signal a policy realignment with the Treaties. These instruments explicitly identify the acceleration of renewable energy deployment and energy-efficiency investments as the primary structural response to the crisis, thereby restoring environmental sustainability to the forefront of the Union's energy agenda.

This dynamic is further illustrated by Regulation 2022/2577,[59] adopted in December 2022 and applicable for 18 months from its entry into force. Art. 3 of that Regulation provided that the planning, construction and operation of installations for the production of renewable energy "shall be presumed as being in the overriding public interest and serving public health and safety." This provision established a strong presumption in favour of renewables in environmental impact and biodiversity assessments, while leaving narrow space for competing environmental considerations relating to the protection of water,[60] habitats[61] and natural species[62] to prevail in exceptional cases. In such circumstances, priority might have nonetheless been accorded to renewables, provided that adequate compensatory measures are adopted by the Member States. This framework shows that environmental sustainability may be temporarily set aside in favour of other overriding interests if it is promptly restored as a priority objec-

[58] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC, O.J.E.U. 28 February 2023, L 63, pp. 1-27.

[59] Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, O.J.E.U. 29 December 2022, L 335, pp. 36-44.

[60] 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, O.J.E.U. 22 December 2000, L 327, pp. 1-73.

[61] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J.E.U. 22 July 1992, L 206, pp. 7-50.

[62] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, O.J.E.U. 26 January 2010, L 20, pp. 7-25.

tive once the crisis subsidies, possibly through compensatory safeguards.

While these examples concern conflicts arising within the sphere of Union action, a structurally distinct but equally significant tension emerges when the pursuit of environmental sustainability at EU level intersects with the Member States' prerogatives in the energy field.

ii) Conflicts between Union objectives and Member State prerogatives

As regards the derogations laid down in Art. 194, para. 2, subpara. 2, TFEU, the margin of manoeuvre enjoyed by the Member States is restricted, as previously noted, by their obligations under EU law, a circumstance which warrants a narrow interpretation of that provision. As this contribution has emphasised, environmental sustainability indisputably constitutes an objective to be pursued by both the Union institutions and the Member States. Accordingly, the prerogatives safeguarded by Art. 194, para. 2, subpara. 2, TFEU, must be oriented towards the attainment of that objective.

A progressive definition of what qualifies as environmentally sustainable energy-related activities, potentially perceived as a constraint on the Member States' freedom of choice, may be derived from the Taxonomy Regulation.[63] That Regulation establishes a common classification system for economic activities regarded as environmentally sustainable, with a view to determining the degree of sustainability of investments. The practical incentive for economic operators lies in enhanced access to funding and investment attractiveness, owing to the "environmentally sustainable" label, which in turn intensifies competition among undertakings.[64] For the purposes of the Regulation, Art. 9 identi-

[63] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, O.J.E.U. 22 June 2020, L 198, pp. 13-43.

[64] B.-E. Konow, "EU Taxonomy, Level Playing Field and Competition

fies six environmental objectives, namely: climate change mitigation; climate change adaptation; the sustainable use and protection of water and marine resources; the transition to a circular economy; pollution prevention and control; and the protection and restoration of biodiversity and ecosystems. In relation to each of these objectives, Arts. 10 to 15 of the Regulation specify the economic activities presumed to substantially and directly contribute to these aims. Furthermore, Art. 16 of the Regulation identifies activities enabling other activities to contribute to those objectives.

The adoption of the Taxonomy Regulation sparked an intense debate in relation to some specific indications related to energy sources.[65] Art. 19, para. 3, of the Regulation explicitly provides that "power generation activities that use solid fossil fuels do not qualify as environmentally sustainable economic activities." At first sight, this may appear to run counter to Art. 194, para. 2, subpara. 2, TFEU, inasmuch as it limits the Member States' freedom to choose between energy sources. Even more controversial was the inclusion of nuclear energy among the activities contributing to decarbonisation. This addition resulted from a subsequent Delegated Regulation,[66] in which the Commission relied on expert scientific assessments to conclude that nuclear energy, although not renewable, constitutes a low-carbon activity capable of significantly contributing to the Union's decarbonisation objectives and of fostering the development of renewable resources.[67] This approach has recently been upheld by the Gener-

Policy in the Energy Sector", in L. Hancher, I. Herrera Anchustegui (eds), *Research Handbook on EU Competition Law and the Energy Transition* (Cheltenham, Edward Elgar 2024), p. 93.

[65] *Ivi*, p. 96.

[66] See in particular Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, O.J.E.U. 15 July 2022, L 188, pp. 1-45.

[67] See particularly Recitals 6 *et seq*. of Delegated Regulation 2022/1214. The uncertainties related to the inclusion of nuclear energy sources among those endorsed by the Union are also reflected by the Commission Communication, *Guidelines on State aid for climate, environmental protection and energy*

al Court, which dismissed an annulment action brought by Austria and confirmed the compatibility of nuclear energy-related activities with the Taxonomy Regulation.[68]

Further limitations on the Member States' margin of action also stem from international law and the Union's obligation to comply with it. In this respect, the Taxonomy Regulation represents a paradigmatic example of secondary legislation adopted in order to give effect to international commitments. As stated in its Recital 3, the Regulation "represents a key step towards the objective of achieving" the results envisaged by the Paris Agreement, in particular climate neutrality by 2050. As emphasised by the General Court, the Taxonomy Regulation must in any event be interpreted consistently with the Paris Agreement.[69] Consequently, subsequent agreements between the parties to that treaty – including those recognising nuclear energy as a technology capable of accelerating decarbonisation – must be taken into account for the purposes of its interpretation, in accordance with Art. 31, para. 3, lit. a), of the Vienna Convention on the Law of the Treaties of 23 May 1969. This interpretative framework confirms that nuclear energy may contribute to climate change mitigation,[70] and clarifies that the derogations in favour of the Member States under Art. 194, para. 2, subpara. 2, TFEU must be understood in the light of the Union's international obligations,

2022, O.J.E.U. 18 February 2022, C 80, pp. 1-89. The Guidelines, which essentially consider compatible with Union law State aid granted to economic activities that contribute to the realisation of EU objectives related to the improvement of environmental protection, expressly do not apply to nuclear energy (para. 13, lit. d). For an analysis on the rationale of this exclusion, see R. Baratta, "Aiuti di Stato e fragilità ambientali: i nuovi orientamenti della Commissione", in *Diritto e società*, 2022/3, pp. 524-525. On the interplay between these Guidelines and the Taxonomy Regulation, see A. Metaxas, "The New State Aid Guidelines on Climate, Environmental Protection and Energy: What Changes Do They Bring?", in L. Hancher, I. Herrera Anchustegui (eds), *Research Handbook on EU Competition Law and the Energy Transition*, cit., pp. 316 ff.

[68] General Court, Judgment of 10 September 2025, case T-625/22, *Austria* v *Commission*, ECLI:EU:T:2025:869.

[69] *Ivi*, para. 187.

[70] *Ivi*, paras. 188-190.

not least in order to avoid engaging its international responsibility. The balance between the discretion retained by the Member States and the Union's pursuit of environmental sustainability is implicitly endorsed by the General Court. As observed by the Court, the Taxonomy Regulation does not establish any "priority for investments in economic activities in the nuclear energy sector over investments in the renewable energy sector",[71] and is therefore consistent with Art. 194, para. 2, subpara. 2, TFEU.[72]

In this respect, the Taxonomy Regulation is not an isolated phenomenon, but rather part of a broader regulatory pattern in the Union legal order. Comparable dynamics emerge in the governance of the Recovery and Resilience Facility,[73] in the environmental conditionality attached to EU funds,[74] and in State aid control in climate-sensitive sectors. In all these areas, Member States retain their prerogatives, yet their discretion is increasingly channelled through functional constraints linked to Union objectives. The Taxonomy thus exemplifies a broader shift from direct harmonisation to indirect steering through financial and regulatory incentives.

[71] *Ivi*, para. 209.

[72] *Ivi*, para. 210.

[73] Indeed, the Commission's assessment of recovery and resilience plans must consider several factors, including whether they contain measures that effectively contribute to the green transition (Arts. 18, para. 4, lit. e), and 19, para. 3, lit. e) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, O.J.E.U. 18 February 2021, L 57, pp. 17-75).

[74] See for instance Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, O. J.E.U. 30 June 2021, L 231, pp. 159-706. Art. 9, para. 4 of such Regulation underlines that the Funds' objectives must be pursued "in line with the objective of promoting sustainable development as set out in Article 11 TFEU, taking into account the UN Sustainable Development Goals, the Paris Agreement and the 'do no significant harm' principle", while also complying with the Union's "environmental *acquis*".

It follows that the Union remains free to pursue its sustainability aims, in particular by encouraging specific energy-related activities and fostering their development, without this necessarily resulting in an undue prioritisation of certain sources over others. The ultimate decision as to which energy mix to rely upon therefore remains with the Member States. Nevertheless, the obligations stemming from EU law, relating both to the pursuit of Union objectives and to the principle of sincere cooperation, as well as those deriving from international law, increasingly orient the Member States' actions towards compliance with the objective of environmental sustainability.

5. *Conclusive Remarks*

This contribution has sought to assess the relevance of environmental sustainability as an objective of the Union's energy policy. Its significance emerges, most importantly, from primary law. A combined reading of Art. 11 TFEU, the mirroring provision laid down in Art. 37 CFR, and Art. 194 TFEU clearly establishes environmental sustainability among the constitutive objectives framing Union action in the field of energy.

With regard to the general functions traditionally attributed to the Union's objectives, environmental sustainability appears to operate on multiple levels. It undoubtedly fulfils a programmatic function, as evidenced by the obligation imposed on the Union's institutions to integrate environmental protection requirements across its policies. In this respect, Art. 37 CFR, as a principle within the meaning of the Charter, requires concrete implementation by the Union legislator. At the same time, the objective also performs a well-established interpretative function, as confirmed by the case-law of the Court of Justice, in line with the broader systemic role assigned to the Union's objectives.

What emerges with particular clarity, however, is the progressive acquisition of an operative dimension by the objective of environmental sustainability within the Union legal order. This is demonstrated, on the one hand, by the Court's case-law on the internal market, where national measures pursuing environmen-

tal aims have been recognised as legitimate grounds for derogating from the freedoms of movement as expressions of overriding public interests. On the other hand, the Commission's decisional practice complements the Court's jurisprudence in the field of competition law, where sustainability considerations have been admitted as a justification for certain forms of horizontal cooperation between undertakings, allowing their compatibility with the internal market to be preserved.

Against this background, the crucial question concerns the extent to which environmental sustainability can be regarded as a *guiding* objective of the Union action. This issue is strictly connected to the analysis of conflicts between objectives, both within Union action and in relation to measures adopted by the Member States in the exercise of their prerogatives under Art. 194 TFEU. The examination of both dimensions suggests that environmental sustainability is treated as a priority objective within the Union legal framework. This priority is reflected, first, in the possibility to justify derogations of movement and from competition law, policies which are themselves instrumental to the achievement of Union objectives. Second, sustainability may be temporarily compressed only in exceptional crisis situations, which, in turn, legitimise normative adaptions aimed at restoring and structurally reinforcing the Union's environmental trajectory. Third, sustainability increasingly orients the Member States' margin of discretion under Art. 194, para. 2, subpara. 2, TFEU, not as an undue limitation on national energy choices, but as a functional prioritisation justified both by EU law and by the international commitments assumed by the Union.

Institutional practice therefore supports the view that environmental sustainability prevails in situations of conflict with other legitimate objectives pursued by the Union or by the Member States. At the same time, an unconditional recognition of such primacy would entail the risk of endorsing an excessively discretionary, case-by-case balancing, particularly in judicial review. In this respect, the present analysis suggests that the resolution of conflicts between objectives cannot be detached from the constitutional framework set out in Art. 3, para. 1, TEU, which identifies the promotion of the Union's values under Art. 2 TEU,

together with peace and the well-being of its peoples, as the Union's primary aims. Accordingly, the more specific objectives listed in Art. 3 TEU and in sectoral provisions such as Art. 194 TFEU must be interpreted in conformity with the Union's foundational values.

In line with the Court's recent case-law, according to which Art. 2 TEU gives expression to "principles containing legally binding obligations",[75] a value-oriented interpretation must therefore guide the construction of Union objectives, no less than that of any other EU law provision. Within this axiological framework, the protection of fundamental rights features predominantly, also in shaping the boundaries of acceptable trade-offs between environmental sustainability and competing interests.

From this perspective, and in compliance with the general duty of coherence laid down in Art. 7 TFEU, environmental sustainability operates as a structural constraint on the way in which conflicts between Union objectives are to be resolved. It does not merely inform political choices, but increasingly shapes the legal standards against which both Union action and Member State measures are assessed. In this sense, sustainability functions as a parameter of justification and proportionality, capable of setting substantive limits to crisis-driven rebalancing and to sectoral trade-offs. The emerging picture is therefore not one of absolute primacy in hierarchical terms, but of substantive constitutional centrality: environmental sustainability contributes to defining the outer boundaries of permissible balancing within the Union's energy policy and, more broadly, within its legal order.

[75] Court of Justice (Full Court), Judgment of 16 February 2022, case C-156/21, ECLI:EU:C:2022:97, *Hungary* v *Parliament and Council*, para. 232; Court of Justice (Full Court) Judgment of 16 February 2022, case C-157/21, ECLI:EU:C:2022:98, *Poland* v *Parliament and Council*, para. 264.

ENVIRONMENTAL SUSTAINABILITY AND THE "CIRCULAR ECONOMY" IN EU LEGISLATION AND POLICIES: THE INTERNAL MARKET PERSPECTIVE

MARIO BARBANO*

SUMMARY: 1. Introduction: The Consumption of Natural Resources as a Matter of Intergenerational Equity. – 2. The Circular Economy in light of EU Primary Legislation. – 3. Overview of EU Policies and Secondary Legislation on Circular Economy. – 4. Setting Legal Order within the Circular Economy Regime: Defining and Implementing Issues. – 5. Towards a Circular Internal Market: The Envisaged Circular Economy Act and its Possible Interactions with Existing EU Legislation. – 6. Upscaling the Market for Circular Materials: The Competition Policy Perspective… – 7. … and the State Aid Policy One. – 8. Conclusive Remarks and Future Perspectives.

1. *Introduction: The Consumption of Natural Resources as a Matter of Intergenerational Equity*

Consumption of natural resources puts unsustainable pressure on the environment. Humanity is currently depleting the Earth 1.8 times faster than its ecosystems can regenerate[1] and, due to population growth, the equivalent of almost three planets will be required by 2050 to sustain current lifestyles.[2]

These projections raise concerns from an inter-generational

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[1] As calculated by the Global Footprint Network (GFN): GFN, Earth Overshoot Day 2025 falls on July 24th: Correcting Humanity's Largest Market Failure, press release, July 2025 https://overshoot.footprintnetwork.org/newsroom/press-release-2025-english/.

[2] See United Nations, The Sustainable Development Goals Report, New York, 2025, p. 32 ff.

equity perspective[3] and require a change of paradigm in economic development,[4] shifting from a linear consumption model (from resource extraction to waste disposal) to a circular one, where repair, re-use or recycling allow further usage of the same material.[5]

By adopting this life-cycle perspective, waste shall be regarded as an environmental resource, a "good" that may be put back into the market, after removal of any harmful substances.[6]

Within the European Union (EU), around five tonnes of waste are generated annually per inhabitant.[7] Albeit the progress made in recycling,[8] the share of secondary (i.e., non-virgin) raw materials used by the EU industry increased only slightly over the last two decades[9], meaning that the EU ambition to

[3] For further reference on intergenerational equity, see World Commission on Environment and Development, *Our Common Future* (United Nations, New York, 1987) ("Brundtland Report"); E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University, Transnational 1988) and, more recently, D. Bertram, "'For You Will (Still) Be Here Tomorrow': The Many Lives of Intergenerational Equity", in *Transnational Environmental Law*, 12 (2023), p. 121 ff.; M. Gehring, "Legal Transition to the Green Economy", in *McGill Int'l J. Sust. Dev. L. & Policy*, XII (2016), p. 135 ff., esp. 151 ff.

[4] Moving towards sustainable consumption and production patterns is part of the UN 2030 Agenda for Sustainable Development (Goal no. 12) and has been later recognized in the Johannesburg Plan of Implementation, adopted in 2002 at the World Summit on Sustainable Development.

[5] On the topic, see T. Jackson, *Prosperity Without Growth: Economics for a Finite Planet* (London, Routledge 2009); K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (London, Penguin 2017); W. Stahel, *The Circular Economy: A User's Guide* (London, Routledge 2020); M. Brandão, D. Lazarevic, G. Finnveden (eds), *Handbook of the Circular Economy* (Cheltenham, Elgar 2022).

[6] Hazardous waste is, indeed, only a limited sub-category of waste subject to an *ad hoc* control regime, as it will be discussed *infra*, Section 3.

[7] See Eurostat, Waste statistics, Statistics Explained, Sep. 2024.

[8] In 2022 the EU recycled 40.8% of its waste and sent 30.2% to landfills, with another significant portion (around 14.2%) used for backfilling and energy recovery, contributing to a total recovery rate of over 61% (*ibid.*).

[9] The rate was 12.2% in 2024, +4% compared to 2004: Eurostat, Circular economy - material flows, Statistics Explained, Nov. 2025, at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Circular_economy _-_ material_flows.

double its circularity rate to 24% by 2030 is still far from being achieved.[10]

Indeed, circular economy represents a major business case for the EU, with strong growth potential towards 2030[11] and implications even beyond environmental policy, as reducing dependence on raw materials is crucial for achieving strategic autonomy.[12]

However, as highlighted by the Draghi and Letta Reports, the EU transition towards a circular economy is hindered by the lack of an internal market for secondary raw materials.[13] This call to action was taken up by the European Commission, which set circularity as one of the pillars of its strategy to enhance EU competitiveness.[14]

This chapter aims to analyse the EU regulatory approach to circular economy, with a focus on the initiatives for establishing an internal market for secondary raw materials. Firstly, the EU regime on circular economy will be outlined, tracing the legal basis

[10] The ambition to make the EU the world leader on circular economy by that date: European Commission, A new Circular Economy Action Plan, COM(2020) 98 final, at 2. This objective has been recently confirmed in *Id.*, The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonization, COM(2025) 85 final, at 16.

[11] According to estimates, circular-economy sectors already generate around EUR 316 billion in gross value added annually, investing approximately EUR 131 billion and employing 4.3 million people: Eurostat, Private investment and gross added value related to circular economy sectors, 24 Mar. 2025, https://doi.org/10.2908/CEI_CIE012; *Id.*, Persons employed in circular economy sectors, 21 Mar. 2025, https://doi.org/10.2908/CEI_CIE011. From the economic perspective, see Ellen MacArthur Foundation, *Towards the Circular Economy - Vol. 1: An Economic and Business Rationale for an Accelerated Transition*, 2013.

[12] See Commission, Study on the Critical Raw Materials for the EU, Luxembourg, 2023, p. 2 ff.

[13] M. Draghi, *The Future of European Competitiveness*, Part B: In-depth analysis and recommendations, Brussels, 2024, at 54 ff.; E. Letta, *Much More Than a Market: Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, Brussels, 2024, p. 42 ff.

[14] See Commission, A Competitiveness Compass for the EU, COM(2025) 30 final, p. 9 ff.; *Id.*, A Strategy for making the Single Market simple, seamless and strong, COM(2025) 500 final, p. 10 ff.; *Id.*, The Clean Industrial Deal, cit., at 2.

in primary law (section 2) and the evolution of EU regulatory policy on the matter (section 3), while highlighting the main defining and implementing issues (section 4). Then, the case for an internal market for circular economy will be examined by discussing the envisaged Circular Economy Act (CEA) (section 5), as well as competition and State aid policy tools for upscaling investments in the sector (sections 6 and 7). In conclusion (section 8), some remarks will be drawn on the need to ensure coherence within EU secondary legislation on circular economy and the difficulties in setting priorities among different policy objectives.

2. *The Circular Economy in light of EU Primary Legislation*

Circular economy, albeit not being expressly mentioned in the Treaties, is an essential component of the EU environmental policy objective of "prudent and rational utilisation of natural resources".[15] This goal reflects inter-generational equity considerations and must be pursued in line with the principle of sustainable development,[16] as well as the other principles of EU environmental law.

Circular economy implies waste prevention in line with the

[15] Article 191(1), third indent TFEU. In detail, see S. Garben, "Article 191 TFEU", in M. Kellerbauer *et al.* (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford/New York, OUP 2019), p. 1516 ff.; F. Munari, L. Schiano di Pepe, *Tutela transnazionale dell'ambiente* (Bologna, Mulino 2012), spec. p. 321 ff. In general, on EU environmental policy, see G. Van Calster, L. Reins, *EU Environmental Law* (Cheltenham, Elgar 2017); J. Van Zemen, A. Rowell, *A Guide to EU Environmental Law* (Oakland, UCP 2020); L. Krämer, *EU Environmental Law* 8th ed. (London, Sweet & Maxwell 2016).

[16] Articles 11 TFEU and 37 CFREU. On the sustainable development principle, see, in general terms, P. Birnie, A. Boyle, C. Redgwell, *International Law and the Environment*, 3rd ed. (Oxford, OUP 2009); D. Bodansky, A. Boyle, D. Freestone, *International Law & Sustainable Development* (Oxford, OUP 1999); M. Fitzmaurice, D. French (eds), *International Environmental Law and Governance* (Leiden, Brill 2015); P. Sands, *Principles of International Environmental Law* 2nd ed. (Cambridge, CUP 2003). On the evolution of the subject matter, see E. Scotford, *Environmental Principles and the Evolution of Environmental Law* (Oxford, OUP 2017); F. Munari, "Tutela internazionale

principle of preventive action, which requires policymakers to act promptly as to avoid risks of environmental damage.[17] Circular economy is also directly linked to the enforcement of the polluter-pays principle,[18] as virgin raw materials often cost less than secondary ones because environmental costs of disposal are not adequately internalised.

Once waste is generated, the principle of correction at source applies,[19] making local communities responsible for collection, treatment and disposal of their own municipal waste,[20] and allowing other categories of waste to circulate, due to the level of specialisation and economies of scale needed for their treatment.[21]

Bearing in mind the legislative competence shared between the EU and its Member States on environmental matters,[22] EU secondary legislation on circular economy finds a legal basis in Article 192(1) TFEU. However, due to the cross-cutting nature of the subject, two principles play a key role in broadening the scope of EU powers in this field.

The first one is the principle of a high level of environmental protection,[23] which ensures alignment with best international standards and shapes secondary legislation on the internal market. According to the safeguard clause laid down in Article 114(3) TFEU, approximation of laws must be pursued by taking "as a

dell'ambiente", in S.M. Carbone *et al.* (eds), *Istituzioni di diritto internazionale* (Torino, Giappichelli 2021), p. 497 ff.

[17] Article 191(2) TFEU.

[18] *Ibid.*

[19] The principle of correction at source prescribes to adopt environmental measures at the most efficient regulatory and operational level. This principle constitutes a specific application of the broader principle of subsidiarity.

[20] See CJEU, 9 July 1992, *Region Wallonne*, C-2/90, para. 34, as well as the case-law on the "waste in Campania" saga: 4 March 2010, *Commission v Italy* (*Waste in Campania*), C-297/08, 16 July 2015, *Commission v Italy (Waste in Campania)*, C-653/13.

[21] Subject to the condition of traceability and compliance with international standards, as it will be discussed *infra*, section 3.

[22] Article 4(2)(e) TFEU.

[23] See Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights of the EU (CFREU).

base" a high level of environmental protection as well as "any new development based on scientific facts".[24] Conversely, Member States' adoption of even higher standards compared to EU ones is limited by internal market rules,[25] as showed by the *Danish bottles* ruling in the field of product design rules impacting on recycling.[26]

The second relevant principle is that of integration of environmental protection into the other EU policies,[27] as circular economy requires a policy-making strategy that takes the whole life-cycle of a product into account, "from cradle to crave". Consequently, EU legislation is shifting from a traditional sectoral approach, focused on waste streams, to a more "horizontal" one that includes resource extraction and product design, as it will be shown below.

3. *Overview of EU Policies and Secondary Legislation on Circular Economy*

While resource efficiency has been among EU environmental policy priorities since the Europe 2020 strategy,[28] the first policy document systematically addressing the subject-matter is the 2014 Communication *Towards a circular economy – a zero waste programme for Europe*.[29] This Communication paved the way for

[24] Article 114(3) TFEU.

[25] Cf. Article 191(2) TFEU.

[26] CJEU, 20 September 1988, *Commission v Denmark (Danish Bottles)*, 302/86.

[27] Article 11 TFEU and 37 CFREU. On impact of the principle of integration on the internal market, see: J. Nowag, *Environmental Integration in Competition and Free-Movement Law*s (Oxford, OUP 2016); B. Sjåfjell, A. Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Abingdon, Routledge 2015); N. De Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP 2014).

[28] See, e.g., Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020; *Id*., A resource-efficient Europe – Flagship initiative under the Europe 2020 Strategy, COM(2011) 21.

[29] *Id*., Towards a circular economy: A zero waste programme for Europe, COM(2014) 398 final. Between 2014 and 2022, 498 EU publications on the circular economy have been produced: B. Baldassarre, H. Saveyn, "A Systematic Analysis of EU Publications on the Circular Economy", JRC Technical Report no. JRC133158, 2023, esp. 8 ff.

the adoption of the first Circular Economy Action Plan (2015),[30] resulting in various policy initiatives, including the circular economy legislative package[31] and the establishment of a monitoring framework.[32]

A second Circular Economy Action Plan (CEAP 2.0) was adopted in 2020[33] as a building block of the European Green Deal.[34] CEAP 2.0 aimed at setting a policy framework for sustainable products and refining regimes addressing specific value chains and waste streams, with a focus on waste reduction. In order to ensure a better *ex post* assessment, the monitoring framework was further implemented.[35]

Within the comprehensive environmental strategy to 2030 outlined by the 8th European Environmental Action Programme (2022), a fast transition to a circular economy is identified as a key element for decoupling economic growth from resource use and environmental degradation.[36] Accordingly, the regulatory approach gradually expanded in order to include product design[37] and integrated into the overall EU competitiveness strategy, thus adding an industrial policy dimension to its traditional regulatory one.[38] Furthermore, EU strategies interact with the national ones elaborated at Member State level.[39]

[30] Commission, Closing the loop - An EU action plan for the Circular Economy, COM(2015) 614 final.

[31] The legislative package included a revision of the legislative framework on waste, of the fertilizers regulation, the adoption of the directive on single-use plastics and eco-design implementing regulations, see: *Id*., Report on the implementation of the Circular Economy Action Plan, COM(2019) 190 final.

[32] Eurostat, Circular Economy Monitoring Framework, 2018.

[33] Commission, A new Circular Economy Action Plan - For a cleaner and more competitive Europe, COM(2020) 98 final.

[34] *Id*., The European Green Deal, COM (2019) 640 final.

[35] Eurostat, Circular Economy Monitoring Framework, 2023. Updated data are available at: https://ec.europa.eu/eurostat/web/circular-economy/monitoring-framework.

[36] Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030.

[37] Commission, On making sustainable products the norm, COM(2022) 140 final.

[38] See the Competitiveness Compass and Clean Industrial Deal Communications cited supra, at nt. 14.

[39] See, e.g., Federal Ministry for the Environment (Germany), Climate Ac-

In parallel with the policies illustrated above, the EU developed a structured legal framework on circular economy whereby multiple layers of regulatory intervention may be identified.

The first layer is characterized by framework legislation on waste, i.e. the Waste Framework Directive (WFD)[40] and the Waste Shipments Regulation.[41] The former, as amended lately in September 2025,[42] provides crucial legal notions such as those of waste and end-of-waste,[43] while the latter sets the conditions for transboundary movements of certain waste within OECD countries, in line with EU international obligations on the matter.[44]

The second layer addresses waste treatment operations and consists of the Industrial Emissions[45] and the Landfill Directives[46] (both amended in 2024),[47] as well as delegated acts to be adopted under the WFD setting technical minimum standards

tion, Nature Conservation and Nuclear Safety, National Circular Economy Strategy, 2024; Ministry of Infrastructure and Water Management (Netherlands), National Circular Economy Programme 2023-2030, 2023; Ministero della Transizione Ecologica, Strategia nazionale per l'economia circolare, 2022.

[40] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (WFD).

[41] Regulation (EU) 2024/1157 of the European Parliament and of the Council of 11 April 2024 on shipments of waste, amending Regulations (EU) No 1257/2013 and (EU) 2020/1056 and repealing Regulation (EC) No 1013/2006.

[42] Directive (EU) 2025/1892 of the European Parliament and of the Council of 10 September 2025 amending Directive 2008/98/EC on waste. The amendment introduces common rules for extended producer responsibility (EPR) for textiles and sets binding food waste reduction targets for Member States.

[43] These notions will be discussed in detail *infra*, section 4.

[44] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989, 1673 UNTS (1989) 57 and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 30 January 1991, 2101 UNTS (2002) 177.

[45] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

[46] Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste.

[47] Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU of the European Parlia-

for sorting and recycling of waste.[48] This layer is complemented by legislation regulating specific waste streams, such as electrical and electronic equipment (EEE)[49] and hazardous substances in them,[50] end-of-life vehicles,[51] sewage sludge,[52] mining waste,[53] persistent chemical[54] and organic pollutants.[55]

The final layer reflects the integration of environmental sustainability considerations into product's legislation. The most remarkable examples are *i)* the Eco-design for Sustainable Products Regulation (ESPR),[56] which replaces and enlarges the scope of the eco-design directive,[57] *ii)* the directive on promoting the

ment and of the Council on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC on the landfill of waste.

[48] Article 27 WFD, cit.

[49] Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE), as amended.

[50] Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, as amended.

[51] Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles, as amended. On the impact of vehicle electrification on this regime, see A. Danthinne, M. Picard, "Assessing the Compatibility of Vehicle Electrification with the EU's Circular Economy Objective", in *European Energy and Environmental Law Review*, XXXI (2022), p. 304 ff.

[52] Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture, as amended.

[53] Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, as amended.

[54] Council Directive 96/59/EC of 16 September 1996 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (PCB/PCT).

[55] Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (POP).

[56] Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of eco-design requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC (ESPR).

[57] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of eco-design requirements for energy-related products.

repair of goods, with the aim of reducing waste generation at its source.[58]

Notably, the ESPR introduces Digital Product Passport (DPP) that enables storage of information on products' sustainability and legal compliance that can be easily accessed by consumers, manufacturers and authorities via a QR code placed on a product.[59] Moreover, the ESPR incentivises the setting of "green" public procurement criteria, i.e., minimum mandatory requirements to be fulfilled by public authorities within the EU when purchasing certain products covered by the regulation.[60] The horizontal life-cycle approach of the ESPR goes in parallel with other recent sector-specific regimes, such as those on packaging,[61] batteries,[62] construction products,[63] micro-plastics,[64] single-use plastics[65] and critical raw materials.[66]

[58] Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828.

[59] Article 9, ESPR, cit. The DPP can include information on: i) technical performance; ii) materials and their origins; iii) repair activities; iv) recycling capabilities; v) life cycle environmental impacts.

[60] Article 65, ESPR, cit.

[61] Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC.

[62] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

[63] Regulation (EU) 2024/3110 of the European Parliament and of the Council of 27 November 2024 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011.

[64] Regulation (EU) 2025/2365 of the European Parliament and of the Council of 12 November 2025 on preventing plastic pellet losses to reduce microplastic pollution.

[65] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment. See I.De Waal, "The Legal Transition Towards a More Circular Plastic Packaging Chain A Case Study of the Netherlands", in *European Energy and Environmental Law Review*, XXX (2023), p. 226 ff.

[66] See Articles 26 ff. Regulation (EU) 2024/1252 of the European Parlia-

4. *Setting Legal Order within the Circular Economy Regime: Defining and Implementing Issues*

In order to achieve circularity, it is crucial to set priorities among policy options for waste treatment and to distinguish between waste and other "goods" that circulate within the internal market. In this vein, important clarifications may be found in the WFD, as interpreted by the established jurisprudence of the Court of Justice.[67]

First of all, the WFD establishes a waste hierarchy – i.e., a priority order in waste treatment – that is structured as follows: i) waste prevention; ii) preparing for re-use; iii) recycling; iv) recovery; v) disposal (thus, as *extrema ratio*).[68] As Member States are required to deliver the best overall environmental outcome, departing from the hierarchy may be necessary for specific waste streams, when appropriately justified (under *inter alia*, technical feasibility, economic viability and environmental protection).[69]

ment and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (CRMA).

[67] On the topic, see T. Turunen, J. Alaranta, "The Role of the CJEU in Shaping the Future of the Circular Economy", in *European Energy and Environmental Law Review*, XXX (2021), p. 51 ff.; C. Backes, M. Boeve, "Envisioning the Future of the Circular Economy: A Legal Perspective", in *Environmental Policy and Law*, LII (2022), p. 253 ff.; R. Feltkamp, T. Hermans, "The (Legal) Concept of Waste: An Obstacle for Exnovating Linear Economic Activities and the Transition to a Circular Economy (In the Brussels Capital Region)?", in *European Energy and Environmental Law Review*, XXX (2023), p. 114 ff.; O. Johansson, "The End-of-Waste for the Transition to Circular Economy: A Legal Review of the European Union Waste Framework Directive", in *Environmental Policy and Law*, LIII (2023), p. 167 ff.; E. Maitre-Ekern, C. Dalhammar, "Towards a Hierarchy of Consumption Behaviour in the Circular Economy", in *Maastricht Journal of European and Comparative Law*, XXVI (2019), p. 394 ff.; D. Tsiatsianis, "Circular or Vicious Loops? Gauging the Persistence of EU Waste Law Against the Circular Economy Transition", in *Journal of Environmental Law*, XXXVII (2025), p. 277 ff.; B. Bokor, "Legal Analysis of the EU Regulatory Framework on Circular Economy and Sustainability Principles in Plastic Food Packaging", in *Cleaner Waste Systems*, XII (2025), Article No. 100412.

[68] Article 4(1), WFD, cit.

[69] Article 4(2) and recital no. 31, WFD, cit.

In order to favour waste prevention, re-use and recycling over disposal, the WFD introduces the concept of extended producer responsibility (EPR).[70] The EPR is a policy mechanism whereby producers are made responsible for the post-consumer stage of a product's life cycle. This responsibility may be financial, organisational, or both, and covers activities such as waste collection, sorting, treatment, and information provision. The goal of the EPR is to internalise environmental costs, incentivise eco-design, and shifts the burden of waste management from public authorities to firms placing products on the market. As the WFD sets only minimum requirements for EPR schemes, their regulation takes place at Member State level.[71]

An effective implementation of the hierarchy requires clarity in defining the notions of waste, by-product and end-of-waste. The definition of waste is broad, encompassing "any substance or object which the holder discards or intends or is required to discard",[72] while hazardous waste is regarded as a specific sub-category, subject to an *ad hoc*, strict control regime.[73]

Waste shall be distinguished from a by-product, i.e., the substance or object resulting from a production process, whose primary aim is not the production of that item. To qualify as by-product four cumulative conditions must be met: i) its further use is certain and ii) it does not require any further processing other than normal industrial practice; iii) the item is produced as an integral part of a production process; iv) further use is lawful, i.e., fulfils all relevant product, environmental and health protection requirements for the specific use.[74]

[70] Article 8 ff., WFD, cit. On the topic, see K. Pouikli, "Concretising the role of extended producer responsibility in European Union waste law and policy through the lens of the circular economy", in *ERA Forum* 20 (2020), p. 491 ff.

[71] See Article 8a, WFD, cit.

[72] Article 3 WFD, cit. See, e.g., CJEU, 18 April 2002, *Palin Granit*, C-9/00; 8 September 2005, *Commission v Spain (Spanish slurry case)*, C-416/02.

[73] Based on control, prohibition of mixing and labelling, see: Article 7(1) and Annex III WFD, cit.

[74] Article 5 WFD, cit. See CJEU, 11 September 2003, *Avesta Polarit Chrome*, C-114/01; 15 January 2005, *Saetti and Frediani*, C-235/02.

The notion of End-of-Waste (EoW) "closes the cycle" as it allows to identify when the item discarded as waste does not fall anymore under waste legislation and may be put back into the market. According to the WFD, EoW is waste that has undergone a recovery operation (including recycling) and complies with specific criteria that are subject to four general conditions: i) the item is commonly used for specific purposes; ii) there is a market for it; iii) it fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; iv) its use will not lead to overall adverse environmental or human health impacts.[75]

EoW criteria set thresholds for pollutants and take into account any possible adverse environmental effects. So far, the criteria applicable to iron, steel and aluminium scrap,[76] glass cullet[77] and copper scrap[78] have been established, while those for plastics, textiles and biological waste are still under elaboration.[79] The transition from waste to a "good" is possible also the other way around; in fact, the CJEU clarified that a good may become waste independently from the intent of its holder, as it occurs, e.g., in case of materials released into the environment during natural disasters.[80]

In line with the goals of circular economy, the notions of

[75] Article 6 WFD, cit. See CJEU, 17 November 2022, *Porr Bau*, C-238/21; 14 October 2020, *Sappi Austria*, C-629/19.

[76] Council Regulation (EU) No 333/2011 of 31 March 2011 establishing criteria determining when certain types of scrap metal cease to be waste under Directive 2008/98/EC of the European Parliament and of the Council.

[77] Commission Regulation (EU) No 1179/2012 of 10 December 2012 establishing criteria determining when glass cullet ceases to be waste under Directive 2008/98/EC of the European Parliament and of the Council. See E. Rodriguez Vieitez, *End-of-Waste Criteria for Glass Cullet: Technical Proposals*, JRC Report JRC68281, Luxemburg, 2011.

[78] Commission Regulation (EU) No 715/2013 of 25 July 2013 establishing criteria determining when copper scrap ceases to be waste under Directive 2008/98/EC of the European Parliament and of the Council.

[79] Cf. G. Orveillon *et al*, "Scoping possible further EU-wide end-of-waste and by-product criteria", JRC Study JRC128647, Luxemburg, 2022. On plastics, see also, infra, section 5.

[80] See CJEU, 7 September 2004, *Van de Walle v Texaco*, C-1/03; 24 June 2008, *Commune de Mesquer v Total*, C-188/07.

by-product and end-of-waste should be extensively interpreted, provided environmental harm is avoided. Conversely, disposal of waste should be allowed only in absence of other viable options, in any case after a life-cycle assessment. Nevertheless, from an internal market perspective, the current regulatory framework has several shortcomings, as underlined recently by the Commission.[81]

First of all, the limited development of EU-wide EoW criteria and by-product status led to the adoption of national or regional EoW criteria by Member States in an uncoordinated manner, an issue that is further amplified by the inadequate application of the principle of mutual recognition in this field.[82] In fact, EU jurisprudence still maintains a broad definition of waste, but concedes that specific circumstances determine whether a material is waste or not, thus leaving up to the competent authorities to take relevant decisions on a case-by-case basis.[83] This level of discretion enjoyed by Member States favoured fragmentation of the waste recycling market into national ones.[84] Similarly, the absence of a harmonised EU definition of by-products also impedes the circularity of production processes.

In addition, implementation of EPR significantly varies from one Member State to another due to the differences in national schemes, resulting in regulatory complexity and high administrative burden for EU undertakings. National registration and reporting requirements create a barrier for cross-border operations, especially for small and medium enterprises.[85]

Finally, unaccounted waste streams and "leakages" of secondary raw materials result in diversion of materials that should be

[81] Commission, COM(2025) 500 final, cit., p. 11.

[82] *Ivi*, p. 12. For further analysis, see T. Turunen, "Waste by Any Other Name? National End-of-Waste Rulings and Waste Shipments", in *Review of European, Comparative & International Environmental Law*, 2025, Article No. 70026. See also Commission's consultation of 2 July 2025, Green-listing certain waste for the purposes of shipments to recovery between Member States, at www.ec.europa.eu.

[83] Compare to CJEU, *Sappi Austria*, cit.

[84] See CJEU, 28 March 2019, *Tallinna Vesi*, C-60/18.

[85] Commission, COM(2025) 500 final, cit., p. 12.

kept within circular loops (i.e., reused, remanufactured, or recycled) but instead are lost to linear disposal pathways, including incineration, landfilling and illegal export.[86]

In this scenario, enhancing the internal market for circular products requires a two-pronged strategy, covering both legislative harmonisation and industrial policy.

5. *Towards a Circular Internal Market: The Envisaged Circular Economy Act and its Possible Interactions with Existing EU Legislation*

Following the recommendations from the Draghi and Letta Reports,[87] as well as calls to action from EU institutions and the industry,[88] the Commission put the adoption of a Circular Economy Act (CEA) among is legislative priorities, together with other policy initiatives for enhancing circularity within the internal market.

The CEA is intended to establish an efficient internal market for waste and Secondary Raw Materials (SRMs), so as to achieve the target of doubling EU circularity rate of 24% by 2030.[89] Envisaged as a regulation based on the approximation of laws provision of Article 114 TFEU, the CEA proposal is expected to comprise both horizontal and sectoral regulatory measures, namely i) reform of end-of-waste criteria; ii) simplification, digitalisation and extension of EPR schemes; iii) introduction of mandatory targeted criteria for public procurement of circular

[86] Commission, Call for evidence for a Circular Economy Act, Ares (2025)6250342, at 1. According to estimates, around 15-30% of global waste shipments are not tracked or controlled properly under international waste shipment rules, increasing the likelihood that waste is mis-managed instead of being reused or recycled (Council of the EU, Waste Trade, 2025, https://www.consilium.europa.eu/en/policies/waste-trade).

[87] See *supra*, footnote 13.

[88] See Council of the EU, Budapest Declaration on the New European Competitiveness Deal, 8 November 2024, IP 838/24, at para. 8; The Antwerp Declaration for a European Industrial Deal, Signed at the European Industry Summit, Antwerp, 20 February 2024, at para. 6.

[89] Commission, Call for evidence for a Circular Economy Act, cit.

goods and services and iv) revision of EU regime applicable to electronic and electric equipment waste.[90]

While the CEA proposal has not been submitted by the Commission yet, some initial considerations may be drawn in light of the consultations carried out with stakeholders, as well as other recent policies addressing specific material streams, such as plastics. In fact, as the CEA seems to go beyond the traditional framework legislation approach, it is still unclear how its measures will interact with the existing EU rules on the matter, especially on regulatory issues that require a sectoral approach.

In this regard, reference can be made to the pilot actions for boosting the circularity of plastics recently published by the Commission.[91] The package includes an implementing regulation to be adopted under Article 6(2) WFD that sets EU-wide EoW criteria for plastics, whose draft is currently subject to consultation.[92] According to the draft implementing regulation, plastic waste would cease to its waste status provided that i) the input plastic and ii) the recycling operations fulfil certain technical requirements;[93] iii) the output plastic can directly be used in the production of new plastic products without further treatment operations and complies with the requirements on product quality; iv) the producer or the importer issues a statement of conformity, to be transmitted in electronic form for each consignment of recycled plastic; v) the producer implements a quality management system that ensures compliance with the rules above.[94] Once it has

[90] *Ivi*, at p. 2.

[91] Commission, Accelerating Europe's transition to a circular economy: a pilot for boosting the circularity of plastics, COM(2025) 805 final.

[92] Commission, Implementing regulation laying down rules for the application of Directive 2008/98/EC of the European Parliament and of the Council as regards criteria to determine when plastic waste ceases to be waste, Ref. Ares(2025)11557440, 23 December 2025, at https://circulareconomy.europa.eu/platform/sites/default/files/2026-01/reg%20on%20end%20of%20waste%20criteria.pdf (Draft Implementing Regulation).

[93] To be specified in the Annexes: Articles 3(1)(a)-(b), Draft Implementing Regulation, cit.

[94] Articles 3(1)(c)-(e) and 4-5, Draft Implementing Regulation, cit.

achieved the EoW status, the plastics output may be further processed in order to improve its quality.[95]

EoW rules have also an external dimension, as they have to be implemented without prejudice to those on waste shipments, which *inter alia* prohibit exports of plastic waste for disposal operations to non-OECD countries;[96] hence, specific custom classifications are envisaged in order to level the playing field for domestically produced and imported materials.[97]

In parallel with the draft implementing regulation, the Commission is going to set the share of chemical recycling outputs that can count towards recycled content objectives under the Single Use Plastics Directive,[98] as well as harmonised rules for their calculation, verification and reporting. These measures are intended to provide greater legal certainty for chemical recycling investments, especially in the treatment of Polyethylene Terephthalate (PET) bottles.[99]

Another reference point for the CEA proposal may come from the recent amendments to the WFD addressing the textiles sector. These amendments include further clarifications on "waste" vis-à-vis "used" textiles in order to prevent waste from being falsely labelled and exported as reusable.[100] Moreover, the WFD extends the EPR to the sector, requiring Member States to establish their own schemes and set EPR fees to be adjusted based on sustainability criteria considering the products' durability and recyclability.[101]

The envisaged CEA would also interact with the Eco-design for Sustainable Products Regulation, as the traceability of mate-

[95] Articles 3(2), Draft Implementing Regulation, cit.

[96] See Article 39(d) Regulation (EU) 2024/1157, cit.

[97] Recital no. 10 Draft Implementing Regulation, cit.

[98] Directive (EU) 2019/904, cit.

[99] Commission, COM(2025) 805 final, cit., at 3-4.

[100] Article 22d WFD, cit. Therefore, Member States must ensure that separately collected textiles undergo sorting operations before their possible shipment. If not sorted, textile waste is subject to the Waste Shipment Regulation.

[101] Article 22a WFD, cit. Cf. the ones developed under the Eco-design for Sustainable Products Regulation (ESPR).

rials during re-use and recycling requires further implementation of the ESPR digital product passport and "green" public procurement criteria must be coordinated with those already regulated by the ESPR.[102]

Finally, it is worth noting that one of CEA pillars is the revision of the EU regime applicable to electronic and electric equipment to ensure its effective collection and recycling and to generate market demand for relevant SRMs. This intervention is to be welcomed, as EEE represent the fastest growing waste stream at 2% per year – of which less than 40% is recycled – and a crucial source of critical raw materials, indispensable for the digital transition.[103] Therefore, any regulatory innovation in this field must take into account not only the regime laid down by the WEEE Directive, as amended lately in 2024,[104] but also the provisions set out by Chapter III of the Critical Raw Materials Act. In fact, the CRMA obliges Member States to adopt national programmes[105] that *inter alia* improve treatment of waste with relevant critical raw materials recovery potential[106] and to increase the use of secondary critical raw materials.[107] Some safeguards are established to ensure coordination at different regulatory levels, as the national measures shall apply to products and waste that are not subject to any specific regime under EU waste legislation[108] and

[102] See *supra*, section 3.

[103] Commission, Call for evidence for a Circular Economy Act, cit., at 2.

[104] See Directive (EU) 2024/884 of the European Parliament and of the Council of 13 March 2024 amending Directive 2012/19/EU on waste electrical and electronic equipment (WEEE).

[105] Article 26(1) Regulation (EU) 2024/1252 (CRMA), cit. According to Article 26(2) CRMA, these programmes may be integrated into new or existing waste management plans and waste prevention programmes adopted pursuant to Articles 28 and 29 WFD.

[106] Article 26(1)(c) CRMA, cit. As per Article 26(7) CRMA, the Commission recently drafted a project implementing regulation listing the products, components and waste streams considered as having a relevant critical raw materials recovery potential (Doc. D111676/01).

[107] Article 26(1)(d) CRMA, cit. According to Article 26(2) CRMA, these programmes may be integrated into new or existing waste management plans and waste prevention programmes adopted pursuant to Articles 28 and 29 WFD.

[108] Article 26(3), first indent CRMA, cit.

without prejudice to trade and competition law provisions enshrined in the TFEU.[109]

6. *Upscaling the Market for Circular Materials: The Competition Policy Perspective…*

The ability of EU businesses to put the recycled materials into the market is impaired not only by inadequate legislative harmonisation, but also by market failures. The latter phenomenon is the result several factors, including an inadequate internalisation of environmental costs for virgin materials, information constraints and asymmetries for sellers and consumers, as well as market fragmentation that impedes the EU recycling industry from achieving adequate economies of scale. As a result, compared to virgin materials, the price of SRMs is often higher while their quality is often lower.[110]

Hence, in order to make SRMs an economically viable alternative, the EU industry needs to ramp up both public and private investments. In this perspective, antitrust and State aid law offer useful tools that may supplement a future comprehensive EU industrial policy on the matter.

As known, agreements between competing undertakings are in principle prohibited under EU competition law (Article 101(1) TFEU),[111] but may be exempted if certain conditions are met

[109] Article 26(4) CRMA, cit. Compare also to the free movement clause in Article 32 CRMA.

[110] Commission, Call for evidence for a Circular Economy Act, Ares(2025)6250342, at 1.

[111] On the topic, see: B. Sufrin, N. Dunne, A. Jones, *EU Competition Law: Text, Cases & Materials* 8th ed. (Oxford, OUP 2023); G. Meessen, "Article 101 TFEU", in M. Kellerbauer, M. Klamert, J. Tomkin (eds), *The EU Treaties*, cit., p. 998 ff.; L.F. Pace (ed), *Dizionario sistematico del diritto della concorrenza italiano e dell'Unione europea* (Roma, Efesto, 2026); P. Manzini, *Diritto antitrust dell'Unione europea* (Torino, Giappichelli 2023), p. 39 ff.; C. Catricalà, C. Cazzato, F. Fimmanò (eds), *Diritto antitrust*, (Milan, Giuffré 2021); A. Pappalardo, *Il diritto della concorrenza dell'Unione Europea* (Milan, CEDAM 2018).

(Article 101(3) TFEU).[112] In this vein, "sustainability agreements" – i.e. certain restrictions to competition in order to achieve worthwhile non-economic goals (environmental standards, labour conditions, etc.) – have been assessed by competition authorities in order to establish whether they can benefit of the above derogation.[113] Consequently, the Commission adjusted its policy on the matter as part of its 2023 guidelines on horizontal cooperation agreements (Horizontal Guidelines).[114]

According to the Horizontal Guidelines, sustainability agreements that may be exempted from Article 101(1) TFEU prohibition[115] include standardisation agreements, whereby competitors purchase only production inputs that have been manufactured in a sustainable manner.[116] This could be the case for competing

[112] Pursuant Article 101(3) TFEU, four conditions apply, two of which are positive (the agreement ensures technical or economic progress, while allowing consumers a fair share of the resulting benefit) and the other two are negative (the agreement does not impose restrictions which are not indispensable and does not eliminate competition in respect of a substantial part of the products in question). See Commission, Guidelines on the application of Article 81(3) of the Treaty (Article 101(3) Guidelines), OJ C 101, 27.4.2004, p. 97.

[113] See, e.g., Bundeskartellamt, German Retailers Working Group – Sustainability initiative to promote living wages in the banana sector, B2-90/21, 2021; ACM, Sustainability arrangements concerning the "Chicken of Tomorrow", ACM/DM/2014/206028, 2015. On the topic, see: O. Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU*, (Cambridge, CUP 2022); M. Campo Comba, "Non-Economic Objectives Under Article 101 TFEU: Recent Trends", in L. Calzolari, C. Cellerino, F. Croci, J. Alberti (eds), *Public and Private Enforcement of EU Competition Law in the Age of Big Data* (Torino, Giappichelli 2024), p. 55 ff.

[114] Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, C(2023) 4752 final (Horizontal guidelines). Similar initiatives were adopted by national competition authorities, see, e.g., ACM, Policy rule - ACM's oversight of sustainability agreements, ACM/UIT/596876, 4 October 2023.

[115] The CJEU clarified that certain restrictions of competition may fall outside the scope of Article 101(1) if they are inherent in the pursuit of a legitimate objective and proportionate thereto: CJEU, 21 September 1999, *Albany International*, C-67/96; 19 February 2002, *Wouters and Others*, C-309/99; 16 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04.

[116] Commission, Horizontal guidelines, cit., para. 538.

firms deciding to use SRMs over virgin materials in their production process. The same rationale may apply to standardisation agreements that facilitate recycling by harmonising packaging materials or packaging sizes.[117] However, little concrete guidance can be found on specific agreement types,[118] although similar initiatives have been authorised by other national competition authorities, such as the Australian voluntary recycling scheme for soft plastic packaging.[119]

As the upscaling of SRMs requires cooperation across the value chain or across sectors, the rules on vertical restraints come into play as well. While the Commission affirms that vertical agreement that pursue sustainability may be exempted in principle under the Vertical Block Exemption Regulation (EU) 2022/720,[120] its guidelines on the matter address circularity only in passing.[121]

Further clarifications may be provided by the Commission on a case-by-case bases via informal guidance letters, which are expressly intended to address novel antitrust issues arising *inter alia* from industry cooperation for the achievement of EU environmental goals.[122] A guidance letter recently endorsed a sustainability agreement for the joint purchasing and the setting of mini-

[117] *Ibid.*

[118] For instance, recycling features mainly in an example of cooperation among recyclers of mobile phones treated as an illegal buyer cartel: Commission, Horizontal guidelines, cit., para. 310.

[119] Australian Competition and Consumer Commission (ACCC), Voluntary product stewardship scheme for soft plastic packaging, AA1000695, 12 November 2025.

[120] See Article 2(1) of Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, as interpreted by Commission, Guidelines on vertical restraints, 2022/C 248/01, para. 8.

[121] For instance, in selective distribution systems, suppliers could require distributors to provide recycling facilities in their outlets (*ivi*, para. 144).

[122] Commission, The Clean Industrial Deal, COM(2025) 85 final, cit., p. 13. Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C 381, 4.10.2022, p. 9.

mum technical specifications of equipment in the port sector, and its legal considerations may be extended also to other industries.[123]

Moreover, the Commission launched several stakeholder consultations regarding industry cooperation in procurement, recycling and reusage of critical raw materials.[124] Among the solutions discussed, respondents highlighted the role that demand aggregation and joint recycling agreements may have in the achievement of economies of scale, and asked the Commission to specify how long-term efficiencies may be assessed in early-stage agreements (e.g., joint testing of new technologies).[125] As a result of these consultation, ad hoc guidance from the Commission is expected, either via a communication or informal letters.

7. … *and the State Aid Policy One*

As known, a State measure that qualifies as aid (Article 107(1) TFEU) may nevertheless be authorised if certain conditions are met, either de jure (Article 107(2) TFEU) or by virtue of a discretionary assessment by the Commission (Article 107(3) TFEU).[126]

[123] Commission, Case AT.40976 – APM Terminals, C(2025) 4523 final, paras. 35 ff. Another recent guidance letter addresses negotiation of licences to use technologies covered by standard essential patents in the automotive sector: *Id*., Case AT.40979 – Guidance – Automotive LNG, C(2025) 4526 final.

[124] See the Call for input of 1 April 2025 and the Targeted consultation of 1 August 2025: Commission, Critical Raw Materials Procurement and Recycling Project, Summary of the Contributions Received in Response to the Call for Input of 1 April 2025, available at https://competition-policy.ec.europa.eu/document/download/b1d385e5-37b1-4d33-880a-a4461f7954ed_en?filename=2025_CRM_call_for_input_summary_of_submissions.pdf; *Id*., Industry cooperation in procurement, recycling and reusage of critical raw materials, 2025, at https://competition-policy.ec.europa.eu/document/download/11b5c362-bba9-4c9f-8060-22c98392ad54_en?filename=2025_CRM_questionnaire_on_cooperation.pdf. On the topic, see J. Modrall, "Critical Raw Materials and EU Antitrust, Cont'd", in *Kluwer Competition Law Blog*, 11 August 2025.

[125] Commission, Summary of the contributions, cit., at 4-5.

[126] Other derogations are laid down in Articles 108(2), 106(2) and 93 TFEU. On the topic, see *ex multis*, L.F. Pace (ed), *Dizionario sistematico del*

Once focused on limiting Member States' subsidies for the sake of a level playing field within the EU internal market, EU State aid policy is shifting to flexibility as a mean to achieve long-term goals of EU industrial ecosystem.[127] Following this approach, the Clean Industrial Deal emphasises the role of State aid in supporting investment in the circular economy.[128] Therefore, it is worth briefly highlighting the main instruments applicable to the sector.

Investment aid for resource efficiency and for supporting the transition towards a circular economy may be awarded by Member States without prior approval of the Commission, provided that the conditions laid down in the General Block Exemption Regulation (GBER) are met.[129] This exemption from State aid prohibition includes investments in the replacement of primary raw materials or feedstock with SRMs[130] and in making the use of by-products more efficient,[131] as well as measures for a better implementation of the waste hierarchy.[132] Some safeguards apply, as the aid cannot relieve the firms from their liability under EU and national law for generating waste, nor from costs of compliance

diritto della concorrenza italiano e dell'Unione europea 3rd ed., vol. 2, (Roma, Efesto 2026); P. Werner, V. Verouden (eds), *EU State Aid Control: Law and Economics* 2nd ed. (Alphen aan den Rijn, Kluwer 2025); T. Maxian Rusche, "Article 107 TFEU", in M. Kellerbauer *et al.* (eds), *The EU Treaties*, cit., p. 1111 ff.; F. Munari, C. Cellerino, "Art. 107 TFUE", in A. Tizzano (ed), *Trattati dell'Unione Europea* 2nd ed. (Milano, Giuffré 2014), p. 1073 ff.; F. Saecker, F. Montag (eds), *European State Aid Law* (Munich, Beck 2016); C. Schepisi (ed), *La 'modernizzazione' della disciplina sugli aiuti di Stato* (Torino, Giappichelli 2011).

[127] See A. Pezzoli, "La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico", in *Mercato Concorrenza Regole*, 2020, p. 139 ff.; C. Schepisi, "Aiuti di Stato … o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel 'comune interesse europeo'", in *Rivista della Regolazione dei Mercati*, 2021, p. 110 ff., esp. at 131.

[128] Commission, The Clean Industrial Deal, COM(2025) 85 final.

[129] Article 47 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (GBER).

[130] Article 47(2)(a)(ii) GBER, cit.

[131] Article 47(2)(c) GBER, cit.

[132] Article 47(2)(b)-(d) GBER, cit.

with EU environmental standards.[133] In any case, the aid must not incentivise an increased use of resources.[134]

When the measure does not fall under the GBER provisions, it may be nevertheless deemed compatible with the internal market by the Commission under Article 107(3)(c) TFEU, as interpreted by the Guidelines on State aid for climate, environmental protection and energy (CEEAG).[135] According to the CEEAG, the exemption above applies to investment aid in resource efficiency (e.g., for the use of SRMs), and in circular economy (e.g., waste prevention and re-use of materials),[136] provided the investment goes beyond established commercial practices that are generally applied throughout the EU.[137]

Aid to cover operating costs of separate collection and sorting of waste may be granted in relation to specific waste streams, but the Member State must demonstrate that such operations are underdeveloped in the area and introduce safeguards to ensure fair access to the market.[138]

As in the case of GBER, both investment and operating aid above must be granted in compliance with the "polluter pays" principle, so the aid cannot incentivise the generation of waste.[139] Moreover, when assessing the compatibility of the aid with the internal market, the Commission must take into account the characteristics of the relevant market for primary and secondary materials, as well as the potential interactions with applicable EPR schemes.[140]

Further aid flexibility under Article 107(3)(c) TFEU is provided by the recent Clean Industrial Deal State Aid Framework

[133] Article 47(4) and (10) GBER, cit.

[134] Article 47(5) GBER, cit.

[135] Commission, Guidelines on State aid for climate, environmental protection and energy 2022, esp. paras. 217 ff.

[136] CEEAG, cit., para. 220.

[137] *Ivi*, para. 235.

[138] *Ivi*, paras. 221, 237 and 247. For instance, the aid must be granted following a transparent competitive bidding process and for a maximum period of 5 years.

[139] *Ivi*, paras. 238 and 249.

[140] *Ivi*, paras. 251-252.

(CISAF).[141] Notably, the CISAF introduces an exhortative provision encouraging Member States to "ensure that projects and activities supported by State aid under this Communication contribute to the circular economy to the largest extent possible".[142] The CISAF allows also specific measures relating to the sector in question such as, aid to incentivise investment to add manufacturing capacity in the field of SRMs,[143] and to de-risk investments in circular economy projects.[144] The latter measure is expressly referred to by the Communication on pilot actions for the plastics sector.[145]

Being among the key EU priorities, circular economy may be also the objective of Important Projects of Common European Interest (IPCEI) that are exempted from State aid prohibition under Article 107(3)(b) TFEU.[146] IPCEIs are designed to enhance cooperation between like-minded Member States and ensure adequate economies of scale. So far, the Commission decisional practice includes an IPCEI on Hydrogen Technology (Hy2Tech) that has a relevant circularity dimension,[147] while other projects, such as the Circular Advanced Materials for Clean Technologies, are currently discussed within the Commission's Design Support Hub.[148]

[141] Commission, Framework for State Aid measures to support the Clean Industrial Deal (Clean Industrial Deal State Aid Framework), C/2025/3602 (CISAF).

[142] CISAF, cit., para. 24.

[143] *Ivi*, para. 160. SRMs must be used in the production of the materials listed in Annex II CISAF.

[144] *Ivi*, paras. 201 ff. In this case, the aid is awarded via a financial institution in order to minimise distortions.

[145] Commission, COM(2025) 805 final, cit., at 7.

[146] Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest 2021/C 528/02 (IPCEI Guidelines), esp. para. 14.

[147] Commission, Important Project of Common European Interest on Hydrogen Technology (Hy2Tech), C(2022) 5158 final, paras. 309 ff.

[148] See *Id*., Advanced Materials for Industrial Leadership, COM(2024) 98 final, p. 9 ff.; Joint European Forum for Important Projects of Common European Interest (JEF-IPCEI), Minutes of the Seventh Technical-Level Meeting, 4 June 2025, at https://competition-policy.ec.europa.eu/state-aid/ipcei/joint-european-forum-ipcei/past-meetings_en.

The cross-border rationale is also at the basis of the Trans-Regional Circularity Hubs envisaged by the Clean Industrial Deal.[149] These Hubs are intended to facilitate cooperation between Member States and interested undertakings, scaling up of investments to supply the secondary raw materials. According to available information, the Hubs will act upon proposals by groups of Member States or industrial actors, identify strategic projects and enable the pooling of diverse regional streams.[150] This approach has some similarities with the Strategic projects under the CRMA[151] and seems more oriented towards industrial policy rather than mere State aid control.[152]

8. *Conclusive Remarks and Future Perspectives*

The analysis above shows the cross-cutting dimension of EU legislation and policies addressing circular economy, which, in light of the principles of sustainable development and integration, goes well beyond the traditional dimension of EU waste regime. While vertical legislation on specific materials or streams is detailed, more attention should be paid to the internal coherence of the system.

In this vein, the Circular Economy Act needs to be designed as a horizontal regulation, focusing on general principles and clarifying its relationship with the WFD and ESPR. This approach would better reflect the underlying internal market ob-

[149] Commission, COM(2025) 85 final, cit., at 15.

[150] *Ibid.*

[151] Article 6 ff. CRMA, cit. The updated list of Stategic projects under the CRMA is available at https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials/strategic-projects-under-crma/selected-projects_en.

[152] Industrial policy falls under supporting competences of the EU Articles 6(b) and 173 TFEU, which poses a barrier to its further expansion. Nevertheless, as per Article 173(3) TFEU, industrial policy objectives shall be pursued also via the other policies and actions of the EU, thus including State aid control. See, S. Mangiameli, "Article 6", in H.J. Blanke, S. Mangiameli (eds), *Treaty on the Functioning of the European Union* (Cham, Springer 2021), p. 243 ff., esp. at 246.

jective and minimise overlapping with existing legislation. At the moment, however, the Commission seems to follow a different approach by tackling first textiles, steel or plastics and postponing the CEA proposal to a subsequent phase, when a part of these sectoral rules will be already in place. Taking stock of the jurisprudence on the WFD, as well as the scientific evidence on the status of the EU circular market, the EU legislature should ensure an effective harmonisation by reducing the margin of appreciation of national authorities. In any case, simplification and removal of regulatory barriers must be pursued without prejudice to the high level of environmental and health protection that characterises the EU legal order.

To achieve a circular internal market, legislative harmonisation must go in parallel with economic measures to cover the large investment gap. From the latter perspective, both industry cooperation under EU competition law and State aid flexibility may provide useful solutions. Due to limited decisional practice and inadequate *ex post* evaluation, however, the effectiveness of the "greening" of the discipline is yet to be fully assessed.[153]

Moreover, these measures need to become part of a more comprehensive industrial policy framework, where priorities among EU objectives such as sustainability and competitiveness may be found.[154] Circularity carries a strong potential in terms of industrial development and strategic autonomy, as shown by the case of critical SRMs; however, it is necessary to take a transparent approach to both the synergies and the differences in order to avoid a risk of a "regulatory greenwashing".

[153] From a State aid law perspective, see: C. Cellerino, in this volume. See also M. Barbano, "La valutazione di compatibilità degli aiuti di Stato alla luce del criterio di sostenibilità ambientale 'Do No Significant Harm'" in *Quaderni AISDUE*, 2025/2, p. 2 ff., at https://www.aisdue.eu/wp-content/uploads/2025/08/Post-Mario-Barbano.pdf.; Id., "Adding the Environmental Perspective to State Aid Control: The Role of Environmental NGOs in Light of the New Internal Review Mechanism", in *European State Aid Law*, XXIV (2025), p. 405 ff.

[154] On the topic, see, recently, F. Munari, "Riconciliare competitività industriale e cd. twin transition nell'Unione europea", in *Rivista della regolazione dei mercati*, 2025/1, p. 2 ff.; D. Gallo, "I rapporti tra aiuti di Stato, tutela dell'ambiente e politica industriale", in *Eurojus*, 2025/4, esp. 2 ff.

ENVIRONMENTAL SOLIDARITY AND EU STATE AID LAW AND PRACTICE

CHIARA CELLERINO*

SUMMARY: 1. Introduction. – 2. Elements of Environmental Solidarity in EU State Aid Primary and Secondary Law. – 3. The So-Called "Temporary Frameworks" and the Clean Industrial Deal State Aid Framework. – 4. The Evaluation Process of National Measures: The Notion of "Undertaking". – 5. The "Common Interest" and the Role of the DNSH Principle – 6. The DNSH Principle and Customary International Law. – 7. Services of General Economic Interest (SGEI) and Environmental Solidarity: The Case of Nature Restoration. – 8. Conclusions.

1. *Introduction*

There is little doubt that the so called "green transition" requires substantial financial resources. Public funding directed towards environmental sustainability objectives constitutes, in itself, an act of solidarity. More specifically, it may be understood as an expression of so-called "vertical solidarity", exercised by States and public authorities *vis-à-vis* their citizens and, more broadly, individuals. At the same time, depending on the design and objectives of public funding schemes, forms of "horizontal solidarity" may also emerge.[1] This occurs where public resources are channelled towards sectors of the green transition that, due to structural market failures, would otherwise fail to attract sufficient private investment. In such cases, public funding induces individuals, including undertakings, to engage in activities that benefit other individuals and society at large in terms of environmental sustainability.

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[1] For an analysis of the solidarity principle in EU law, based on the above-mentioned categories, see G. MORGESE, "Il 'faticoso' percorso della solidarietà nell'Unione europea", in *I Post di AISDUE* (III) 2021, *aisdue.eu*, also for further references.

Based on these premises, it is worth examining the extent to which the rules governing public funding within the EU legal system allow for, or even actively promote, the allocation of resources in support of collective sustainability objectives and may therefore be regarded as expression of environmental solidarity. From this perspective, the contribution seeks to identify the "environmental solidarity elements" that can be derived from the EU State aid legal framework, as laid down in the relevant provisions of primary and secondary law, as well as in the associated enforcement practice of the European Commission. After providing an overview of the existing normative framework on State aid under EU primary and secondary law (sections 2 and 3), the paper turns to an analysis of the legal concepts and instruments that enable the Commission to weigh environmental interests in the assessment of the compatibility of aid measures (sections 4, 5, 6). It then examines the concept of services of general economic interest (SGEI) as an expression of the principle of solidarity within the EU legal order, and explores its potential application to activities that are particularly beneficial to the environment, such as nature conservation and restoration (section 7). In this context, the paper draws some concluding remarks on the need to make full and coherent use of the legal tools available under EU law to enable the effective allocation of public funding towards the pursuit of fundamental collective sustainability objectives (section 8).

2. *Elements of Environmental Solidarity in EU State Aid Primary and Secondary Law*

Although State aid law has traditionally been perceived as a branch of regulation closely linked to competition law – primarily concerned with protecting the competitive process within the internal market from distortions arising from State intervention – there is little doubt that, at least since the Commission's 2012 Communication on the modernisation of State aid policy,[2] and

[2] Communication from the Commission, State Aid Modernisation (SAM), 8.5.2012 COM(2012) 209 final.

arguably even earlier, State aid policy has increasingly been oriented towards the pursuit of broader objectives of common European interest.[3] In this evolution, State aid control has progressively focused on EU policy priorities, resulting, *inter alia*, in a tool for coordinating Member States' industrial policies.[4] This development has been made possible by the existence, at the level of primary law, of a number of exceptions to the general prohibition of State aid laid down in Article 107(1) TFEU. In particular, the derogations provided for in Article 107(2) and (3) TFEU create significant normative space for Member States to deploy public spending policies in support of objectives of general interest, including environmental ones. The recognition, at Treaty level, of the legitimacy of public financial intervention aimed at pursuing such broadly defined general interests has in turn given rise to the notion of so-called "good aid", that is, aid measures deemed compatible with the internal market precisely because of the public interest objectives they serve.[5] In particu-

[3] See D. Gallo, "La relazione tra servizi pubblici, tutela della concorrenza e solidarietà nell'ordinamento dell'Unione europea", in *Unione europea e diritti*, 1/2025; D. Ferri, J. Piernas Lopez, "The Social Dimension of EU State Aid Law and Policy"*,* in *Cambridge Yearbook of European Legal Studies*, XXI (2019), p. 75 ff.; F. Saeker, F. Montag (eds.), *European State Aid Law* (Munich, Nomos 2016); F. Munari, C. Cellerino, "Art. 107 TFEU", in A. Tizzano (a cura di) *Trattati dell'Unione europea* (Milano, Giuffrè 2014), p. 1073 ff.; V. Di Bucci, "The Modernisation of State Aid Control and Its Objectives: Clarity, Relevance, Effectiveness", in *Italian Antitrust Review,* I (2014/3), pp. 7-23; C. Schepisi, *La modernizzazione della disciplina sugli aiuti di Stato* (Torino, Giappichelli 2011).

[4] Recently, F. Munari*,* "Riconciliare competitività industriale e cd. twin transition nell'Unione Europea", in *Rivista della Regolazione dei Mercati*, 2025/1, p. 1, p. 7 ff.; D. Gallo, "I rapporti tra aiuti di Stato, tutela dell'ambiente e politica industriale", in *Eurojus*, 29/12/2025; G. Bruzzone, "I rapporti tra politiche di concorrenza e politica industriale nella strategia europea per la crescita", in F. Rossi dal Pozzo (ed.), *Politiche di concorrenza e politica industriale: sinergia o conflitto*?, in *Eurojus*, fasc. spec., 2023, p. 16 ff.; E. Bruti Liberati, "La strategia industriale europea tra intervento pubblico finalistico e dinamiche di mercato", in *Rivista della regolazione dei mercati*, 2023/2, p. 252 ff.

[5] F. Munari, C. Cellerino, "Art. 107 TFEU", cit.; V. Di Bucci, "The Modernisation of State Aid Control and Its Objectives: Clarity, Relevance, Effectiveness", cit.

lar, under paragraphs 2 of art. 107 TFUE, some types of aid are considered always compatible with the internal market. These include social aid granted to consumers, provided it is not discriminatory on the origin of the goods, aid to compensate damage from natural disasters or exceptional occurrences, aid to the economy of certain areas of Germany affected by the former division of the country. Under paragraph 3, other types of aids can be declared compatible with the internal market, after due assessment by the European Commission. These include aid to promote regional development in disadvantaged areas (art. 107.3, lett. a) TFEU), aid to support important projects of common European interest (hereinafter, "IPCEI") or to remedy serious economic disturbances in a Member State (art. 107.3, lett. b) TFEU), aid to develop certain economic activities "*where such aid does not adversely affect trading conditions to an extent contrary to the common interest*" (art. 107.3, lett. c) TFEU), aid to promote culture and heritage conservation (art. 107.3, lett. d)), other categories of aid that may be specified by the Council (art. 107.3, lett. e) TFEU).

Pursuant to Article 108(3) TFEU, Member States must notify any new measure that may fall under the aid prohibition and cannot proceed without the Commission's prior authorization declaring whether the measure in question falls under the derogations above ("standstill clause"). Only certain categories of aid may be exempted from the notification requirement, provided that they fulfil the conditions laid down by Commission's regulations adopted under Article 108(4) TFEU.

With specific regard to environmental objectives, state aid schemes are generally justified under the exceptions provided for in Article 107(3)(c) TFEU and, more recently, under Article 107(3)(b) TFEU. Over time, these Treaty-based derogations have been progressively clarified and operationalised through secondary legislation and soft law instruments, with the aim of exempting certain categories of aid from notification requirements or, more broadly, facilitating Member States' task in designing aid measures that pursue legitimate objectives, while at the same time streamlining the Commission's compatibility assessment. In this respect, particular reference should be made to

the 2022 Guidelines on State aid for climate, environmental protection and energy (hereinafter also referred to as the "Environmental Guidelines"),[6] the Guidelines for State aid in the agricultural and forestry sectors and in rural areas (hereinafter also the "Agricultural and Forestry Guidelines"),[7] the 2021 Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (hereinafter, "IPCEI Guidelines"),[8] as well as the General Block Exemption regulation[9] and the Agricultural Block exemption regulation.[10] The legal framework arising from the above mentioned instruments must be coordinated also with

[6] Communication from the Commission, Guidelines on State aid for climate, environmental protection and energy, in *OJ* C80, 18.2.2022, pp. 1–89. On these guidelines, see R. Baratta, "Aiuti di Stato e fragilità ambientali: i nuovi orientamenti della Commissione", in *Diritto e Società*, 2022/3, p. 517 ff.; A Metaxas, "The New State Aid Guidelines on Climate, Environmental Protection and Energy: What Changes Do They Bring?", in L. Hancher, I. Herrera Anchustegui (eds.), *Research Handbook on EU Competition Law and the Energy Transition* (Cheltenham, Edward Elgar 2024); T.G. Iliopoulos, "State Aid Assessment for Renewable Energy Support Schemes: Deconstructing the Guidelines on State aid for Climate, Environmental Protection and Energy, in View of the Recent Major Crises", in *Review of European Administrative Law*, XVI (2024), p. 45 ff. For an overview on the interplay between competition law and environmental sustainability, see C. Muraca, "Tutela della concorrenza e sostenibilità ambientale: un dialogo difficile ma necessario", in *Rivista della regolazione dei mercati*, 2021/1, p. 70 ff.

[7] Communication from the Commission, Guidelines for State aid in the agricultural and forestry sectors and in rural areas, 21.12.2022, pp. 1-90.

[8] Communication from the Commission Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, 30.12.2021. An example of IPCEI with strong sustainability implications, are the Hydrogen IPCEIs (approved in 2022-2024), large, multi-country projects involving companies and Member States, covering the entire hydrogen value chain, from production to end use. See https://ipcei.observatory.clean-hydrogen.europa.eu/.

[9] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, *OJ* L 187, 26.6.2014, pp. 1-78.

[10] Commission Regulation (EU) 2022/2472 of 14 December 2022 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, *OJ* L 327, 21.12.2022, pp. 1-81

the Common Agricultural Policy framework, which allows to mobilize investments both at EU and at Member States level and has significant implications for environmental objectives.[11]

It should be noted that the existing legal framework adopts a broad understanding of the environment, encompassing both climate change and biodiversity protection. From this perspective, for example, the Environmental Guidelines provide a comprehensive framework for assessing the compatibility of aid measures and for determining which forms of "green aid" may be authorised. They clarify, *inter alia*, the eligible costs and the substantive conditions that aid measures must satisfy. Aid may not be granted to enable compliance with existing EU environmental legislation, and national measures must be consistent with EU environmental policy objectives. It is also important to emphasise that the Guidelines are inspired by the concept of technological neutrality. In principle, all technologies may qualify for aid, if they deliver tangible environmental benefits, although higher aid intensities may be permitted for certain measures delivering greater environmental benefits, based on different factors. Furthermore, certain technologies or activities are excluded from aid or constrained (e.g. fossil fuels, or measures creating carbon lock-in effects). This shows that neutrality operates, in any case, strictly within environmental and climate policy boundaries and the Guidelines are clearly embedded in the Green Deal strategy, actively steering investment towards decarbonisation and sustainability objectives. On this basis, Member States may grant aid for a wide range of activities, including re-

[11] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013; Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013 and connected legal acts, available at https://eur-lex.europa.eu/IT/legal-content/summary/rules-and-financial-support-for-cap-strategic-plans.html?fromSummary=03.

newable energy production, energy efficiency measures, hydrogen and low-carbon technologies, carbon capture, utilisation and storage, clean mobility and charging infrastructure, waste recycling and circular economy activities, as well as biodiversity protection.

3. *The So-Called "Temporary Frameworks" and the Clean Industrial Deal State Aid Framework*

This vocation of State aid rules to steer investments towards EU policy priorities has been further strengthened in response to a series of crises, initially the COVID-19 pandemic and subsequently the energy crisis triggered by the Russian Federation's invasion of Ukraine.[12] Indeed, both the 2020 COVID Temporary Framework[13] and, more directly, the 2023 Temporary Crisis and Transition Framework[14] adopted by the Commission were strongly influenced – albeit to different degrees – by the European Green Deal and its decarbonisation objectives. In June 2025, the emergency-driven approach underpinning these temporary frameworks gave way to a more stable regulatory strategy, aimed at providing undertakings and Member States with greater legal certainty for medium- and long-term investment planning. In this context, the European Commission adopted a new State aid framework accompanying the Clean Industrial Deal, intended to replace the earlier temporary regimes. This new Clean Industrial

[12] C. Schepisi, "Aiuti di Stato … o aiuti tra Stati? Dal Temporary Framework al Recovery Plan nel 'comune interesse europeo'", in *Rivista della Regolazione dei Mercati*, 2021/1, p. 110; F. Rossi dal Pozzo, "Aiuti di Stato e stato di emergenza tra solidarietà e condizionalità", in *Eurojus*, 2021/4, p. 59 ff.

[13] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, in *OJ* C 91I, 20.3.2020, pp. 1-99

[14] Communication from the Commission, Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, in OJ C, 21.11.2023, p. 1188 ff.

Deal State Aid Framework (CISAF) will remain in force until 31 December 2030.[15]

As is well known, the underlying idea of the Clean Industrial Deal is to decouple economic development from the excessive exploitation of natural resources, by turning decarbonisation into a driver of growth for European industry.[16] This strategy also responds to rising energy costs and increasingly intense global competition. The overarching objective of the various actions envisaged under the Deal is to strengthen production capacity within the EU, with a particular focus on energy-intensive industries and the clean-tech sector. The former category includes, *inter alia*, the steel, metals and chemicals industries, which face an urgent need to decarbonise, transition to clean energy sources, and address high energy costs, unfair global competition, and regulatory complexity. The latter sector lies at the core of the EU's future competitiveness and is essential for industrial transformation, circularity and long-term decarbonisation.

Against this background, the Clean Industrial Deal State Aid Framework (CISAF) sets out permissive conditions for State aid measures aimed at accelerating the deployment of clean energy, providing targeted support for electricity costs borne by energy-intensive users, facilitating industrial decarbonisation processes, ensuring sufficient manufacturing capacity in clean technologies, and de-risking private investments in strategic sectors. At the same time, CISAF seeks to preserve a level playing field within the internal market by channelling public support towards activities that are consistent with the Union's climate and environmental objectives and by limiting distortive effects on competition.

While it is true that the energy crisis has led to a partial reor-

[15] Communication from the Commission, Framework for State Aid measures to support the Clean Industrial Deal (Clean Industrial Deal State Aid Framework), C/2025/7600, OJ C, C/2025/3602, 4.7.2025

[16] F. Costamagna, "Il rilancio della competitività economica europea: ruolo e strumenti dell'Unione europea", in *Rivista della regolazione dei mercati*, 2025/1, p. 14 ff.; D. Bevilacqua, "Il Clean Industrial Deal e la (promessa) programmazione della sostenibilità", in *Rivista giuridica dell'Ambiente online*, Aprile 2025.

dering of priorities – particularly where aid has been granted to support parts of the fossil energy sector – environmental objectives remain, in general, well integrated into the State aid legal framework outlined above. These objectives operate in two distinct but complementary ways. On the one hand, they play a positive steering role, by enabling public funding to be directed towards Green Deal objectives such as decarbonisation, energy efficiency, clean technologies and environmental protection. On the other hand, they perform a negative or constraining function, by preventing national aid measures from generating carbon lock-in effects that would hinder the long-term sustainability of European industry.[17]

Thus, EU State aid legal framework incorporates elements of environmental solidarity, based on the Treaty-based exceptions to the general prohibition of State aid, as further developed through subsequent policy choices at EU level, in line with the integration principle enshrined in art. 11 TFEU. The following section examines the extent to which such elements are reflected in the European Commission's assessment of national aid measures.

4. *The Evaluation Process of National Measures: The Notion of "Undertaking"*

Elements of environmental solidarity may be factored in by the Commission at several stages of the State aid assessment procedure. This is the case both in determining whether a measure constitutes State aid within the meaning of Article 107(1) TFEU and in assessing the effects of the measure on the internal market. Regarding the very notion of State aid, it is well established that

[17] S. Lünenbürger, C. Holtmann, J. delarue, "Implementation of the Green Deal: Integrating Environmental Protection Requirements into the Design and Assessment of State Aid", in *European State Aid Law Quarterly*, XIX (2020), p. 418 ff., spec. p. 425 ff.; M. Barbano, "La valutazione della compatibilità degli aiuti di stato alla luce del criterio di sostenibilità ambientale 'do not significant harm'", in *Quaderni AISDUE*, Fasc. Spec., 2025.

the EU State aid rules apply only to "undertakings", broadly defined as any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed. Public bodies may be regarded as undertakings where they offer goods or services on a market. From this perspective, a key issue is whether the beneficiaries of public funding aimed at supporting or incentivising environmentally beneficial activities can be qualified as undertakings. While there is little doubt that this is the case where aid is granted to industrial operators – for example, to support the decarbonisation of production or improvements in energy efficiency – the application of the concept becomes more complex in other contexts. This is particularly true where the beneficiary carries out activities that are beneficial to the environment but do not necessarily involve market participation, such as certain forms of nature conservation. In such cases, the qualification of the activity carried out by the beneficiary as economic or non-economic becomes a crucial factor in determining the applicability of State aid rules.

The Commission and the Court have long acknowledged that nature conservation activities, accessible to the general public free of charge, can be considered solely of a social and cultural nature and do not amount to economic activity.[18] This has led the Commission, in some cases, to exclude the existence of a state aid for measures aimed to support nature conservation projects. For example, in two decisions of 2017, the Commission acknowledged that a German measure relating to 100% support funding for basic protection and management activities in rural areas concerning nature conservation and landscape maintenance**,** carried out by non-profit private law legal entities or public bodies responsible for the management of sites, were not to be considered as state aid, since no economic activity was taking place.[19] Tellingly, the nominal fee, exceptionally required to access the areas from the public, and covering only a fraction of the true

[18] CJEU, 12 September 2013, Case T-347/09, *Commission v. Germany.*

[19] *Commission/Germany* SA.456445 and SA.46073. See, on these cases, P. Nicolaides, "Public Support for Nature Conservation is not State Aid", 25 April 2017, available at www.lexxion.eu.

costs of management and conservation, was not considered a remuneration for the services provided and, therefore, did not affect the qualification of the activity as non-economic.

However, in other cases involving similar conservation projects, beneficiaries were considered undertakings, in view of economic activities carried out in connection with land conservation, such as wood sale, fishing and hunting charges.[20] As it will be explained in more details below, other types of reasonings may apply in these cases, and the approach taken by the Commission in the assessment of the nature of the activities carried out by the beneficiary can determine very relevant consequences on the assessment of subsidy and on its compatibility with the Treaties (below section 6).

5. *The "Common Interest" and the Role of the DNSH Principle*

Once the beneficiary is classified as an undertaking, the compatibility assessment under Article 107(3)(c) TFEU requires the Commission to verify, first, whether the aid facilitates the development of certain economic activities (the positive condition) and, second, whether it affects trading conditions to an extent contrary to the common interest (the negative condition). Considerations of environmental solidarity may influence this assessment, most notably in relation to the identification and evaluation of the elements that may affect the "common interest".

As regards the positive condition, the Commission must, in the first place, identify the economic activity facilitated by the measure, assess its positive effects for society at large, and determine its relevance considering specific EU policy objectives. A measure is regarded as facilitating an economic activity only if it produces an incentive effect. Such an effect is present where the

[20] See, *infra*, footnote 44. Furthermore, in a case relating to land swaps for nature conservation, the Court held that a person that has acquired public land in the context of a land swap transaction can qualify as undertaking even if the economic activity is not carried out on that land, see CJEU, 19 October 2023, case C-325/22, *TS*.

aid induces the beneficiary to change its behaviour by engaging in additional economic activity, or in economic activity that is more environmentally sustainable, which it would not undertake in the absence of the aid or would pursue only in a more limited or different form. Consequently, aid must not merely subsidise costs that the beneficiary would have incurred in any event, nor may it compensate for the normal commercial risks inherent in an economic activity.[21] Environmental considerations can influence, for example, the Commission's assessment on the existence of an objective of common interest and its relevance for EU objectives, including Projects of Common European Interest: aid supporting activities that significantly harm the environment may fail to meet a legitimate EU policy objective.

Turning to the negative condition, the Commission examines whether the aid is justified in light of the need for State intervention, as well as its appropriateness, proportionality, transparency, and its ability to avoid undue distortions of competition and trade. In particular, the proposed measure must be targeted at situations in which it can bring about a material development that the market alone is unable to deliver, for example by addressing market failures affecting the activities supported (the necessity of the aid). Aid is considered proportionate where the amount granted to each beneficiary is limited to the minimum necessary to enable the implementation of the aided project or activity.[22] As regards environmental considerations, if a measure supports environmentally harmful activities, the Commission may question whether State aid is an appropriate instrument.

As a final step, the Commission is required to balance the identified negative effects on competition and trade against the positive effects of the aid on the supported economic activities. The contribution of the measure to environmental protection, energy policy objectives, and the transition towards environmentally sustainable economic activities is relevant during the balancing exercise. In particular, the Commission must consider

[21] Guidelines on State aid for climate, environmental protection and energy, cit.

[22] *Ivi*, para. 34

whether the aid contributes to the achievement of the Union's legally binding targets under the European Climate Law, as well as the EU's 2030 energy and climate objectives. Clearly, environmental harm or carbon lock-in effects fail to counter-balance negative effect on competition and trade. In this balancing exercise, environmental considerations operate as expression of environmental solidarity, allowing broader collective sustainability interests to be weighed against competitive concerns and preventing carbon lock-in effects of aid measures.[23]

In this context, attention should be drawn to an emerging principle in state aid law and practice, namely the "do no significant harm" principle ("DNSH"). This principle did not originate in State aid law. It was first stated by the Commission in the *European Green Deal*, as a commitment not to harm the environment within the actions envisaged in the Deal, to ensure a coherence between the green transition and other policies of the Union. The principle was subsequently enshrined in binding EU secondary legislation through Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment (the so-called "Taxonomy Regulation"). Under art. 3 of the Taxonomy regulation, an economic activity is environmentally sustainable, *inter alia*, where it contributes substantially to one or more of the environmental objectives set out in Article 9 and does not significantly harm any of them.[24] Article 17 of that Regulation provides a definition of "significant harm" for each of the mentioned objectives, thereby establishing the DNSH principle as a legal criterion for determining whether an economic activity may be considered environmentally harmful. The DNSH principle was then further applied in the context of EU financial instruments through Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility (RRF), under which compliance

[23] Guidelines on State aid for climate, environmental protection and energy, cit.

[24] According to art. 9 of the Taxonomy Regulation, environmental objectives are listed as follows: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems.

with DNSH became a mandatory condition for measures included in national Recovery and Resilience Plans. Interestingly, aid schemes identical to measures approved by the Council within such Plans, are assumed to be compatible with the principle, since compliance has been verified in that context.[25]

As the taxonomy regulation can in principle apply also to public investments, the DNSH was principle progressively integrated into State aid law and practice. The principle is referred to in the Covid Temporary Framework and extended to all environmental aid by the CEAG. Furthermore, while DNSH is not always explicitly named, it is functionally embedded in several ways within the state aid legal framework. Reference can be made to environmental eligibility conditions in the CEEAG, sustainability exclusions in the General Block Exemption Regulation, and all the requirements to avoid lock-in effects or significant environmental harm.

Looking at the practice, DNSH seems to increasingly influence how the Commission applies classic State aid criteria, especially when identifying the existence of an objective of common interest (including Projects of Common European Interest), assessing the appropriateness and necessity of aid, balancing positive and negative effects of the measure. In this setting, DNSH functions as an *ex ante* safeguard ensuring the environmental coherence of public spending at both EU and national levels. The Commission can also refer to the principle within the *ex post* assessment of the aid measure, when provided.[26]

6. *The DNSH Principle and Customary International Law*

As regards the legal status of the DNSH principle within the EU legal order, to date, it has been expressly enshrined only in instruments of secondary law. Thus, its qualification as a general principle of law common to the constitutional traditions of the

[25] Guidelines on State aid for climate, environamental protection and energy, footnote 50.

[26] M. Barbano, "La valutazione di compatibilità degli aiuti di Stato", *cit*.

Member States remains uncertain.[27] Nevertheless, the duty to prevent significant harm to the environment is recognised as a principle of customary international law and bears a clear connection with the concept of inter-generational solidarity, to the extent that harm made today to the environment affects generations to come. This understanding has recently been re-affirmed by the International Court of Justice in its Advisory Opinion of 23 July 2025 on the obligations of States in respect of climate change. In that Opinion, the Court clarified that the scope of the duty is not limited to cases of direct transboundary environmental harm; it also extends to the protection of the climate system and other components of the environment as such, which may result from the cumulative actions of States and private actors operating under their jurisdiction and control. Although such activities may not appear environmentally significant when assessed in isolation, their interaction with other actions can generate serious environmental consequences.[28] Accordingly, the ICJ held that the duty to prevent significant harm to the climate system and other parts of the environment arises as a consequence of the general risk of significant harm to which States contribute, in different ways, through activities carried out within their jurisdiction or control.[29]

From this perspective, the DNSH principle, as applied at EU level, may be understood as a specific expression of the corresponding principle of customary international law. If this construction is accepted, further implications may follow as regards the principle's normative status within the hierarchy of sources of EU law, potentially strengthening its interpretative and systemic role.[30] This reading reinforces the relevance of the DNSH principle in EU State aid practice, where it increasingly operates as a benchmark for assessing the environmental sustainability of public

[27] *Ibidem*.

[28] International Court of Justice, 23 July 2025, *Advisory Opinion on the obligations of States in respect of climate change*, par. 134. See, on the point, the contribution of M. Gestri, in this volume.

[29] International Court of Justice, *Advisory Opinion*, cit., par. 276-279.

[30] On the status of general international law within the EU legal order, see CJEU, 16 June 1998, Case C-162/96, *Racke*.

support measures. No doubts the principle is also a clear expression of inter-generational solidarity within the EU legal order.[31]

7. *Services of General Economic Interest (SGEI) and Environmental Solidarity: The Case of Nature Restoration*

The notion of SGEI is an additional route to incorporate environmental solidarity considerations, within the EU law discipline of public spending. While article 106(1) TFEU requires Member States to ensure that public undertakings and those enjoying special or exclusive rights comply with the EU competition rules, including State aid rules, article 106(2) TFEU introduces a derogation allowing undertakings entrusted with the operation of SGEI to be exempt from the application of competition and State aid rules, insofar as those rules would obstruct the performance of their public service tasks, provided that trade is not affected to an extent contrary to the "*interests of the Union*". Article 106(2) TFEU also provides the legal basis allowing for compensation of public service obligations, that might otherwise qualify as State aid, underpinning other doctrines and instruments such as the *Altmark* criteria,[32] the SGEI Decision,[33] and the SGEI Framework.[34] Environmental services have benefited of this derogation.

[31] On the topic, see, recently, K. Sulyok, "Future Proofing EU Law – Does the European Union Have a Legal Obligation to Protect Future Generations?", in *Review of European, Comparative & International Environmental Law*, XXXIV (2024), p. 420 ff.

[32] CJEU, 24 July 2003, Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*.

[33] Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, in *OJ* L 7, 11.1.2012, pp. 3-10.

[34] Communication from the Commission, European Union framework for State aid in the form of public service compensation, in *OJ* C 8 dell'11.1.2012, pp. 15-22. See also Commission Regulation (EU) 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, in *OJ* L 2832, 15.12.2023.

The *Diego Cali* case is a reference in point.[35] The Court of Justice held that the monitoring and prevention of oil pollution in the port of Genoa constituted a service of general economic interest. The undertaking enjoyed exclusive rights and charged compulsory fees to port users. The grant of exclusive rights could be justified under Article 106(2) TFEU since the task involved continuous surveillance, specialised expertise, and public-interest environmental objectives that would be difficult to ensure under normal market conditions. This judgment has since served as a basis for applying Article 106(2) TFEU to other environmental services, such as waste management.[36]

Having clarified the above, one may question whether nature conservation activities, when entrusted to an undertaking and carried out as an economic service or in connection with an economic activity (see above, section 4), may fall under the scope of Article 106(2) TFEU or connected doctrines.[37] This would imply the qualification of such activities as a SGEI or public services. To be clear, nature restoration and conservation projects, where entrusted to undertakings, are allowed in different ways under the exceptions provided for by the above-mentioned state aid legal framework, and the Commission usually prefers to assess their compatibility under art. 107.3 TFEU and related Guidelines. However, the idea of considering such activities as SGEI under art. 106 TFEU would entail a more radical approach, capable to push a change of perspective in the allocation of public fundings, valorising in particular the wide-spread economic as well as environmental benefits to society deriving from this type

[35] CJEU, Case C-343/95, *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA*.

[36] CJEU, Case C-209/98, *Sydhavnens Sten & Grus A/S v Københavns Kommune*; Commission Decision N 330/2004 – *Ireland – Waste Management Services*.

[37] On the topic, see J. W. VAN DE GRONDEN, "State Aid, Sustainable Management of Natural Sites and Services of General Economic Interest", in *Market and Competition Law Review*, VIII (2024), p. 17 ff.; J. SMILA, E PRIMMER, "Legal Analysis of the Relationship between European State Aid and Nature Conservation Law, and Economic Instruments for Biodiversity Protection" (Policymix Report issue 7/2012).

of activities, in line with environmental solidarity objectives and with more recent trends of EU regulation in this field.

In this regard, nature conservation is not new as an objective of EU law and policy. Since the very beginning of EU environmental policy, EU adopted measures aimed to protect nature such as the Habitats directive,[38] and the Birds protection directive.[39] Several other pieces of EU legislation followed, with a view to impose to Member States obligations to protect nature and reduce pollution. Their effectiveness, however, has not been fully satisfactory for several reasons, which go beyond the scope of the present work. In any case, today, the need to intervene is somehow even more compelling, if one considers that, according to experts, and despite the prolific legislation in place, Europe's nature is in alarming decline, with more than 80% of habitats in poor condition.[40] This also justifies a shift form a language based on nature "conservation" to one based on nature "restoration", as enshrined in the recently adopted regulation (EU) 2024/1991 of 24 June 2024 on nature restoration (hereinafter, "Nature restoration regulation").[41] This is the main piece of legislation aiming to address these preoccupations, by setting particularly ambi-

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

[39] Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds.

[40] See European Commission website: https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-regulation_en

[41] According to regulation (EU) 2024/1991 of 24 June 2024 on nature restoration, art. 3.3, "'restoration' means the process of actively or passively assisting the recovery of an ecosystem in order to improve its structure and functions, with the aim of conserving or enhancing biodiversity and ecosystem resilience, through improving an area of a habitat type to good condition, re-establishing favourable reference area, and improving a habitat of a species to sufficient quality and quantity." The Nature restoration regulation implements the EU biodiversity strategy 2030, as a fundamental part of the European Green deal. Action in the field of biodiversity is also imposed by EU and the member States international obligations, as deriving from the Convention on Biological Diversity, to which both EU and the MS are parties, and the Global Biodiversity Framework, adopted at the fifteenth meeting of the Conference of the Parties to the Convention on Biological Diversity on 7-19 December 2022, setting out action-oriented global targets for urgent action over the decade to 2030.

tious targets and timeframes on member States, in terms of restoration measure addressed to ecosystems both already protected by EU law (such as Natura 2000 sites) and not (e.g., urban ecosystems).[42] It goes without saying, huge investments are required to support actions in the interested sites.

As compared to previous legislation, the Nature restoration regulation focuses on the economic and societal benefits of healthy ecosystems, which deliver a range of so called "ecosystem services" that contribute significantly to productivity in certain sectors. In particular, its recital 14 underscores that

> biodiverse ecosystems such as wetland, freshwater, forest as well as agricultural, sparsely vegetated, marine, coastal and urban ecosystems deliver, if in good condition, a range of essential ecosystem services, and the benefits of restoring degraded ecosystems to good condition in all land and sea areas far outweigh the costs of restoration.

The underling idea is that restoring wetlands, rivers, forests, grasslands, marine ecosystems, and the species they host will help not only to increase biodiversity as a value *per se*, limit global warming and therefore mitigate climate change, but also secure the mentioned eco-system services. These are services that nature does for free, like cleaning our water and air, pollinating crops, protecting us from floods and spreading diseases, increase resilience of our agricultural system and thus food security. They

[42] In particular, it sets a framework within which Member States shall put in place effective and area-based restoration measures with the aim to jointly restore, as a Union target, at least 20 % of land areas and at least 20 % of sea areas by 2030, and all ecosystems in need of restoration by 2050. The Regulation establishes restoration obligations per each ecosystem type, to be further specified by Member States within their National Restoration Plans (NRPs). NRP must be submitted to the European Commission by September 1, 2026. E.g., restoration measures for terrestrial ecosystems must cover an area of habitats listed in Annex I that is not in good condition equal to at least 30% by 2030 (then 60% by 2040 and 90% by 2050). Restoration of Natura 2000 sites may be given priority until 2030. Once such habitats have reached a good status, Member States put in place measures to ensure that areas "do not deteriorate significantly" (so-called non-deterioration obligation established in art. 4.11, second indent of the Nature restoration regulation). A similar approach applies to maritime ecosystems.

are clearly measurable in economic terms, by referring to the cost of replacing them through man-made activities (some of them are probably not completely replaceable). As a matter of facts, they contribute significantly to our GDP in sectors such as tourism, agri-food, wood production, allowing also savings in the public spending in sectors such as health system and natural disaster prevention. This is why it is generally stated that every 1 euro invested into nature restoration adds €4 to €38 in benefits.[43]

In light of the above, public compensation for such activities could be allowed not only under art 107 TFEU exceptions, but also under art. 106 TFEU or connected doctrines. Indeed, Member States have a wide margin of discretion regarding the nature of services that can be classified as SGEIs. The Commission has already accepted in some cases that conservation projects qualify as SGEIs. This approach has not been challenged before the Court of Justice, although there is no clear judgment in which Article 106(2) TFEU has been expressly applied to a "pure" nature conservation activity. For example, in a case regarding two German measures entailing respectively the funding of large scale conservation projects and the gratuitous transfer of federally-owned land in natural heritage areas, accompanied by nature conservation obligations to beneficiaries selected through open procedure based on technical qualifications, the beneficiaries were considered undertakings, in view of the economic activities carried out in connection with the land, such as wood sale, fishing and hunting charges. Yet, the Commission held that

> nature restoration tasks entrusted by Germany to nature conservation entities pursue objectives which are of interest for society as a whole, namely the preservation of intact habitats… for future generations. These tasks can be construed as services rendered to all citizens… compensation for SGEI is the most correct approach for the measures put in place by Germany, which must be assessed globally.

Hence, the measure was considered compatible with art. 106.2

[43] See, Commission website, https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-regulation_en

TFUE.[44] While the decision is not fully convincing in its legal reasoning, due to the cumulative assessment of economic and non-economic elements within the alleged SGEI – i.e. nature conservation is not considered an economic activity according to the case-law of the Court of Justice, but when it is accompanied by economic exploitation of land, it may qualify as SGEI under art. 106 TFEU – it has the merit of acknowledging the value of nature restoration in terms of a service to society as a whole. Alternatively, one could apply the *Altmark* criteria,[45] to the extent that the beneficiary covers the costs necessary to provide healthy eco-system services to the public. This situation should be distinguished from the one, analysed by the Court in the *Santini* case, where an economic operator is compensated for loss deriving from the obligation to comply with national regulation arising from the implementation of the EU nature law (namely, the birds Directive). Indeed, the Court has clarified that the mere obligation to comply with EU law nature conservation obligations does not mean that an operator has been tasked with public service obligations.[46] Having clarified this, the proposed solutions point towards a possible shift from an approach based on the traditional "polluter pays" principle towards one embedding a new "beneficiary pays" principle. Such a shift would reflect a more solidaristic approach to environmental protection, one that acknowledges the collective benefits derived from healthy ecosystems and justifies collective financial responsibility for their preservation and restoration.

8. *Conclusions*

Solidarity considerations are inherently rooted in EU State aid law and practice as well as in the ratio of art. 106 TFEU. In

[44] *State aid NN 8/2009 – Germany. Nature conservation*; see, for similar findings, also *State aid No SA.27301 (2015/NN) – the Netherlands. Alleged illegal State aid in connection with the subsidized acquisition or free granting of nature land.*

[45] CJEU, 24 July 2003, Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg.*

[46] CJEU, 27 January 2022, Case C-238/20, *Santini-S*, par. 48.

line with the integration principle established in art. 11 TFEU, environmental interests are protected under state aid secondary law and policy mainly through the declination of the exceptions provided for under art 107(3) TFEU and the related decisional practice of the European Commission. This helps to steer public funding towards goals of general environmental interest, as well as to avoid carbon lock-in effects of aid schemes. In this context, the DNSH principle has emerged as a guiding principle, influencing the evaluation of the compatibility of measures by the European Commission. While reflecting the broader duty to prevent significant environmental harm as recognised under customary international law, this principle is also expression of inter-generational solidarity within the EU legal order, to the extent that harm made to the environment today will affect generations to come. Moreover, the notion of Services of General Economic Interest (SGEI) under Article 106(2) TFEU is an additional avenue for incorporating environmental solidarity into State aid law. Case law has long accepted that certain environmental services may qualify as SGEI, thereby justifying derogations from competition and State aid rules. On this basis, it is proposed that nature restoration activities entrusted to undertakings could likewise be treated as SGEI, in certain cases, given their broad societal and economic benefit. This could open an additional normative space to justify public spending in this filed, in line with the actions required by the implementation of the Nature restoration regulation.

All the above analysed legal elements should be fully and coherently exploited to ensure the allocation of public fundings towards effective environmental benefits. This would in turn fosters vertical solidarity between the Member states and individuals, as well as horizontal solidarity between individuals themselves, to the extent that State aids schemes are capable to orient undertakings to do things that they would not otherwise do, to the benefit of the environment and, therefore, of the public at large.

In this regard, the recent reforms strengthening access to justice in environmental matters in relation to EU State aid decisions is an additional manifestation of this solidarity. As known,

the Commission has revised its procedural rules so as to allow non-governmental organisations (NGOs) to request an internal review of certain State aid decisions, with the aim of assessing whether such decisions comply with EU environmental law.[47] As a result of these changes, at least in principle, the EU legal order now enables members of the public to monitor the application of environmental principles within State aid practice. In doing so, civil society actors are placed in a position to play an active role in the implementation of environmental sustainability, contributing to the integration of environmental considerations into economic decision-making under EU law.

[47] See European Commission, Code of Best Practices for the conduct of State aid control procedures, 2025, in *OJ* C2810. This amendment was prompted by the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2015/128, in which the EU legal order was found to be in breach of the Convention as regards access to justice, inter alia due to the restrictive standing requirements stemming from Article 263 TFEU. On the topic, see: A. SCHERER, "Access to Environmental Justice under the Aarhus Convention: Evaluating the Contemporary Hurdles for ENGOs in Challenging State Aid Decisions under EU Law" in *Journal of European Competition Law & Practice*, XV (2024), p. 197 ff.; J. BLUCKER, "State Aid Law", in B. Peters, E. Lohse (eds.), *Sustainability through Participation? Perspectives from National, European and International Law* (Boston/London, Brill 2023), p. 231 ff.; on the recent amendments, see for example M. BARBANO, "Adding the Environmental Perspective to State Aid Control: The Role of Environmental NGOs in Light of the New Internal Review Mechanism", in *European State Aid Law Quarterly*, XXIV (2025), p. 405 ff.

THE RELEVANCE OF ENVIRONMENTAL SUSTAINABILITY IN THE EU EXTERNAL ACTION AND TRADE AGREEMENTS

Flavia Zorzi Giustiniani*

Summary: 1. Introductory Remarks. – 2. Environmental Sustainability in Unilateral Measures. The Case of the Carbon Border Adjustment Mechanism (CBAM). – 3. The Growing Focus on Environmental Sustainability in "New Generation" Trade Agreements. – 4. The Paradigmatic Case of the EU-Mercosur Agreement. – 5. Some Tentative Conclusions.

1. *Introductory Remarks*

Sustainability, including in its environmental dimension, is an objective of EU's external action enshrined in Article 21 para. 2 TEU, which commits the Union to "help to develop international measures to preserve and improve the quality of the environment and the sustainable management of global resources, in order to ensure sustainable development." The bindingness of such commitment is reinforced by the integration clause ex Article 11 TFEU, which requires to integrate environmental protection requirements "into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development."[1] As a consequence, environmental sustainability has assumed a transversal and central relevance in the EU legal order, and as such needs to inspire EU actions both

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[1] The same environmental integration duty is also enshrined in Article 37 of the Charter of Fundamental Rights of the EU, which connects it with the principle of sustainable development. On the environmental integration principle, cf. M. Montini, "The principle of integration", in L. Krämer, E. Orlando (eds), *Principles of environmental law* (Cheltenham, Edward Elgar 2018), p. 139 ff.

internally and externally.[2] Lastly, the environmental integration principle has been reinforced with the adoption of the European Green Deal and accompanying initiatives.[3]

When acting externally, the Union must also guarantee the coherence of its action according to Article 21, para. 3 TEU.[4] This implies the need to ensure not just the *overall* coherence of external action, but also that the latter is consistent with internal policies having an external dimension, as is notably the case for the environment.[5] In the absence of a clear definition of coherence, its legal implications are also uncertain.[6] Nonetheless, when read in conjunction with Articles 11 and 21 TEU, it would seem

[2] Cf. M. Montini, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile* (Napoli, Editoriale Scientifica 2025), p. 56. The Court of Justice of the European Union (CJEU) has however recognised a broad discretion on the part of the EU legislator in concretely assessing on a case-by-case basis the extent of such integration (cf., e.g., Case T-512/12, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council*, 2015 ECLI:EU:T:2015:953, para. 164; Case C-733/19, *Kingdom of the Netherlands v Council & Parliament*, ECLI:EU:C:2021:272, paras. 49-50 (May 15, 2021). In the literature, see F. Munari, L. Schiano Di Pepe, *La tutela transnazionale dell'ambiente* (Bologna, Il Mulino 2012).

[3] Cf. V. Karageorgou, "The Environmental Integration Principle in EU Law: Normative Content and Functions also in Light of New Developments, such as the European Green Deal", in *European Papers*, VIII (2023), p. 159 ff.

[4] The Commission's awareness of the need for greater coherence to ensure the EU secures its position on the global stage was shown already in its 2006 Communication "Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility", Communication from the Commission to the European Council, 08.06.2006, CoM(2006), 278 final.

[5] On the topic see generally: A. Mignolli, *L'azione esterna dell'Unione europea e il principio della coerenza* (Napoli, Jovene 2009); L. Hertog, S. Stross, "Coherence in EU External Relations. Concepts and Legal Rooting of an Ambiguous Term", in *European Foreign Affairs Review*, XVIII (2013), p. 373 ff.; M. Manchin, L. Puccio, A.B. Yildrim (eds), *Coherence of the European Union Trade Policy with its Non-Trade Objectives* (Cambridge, Cambridge University Press 2024).

[6] A rare reference to coherence (consistency) in the jurisprudence of the CJEU can be found in Case C-263/14, where it is affirmed that "the European Union must ensure, in accordance with Article 21(3) TEU, consistency between the different areas of its external action, and the duty to inform which the other institutions owe to the Parliament under Article 218(10) TFEU contributes to ensuring the coherence and consistency of that action." (CJEU, Case C-263/14, *Parliament v. Council*, para. 72)

at least to require that the respect of EU values, objectives and principles, and notably the principle of a high level of environmental protection, is not contradicted or gravely diminished by the Union's actions or policies.

As far as external action is concerned, the growing relevance of environmental sustainability can be appreciated in particular with respect to the external EU policy *par excellence*, i.e. common commercial policy (CCP). Environmental sustainability has been in fact progressively integrated into external trade policy, both within unilateral instruments and international agreements. Such an integration, as will be shown in the present contribution, is promising and yet largely incomplete: it would thus need a clearer and more decisive stance from the Union, that should pursue its external action coherently and in accordance with its objectives, principles and values.

2. *Environmental Sustainability in Unilateral Measures. The Case of the Carbon Border Adjustment Mechanism (CBAM)*

Environmental sustainability is promoted by a number of unilateral trade measures recently adopted by the European institutions, notably the CBAM,[7] the Corporate Sustainability Reporting Directive (CSRD),[8] the Corporate Sustainability Due Diligence Directive (CSDDD)[9] and the Regulation on Deforestation-Free Products (EUDR).[10] While all these instruments have

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

[8] Cf. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

[9] Cf. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

[10] Cf. Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) 995/2010.

raised doubts concerning their compatibility with the World Trade Organisation (WTO) system and its non-discrimination rules, the CBAM has posed the additional problem of its respect of the Common but Differentiated Responsibilities and Respective Capabilities (CBDR) principle, as also shown by the harsh critiques received in this respect by many developing countries.

CBDR is a fundamental tenet of international environmental law since the Rio Declaration on environment and development of 1992 and, with its corollary of national voluntary contributions, was later inserted in the UN Convention on Climate Change and the subsequent Paris agreement in order to guarantee the differentiated contribution of participating countries based on their willingness and capacity.[11] Despite its vagueness and the insufficient commitment by States to implement it or, at least, to agree on the concrete modalities for doing so, CBDR nevertheless plays a key and undisputed role in the current inter-

On unilateral measures and sustainable development cf. A. Mignolli, *The European Union and Sustainable Development. A Study on Unilateral Trade Measures* (Roma, Edizioni Nuova Cultura 2018).

[11] On CBDR cf. *inter alia*: L. Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", in *Review of European Community and International Environmental Law*, IX (2000), p. 120 ff.; Centre for International Sustainable Development Law, "The Principle of Common but Differentiated Responsibilities: Origins and Scope", Working Paper and Legal Brief Series (2002), available at https://www.academia.edu/31031554/The_Principle_of_Common_But_Differentiated_Responsibilities_Origins_and_Scope_For_the_World_Summit_on_Sustainable_Development_2002_Johannesburg_26_August_I_Definition_of_the_Principle_of_Common_but_Differentiated_Responsibilities; L. Pineschi, "Tutela dell'ambiente e responsabilità comuni ma differenziate nei rapporti tra Stati sviluppati e Stati in via di sviluppo", in N. Boschiero, R. Luzzatto (eds), *I rapporti economici internazionali e l'evoluzione del loro regime giuridico. Soggetti, valori e strumenti* (Napoli, Editoriale Scientifica 2008), p. 87 ff.; D. Weijers, D. Eng, R. Das, "Sharing the Responsibility of Dealing with Climate Change: Interpreting the Principle of Common but Differentiated Responsibilities", in J. Boston, A. Bradstock, D. Eng (eds), *Public Policy: Why Ethics Matters* (Canberra, ANU E Press 2010), p. 141 ff.; S. Singh, "Tracing the 'Common but Differentiated Responsibilities' (CBDR) Principle under Climate Change Regime", in *Indian Journal of Law and Justice*, XIII (2022), p. 251 ff.

national regulatory framework on climate change, particularly in interpreting existing climate obligations.[12]

CBAM is specifically and primarily aimed at preventing international and European climate objectives from being undermined by so-called carbon leakage due either to the relocation of production or to increased imports of more carbon-intensive products.[13] Although, to date, the actual existence of carbon leakage episodes has not been adequately proven,[14] it appears clear that the risk of carbon leakage is set to increase exponentially in the coming years due to the expected reduction in emissions by the Union and, more specifically, by the gradual elimina-

[12] Cf. L. Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", cit., p. 124.

[13] Carbon leakage has been defined as the "undesirable consequences of a situation where different jurisdictions pursue climate policies at different ambition levels" (cf. B. Goerlach, E. Zelljadt, "Forms and Channels of Carbon Leakage", in *Climate Change*, XVI (2018), p. 3). The risk of carbon leakage is so explained in the Commission's Inception Impact Assessment: "As long as many international partners do not share the same climate ambition as the EU, there is a risk of carbon leakage […] If this risk materialises, there will be no reduction in global emissions, and this will frustrate the efforts of the EU and its industries to meet the global climate objectives of the Paris Agreement. In this context, a carbon border adjustment mechanism would ensure that the price of imports reflect more accurately their carbon content." It should be underlined that, although the Commission is careful to emphasize the climate impact, carbon leakage has a dual nature: "[t]echnically, the phenomenon refers only to the relocation of emissions, which can be considered a purely environmental issue. However, carbon leakage also has prevalent economic implications. Without any protection against carbon leakage, EU businesses would be at a disadvantage as compared to non-EU businesses which are able to sell their products on the EU market without being affected by ETS levies. In the long term, this may lead the onus of a particular industry and accompanying long-term investments to shift from the EU to other regions with laxer constraints. Carbon leakage is therefore inherently tied to a loss of competitiveness." (E. Pander Maat, "Leading by Example, Ideas or Coercion? The Carbon Border Adjustment Mechanism as a Case of Hybrid EU Climate Leadership", in *European Papers*, VII (2022), p. 55 ff., p. 65)

[14] For an overview of the different findings of various studies on carbon leakage cf. European Commission, Impact Assessment Report Accompanying the Document Proposal for a Regulation Establishing a Carbon Border Adjustment Mechanism, SWD(2021)643 final, 14 July 2021, para. 2.2, annex 11.

tion of free allocations of emission allowances under the European Emissions Trading System (ETS).

The new instrument envisages taxing imports of carbon-intensive products from non-EU countries,[15] ensuring that the same carbon cost is applied to European production for its share of greenhouse gases.[16] If a producer outside the EU has already paid a carbon tax in a third country, the EU importer will then be able to deduct the corresponding cost. In the initial phase, the affected products will concern only six sectors, selected primarily because they are particularly carbon-intensive (cement, iron and steel, aluminum, fertilizers, electricity and hydrogen). The progressive extension to other sectors, which will also be carried out based on the results of the Commission's review of the Regulation, will then go hand in hand with the gradual dismantling of the European ETS.

Complying with the monitoring and reporting requirements set forth in the CBAM Regulation will indeed entail administrative burdens and significant costs for production facilities in third countries, which could prove unsustainable for some Least Developed Countries (LDCs) without substantial financial support as well as totally unfair. As is known, these countries are among the least responsible for the current climate crisis and at the same time the worst affected by it.[17]

Although LDCs collectively represent less than 0.1% of EU

[15] Goods originating in Norway, Iceland, Liechtenstein, or Switzerland are exempt by virtue of their participation in the European ETS or (in the case of Switzerland) by the link between the national ETS and the EU ETS. Likewise, the CBAM Regulation does not apply to goods originating in the following territories: Büsingen, Heligoland, Livigno, Ceuta, Melilla (cf. annex II section A, Regulation 2023/956).

[16] For a more detailed analysis of the CBAM Regulation please allow me to refer to F. Zorzi Giustiniani, "Il Meccanismo UE di adeguamento del carbonio alle frontiere: punto di svolta o occasione mancata?", in *Studi sull'integrazione europea*, XIX (2024), pp. 129-147.

[17] Cf. Institute for European Environmental Policy, "What can Least Developed Countries and other climate vulnerable countries expect from the EU Carbon Border Adjustment Mechanism (CBAM)?", 2021, available at https://www.iisd.org/publications/europe-union-carbon-border-adjustment-mechanism, p. 9.

imports in the sectors currently covered by the CBAM (iron and steel, fertilizers, and cement), their relative importance may be significant. Senegal's fertilizer exports to the EU account for 2.5% of its gross domestic product. Then there is the exceptional case of Mozambique, whose aluminum exports are directed halfway to the EU. Mozambique is also a prime example of a low-income country that currently lacks the institutional capacity to measure its industrial emissions.[18] Finally, when assessing the impact of the CBAM on a LDC, the indirect effects of the Mechanism must also be considered, as evidenced by the case in which raw materials from a LDC become components of a product exported to the EU from another country subject to the CBAM tariff.[19] The particularly vulnerable situation experienced by some developing countries, especially LDCs, would therefore seem to require a flexible, or rather differentiated, application of the CBAM to them. This would also ensure compliance with the CBDR and the bottom-up approach that informs the Paris Agreement. The final text of the CBAM regulation, however, does not grant any special, let alone privileged, treatment to LDCs.

The Commission's proposal did in fact state that the Union would collaborate with low- and middle-income countries to achieve the decarbonization of their manufacturing industries and also support "the least developed countries with the necessary technical assistance to facilitate their adaptation to the new obligations established" by the regulation.[20] This commitment,

[18] L. Eicke, S. Weko, M. Apergi, A. Marian, "Pulling up the Carbon Ladder? Decarbonization, Dependence, and Third-Country Risks from the European Carbon Border Adjustment Mechanism", in *Energy Research & Social Science*, LXXX (2021), available at https://ui.adsabs.harvard.edu/abs/2021ERFF…8002240E/abstract.

[19] The example is taken from C. Brandi, "Priorities for a Development-Friendly EU Carbon Border Adjustment Mechanism (CBAM)", in *Deutsches Institut für Entwicklungspolitik (DIE) Briefing Paper*, XX (2021), p. 2.

[20] Cf. COM(2021)564 final, p. 5. In order to ensure compliance with the CBDR, it was proposed to introduce a specific exemption for LDCs into the regulation, aimed at excluding them from the scope of the instrument. Such a possibility had been considered when drafting the legislative proposal by the

however, did not pass the drafting process.[21] As a consequence, the only references to developing countries, and in particular to LDCs, found in the CBAM Regulation are: in the preamble, which merely calls for the Union to provide specific technical assistance to developing countries and LDCs;[22] and in the body text, as to the content of the impact assessment, which will be carried out by the Commission during the periodic reporting and review of the framework.[23]

The reported failure to address the particular vulnerability of LDCs in the CBAM Regulation is clearly not in line with the CBDR and is not even justifiable from a purely economic point of view. In fact, since the application of the CBAM already remedies distortions of competition between products, the Mechanism's revenues, instead of being used internally, should be more fruitfully redistributed to LDCs and in particular "used to enable technology transfer and capacity-building."[24] This is one of the

Commission itself, but it was ruled out for the following reasons: "[B]lanket exemptions from a CBAM should be avoided, as setting up a mechanism that will encourage LDCs to increase their level of emission and run counter to the overarching objective of the CBAM. In addition, these exemptions would be temporary in nature, and would therefore prove counterproductive for LDCs in the long run: the carbon intensive industry would have to be dismantled, and if exempted now, adaptation costs for LDCs would be higher. To sum up, neither the EU nor the trading partners would have an interest in fostering the growth of carbon-intensive industries in these countries." (SWD(2021)643 final, p. 30) The above reasons are certainly understandable. However, the failure to consider the particular vulnerability of LDCs in the CBAM Regulation cannot be accepted.

[21] During the vote on the draft regulation, which took place on 22 June, 2022, the European Parliament, at the instigation of various NGOs such as Oxfam International, unsuccessfully requested that part of the Mechanism's revenues be used to support decarbonization initiatives in third countries (cf. Oxfam International, European Parliament Vote on Carbon Border Tariff is a Step up but Still Unfair to Poorer Countries, 22 June 2022, available at https://www.oxfam.org/en/press-releases/european-parliament-vote-carbon-border-tariff-step-still-unfair-poorer countries).

[22] Cf. preambular para. 71.

[23] Cf. in particular art. 30, paras. 2, lett. f), and 6, lett. a), vii).

[24] Cf. G. C. Leonelli, "Practical Obstacles and Structural Legal constraints in the Adoption of 'Defensive' Policies: Comparing the EU Carbon Border Adjustment Mechanism and the US Proposal for a Border Carbon

potential improvements that could still be smoothly undertaken in the current transitional phase, before the entry into force of the CBAM definitive regime in 2026.

3. *The Growing Focus on Environmental Sustainability in "New Generation" Trade Agreements*

The main instrument through which the EU promotes environmental sustainability externally is its "new generation" free trade agreements (FTAs) stipulated with third countries. Despite the undisputed contribution of international trade to environmental degradation, the related practice is quite recent. Indeed, traditional FTAs were aimed essentially at trade liberalisation, and consequently left aside non-commercial concerns, which were considered only exceptions to be eventually invoked by a contracting party, in accordance with the precepts of the global WTO regime.[25] By contrast, new generation FTAs have a much broader scope. Also, as a result of the failure of the multilateral WTO Doha Round talks in 2005,[26] the Commission launched its Global Europe strategy,[27] which affirmed the need for FTAs "comprehensive and ambitious in coverage, aiming at the highest degree of trade liberalisation including far-reaching liberalisation

Adjustment. Legal Studies", in *Birkbeck Institutional Research Online*, 2022, p. 21.

[25] Cf. Art. XX of GATT 1994, which contains general exceptions such as "human, animal or plant life or health" (lett. a) (the so-called non-trade values or concerns).

[26] Cf. Surya P. Subedi, "The Road from Doha: The Issues for the Development round of the W.T.O. and the Future of International Trade", in *International and Comparative Law Quarterly*, LII (2003), p. 425; R. Tarasofsky, A. Palmer, "The WTO in Crisis: Lessons Learned from the Doha Negotiations on the Environment", in *International Affairs*, LXXXII (2006), p. 899; R. Baldwin, "The World Trade Organization and the Future of Multilateralism", in *Journal of Economic Perspectives*, XXX (2016), p. 95.

[27] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Global Europe: Competing in the World*, COM (2006) 567 final, October 4, 2006.

of services and investment."[28] The new approach was then consecrated by the Lisbon Treaty, which placed the CCP in a broader context of non-economic goals, such as sustainable development and the improvement of the quality of the environment.[29] According to the CJEU, the new FTAs are specifically characterised by the fact of containing "provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition *and sustainable development*."[30]

Based on the double exigency, on the one hand of guaranteeing the coherence of its action and, on the other hand, of asserting and promoting its values and interests, as generally required by Articles 3 para. 5 and 21 TEU and, with respect to the CCP, by Article 205 TFEU, the Union has progressively put a stronger emphasis on sustainability in its FTAs. The centrality of sustainable development in its three dimensions – economic, social and environmental – as a crucial element common to all bilateral trade agreements has been routinely affirmed by the Commission. Moreover, since 2015, such a statement is accompanied by the asserted need to pursue a more responsible free-trade and investment policy which is aimed at promoting EU values and takes into account also environmental global needs, in line with the UN Sustainable Development Goals of Agenda 2030.[31] It has thus become common practice to insert in the "new generation" FTAs a specific chapter on Trade and Sustainable Development (TSD) covering labour and environmental commitments[32]

[28] European Commission, *Global Europe: Competing in the World*, cit.

[29] Cf. Art. 3 para. 5, TEU.

[30] CJEU, Opinion 2/15, ECLI:EU:C:2017:376, para. 17 (May 16, 2017), emphasis added.

[31] Cf. COM (2015) 497 def., 14.10.2015; COM (2017) 492 def., 13.9.2017; COM (2021) 66 def., 18.2.2021. As to the CJEU, in Opinion 2/15 it held that "the objective of sustainable development forms an integral part of the common commercial policy." (Opinion 2/15, 16 May 2017, para. 147)

[32] The first FTA to include a TSD Chapter laying down also environmental commitments was the agreement conclude with the Republic of South Korea (cf. Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, EU-Korea, 6 October 2011, O.J. L 127/7).

TSD chapters are generally structured according to a pre-set model, which has been applied to all the FTAs stipulated in the last two decades. While the precise contents and functioning of each TSD change from one TFA to another, all TSDs are tipically composed of three main elements, namely commitments by the parties, structures to involve civil society in monitoring implementation of such commitments, and a dispute settlement mechanism. The monitoring and remedial systems are structured so to emphasize dialogue and cooperation, contrary to the typical approach of the U.S. and Canada, which is focused on sanctions or financial penalties.[33] The monitoring implementation phase is organized, in particular, through a peculiar system of civil society dialogue consisting of a TSD Committee, composed of high-level representatives from each party's administration; a Domestic Advisory Group, made up of members of civil society and the European Economic and Social Committee; and a Civil Society Committee, composed of broader civil society stakeholders. The dispute settlement mechanism is instead inspired by the ordinary State-to-State dispute settlement that applies to the rest of the agreement, but is however different as to its functioning.[34] It envisages launching Government consultations among trade partners, eventually followed by the referral of the question to a panel of independent experts (arbitrators). The panel is in charge of producing public reports with non-binding recommendations. Sanctions, such as the suspension of trade concessions, are instead generally excluded.[35] As a result, environmental-related

[33] Cf. R. Leal-Arcas, M. Anderle, F. da Silva Santos, L. Uilenbroek, H. Schragmann, "The Contribution of Free Trade Agreements and Bilateral Investment Treaties to a Sustainable Future", in *Zeitschrift für Europarechtliche Studien*, XXIII (2020/1), p. 17.

[34] On the topic cf. E. Baroncini, "Promoting and Enforcing Sustainability: The Dispute Settlement Practice in the New Generation of EU Trade Agreements", in *Archivio giuridico online*, IV (2025), pp. 64-106.

[35] On the topic cf. M.L. Martins, "Trade and Sustainable Development Chapters in EU Free Trade Agreements: Challenging the Exclusion of Sanctions as a Tool of Inducing Compliance with Environmental Standards in the Context of International Trade", Maastricht University, August 2021, available at https://www.maastrichtuniversity.nl/sites/default/files/2023-03/margarida_martins_thesis.pdf

provisions cannot be enforced, and their breach does not "entail consequences capable of affecting trade flows or triggering significant remedial measures."[36]

As to the substantive part of the TSD Chapter, in which the reciprocal obligations and commitments of the Union and the third State are laid down, a large portion is dedicated to pre-existing commitments under public international law, especially under Multilateral Environmental Agreements (MEAs) or labour conventions. A specific section of the TSD, tipically rubricated as "Trade and Environment", then commits the trade partners: to effectively implement the MEAs to which they are parties and, more rarely, to exchange information on the progress on ratification of other MEAs;[37] and to cooperate as appropriate with respect to environmental-related issues of mutual interest.[38]

[36] Cf. M. Schettini, "The European Union's Contribution to the Transition to a Circular Economy Model through its New Generation Free Trade Agreements: A Step towards Global Sustainability?", in *Quaderni AISDUE*, XI (2025), p. 12. The shortcomings of the "special" dispute settlement mechanism under the TSD Chapters, and notably the length of the dialogue-based mediation process and its scarce effectiveness in leading to compliance, have been well shown by the case against South Korea in relation to labour rights issues (cf. E. Blot, A. Oger, J. Harrison, "Enhancing Sustainability in EU Free Trade Agreements: The Case for a Holistic Approach", Policy report, Institute for European Environmental Policy (IEEP), 2022, available at https://ieep.eu/publications/enhancing-sustainability-in-eu-free-trade-agreements-the-case-for-a-holistic-approach/, p. 29).

[37] Cf. EU-Japan FTA, Art. 16.4, para. 3; EU-Vietnam FTA, Art. 13.5, para. 3; EU-UK TCA, Art. 400, para. 3; EU-Central America Association Agreement (hereinafter AA), Art. 287, paras. 3, 4; EU-Moldova AA, Art. 366, para. 3; EU-Mexico Agreement in principle, Art. 4, para. 3; EU-Mercosur Agreement in principle, Art. 5, para. 4; EU-New Zealand FTA, Art. X.5, para. 3. An interesting exception is represented by EU-Central America AA, Art. 287, whose paragraph 3 contains the obligation for the Parties to undertake to ensure ratification of the amendment to Article XXI of Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States by the entry into force of the Agreement.

[38] Notable exceptions in this regard are constituted by the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-UK Trade and Cooperation Agreement, in which labour and environmental standards are treated separately, in stand-alone chapters (EU-UK TCA, supra note 43, at title XI, Chapter 6 (Labour and Social Standards); Chapter 7 (Environ-

The TSD Chapter is not limited, though, to reaffirming existing international obligations, but also deals with the so-called "right to regulate". On such right EU FTAs, utilising similar, imperative language usually state that each party has the right to set its own priorities and to establish its level of protection in the fields of environmental and labour law.[39] The reference to the right to regulate, as an expression of the principle of sovereign equality and permanent sovereignty over natural resources, can be found in numerous commercial and investment agreements stipulated all over the globe.[40] Under EU law, as authoritatively established by the CJEU, the right to regulate is a principle that is part of the same autonomy of the EU legal order.[41] Within EU FTAs, it is meant in particular to clarify that the agreement has no harmonising effects in a wide range of public policy areas,[42] such as environmental and social policies, and that trade partners are thus free, as far as their domestic laws and policies are consistent with their own international obligations (e.g. the MEAs to which they are parties), to determine their level of protection accordingly.

The solemn affirmation of such a sovereign right is generally accompanied by commitments related to domestic legislation, which are expressed through levels of protection clauses, i.e. the non-regression clause and the future level of protection

ment and Climate Change) and Chapter 8 (Other instruments for Trade and Sustainable Development)).

[39] EU - CARIFORUM, Art. 184 para. 1 and 192; EU - Korea, Art. 13 para. 3; EU - Singapore, Art. 12 para. 2(1); EU - Vietnam, Art. 13 para. 2(1); CETA, Art. 23 para. 2 and Art. 24 para. 3; EU - Japan, Art 16 para. 2(1).

[40] "Despite its obscure character, its ubiquity is affirmed by its frequent mentions in forums, ranging from the WTO to new-generation trade agreements." (cf. E. Osanlenlen Adu, "Revisiting the right to regulate", Working Paper 247 (2025), available at https://ghum.kuleuven.be/ggs/publications/working_papers/wp247-ggs-estherosalenlen-def.pdf, p. 3).

[41] CJEU, Opinion 1/17 re CETA EU:C:2019:341.

[42] A partial exception is constituted by the FTAs concluded under the neighborhood policy, where there's a general commitment of legislative approximation to the EU acquis on environmental aspects weighing on the EU's counterpart (cf. the Deep and Comprehensive FTAs concluded with Ukraine, Moldova and Georgia).

clause. The former clauses, in particular, are aimed at preventing the achievement of a competitive advantage by reducing standards after the conclusion of the agreement[43]. In EU FTAs non-regression clauses commit or rather *discourage* the Parties from reducing or weakening their levels of protection, while future levels of protection clauses *encourage* the same Parties to increase such levels over time.[44] These clauses should in fact pose limits to the scope of the right to regulate; and yet, being aspirational in character, they constitute "best endeavour obligations" whose bindingness appears rather limited.[45] As such, the said commitments are difficult to invoke in court.[46] Moreover, the substantive content of these clauses is highly conservative, because it corresponds entirely to the *basic* international (environmental) law standards referenced elsewhere in the TSD Chapter. In other terms, "compliance with the public international law baseline is the only (substantive) limit to the Parties' right to regulate."[47]

In sum, the said clauses evidence the soft "cooperative" approach generally utilised by the Union in the TSD chapters. This stands in stark contrast with the more "competitive" stance of other large trading powers – the United States *in primis* –

[43] Cf. A. D. Mitchell, J. Munro, "An International Law Principle of Non-Regression from Environmental Protections", in *International and Comparative Law Quarterly*, LXXII (2023), pp. 35-71.

[44] G.C. Leonelli, "From extra-territorial and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU-UK Trade and Cooperation Agreement", 16 May 2021, available at https://academic.oup.com/jel/article-abstract/33/3/611/6338423?redirectedFrom=fulltext, p. 11.

[45] Cf. G. Adinolfi, "A Cross-cutting Legal Analysis of the European Union Preferential Trade Agreement's Chapters on Sustainable Development. Further Steps towards the Attainment of the Sustainable Development Goals?", in C. Beverelli, J. Kurtz, D. Raess, *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum* (Cambridge, Cambridge University Press 2020), p. 34.

[46] Cf. M. Montini, *L'azione esterna dell'Unione europea per l'attuazione dello sviluppo sostenibile*, cit., p. 184.

[47] Cf. G.C. Leonelli, "From extra-territorial and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU-UK Trade and Cooperation Agreement", cit., p. 15.

"which is primarily aimed at levelling the playing field with trade partners so that the higher American standards on environmental protection do not put domestic companies at a disadvantage."[48]

Lately, the deficiencies of the European approach in addressing the multiple negative impacts of trade agreements, and notably the need to remodel the Parties' "sovereign" right to regulate so to ensure an effective level playing field (LPF) were finally recognized by European institutions. This was reflected, in particular, in the partnership agreement (Trade and Cooperation Agreement – hereafter TCA) negotiated with the United Kingdom following Brexit, and then more generally affirmed by the Commission in its Trade Policy Review (2021), which emphasised the need to "[s]trengthen the EU's focus on implementation and enforcement of trade agreements, and *ensure a level playing field*."[49]

LPF is essentially a trade policy concept aimed at guaranteeing equal conditions for all operators in the market. While in such narrow, originary framing LPF is not apt to safeguard a high level of environmental protection, during the TCA negotiations the EU affirmed that its compliance also implied the respect of some social and environmental standards.[50] Accordingly, TCA goes beyond non-regression clauses and sets out in an *ad hoc* section the rules regarding LPF and sustainable development.[51] In particular, the LPF provisions commit the EU and the UK to upholding high levels of protection on social and environmental standards and to manage the divergence of standards, eventually through a rebalancing mechanism. Moreover, non-regression

[48] Cf. S. E.M. Cesar de Oliveira, J. C. Visentin, B. F. Pavani, P. D. Branco, M. de Maria, R. Loyola, "The European Union-Mercosur Free Trade Agreement as a tool for environmentally sustainable land use governance", in *Environmental Science and Policy*, CLXI (2024), p. 5.

[49] Cf. European Commission, Trade Policy Review. An open, sustainable and assertive trade policy, 2021, p. 22, emphasis added.

[50] Cf. European Parliamentary Research Service, *The level playing-field for labour and environment in EU-UK relations*, November 2021.

[51] Cf. Title XI, "Level Playing Field for Open and Fair Competition and Sustainable Development", TCA.

clauses bind both parties to the level of protection at the time of Brexit.

The regime so established is the most ambitious ever drafted in a trade agreement, but clearly builds on the existence of a unique relationship between the parties and the fact of sharing high levels of standards. The Union, in fact, even tried to impose its own rules and principles, notably in the environmental field, through the mention of a fundamental tenet of EU environmental law, *i.e.* the precautionary principle. In the final text, though, following the UK's request to avoid any reference to EU law, the precautionary principle has been renamed precautionary *approach* and its formulation approximated to its milder international equivalent, which allows for precautionary measures only to a very limited extent.[52]

As to disputes settlement, the LPF provisions go further than ordinary FTAs, granting each side the right to introduce measures to remedy the imbalance on trade and investment that follows on policy divergence. However, such rebalancing mechanism can be activated only in case of "significant divergences" "with respect to labour and social, environmental or climate protection, or with respect to subsidy control"[53] that cause distortions to bilateral trade and investment flows. In other terms, rebalancing measures can be introduced in very limited cases,

[52] The WTO-SPS-Agreement, covering sanitary and phytosanitary measures, does not expressly mention the precautionary principle; nonetheless, such principle is partly reflected in Art. 5. This provision requires that SPS measures be based on a risk assessment (Art. 5 para. 1); and, where there is no sufficient scientific evidence available, it allows only provisional measures (Art. 5 para. 7), accompanied with an obligation to seek to obtain additional information necessary for a risk assessment, and to review the provisional measure within a reasonable period of time. As has recently been observed, "While the question of whether FTAs pose a risk to the EU's precautionary principle has attracted considerable political interest, there are, as of now, few scientific analyses scrutinizing the role of the precautionary principle in such agreements." (B. I. Striebel, N. Cunha Rodrigues, "Worldwide Expansion of the EU Precautionary Principle Through Free Trade Agreements", in R. A. Wessel *et al.* (eds), *EU External Relations Law and Sustainability. The EU, Third States and International Organizations* (The Hague, T.M.C. Asser Press 2024) p. 17)

[53] Cf. Art. 355, TCA.

where the alleged breach is substantial and has a material impact on trade and investment. As a result, contrary to EU ambitions, even in this respect LPF has been significantly downsized and ultimately reduced to its traditional economic dimension.

A crucial policy instrument that typically accompanies EU TFAs is then constituted by impact assessments, which are conducted at various stages, from the pre-negotiation phase to implementation.[54] In particular, Sustainability Impact Assessments (SIAs) and Ex-post assessments are used to evaluate the sustainability impact of an agreement. A to SIAs, they are "independent ex ante assessments carried out by external consultants"[55] and should include comprehensive consultation of stakeholders.[56] They are meant to provide the Commission with a detailed evaluation of the potential economic, social, environmental and human rights impacts of the drafting instruments. As such, SIAs are a crucial tool in better guiding negotiations in conformity with the sustainability agenda. Unfortunately, however, it is not infrequent that the negotiation process is completed before the Final Report of the SIA.[57] Ex-post evaluations, instead, are undertaken at a later stage, after the FTA has already entered into force and has been tested on the ground, so to comprehensively assessing and monitoring the instrument's actual impact after implementation.[58]

[54] See www.policy.trade.ec.europa.eu/analysis-and-assessment/policy-evaluation_en.

[55] European Commission, 'Handbook for trade sustainability impact assessment' (April 2016, Second Edition) available at https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF, p. 5.

[56] European Commission, 'Sustainability Impact Assessments, (2013), http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/

[57] This was the case, for instance, for the EU-Mexico FTA, the parties of which finalised the deal in April 2018 while the SIA report was released later that year. Along similar lines, the EU-Mercosur Trade Agreement's SIA was concluded after the end of negotiations. In this latter case, a complaint on the issue was submitted by civil society bodies to the European Ombudsman, who found that the practice constituted maladministration (European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated "sustainability impact assessment" before concluding the EU-Mercosur trade negotiations).

[58] European Commission (2018) Ex Post Evaluations http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/ex-post-evaluations/.

As to the environmental aspect, four specific areas are most commonly addressed by SIAs and ex-post assessments, namely climate change, biological diversity, sustainable management of forests and trade in forest products, as well as trade in fisheries and aquaculture products.[59] Even though the treatment of the environmental impact is quite varied across FTAs, a general shortcoming can be found in the absence of a clear correlation with TSD chapters. Other identified limitations concern: the insufficient resources to carry out environmental assessments; the related lack of guidance and identified good practice; and the under-engagement of national and local stakeholders.

Still more fundamentally, SIAs, as well as ex-post assessments, are utilised exclusively in order to minimise environmental and broader social effects of FTAs while they should rather be aimed at "fully investigat[ing] how trade agreements can achieve specified environmental and social goals."[60]

4. *The Paradigmatic Case of the EU-Mercosur Agreement*

As previously mentioned, the need to revise the contours of FTAs in order to ensure a veritable LPF was generally addressed by the European Commission within its 2021 Trade Policy Review. A step further, in the direction of a stronger focus on sustainable development and environmental objectives, notably through their enforceability, was then made with 2022 Communication "The Power of Trade Partnerships: Working Together for Green and Just Economic Growth".[61] Soon after, in 2024, the

[59] Cf. J. Cáceres, M. Tokas, M. Gehring, F. de Andrade Correa, "Environment and Climate Change in the Draft EU-Mercosur Trade Agreement. Legal Analysis and Proposed Provision", 28 April 2021, available at https://www.cisdl.org/environment-and-climate-change-in-the-draft-eu-mercosur-trade-agreement-2021/, p. 27.

[60] Cf. S. E.M. Cesar de Oliveira *et al.*, "The European Union-Mercosur Free Trade Agreement as a tool for environmentally sustainable land use governance", cit., p. 29.

[61] Cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Commit-

Union stipulated three FTAs, with Chile, New Zealand and Kenya, which have been hailed as a more advanced generation of trade agreements.[62]

It is in light of this partially new framework that one of the last FTAs concluded by the Union – the one stipulated with Mercosur States – will now be examined, notably from the perspective of environmental sustainability. Being the largest trade agreement ever stipulated by the EU, its relevance is undisputed and its wide potential impact on sustainability could not be underestimated. It is also, *stricto sensu*, the first veritable mega-regional, since the Union's counterpart is not just a country, albeit a large one, as was the case with the EU-Canada Comprehensive Economic and Trade Agreement (CETA), but rather a sub-regional bloc composed of Argentina, Brazil, Paraguay, and Uruguay.

After nearly two decades of intermittent talks, the parties reached a first politically agreed text in June 2019. Nonetheless, the increased destruction of the Amazon rainforest decided by Brazil's President Bolsonaro provoked a strong opposition against the agreement, led by civil-society actors, in both the EU and Mercosur countries. The subsequent and final negotiations have succeeded, not coincidentally, thanks to the changes to the TSD Chapter, including the adoption of an extensive new annex. As a result, on 3 September 2025 the Commission has presented the EU-Mercosur agreement as two parallel legal texts of the EU-Mercosur Partnership Agreement (EMPA) and an Interim Trade Agreement (ITA) and put forward its proposals to the Council for the signature and conclusion of the EMPA, which will subsequently need ratification by all Member States.

While the conclusion of these decade-long negotiations has been hailed as a success by many, a careful examination of the main elements of the text concerning sustainability rather highlights a worrying backtrack by the Union, which appears in con-

tee of the Regions of 22 June 2022, "The Power of Trade Partnerships: Together for Green and Just Economic Growth", COM/2022/409 final.

[62] Cf. M. Schettini, "The European Union's contribution to the transition to a circular economy model through its new generation free trade agreements: a step towards global sustainability?", cit., p. 4.

tradiction with its sustainability ambitions and, even more fundamentally, with its iconic right to regulate and its "ability […] to maintain the autonomy of the EU legal order."[63]

The concrete attention given to sustainability must be evaluated first of all in light of the SIA process and the content of the TSD Chapter. On substance, the interim report as well as the final SIA are criticizable for the superficial analysis and the various data omissions, and notably for the failure to assess the impact of the agreement on ecosystems and biodiversity.[64] Critics also underlined the failed assessment of the impacts of deforestation on climate change.[65] As to the SIA process, it raises specific concerns related both to procedure and substance. Regarding the first point, the SIA was published almost two years after the political agreement and, consequently, it could not influence at all the content of the negotiations. This, as was concluded by the Ombudsman upon request of five civil society organizations, was a blatant case of maladministration.[66] Furthermore, SIA's bias was just an element of the broader opacity and democratic deficit that characterised the negotiations, as shown by the failed publication by the Commission of the negotiating mandate, Commission proposals, and draft texts.[67]

Among the substantive changes recently introduced in the

[63] Cf. Motion for a resolution seeking an opinion from the Court of Justice of the European Union on the compatibility of the EU-Mercosur Partnership Agreement and the Interim Trade Agreement with the Treaties, available at https://www.euractiv.com/content/uploads/sites/2/2025/10/MERCOSUR.pdf, p. 3.

[64] Cf. LSE Consulting, "Sustainability Impact Assessment in Support of the Association Agreement Negotiations between the European Union and Mercosur" (Final Report, December 2020), 90-93.

[65] Cf. IEEP, "Environmental Credentials of EU Trade Policy: A Comparative Analysis of EU Free Trade Agreements" (April 2021).

[66] European Ombudsman, Decision in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated "sustainability impact assessment" before concluding the EU-Mercosur trade negotiations, 17 March 2021.

[67] Cf. M. Dupré, S. Kpenou, "Key Insights into the Final EU-Mercosur Agreement", January 2025, available at https://www.veblen-institute.org/IMG/pdf/vf_key_insights_into_the_final_eu-mercosur_agreement_jan_2025.pdf, p. 11.

new annex to the TSD chapter, there is a mandatory commitment to cooperate on sustainable value chains and the provision of preferential market access by the EU to a list of sustainable goods from Mercosur countries.[68] Such list, however, will be drawn up only after the EMPA's entry into force. As was aptly remarked, the said commitments should "constitute the core of the agreement rather than […] a structural afterthought."[69] As to enforceability, TSD provisions continue to be excluded from sanctions, thus not following the new sanctions-based approach pursued in recent FTAs with New Zealand (2023) and Kenya (2024).

Another topic addressed in the Annex is deforestation, a particularly sensitive issue considering the presence of immense rainforests in Mercosur States. In this respect, Article 16 contains a soft commitment to implement measures to halt deforestation after 2030. Logging, in fact, is not prohibited and parties are only required to "implement measures to combat illegal [logging] and related trade." As a result, these commitments cannot ensure that the trade occurring under the agreement will not contribute to deforestation.

A further novelty, which was meant to introduce stronger sustainability commitments, concerns climate change. The Paris Agreement is now considered an "essential element" of the EMPA, allowing either party to suspend trade benefits if the other withdraws from or acts in bad faith towards the Paris Agreement's objectives. The clause's formulation is however vague and weaker than in past agreements with the UK and New Zealand.[70]

[68] Cf. Arts. A.3 (31)-(32) and A.4(40) of the new Annex.

[69] Cf. J. Harrison, S. Paulini, "The Revised EU-Mercosur Trade Deal: Does it Adequately Address Trade-Environment-Development Interlinkages?", 24 September 2025, available at www.ejiltalk.org/the-revised-eu-mercosur-trade-deal-does-it-adequately-address-trade-environment-development-interlinkages/, p. 3.

[70] In the EU-UK TCA, the Paris Agreement is enshrined as an essential element under Title II, "Basis for Cooperation". In the EU - New Zealand FTA, the Paris Agreement is raised as an essential element in Chapter 19 on TSD, as well as in the Final Provisions (Chapter 27) in a provision relating to "Fulfilment of obligations".

Moreover, EMPA does not recognise that "the Paris Agreement takes unambiguous precedence when it comes into conflict with other rights and obligations under the Agreement."[71]

Still more unsatisfying is the treatment of precaution. The precautionary principle, enshrined in Article 191 para. 2 TFEU is one of the main pillars of EU environmental policy and forms the basis of many acts of EU secondary law concerning health, consumer and environmental protection. The TSD chapter contains only a general reference to precaution, and not to the precautionary principle. What is more, the Sanitary and Phytosanitary (SPS) Chapter rather favours a risk assessment-based model where restrictions must be based on scientific evidence for harm: "A trade party is thus inhibited from adopting trade restrictive measures in the event of a suspected health hazard, in the absence of clear and indisputable scientific evidence."[72] In any case, such measures need to be provisional and reviewed "in a reasonable period of time",[73] while the application of the EU_precautionary principle is not made conditional upon such a requirement.[74]

An additional, and probably the most critical element of the EMPA to be considered is the "rebalancing mechanism". Such a mechanism has been inserted in the political agreement reached at the end of 2024 upon request of the Mercosur countries.[75] De-

[71] Cf. C. Eckes, P. Krajewski, "Legal analysis. How sustainable is the EU-Mercosur Agreement?", University of Amsterdam, 17/04/2025, available at https://caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf, p. 9.

[72] Cf. I. Massa, L. Modesto, D. Vivani, Y. Vecchio, "Paper: EU-Mercosur Agreement. Gaps in standards, health and environmental concerns", 2022, available at https://www.divulgastudi.it/wp-content/uploads/2022/07/PAPER-04_Mercosur-EN-2.pdf, p. 22.

[73] Chapter 6 Article 6.12 (2) of the SPS Chapter.

[74] As was highlighted by the European Parliamentarians sponsoring the Motion for a resolution seeking an opinion from the Court of Justice of the European Union on the compatibility of the EU-Mercosur Partnership Agreement and the Interim Trade Agreement with the Treaties, cit., p. 3.

[75] As part of the principal dispute settlement system of the Agreement, it is assumed that the mechanism has a wide scope of application, including trade and sustainable development issues (cf. B. Rudloff, P.-T. Stoll, K. Mensah, Z. Ahmad, S. Sultan, "A comprehensive analysis of the updated trade part of

spite the identical name, it is completely different from the mechanism envisaged in the EU-UK TCA. Inspired by the non-violation remedy under the GATT,[76] the EMPA's rebalancing mechanism would allow a Party to resort to dispute settlement if it considers that "a measure applied by the other party nullifies or substantially impairs any benefit accruing to it under the covered provisions in a manner adversely affecting trade between the parties, whether or not such measure conflicts with the provisions of Part X of the Agreement, except if otherwise expressly provided."[77] Admittedly, the clause has already been subject to different interpretations. According to Mercosur countries, the mechanism "will enable Mercosur to counterbalance the effects that unilateral EU measures (such as the Green Deal) have or could have on exports from Mercosur countries."[78] And in fact, probably not coincidentally, the mechanism was proposed after the adoption by the EU of various unilateral measures in the field of sustainable development, such as the EUDR, CBAM and EUCSDDD. According to the EU, instead, the clause does not apply to regulations already adopted.[79] The term "measure", however, "appears to include legislation not yet implemented",[80] like is the case for the said controversial unilateral measures. Even conceding that the threshold triggering the mechanism is quite high[81] and that eventual compensation measures are to be

the EU-Mercosur Partnership Agreement, European Parliament's Committee on International Trade", June 2025, available at https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2025)754477, p. 41, fn. 22).

[76] Art. XXIII 1(b) GATT.

[77] Cf. Following an arbitral award, in favour of a complaining Party, Article XX.17(2) then requires the Parties to "endeavor to privilege a solution which effectively expands market access by means of measures including the reduction of tariffs and the elimination of non-tariff barriers."

[78] Cf. Communication published by the Ministry of foreign affairs of Uruguay, 6 December 2024. Along similar lines was the interpretation rendered by the Brazilian government (cf. Factsheet published by the Brazilian government, para. 7).

[79] Cf. M. Dupré, S. Kpenou, "Key Insights into the Final EU-Mercosur Agreement", cit., p. 9.

[80] *Ibid.*

[81] And also far higher than the WTO standard for non-violation complaints (see *supra*, footnote 76).

agreed by both parties, the mechanism is a potential threat to the parties' regulatory autonomy.[82] In particular, "it could be used […] against new environmental regulations that raise European standards"[83] and against the application of so-called "mirror measures", i.e. measures imposing the same regulatory standards or policies to both domestic and imported products. Furthermore, remedial measures may consist in "additional concessions and market access for *unsustainable* products"[84] and thus "directly lead to an increase in the EU's trade-related GHG emissions" and "result in legal responsibility of the EU Member States under the European Convention on Human Rights."[85] Last but not least, also when not triggered, the mechanism, either as a means of putting pressure or by inducing officials to self-censure, will probably have the effect of "further institutionalis[ing] a bias towards the *status quo*."[86]

The risk of the regulator being captured could notably occur in the implementation of the Deforestation Regulation. As was remarked, the procedures set out in the Annex to the TSD chapter[87] appear to oblige the authorities responsible for the EUDR's

[82] A contrary opinion is expressed by B. Rudloff, P.-T. Stoll, K. Mensah, Z. Ahmad, S. Sultan, "A comprehensive analysis of the updated trade part of the EU-Mercosur Partnership Agreement, European Parliament's Committee on International Trade", cit. p. 43. The authors, while admitting, "given the dynamic and evolutionary nature of sustainability regulation, the possibility of a non-violation complaint raised by a Mercosur party challenging an EU sustainability measure, at some point in the future", consider the mechanism "as a useful tool to prevent regulatory surprises between contracting parties [a regulatory chill?], also adding a layer of encouragement to continue effective cooperation on sustainability regulations affecting trade" (author's note in square brackets).

[83] F. Couveinhes Matsumoto, S. Robert, "Analysis of the 'Rebalancing Mechanism' of the EU-MERCOSUR Free Trade Agreement", June 2025, available at https://www.veblen-institute.org/IMG/pdf/vf-june_2025_-_analysis_of_the_rebalancing_mechanism_of_the_eu-mercosur_free_trade_agreement.pdf, p. 15.

[84] Cf. C. Eckes, P. Krajewski, P. Krajewski, "Legal analysis. How sustainable is the EU-Mercosur Agreement?", cit. p. 15.

[85] *Ibid.*

[86] *Ivi*, p. 16. See also Cf. M. Dupré, S. Kpenou, "Key Insights into the Final EU-Mercosur Agreement", cit., p. 10.

[87] "54. When implementing sustainability measures that affect trade, con-

implementation "to give priority to data from the States concerned on the reality of deforestation […] and on legislation relating to deforestation (and therefore on the legality of exported products), even if this data is less reliable."[88] As a result, such provisions inevitably compromise the independence of EU Member States' authorities.[89]

In conclusion, a final note on the negotiation process is also due. The recent decision, made in autonomy by the Commission, to split the Agreement into two separate legal text – the EMPA and the ITA –, while most probably dictated by the need to put an end to an endless negotiation process, appears in contrast with the EU Treaties, and notably with Article 218 paras. 2 and 4 TFEU as well as with the principles of conferral, institutional balance and sincere cooperation. Moreover, such a split, as denounced by a group of European parliamentarians, is a clear at-

sistent with its legal framework, a Party shall *give full consideration* to scientific or technical information *submitted by the other Party and should take into account the actions taken by that Party* to implement the commitments under this Instrument. 55. Where a Party's law provides for verification of compliance of an imported product with the relevant laws of another Party, the Parties acknowledge that *the authorities of a Party are best placed to assess compliance with the law of that Party*. […]. 56. With regard to the implementation of sustainability measures affecting trade and the placement on the market related to the protection of wooded ecosystems and where EU law so allows: (a) The EU recognises that this Agreement and actions taken to implement commitments thereunder *shall be favorably considered*, among other criteria, in the risk classification of countries. (b) Documentation, licenses, information and data from certification schemes and traceability and monitoring systems *officially recognized, registered or identified by Mercosur countries shall be used as a source by the relevant authorities in the EU for the purpose of verifying compliance of products covered by such measures with traceability requirements placed on the EU market*. (c) In case of a divergence […] the relevant authorities in the EU […] shall, upon request, *promptly consider* information and clarifications *provided by Mercosur countries.*" (cf. paras. 54 to 56 of the Annex, emphasis added).

[88] Cf. F. Couveinhes Matsumoto, S. Robert, "Analysis of the 'Rebalancing Mechanism' of the EU-MERCOSUR Free Trade Agreement", cit., p. 17.

[89] Cf. M. Rice, "The Mercosur trade deal risks derailing the EU's plan to protect the world's forests", Client Earth, 20 December 2024, available at https://www.clientearth.org/latest/news/the-mercosur-trade-deal-risks-derailing-the-eus-plan-to-protect-the-worlds-forests/.

tempt to circumvent national parliaments' right to ratify the ITA agreement, which being a trade agreement falls within EU's exclusive competence and requires only approval by qualified majority in the Council and the European Parliament.[90] What is more, ITA's duration is inextricably linked with the fate of the political agreement; consequently, if the latter fails to be ratified in one or more Member States, the ITA agreement would remain in effect.

5. *Some Tentative Conclusions*

Trade liberalisation does not go necessarily hand in hand with environmental sustainability, and in fact practice shows that environmental as well as social standards are easily sacrificed in the pursuit of competitive advantages in the global market. In this framework, the EU's growing commitments towards environmental sustainability in its trade agenda are undoubtedly a step in the right direction. What is still needed, though, is a more meaningful and coherent engagement to reorient EU external action accordingly.

As to unilateral sustainability trade instruments, our inquiry on the CBAM Regulation highlighted how the Union failed to abide by the CBDR principle by taking the necessary measures to help LDCs. Such an intervention, which is still possible in the enactment of the CBAM and could be financed by the same revenues generated under the Mechanism, is all the more needed to counter perceptions of regulatory imperialism in North-South relations.[91]

[90] According to Eckes and Krajewski, the said split "can be seen as a potential abuse of [the Commission's] agenda-setting powers" (C. ECKES, P. KRAJEWSKI, P. KRAJEWSKI, "Legal analysis. How sustainable is the EU-Mercosur Agreement?", cit., p. 26).

[91] Cf. Rudloff, who argues that the EU's unilateral sustainability regulations may undermine the cooperative spirit of bilateral trade and reinforce perceptions of regulatory imperialism, particularly in North-South relations (B. RUDLOFF, "The EU between sustainability unilateralism and bilateral trade

As to trade agreements, we have seen the growing relevance attributed to environmental sustainability in FTAs, notably in TSD Chapters. The analysis has revealed that the EU approach, despite the recent changes directed in particular at strengthening the enforceability of sustainability provisions, is still not satisfying. The objective of trade facilitation indeed always trumps over environmental protection and non-trade concerns, as sanctioned by the latter's segregation in a separate, *ad hoc* chapter. In more general terms, the pursuit of free trade appears to have been realised at the expense of fair trade, despite the two being part of the same objective ex Article 3 para. 5 TEU.

Ten years ago, in its Trade for All policy, the Commission publicly pledged "that no trade agreement will ever lower levels of regulatory protection; that any change to levels of protection can only be upward; and the right to regulate will always be protected."[92] As we have seen, this commitment is far from having been fulfilled. Regulatory cooperation, i.e. the alignment of regulations and standards among the trade parties, in TSD Chapters has resulted in a minimalist approach, with commitments generally leveled to the basic international law benchmark. As was put by Sadeleer: "so far, the EU has not been exporting any new standards but has merely been achieving one of its objectives in external relations – compliance with international law."[93] It can be added that, quite paradoxically, the said minimalist approach, when resulting in preferential treatment being granted to goods and services not in compliance with EU rules and principles, also triggers a veritable "counter-Brussels effect". This trend has reached its peak with the EU-Mercosur agreement, whose rebal-

agreements. Paths to better partnerships", in *SWP Working Papers*, V (2025), pp. 12-14.

[92] European Commission, "Trade for All: European Commission Presents New Trade and Investment Strategy", Foreword, available at https://op.europa.eu/en/publication-detail/-/publication/d90eda7c-7299-11e5-9317-01aa75ed71a1.

[93] Cf. I. Damjanovic, N. de Sadeleer, "Values and objectives of the EU in light of Opinion 1/17: 'Trade for all', above all", in *Europe and the World: A Law Review*, IV (2020), available at https://journals.uclpreff.co.uk/ewlr/article/pubid/EWLR-4-6/.

ancing mechanism, in particular, risks representing a potential threat to the same regulatory autonomy of the Union.

In conclusion, the continuing shortcomings of TSD Chapters and more broadly of FTAs, in addressing environmental sustainability, coupled with the practice of mercantilist-minded negotiations, open to lobbies but not to civil society actors, would seem to require a correction of such treaties' economic bias through a veritable integration of sustainability concerns in their whole text, together with more transparency and scrutiny of the related negotiation process. Only by acting coherently with its principles and values can the Union succeed in preserving its regulatory model at home and promoting it externally.

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Finito di stampare nel mese di Maggio 2026
dalla *Grafica Elettronica* - Napoli