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Editorial EYIEL 9 (2018)

Ownership, exploitation and use of natural resources as well as trade and investment in these resources have been core subjects of international economic law for many decades. In its Resolution 1803 (XVII) of 14 December 1962 on "Permanent sovereignty over natural resources", the General Assembly of the United Nations declared that

> [t]he exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities

thus, pointing to the necessity of regulating natural resources in both domestic and international law. While the 1960s and 1970s were dominated by general debates about national sovereignty and the right to expropriate natural resources, the 1980s and 1990s saw movements towards trade liberalisation and the attraction of foreign capital to develop and exploit natural resources. Since the 2000s, natural resources law is increasingly shaped by the requirements of sustainable development and the impact of natural resources exploitation on the environment, human rights and social development. Indeed, many of the 17 Sustainable Development Goals declared by the World Summit in 2015 are intrinsically linked to natural resources use and management.

In light of the continuing importance and relevance of natural resources as a matter of international economic governance, but also considering new challenges and topics such as natural resources in outer space or the deep sea, volume 9 of the *European Yearbook of International Economic Law (EYIEL)* devotes its main thematic section on natural resources law as part of international economic law. Consequently, the contributions of Part I of this volume of the yearbook focus on various aspects of natural resources in international and European trade, investment and commercial law as well as other matters of economic law in the broader sense.

Considering the shift towards sustainable development in natural resources law in recent years, it seems more than appropriate to address this matter from the outset: *Maximilian Oehl* argues that the concept of sustainable development can be seen as

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an overarching principle of natural resources law. He portrays the core elements of sustainable development as a norm of international law and shows the corresponding legal effects. He concludes that sustainable development can be regarded as the ultimate object and purpose of natural resources law. Placing sustainable development at the heart of the matter inevitably leads to tensions with more narrowly defined economic and commercial objectives.

Apart from questions of exploitation and use of natural resources, trade in natural resources has been the subject of significant disputes between nations given the uneven distribution of certain natural resources across the globe. This was felt nowhere more than in the WTO. Recent cases involving Chinese export restrictions are ample proof of this as analysed and discussed by *Ilaria Espa.* She argues that as a result of these cases China is left with basically no margin of manoeuvre to legitimately use export restrictions to achieve economic diversification goals. This may conflict with sustainable development goals. Next to trade disputes, natural resources are also increasingly becoming a subject of WTO accessions as shown through the comparative analysis of WTO Accession Protocols by *Friedl Weiss and Anna Marhold*. They demonstrate that energy and fossil fuels have become prominent topics in accession negotiations, resulting in an increasing amount of commitments on transit and export duties on raw materials and fossil fuels. Trade in natural resources may not only be the source of commercial disputes, but also contribute to military conflicts and human rights violations. This is especially the case for diamonds and gold. *Krista Nadakavukaren Schefer* assesses the schemes regulating gold, diamonds and minerals stemming from conflict zones and reviews the compatibility of these regulatory frameworks with global trade law. She considers whether the Kimberly Process Certification Scheme could—and should—serve as a model for deeper integration of human rights considerations into the WTO system and concludes that the international community should not worry too much about WTO rules when trying to effectively resolve human rights violations in supply chains.

Moving from trade to investment law, *Tarcisio Gazzini* examines the legal protection of foreign investment in the natural resources sector arguing for the need to strike a balance between the private and public interests at stake. He concludes that the clarification and preservation of the right of states to exercise regulatory powers in recent international investment treaties is an important step towards a more efficient and balanced legal framework on foreign investment in general and in the natural resources sector in particular. As investments in natural resources are not only a subject matter of international investment agreements but also of state-investor contracts, *Lorenzo Cotula* examines how these contracts provide the legal basis for natural resource projects. He identifies shifts towards greater contract transparency and growing experience with community-investor agreements in recent practice suggesting new agendas for research and action which require interdisciplinary approaches cutting across traditional boundaries between research and practice and between academic disciplines. Applying principles of permanent sovereignty over natural resources and international investment law to the case of shale gas extraction by means of fracking, *Leonie Reins, Dylan*

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Geraets and Thomas Schomerus ask if the case of fracking is merely another example of the tension between the rules that govern international economic relations and domestic policy considerations, or whether it represents a potential turning point in the way the international community perceives these constraints on domestic policymaking. They focus in particular on the pending Lone Pine investment arbitration case which takes place against the background of increasing public discontent with investor-state dispute settlement and a reconsideration of this concept by several states.

Trade, sustainable development and energy management are also core matters of European economic law. *Jörg Philipp Terhechte* therefore calls for the conceptualisation of a genuine European natural resources law. This should focus, he argues, on safety, sustainability and efficiency in the supply locating the new field of European natural resources law between environmental and economic law. The EU Timber Regulation which establishes a legal regime for trade in timber and timber products could be seen as part of the emerging field of European natural resources law. *Concetta Maria Pontecorvo* assesses the effectiveness of this regulation in the light of its actual implementation and whether it could serve as a model for other EU legislative regimes trying to ensure that EU trade with other countries contributes to sustainable development and the protection of human rights.

The final three chapters of the first part of this yearbook address elements of natural resources law reaching beyond traditional frontiers. As deep seabed mining may soon become a commercial reality, *Joanna Dingwall* evaluates the international legal regime applicable to mining activities in this area. This includes the United Nations Convention on the Law of the Seas (UNCLOS) and the activities of the International Seabed Authority. Similar to deep seabed mining the exploitation of natural resources in the Arctic is still, in many cases, merely potential. However, the consequences of climate change could change this soon. *Fernando Loureiro Bastos* shows that the exploitation of natural resources in the Arctic is currently heavily regulated by domestic and international environmental law and subject to activities of the Arctic Council. A future legal regime for natural resources in the Arctic should not be based on traditional territorial approaches but on cooperation and joint management maintaining a demanding environmental framework. Finally, *Mahulena Hofmann* and *Federico Bergamasco* provide an overview of the international and domestic legal frameworks relevant for the upcoming space mining activities. As existing international agreements do not provide for any specific rules on space mining, a future international regime should take into account that space resources activities have a potential to boost existing space activities and enable further long-time projects, including the long stay of human beings in outer space.

Part II of this EYIEL volume on regional developments focuses on two regions which normally do not feature too prominently in scholarly literature and in political debates, but are of significant importance for the EU. *Seljan Verdiyeva* reports on the law and politics of trade in energy in the Eurasian Economic Union (EAEU) established in 2014 between the Russian Federation, Kazakhstan, Belarus, Armenia and the Kyrgyz Republic. Despite the significant role of energy resources in these

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countries, the formation of the common energy market faces difficulties *inter alia* due to the lack of trust between the members, monopolisation of the energy sectors and dependence on single source of energy, mainly fossil fuel. *David Berry* introduces the Caribbean Community (CARICOM). He reviews the development of regional integration law through the treaty-interpreting jurisprudence of the Caribbean Court of Justice (CCJ) and draws comparisons between Caribbean developments and the EU.

The section of the EYIEL on institutions (Part III) contains—as usual—up-to-date analyses of trade and investment treaties and case law: *Catherine Titi* reports on recent developments in international investment law including newly concluded agreements as well as the proposals to reform the international investment dispute settlement system. *Jan Bohanes, Panagiotis Kyriakou, Christian Vidal and Tatiana Yanguas* focus on WTO case law in 2016; a large proportion of the case law concerns trade remedies, in particular anti-dumping measures. Furthermore, *Hoang Pham, Anjum Rosha and Bernhard Steinki* discuss the inclusion of the Renminbi in the Special Drawing Right (SDR) Basket of the International Monetary Fund which raises the Chinese currency into the club of the most important global currencies. This is the most significant change to the SDR basket in over four decades and may have a lasting impact on the international monetary system.

The final part of the yearbook contains book reviews which partly take up the subject of the main part such as *Jörn Griebel's* review of *Integrating Sustainable Development in International Investment Law* by Manjiao Chi, *Fernando Dias Simões'* review of *Charting the Water Regulatory Future: Issues, Challenges and Directions* by Julien Chaisse and *Christian J. Tams'* take on *Die Bewirtschaftung der genetischen Ressourcen des Meeresbodens* by Matthias J. Annweiler as well as *Der Meeresboden* by Mario Starre. Other reviews address Ben Saul's *The International Covenant on Economic, Social and Cultural Rights*, Travaux Préparatoires (reviewed by *Ibrahim Kanalan*); Jorun Baumgartner on *Treaty Shopping in International Investment Law* (reviewed by *Yun-I Kim*); and David Kennedy on *A World of Struggle* (reviewed by *Gail Lythgoe*) and the *Research Handbook on Trade in Services* edited by Pierre Sauvé and Martin Roy (reviewed by *Charlotte Sieber-Gasser*).

Volume 9 of the EYIEL also introduces a number of editorial reforms. One novelty is that EYIEL now enables articles to be published online as soon as the final version of an article has been reviewed by the editors. This means that authors who concluded their contributions early will also have the benefit of an earlier publication date. Other editorial changes concern the EYIEL team: Most importantly, the editors are happy to welcome *Judith Crämer* to the newly established position of an Assistant Editor of EYIEL. Judith Crämer is Research Assistant at Leuphana University Lüneburg and assumed her new position in February 2018. She already bore most of the managerial tasks and responsibilities in the final phase of Volume 9 of the EYIEL. Without her tremendous engagement and enthusiasm, this volume would not have seen the light of the day. The editors are therefore most grateful to her. Judith Crämer was supported by student assistants in Erlangen and Lüneburg. We therefore owe special thanks to *Rachel Hoepfer* and *Zedlira Shefkiu*.

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Finally, *Anja Trautmann* who already worked with the EYIEL when still at Saarland University moved to Springer in Heidelberg and took up the responsibility of managing the EYIEL from there for which we are ever thankful.

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October 2018

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Part I
Natural Resources Law

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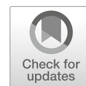
The Role of Sustainable Development in Natural Resources Law



Maximilian Oehl

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1 Introduction

Natural resource (NR) management is a key element for achieving Sustainable Development (SD). According to Sustainable Development Goal (SDG) #12, more precisely its sub-target 12.2, the international community is held to "achieve the sustainable management and efficient use of natural resources" by 2030.[1]

The author would like to thank Markus Krajewski for his valuable comments on an earlier draft of this chapter. All remaining errors are naturally my own.

[1]Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), p. 22.

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The *factual* significance of NR management for SD and vice versa is manifold and ambiguous. For one, in economic terms NR either provide the raw material for processed, e.g. industrial goods or constitute economic goods themselves.[2] Second, they also often represent the objects of environmental protection measures. And third, NR are frequently a or even *the* major source of state revenue and therefore the basis not only for the economic, but also the overall social development of societies.

Moreover, NR activities, especially in the extractive industries, create numerous governance challenges for all stakeholders involved—host and home governments, international organizations, corporations and civil society.[3] Apart from the in situ governance challenges, such as the protection of a specific watercourse against harmful uses, the award of exploration and extraction rights or adequate consultation of local populations whose livelihoods may be concerned by NR activities, the overall *economic* challenge is for states to continuously reap the benefits of resource development and to effectively utilize those for the advancement of society.[4]

Some characteristics of the NR sector make it particularly fit to contribute to SD. Its long-term, capital-intensive projects often constitute promising business opportunities, which attract foreign investment while at the same time potentially generating substantial revenue for host states.[5] For the so-called group of *Commodity Dependent Developing Countries* (CDDCs), these revenues are vital—if not even the only means—to foster development.[6] Moreover, extractive industries typically require vast infrastructure as well as a net of suppliers and other partners in the supply chain. This creates opportunity for local content development and technology transfer through so-called "spillover effects".[7]

[2]Both can be summed up under the term "commodity" in the sense of the definition provided by Article 56(1) of the 1948 Havana Charter.

[3]Sachs L (2013) On Solid Ground: Toward Effective Resource-Based Development. World Politics Review, https://beta.extractiveshub.org/servefile/getFile/id/1616 (last accessed 7 February 2018), p. 6.

[4]Cf. instructively on the range of governance challenges in the commodity sector Bürgi Bonanomi E et al. (2015), "The Commodity Sector and Related Governance Challenges from a Sustainable Development Perspective: The Example of Switzerland and Current Research Gaps", WTI Working Paper, 14 July 2015, https://www.wti.org/media/filer_public/38/38/38387f2d-b6b5-40d3-9bf5-dc42b8d3eefa/wti_cde_iwe_working_paper_july_2015_2_the_commodity_sector_and_related_gov.pdf (last accessed 7 February 2018).

[5]Sachs L (2013) On Solid Ground: Toward Effective Resource-Based Development. World Politics Review, https://beta.extractiveshub.org/servefile/getFile/id/1616 (last accessed 7 February 2018), p. 2.

[6]CDDCs are defined as those states in which the ratio of the value of commodity exports to the value of total merchandise exports exceeds 60%, 'The State of Commodity Dependence 2016' UN Doc UNCTAD/SUC/2017/2, http://unctad.org/en/PublicationsLibrary/suc2017d2.pdf (last accessed 7 February 2018), p. 19. For the list of CDDCs cf. 'The State of Commodity Dependence 2016' UN Doc UNCTAD/SUC/2017/2, http://unctad.org/en/PublicationsLibrary/suc2017d2.pdf (last accessed 7 February 2018) cf. pp. 23–24.

[7]Sachs L (2013) On Solid Ground: Toward Effective Resource-Based Development. World Politics Review, https://beta.extractiveshub.org/servefile/getFile/id/1616 (last accessed 7 February 2018), p. 2.

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However, in order to thus "make the commodity [or NR] sector work" for SD, all stakeholders are held to pursue targeted SD policies.[8] This political agenda is mirrored in SD as a *legal* concept of international law.[9] Regarding its legal dimension, both corporations and governments are for instance held to commit to the highest environmental, social and human rights standards in order to support SD.[10]

SD as a concept insofar represents a fascinating and equally nebulous object of study. While SD generally can be perceived as both an analytical as well as a normative concept,[11] this study examines first and foremost the *legal normativity* of SD as a concept of international law. After casting some definitional bases (Sect. 2), it discusses in detail the evolution of SD from a political objective (Sect. 3) to a concept of international law (Sect. 4). It thus seeks to contribute to the constantly evolving body of treatises, which aim at clarifying the functioning of SD as a legal concept.[12]

2 What Is Natural Resources Law?

For the purposes of determining what can actually be described as Natural Resources Law, we shall first define the objects it applies to, i.e. natural resources.

While Principle 2 of the 1972 Stockholm Declaration refers to "natural resources [. . .], including the air, water, land, flora and fauna and especially representative samples of natural ecosystems", international law does not provide a clear definition of the term.[13] Beyerlin and Scholz describe it as being "narrower than that of 'nature', but broader than that of 'biological diversity'."[14]

[8]Blasiak R et al. (2016) Making the Commodity Sector Work for Developing Countries Local Impacts, Global Links, and Knowledge Gaps. Swiss Academies Factsheet, Vol. 11, No. 2, https://iwe.unisg.ch/-/media/dateien/instituteundcenters/iwe/afactsheet2016commodities2.pdf (last accessed 7 February 2018).

[9]The usage of the term 'concept' throughout the study is not meant to refer to a specific normative categorization of SD, but rather a placeholder until its conclusive classification in the final section of the main part, cf. Sect. 4.4.

[10]Natural Resource Governance Institute (2014) Natural Resource Charter, 2nd edition, https://resourcegovernance.org/sites/default/files/NRCJ1193_natural_resource_charter_19.6.14.pdf (last accessed 7 February 2018), precepts #11 and #12.

[11]Sachs (2015), pp. 3–8. Sachs seems to understand "normativity" rather in the sense of a value decision in favour of complexity and thus less in a legal sense, p. 7.

[12]Schrijver and Weiss (2004), Schrijver (2008), Barral (2012), and Cordonnier Segger and Weeramantry (2017).

[13]Cf. Schrijver (1997), pp. 14–15; for "natural wealth" Schrijver employs the following definition: "those components of nature from which natural resources can be extracted or which serve as basis for economic activities"; Beyerlin and Holzer (2013), para. 1; under the 43 US Code of Federal Regulations Sec. 11.14, natural resources are defined as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States".

[14]Beyerlin and Holzer (2013), para. 1.

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Legal dictionaries refer to a natural resource i.a. as

> [a]ny material from nature having potential economic value or providing for the sustenance of life, such as timber, mineral, oil, water, and wildlife.[15]

Schrijver likewise seems to employ a rather economic understanding of the term and defines natural resources as

> supplies drawn from natural wealth which may be either renewable or non-renewable and which can be used to satisfy the needs of human beings and other living species.[16]

He also alludes to the differentiation between non-renewable "stock" resources and renewable "flow" resources, yet not without pointing to the blurry nature of the line, which frequently runs between these two categories.[17] Some point to the fact that the general duty to preserve natural resources for the benefit of present and future generations is amplified with regard to the former—vital renewable resources such as wildlife and natural ecosystems.[18]

Natural Resources Law is the field of law, which regulates all NR-related activities, especially exploration, exploitation or other commercial usage, and preservation. For the purposes of this study, NRL depicts the body of those norms of *international* law, which address corresponding regulatory objectives.[19] As such, it represents a crosscutting subject of international law, which adopts a NR-specific perspective on the body of international law thus identifying those norms, which create the regulatory picture as it applies in the NR sector.[20]

[15] Garner (2009), p. 1127; cf. Majzoub and Quilleré-Majzoub (2013), p. 10361.

[16] Schrijver (1997), p. 19.

[17] Schrijver (1997), pp. 13–14.

[18] del Castillo-Laborde (2010), para. 4.

[19] On the US example of domestic NRL Fischman (2007).

[20] Cf. With regard to international energy law, cf. Vinuales (2013). On conceptualizations of fields of law cf. expertly Aagaard (2010). A parallel notion to NRL is the narrower field of International Commodity Law (ICL). It has a stronger economic connotation as it focuses exclusively on those items originating from natural resources—or, under Schrijver's terminology, "natural wealth"—that are typically being traded and/or refined/processed for specific end uses as e.g. foodstuffs or industrial goods. Therefore, its concept and terminology are preferable whenever one is seeking to address this specific economic use of natural resources—or, for that matter more precisely, commodities. In this sense, the broader field of NRL appears to be the more favourable concept whenever, beyond their use as commodities also other economic usages of natural resources, such as navigation, or energy generation and their related governance challenges are concerned.

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3 SD as a Political Objective

The notion of SD has witnessed a remarkable evolution in the past decades. While the concept of sustainability has its origins already in eighteenth century theories on sustainable forest management,[21] it has increasingly been linked to the challenge of generating wholesome economic growth starting in the 1970s.[22]

Following the realization that while the First UN Development Decade between 1960 and 1970 had been successful in terms of economic growth, but issues of mass poverty and environmental protection remained or even worsened, the UN introduced a new chapter on "Human Development" to its overall development strategy for the Second Development Decade in 1970.[23] Subsequently, in 1972, the Stockholm UN Conference on the Human Environment addressed the challenge of upholding sustainability in the context of economic growth, i.a. by linking the need for development to the objective of environmental protection (principle #8 Stockholm Declaration) or calling for integrated development planning (principle #13 Stockholm Declaration).[24]

The concept of SD as such appeared on the scene of international politics in 1980 when the IUCN published its *World Conservation Strategy* with the subtitle *Living Resource Conservation for Sustainable Development*.[25] Its popularity increased significantly with the famous 1987 *Brundtland report*, which defined SD as a "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[26]

Thus having earned international attention, SD featured prominently in the 1992 Rio Declaration on Environment and Development, which in its Principle #1 puts human beings at the centre of concerns for SD.[27] Another outcome document of the Rio conference, the so-called *Agenda 21* launched a "new global partnership for

[21]Proelß (2017), para. 50; Gehne (2011), p. 11.

[22]Gehne (2011), p. 21 with reference to the UN GA International Development Strategy for the Second United Nations Development Decade, 24 October 1970, UN Doc. A/RES/2626(XXV), http://www.un-documents.net/a25r2626.htm (last accessed 7 February 2018).

[23]UN GA International development strategy for the Second United Nations Development Decade, 24 October 1970, UN Doc. A/RES/2626(XXV), para. 8; cf. Gehne (2011), p. 21. In addition, "the Founex Report 'Development and Environment' of 1971 pointed to the linkage of long-term development goals and environmental protection", cf. Beyerlin (2013), para. 2.

[24]Sachs (2015), p. 4.

[25]Cf. before also UN GA International Development Strategy for the Third United Nations Development Decade, 5 December 1980, UN Doc. A/RES/35/56, cf. Beyerlin (2013), para. 3.

[26]Report of the World Commission on Environment and Development: Our Common Future, 4 August 1987, UN Doc. A/42/427, http://www.un-documents.net/our-common-future.pdf (last accessed 8 February 2018), Chap. 1, para. 49.

[27]It is furthermore expressly contained in Principles 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27 of the 1992 Rio Declaration on Environment and Development, 12 August 1992, UN Doc. A/CONF.151/26 (Vol. I), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (last accessed 8 February 2018).

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sustainable development" thus setting in motion an almost universal process guided by a broad catalogue of recommendations.[28] The *Agenda 21* marked the beginning of a process, which eventually made way for the pivotal status that SD is holding in international relations today.

In 2000, environmental sustainability was included in the *Millennium Development Goals*, as Goal #7. Two years later, in 2002, SD set tone and agenda for the Johannesburg World Summit on SD. Its outcome document, the WSSD Plan of Implementation explicitly built on the achievements since the 1992 Rio conference and covered a broad range of SD-related issues from poverty eradication, consumption and production patterns, natural resource management as base of economic and social development, health and SD to the institutional framework for SD.[29] In the 2005 World Summit Outcome Resolution, the UN General Assembly reaffirmed SD as a "key element of the overarching framework of United Nations activities."[30]

In 2012, at the so-called Rio+20 conference, the international community renewed its commitment to SD, now increasingly summarizing SD by reference to three constituent elements: economic and social development as well as environmental protection.[31] In order to focus the joint efforts on specific targets, the document called for the elaboration of a set of sustainable development goals (SDGs).[32]

The 2030 Agenda for Sustainable Development titled *Transforming Our World* provides those SDGs. In the corresponding 2015 Resolution of the UN General Assembly, the latter describes the adoption of said agenda as an "historic decision on a comprehensive, far-reaching and people-centred set of universal and transformative Goals and targets."[33] The *SD Agenda* marks the end point of the evolution of SD from a notion originating in forest management and later gaining relevance in environmental protection policy to *the* universal political agenda of our time. Mindful of the great weight this agenda carries, the UN General Assembly describes it as:

> . . .an Agenda of unprecedented scope and significance. It is accepted by all countries and is applicable to all, taking into account different national realities, capacities and levels of development and respecting national policies and priorities. These are universal goals and

[28]Cf. Beyerlin (2013), para. 5.

[29]Plan of Implementation of the World Summit on Sustainable Development, 4 September 2002, UN Doc. A/CONF.199/20, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed 8 February 2018).

[30]2005 World Summit Outcome, 24 October 2015, UN Doc. A/RES60/1, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1 (last accessed 8 February 2018), para. 10.

[31]The future we want, 11 September 2012, UN Doc. A/RES/66/288, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last accessed 8 February 2018), para. 1.

[32]The future we want, 11 September 2012, UN Doc. A/RES/66/288, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last accessed 8 February 2018), para. 246.

[33]Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 2.

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> targets which involve the entire world, developed and developing countries alike. They are integrated and indivisible and balance the three dimensions of sustainable development.[34]

While therefore the status of SD as the universal *political* objective of the international community is clearly spelled out and—not least due to its overarching, integrated nature—remains largely undisputed,[35] the situation is less clear with regard to the *legal* weight SD carries as a concept of international law. Its legal contours are regularly said to remain of some vagueness[36]; also its nature as a principle, a concept or some other kind of law has been the subject of quite a few debates in international legal scholarship and jurisprudence in the past decades.[37] As has been stated by others elsewhere,[38] now seems to be the time to seek greater clarity in this regard—not least in order to flank the endeavour to *operationalize* SD, especially through the SDGs, with the legal instruments necessary.

4 SD as a Concept of International Law

Subsequently, the conceptual content of SD (Sect. 4.1) as well as its legal effects (Sect. 4.2) will be portrayed before approaching the debate on its legal status under international law (Sect. 4.3). Lastly, this paper examines the hypothesis that SD constitutes a fundamental *regulatory objective* of the international legal order (Sect. 4.4) as well as the object and purpose of NRL (Sect. 4.5) and what effects such claim brings about.

4.1 The Conceptual Content of SD

Despite the vagueness mentioned that is said to be surrounding the legal nature of SD, the core elements of its conceptual content have crystallised quite clearly over the past decade. As portrayed above, the *Brundtland* report initially employed a mainly *inter*generational understanding of the concept of SD focusing on the conservation of the planet for future generations. Subsequently, however, SD evolved normatively to a concept that puts human beings and their need for sufficient

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[34] Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 5.

[35] See already Schrijver (2008), p. 251.

[36] Cordonnier Segger and Weeramantry (2017), p. 5.

[37] Cordonnier Segger and Weeramantry (2017), p. 5; Lowe (1999); Schrijver and Weiss (2004); Schrijver (2008); Beyerlin (2013), para. 15.

[38] Cordonnier Segger and Weeramantry (2017), p. 5.

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socio-economic development at the centre, thus emphasizing *intra*generational elements, yet without fully abandoning the intergenerational perspective.[39]

Beyond references to SD in the reports mentioned, the conceptual content of SD was first elaborated in legal terms in the, however non-binding, Rio Declaration of 1992.[40] Principle 4 Rio, resembling the operational language of a legal rule, for instance postulates 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.

While 12 of the 27 Rio Principles expressly refer to SD, its so-called social or third pillar had only been added 5 years later when the UN General Assembly adopted its *Programme for the Further Implementation of Agenda 21*.[41] In the meantime, SD had already been referred to in various international agreements, such as Article 3 (4) of the 1992 UNFCCC, Article 8 lit. e) of the 1992 Convention on Biological Diversity (1992), i.a. Articles 2, 4 and 5 of the 1994 UN Convention to Combat Desertification and Drought (1994), Article 1 lit. c) of the International Tropical Timber Agreement (1994), or the preamble of the 1994 WTO agreement—yet without defining the concept.[42]

Despite its inclusion in further documents and agreements of international and supranational law respectively, such as the Doha Declaration of Ministers of 14 November 2001, Articles 2 and 6 of the EC treaty or i.a. Article 1 of the 2001 Cotonou Agreement no further clarifications as to the conceptual contents of SD were made.[43] However, the 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific provided the following detailed definition for 'sustainable development' in its Article 3(1)(a):

> . . .[S]ustainable development means the process of progressive change in the quality of life of human beings, which places them as the centre and primary subjects of development, by means of economic growth with social equity and transformation of production methods and consumption patterns, sustained by the ecological balance and life support systems of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and full public participation, peaceful coexistence in harmony with nature, without prejudice to and ensuring the quality of life of future generations.[44]

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[39]Barral (2012), pp. 380–381 thus defines the element of socio-economic growth as a matter of the *intra*generational, the element of environmental protection as the *inter*generational equity that SD postulates.

[40]Barral (2012), p. 381.

[41]Programme for the Further Implementation of Agenda 21, 28 June 1997, UN Doc. A/RES/S-19/2, http://www.un.org/documents/ga/res/spec/aress19-2.htm (last accessed 8 February 2018), Annex, para. 3; cf. Barral (2012), p. 381.

[42]Beyerlin (2013), para. 6.

[43]Cf. Schrijver (2017), p. 100.

[44]The 2002 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, 18 February 2002, CISDL Translation available online: http://www.cep.unep.org/services/nepregseas/Convention_English_NEP.doc (last

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Also international jurisprudence has referred to SD in various instances. In its 1997 judgement in the *Gabcikovo-Nagymaros* case, the ICJ described the "need to reconcile economic development with protection of the environment" as "aptly expressed in the concept of sustainable development."[45] In his corresponding separate opinion Judge Weeramantry spoke of SD as a "principle of normative value".[46] One year later, in 1998 the WTO Appellate Body in the *US-Shrimps* case applied SD as a guiding principle in the interpretation of the chapeau of Article XX GATT, which "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO agreement."[47] In 2005, the arbitral tribunal in the *Iron Rhine* case noted that international law "require[s] the integration of appropriate environmental measures in the design and implementation of economic development activities."[48] And in its 2010 *Pulp Mills* case, the ICJ recognized a legal obligation for the Parties to "strike a balance between the [commercial] use of the waters and the protection of the river consistent with the objective of sustainable development."[49]

While these prominent statements stemming from international jurisprudence to some extent sharpen the notion of SD—as requiring the balancing of economic development and environmental protection—further conceptual clarity as regards the content of SD is provided by a wide range of declarations, resolutions and reports originating from States or international organizations.[50]

As some authors point out, the synthesis of these documents exhibits a remarkable degree of consistency with regard to the core concept of SD.[51] Starting in 1997, since the adoption of its *Programme for the Further Implementation of Agenda 21*,

accessed 8 February 2018); cf. What is Sustainable Development Law?. A CISDL Concept Paper, Montreal, 2005, http://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf (last accessed 8 February 2018).

[45] *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf (last accessed 8 February 2018), p. 78, para. 140; cf. Beyerlin (2013), para. 16.

[46] Separate Opinion of Vice-President Weeramantry to *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf (last accessed 8 February 2018), p. 88; cf. Beyerlin (2013), para. 16.

[47] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58544&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 8 February 2018), para. 153; cf. Gehne (2011), p. 294.

[48] *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, 27 RIAA (2005) 35, http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf (last accessed 8 February 2018), para. 59; cf. Barral (2012), p. 387.

[49] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, http://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf (last accessed 8 February 2018), p. 74, para. 177.

[50] Cf. Barral (2012), p. 381; Wälde (2004), p. 121.

[51] Barral (2012), p. 380.

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the international community generally refers to SD as requiring "the integration of its economic, environmental and social components."[52] Subsequently, the 2002 WSSD Plan of Implementation speaks of "economic development, social development and environmental protection" as the "interdependent and mutually reinforcing pillars" of SD.[53] Ever since, this definition of SD has been constantly repeated in various documents issued by the international community or the UN respectively, such as the 2005 World Summit Outcome,[54] the Rio+20 outcome document "The Future We Want"[55] or the SD Agenda[56]—in just slightly differing wordings.

What they, as well as the definitions of SD circulating within international legal scholarship,[57] all share are their references to the three constituent elements of SD: environmental protection, social and economic development. Some authors and international documents respectively in addition accentuate the forward-looking perspective SD employs,[58] a tribute to the intergenerational origins of the concept. Others add an indication of the integrated manner in which SD shall be pursued, also described as the *integration principle*.[59]

Depending on what degree of comprehensiveness one prefers, the definition of SD thus generally contains between three and five express elements. Its *core* conceptional content can be defined as the consolidation of socio-economic development and environmental protection. Both, the reference to the long-term focus of SD as well as the integration principle, are therefore at the same time logical supplements and somewhat inherent to the concept of SD—with the *inter*generational perspective in a sort operating as guideline and measuring tool of the integrated pursuit of SD.[60]

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[52]Programme for the Further Implementation of Agenda 21, 28 June 1997, UN Doc. A/RES/S-19/2, http://www.un.org/documents/ga/res/spec/aress19-2.htm (last accessed 8 February 2018), Annex, para. 3.

[53]Plan of Implementation of the World Summit on Sustainable Development, 4 September 2002, UN Doc. A/CONF.199/20, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed 8 February 2018), para. 2.

[54]2005 World Summit Outcome, 24 October 2015, UN Doc. A/RES60/1, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1 (last accessed 8 February 2018), para. 10.

[55]The future we want, 11 September 2012, UN Doc. A/RES/66/288, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last accessed 8 February 2018), para. 3.

[56]Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 2.

[57]E.g. SD as the "conceptual bridge" between right to social and economic development and the imperative to protect the environment, Cordonnier Segger and Weeramantry (2017), p. 6.

[58]Gehne (2011), p. 291.

[59]Barral (2012), p. 381; cf. also ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002, UN Doc. A/CONF.199/8, 9 August 2002, http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/8&Lang=E (last accessed 8 February 2018), principle #7.

[60]These two elements, however, to my mind rather constitute *additional* components of SD, which serve to further clarify its functioning and especially to guide its application. I therefore suggest to

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This conceptual content of SD, however, is not merely an end in itself, but much rather inspired by and henceforth guides a body of law, which has been described as International SD Law. It is defined as the corpus of international law that regulates the relevant intersections between international environmental, economic and social law in order to foster SD.[61] SDL can be defined as the intersection of social, ecological and economic subject-matters of international law.[62]

Further precision to this body of SDL is being provided by the so-called New Delhi Principles *Relating to* SD.[63] These principles have been elaborated by a committee composed of international legal scholars under the auspices of the International Law Association (ILA) in 2002.[64] Instead of defining SD itself, they rather portray the precepts either *emanating from* or *pursuing* the objective of SD.[65] The ILA Committee elaborated the following, non-exhaustive seven principles:

1. The duty of States to ensure sustainable use of natural resources,
2. The principle of equity and the eradication of poverty,
3. The principle of common but differentiated responsibilities,
4. The principle of the precautionary approach to human health, natural resources and ecosystems,

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distinguish between these supplements of SD and the *core concept* of SD. cf. in the same vein, Proelß (2017), para. 52.

[61]What is Sustainable Development Law?. A CISDL Concept Paper, Montreal, 2005, http://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf (last accessed 8 February 2018), p. 1.

[62]Gehne (2011), p. 54.

[63]ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002, UN Doc. A/CONF.199/8, 9 August 2002, http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/8&Lang=E (last accessed 8 February 2018); Schrijver (2008), p. 173.

[64]The ILA, which was founded in 1873, today has more than 4300 members worldwide, among them renowned personalities who are holding or held prestigious positions in international jurisprudence and academia, cf. http://www.ila-hq.org/index.php/about-us/aboutus2 (last accessed 8 February 2018). It constitutes one of the most authoritative organisations producing international legal scholarship, many of its reports are being widely perceived by international and governmental organisations as well as academia. The 2002 ILA Principles feature prominently in many treatises on the topic of SD and thus appear to have been recognized as an accurate account of the law relating to SD, cf. i.a., Schrijver (2008); Grosse Ruse-Kahn (2010); Cordonnier Segger (2017); Schrijver (2017).

[65]In a preambular paragraph, however, SD is defined as an "objective" that "involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations", ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002, UN Doc. A/CONF.199/8, 9 August 2002, http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/8&Lang=E (last accessed 8 February 2018).

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5. The principle of public participation and access to information and justice,
6. The principle of good governance,
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

In the last preambular paragraph of the 2002 New Delhi Declaration, it added that in its view the "consolidation and further development" of these seven principles "would be instrumental in pursuing the objective of sustainable development in an effective way."[66]

The subsequent sections elucidate the specific relationship between SD as a legal concept and NRL.

4.2 The Legal Effects of SD

The two major legal effects of SD are reflected in its core conceptual content.

For one, SD obliges states to conduct a balancing exercise between economic, ecological and social aspects before coming to a decision. This is the effect demonstrated in the cases *Gabcikovo-Nagymaros* and *Pulp Mills*.[67] In NRL, it is reflected in the principle of sustainable use, which is deemed to be an emerging customary rule.[68] This obligation has been identified as the clear, *primary rule*, which ultimately mandates states to "act sustainably".[69] Evidently, such a rule can only be respected in a *relative* manner—relative to the other objectives the respective legal subject is obliged to pursue.[70] Barral insofar speaks of an "obligation of means" that SD imposes on states, in that it only requires the state to make the efforts necessary to perform the balancing exercise and not to reach a specific result.[71]

Whether or not a state has conducted the balancing exercise correctly and therefore fulfilled its duty according to the SD rule, can be assessed through

[66]ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002, UN Doc. A/CONF.199/8, 9 August 2002, http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/8&Lang=E (last accessed 8 February 2018).

[67]Cf. previous section, Sect. 4.1.

[68]ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, http://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), p. 14, Annex, Guiding Statement #3.

[69]Cf. Proelß (2017), para. 56; Gehne (2011), p. 314 in this respect describes SD as "multipolar programme norm"; Barral (2012), p. 388.

[70]Cf. Gehne (2011), p. 314. However, given the universal nature of SD, many, if not most of the objectives a state is typically pursuing can generally be subsumed under one of the three pillars of SD.

[71]Barral (2012), p. 388.

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"measuring tools", such as the precautionary principle, including e.g. the obligation to perform an Environmental Impact Assessment.[72] What exact standards have to be met in order to act in conformity with SD, however, will vary according to the specific circumstances, especially whether a particular treaty applies and whether this treaty specifies the balancing obligation.[73] The SDGs, including its 169 targets and sub-targets may serve to further specify the "how" of the balancing exercise that states need to perform according to the rule contained in SD—especially if and where international judges contribute to the development of legal instruments for operationalizing them.[74]

For the other, SD also operates as a *methodical norm* that regulates how certain legal elements have to be applied or interpreted.[75] This effect is clear, where SD expressly features in a specific treaty, e.g. in the preamble as in the *US-Shrimp* case before the WTO Appellate Body.[76] SD here added "colour, texture and shading" to the Appellate Body's interpretation of the term "exhaustible natural resources" of Article XX(g) GATT, essentially functioning as an interpretation guideline.[77]

On the basis of these legal effects of SD as a *primary rule* on the one hand and a *methodical norm* on the other, we shall now turn to the question what legal status SD exhibits.

4.3 The Legal Status of SD

The legal status of SD has remained unclear and debated for quite some time now. Some argue that this might have been due to the need to appease economic interest groups that otherwise could have voiced opposition against SD as a clearly spelled out, strong legal concept.[78] This author agrees that, after many legal scholars over the past decade have paved the way therefore, the time has now come to seek greater

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[72]Cf. Barral (2012), p. 388; Proelß (2017), para. 56.

[73]Barral (2012), p. 388 speaks of varying circumstances rationae materiae, temporis, personae, and loci. Proelß (2017), para. 56 points to the wide margin of discretion that should be conceded to state actors as to the "*how*" of the balancing exercise given the *political* nature of the task. This indicates that the SD *rule* will mainly influence discretionary decisions of the legislative and executive branches.

[74]Cf. also Proelß (2017), para. 57.

[75]Gehne (2011), p. 324. In this dimension, SD thus particularly influences decisions of the judiciary branch.

[76]*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58544&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 8 February 2018), para. 153; cf. Gehne (2011), p. 294.

[77]Cf. Barral (2012), p. 392.

[78]Cordonnier Segger and Weeramantry (2017), p. 5.

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clarity as to the legal status of SD especially given the universal role SD has meanwhile obtained as a *political* objective of the international community. It is a requirement central also to the obligation of the international community, according to i.a. Principle 27 of the 1992 Rio Declaration to further develop the international law fostering SD.[79]

4.3.1 The General Debate

The opinions on the legal status of SD differ to a large degree. On the one end of the spectrum, some authors argue that SD would constitute a mere political ideal without any normative force.[80] They, however, disagree as to whether SD could have the effect of creating subsequent norms of international law that could flow from it.[81] Others describe SD as a "constitutional guiding concept" or "meta principle".[82] The functioning of such meta principles has been described as "set[ting] the bounds for the types of proposals and arguments that can be made" in international negotiations. As such they are said to "establish the context" for the development of more specific norms, e.g. in international treaties.[83] Lowe thus described SD as belonging to a category of "modifying" or "interstitial" norms, which "are pushing and pulling the boundaries of true primary norms" in cases where they interfere.[84] These modifying norms are said "not [to] seek to regulate the conduct of legal persons directly", i.e. *not* to legally bind subjects.[85] Instead their application is limited to the application, especially interpretation of the law.[86]

While this view seems long to have dominated the debate, more and more authors have abandoned this standpoint. Categorizing SD as a "modifying" and thus secondary norm of international law, according to Proelß can serve to circumvent the discussion as to whether it has obtained customary status as a "primary norm". However, he points to the fact that one has to clearly distinguish between the

[79] Cf. already Report of the World Commission on Environment and Development: Our Common Future, 4 August 1987, UN Doc. A/42/427, http://www.un-documents.net/our-common-future.pdf (last accessed 8 February 2018), Chap. 12.

[80] Beyerlin (2007), pp. 444–445; cf. Proelß (2017) para. 53; also Beyerlin (2013), para. 19.

[81] Beyerlin (2013), para. 19 referring to Lowe (1999), p. 30 deems excluding such an effect "hardly persuasive".

[82] Scheyli (2008), pp. 296–298, 352–353; cf. Proelß (2017), para. 53.

[83] Bodansky (2009), 203; cf. Proelß (2017), para. 53.

[84] Lowe (1999), pp. 31, 33; cf. Proelß (2017), para. 53; Beyerlin (2013), para. 17.

[85] Lowe (1999), p. 33; cf. Barral (2012), p. 387.

[86] Gehne (2011), pp. 32–322; Lowe (1999), p. 34; cf. Barral (2012), p. 387.

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classification of SD according to its normative nature and questions related to its binding effect.[87]

Mindful of treating these matters separately, authors increasingly now highlight that despite its open, flexible nature SD *does* provide a clear rule,[88] which obliges states to "act sustainably"[89] or, more concretely, "to balance social, economic and ecological interests".[90]

4.3.2 SD as a Principle of International Law?

One way to clarify the legal nature of SD could lie in defining it as a principle of international law—a question that has equally sparked intense debates.

According to Statement #1 of the 2012 Sofia Guiding Statements issued by the ILA,

> recourse to the concept of 'sustainable development' in international case-law may, over time, justify a hardening of the concept itself into a principle of international law, despite a continued and genuine reluctance to formalise a distinctive legal status[.]

The ILA statement alludes to another contentious issue in international legal methodology—the question what constitutes a principle of international law and in what way a new principle can be identified.

The usual, obvious starting point of treatises on this matter is Article 38 of the ICJ Statute, which prominently portrays the sources of international law. Next to international conventions (lit. a)), international custom (lit. b)) and "the general principles of law recognized by civilized nations" (lit. c)) are being listed as such. Judicial decisions "and the teachings of the most highly qualified publicists of the various nations" according to Article 38 lit d) serve as subsidiary means for the determination of rules of law. The interpretation of Article 38 lit. c) ICJ Statute, however, is controversial. "General principles" are being understood as either principles of

[87]Proelß (2017), para. 54. The ILA scholars in this respect call for more "flexibility" in the assessment of the normative quality of SD in order to facilitate an accurate capture of its legal effects, ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), p. 6.

[88]Barral (2012), p. 378 refers to SD as a primary norm of international law, which "purports to directly regulate conduct and has properly material and direct legal implications".

[89]Gehne (2011), p. 314.

[90]Proelß (2017), paras. 54–55; also Barral (2012), p. 388; Proelß (2017), para. 56 sees this rule to have obtained the status of customary international law. Referring to the great number of international legal documents, in which SD is contained, he makes this claim in relation to the "if" of a balancing exercise. In his view, the customary content of SD requires states to conduct this balancing exercise. Yet, he also points out that IL—at least for now—provides little to no guidance as to *how* such a balancing exercise shall be conducted.

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domestic law, principles of international law or those principles of domestic law, which apply to international relations.[91]

SD originates from the international legal order and therefore most aptly falls within the second category.[92] While principles of domestic law are typically being identified through an exercise of comparing domestic legal orders, principles of international law are generally being derived from either international treaty law or custom.[93] The exercise of assessing the status of a particular norm as either custom or a principle of international law can therefore overlap.[94]

Characteristics of General Principles

Herczegh in 1969 defined a principle of law as "a norm of general validity which is manifested not in a single statutory provision, but by a group of mutually interdependent legal rules or their system."[95] MacCormick refers to "principles as statements that give expression to the purposes and values behind individual norms."[96] Eckhoff and Sundby see principles as "guidelines", which, in contrast to "rules", guide the decision especially of judges where there are no uncontroversial individual norms regulating the particular situation.[97] Koskenniemi distinguishes between a *normative* and a *descriptive* theory of principles.[98] According to the former, principles contain norms that have an effect on substantive decision-making—either as guidelines or as elements describing the "background" of the international legal order, in which the individual judge or "Rechtsanwender" needs to make his decision.[99] Under the descriptive theory, the "organizational function" of principles is being emphasized. They are seen as instruments "to describe and systematize the totality of [a certain set of] individual norms".[100] As such, principles constitute "theoretical concepts [. . .] whose validity is dependent on the validity of the norms or statements to which they refer".[101]

[91] Shaw (2017), pp. 73–74; Thirlway (2010), p. 109; Jennings and Watts (1992), pp. 36–40.

[92] Given that SD has as of now also found proliferation in many domestic legal orders, it could over time also evolve to a domestic principle of law that applies to international relations.

[93] Cf. Thirlway (2010), p. 109.

[94] This question again is to be distinguished from the one relating to the *binding nature* of SD; cf. also Sect. 4.4.4 below.

[95] Koskenniemi (2000), p. 371 with reference to Herczegh (1969), p. 36.

[96] Koskenniemi (2000), p. 371 with reference to MacCormick (1978), pp. 65–72.

[97] Koskenniemi (2000), p. 373 with reference to Eckhoff and Sundby (1976); Similarly Cordonnier Segger (2017), p. 61 with reference i.a. to Dworkin (1977), pp. 22–31.

[98] Koskenniemi (2000), p. 367.

[99] Koskenniemi (2000), pp. 368–370.

[100] Koskenniemi (2000), pp. 381–383.

[101] Koskenniemi (2000), p. 382.

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When it comes to SD, both its normative and descriptive dimension can be witnessed in international law. As to the latter, especially its organizational function relating to the elaboration of SDL and the New Delhi Principles respectively come to mind. With regard to the normative dimension of SD, things become a little more intricate. In its *Gabčikovo-Nagymaros* and *Pulp Mills* judgments the ICJ saw an obligation for the Parties to reconcile economic development with environmental protection. While laying out this obligation, the court, however, was not guided by a hypothetical "principle" of SD in the sense that it required the judges to arrive at a certain result. Much rather, SD here had the effect on the court to *at all* set out said obligation to balance economic and ecological aspects, in the end merely demanding the Parties to e.g. "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant."[102] This however does not necessarily imply that SD does not constitute a principle, but much rather points to its conceptual content, which—at least for now—primarily provides for the "if" of the balancing exercise, but less so for the "how".

The Constructivist Exercise of Forming Principles of International Law

While SD thus exhibits some of the traits usually common for legal principles, it is not yet clear, whether SD actually constitutes a principle of international law. While Koskenniemi alludes to the *constructivist exercise* necessary in order for a new principle to emerge, the perception of what principles are, seems to still be dominated by the positivist view that law is to be seen as equivalent to state behaviour. According to Virally, whose view is paradigmatic for this perception, "…the existence or non-existence of common principles is a question of fact to be solved by examination rather than *a priori* opinion."[103] Koskenniemi describes this view as "perhaps the view of the majority of international lawyers today", which sees principles as "generalizing descriptions of certain regularities in State behaviour."[104] It may be due to this view that the ILA scholars recognise a "continued and genuine reluctance to formalise a distinctive legal status" of SD.

At this point, one could now, in an attempt to assess whether or not SD in fact constitutes a principle of international law, refer to the many treaties, resolutions, declarations and examples of international as well as national jurisprudence, which refer to SD in one way or the other. At the end of an exercise that resembles the assessment of international custom according to state practice and opinio juris and

[102] *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf (last accessed 8 February 2018), p. 78, para. 140.

[103] Virally (1968), p. 147; cf. Koskenniemi (2000), p. 385.

[104] Koskenniemi (2000), p. 385.

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somewhat narrows the legal analysis regarding the emergence of a new principle down to a "matter of relative numbers", some would likely deem the result to be sufficient for making such determination, while others probably would not.[105]

The author agrees with ILA Guiding Statement #1 that this situation could over time be remedied through judges that, by recourse to SD, render decisions, which further specify scope and nature of SD as a legal principle. Such a development may, first of all, however require that judges capacitate themselves to do so—by at least partly departing from the still dominant methodology when it comes to discerning principles of international law.

As many have already argued, rigid approaches to the identification of emerging norms of international law can create major problems for the international legal order.[106] While of course we are far from the tumultuous, deadlocked scenarios of the interwar period, this thought is still worthy to be borne in mind when approaching the task of determining whether or not a specific norm has emerged to become part of international law *today*. The former president of the ICJ, R. Y. Jennings already in 1981—referring to customary international law—prompted the international law community to

> face squarely the fact that the orthodox tests of custom – practice and opinion juris – are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions and it is often the focus of contention.[107]

In Jennings's view, the categorization of the sources of international law according to Article 38 ICJ Statute, including the methodology they entail, need to be read and applied mindful of the fact that they have their origins in the 1920s—and may therefore be somewhat out-dated. He states to be convinced that "mould[ing]" the new trends and techniques of how law emerges and is being identified "into one or the other compartments [of Article 38 ICJ Statute]" would be a mistake.[108] Instead, new modes of emerging rules of international law require more flexibility in thinking and the methodological approaches to assessing them.[109] This corresponds to another observation that Jennings makes—the fact that today the importance of

[105]Insofar, cf. Separate Opinion of Vice-President Weeramantry to *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf (last accessed 8 February 2018), p. 104 who already in 1997 saw "plentiful indications", which justify giving "the principle of sustainable development the nature of customary law". In favour also Proelß (2017), para. 56; Barral (2012), p. 386; arguably Sands (2012), p. 217 as well. Cautious Cordonnier Segger (2017), p. 92. Against Beyerlin (2013), para. 18; Lowe (1999), p. 33.

[106]In lieu of many Jennings (1998), p. 737 with reference to the difficulties in developing or changing customary international law in the interwar period.

[107]Jennings (1998), p. 738.

[108]Jennings (1998), p. 742.

[109]Cf. ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&

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judicial decisions as well as publications by international scholars may be greater than ever before, especially when it comes

> to bring[ing] certainty and clarity in the places where the mass of material evidences is so large and confused, as to obscure the basic distinction between law and proposal.[110]

This description comes remarkably close to the situation of SD as a legal concept today. As repeatedly mentioned above, there is a great volume of documents and evidences of state practice with regard to SD, yet as of now, it has rather brought about confusion than clarity. This calls for the international legal scholars, be they performing the duties of international judges or of publicists, to provide further clarity.

It is questionable whether judges and publicists will be able to answer this call by the former President of the ICJ if they stick to an analysis of the law that is to a large degree a "matter of relative numbers."[111] As Koskenniemi rightly points out, a judge *finding* a principle, or any other type of emerging rule for that matter, through an empirical exercise rather resembles an ideal than an accurate description of what is actually going on.[112] Judges are *constructing* principles or rules based on what they perceive as the fundamental goals and values of the international legal order they are operating in.[113] These form the "appropriate testing ground" for emerging legal principles.[114]

Now, what one has to give to the empirical approach is that it attempts to make an impression of international law making as a reliable, objective exercise—an endeavour, which is honourable given that it may help convince many of the legitimacy and objectivity of the law itself. The constructivist approach, to the contrary, decreases the reliability of the law making exercise since the constructions of the fundamental goals and values that serve as the testing ground for new rules may differ from, particularly, judge to judge that is performing the task.[115]

In the specific case of SD, however, this problem does not appear to arise. Given the acceptance of SD as *the* universal agenda of the international community—that is even specified by respective goals, targets and sub-targets—the testing ground is

StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), p. 6.

[110]Jennings (1998), p. 749.

[111]Referring to international custom Dissenting Opinion of Judge Yusuf to *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, 3 February 2012, ICJ Reports 2012, http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-05-EN.pdf (last accessed 8 February 2018), p. 297.

[112]Koskenniemi (2000), p. 389.

[113]Cf. also Shaw (2017), p. 52. On the "myth of (in)determinacy" in international law, Bianchi (2010).

[114]Koskenniemi (2000), p. 390.

[115]Cf. Koskenniemi (2000), p. 396: "In this discourse, general principles come in when other norm-formulations do not seem to provide coherence for the legitimation of the solution which is intuitively experienced as correct. Such intuition is not, however, an uncontrolled impulse. . .".

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spelled out as precisely and unambiguously as one could possibly imagine. This circumstance in fact should be valued as a remarkable opportunity for international jurisprudence and international publicists respectively to elaborate a set of norms that finds the support of the entirety of the international community. Of course, this task—especially balancing diverging interests, capabilities and understandings between (state) actors—becomes more and more intricate the more specific the rules to be elaborated need to be. Yet given the frequently articulated need for new legal instruments fostering SD, there appears to still be a lot of room for the ascertainment of new norms even before one enters these challenging realms.

The Fruitless Nature of the Debate on the Legal Status of SD to Date
All in all, however, whether or not SD can be seen as principle of international law or not, whether Judge Weeramantry who saw an according status confirmed, or the majority of his colleagues that merely referred to the "concept" of SD were right in the *Gabcikovo-Nagymaros* decision of the ICJ is, particularly if one bears in mind what President Jennings had to say with regard to new kinds of international law that are constantly emerging, a rather secondary question—if not to say "sterile" as the ILA had already put it in 2008.[116]

SD is indeed a perfect example for a legal concept that deserves to "be released from the shackles of legal formalism in order to be given operational meaning", because in the end, what really counts are the practical, legal effects it elicits.[117] As will be portrayed in the subsequent section, leaving the classical "boxes" of the sources of international law may serve to not only aptly categorize SD, but also to conflate its legal effects as a *primary rule* and a *methodical norm*.

4.4 SD as Regulatory Objective

As stated repeatedly throughout this chapter, SD has evolved to become *the* universal *political* objective of the international community.[118] Against this backdrop, it

[116]ILA 2008 Rio de Janeiro Conference, Committee on International Law on Sustainable Development, Report, http://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1179&StorageFileGuid=3d118f92-d796-4ad5-9b78-c22fb3bb3b1c (last accessed 8 February 2018), p. 7; cf. ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), p. 6.

[117]ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), p. 6; cf. also Sands (2012), p. 217 who states in a *nonchalant* manner that SD "is recognized as principle (or concept) of international law".

[118]Cf. above Sect. 3; Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 5.

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seems natural that SD also constitutes a *regulatory* objective, or object and purpose,[119] due to i.a. two factors: for one, political objectives are usually—at least to some extent—being pursued through legal instruments (Sect. 4.4.1). For the other, law generally seeks to foster the development of society (Sect. 4.4.2). As will be demonstrated, it features as such in various treaty regimes (Sect. 4.4.3) and can also have this effect regardless of treaty law (Sect. 4.4.4).

4.4.1 The Typical Evolution from Political to Regulatory Objective

Political objectives are typically being formulated as the outcome of decision-making processes within the respective government. Once a political objective has been set, the government usually moves to the *implementation phase*. Most likely all states, yet certainly their majority, take *legal* measures in pursuit of an objective.[120] Therefore, one can constitute that on the national level, as a rule, a clearly identified, articulated political objective at some point evolves to become the regulatory objective of the legal instruments, which are meant to implement it.

On the international level, the situation is essentially the same. Whenever the international community defines a political objective, for instance after a decision-making process in the UN General Assembly, the Security Council or any other UN institution, it usually adopts a resolution, which not rarely itself constitutes the instrument for the implementation of the objective. Typically in such cases, the political objective features in a preambulatory paragraph, thus becoming the regulatory objective of the respective resolution.[121] The operative paragraphs serve to fulfil the objective, which thus has been transformed into a *legal* element. Even where the international community decides to first articulate the objective in a purely declaratory, non-legal nature,[122] usually the application of legal instruments follows on the international or national levels at a later stage.[123] Insofar the reference to the

[119]The notions “regulatory objective” and “object and purpose” are being used synonymously here, both describing the ultimate ends a particular legal rule, instrument or field is intended to serve.

[120]Even dictatorships/repressive regimes tend to carry out their actions in legal form. cf. only the disastrous example of Nazi Germany, which exhibited a rule of law that served the most unlawful purposes, including war crimes and the Holocaust. In an attempt to set to rights these repugnant conditions i.a. Radbruch (1946).

[121]This holds true regardless of the binding or non-binding nature of the resolution.

[122]Many resolutions and other UN acts are typically qualified as *soft law*, cf. Knauff (2014), pp. 387–389; non-legal acts below this threshold can consist of e.g. statements at press conferences or other purely reporting acts.

[123]If, for instance, in the 2002 WSSD Plan of Implementation, the Heads of State commit themselves to “promote coherent and coordinated approaches to institutional frameworks for sustainable development at all national levels”, such institutional frameworks will generally be implemented through law, thus rendering SD the regulatory objective of such endeavours, Plan of Implementation of the World Summit on Sustainable Development, 4 September 2002, UN Doc. A/CONF.199/20, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed 8 February 2018), para. 162(a); cf. also Transforming Our World:

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"aspirational" nature of the SDGs in e.g. the Rio+20 outcome document or the SD Agenda cannot be understood as a rebuttal of the claim that SD constitutes a regulatory objective: while the specific *goals and targets* may be aspirational, the *measures* that governments—who are supposed to drive the implementation according to the SD Agenda[124]—are taking, will typically be of a legal nature and therefore pursue SD as a regulatory objective.[125]

Since this is an observation of general validity with regard to *any* political objective, it could generally also be said to be true when it comes to SD. Yet, it is not ruled out that in some exceptional cases, a political objective never features in any legal instrument and thus never becomes a regulatory objective. Therefore, the question is whether SD constitutes one of these exceptional cases.

As outlined above, there had for long been a debate as to whether SD can actually be qualified as having normative character. These discussions, however, revolved around the classification of SD as either a concept or a principle of law and its customary character respectively. As Cordonnier Segger puts it, these debates may simply have been asking the wrong question[126]—they did not assess whether SD constitutes a regulatory objective let alone make a statement to the contrary.

Furthermore, the ICJ, while refraining from explicitly classifying the legal nature of SD, referred to it as a "concept" of international law, which likewise cannot be read as an expression contrary to the claim that SD constitutes a regulatory objective. Quite the opposite, the WTO Appellate Body in *US-Shrimps* stated that the preamble of the 1994 WTO Agreement "*explicitly acknowledges 'the objective of sustainable development'*."[127] In fact, the Appellate Body essentially applied methodology,

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The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 21, which pledges that the agenda needs to be implemented on global, regional, national levels.

[124]Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), paras. 39–47.

[125]Cf. the catalogue of measures that states shall implement in order to foster SD in Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 41: "We recognize that these will include the mobilization of financial resources as well as capacity building and the transfer of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed. Public finance, both domestic and international, will play a vital role in providing essential services and public goods and in catalysing other sources of finance." Naturally the implementation of such measures requires legal instruments.

[126]Cordonnier Segger (2017), p. 72 speaks of a "search in the wrong direction".

[127]*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=58544&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 8 February 2018), para. 129.

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which is usually being used for handling the object and purpose of a particular agreement: to interpret individual provisions in its light, the so-called *teleological interpretation*.[128] Further examples of international agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC) or the Convention on Biological Diversity (CBD), which will be discussed in further detail below, give indication that SD *does* feature as the regulatory objective in quite a few legal instruments.[129] Consequently, an exceptional case is not given in its regard.

4.4.2 Law as an Instrument Fostering the Development of Society

Another element—which relates more to the conceptual content of SD—makes it appear natural for it to constitute a regulatory objective. It is the observation that generally, law is *conceptually* meant to *ultimately* foster the development of the respective society it applies for. Every individual instrument, in fact every rule, contributes its modest or greater part to the functioning of a greater whole, which is at least *intended to* or *portrayed as* advancing the development of its constituents.[130] When it comes to the international legal order, in this light even the law of consular relations can be seen as *ultimately* implementing the objective of development: by regulating international relations, it contributes to stability in international diplomacy and thus potentially peace—a major factual precondition for the development of a society.[131] The same claim can be made with regard to any rule of international law, of course with the "causal chain" between the norm's operation and the ultimate objective of development being of varying lengths.[132]

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[128]On the "teleological school of thought" briefly Shaw (2017), p. 707.

[129]Cf. Sect. 4.4.3 below; also Art. 9(1), 10(2)(a) UNCCDD, which call for national action programmes to be designed and implemented for SD. Many of such policies will be implemented through legal instruments, which will generally feature SD as their regulatory objective.

[130]Again even repressive governments usually portray their policies and thus legal instruments as being implemented for the benefit of the people, the advancement of the state etc. cf. e.g. the example of North Korea, which portrays its nuclear weapons programme as a "road of independence and justice", Ellis R and Cuevas M (2017) North Korea says it's not backing down on nuclear development in 2018. CNN International Edition, 30 December 2017, https://edition.cnn.com/2017/12/29/asia/north-korea-statement-on-nuclear-development/index.html (last accessed 9 February 2018).

[131]Now one could of course argue that also war can contribute to the development of a society. The *jus cogens* prohibition of force in Article 2(4) UN charter however is one of the foundational pivots of the international legal order—which thus clearly gives preference to a development based on peace, and not on war, cf. also Article 1(1) UN charter as well as principle #24 of the Rio Declaration according to which "[w]arfare is inherently destructive of" SD. Apart from this normative aspect, also factually human societies develop better in times of peace, cf. instructively Sen (1999), pp. 3–4 and his perception of "development as freedom". War in this context is an "unfreedom" that needs to be removed in order for society to prosper.

[132]Take for example international humanitarian law, which regulates an orderly conduct in times of war, thus decreasing atrocities and fatalities, which in turn contributes to human resources being depleted in a less speedily manner. In addition, of course, it also contributes to a climate between the

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Therefore, the contention that law, as a general concept, pursues the ultimate objective of contributing to the development of society is quite easy to make—despite potentially remaining debates between the political organs or other stakeholders, what approaches are the right ones in order to reach the goal of development, it nonetheless is generally at least *intended to* or, in case of a rogue government, *portrayed as* fostering development.[133]

Yet the question remains why (international) law should be seen as pursuing the objective of *sustainable* development. The answer relates to the arguably only or at least most prominent alternative that can be witnessed in the history of humankind—a purely economic development.[134]

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parties at war, which may increase the likelihood of later peaceful stable relations once the fighting has seized for some time. Or a procedural rule which features in the statutes of any international court, tribunal or commission: since these institutions are typically created in order to remedy injustice—and thus tensions between either states, particular social groups or individuals—it contributes to strengthening the rule of law, thus to the stability of a nation or even the international community as a whole, which again is the precondition for i.a. economic growth and therefore development. cf. in this respect e.g. Article 1 of the 1948 Havana Charter, which explicitly recognizes "the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations" before addressing the measures necessary to foster economic prosperity; cf. also the Preamble of the 2014 UN Arms Trade Treaty, https://www.un.org/disarmament/att/ (last accessed 9 February 2018), which does not omit to mention that "peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and [. . .] development, peace and security and human rights are interlinked and mutually reinforcing".

[133] I thus do *not* mean to contend that all of international law *actually* contributes to the development of our global society. Proponents of the TWAIL movement and International Development Law have expertly demonstrated, what normative and institutional changes may be necessary in order for international law to more vigorously work towards reducing inequalities between global centre and periphery, cf. e.g., the strong stance voiced by Mutua and Anghie (2000). However, these observations to my mind do not refute my statement that law—*conceptually* speaking—is meant to foster development. Lawmakers will generally at least *pretend* to be pursuing this objective. In fact, the TWAIL critique (and others) further underlines this conceptual purpose of the law: the authors are dissatisfied with the current legal regime since it does not sufficiently foster development. Their critique thus does not counter my statement regarding law as an instrument for pursuing development, but instead addresses the notion and precise aims of 'development' one employs. Likewise, the fact that, conversely, the development of a society may frequently shape the applicable law does not rebut my statement—both can be held to be correct: law is conceptually intended to foster development and development drives the creation of law. These simple observations become intricate only once one enters the debate as to *what* law shall be created for *which* kind of development.

[134] While in the ancient or medieval times, war glory, the pursuit of religious motives or the intention to rule the greatest possible share of territory may have been the articulated objective of many policies, these pursuits likewise can be seen as individual perceptions of what kind of actions may contribute to the *development* of a state or society in terms of a "specified sense of advancement", cf. Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/development (last accessed 9 February 2018). If not in all policies, at least in most the advancement of the state in economic terms, e.g. the increase of a nation's wealth through conquering enemy territory, securing important geostrategic positions etc. will regularly have featured as, at a minimum, a secondary objective. On early signs of *sustainable* approaches to economic development however,

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Without further discussing political objectives in the pre-industrial era, we may jump right to a moment in history when purely economic development was explicitly articulated as a central political—and regulatory—objective. According to Article 1 of the 1948 Havana Charter (HC) the Parties, i.a. seeking to institute an International Trade Organization,[135] were pursuing objectives such as the "attainment of the higher standards of living, full employment and conditions of economic and social progress and development" pledging, for that purpose, i.a. "[t]o foster and assist industrial and general economic development." According to Article 8 HC,

> Members recognize that the productive use of the world's human and material resources is of concern to and will benefit all countries, and that the industrial and general economic development of all countries, particularly of those in which resources are as yet relatively undeveloped, as well as the reconstruction of those countries whose economies have been devastated by war, will improve opportunities for employment, enhance the productivity of labour, increase the demand for goods and services, contribute to economic balance, expand international trade and raise levels of real income.

Evidently, development here is understood primarily in economic terms. While it is seen as a precondition for an improvement also of social development, the latter equally is understood especially economically—in the sense of "higher standards of living" or "raise[d] levels of real income"—and unlike today does not refer to an advancement of society also as regards the respect for the rule of law and Human Rights respectively. The objectives set out by the UN charter are slightly different in that they call for, in the preamble, "the promotion of the economic and social advancement of all peoples" yet at the same time for "promoting and encouraging respect for human rights and fundamental freedoms", Article 1(3) UN charter.

Consequently, while the reference to *environmental protection* is missing in these early yet highly authoritative texts, they already set economic and—under different perceptions—social development as an overarching objective of international law.

While one could now of course argue that this objective has—especially given that there has not been any modification of the UN Charter in the meantime—remained exactly the same, this would mean nothing more than to ignore the significant amount of state practice, which defines SD as regulatory objective ever since the notion of SD made its appearance on the international scene. As mentioned before, SD has obtained the status of being *the universal* political agenda of the international community.[136] While some actors, especially in the private sector, but occasionally also states, may still be favouring the purely economic understanding of

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cf. instructively Separate Opinion of Vice-President Weeramantry to *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf (last accessed 8 February 2018), pp. 107–108.

[135] The ITO was never established mainly due to domestic opposition within the US, Sacerdoti (2014), para. 10.

[136] Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 5.

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development and even act accordingly,[137] this observation cannot suffice to counter the claim that SD has obtained the status of a regulatory objective. This is because whenever a state pursues purely economic objectives, it would do so, yet without claiming, at least as regards the international legal order, that its behaviour would actually be *lawful*. Instead, in many instances, it would likely attempt to *justify* its actions as still remaining within the boundaries of what SD requires, by e.g. pointing to pretextual environmental impact assessments or the like—thus demonstrating respect of the SD rule even in times where it (secretly) aims to ignore it.[138] In other words, those state acts that pursue a purely economic objective, thus leaving out the idea of sustainability, are typically being taken without corresponding opinio juris.[139]

Many aspects thus allude to SD having become a regulatory objective of international law. Subsequently, this contention shall experience further examination.

[137]Take, for instance, the US government's recent decision to withdraw from the Paris Agreement. While such action has been taken in a move to challenge the presumptions revolving around climate change, not even the US government seems to challenge SD as an overall regulatory objective with regard to the other objectives it entails, cf. the remarks by incumbent US president Donald J Trump: "Not only does this deal subject our citizens to harsh economic restrictions, it fails to live up to our environmental ideals. As someone who cares deeply about the environment, which I do, I cannot in good conscience support a deal that punishes the United States — which is what it does — the world's leader in environmental protection, while imposing no meaningful obligations on the world's leading polluters", Statement by President Trump on the Paris Climate Accord, 1 June 2017, https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ (last accessed 9 February 2018).

[138]This of course at the same time illustrates the weakness of the current operation of SD as an element of international law. It can only be remedied through further (judicial and or scholarly) elaboration as to the "how" of the balancing exercise required from states, cf. Cordonnier Segger and Weeramantry (2017), pp. 5–6.

[139]This is indicated *inter alia* by the fact that all states agreed on the SD Agenda. It can furthermore be witnessed in countless examples of state practice in the form of public statements, declarations etc. Apart from that, state practice does not have to be "in absolutely rigorous conformity" with a particular customary rule in order for the latter to be recognized as such, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, 27 June 1986, ICJ Reports 1986, http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (last accessed 9 February 2018), p. 98: "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule". On the "two factor test" for determining international custom and its applicability to SD as an object and purpose, cf. Sect. 4.4.4 below.

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4.4.3 SD as Regulatory Objective in Treaty Regimes

The categorization of SD as a regulatory objective can be further supported by an analysis of those international agreements that reference SD—they generally include it as a regulatory objective.[140]

The 1992 UNFCCC in its Article 2, which is titled “Objectives” sets out that the overall aim of the convention to stabilize greenhouse gas emissions should be achieved within a time frame sufficient to “enable economic development to proceed in a sustainable manner”. In addition, the UNFCCC sets forth the “principle” that “[t]he Parties have a right to, and should, promote sustainable development”, Article 3 (4) UNFCCC. According to Article 1 of the 1992 CBD, one of the objectives of the treaty is the sustainable use of the components of biodiversity. Article 8(e) of the CBD obliges states to “promote environmentally sound and sustainable development in areas adjacent to protected areas”.

Article 2 of the 1994 UN Convention to Combat Desertification and Drought puts the direct aim of the agreement to combat desertification in context with the objective to achieve “sustainable development in affected areas”. Pursuant to Article 4(2)(b) of the treaty, the Parties are under the general obligation to contribute to “establishing an enabling international economic environment conducive to the promotion of sustainable development”. Article 1(c) of the 1994 International Tropical Timber Agreement defines “[c]ontributing to sustainable development” as one of the objectives of the agreement. The same holds true for many other International Commodity Agreements, such as Article 1(3) of the 2007 International Coffee Agreement, which calls for the development of a sustainable coffee sector, Article 1(2) of the 2015 International Agreement on Olive Oil and Table Olives, which aims to “ensure the integrated and sustainable development of the sector” or Article 1 of the 2010 International Cocoa Agreement, which seeks to support the SD of the global cocoa sector. Article 2 of the 1995 Straddling Stocks Convention sets the objective to “ensure the [. . .] sustainable use of straddling fish stocks and highly migratory fish stocks”. As already mentioned, the preamble of the 1994 WTO agreement likewise sets “the objective of sustainable development”. The 2015 Paris Agreement, according to its Article 2(1) “aims to strengthen the global response to the threat of climate change [. . .] in the context of sustainable development”.

Further examples include the preamble of the 1991 (Espoo) Convention on Environmental Impact Assessment in a Transboundary Context, the preamble of the 1992 (Ospar) Convention for the Protection of the Marine Environment of the

[140]Transforming Our World: The 2030 Agenda For Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 8 February 2018), para. 5, many of which will generally be qualified as *soft law*, the emphasis here is on *binding* international agreements.

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North-East Atlantic,[141] Articles 2, 10 and 12 of the 1998 UNFCCC Kyoto Protocol, Article 4(3) of the 2004 Barcelona Convention for the Protection of the Mediterranean,[142] Article 2(3) of the 1998 Danube River Protection Convention, Articles 1.1 and 6.2 lit. f) of the 2009 FAO International Treaty on Plant Genetic Resources for Food and Agriculture ("Seed Treaty"),[143] Article 1(2)(a) of the Energy Charter Treaty, the preamble as well as Article 915(c) of the NAFTA,[144] Article 1(2) of the 2001 EU-ACP Cotonou Agreement, Article 1(a) of the 2008 EU-CARIFORUM Economic Partnership Agreement (EPA), Article 1(a) of the 2016 EU-SADC-EPA, the preamble, Articles 22.1 and 24.2 of the Comprehensive Economic and Trade Agreement (CETA), Article 3 of the 2014 EU-Ukraine Association Agreement as well as Articles 3(3) and (5), 21(2)(d) and (f) of the EU-treaty and Article 11 of the Treaty on the Functioning of the EU.[145] Also the German commodity partnership agreements concluded with Kazakhstan, Mongolia and Peru expressly include the objective of SD.[146]

All these provisions serve as evidence that SD has on numerous occasions been expressly included as regulatory objective in international treaty law. We shall now turn to the question whether SD can also operate as a regulatory objective outside the treaty regimes it features in.

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[141]Updated text of 2007; the preamble speaks of "sustainable *management*", yet clearly refers to the definition of SD when stating that such management shall be conducted in a manner that the marine ecosystem will "continue to meet the needs of present and future generations".

[142]Here, SD is referenced under the heading "general obligations", yet essentially used as a regulatory objective as well, since the specific obligations of the Parties are spelled out "in order to [. . .] contribute to the sustainable development of the Mediterranean Sea Area".

[143]Cf. Cordonnier Segger (2017), p. 81.

[144]The latter provision defines SD as a legitimate objective for the introduction of technical barriers to trade (TBT).

[145]Cf. also the catalogues provided by Schrijver (2017), p. 100 and Barral (2012), p. 388, Fn. 59. On the EU-CARIFORUM-EPA and SD as an objective Grosse Ruse-Kahn (2010).

[146]Cf. preamble, Article 1(2) and Article 2(1) of the Germany-Peru commodity partnership agreement, Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Peru über Zusammenarbeit im Rohstoff-, Industrie- und Technologiebereich, signed 14 July 2014, https://www.bmwi.de/Redaktion/DE/Downloads/A/abkommen-zwischen-brd-und-peru-partnerschaft-rohstoff-industrie-und-technologiebereich.pdf?__blob=publicationFile&v=6 (last accessed 9 February 2018); Articles 1(2) and 2(2) of the Germany-Kazakhstan commodity partnership agreement, Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Kasachstan über Zusammenarbeit im Rohstoff-, Industrie- und Technologiebereich, signed 8 February 2012, https://www.bmwi.de/Redaktion/DE/Downloads/A/abkommen-zwischenbrd-und-kasachstan-partnerschaft-rohstoff-industrie-und-technologiebereich.pdf?__blob=publicationFile&v=1 (last accessed 9 February 2018); Articles 1(2) and 2(2) of the Germany-Mongolia commodity partnership agreement, Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Mongolei über Zusammenarbeit im Rohstoff-, Industrie- und Technologiebereich, signed 13 October 2011, https://www.bmwi.de/Redaktion/DE/Downloads/A/abkommen-zwischen-brd-und-mongolei-zusammenarbeit-rohstoff-industrie-technologie.pdf?__blob=publicationFile&v=1 (last accessed 9 February 2018).

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4.4.4 SD as Regulatory Objective Outside Treaty Regimes

According to the ILA's 2012 Guiding Statement #2,

> treaties and rules of customary international law should, as far as possible, be interpreted in the light of principles of sustainable development and interpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would be to undermine territorial boundaries and other fundamental aspects of the global legal order, would otherwise infringe the express wording of a treaty or would breach a rule of jus cogens[.][147]

The ILA scholars, which are notably referring to SD here as "goal", appear to advocate for an application of SD which is tantamount to the *teleological interpretation* of *all* treaties and custom in the light of SD and its related principles respectively. In a domestic law context, such effects can usually be perceived with regard to constitutional objectives—all law typically needs to be interpreted in their light. Only where they conflict with other constitutional norms or objectives, they need to be balanced with the latter.[148]

In addition, States, according to ILA statement #3 with regard to NR and generally according to the *Gabcikovo-Nagymaros*, *Pulp Mills* and *Iron Rhine* decisions are held to "act sustainably", i.e. to perform a balancing exercise whenever taking action. Thus not only existing law needs to be interpreted in light of SD, but also new law that is being created—or any measures that are being taken—needs to be designed mindful of the objectives of SD.

Both of these effects of SD, as a *methodical norm* on the one hand and a *primary norm* on the other can be seen as characteristic for the object and purpose of e.g. a field of law or constitution.[149]

Now the question arises how, i.e. on what grounding as regards legal doctrine, such effects of SD in the international legal order can be both explained and legitimized.[150] For one, the primary rule of SD could be classified as a rule of customary international law.[151] The dimension of SD as a methodical norm could be understood as forming a principle of international law, which is equally derived from

[147] ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), Annex, Guiding Statement #2.

[148] The ILA here, to stick with the comparison with domestic legal orders, defines four of such potentially conflicting "constitutional" objectives or principles: territorial boundaries, fundamental aspects of the global legal order, the express wording of a treaty or a rule of *jus cogens*.

[149] On the domestic level, if the legislator seeks to introduce e.g. a new norm of criminal law, it needs to adequately balance the various objectives of this field of law—for instance protecting the population, preventing it from committing crime and at the same time ensuring pathways to the rehabilitation of offenders.

[150] Barral (2012), p. 391 appears to see such effects of SD as an "extraneous conventional rule" and thus regardless of its status as international custom.

[151] Proelß (2017), para. 56; Barral (2012), p. 386.

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custom. This, however, would entail the usual issues related to the identification of new custom. Paradigmatically, some authors recognize a customary status of SD—while others do not.[152]

Another approach would be to classify SD as a general principle, which is derived from domestic law and applicable to international relations. Similarly to the difficulties in identifying custom, such a principle first, however, would have to be identified through a comparative exercise—an endeavour that can bring about equally ambiguous results and would certainly go beyond the scope of this study.

It therefore appears to be both expedient and simpler to leave the classical "boxes" of Article 38 of the ICJ Statute and recognize the fact that SD may constitute a source of international law in its own right—as a fundamental *object and purpose* of international law.[153]

Now what follows from this categorization with regard to the binding nature of SD outside treaty law? One possible starting point would be to assess the quality of SD as a sort of "customary object and purpose". As a consequence, one would have to conduct the usual "two factor test" and analyse relevant state practice as well as corresponding opinio juris.[154]

However, given the particular nature of SD, this assessment appears rather inappropriate, as it cannot serve to adequately appraise the legal value that States have attributed to it. While the element of state practice can be held to maintain its relevance also when examining the normative force of a regulatory objective, the subjective element of opinio juris needs to be modified given that we are dealing with a different type of norm.[155] Instead of asking whether states considered SD to entail a legal obligation, we shall ask—more precisely—whether they wanted to set SD as a regulatory objective, thus expressing their consent to the typical legal effects it brings about. Given the natural "kinship" between political and regulatory objectives, the proliferation of SD as a regulatory objective in international treaty law, the fact that law generally seeks to foster development and the universal nature of the SD Agenda I believe that there are good reasons to answer this question in the positive.

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[152]Cf. already above, Sect. 4.3.2.

[153]Similarly Cordonnier Segger (2017), p. 93 as well as Schrijver (2017), p. 101; referring to SD as an "objective" also *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, http://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf (last accessed 8 February 2018), p. 74, para. 177; on the need to leave the "boxes" of Article 38 cf. Sect. 4.3.2 above on the remarks by Jennings (1998).

[154]In addition, one could also assess the "fundamental norm creating character" of SD, cf. Cordonnier Segger (2017), pp. 69–72.

[155]In my view, there is room for methodological flexibility here i.a. since it is fair to speak of a certain "presumption" for a universal political objective such as SD to acquire the status of a legally binding regulatory objective. The opinio juris of states to a certain degree is thus somewhat already inherent to the *universal* objective, especially when States express their will to "operationalize" it intensively. This does not mean, of course, to entirely ignore opinio juris beyond this point, particularly if there should be indications of a changing opinion or a modification of the political objective. However, there are no such signs with respect to SD.

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As a consequence, SD can be said to unfold its normative force also outside treaty regimes it is expressly included in.[156]

4.5 SD as the Overall Object and Purpose of NRL

Now what results from these observations for the status of SD within NRL?

As has been outlined already at the outset of this chapter, the *factual* correlations between SD and NR are manifold. The same statement can also be held to be accurate with regard to the interrelations of SD as a *legal* concept and the international law regulating NR activities, NRL.

As likewise laid out above, SD as a legal concept consists of the three core dimensions of social and economic development as well as environmental protection. All of these three dimensions are relevant when it comes to NR, with SD as a *legal* concept thus far particularly playing a role in NRL in situations in which NR are being exploited for economic purposes and at the same time require environmental protection.

Quite tellingly, nearly all prominent cases dealing with SD as a legal concept that have been treated by international jurisprudence relate to natural resources. In the *Gabcikovo-Nagymaros* case, for instance, a conflict between the Parties arose over the construction of a dam on the river Danube; and also in the only other judgement in which the ICJ touched upon SD, the one issued in the *Pulp Mills* case, the contentious matter revolved around pulp mills that Uruguay had built on River Uruguay. As already briefly stated above, in the first case the court ruled that SD required the Parties to "reconcile economic development with [the] protection of the environment".[157] In *Pulp Mills*, the court, referring to Article 27 of the applicable treaty, notably emphasizes the

[156] As argued by Barral (2012), p. 394 with reference to the *Iron Rhine* decision, this *external* normative force can be of such intensity as to even "revise" an individual treaty norm. According to Article XII of the 1839 Treaty, Belgium would have had to bear the costs for the construction of the railway, while in the end the tribunal, interpreting the provision i.a. in light of SD, ruled that costs would have to be shared between the Parties, i.a. in order to factor in the obligation carried by the Netherlands to construct the railway in conformity with contemporary environmental standards, *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, decision of 24 May 2005, 27 RIAA (2005) 35, http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf (last accessed 8 February 2018), pp. 115–121.

[157] *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, http://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf (last accessed 8 February 2018), p. 78, para. 140.

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> interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.[158]

The balancing of environmental protection requirements, which naturally seek to protect NR, and the interest in an infrastructure development project was also central to the *Iron Rhine* arbitration.[159] In *US-Shrimps*, the WTO Appellate Body interpreted the term “natural resources” under Article XX lit. g) GATT as also comprising marine turtles. And also the *Seabed Mining* Advisory Opinion issued by the ITLOS in 2011 is concerned with NR, detailing the obligations for states conducting seabed-mining operations both under the UNCLOS and customary international law. In fact, in its opinion the ITLOS discusses a broad range of issues and obligations that are also reflected in the New Delhi principles, which further underlines the great intersection of NRL and SDL.[160]

In addition, also the large majority of international treaties in which SD is expressly being referred to are part of NRL, such as the International Commodity Agreements, the UNFCCC, or the Espoo and Ospar Conventions.[161] With regard to international legal scholarship, Wälde already in 2004 pointed out that “[t]here is virtually no academic work in the field of [. . .] natural resources of recent times that does not emphatically rely [on SD] as a foundational reference.”[162]

Also the specific principles, which relate to SD are of great relevance in NRL. Again taking up the New Delhi principles as their most articulate collection, all seven principles are pertinent when it comes to managing NR. Such is evident regarding the duty of States to ensure sustainable use of natural resources (principle #1) and the precautionary approach to human health, natural resources and ecosystems (principle #4). The principle of common but differentiated responsibilities (principle # 3) must be borne in mind in NR protection efforts, particularly with regard to shared resources. Evidently, good governance (principle #6) is key when it comes to sustainably managing NR (and thus fulfilling the duty of principle #1),

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[158] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, ICJ Reports 2010, http://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf (last accessed 8 February 2018), p. 74, para. 177.

[159] In depth analysis by Baetens (2017).

[160] ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, http://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), p. 12 French (2011), p. 526. Further cases that concerned NR and touched upon SD or related concepts include *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), Judgment, 31 March 2014, ICJ Reports 2014, http://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf (last accessed 9 February 2018), p. 226; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf (last accessed 9 February 2018), p. 226.; cf. the list provided by Schrijver (2017), p. 100 and the extensive list of cases in Cordonnier Segger and Weeramantry (2017), pp. x–xxvi.

[161] Cf. Sect. 4.4.3 above.

[162] Wälde (2004), p. 119.

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including the need to ensure adequate public participation and access to information and justice (principle #5) for all stakeholders concerned by a particular NR activity and pursuing integrated approaches in particular in relation to human rights and social, economic and environmental objectives (principle #7). Correctly managed, NR activities contribute to both inter- and intragenerational equity and to the eradication of poverty (principle #2).

After this brief analysis, one can draw the following interim conclusion: for one, SD is a core concept of NRL with regard to both of its effects as a primary norm requiring the balancing of social, economic and environmental factors and as a methodical norm, which influences the interpretation of key terms of NRL; for the other, the rules and principles of NRL play a key role in pursuing the regulatory objective of SD.

Consequently, the interrelationship of SD and NRL are converged in the operation of SD as the object and purpose of NRL: the sustainable use of natural resources (New Delhi Principle #1),[163] which has emerged to a customary rule—at least in regard to shared or common resources—and essentially requires states to integrate considerations of sustainability in all their NR activities,[164] insofar represents the counterpart of the primary rule contained in the core concept of SD, yet specified for the NR context; in addition, all rules and principles of NRL—including the term "NR" as reflected in the *US-Shrimps* case—need to be interpreted in the light of SD.

Identifying SD as such entails the benefit of further strengthening its effectiveness. As the overall object and purpose, operating on a somewhat *meta* level, SD "spearheads" the entire field of NRL, therefore impacts the application and interpretation of all of its rules and ultimately ensures the greatest possible degree of *integration* and *coherence*. As a result, NRL becomes a sub-branch of SDL. In addition, it creates ample opportunity for judges and scholars to elaborate new rules e.g., based on the interpretative evolution of existing norms.

5 Conclusions

This chapter has illustrated the evolution of SD from a political objective to a fundamental regulatory objective of international law. The conceptual content of SD exhibits a remarkable degree of consistency, with social and economic development as well as environmental protection constituting the three universally accepted pillars. Its legal effects can generally be held to be twofold—it operates as a *primary*

[163]ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002, UN Doc. A/CONF.199/8, 9 August 2002, http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/8&Lang=E (last accessed 8 February 2018).

[164]ILA 2012 Sofia Conference, Committee on International Law on Sustainable Development, Final Report, http://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1177&StorageFileGuid=7dcf2ffb-6010-48cf-ad92-32453d8ee2b9 (last accessed 8 February 2018), Annex, Guiding Statement #3.

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norm, which obliges states to perform a balancing exercise in the interest of sustainability and as a *methodical norm*, which mandates the interpretation of all of international law in the light of SD.

Both of these legal effects are characteristic for the functioning of a regulatory objective or the object and purpose of a field of law or constitutional framework. Given the large evidence of state practice especially in international treaty law, which employs SD as a regulatory objective, its universal nature and acceptance, the multitudinous state acts on global, regional, national and local levels which seek to implement SD objectives and the fact that law generally and international law in particular typically seeks to foster the development of society, it appears fair to say that SD has evolved to become a fundamental regulatory objective of the international legal order.

In view of the close relationship and interrelatedness of SDL and NRL and its integrated nature, SD can be identified as the object and purpose of NRL. Indeed, for all these reasons, it appears not to be entirely unlikely that it might evolve even to the ultimate object and purpose of the body of international law itself. Such a perception of SD could inspire a judicial law making, which keeps pace with the times—and particularly with the new global consensus on where our world should be headed.

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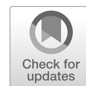
Chinese Natural Resources Disputes: A Never-Ending Story?



Ilaria Espa

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1 Introduction

In the summer 2016, the US and the European Union (EU) initiated a new dispute against China at the World Trade Organization (WTO), which concerned the export duties and the export quotas imposed by the Chinese government on various raw materials of mineral origin (namely, antimony, chromium, cobalt, copper, ferro-nickel, graphite, indium, lead, magnesia, talc, tantalum and tin).[1] Consultations

[1]Request for Consultations by The United States, *China – Export Duties on Certain Raw Materials*, G/L/1147, WT/DS508/1, 14 July 2016, later supplemented by Request for Consultations by The United States, Addendum, *China – Export Duties On Certain Raw Materials*, G/L/1147/Add.1, WT/DS508/1/Add.1, 25 July 2016. Request for consultations by the European Union, *China – Duties*

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among the parties have hitherto been launched and failed; a single panel was thus established on 23 November 2016.[2] This is the third time China's regime of export restrictions on raw materials gets under scrutiny at the WTO since 2009.[3] In a first dispute, *China – Raw Materials*, the measures at issue were the export duties and the export quotas that China maintained on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous and zinc.[4] A second case, *China – Rare Earths*, challenged the export duties and the export quotas imposed on rare earth elements, tungsten and molybdenum.[5]

The series of raw materials disputes targeting China reflects China's peculiar position as a leading supplier of mineral resources in the international market, on the one hand, and as an emerging economy sustaining unprecedented economic transformation though a variety of instruments of "green" industrial policy such as export restrictions, on the other hand.[6] At the same time, it is arguably a reflection of the specific obligations on the export side that China has assumed in addition to standard disciplines contained in the General Agreement on Tariffs and Trade (GATT) in the context of its WTO accession.[7] The former aspect has made it a privileged target on the part of those net-importing countries that depend on access to Chinese natural resources to feed the needs of key manufacturing sectors.[8] The latter aspect has rendered its export regime exceptionally vulnerable to WTO challenges.

Not surprisingly, WTO disputes on export restrictions have all targeted China so far and repeatedly condemned any of the measures at issue: under paragraph 11.3 of its Accession Protocol, in the case of export duties, and under Article XI:1 GATT, in

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and other Measures concerning the Exportation of Certain Raw Materials, G/L/1148, WT/DS509/1, 25 July 2016, later supplemented by Request for consultations by the European Union, Addendum, *China – Duties and other Measures concerning the Exportation of Certain Raw Materials*, G/L/1148/Add.1, WT/DS509/1/Add.1, 23 August 2016.

[2]Dispute Settlement Body—Minutes of meeting held in the Centre William Rappard on 23 November 2016, WT/DSB/M/389, 23 January 2017, pp. 6–7.

[3]The third raw materials dispute will be henceforth referred to with its official short title: *China – Raw Materials II*.

[4]See Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII (hereinafter Appellate Body Reports, *China – Raw Materials*), p. 3295.

[5]See Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 7 August 2014, DSR 2014:IV (hereinafter Appellate Body Reports, *China – Rare Earths*), p. 1127.

[6]As it is known, export restrictions depress the price of raw materials in the imposing country. This may lead to a reduction of domestic production, which in turn contributes mitigating the negative environmental externalities linked to extractive activities by slowing the pace of extraction, and, consequently, the rate of depletion of finite resources. It may however also boost the domestic downstream industries that avail themselves of the cheaper raw materials to the detriment of foreign competitors. For a thorough discussion on this duality, see Wu and Salzman (2014), pp. 426–430.

[7]See Sect. 3.

[8]As one of the largest exporter of critical minerals and metals, China can affect world supply and drive up world prices through the use of export barriers, in addition to artificially lowering domestic prices. See Sect. 2.3.

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the case of export quotas. Significantly, moreover, China's efforts to defend its mineral export restraints as measures forming part of comprehensive environmental and/or conservation strategies under Article XX(b) and Article XX(g) GATT were also dismissed: Article XX GATT was found a priori unavailable for violations of China's export duty commitments as contained in its Accession Protocol; China's Article XI:1 GATT-inconsistent quantitative restrictions were instead condemned as constituting an instrument of industrial policy.[9]

The approach espoused by the Appellate Body in the first disputes seems to leave very little room to China for defending its export duties and quotas in the latest pending dispute, inasmuch as *China – Raw Materials II* revolves around the same core legal issues. What it is more, it arguably exposes China to a very high chance to be subject to other similar WTO challenges as long as China's export regime continues to encompass the same type of measures that were condemned in previous raw materials disputes.[10]

In light of all the foregoing, this article aims at dissecting the factual circumstances and the legal premises that made China's export regime the target of a raw materials "saga" with a view to exploring whether and, if so, under which conditions the recent WTO case law on (mineral) export restraints makes it any more likely for new similar disputes to be initiated against it. This article is thus organised as follows: Sect. 2 illustrates the driving factors behind the raw materials disputes launched against China's export duties and quotas on mineral resources. This is followed by an analysis of the WTO obligations on the export side binding on China (Sect. 3). Section 4 discusses the implications with regards to China's regulatory autonomy to impose export restrictions for alleged sustainable economic development needs compared to other resource-endowed WTO Members. Finally, Sect. 5 provides some general conclusions on the likelihood of new WTO disputes on (mineral) export restraints involving China.

[9]As it is known, GATT Article XX(b) and (g) justify, respectively, measures necessary to protect human, animal and plant life or health, and measures related to the conservation of exhaustible natural resources. Pursuant to the introductory paragraph of Article XX, any such measure cannot nevertheless 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." For a detailed analysis of China's defensive arguments, see for all Espa (2015), pp. 194–208.

[10]For a detailed explanation of how the so-called likeness of success argument conditions the choice of disputes, see De Bièvre et al. (2017), pp. 411–425.

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2 Driving Factors Behind Chinese Natural Resources Disputes

China is not the only country imposing export restrictions on raw materials.[11] Yet, several factors explain why WTO disputes have repeatedly targeted Chinese export restrictions. First, China's regime of export restrictions has not precedent in scope and coverage among resource-endowed WTO Members, at least for what concerns hard commodities. Second, among those such commodities are raw materials of mineral origin that are strategically important to key manufacturing sectors. Third, China is a global leading producer (if not the sole producer) of many of the restricted raw materials.

2.1 Pervasiveness of China's Regime on Export Restrictions

China's regime of export restrictions is pervasive and comprises both export duties and quantitative export restrictions. Both categories of measures are systematically applied on a wide range of commodities and overall administered by the Chinese Ministry of Commerce (MOFCOM).

The Ministry reviews and publishes every year in December a Tariff Implementation Plan, which contains the list of products to be subject to a new and/or adjusted export tax rate, in accordance with the Regulations on Import and Export Tariffs.[12] The number of HS 8-digit tariff lines subject to statutory export duties has been increasing in recent years, going from 95 HS 8-digit tariff lines in 2009 to 102 in 2015.[13] According to latest data provided by the WTO Secretariat, moreover, China still maintained interim export duties (i.e. duties applied for a limited period) on 314 tariff lines at the HS 8-digit level in 2015.[14] When imposed on items which are already subject to a statutory rate, interim export duties prevail and are normally lower, ranging from 0 to 35% compared with the 20–50% range of statutory export duties.[15] In most cases, however, interim export taxes are applied on additional tariff

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[11]For a detailed description of the magnitude and the distinguishing features of the current wave of proliferating export restrictions on primary commodities, more generally, and on mineral resources, more specifically, see Espa (2015), pp. 8–34.

[12]The Regulations on Import and Export Tariffs came into force on 1 January 2004. See Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/300/Rev.1, 27 May 2014, p. 79.

[13]Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/264/Rev.1, 20 July 2012, p. 58; Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/300/Rev.1, 7 October 2014, p. 80; Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

[14]Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

[15]Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

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lines items which are not subject to statutory export taxes.[16] Based on this system, China still cumulatively subjects 4.1% of all tariff lines at the HS 8-digit level to export duties (including both statutory and interim duties).[17] Such overall incidence has only slightly decreased since 2013, showing China's reluctance to phase out its export duties beyond what strictly necessary to ensure the implementation of the Appellate Body rulings in *China – Raw Materials* and *China – Rare Earths*.[18]

China also maintains the most comprehensive (and complex) system of export quotas among WTO Members. It is based on a series of measures consisting of basic framework legislation (the Foreign Trade Law), a set of implementing regulations aimed at governing the administration of the imports and exports (the Regulation on the Administration of the Import and Export of Goods), as well as specific annual measures indicating all products subject to export quotas for each year (the annual Export Licensing Catalogue) and the related annual quota amounts (the annual Export Quota Amounts).[19] Both the Catalogue and the annual total amounts are formulated and announced by MOFCOM on 31 October of each year for the following year.[20] Exporters can apply for an export quota until 15 November of each year. Annual quotas are then generally allocated by 15 December and, in some cases, twice a year through a "first batch" and a "second batch" occurring in December and July, respectively. The allocation of quotas is done either directly or through a quota bidding system.[21] In both cases, MOFCOM sets out general

[16]Interim duty rates may also be flanked by "special" duty rates which are mainly seasonal and substantially higher than interim duty rates. For instance, in 2013, thirteen HS 8-digit tariff lines were subject to a 75% special duty rate. Interim duty rates are revised from time to time, but are normally in place for many years and sometimes even decades. Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/199/Rev.1, 12 August 2008, p. 74.

[17]Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

[18]See Espa (2015), p. 83.

[19]For a thorough account of the functioning of China's export quota regime, see Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 5 July 2011 (hereinafter Panel Reports, *China – Raw Materials*), paras. 7.172–7.201.

[20]Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/300/Rev.1, 27 May 2014, p. 81.

[21]In the former case, MOFCOM determines the total ceiling for quotas in light of a number of objectives, including the safety of the national economy, the protection of limited domestic resources, the development of national industries and the state of demand on the international and the domestic markets. MOFCOM also allocates the quotas directly or through local administrative authorities based on criteria that include export performance, the utilization ratio of the export quota, the business management/operation capacity of the applicant and its production scale. See China's Export Quota Administration Measures, Article 10 and Article 19, cited in Panel Reports, *China – Raw Materials*, paras. 7.177–7.178. In the latter case, any interested enterprise submits a bidding price and a bidding quantity to China's Export Quota Bidding Committee, which is established within MOFCOM and determines the quantity of the export quotas along with governing each step of the bidding procedure. China's Bidding Office determines the winning bidders by ranking all bids received from applicants in descending order (i.e. from the highest bid prices to the lowest) and matching them with the related bidding quantities until the total bidding

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eligibility requirements for enterprises, which frequently vary depending on the nationality of the enterprises. Sector-specific eligibility requirements are also established and have often included prior export experience or export performance requirements.[22] Often, foreign-invested enterprises are required to satisfy additional requirements.[23]

According to the WTO Secretariat and the OECD, such a system still applied to almost 200 tariff lines at the HS 8-digit level, including more than 40 types or groups of minerals before the *China – Rare Earths* reports were adopted.[24] Similarly to what happened in the case of export duties, however, China has reluctantly eliminated the sole measures targeted by the Appellate Body rulings.[25]

2.2 Criticality of Targeted Raw Materials

China's regime of export restrictions covers a wide range of raw materials of mineral origin that are essential to key manufacturing sectors such as construction, metallurgy, electronics and telecommunication, equipment manufacturing, transportation (including automotive, aeronautics, train and shipbuilding), chemicals, plastic and glass.[26] These sectors cover a predominant share of the total value added for the manufacturing sector.[27] Significantly, the economic importance of such materials is determined by their irreplaceability for the manufacture of new high-tech

quantity equals the annual total amount available for each product. See China's Export Quota Bidding Measures, Article 26, cited in Panel Reports, *China – Raw Materials*, paras. 7.187–7.199.

[22]See, e.g. the requirements established for exporters of bauxite, coke, fluorspar, silicon carbide and zinc, detailed in Panel Reports, *China – Raw Materials*, paras. 7.177–7.186 and paras. 7.198–7.201. See also the requirements imposed on exporters of rare earth elements, molybdenum and tungsten described in Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R, adopted 26 March 2014 (hereinafter Panel Reports, *China – Rare Earths*), paras. 7.204–7.235.

[23]Morrison WM and Tang R (2012), China's rare earths industry and export regime: economic and trade implications for the United States, US Congressional Research Service (CRS) Report for Congress, 30 April 2012, https://fas.org/sgp/crs/row/R42510.pdf (last accessed 15 January 2018).

[24]Fliess et al. (2014), p. 13; Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

[25]At first, the Chinese government seemed determined not to bring its regime into compliance with the Appellate Body recommendations. See Espa (2015), p. 328.

[26]For a detailed description of the most common end-uses of mineral resources subject to export restrictions by the Chinese government, see Korinek and Kim (2010), pp. 123–130. More detailed profiles covering the main end-use markets of each material were prepared by the European Commission. See European Commission (2014) Report on critical raw materials for the EU: non-critical raw materials profiles, http://www.catalysiscluster.eu/wp/wp-content/uploads/2015/05/2014_Critical-raw-materials-for-the-EU-2014.pdf (last acceded 15 January 2018).

[27]Espa (2015), p. 58.

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applications, including clean energy technology equipment and, more generally, a variety of environmentally friendly technologies.[28]

Not surprisingly, such critical minerals and metals are the most intrusively affected by China's regime of export restrictions compared to other categories of commodities. In particular, the highest export duty rates imposed by China are the ones applied on minerals and metals, more generally, and on the critical minerals and metals targeted by the WTO raw materials disputes, more specifically.[29] Interestingly, China also frequently resorts to progressive taxation, namely taxing ores and concentrates higher then oxides and semi-processed and processed products.[30] Mutatis mutandis, the same holds true for China's export quotas, which have not only mainly targeted minerals and metals but also been gradually tightened along the years, both in terms of absolute value and as a percentage of total Chinese production.[31]

All these elements have made China's export restrictions instrumental to promoting local downstream processing industries, in apparent contradiction to the goals of environmental protection and resource protection consistently purported by the Chinese government before the WTO adjudicators.[32] Chinese domestic production and exports of higher value-added intermediate products have in fact systematically expanded in coincidence with the use of mineral export restraints.[33] This has been possible due to the combination of the price depression effect induced on restricted materials in the Chinese market compared to world market levels and the comprehensive industrialization programmes launched by the Chinese government in recent years.[34] Among them, the Twelfth and Thirteenth National Five-Year Plans (2011–2015 and 2016–2020, respectively) have targeted the expansion of many industries that avail themselves of restricted minerals and metals (namely, iron/steel and non-ferrous metals, construction, equipment manufacturing, shipbuilding and automotive) in addition to boosting leading-edge manufacturing sectors (including, energy conservation and environmental protection, new generation information technology, biotechnology, high-end manufacturing equipment, new energy and materials and new-energy vehicles), which again comprise large raw material-

[28]See Espa (2015), pp. 56–58.

[29]See Espa (2015), pp. 77–80.

[30]OECD Inventory on export restrictions on Industrial Raw Materials, https://qdd.oecd.org/subject.aspx?Subject=ExportRestrictions_IndustrialRawMaterials (last acceded 20 January 2018).

[31]A striking example in this respect is the evolution of the allocated export quotas imposed on rare earth elements, which went from 59,643 metric tons in 2007 through 49,990 metric tons in 2008 to 30,259 metric tons in 2010. Although the number of total allocations always remained within the range of 30,000–31,000 metric tons until 2014, from 2011 the list of products covered by the quota was updated to include various ferro-alloys that were not covered before. This de facto reduced the 2011 rare earths export quota by as much as 30%. See Espa (2015), pp. 91–92.

[32]Espa (2015), pp. 114–115.

[33]Korinek and Kim (2010), pp. 118–119; Price and Nance (2010), p. 91; Fung and Korinek (2014), p. 19.

[34]Wu (2017), pp. 673–691.

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using downstream firms.[35] The Plans have furthermore been followed-up by a number of sector-specific plans aimed at imposing targeted objectives for the reinforcement of "national champions" in different industries, including the raw materials industry.[36]

In conclusion, although China has consistently denied that export restrictions were implemented with a view to lowering the price of domestic raw materials as part of its industrial policy, such instruments have often played a crucial role in the development and/or the expansion of strategic industrial sectors instead of disincentivising Chinese mining production as predicted by theoretical economic models.[37]

2.3 Magnitude of the Economic Effects of China's Export Restrictions

China is the world's leading producer of many of the raw materials of mineral origin subject to export restrictions.[38] It also remains or has until recently been the sole producer of a number of targeted raw materials (e.g. rare earth elements).[39] This is not solely due to the geographical concentration of mineral resources, as in most cases the global distribution of reserves is much more widely dispersed than the Chinese dominance in world's mine production would suggest.[40] It is also a reflection of decades-long mine dismantling processes in relatively-abundant countries, including advanced economies such as Australia, Canada and the US, which resulted from a combination of Chinese dumping practices dating back to the 1970s, economic considerations related to the cost-effectiveness of expanding production capacity during a prolonged time of low commodity prices lasted until the mid-2000s and the increasing regulatory costs associated with compliance with environmental regulations.[41]

As one of the largest exporters of critical minerals and metals, China can affect world supply and drive up world prices through the use of export barriers, in addition

[35]Wu (2017), pp. 686–687.

[36]Espa (2015), pp. 114–115.

[37]According to standard economic theory, the domestic price decline induced by export restrictions should in turn generate a reduction in domestic production. Fung and Korinek (2014), p. 15. Yet, a substantial body of literature has pointed to contradicting evidence when it comes to assessing the adequateness of export restrictions as environmental tools. For an overview of this literature, see Espa (2015), pp. 119–122.

[38]China's dominance in global mining production was thoroughly assessed. Espa (2015), pp. 58–61.

[39]Wu (2017), pp. 678–680.

[40]Korinek and Kim (2010), p. 108.

[41]See, e.g. Gu (2011), p. 774; Wu (2017), p. 686.

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to artificially lowering domestic prices.[42] As a result, import-dependent countries are exposed to severe competitiveness losses without readily being able to rely on alternative suppliers or indigenous production capacity. With a view to understanding the magnitude of such resulting competitive disadvantage, the OECD has specifically assessed the impact of a number of export restrictions applied by China on various minerals and metals including coke, rare earth elements and, more generally, several materials that China predominantly produces worldwide. In the case of coke, China's export restrictions created a substantial contraction of Chinese exports and a corresponding price differential of 241 USD per metric ton between world prices and Chinese domestic prices.[43] This translated into a cost advantage of almost 145 USD per metric ton for Chinese steel producers over foreign companies, equal to more than 20% of the international market price for carbon steel.[44] China's export restrictions on rare earth elements have also caused great distortions in the world market, creating a de facto dual pricing regime whereby Chinese rare earth processors were paying 31% less than their foreign competitors in 2008.[45] Access to supply was also compromised for foreign consumers after China tightened quota levels below global demand in 2009.[46] Similar effects on Chinese on downstream producers and foreign competitors were induced by China's export regime on tungsten articles.[47]

In light of the foregoing, other relatively well-endowed countries such as Australia and the US have resumed production of critical mineral resources, but they are still dwarfed by Chinese production due to the lagged response of supply in the mining sector.[48] US- and EU-based companies dependent on restricted inputs have started relocating manufacturing facilities to China in order to circumvent the economic impact of China's export restrictions and thus remain competitive with Chinese downstream firms.[49] Yet, the threat of manufacturing jobs loss is a scenario that both the US and the EU cannot afford at a time where economic stagnation is leaving them vulnerable to anti-trade political rhetoric. Not surprisingly, they have opted for the judicial option within the multilateral trading system to protects their national economic interests.

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[42]Fung and Korinek (2014), p. 17.

[43]Price and Nance (2010), p. 91.

[44]Price and Nance (2010), p. 91.

[45]Korinek and Kim (2010), pp. 118–119; Fung and Korinek (2014), p. 31.

[46]Gu (2011), p. 768.

[47]European Commission (2010) Annex V to the report of the Ad-hoc Working Group on defining critical raw materials, https://ec.europa.eu/growth/tools-databases/eip-raw-materials/en/community/document/annex-v-report-ad-hoc-working-group-defining-critical-raw-materials (last accessed 22 January 2018).

[48]Even if mining companies decide to increase investment, actual capacity expansion requires at least 5 years and sometimes even decades to become operational due to decision and implementation lags. Korinek and Kim (2010), p. 104; Peeling et al. (2010), p. 159.

[49]Wu (2017), p. 687.

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3 China-Specific WTO Obligations on the Export Side

As shown above, China's extensive regime of export restrictions, matched with its dominance in mine production, plays a big role in explaining the series of raw materials disputes brought at the WTO. Another important part of the story, however, is arguably played by the comprehensiveness of China-specific obligations on the export side.

3.1 China's WTO Obligations on the Use of Export Duties

China's WTO obligations on the use of export duties were assumed by virtue of paragraph 11.3 of its Accession Protocol[50] and the related provisions of its Working Party Report.[51] According to paragraph 11.3:

> China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

Annex 6 to China's Accession Protocol, labelled "Products Subject to Export Duty", lists 84 HS 8-digit products for which maximum levels of export duty are provided. With respect to these commitments, a Note to Annex 6 clarifies:

> China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected Members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

Among the 84 products listed in Annex 6 are mostly mineral raw materials, from iron and ferro-alloy metals to non-ferrous metals and industrial minerals.[52] The bound export duty rate ranges from 20% to 40%. Significantly, however, China's maintains

[50]Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001.

[51]See paragraphs 155 and 156 of China's Working Party Report, WT/ACC/CHN/49, 1 October 2001. These paragraphs fall under Section C "Export Regulations" and deal solely with China's specific obligation to eliminate export duties. Paragraph 155 reads: "taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol." Paragraph 156 confirms: "China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminium products, were subject to export duties."

[52]Out of 84 listed products, only 4 are fishery products or products of animal origin. See Annex 6 to China's Protocol of Accession.

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export duties on a range of mineral raw materials which far outnumbers the listed products.[53]

Whether China can still lawfully maintain such export duties and, if so, under which conditions, depends on the level of flexibility built in paragraph 11.3 of its Accession Protocol and the related Working Party Report provisions. In *China – Raw Materials*, the Appellate Body affirmed that a combined reading of paragraph 11.3, Annex 6 and the Note to Annex 6 indicates that China must not impose export duties other than those falling within the scope of a specific set of exceptions: those covered by GATT Article VIII[54] and those applied in conformity with Annex 6. In its view, this implies that (1) China cannot apply export duties on products not listed in Annex 6;[55] (2) the "exceptional circumstances" provided for in the Note to Annex 6 cannot be invoked to impose export duties on non-listed products;[56] (3) in the case of the 84 listed products, China can increase the applied export duties only up to the maximum rate set out in Annex 6[57] by invoking the "exceptional circumstances" exception provided for in the Note to Annex 6, but only insofar as it fulfils the prior consultation requirement.

The Appellate Body also found that paragraph 11.3-inconsistent export duties an not be subject to Article XX GATT defences in *China – Raw Materials* and *China – Rare Earths*. It considered in particular that the unavailability of Article XX GATT stems from (1) the fact that China's export duty commitments were assumed under an individual accession protocol provision, paragraph 11.3, rather than being negotiated as export duty concessions directly incorporated within the GATT framework and (2) the fact that paragraph 11.3 of China's Accession Protocol does not exhibit an "objective link" to the GATT flexibilities, mainly in the form of an express reference to the GATT Agreement or to the WTO Agreement, more generally, or to Article XX GATT itself, more specifically.[58]

The Appellate Body made clear that ascertaining the existence of a discernible "objective link" to any GATT flexibilities requires a case-by-case analysis of individual accession protocols provisions, having due regard to the specific language

[53]In addition, the export duties applied on all listed products are set already at the maximum bound rate indicated under Annex 6, but the listed products are by far outnumbered by the mineral products restricted at the exportation. Espa (2015), pp. 150–151. See also Sect. 2.1 above.

[54]The Appellate Body clarified that the export duties regulated under paragraph 11.3 of China's Accession Protocol do not fall within the scope of Article VIII GATT. Appellate Body Reports, *China – Raw Materials*, para. 290.

[55]Appellate Body Reports, *China – Raw Materials*, para. 284.

[56]Appellate Body Reports, *China – Raw Materials*, para. 284.

[57]Appellate Body Reports, *China – Raw Materials*, para. 285. This is because the word "furthermore" in the second sentence of the Note to Annex 6 was interpreted by the Appellate Body to mean that the obligation contained in the second and third sentences of the Note (i.e. the exceptional circumstances requirement and the consultation requirement) are "in addition to China's obligation under the first sentence not to exceed the maximum tariff levels provided for in Annex 6." Appellate Body Reports, *China – Raw Materials*, para. 287.

[58]For a thorough analysis of the Appellate Body's reasoning and its systemic implications, see Espa (2015), pp. 194–208.

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of the provision taken in its context and in light of the purpose of the WTO Agreement, as well as to the specific circumstances of the case (including the measure(s) at issue and the nature of the alleged violation)[59]; yet, it follows from its reasoning on the limits inherent to the way paragraph 11.3 of China's Accession Protocol was drafted that China would also be prevented from renegotiating its export duty commitments in accordance with GATT-specific procedures available to duty concessions.[60]

3.2 *China's WTO Obligations on the Use of Export Quantitative Restrictions*

As regards its use of export quotas and, more generally, quantitative types of export restrictions, China's obligations arise exclusively from the GATT. As it is known, the Agreement outlaws any type of quantitative restrictions on exports as per Article XI:1, which reads:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Contrary to what happens in the case of export duties, this general elimination obligation applies across the board to all WTO Members and is indeed a cornerstone of the overall GATT architecture.[61] Accordingly, it has been consistently interpreted in a broad manner in GATT/WTO case law.[62] WTO dispute settlement bodies have in particular made clear that the scope of Article XI:1 does not solely cover formal quantitative restrictions, such as quotas, but also any types of "restrictions", irrespective of their legal status or their de jure or de facto nature, as long as they have a limiting or restrictive effect on the volume of exports.[63]

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[59] Appellate Body Reports, *China – Rare Earths*, para. 5.74.

[60] The classical way for members to renegotiate their tariff concessions is the deconsolidation procedure under Article XXVIII GATT. For a more detailed explanation, see Espa (2015), pp. 202–204.

[61] Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 19 November 1999, as modified by Appellate Body Report, WT/DS34/AB/R, 22 October 1999, DSR 1999:VI, p. 2363, para. 9.63.

[62] At the time of writing, out of the seven cases that have dealt specifically with quantitative restrictions on exports under Article XI:1 GATT, all the measures challenged were considered to fall within the meaning of "prohibitions or restrictions…on the exportation". For a thorough analysis of Article XI:1 GATT jurisprudence on the export side, see Espa (2015), pp. 169–175.

[63] In *China – Raw Materials*, in particular, the Panel clarified that "the very *potential* to limit trade constitute[s] a 'restriction' within the meaning of Article XI:1 of the GATT 1994." Panel Reports, *China – Raw Materials*, para. 7.1081 (original emphasis).

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Against this backdrop, it is unambiguous that any of the quantitative export restrictions applied by the Chinese government, a fortiori those export quotas challenged at the WTO, unambiguously fall under the remit of Article XI:1 GATT.[64] It is also undisputed, however, that China could seek justification for such measures, just like any other WTO Member, by invoking the GATT exceptions relevant to mineral export restraints—in contrast to what happens for its paragraph 11.3-inconsistent export duties.

Several GATT exceptions have been invoked by China to defend its export quotas as measures allegedly forming an integral part of comprehensive environmental and/or conservation strategies ultimately seeking to fulfil "sustainable economic development" goals.[65] In *China – Raw Materials*, China sought justification for the export quotas imposed on refractory-grade bauxite under Article XI:2 (a) GATT, which shelters Article XI:1-inconsistent export prohibitions or restrictions that are "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party."[66] In *China – Raw Materials* and *China – Rare Earths*, China invoked both Article XX(b) GATT, which covers measures that are "necessary to protect human, animal or plant life or health" and Article XX(g) GATT, which provides justification for measures "related to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption."[67] In the latter case, however, its strategy has gradually shifted towards focusing on the conservation exception due to the higher evidentiary burden entailed by the necessity test incorporated into Article XX(b) GATT.[68]

Up until now, China has consistently refrained from considering other general exceptions more directly relating to industrial needs. Article XX(i) GATT, in particular, allows to justify measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan." Article XX (j) GATT shelters those measures that are "essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products . . . ". It remains to be seen whether

[64] A variety of export restrictive measures have been considered to fall within the remit of Article XI:1 GATT in existing WTO case law, from export quotas through non-automatic export licensing schemes to minimum export prices. For a complete overview, see Espa (2015), pp. 169–172.

[65] For a description of how export restrictions have served both industrial and environmental goals, see Sects. 2.2 and 2.3.

[66] Appellate Body Reports, *China – Raw Materials*, paras. 323–337.

[67] As it is known, measures falling under one of the listed exceptions must also meet the test of the chapeau to Article XX GATT, which requires that they 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."

[68] For a broader discussion, see Espa (2015), pp. 209–213.

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China will change its defensive strategy in *China – Raw Materials II* in light of the ambivalent rationale of its Article XI:1 GATT-inconsistent export quotas.[69]

4 Assessing China's Regulatory Autonomy to Impose (Mineral) Export Restraints

The analysis of the obligations binding upon China with respect to the use of export restrictions has shown that China has undertaken uniquely stringent export duty commitments in the context of its accession, both with regards to their scope and coverage and to their level of *in*flexibility. As explained below, such commitments leave it with minimal margin of manoeuvre to lawfully use export duties, irrespective of what their rationale may be, as compared to other resource-endowed WTO Members. China is thus left with the harder task to seek justification for GATT-inconsistent, yet more trade-distortive types of export restrictions, such as export quotas, under Article XX GATT.

4.1 Regulatory Autonomy to Impose Export Duties

When looking at China's export duty commitments as arising from paragraph 11.3 of its Accession Protocol and interpreted in recent WTO jurisprudence, China's regulatory autonomy to introduce (mineral) export restraints appears severely limited for two main reasons.

First, the scope and coverage of its obligations are extensive. China shall abstain from imposing export duties on any products except for the 84 HS 8-digit tariff lines listed in Annex 6 to the Protocol and, even in this case, it can only increase its applied rate up to the maximum duty rate indicated in Annex 6 of its Accession Protocol insofar as "exceptional circumstances" occur and after consulting with affected Members. The Appellate Body has not yet interpreted the expression "exceptional circumstances" so it remains open to question whether it is intended to refer to (any of the) GATT flexibilities. Based on the principle of effective interpretation, however, it seems very unlikely that it could be considered to overlap with Article XX GATT.[70]

As such, China's obligations are unprecedented among resource-endowed Members, be it WTO Members exclusively bound by standard GATT disciplines or newly acceded WTO Members that have assumed country-specific export duty

[69] Espa (2015), pp. 111–118.

[70] According to the principle of effective interpretation, all applicable provisions of a treaty should be interpreted in a way so as to give effect to all of them without rendering them useless, redundant or irrational. See Van Damme (2009).

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commitments in their accession protocols. The former group of countries, which includes all original WTO members and 23 out of the 35 newly acceded members, are in fact under no obligation to either eliminate or reduce export duties as per Article XI:1 GATT, although they do remain free to negotiate export duty concessions on a voluntary basis following the same procedure envisaged for import tariffs under Article II:1(b) GATT.[71] To date, however, Australia is the only Member that has engaged in such practice, although by means of including very targeted export duty concessions in its Schedule.[72] All other Members exclusively bound by GATT obligations, including large world suppliers of raw materials, can thus lawfully introduce and/or maintain export duties, irrespective of whether they use them for developmental purposes or for GATT Article XX-consistent purposes.

Paragraph 11.3 of China's Accession Protocol not only goes much further than standard GATT disciplines, but also has a much broader scope than the export duty commitments assumed by most other newly acceded Members, including any of the resource-endowed countries among such Members. At the moment of writing, in particular, 12 other members (Mongolia, Latvia, Croatia, Saudi Arabia, Vietnam, Ukraine, the Russian Federation, Montenegro, Lao People's Democratic Republic, Tajikistan, Kazakhstan and Afghanistan, in order of accession) have assumed country-specific obligations on the use of export duties in the context of their accession,[73] but only Montenegro and Tajikistan have abided by general elimination obligations, albeit mitigated by a list of export tariff bindings in the case of the latter, similarly to China.[74] They are however neither large suppliers in the international market of minerals and metals nor have they imposed any export restrictions on such

[71]Once included in GATT schedules, export duty concessions are binding and legally enforceable by virtue of Article II:1(a) and Article II:7, and could be subject to the deconsolidation procedure under Article XXVIII. For a more detailed explanation, see Espa (2015), pp. 131–135.

[72]Australia has negotiated export duty concessions on a set of 11 HS 8-digit tariff lines (namely, iron ore, titanium ore, zirconium ore, coal, peat, coke, refined copper, unwrought nickel, nickel oxide, and lead waste and scrap) by means of inserting an ad-hoc mandatory note in Section 2 of Part I of its Schedule on "MFN [most-favoured nation] import tariff commitments on non-agricultural products." The note states: "There shall be no export duty on this product." Australia's Uruguay Schedule, AUS1-201 through AUS1-204.

[73]See Espa (2017), pp. 368–370.

[74]Tajikistan committed to eliminate all export duties except those admitted by Table 9 of its Working Party Report or applied in conformity with Article VIII GATT, while omitting reference to Article XX GATT or any other general reference to the GATT 1994 or the WTO Agreement. Montenegro committed not to introduce any export duty without negotiating the incorporation of explicit or implicit references to Article XX flexibilities. Other newly acceded Members, such as Latvia, Mongolia and Saudi Arabia, promised to eliminate only the export duties applied on a limited number of products. The other newly acceded Members committed to phase down and bind the export duties applied on a specific list of products (for instance, Vietnam and Kazakhstan). For a thorough analysis, see Espa (2015), pp. 202–204.

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materials susceptible to influence world prices and/or supply.[75] The one key resource-endowed Member, which did accept to phase down and/or eliminate export duties on more than 700 tariff lines, the Russian Federation, committed to do so by means of negotiating export duty *concessions* in a new, specific part (Part V "Export Duties") of its GATT Schedule.[76] Accordingly, its obligations are directly incorporated into the GATT framework and thus grant access to GATT-specific exceptions and adjustment procedures applicable to duty concessions.

This consideration leads to the second reason, namely that China's obligations on export duties are *in*flexible. As discussed above, such inflexibility stems from the "objective link" approach developed by the Appellate Body to assess the availability of GATT flexibilities to violations of export duty commitments contained in individual accession protocol provisions, which do not incorporate GATT flexibilities.[77] Here again, China is not the only newly acceded Member that has assumed export duty commitments through such legal technique, but it is the only large raw materials supplier among them.[78]

The unparalleled stringency of China's export duty commitments makes it particularly vulnerable to WTO disputes as they cannot be derogated from or modified a priori, at least insofar as the Appellate Body confirms the soundness of its "objective link" approach.[79] On this point, it is worth-noting that, although the WTO legal system is not based on the principle of *stare decisis*, at least two considerations suggests that the Appellate Body will hardly revert its reasoning. First, the Appellate Body arguably conceived the "objective link" approach as a general guiding framework for assessing the relationship between the provisions of post-1994 accession protocols, on the one hand, and the WTO Agreement and/or the Multilateral Trade Agreements annexed thereto, on the other hand. In this sense, it seemed inspired by the broader goal to properly situate accession protocols within the overall WTO legal framework more than just merely deciding on the availability of Article XX GATT to violations of paragraph 11.3 of China's Accession Protocol.[80] Second, in *China – Rare Earths* China did raise four allegedly novel legal arguments with a view to seek the reversal of the Appellate Body's finding in *China – Raw Materials*, which revolved around: (1) the interpretative value of the WTO's fundamental environmental objectives, as stated in the Preamble of the Marrakesh Agreement; (2) the meaning of textual silence in paragraph 11.3; (3) the existence of an "intrinsic relationship" between paragraph 11.3 and the GATT 1994 and, (4) the

[75]See OECD Inventory on Export restrictions on Industrial Raw Materials, https://qdd.oecd.org/subject.aspx?Subject=ExportRestrictions_IndustrialRawMaterials (last acceded 20 January 2018).

[76]See Espa (2015), pp. 156–159.

[77]See Sect. 3.1.

[78]Espa (2015), pp. 204–208.

[79]The extent to which China's obligations could be renegotiated seems to depend on whether paragraph 11.3 of its Accession Protocol itself can be amended. China's accession protocols (as all other accession protocols), however, do not contain any amendment provisions and therefore the matter is still far from settled. Qin (2012), p. 1157.

[80]See Espa (2015), pp. 204–206.

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interpretation of the term "nothing in this Agreement" in the chapeau of Article XX GATT.[81] In examining each argument, however, the Panel did not conduct a *de novo* determination but merely aimed at discerning whether they presented "cogent reasons" for departing from the prior Appellate Body report and concluded that this was not the case.[82] Although this finding was not appealed, the Appellate Body similarly confirmed the soundness of the approach endorsed in *China – Raw Materials* by stating: "[w]e also see no reason to revisit the ruling of the Appellate Body in *China–Raw Materials.*"[83]

In light of the above, it seems unlikely that a new set of challenges against China's export duties will result in a different outcome given the extremely narrow policy space left to China under paragraph 11.3 of its Accession Protocol. As shown by the evolution of China's defensive strategy under Article XX GATT along the various raw materials disputes, however, this level of *in*flexibility has induced China to use more trade-distortive, but GATT-inconsistent, export quantitative restrictions when seeking to address legitimate concerns coming under one of the public policy goals recognised under GATT general exceptions with a view to seek justification under Article XX GATT.

4.2 Regulatory Autonomy to Impose Export Quotas

China's regulatory autonomy to use (mineral) export restraints covered under Article XI:1 GATT can be assessed by way of testing the extent to which China may successfully defend export restrictions on the basis of available GATT exceptions. As mentioned above, the exceptions relevant to mineral export restraints are Article XI:2(a), the general "environmental" exceptions (Article XX(b) and (g)) and the general "industrial" exceptions (Article XX(i) and (j)).[84]

While the latter exceptions have never been interpreted by WTO case law,[85] the reach of Article XI:2(a) GATT and the general "environmental" exceptions have recently been explored in *China – Raw Materials* and *China – Rare Earths*.[86]

As to the shortage of supply exception under Article XI:2(a), the Appellate Body narrowly interpreted this provision in *China – Raw Materials* and identified three

[81] Panel Reports, *China – Rare Earths*, paras. 7.62–7.104.

[82] Panel Reports, *China – Rare Earths*, para. 7.115.

[83] Appellate Body Reports, *China – Rare Earths*, para. 5.65.

[84] For a more detailed account, see Espa (2015), pp. 208–209.

[85] Even so, the potential of "industrial" Article XX exceptions to justify mineral export restraints is considered to be quite limited inasmuch as they target very specific situations of emergencey. Espa (2015), pp. 221–223.

[86] Although such an interpretation and application of Article XX(g) GATT was given by the Appellate Body in the context of two disputes involving China, the same approach is likely to apply with regards to any WTO Member imposing mineral export restraints due to the fact that Article XI:1 is a standard GATT rule generally applicable across-the-board. See Sect. 3.2.

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main requirements to be met cumulatively: first, the "temporarily applied" requirement, which demands that the restrictions or prohibitions be limited in time; second, the "critical shortage" requirement, which refers to deficiencies that amount to a situation of decisive importance or that reach a vitally important or decisive stage; third, the "essentialness" requirement, which requires that the product be important or necessary or indispensable to a particular Member have due regard to the particular circumstances faced by that Member at the time when it applies the restriction or prohibition.[87] In essence, Article XI:2(a) GATT cannot be invoked to justify export restrictions responding to situations of physical scarcity and/or exhaustibility of essential mineral resources (that is, situations of *permanent* shortages),[88] hence making it arguably unlikely for Chinese measures to pass the three-tier test.

The odds of convincing the Appellate Body are similarly not good in the case of mineral export restraints purportedly used for "environmental" purposes. As shown in *China – Raw Materials* and *China – Rare Earths*, in particular, the Appellate Body made clear that mineral export restraints are difficult to justify because environmental externalities and depletion risks derive from domestic mine production rather than exports.[89] In the same vein, it warned against invoking the principle of sustainable development and the principle of sovereignty over natural resources as pretexts to shelter export restrictions under the conservation exception when they are rather used as instruments of industrial policy.[90]

Although condemning China's export restrictions in both disputes, the WTO adjudicators did elaborate on the space left to WTO Members for sustainable natural resources management, with particular reference to Article XX(g) GATT.[91] They did so by shedding light on the relationship between "conservation" under Article XX(g), sustainable development and permanent sovereignty over natural resources. They accepted that the term "conservation" in Article XX(g) incorporated the notion

[87]For a thorough analysis, see Espa (2015), pp. 180–185.

[88]For more details, see, among others, Howse R and Josling T (2012) Agricultural export restrictions and international trade law: a way forward, International Food and Agricultural Trade Policy Council (IPC) Position Paper, http://www.agritrade.org/Publications/documents/Howse_Josling_Export_Restriction_final.pdf (last accessed 25 January 2018), p. 14.

[89]Espa (2015), pp. 209–213.

[90]Espa (2015), pp. 214–221.

[91]China's strategy has progressively focussed on advocating for an evolutionary interpretation of the conservation exception under Article XX(g) in light of the principle of sustainable development and the principle of sovereignty over natural resources. In particular, it invoked the latter to sustain that China's "... right to 'manage the supply' of exhaustible natural resources is inherent to its sovereignty over exhaustible natural resources, which [. . .] allows resource-endowed Members to 'freely use and exploit their natural wealth and resources. . .for their own progress and economic development'." Panel Reports, *China – Rare Earths*, para. 7.457. In addition, it argued that the principle of sustainable development, as enshrined in the Preamble of the WTO Agreement, informs the interpretation of the conservation exception as to allow Members to "adopt measures, including export quotas, that foster the sustainable development of their domestic economies consistently with general international law and WTO law." Panel Reports, *China – Rare Earths*, para. 7.457.

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of exercising rights over natural resources in the interests of a Member's economic and sustainable development, and accordingly recognised the right of WTO Members to design their conservation programmes based on "their own assessment of various, sometimes competing, policy considerations and in a way that responds to their own concerns and priorities."[92] However, they clarified that, while "conservation" policies may take sustainable economic development into account, measures that have a "sustainable economic development" objective, such as supply management, cannot be pursued under the rubric of "conservation" within the meaning of Article XX(g) GATT.[93] In other words, Article XX(g) cannot be "stretched" into an exception protecting measures that pursue industrial policy goals.[94] This conclusion lies in the premise that the exercise of sovereignty over natural resources cannot be intended to enable Article XX(g) to allow a WTO Member to allocate the available stock of a product between foreign and domestic consumers because, once extracted and in commerce, natural resources are subject to WTO law.[95]

Accordingly, several factors were taken into consideration by the WTO adjudicators to condemn China's measures. First, albeit forming part of China's comprehensive conservation policy, China's export quotas lacked the requisite close and genuine connection with the conservation goal inasmuch as they burdened foreign consumers while reserving a supply of low-price raw materials to domestic downstream industries.[96] Second, the design and structure of China's export quotas system were not even-handed in the sense required by Article XX(g) in as much as the extraction, production and export quotas were applied "at different dates, on different products, and denominated in different values without any apparent coordination among them",[97] and the domestic caps were set at levels which were lower than the expected demand for the period during which they were intended to apply.[98]

All this notwithstanding, the Appellate Body did admit that "Article XX(g) of the GATT 1994 does not exclude, a priori, export quotas or any other type of measures from being justified by a WTO Member pursuing the conservation of an exhaustible

[92]Panel Reports, *China – Rare Earths*, para. 7.459.

[93]Panel Reports, *China – Rare Earths*, para. 7.460. The Panel reiterated that "measures adopted for the purpose of economic development . . . are not 'measures relating to conservation' but measures relating to industrial policy."

[94]Panel Reports, *China – Rare Earths*, paras. 7.451–7.452 and 7.459–7.460.

[95]Panel Reports, *China – Rare Earths*, para. 7.462. As noted by the panel in *China – Raw Materials*, "a State's sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood. Nor . . . has China or any other WTO Member 'given up' its right to adopt export quotas or any other measure in pursuit of conservation. China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources." Panel Reports, *China – Rare Earths*, para. 7.270.

[96]Panel Reports, *China – Rare Earths*, paras. 7.419–7.488.

[97]Panel Reports, *China – Rare Earths*, para. 7.611.

[98]Panel Reports, *China – Rare Earths*, para. 7.550.

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natural resource."[99] On a more practical level, however, the very nature of export restrictions as "measures that increase the cost of [a raw material] to foreign consumers but decrease their costs to domestic users" was considered in both *China – Raw Materials* and *China – Rare Earths* as "difficult to reconcile with the goal of conservation."[100]

5 Conclusion

The analysis of China's WTO obligations on the export side, as interpreted by recent case law, shed light on China's extreme vulnerability to WTO raw materials disputes, irrespective of whether it purports to use export restrictions to achieve "sustainable economic development" goals. This holds true with respect to export duties (that is, the only type of export restrictions otherwise available under standard GATT disciplines to achieve economic diversification goals), due to the uniquely stringent and inflexible export duty commitments assumed by China under paragraph 11.3 of its Accession Protocol;[101] and, it also applies to the choice of quantitative types of export restrictions covered under Article XI:1 GATT, such as export quotas, including when introduced within the context of comprehensive environmental and/or conservation strategies.[102] The Appellate Body has in particular made clear that a Member's sovereign rights over its natural resources cannot be invoked to transform the conservation exception under Article XX(g), even if available, into an industrial policy exception meant to assist downstream processing industries.[103]

Based on such developments, China is arguably left with basically no margin of manoeuvre to legitimately use export restrictions to achieve (even indirectly) economic diversification goals. This makes the outcome of the third raw materials dispute highly predictable and, moreover, it exposes China, at least in principle, to as many new, easy-to-win disputes as the pervasiveness of its export regime still allows. Otherwise said, until China will not dismantle its comprehensive, yet apparently WTO-inconsistent export regime, the weapon of litigation will always be readily available to affected Members. What is more, the criticality of many of the mineral raw materials that it restricts on the exportation, on the one hand, and its dominance in world's mine production, on the other hand, render such scenario ever more concrete, especially in the context of the recently revived trade tensions

[99] Appellate Body Reports, *China – Rare Earths*, para. 5.162.

[100] Panel Reports, *China – Raw Materials*, para. 7.434; Panel Reports, *China – Rare Earths*, para. 7.541.

[101] See Sects. 3.1 and 4.1.

[102] See Sects. 3.2 and 4.2.

[103] See Sect. 4.2.

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between China and advanced economies that are typically dependent on the importation of raw materials such as the US and the EU.[104]

China's persistence in maintaining export duties and export restrictions, however, seems far to fade away against the threat of WTO litigation. Scholars have advanced different theories as to why this is so, with some attributing it, more generally, to Chinese disdain for a legal system it participates in as a rule-taker,[105] and other more specifically linking it to the lack of retrospective remedies in WTO law, which would give China a "'free pass' for *temporary* breach".[106] While these theories certainly play some role in explaining China's behaviour, it is submitted that China's ill-concealed reluctance to get rid of its export regime also reflects a more "ideological" stance against what it feels it amounts to a permanent loss of regulatory autonomy to use export restrictions as legitimate developmental tools.[107] This applies in particular to the use of export duties owing to the uneven playing field created by the WTO accession regime on export duties, which contrasts with the paucity of commitments on the part of the vast majority of WTO Members, but also holds true with respect to the use of export quotas as an "inevitable" avenue to reserve the right to invoke relevant GATT flexibilities.[108]

In conclusion, the outcome of and the approach espoused in recent WTO case law on mineral export restraints will continue to make China highly vulnerable to similar legal actions until its export regime is integrally dismantled. Yet, checkmating China through WTO litigation would arguably fail to move this goal much closer inasmuch as it could bring back into the spotlight the more general issue of policy space available to developing country Members after the enforcement of a proliferating number of (uneven) WTO-plus commitments and, accordingly, raise more general questions as to the overall legitimacy of a system that allegedly frustrates the developmental aspirations of its Members.

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[104]Wu (2017), pp. 673–675.

[105]Webster (2014), pp. 525–578.

[106]Wu (2017), pp. 683–688.

[107]Commodity exporting countries have consistently resisted any attempts at reinforcing international trade disciplines on export restrictions since the GATT era. See, e.g., Qin (2012), pp. 1180–1186.

[108]See Sects. 4.1 and 4.2.

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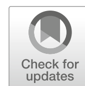
Energy and Fossil Fuels as a Topic of WTO Accession Protocols



Anna Marhold and Friedl Weiss

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1 Introduction

This contribution seeks to analyse and compare WTO Accession Protocols, particularly the interpretations given relevant commitments made in them regarding energy and fossil fuels.

Much has changed in global trade relations since the launch of the Doha Round of multilateral trade negotiations in November 2001. While these negotiations have

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hitherto been virtually dead-locked, regional arrangements and various protectionist practices continue to proliferate. Nonetheless, WTO economists have issued a strong upward revision to their forecast for 2017 trade expansion due to a sharp acceleration in global trade growth in the first half of the year.[1] At the same time the WTO edges steadily closer towards near universal membership.[2] It also gradually consolidates and extends its disciplines to cover ever wider areas of international commerce.[3] This evidently shows that despite its manifold shortcomings which are much debated, the WTO still remains the trusted guardian of the world's system of multilateral trade governance.

2 Accession to the GATT and the WTO

Except perhaps for the ICJ's *First Admission Case* regarding accession to membership in the United Nations, accession to membership in international organisations has seldom been subject of legal analysis.[4]

Accession to the WTO, governed by the provisions of Article XII of the WTO Agreement, is open to "any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement and the Multilateral Trade Agreements. . .on terms to be agreed [and] . . .shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto" (Art.XII:1).[5] This provision also confirms that the principle of the "single undertaking" as stated in Article II:2 WTO is applicable to acceding countries.[6] As the procedural aspects are not regulated in Article XII WTO, a "Handbook on Accession" to the WTO, provides guidance to what essentially constitutes continuation of pre-established GATT practice. Accordingly, upon application directed to the Director General the General Council may establish a 'Working Party' (WP) generally given standard terms of reference "*to examine the*

[1]WTO upgrades forecast for 2017 as trade rebounds strongly, 21 September 2017, PRESS/800, https://www.wto.org/english/news_e/pres17_e/pr800_e.htm (last accessed 27 May 2018).

[2]Since 29 July 2016 the WTO has 164 Members and covers ca. 98% of world trade. According to the most recent list of Current Accession Working Parties 22 countries seek membership, 6 of which are Least-Developed Countries (LDCs), List of Current Accession Working Parties, WT/ACC/17/Rev.6, 18 December 2017.

[3]See e.g. Agreement on Trade Facilitation (TFA), WT/L/940, in force since 22 Feb. 2018; Weiss (1998), pp. 71–117.

[4]Conditions of Admission of a State to membership in the United Nations, Advisory Opinion of 28 May 1948, Reported in International Law Quarterly, 2(3): 483–519.

[5]Compare the similar yet different wording of Art. XXXIII, General Agreement on Tariffs and Trade, 1994, 1867 U.N.T.S. 187 ('GATT'); see also Parenti (2000), pp. 141–157.

[6]Article II:2 of the WTO Agreement provides that the Multilateral Trade Agreements in Annexes 1, 2 and 3 are "integral parts" of the WTO Agreement, Agreement Establishing the World Trade Organization, 1994, 1867 U.N.T.S. 154.

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application of the Government of.. . .to accede to the WTO under Article XII and to submit to the General Council recommendations which may include a draft Protocol of accession".[7]

The process of accession, briefly summarised, consists of negotiations on the terms of accession, the so-called ticket of admission. One track of negotiations, the "bilaterals", deal with market-access commitments in the fields of goods and services. The other track, operating at the multilateral level of the WP, is concerned with examining the compliance of the applicant's internal legislation with WTO provisions of the covered agreements and with discussion on how to secure such compliance upon accession.[8] The results of the two-track negotiations will be recorded in the WP Report and in the attached schedules of concessions comprising the consolidated schedules of concessions for goods and services, the outcome of the so-called "bilaterals". The WP Report normally contains a description of the foreign trade regime of the acceding country and of the commitments it will undertake upon accession, mainly commitments assuring compliance with the covered agreements, but may also contain other commitments, e.g. to submit annual reports on progress of a privatization process etc. Lastly, the WP Report also includes the drafts of the accession decision by the General Council and of the all-important Protocol of accession. After adoption of the completed WP Report by the WP which signals its formal conclusion, it will be sent to the Ministerial Conference or, if not in session, to the General Council for final approval of the terms of accession. This approval, however, does not constitute the end of the accession process. The General Council merely decides that the applicant country 'may accede to the WTO' upon acceptance of the protocol—normally by signature of one of its authorised representatives—which enters into force 30 days after the acceptance.[9] This Protocol, including the specific commitments made by the acceding country, both regarding its internal legislation and market access referred to in the WP Report, shall form an integral part of the WTO Agreement for the acceding country.[10] Violation of the provisions of the Accession Protocol will, therefore, be subject to the disciplines of the Dispute Settlement Understanding.

[7]Accession to the World Trade Organization, Procedures for Negotiations under Article XII, WT/ACC/1, 24 March 1995 as revised by Accession to the World Trade Organization, Procedures for Negotiations under Article XII, Note by the Secretariat, WT/ACC/22/Rev.1, 5 April 2016.

[8]Parenti (2000), p. 151.

[9]See e.g. Accession of Ukraine, Decision of the General Council, WT/L/718, 13 February 2008, para 8.

[10]E.g. Accession of Ukraine, Decision of the General Council, WT/L/718, 13 February 2008, para 2.

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3 Energy and Fossil Fuels in WTO Accession Protocols

Two landmark rulings of the WTO Dispute Settlement Body (DSB)—"*China-Raw Materials*"[11] and "*China-Rare Earths*"[12] provided authoritative, yet to some extent ambivalent guidance on a series of complex legal issues involving the use of various types of export restrictions by WTO Members.

Both cases involved several complainants and numerous third party participants. In each of them the Appellate Body (AB) concurred with the three complainants. In the case of *China-Raw Materials* the AB, with a few exceptions only, also broadly agreed with the Panel Report that China had violated WTO law and gave short shrift to certain export restrictions maintained by the People's Republic of China (P.R.C.). Commentators observed that the AB's decision would set the tone for export restrictions on natural resources and energy products and that it will undoubtedly have far reaching consequences for raw-material exporting countries. However, the AB also adopted a somewhat controversial finding with potentially significant implications for international trade in mineral products as well as for agricultural and energy products. The AB in effect ruled that due to the wording of China's Accession Protocol under which it had assumed additional commitments with respect to export duties,[13] China was not permitted to invoke, as a defence, public policy justifications such as environmental protection, though widely accepted amongst the WTO membership.

These cases triggered intense debates amongst trade policy experts and trade law scholars both on issues relating to the general status of raw materials in trade law and on the legal characteristics and interpretation of Accession Protocols containing commitments regarding raw materials.[14]

3.1 *Status of Raw Materials in Trade Law*

As for the first set of issues, the status of raw materials in trade law, suffice it to recall that while the abortive Havana Charter for an International Trade Organisation (ITO) of April 1948[15] contained a chapter on Intergovernmental Commodity Agreements

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[11] Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012.

[12] Appellate Body Reports, *China – Measures Related to the exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 29 August 2014.

[13] Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001: E.g. under Article 18 of Appendix 1A of the Accession Agreement, China is required to make annual notifications of non-automatic export restrictions.

[14] For an account of the historical background and terminological usage see e.g. Weiss (2015), pp. 296ff.

[15] Havana Charter for an International Trade Organization, UN Doc. E/Conf.2/78, 24 March 1948.

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and a definition of raw materials, the GATT does not contain its own rules on trade with raw materials as it was not drafted in contemplation of such trade. Instead it incorporates those of the Havana Charter through a series of complex cross-references, most importantly Article XX (h), which covers export or import quotas.[16] In fact the GATT Contracting Parties never managed to agree on standards for agreements on raw materials as envisaged under Article XX (h) GATT, nor was any such agreement ever submitted to them, whether for their approval or disapproval. Generally speaking, the GATT remained passive in this respect, prompting discontent and criticism on the part of developing countries.

3.2 WTO Accession Protocols

The focus of this article, however, is on the second set of issues, the AB's novel approach to the interpretation of commitments made regarding natural resources and energy in Accession Protocols.

In recent years, interdependence within the global economy has deepened. Particularly after the global financial crisis in 2008, disputes over "behind-the-border" measures have been increasing steeply, amid clashes of multiple sets of trade rules and industrial policies. In fact export restrictions represented the fastest growing type of trade restriction accounting for 27% of all new trade restrictive measures introduced by WTO Members in the years 2013–2014, the highest ever recorded since the start of the crisis.[17] In the extractive sectors, export restrictions have been particularly controversial due to their ambivalence. Indeed, by slowing the pace of extraction and hence depletion of finite resources they are apt to mitigating negative environmental consequences associated with extractive activities. On the other hand, by also *de facto* "subsidizing" domestic downstream producers, they serve industrial policies. In order to uphold the WTO's "rule-oriented" approach during turning points in the international economic order, it seems that analysis of such measures needs to be extended to cover the objectives and backgrounds for their introduction, and even their secondary effects, so that the objective structure of the measures themselves can be accurately understood. Otherwise, measures ostensibly taken e.g. for environmental or safety reasons can provide pretexts for "murky" protectionism. Export restrictions on natural resources and foodstuffs have become problematic in terms of international trade, and have repeatedly been subject of discussions and analysis,[18] including in the WTO Doha Round negotiations in the

[16]Article XX(h) GATT and Note Ad Article XX(h) GATT.

[17]Report to The TPRB from the Director-General on Trade-Related Developments, WT/TPR/OV/W/8, 27 June 2014, p. 23. Despite their pledge to roll back protectionist measures, G-20 economies alone have introduced 1441 trade restrictive measures including trade remedies since 2008; 75% of these were still in place by October 2015, cf. Key findings in Joint OECD-WTO-UNCTAD Report on G-20 Trade and Investment Measures, 30 October 2015.

[18]OECD (2014).

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fields of Non-Agricultural Market Access (NAMA) and agriculture.[19] Quantitative restrictions (QRs) have habitually focused on imports, but it is noteworthy that a number of WTO Members[20] implement restrictions and controls on exports.[21] Disciplines over export restrictions prescribed in WTO Agreements including Accession Protocols were several times subject to interpretation and elucidation in WTO dispute settlement proceedings.[22]

4 Energy in Accession Protocols 1996–2015

Since the establishment of the WTO in 1995, 34 new countries have joined the Organization, bringing the total amount of WTO Members to 164 in 2018.[23] Several of these countries, such as China, Ecuador, Kazakhstan, Oman, Saudi Arabia, Russia and Ukraine are major energy producing, exporting, importing and/or transporting countries and have taken up commitments relevant for this sector. This section will highlight the most important of these commitments in chronological order of accession. It will discuss the main commitments made by seven WTO Members that are, in various ways, particularly important players on the global energy stage. Several of these countries, namely Ecuador, Oman, Saudi Arabia, Russia and Kazakhstan are major fossil fuel producers. Moreover, Ecuador and Saudi Arabia are also members of the Organization of Oil Exporting Countries (OPEC). We also discuss the contrasting example of China, the WTO Member which is both the world's biggest solar panel producer and energy importer. Last but not least, we will also look at the accession commitments of one of the most contested energy transit countries worldwide: Ukraine.

[19] Japan, along with Switzerland, has made a proposal regarding export restrictions from the perspective of food importing countries aiming at tightening conditions for the implementation of export restrictions and for monitoring their continued use.

[20] E.g. China, ASEAN, USA, Canada; on food stuff after 2010 e.g. Russia, Ukraine, India, Pakistan, Argentina, Kazakhstan.

[21] Depending on their objectives several categories of export restrictions may be distinguished: (1) Export tariffs (taxes) to generate fiscal revenue; (2) Export restrictions/export tariffs (taxes) to protect domestic industries; (3) Export limits/export tariffs, taxes to protect domestic supply; (4) Investment-related export demand; (5) Miscellaneous other export restricting measures, e.g. diplomatic measures (pursuant to UN Security Council Resolutions, international treaties, international export control frameworks).

[22] Liu (2014), pp. 751–771.

[23] See WTO, 'Protocols of accession for new members since 1995, including commitments in goods and services', 30 November 2015, https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm (last accessed 27 May 2015).

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4.1 Ecuador (1996)

Ecuador is one of the thirteen Members of OPEC. The country joined the WTO briefly after its establishment, in 1996.[24] At that time, energy discussions were not centre stage in the multilateral trading forum, when the newly established Organization and its Members had plenty of other matters to deal with. Perhaps for this reason, energy did not feature prominently in Ecuador's Accession Protocol. Energy (oil and gas), are mentioned with respect to economic policies and state trading enterprises, as the only sector where prices were controlled by the state.[25] Nevertheless, no stringent commitments were made in this sector. The country did, however, take up some commitments in the energy services sectors (services incidental to mining).[26]

4.2 Oman (2000)

While Oman is not a Member of the OPEC (though often mistaken for one), it is a prominent oil producer and exporter. It acceded to the WTO in 2000. In contrast to Ecuador, energy issues already played a bigger role in Oman's accession. Leading up to its efforts to accede to the WTO, Oman for instance significantly liberalized its markets.[27] Aside from going through a process of privatisation, it agreed to consider its national oil company, Petroleum Development Oman (PDO) as a State Trading Enterprise in the sense of the GATT Article XVII.[28] It also opened its service sector with respect to reservoir exploration and electricity distribution without any

[24]Protocol for The Accession of The Republic of Ecuador to the Agreement Establishing the World Trade Organization, WT/ACC/ECU/6, 22 August 1995; Report of the Working Party on the Accession of Ecuador, WT/L/77 + Corr.1, 7 August 1995.

[25]Report of the Working Party on the Accession of Ecuador, WT/L/77, 14 July 1995, para 7: '*The only prices controlled by the State were internal prices of certain oil and gas products for domestic consumption, pharmaceuticals and electricity.*'; Para 63 on State-Ownership and Privatization; State Trading Enterprises: '*Furthermore, there were no monopolies in Ecuador except in the case of natural gas and some petroleum products*.' And, Pricing Policies, para 52: '*The price-setting policy Ecuador had established in the 1970s had been virtually dismantled. The exceptions to this trend were fuels and gas for household use, where prices were set by the Ministries of Finance and Energy and Mining; and medicaments.*'

[26]UNCTAD (2001), p. 211.

[27]Protocol of Accession of The Sultanate of Oman to the Marrakesh Agreement Establishing the World Trade Organization, (WT/ACC/OMN/28, 3 November 2000); Report of the Working Party on the Accession of Oman, WT/ACC/OMN/26, 28 September 2000, para 14; Also see IBP (2015), p. 114.

[28]Report of the Working Party on the Accession of Oman, WT/ACC/OMN/26, 28 September 2000, paras 109–114, at para 112; Also see Jimenez-Guerra (2001), p. 23.

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conditions.[29] Last but not least, Oman signed up to the Agreement on Government Procurement (AGP), which is a plurilateral trade agreement binding only those WTO Members which have accepted it.[30] This implies that when procuring energy products, Oman has to abide by the rules of this Agreement, which has far-reaching consequences for the country.

4.3 China (2001)

China joined the WTO in 2001.[31] While it is not a major energy producer, it is the world's biggest importer of energy as well as the main manufacturer of solar panels worldwide.[32] It is, therefore, imperative to discuss the country in this context. Because China's domestic market is so vast, concerns were raised with respect to price controls that the country maintains on various products.[33] Energy (gas and electricity) is also subject to these price controls.[34] In its Accession Protocol, China has agreed to apply its price controls in a WTO consistent manner, although it was permitted to maintain them.[35] China is also expressly allowed to maintain an import quota on processed oil (a WTO-minus commitment).[36]

With regard to State Trading, China also undertook WTO-minus commitments, as it retained the right to impose import and export state trading measures on crude and processed oil, but has to do so in a fully transparent and WTO-compliant

[29]Report of the Working Party on the Accession of Oman, WT/ACC/OMN/26, 28 September 2000, paras 109–114, at para 112; Also see Jimenez-Guerra (2001), p. 23.

[30]Report of the Working Party on the Accession of Oman, WT/ACC/OMN/26, 28 September 2000, p. 121; Article II:3, Agreement Establishing the World Trade Organization, 1994, 1867 U.N.T.S. 154; Annex 4, Agreement Establishing the World Trade Organization, 1994, 1867 U.N.T.S. 154.

[31]Protocol on The Accession of The People's Republic of China, WT/L/432, 23 November 2001; Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001.

[32]Earth Policy Institute, Annual Solar Photovoltaics Production by Country, 1995–2012, 31 July 2013, www.earth-policy.org/datacenter/xls/indicator12_2013_2.xlsx (last accessed 27 May 2018).

[33]Milthorp and Christy (2011), p. 314.

[34]Milthorp and Christy (2011), p. 314 and Annex 4 to Protocol on The Accession of The People's Republic of China, WT/L/432, 23 November 2001.

[35]Milthorp and Christy (2011), p. 314 and Annex 4 to Protocol on The Accession of The People's Republic of China, WT/L/432, 23 November 2001 and Protocol on The Accession of The People's Republic of China, WT/L/432, 23 November 2001, para 64: '*In response, the representative of China confirmed that China would apply its current price controls and any other price controls upon accession in a WTO consistent fashion, and would take account of the interests of exporting WTO Members as provided for in Article III:9 of the GATT 1994. He also confirmed that price controls would not have the effect of limiting or otherwise impairing China's market-access commitments on goods and services. The Working Party took note of these commitments*'.

[36]Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, p. 134, Table 2.

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manner.[37] Last but not least, as discussed above, it is well known that China agreed to tie its export duties on several raw materials and rare earths, not to mention that it would eliminate other export restrictions (such as licensing), central issues in the *China-Raw Materials* and *China-Rare Earths* cases.[38] While not directly pertaining to energy, this is relevant for the wider debate concerning restrictive measures affecting raw materials and natural resources. Additionally, it is important with regard to the (im)possibility of Members to invoke GATT Article XX Exceptions to its obligations flowing from Accession Protocols.[39]

4.4 Saudi Arabia (2005)

Saudi Arabia's WTO Accession marked the entry of one of the world biggest oil producers and the most prominent OPEC Member. Dual energy pricing issues were a key issue in its accession.[40] After heated negotiations, especially in the context with the EU (back then still the EC), Saudi Arabia did eventually take up the commitment that it would not sell its petroleum domestically below the world market price[41]:

> In response to a question from a Member of the Working Party, the representative of Saudi Arabia stated that all petroleum-based and natural gas-based products in Saudi Arabia were made available to all users regardless of whether the users were Saudi or foreign owned. He

[37]Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, p. 134, Table 2, Annex 2A2 ('Products Subject to State Trading Import'), paras 50–57 and 58–73, respectively, and Annex 2A2 ('Products Subject to State Trading Export'), items 31–49, list coal, crude oil and processed oil.

[38]Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R, adopted 22 February 2012, DSR 2012: VII, p. 3295; Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1/WT/DS395/R, Add.1 and Corr.1/WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R, DSR 2012:VII, p. 3501; Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R/WT/DS432/AB/R/WT/DS433/AB/R, adopted 29 August 2014; Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1/WT/DS432/R and Add.1/WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R/WT/DS432/AB/R/WT/DS433/AB/R; note that paragraph 11.3 of China's Accession Protocol (n 31) does not include a reference to the GATT, in contrast to newer Accession Protocols (Russia, Ukraine, Kazakhstan).

[39]Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1/WT/DS395/R, Add.1 and Corr.1/WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, paras 7.124–7.129; Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R, adopted 22 February 2012, paras 279–285.

[40]Milthorp and Christy (2011), p. 306 ff.

[41]Milthorp and Christy (2011), p. 306 ff.

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> noted that currently domestic sales of heavy naphtha were not subject to any discount and were priced at the prevailing international price. Prices of exports of these products, he confirmed, were based entirely on international market conditions.[42]

In view of the fact that Saudi Arabia and OPEC (still) have considerable influence on the world market price of oil, by means of the production quota they apply on crude petroleum, the question arises to what extent this is really a firm commitment to eliminate dual pricing. Furthermore, Saudi Arabia's dual pricing policies may be administered in different ways than just through a low domestic price of petroleum (e.g. by administering export taxes on petroleum (not regulated by the GATT), which may not be included in the calculation of the world market price).

Apart from petroleum, there are large quantities of natural gas in Saudi Arabia, mostly in the form of Liquefied Natural Gas (LNG) produced as a by-product of oil exploration. In its accession report, the country did note that natural gas was sold domestically at a regulated price, as this gas is not intended for export.[43] As this was subjected to considerable criticism from the EU, the representative from Saudi Arabia in the Report of the Working Party stated that:

> Saudi Arabia would apply its price regulations and profit controls in a WTO consistent fashion, taking into account the interests of exporting WTO Members as provided for in Article III:9 of the GATT 1994 and in Article VIII of the General Agreement on Trade in Services (GATS).[44]

Because it is so closely tied to its petrochemical sector, State Trading was another issue that attracted much attention in Saudi Arabia's accession negotiations.[45] Paragraphs 44–52 of the Working Party Report dealt with this matter. State Trading Enterprises that are especially relevant for the Saudi energy sector are the Saudi Arabian Basic Industries Cooperation (SABIC), the Saudi Electricity Company (SEC) and the Saudi Arabian Oil Company (Aramco). Concerning the first, SABIC, the report stated that the company, although state owned, does not enjoy any special or exclusive privileges and there are no legal impediments to competition.[46] The same statement was made regarding SEC.[47] Saudi Aramco plays a prominent role in exploiting domestic energy resources and the country's investor

[42] Protocol on the Accession of The Kingdom of Saudi Arabia, WT/L/627, 11 December 2005; Report of the Working Party on the Accession of the Kingdom of Saudi Arabia, WT/ACC/SAU/61, 1 November 2005, para 28.

[43] But it emphasised that this price was available to all on the domestic market, whether from domestic or foreign origin. See especially Report of the Working Party on the Accession of the Kingdom of Saudi Arabia (n 24) para 29; This is not deemed to be contrary to Article III.9 GATT.

[44] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia, WT/ACC/SAU/61, 1 November 2005, para 37, incorporating by reference the list in Annex A, which includes an exhaustive list of goods that are subject to price controls.

[45] Milthorp and Christy (2011), p. 311 ff.

[46] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia, WT/ACC/SAU/61, subparagraph 44(i).

[47] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia, WT/ACC/SAU/61, subparagraph 44(iii).

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climate in the energy sector remains restricted, although it has opened up in recent years.[48] With regard to its procurement procedures, the Report stated that:

> Saudi Aramco's procurement procedures afforded full opportunity for all qualified suppliers of goods and services of WTO Member countries to compete for participation in competitive bidding. The company selects the most technically and financially qualified contractor whose bid represented the least overall cost to Saudi Aramco.[49]

All in all, it is clear that energy issues were an important topic in Saudi Arabia's accession negotiations. While perhaps not to the desired degree of all negotiating parties, the countries concerned did undertake important commitments in the energy sector.

4.5 Ukraine (2008)

In the above-mentioned list of acceding countries, Ukraine represents a unique example. Although it is not a significant energy producer, it may be the most important and controversial energy transit State in the world. It is the gateway for Russian and Central Asian gas to Europe, apart from being highly depended on gas imports itself. In the 2000s, the Ukraine was at the centre of heated gas transit disputes with its neighbour Russia, that left the EU partially in the cold.[50] Since these events occurred around the time of Ukraine's accession negotiations to the WTO, transit issues received special attention. The result was that transit commitments made by Ukraine in the energy sector were most comprehensive, both with respect to goods and services. Concerning GATT Article V, especially third-party access was a much discussed issue.[51] Eventually, Ukraine committed itself to the following:

> The representative of Ukraine confirmed that Ukraine would apply all its laws, regulations and other measures governing transit of goods (including energy), such as those governing charges for transportation of goods in transit, in conformity with the provisions of Article V of the GATT 1994 and other relevant provisions of the WTO Agreement. The Working Party took note of this commitment.[52]

These commitments indicate that transit trough fixed infrastructures such as pipelines is covered by GATT Article V, at least for those countries that have accepted

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[48]Milthorp and Christy (2011), p. 312.

[49]Report of the Working Party on the Accession of the Kingdom of Saudi Arabia, WT/ACC/SAU/61, subparagraph 44(vi).

[50]Chiefly in the winters of 2005/2006 and 2009/2010.

[51]Third party access policy requires the owners of natural monopoly infrastructure, such as gas pipelines and electricity grids, to grant access to those facilities to parties other than their own customers, usually competitors in the provision of the relevant services, often from other countries, on commercial terms comparable to those that would apply in a competitive market.

[52]Protocol on the Accession of Ukraine, WT/L/718, 13 February 2008; Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152, January 25, 2008, para 367.

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WTO-plus commitments with respect to transit (see also the discussion re Kazakhstan below). In its services schedule, Ukraine moreover undertook commitments regarding 'Services incidental to energy distribution' and 'Pipeline transportations of fuels'.[53] In addition, Ukraine committed itself to:

> Provide full transparency in the formulation, adoption and application of measures affecting access to and trade in services of pipeline transportation. Ukraine undertakes to ensure adherence to the principles of non-discriminatory treatment in access to and use of pipeline networks under its jurisdiction, within the technical capacities of these networks, with regard to the origin, destination or ownership of product transported, without imposing any unjustified delays, restrictions or charges, as well as without discriminatory pricing based on the differences in origin, destination or ownership.[54]

These commitments, especially in combination with Ukraine's State Trading obligations, can be interpreted as a requirement for the country to give access to its gas transport network and operate it in a non-discriminatory (MFN) manner.[55]

Regarding State Trading Enterprises (STEs), the Accession Report lists three national energy and energy distribution companies, UkrGasEnergo, Naftogas and Energorynok as State Trading Enterprises.[56] The language used in the Accession Report with respect to STEs is very similar to that contained in Saudi Arabia's Protocol, partly because it had to satisfy US trading demands.[57] Last but not least, regarding price controls on energy maintained by Ukraine, although discussed in the WP, no commitments were made regarding them.[58]

[53]Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152/Add.2, 25 January 2008 (services incidental to energy distribution), and 33 (Pipeline Transport, and (a) transportation of fuels (CPC 7131)); Both sectors record commitments of 'None' in modes 1, 2 and 3, and 'Unbound' in mode 4 for both market access (right to participate in the market) and national treatment (non-discrimination against non-nationals).

[54]Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152/Add.2, 25 January 2008 (services incidental to energy distribution), and 33 (Pipeline Transport, and (a) transportation of fuels (CPC 7131)); Both sectors record commitments of 'None' in modes 1, 2 and 3, and 'Unbound' in mode 4 for both market access (right to participate in the market) and national treatment (non-discrimination against non-nationals).

[55]Milthorp and Christy (2011), pp. 317ff.

[56]Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152, January 25, 2008, para 44.

[57]Milthorp and Christy (2011), p. 318; The language agreed was sufficient for the US President to make the certification required by Section 1106.

[58]Milthorp and Christy (2011), p. 317 referring to paras 63–67 of the Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152, January 25, 2008.

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4.6 Russia (2012)

Russia's accession process was particularly lengthy and cumbersome, covering almost two decades.[59] While Russia did undertake some commitments with regard to energy, they are perhaps not as far-reaching as all negotiating parties would have wanted (e.g. especially the EU tried to commit Russia to eliminate dual pricing policies).[60] Additionally, some of the commitments Russia undertook were framed in the context of the Eurasian Economic Union (EAEU).[61] Overall, it seems that the nature of the commitments is not so much WTO-plus (going beyond those contained in the WTO Agreements), but more of a confirmation that Russia's energy sector has to comply with WTO rules.[62] Nevertheless, Russia has agreed to tie some of its export duties on energy products. It has also committed itself to phase out several of these duties over time.

With respect to export restrictions, Russia naturally confirmed that these would not be justified under the WTO agreement.[63] While some parties expressed concern about licensing requirements connected to access to oil and gas pipelines, Russia stated that there are no such requirements with respect to oil and natural gas, and that, according to the Federal law on licensing of specific activities, there are no licensing requirements for the following activities: (1) the operation of oil and gas production facilities; (2) the sale of oil, gas and oil/gas processing products; (3) the processing of oil, gas and oil/gas processing products thereof; (4) the transportation of oil, gas and oil/gas processing products; (5) the storage of oil, gas and oil/gas processing products; and (6) the activity of operating gas networks.[64]

As noted above, Russia has taken up some binding commitments on export duties applied to energy goods, based on the HS Classification of Chapter 27.[65] Regarding export duties on crude oil, as well as some other oil products, Russia committed to a

[59]Protocol on the Accession of the Russian Federation, WT/L/839 and WT/MIN(11)/24, 17 December 2011; Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011.

[60]Milthorp and Christy (2011), p. 324; Marhold (2017), pp. 6–8.

[61]The Eurasian Economic Union was established in 2014 and is comprised of Russia, Kazakhstan, Belarus, Kyrgyzstan and Armenia, see http://www.eaeunion.org/?lang=en (last accessed on 27 May 2018).

[62]Milthorp and Christy (2011), p. 324; See also generally, Stewart and McDonough (2011); Global Intelligence Alliance (2012).

[63]Milthorp and Christy (2011), p. 324.

[64]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para. 270 and Federal Law No. 128-FZ of 8 August 2001 "On Licensing of Specific Types of Activity" (as last amended on 28 September 2010).

[65]See Russia's Schedule of Concessions and Commitments on Goods, Schedule CLXV, Part V, p. 853 and 870; HS Convention: The Harmonised System Convention (Harmonised Commodity Description and Coding System), 14 June 1983, 1503 U.N.T.S. 167, Chapter 27 Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes.

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formula, which calculates the duties on the basis of the world market price of oil.[66] For non-petroleum gases, the export duty will decrease to zero over the implementation period of the Accession Protocol (4 years).

With respect to State Trading Enterprises, Russia's state-owned (51%) Gazprom Group and other owners and operators of pipeline networks, were subject to much debate in the accession process.[67] Russia stated that it will notify Gazprom as an STE in accordance with Article XVII upon its accession, but further stated that the Gazprom Group is the only enterprise having special or exclusive privileges with respect to exporting natural gas. Nevertheless, the question remains to what extent Article XVII GATT allows STEs to charge different prices for its sales of a product in different markets provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets. This matter is relevant for the dual pricing debate.[68] Although Russia has stated that it would eliminate dual pricing on the production and distribution of natural gas to the domestic industry, this issue should be kept in mind.

As for dual energy pricing itself, the EU (together with the US), as mentioned above, was pushing for commitments by Russia, but was not very successful in this respect.[69] These Members stated that:

> According to certain studies of the costs required for production and sustainability of the production of natural gas, domestic regulated prices did not cover the full long-run marginal cost of producing natural gas of Gazprom. They requested a confirmation from the Russian Federation that gas suppliers would act on the basis of commercial considerations, based on full recovery of costs and a reasonable profit.[70]

Russia however, used the argument that is in its right to exercise its sovereignty over natural resources with respects to its subsurface resources, including natural gas.[71] Moreover, Russia stressed that the practices were not very different from practices maintained by many other Members, possibly having Saudi Arabia in mind. Also, with regard to subsidies, Russia additionally firmly stated that it did not believe that the governmental regulation of national monopoly prices constitutes a subsidy within the sense of the Agreement on Subsidies and Countervailing Measures (ASCM).[72] However, this does not mean that other WTO Members may not consider these as actionable or prohibited subsidies and challenge them in WTO

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[66]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, Annex 1.

[67]Milthorp and Christy (2011), p. 294.

[68]Milthorp and Christy (2011), p. 294.

[69]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, paras 120–133.

[70]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 122.

[71]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 123.

[72]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 696.

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dispute settlement. Moreover, in relation to concerns from Members about the disparity between the price of gas sold to industrial consumers in the Russian Federation and the world price of gas, the representative of the Russian Federation stated:

> [. . .] that gas export prices were not regulated and were established on the basis of supply and demand in the importing country. He was of the view that there was no "world market price" for gas, and noted that for gas shipped to Europe, costs of shipment and transport reflected a substantial part of the landed price.[73]

It follows that regarding the issue of dual pricing, as touched upon above, negotiation parties failed to obtain the full commitments they had hoped for, although some commitments were made. First and foremost, Russia confirmed that producers and distributors of natural gas would operate on the basis of normal commercial considerations regarding their supplies to industrial users.[74] Russia also stated it intended to increase its prices for natural gas by 2030. This implies that the prices of natural gas within Russia will be calculated on the basis of the same principles as those for the rest of Europe, which will mitigate the difference between domestic and export prices significantly. However, Russia will maintain dual pricing policies with respect to domestic energy supplies to households and non-commercial users, under the label of social policy.[75]

It should be mentioned in passing that the EU perceived Russia's stance towards dual pricing as disconcerting. As a result, in 2015, the European Commission commenced an antitrust investigation into Gazprom's business practices in Central and Eastern Europe.[76] The EU's objections in these ongoing investigations are, among others, addressed at what the EU labelled as 'Gazprom's alleged unfair pricing policy'.[77] On the basis of a comparison, the EU concluded that Gazprom is charging unfair prices:

> In order to assess whether individual price levels in a country are unfair, the different Member State prices were compared to a number of different benchmarks, such as Gazprom's costs, prices in different geographic markets or market prices. On the basis of this analysis, the Commission has come to the preliminary conclusion in its Statement of Objections that the specific price formulae, as applied in Gazprom's contracts with its customers, have contributed to the unfairness of Gazprom's prices: Gazprom's specific

[73]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 127.

[74]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 132.

[75]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 132.

[76]See European Commission, Factsheet, Antitrust: Commission send Statement of Objections to Gazprom, Brussels, MEMO/15/4829, 22 April 2015, http://europa.eu/rapid/press-release_MEMO-15-4829_en.htm (last accessed 27 May 2018).

[77]European Commission, Factsheet, Antitrust: Commission send Statement of Objections to Gazprom, Brussels, MEMO/15/4829, 22 April 2015, http://europa.eu/rapid/press-release_MEMO-15-4829_en.htm (last accessed 27 May 2018).

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> price formulae which link the price of gas to the price of oil products seem to have largely favoured Gazprom over its customers.
>
> The Commission's preliminary conclusion, as outlined in the Statement of Objections, is that Gazprom has charged unfair prices in five Central and Eastern European countries (Bulgaria, Estonia, Latvia, Lithuania and Poland).[78]

Concerning price controls, Russia provided a list and services subject to them and confirmed that they will be applied in a WTO consistent manner, especially with regard to GATT Article III.9.[79] The list includes natural gas, gas transportation, nuclear fuel cycle products, electric power and heat generated by suppliers on the wholesale market, electric energy network transmission services, transportation services of crude oil and oil products through pipelines.[80]

Inevitably, transit of energy was an important issue. Prior to its accession, Russia had raised the question as to whether or not GATT Article V would cover fixed infrastructures such as gas pipelines. Its accession commitments on transit proved a partial turnaround on this issue. With respect to transit fees, the country confirmed that it would apply all its laws, regulations and other measures governing the transit of goods, including energy in accordance with the obligations set out in Article V.[81] However, with regard to access to pipelines and pipeline transport services, Russia has not undertaken any commitments.[82] Gazprom as an STE will furthermore continue to be the sole exporter of natural gas.[83] Moreover, gas is subject to an export monopoly when the goods originate in Russia but are exported to the Customs Union with Kazakhstan and Belarus.[84] Regarding services, Russia undertook some commitments with regards to market access in the energy sector in its Services Schedule (mining, manufacturing and energy distribution).[85] However, these commitments are not particularly strong.

[78]European Commission, Factsheet, Antitrust: Commission send Statement of Objections to Gazprom, Brussels, MEMO/15/4829, 22 April 2015, http://europa.eu/rapid/press-release_MEMO-15-4829_en.htm (last accessed 27 May 2018).

[79]GATT Article III.9 and Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 133.

[80]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, Tables 7 and 8 on pages 407–411.

[81]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 1161.

[82]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 136.

[83]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 271.

[84]Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para 1147 and Table 28.

[85]Mining under the UN Central Product Classification (CPC) 883: Manufacturing under CPC 8845 and energy distribution under CPC 887.

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In contrast to China, where a reference to the GATT in the goods schedule was absent, Russia in its goods schedule included a Part V on export duties explicitly referring to the GATT:

> The Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase them beyond the levels indicated in this schedule, except in accordance with the provisions with GATT 1994.[86]

This addition is crucial, as this reference would suffice for the applicability of the GATT Article XX-exceptions to the goods listed in Part V. It is not unlikely that it is due to the experience with the Chinese Accession Protocol that newly acceding countries have been careful enough to include a reference to the GATT in their schedules of concessions.

4.7 Kazakhstan (2015)

Kazakhstan is one of the WTO's newest Members (it joined the Organization in 2015).[87] It is the last in the string of major energy players to join the WTO. As with Russia, a lot of Kazakhstan's Energy Commitments are framed in the context of the Eurasian Economic Union.

Regarding transit, Kazakhstan's commitments on transit go further than Russia's, as it was explicitly agreed that transit related laws, regulations and other measures governing the transit of goods (including energy) will be regulated in accordance with GATT Article V.[88]

Furthermore, Kazakhstan made accession-specific commitments with respect to it Government owned/regulated pipelines. Access to them is granted for foreign investors producing crude oil and gas in Kazakhstan on a non-discriminatory manner.[89] Additionally, when applying measures to transportation through pipelines, Kazakhstan undertook not to discriminate with respect to the origin of crude oil and gas production and destination, or with respect to the application of tariffs vis-à-vis domestic and foreign investors.[90]

[86]Russian Federation, Goods Schedule CLXV, Part V—Export Duties, WTMIN112A1-02 (22.08.2012) and Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, paras 637–638; per analogy, Ukraine, Vietnam and Kazakhstan have also included such reference in their commitments.

[87]Protocol on the Accession of the Republic of Kazakhstan, WT/L/957, 30 July 2015, Report of the Working Party on the Accession of Kazakhstan, WT/ACC/KAZ/93, 23 June 2015.

[88]WTO, Overview of Kazakhstan's Commitments, https://www.wto.org/english/news_e/news15_e/kazakhannex_e.pdf (last accessed 27 May 2018).

[89]Report of the Working Party on the Accession of Kazakhstan, WT/ACC/KAZ/93, 23 June 2015, paras 87, 162, 163.

[90]WTO, Overview of Kazakhstan's Commitments, https://www.wto.org/english/news_e/news15_e/kazakhannex_e.pdf (last accessed 27 May 2018).

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Kazakhstan also made commitments regarding Trade-Related Investment Measures (TRIMs) in the energy sector. It will eliminate all existing WTO-inconsistent measures on local content provisions in the investments in the oil and gas sector by 1 January 2021.[91]

In contrast to Ecuador, that joined two decades earlier, we can see that issues pertaining energy played an important role in Kazakhstan's accession. This illustrates the different attitude towards energy as opposed to the time of the WTO's establishment in 1995.

5 Concluding Remarks on WTO Accession Protocols and Energy

If we consider the commitments in the Accession Protocols above, what immediately catches the eye is the gradual development in energy discussions and commitments in the accession of energy producing, exporting and transporting countries. At first, as exemplified by Ecuador's accession, these featured only as a minor issue. However, from Oman's accession onwards we see a steady rise in energy topics placed on the agenda of the Working Party Reports. What is clear is that the WTO accession process automatically sheds light on the energy sector in these countries; acceding countries have to make sure that, at a minimum, these sectors are WTO compliant.

What then, are the trends we can discern when looking at these accession commitments? One development is that energy transit issues are increasingly being discussed in the global trade forum, at least when it comes to acceding members. While it is not clear whether GATT Article V applies to fixed energy transmission structures of WTO Members that joined the organization in 1995, it is clear that the Article applies to those that have made specific energy commitments on with respect to GATT Article V in their accession protocols (i.e. Ukraine, Russia and Kazakhstan). While these commitments may not always be full-fledged or far-reaching, it does show that the WTO is a forum where energy transit issues are discussed and negotiated actively. Perhaps the WTO is complementing or even taking over from the Energy Charter Treaty in this respect, as energy discussions under its auspices seem to have been dormant for quite a while.[92]

Another trend is that acceding countries are increasingly binding their export duties (such as China and Russia) and that some new Members have specifically bound export duties on energy goods (Russia in particular). This is a positive development indicating that countries are shifting away from non-transparent pricing

[91] Report of the Working Party on the Accession of Kazakhstan, WT/ACC/KAZ/93, para 897.

[92] The most recent draft of the Energy Charter Treaty, 'Transit Protocol' Doc No: TT87 22/01/2010 was dated 22 October 2010; Marhold (2015), pp. 389–435.

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policies and are realizing that export duties, just as much as import duties, can be subject to bargaining, and can be to the negotiating country's advantage.

Connected to this are commitments with regard to dual pricing policies. While commitments may not have been as firm as the EU and the US would have liked to see, it is undoubtedly a positive development that the issue as such has at all been discussed in the accession negotiations. Both Saudi Arabia and Russia have partially committed to eliminating such practices, which may be a small victory, but is still more positive than a complete absence of commitments in this sensitive area.

All in all, we can discern that with a greater number of major energy players acceding to the WTO, these topics feature more prominently in accession negotiations, resulting in gradual clarification of important issues such as transit, export taxes and dual pricing policies.

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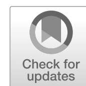
All that Glitters: Conflict Diamonds, Dirty Gold and the WTO Legal Framework on Trade and Human Rights



Krista Nadakavukaren Schefer

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1 Introduction

Gold and diamonds! Of all the substances on Earth, fewer emote such an emotional response than do these two minerals. Gold, the symbol of wealth, power, and beauty throughout history; diamonds, first prized for their usefulness and rarity became the symbol of love and eternity in the mid-twentieth century. Coveted by cultures across the globe as adornment, both gold and diamonds are industrially important as well. The electronics and computer industries, in particular, are major users of each, driving the trade in rough diamonds and raw gold from the mining towns to manufacturing centres hundreds or thousands of miles, or half a world away.

The history of gold and diamonds,[1] their usage, and—not surprisingly—their legal status, however, differ significantly. Diamonds' role in world trade has always been minor. Although early traders did carry diamonds from their origin in India along the Silk Road, and, by the fourteenth century to the cutting centres of Europe, the stones themselves were always valued for their own sake—as production materials or as gems. As diamonds were not found in quantity outside of India until the nineteenth century, they were simply too rare to take on a major economic or social role until that time.

Gold, on the other hand, has been not only worked and traded as a metal by the earliest of human civilizations, much of its value has been—for all of recorded history at least—intangible. Numerous cultures from all parts of the globe have linked gold to religion, mysticism, and superstition. Equally important was the value leant by gold's uniformity, which allows it to have a recognized value in different places and among societies: gold as currency.[2]

The legal status of these minerals follows their usage. While diamonds are exclusively traded as products, or goods, and subject to the "normal" rules of importation and exportation, gold's various uses dictate a variety of possible applicable treatments in international trade. As jewellery, gold can be a good, its import and export subject to customs tariffs and quantitative restrictions; as a commodity, its trade can be non-physical and regulated by the commodity exchanges; as a currency, its trade can be highly restricted by financial supervisors and subjected to prudential exceptions.

In the past, the trade in diamonds and gold has rarely been an object of interest as a comparative matter. The recent and growing attention to human rights in supply chains has made such a comparison of potentially great interest, however. This is because while the trading rules applying to these two elements are so different, the supply chains of both raw and cut or refined diamonds or gold are very similar from the point of view of human rights abuse.

A literally vicious circle, the linkage between natural resource trading and violent conflict was documented for diamonds in the late 1990s/early 2000s by the NGOs

[1] See generally Bernstein (2012); Kretschmer (2003).

[2] Or as a backing of currency to secure the value of the official tender in circulation.

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Global Witness and Partnership Africa-Canada.[3] The publicity of the revelations spurred industry attention as well as the attention of governments and the United Nations. The result was a multi-stakeholder effort called the Kimberley Process,[4] aimed at breaking the flow of war-funding by halting the trade in so-called "conflict diamonds" (or, more vividly, "blood diamonds"). The Kimberley Process quickly developed into a "scheme"—non-binding as a matter of international law, but backed by national trading frameworks. It is certainly the most prominent program for severing the connections between the trade in diamonds and the human rights abuses of intrastate conflicts that exists today.

Despite implementation failures,[5] the Kimberley Process continues to attract attention because it is the tangible result of an effective campaign by non-governmental organizations to put human rights on the international trade agenda. The fact that there are numerous other resources the extraction of which is of great concern to human rights observers, only some of which are also "conflict" resources (the lapis lazuli of Afghanistan, for instance, which is a source of money for IS troops there[6]), means that it is worth considering whether the Kimberly Process Certification Scheme could—and should—serve as a model for deeper integration of human rights considerations into the global trading system epitomized by the World Trade Organization (WTO) rules. Moreover, while similarly motivated, there are significant aspects of current attempts to stop trade in conflict diamonds and human rights-violative gold that are divergent. Just how these differences will affect the WTO-compatibility of the regulatory frameworks is something this entry will also address.

I begin in Sect. 2 with a review of how conflict minerals became a concept and how mineral supply chains gained the international community's attention. In Sect. 3 I then set out the framework of the Kimberley Process Certification Scheme as an

[3]Global Witness, A Rough Trade: The Role of Companies and Governments in the Angolan Conflict (1998), text available at (last accessed 22 September 2017); Smillie I, Gberie L, and Hazleton R (2000) The Heart of the Matter: Sierra Leone Diamonds & Human Security.

[4]See below Sect. 3.

[5]The Kimberley Process' obvious and serious weaknesses in enforcement have been documented by, among others, Global Witness itself, who withdrew from being a formal Observer to the Process in 2011. Gooch C, Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable, 2 December 2011, available at: https://www.globalwitness.org/en/archive/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable/ (last accessed 22 September 2017). The NGO protested that the Process had proven itself "increasingly outdated" by refusing "to evolve and address the clear links between diamonds, violence and tyranny." Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable, Press release, 2 December 2011, available at: https://www.globalwitness.org/en/archive/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable/ (last accessed 22 September 2017).

[6]Global Witness, War in the Treasury of the People: Afghanistan, Lapis Lazuli and the battle for mineral wealth (2016), text available at: https://www.globalwitness.org/en/campaigns/conflict-minerals/war-treasury-people-afghanistan-lapis-lazuli-and-battle-mineral-wealth/ (last accessed 23 April 2018).

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early response to the conflict minerals problem. The focus of Sect. 4 is on the principles of WTO law that make regulation of supply chains legally problematic for WTO Members. Section 5 then turns to gold, describing the processes underway to eliminate "dirty" gold from the legitimate international supply chains. The conclusions in Sect. 6 assess the likelihood of a "Kimberley Process for gold" and suggests that the international community may be moving beyond worrying about WTO rules when trying to address how most effectively to resolve human rights violations in supply chains.

2 Conflict Minerals or Minerals from Conflict-Affected Areas: From Regulating Products to Regulating Supply Chains

Of the many tragic theatres over the past 50 years, few have measured up to those of Western Africa in the 1990s. It was not just that an estimated 827,000 people were killed and millions more forced to flee their homes that made these conflicts shocking to the international community's collective conscience—it was also the brutality with which the attacks occurred. In Sierra Leone alone, an estimated 20,000 civilians were killed in the civil war, 7000 in January 1999 during a campaign known as "Operation No Living Thing"—dying man by man, woman by woman, and child by child—the lucky ones with guns, thousands of others with more rudimentary tools.[7]

And for what? Ethnic violence and historical disgruntlements probably played a role (the "grievance theory"), but that role may have been more one to motivate would-be killers. The higher goals, it seems, were more mundane—for control over natural resources (the "greed theory").[8]

Significantly, the same natural resources that spurred conflict were used to finance the conflict. An egregious example of the "resource curse,"[9] the story of bringing the idea of conflict minerals into the public eye had its historical roots in the

[7]The horrors of this campaign were captured on the award-winning documentary film "Cry Freetown," directed by Somura (2000), Cry Freetown, available at: https://www.youtube.com/watch?v=NUCfAOBH3wo (last accessed 3 September 2017).

[8]The political science and economic literature on the causes of civil wars is huge. A good place to begin is the economic analysis provided by Collier and Hoeffler in their 2004 article, Greed and Grievance in Civil War. Collier and Hoeffler (2004), pp. 563–595.

[9]The "resource curse" is the label given to the observed phenomenon of failing to develop economically despite—or indeed, because of—their abundance of natural resources. See Sachs J and Warner A, "Natural Resource Abundance and Economic Growth" NBER Working Paper No. 5398, December 1995, text available at: http://www.nber.org/papers/w5398 (last accessed 23 January 2018); Frankel J, The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions. HKS Faculty Research Working Paper Series RWP12-014, John F. Kennedy School of Government, Harvard University (2012).

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investigative efforts of non-governmental organizations into the civil wars of Angola and Sierra Leone, and it is kept alive today by the reports coming out of the Democratic Republic of the Congo.

The basic plot is simple: (1) valuable resources—gemstones, minerals, and lumber—are extracted from areas forcibly controlled by militarized groups or are stolen from local populations under threat of violence; (2) the resources are sold onto world markets—often by traders in the local markets or to smugglers who then place them on the world market; and (3) the profits are used to purchase more weapons and feed more fighters, who can therefore seize more resources.

The variations on this basic three-step process are innumerable, making generalizations an only somewhat useful basis for developing legal responses to the problems emanating from trade in conflict minerals. Whether the resources are taken by rebel forces or governmental troops or even “just” organized criminals may indicate the level at which laws to stop the trade need to be applied—are national laws sufficient? Do we need international laws in place? Similarly, the path the resources take to get to the world market may vary. Sometimes resources enter the world market high up on the supply chain, with miners selling directly to middlemen who are closely connected to foreign purchasers, while at other times these resources pass through many more hands before reaching the international companies who purchase large amounts of the mineral. Finally, the proceeds from the sales might be going to purchase guns or food for fighters, but may also be directed toward projects that have a more generalized effect on political opposition. Thus, the state, for example, may profit from sales of resources and use the revenue to maintain security forces that repress dissent.[10]

Given the contextual differences, it may not be surprising that on the regulatory level there are variations in the way the resources have been approached. The only thing that truly unifies the regulations is the underlying goal of stopping human rights or environmental abuses that are connected to the resources. Yet, given the plethora of human rights and environmental abuses that accompany the extraction, trade, transport, and working of resources that are sourced from territories where armed conflicts are on-going, the immediate goals may differ: stopping violations at the stage of extraction, stopping abuses that accompany the sales or transport of the minerals, or preventing the violation-tainted products from reaching consumers. In each case, the mineral could be considered a “conflict mineral” in the general sense. However, as a technical legal term, “conflict mineral” has no universally accepted definition. While its use in policy discussions indeed suggests that a “conflict mineral” is a metal or other natural element that directly or indirectly benefits

[10]E.g., Zimbabwe’s alleged use of a large portion of its national sales of diamonds from the Marange mines for maintaining a state intelligence apparatus to control the population. See Global Witness, Zimbabwe’s Vast Diamond Riches Exploited by Secretive Political and Military Elites, Report Shows, Press Release, 11.9.2017, text available at: https://www.globalwitness.org/en-gb/press-releases/zimbabwes-vast-diamond-riches-exploited-secretive-political-and-military-elites-report-shows/ (last accessed 24 April 2017).

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armed groups (or other violence),[11] there is no binding international legal instrument setting this out with individual elements that can be interpreted and applied.[12]

The first conflict mineral to gain attention was diamonds. Accordingly, we turn first to a description of the Kimberley Process Certification Scheme before describing the current attempts to regulate other conflict minerals, including gold.

3 Kimberley Process Certification Scheme

The Kimberley Process Certification Scheme (Kimberley Process or KPCS) was the response of the diamond industry and governments to NGO revelations of the financial connections between diamond trading and the internal armed conflicts occurring in Western Africa in the 1990s.[13] With unimaginable levels of brutality, the civil wars in Angola, Democratic Republic of the Congo, the Ivory Coast, Liberia, and Sierra Leone were particularly horrific in their targeting of civilian populations. While the government soldiers of these nations were responsible for numerous humanitarian atrocities and human rights abuses, it was the insurgent groups' use of soldiers and weapons paid for by the sales of diamonds (among other natural resources) extracted or stolen from local miners that particularly motivated the civil society campaign to address the role of diamond trading in civilians' suffering.

3.1 The Kimberley Process

The effort was officially kicked-off by the South African government's convening of a May 2000 meeting of southern African leaders in the town where the first diamond mine in Africa had been established: Kimberley in South Africa. Gathering the support of the main players of the diamond industry (De Beers and the World Diamond Council were heavily involved), governments of the other diamond producing and purchasing states, and NGOs, the multi-stakeholder Kimberley Group began a dialogue to address the question of how to prevent the civilian deaths and maiming that were the hallmark of the conflicts in the region.

[11]E.g., European Commission, The New Regulation: What are Conflict Minerals?, http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/ (last accessed 22 September 2017).

[12]"Conflict resources" is a broader term (one which I have not found in legislation) and can include plants, whether narcotics or medicinal, which are traded to support parties to an armed conflict. Burnley (2011), p. 7.

[13]The Kimberley Process homepage has a history as well as relevant documents online, https://www.kimberleyprocess.com/en (last accessed 25 January 2018).

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The United Nations enthusiastically embraced the efforts, raising the visibility of the fight to halt trade in "conflict diamonds" by concluding a resolution titled, "The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts."[14]

3.2 The Kimberley System

The answer was simple in theory—stop the international trade in diamonds which may have been sold to finance insurgent groups and most of the human rights abuses against civilians perpetrated upstream will stop. The Preamble of the KPCS Core Document clearly reflects the connection of the two phenomena:

> PARTICIPANTS,
>
> RECOGNISING that the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to the fuelling of armed conflict, the activities of rebel movements aimed at undermining or overthrowing legitimate governments, and the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons;
>
> FURTHER RECOGNISING the devastating impact of conflicts fuelled by the trade
>
> in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts;[15]

In practice, however, it would be necessary to be able to do this without taking away the economic benefits of the "legitimate trade" (i.e., non-conflict financing) in diamonds. The answer settled upon to break the financial links between diamonds and war was the creation of the Kimberley Process Certification Scheme. This was to require participants to create a means for identifying which diamonds had been tainted by their funding of rebels and which had not—differentiating, that is, in KP terminology, between "conflict diamonds" and other diamonds.

As the geology of diamonds (pure carbon) does not permit the identification of single stones to a specific extraction site, the KP participants settled on a plan by which individual shipments of uncut ("rough") stones would be packaged in sealed containers and officially marked by governmental entities to certify the stones' legitimacy prior to export. Importing governments, too, would agree to permit the importation of only those shipments of diamonds which were accompanied by an

[14] United Nations, Resolution adopted by the General Assembly, 'The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts,' A/RES/55/56 (29 January 2001).

[15] Kimberley Process Certification System, Core Document, Preamble, text available at: https://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf (last accessed 2 October 2017).

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official certification declaring that the particular shipment was not one containing conflict diamonds.

While each participant designs its own certificate, all official KP certifications needed to contain certain information relevant to the sourcing of the diamonds to be considered in conformity with the Kimberly Process. The mandatory elements to appear on the certificate include: a unique number with the ISO Alpha 2 country code; the issuing authority; the carat weight/mass of the stones contained; and their value in U.S. dollars.[16] The crux of the Kimberley Process' reliability was the participants' mutual agreement to only trade with other participants. Ensuring that any shipment of diamonds would only be import from and exported to the KPCS partners meant that every shipment was certified from the original sale to the sale to the final customer.

3.3 The Weaknesses

That, at least, is the theory. There are numerous weaknesses to the KPCS's conception and operation. A main *conceptual* one is the narrow definition of "conflict diamond," which limits the focus of the certification requirement to trade in uncut stones "used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions."[17] Thus, not only is the cutting and polishing unsupervised by the Scheme, neither is the trade in rough diamonds from government troops that may have violated the rights of labourers or civilians. In 2011, for example, the KP Chairman issued a decision permitting trading in rough diamonds from Zimbabwe's Marange mines despite confirmed evidence of torture, forced labour, and child labour perpetrated by governmental troops. As such abuses would not make the diamonds from that mine "conflict" stones, their trade could continue among participants.[18] The same is true for trading by or from criminal syndicates which thrive in territories with weak governance and consequently have no intent of overthrowing those in power.

The main *operational* weakness is the KPCS's reliance on the competence and integrity of government officials responsible for certifying the shipments and

[16]Kimberley Process Certification System, Core Document, Annex I (A) and (B), text available at: https://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf (last accessed 2 October 2017).

[17]This limitation was present from the beginning. UNGA Resolution 55/56, promoting the original Kimberley Process efforts, restricted the scope through its definition of the subject: trade in "conflict diamonds." It noted in the preambular language that it "Understand[s] conflict diamonds to be rough diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments," A/RES/55/56.

[18]Several participants, including Canada, the European Union, and the United States, complained about the abuses.

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controlling imports and exports. Section IV ("Internal Controls") uses soft language ("Each Participant should [...]") to encourage Participants to establish internal control mechanisms to enforce the Scheme.[19] Oversight of the diamond companies by independent auditors is similarly limited,[20] being voluntary, leaving the Scheme's effectiveness particularly open to abuse by corrupt or even merely under-resourced agents. Poor governance in the producing states is an ever-present problem that the KPCS does nothing to address. With corruption and smuggling rampant, the Scheme's hope that certification will equal conflict-free stones is simply unrealistic. Estimates by underground reports state that approximately 25% of the diamonds sold on world markets are illegally sourced, with much higher numbers for certain high-risk countries.[21] A reported 80% of the diamond trade in the Democratic Republic of the Congo, for instance, is illegal.[22] How can this be? Because the movement of diamonds is still easy. The United Nations expert group on the Democratic Republic of the Congo, for example, noted the availability of illicit goods trafficking not only across the country's 9000 km of border (with nine different neighbours), but on the lakes forming a significant portion of that border (due to a lack of maritime forces) and via air, by landing on any of the country's largely uncontrolled airstrips—of which there are reported more than there are roads.[23] With limited resources for security or customs personnel, smugglers have an easy time moving stones.

> Moving stones across countries isn't exactly the stuff of James Bond. 'It's very easy to cross [international borders in Africa] without a Kimberley Process certificate. You can wear them, hide them in a bag, put them in your boots,' [the informant] explained. 'And it's easy to get a fake certificate if you are moving a lot of stones. The price varies depending on which country you want to say that they are from: from $100 for an Angola certificate to $500 maximum for a South Africa one.' [...] 'If a buyer spends a million or more, I give him the KP certificate for free.'[24]

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[19]The 2013 amendments to the Core Document included the insertion of Annex IV, which contains "additional requirements for establishing internal controls" to the existing provisions. Modification to the Core Document of the Kimberley Process Certification Scheme, Decision 1/2013 (in effect as of 1 January 2015).

[20]Kimberley Process Certification System, Core Document, Section IV ("Principles of Industry Self-Regulation"), text available at: https://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf (last accessed 2 October 2017).

[21]Miklian J, "Let's Deal!" A Conversation with a Diamond Smuggler, Words Without Borders, Magazine, September 2013, text available at: http://www.wordswithoutborders.org/article/lets-deal-a-conversation-with-a-diamond-smuggler (last accessed 3 September 2017).

[22]Id.

[23]See Letter Dated 15 July 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2004/551, paras. 26–47, (15 July 2004).

[24]Miklian J, "Let's Deal!" A Conversation with a Diamond Smuggler, Words Without Borders, Magazine, September 2013, text available at: http://www.wordswithoutborders.org/article/lets-deal-a-conversation-with-a-diamond-smuggler (last accessed 3 September 2017).

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Thus, beyond dampening the trade and human rights discussion, the WTO waiver[25] granted to the Kimberley Process participants achieves nothing in the way of ensuring that human rights abuses are actually addressed.

3.4 Regulation of Conflict Gold

Once the Kimberley Process Certification Scheme was operating, attention turned to the similar abuses taking place in the supply chains of other minerals. With the computer/technological instruments industry the focus of much of the attention, it was not long before other resources were found to be connected to the financing of wars. The Democratic Republic of Congo's civil war, in particular, was being waged *for* but also *by* the profits of the sale of four minerals required for the production of electronics: tin, tungsten, tantalum, and gold. Conflict diamonds were no longer the only "conflict mineral."

3.5 US Law on Trade in Conflict Minerals

On the national level, a precise legal definition of "conflict mineral" is found in the United States' Dodd-Frank Wall Street Reform and Consumer Protection Act.[26] This 2010 legislation's main aim is to promote financial stability and consumer protection.[27] It also, however, includes provisions to foster transparency in corporate activities in the extractive sector of war-torn Africa. Section 1502 was conceived to reduce the demand for minerals stemming from the Democratic Republic of Congo (DRC). That provision instructs the Securities and Exchange Commission (SEC) to require that any companies within its administrative scope investigate their supply chains and, if they source from the DRC, that they explain why it is necessary to do so. Considered burdensome by the affected industry, section 1502 limits the scope of "conflict mineral" to the "3Ts" (tin, tantalum, and tungsten), gold, and minerals from the territory of the Democratic Republic of Congo and surrounding countries:

> (4) Conflict mineral.--The term "conflict mineral" means--
> (A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or
> (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.[28]

[25]See below Sect. 4.

[26]Pub.L. 111–203, 124 Stat. 1376–2223 (21 July 2010); for an explanation and analysis of the Act, see Dorman et al. (2010).

[27]For an overview of the Act, see Skeel (2010).

[28]Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, Section 1502(e)(4).

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Even though limited, the scope addresses the most visible abuses stemming from the trade in minerals.

3.6 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

Following soon after Dodd-Frank, the Organization for Economic Co-operation and Development (OECD) began discussions on how to encourage multinational corporations to source ethically. Having learned from the critiques aimed at the KPCS, the OECD's angle on regulating the mineral trade's links to human suffering shifted from away from the point of the mineral's entrance onto the world market toward a holistic view of the entire supply chain. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[29] (the OECD Guidance), takes a wide view of the problems associated with the extraction of minerals and addresses a myriad of topics that have brought disrepute to natural resource supply chains. Accordingly, while there is particular mention of the African Great Lakes region, the Guidance is general in describing the need for supply chain management in territories where armed conflict is occurring. Most importantly, it extends the concern to areas where there may be no armed conflict, but where the situation is otherwise "high-risk" for individuals located there. The concept of "conflict-affected and high-risk area" defined in the Gold Supplement is worth setting forth in full:

> **Conflict-affected and high-risk areas** – Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.[30]

Comparing this to the Kimberley Process definition of "conflict diamond," the Guidance is strikingly more suited to addressing the sufferings actually experienced as a result of mineral extraction and trading. First, the Guidelines point out the existence of armed violence against humans as only one problem. It also points to the slavery, child labour, and sexual violence that surround the extraction and trade of

[29] OECD (2016) OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas.

[30] Id., p. 66.

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such resources. The document further mentions the risk of human rights violations perpetuated by not only by armed non-state forces, but also the abuses carried out by governmental and private security forces and by organized crime. It openly acknowledges the existence of corruption and money laundering as a risk facing downstream companies. The OECD Guidance's approach refers not to trade in "conflict minerals" but to supply chains of "minerals" that are "from" conflict or high-risk areas. This is a large step forward for those trying to address the problem, as it broadens the scope significantly. Two of the most striking expansions in scope come from the elimination of the focus on only the abuse relating to the unworked, or "raw," mineral and the recognition that the human rights abuses may arise in situations that are not militarized.

While the OECD Guidance is a non-binding instrument, its influence is unquestionably great. Companies and organizations make frequent reference to the rules, and they are seen to be representative of good corporate practice.[31] The rules have also become a model for national efforts to legislate for ethical supply chain management, with a preeminent example of this being the recently concluded European Union regulation, set forth next.

3.7 European Union Regulation on Trade in Minerals and Metals from Conflict-Affected and High-Risk Areas

The European Union (EU) passed a Regulation in May 2017 (which is to come into effect in 2021) that takes a hybrid approach to the supply chain regulation challenge. It adopted the OECD Guidance approach in its efforts to legislate for supply chain due diligence, addressing trade in minerals and metals from "conflict-affected and high-risk areas." As with the OECD Guidance, this latter term is defined broadly, going much beyond the focus on abuses by insurrection groups in the extracting process:

> 'conflict-affected and high-risk areas' means areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses [. . .].[32]

However, like the United States, the European approach keeps the legislative focus exclusively on the 3Ts and gold. The Regulation's definitions state, in an exclusive list:

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[31] E.g., Responsible Jewellrey Council, https://www.responsiblejewellery.com/oecd-due-diligence-guidance/ (last accessed 23 January 2018); London Bullion Market Association http://www.lbma.org.uk/assets/LBMA%20Audit%20Guidance%20v%200.pdf (last accessed 23 January 2018).

[32] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ 2017, L 130/1, Article 2(f).

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'minerals' means the following, as listed in Part A of Annex I;

- ores and concentrates containing tin, tantalum or tungsten, and
- gold;

'metals' means metals containing or consisting of [the 'minerals'], or as listed in Part B of Annex I[33];

No other minerals or resources (Annex I Part B lists the chemical compounds of tin, tungsten, tantalum and gold—their oxides, hydroxides, carbides, and chlorates) come within the scope of the Regulation explicitly, and the wording does not permit the interpreting-in of any additional resources.

Perhaps more significantly, the EU Regulation specifically sets out its regulatory aims to be stopping trade by security and militarized forces:

1. This Regulation establishes a Union system for supply chain due diligence ('Union system') in order to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold. [...][34]

The need for stopping this trade is undisputed, and the Regulation does encompass the actions of governmental troops, which is important. Still, this wording falls far short of ensuring that the supply chain is untainted by any human rights abuses or even widespread governance and security failures. In fact, several of the criticisms that have arisen in the context of diamond supply chain management are left unaddressed by these newest legislative efforts.

Regardless of the operational problems of the different attempts to regulate the diamond and gold supply chains, the motivation of disconnecting human rights violations from the profitability of the trade in these elements is one that most states and organizations can agree upon in theory. Just how far a state can go to achieve this disconnection, though, is debatable. We turn, then, to the possible limits placed on these efforts by the rules of the World Trade Organization treaties.

4 Regulation of Supply Chains and WTO Law

The weaknesses of the Kimberley Process Certification Scheme that are so glaring today were not so apparent when the Participants were drafting the Core Document. At that time, the main concern raised was the Scheme's consistency with the legal rules of the World Trade Organization (WTO). Specifically, the participant-only

[33] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ 2017, L 130/1, Articles 2 (a), 2(b).

[34] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ 2017, L 130/1, Article 1.1.

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element of the KPCS put into question whether its implementation could expose participants to trade sanctions.

The Core Document states:

> Each Participant should:
>
> [. . .]
>
> (c) ensure that no shipment of rough diamonds is imported from or exported to a non-Participant.[35]

At present, the 81 states that participate in the KPCS represent (according to the KPCS website) 99.8% of world diamond trading.[36] Even at the time of its conclusion in 2003, all but one of the significant diamond trading states were participants (the exception being Liberia, which joined in 2007).[37] Nevertheless, this question of how to ensure WTO compatibility became a crucial element of the negotiations.

As the WTO obligations existed prior to the Kimberley Process, it is not unreasonable that the question arose as to the KPCS's overall compatibility with the governments' international obligations. It is clear that since not all WTO Members with diamond imports or exports were KPCS participants, any government that was both a WTO Member and a KPCS participant (hereinafter WTO-KPCS government) was in a position of being potentially brought before the WTO dispute settlement mechanism by a WTO Member who was not a KPCS participant as allegedly violating its WTO commitments.[38]

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[35] Kimberley Process Certification System, Core Document, Section III ("Undertakings in respect of the international trade in rough diamonds"), text available at: https://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf (last accessed 2 October 2017).

[36] Kimberley Process Certification System, Core Document, text available at: https://www.kimberleyprocess.com/en/participants (last accessed 4 September 2017).

[37] Only ten states have joined as KPCS participants subsequent to 2003: Bangladesh, Cambodia, Cameroon, Liberia, Indonesia, Kazakhstan, Liberia, Mexico, New Zealand, Panama, Singapore, Swaziland, and Turkey. See Kimberley Process Certification System, Core Document, text available at: https://www.kimberleyprocess.com/en/participants (last accessed 2 October 2017).

[38] This possibility is heightened by the fact that a WTO Member does not need to have actual imports or exports of a product to bring a complaint based on another Member's restrictions on trade in that product. The Appellate Body of the WTO has confirmed that the potential for trade of a certain product satisfies the requirements for launching a dispute settlement proceeding. Accepting indirect as well as direct impacts on internal conditions of trade as targets of Members' concern, the WTO dispute settlement system is substantially relieved of limits on standing:

> 135. [. . .] we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful."
>
> 136. We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:

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4.1 WTO Principles

Securing the long-term liberalization of trade is the unifying aim of the rules of the trading system. This liberalization is accomplished through two main principles: the promotion of access to Members' markets and Members' non-discrimination in their treatment of comparable, or "like" products and services (and service suppliers). While market access is a matter of ensuring that goods and services can cross national borders as freely as possible, under the WTO treaties, non-discrimination requires that each Member treat the goods and services of each other Member "no less favourably than" it treats all other like products and services. It is clear from even this basic level that the implementation of a program such as the Kimberley Process Certification Scheme could violate both of the WTO's most fundamental principles: first, the restriction on importation and exportation of conflict diamonds is a limitation on market access (in the form of a quantitative restriction, prohibited by Article XI GATT); the non-discrimination provision is also arguably violated by the continued allowance of trade in non-conflict diamonds (Article XIII GATT limits Members' selective use of import and export restrictions of like products to quota allocations based on historical trade shares).

Before describing the content of these two principles, it is important to be aware of the potential sanctions that their violation can cause a WTO Member. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is applicable to all WTO Members for any of their disputes with one another arising out of the WTO agreements, including the GATT. Under the DSU, Members who are found to be in violation of their WTO obligations may be required to "come back into compliance" or face trade barriers. The latter may be composed, for example, of increased tariffs or reduced quantitative allowances against the importation of particular goods to the complainant Member's territory from the defendant Member's territory. Because the decision to impose sanctions in the face of non-compliance cannot be blocked by the opposition of the defendant's representative in the Dispute Settlement Body (DSB),[39] the remedies system is considered to be a particularly "strong" regime for international law.[40] The "strength" comes from both the one-sided nature of the sanction and the fact that the measure can have practical and direct economic consequences rather than, for example, the intangible

> ... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.[footnote]

European Communities—Regime for the Importation, Sale and Distribution of Bananas ("EC-Bananas III"), WT/DS27/AB/R, paras. 135–136 (9 September 1997) (quoting the panel reports of the same case at para. 7.50).

[39]Negative consensus decisionmaking applies to decisions about sanctions: that is, unless all members of the DSB refuse to accept the proposal to impose sanctions (including the member proposing them in the first place), the decision will be deemed accepted. DSU Article 22.6.

[40]Feichtner (2009), p. 616.

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"shame" that comes from the government being set out as in violation with a WTO regulation.

4.2 *Market Access Restrictions*

4.2.1 The Prohibition on Quantitative Restrictions

Article XI GATT takes a clear position against the use of trade restrictions focused on the amount of a product allowed to enter or leave the market. There are exceptions to the first paragraph's "No prohibitions or restrictions" language, as paragraph 2 lists situations in which the Members may impose restrictions. These relate to agricultural products and commodities, not to diamonds or gold, however.

4.2.2 Non-discrimination

The WTO also requires that Members treat other WTO Members' products and services with conditions of competition that are no less favourable than they do their own or any other trading partners' like products and services. Found in numerous provisions throughout the WTO agreements, in the GATT, the most prominent references are in Article I, with the cornerstone principle, Most-favoured nation treatment (MFN, the principle of non-discrimination among WTO Members); Article III, with the principle of National Treatment (the principle of non-discrimination between a Member's domestic traders and another Member's traders); and Article XIII, with the obligation of affording non-discriminatory treatment in the context of quantitative restrictions (to ensure that any import or export prohibitions/limitations they apply is applied to all trade in the like product).

4.2.3 Technical Barriers to Trade

Another group of market access restrictions the WTO addresses is that of technical barriers to trade. The Agreement on Technical Barriers to Trade (TBT Agreement) sets out a framework for WTO Members to follow when imposing mandatory technical regulations that could limit the trading of goods among or between Members.

Under the TBT Agreement, an obligatory label requirement can be a "technical regulation" and therefore subject to the rules of the Agreement. The TBT Agreement's Annex I defines the term:

> 1. Technical regulation
>
> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging,

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> marking or labelling requirements as they apply to a product, process or production method.[41]

A governmental regulation that is characterized as a technical regulation is not in itself a violation of the WTO, but it does require the WTO Member to attend to the obligations of the Agreement, including that it be applied non-discriminatorily. Article 2.1 TBT Agreement states:

> 2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.[42]

While the Appellate Body has said that GATT 1994-based definitions of "like product" may differ across provisions, and thus, implicitly, across agreements, for purposes of this entry, I presume that the TBT Agreement Article 2.1 likeness test poses the same questions as the Article XIII GATT test does.

4.3 The WTO Conformity of Regulation of Supply Chains

4.3.1 Kimberley Process Certification Scheme

The Kimberley Process Certification Scheme poses several immediately recognizable difficulties for WTO-KP. The newer regulations for minerals from conflict-affected and high-risk territories are much less problematic currently, but could face similar problems if developed into more binding instruments.

As set out above, according to the law of the World Trade Organization (specifically, the General Agreement on Tariffs and Trade, or GATT), the limitation of imports and exports of a "product"—in this case, rough diamonds,[43] forms a quantitative restriction on trade. Technically a quota of zero, a prohibition is included within this term. The imposition of quantitative restrictions on either the import or export of goods among WTO Members is generally illegal under General Agreement on Tariffs and Trade, Article XI. Paragraph 1 of Article XI GATT states plainly:

> "No prohibitions or restrictions other than duties, taxes or other charges [...] shall be instituted [...] on the importation [...] or on the exportation" of any product from a Member territory or to a Member territory.

The Kimberley Process Certification Scheme, banning trade in non-certified diamonds entirely, then, is clearly contrary to the idea of market access itself. It is, in fact, the most potent restriction that exists and fits none of the carve outs found in Article XI.[44]

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[41] TBT Agreement, Annex I, 1.

[42] TBT Agreement, Article 2.1.

[43] Harmonized commodity numbers 7102.10, 7102.21 or 7102.31 refer to unworked diamonds.

[44] Pauwelyn (2003), p. 1183.

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That is not the only problem, however. The permission of trade among KP partners but not with outsiders is also discriminatory. The first paragraph of Article XIII GATT demands that any import or export prohibition that is applied by a WTO Member be applied to all imports or exports of the "like product" from third countries.[45] The principle underlying Article XIII GATT is repeated in other forms throughout the WTO texts, most prominently in Article I GATT's statement of the Most-Favoured Nation (MFN) treatment obligation:

> With respect to [. . .] all rules and formalities in connection with importation and exportation, [. . .] any advantage, favour, privilege or immunity granted by any contracting party to any product [. . .] shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[46]

Any form of regulation, then, that would apply to a subset of WTO Members' traders, could fall afoul of the rules on non-discrimination.

Finally, a labelling requirement such as the KPCS Core Document requires, would clearly be a "technical regulation" as defined by the TBT Agreement. Thus, any law based on obligatory labels for the importation or exportation of conflict minerals would necessarily have to be non-discriminatory within the scope of the TBT Agreement.

4.3.2 Potential Solutions to WTO Violations

The WTO Members were careful to maintain a degree of policy flexibility by providing for explicit exceptions to the rules of the GATT. These include the security exception of Article XXI GATT and the general exceptions of Article XX GATT. Importantly, these exceptions apply to any GATT provision—market access or non-discrimination—but also only to GATT provisions—and so cannot excuse a measure that is a violation of the TBT Agreement.

A strong argument can be made that the specific reference to "conflict" minerals could lend security exception coverage to measures implemented to prevent trade in these minerals. The KPCS Core Document's definition of "conflict diamond" with a reference to the Security Council's condemnation of the rebel movements financed by such diamonds almost surely would have leant the Process coverage under GATT Art. XXI(c), the security exception provision providing a general exception to WTO Members to implement Security Council sanctions programs.[47] Similarly, Article XXI(b) could be invoked to justify a ban on conflict minerals based on their contribution to the financing of arms.[48]

[45] See discussion below.

[46] While the idea of MFN would allow for different-but-equal treatment, clearly permitting trade with one state and not with another is explicitly discriminatory.

[47] Pauwelyn (2003), pp. 1184–1185.

[48] Pauwelyn (2003), pp. 1185–1186.

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Some observers and WTO-KP governments felt that the general exceptions of Article XX(a) (excepting measures necessary to protect public morals) or (b) (measures necessary to protect human life or health) would suffice to relieve KP participants of any liability under the trade agreements. Given the increasing scope for WTO Members' domestic policymaking decisions in recent Article XX jurisprudence, the likelihood that either general exception would be accepted on the merits for the minerals from conflict-affected and high-risk areas is arguably even higher today. At the time of the Kimberley Process negotiations, however, the Appellate Body had not yet addressed Article XX(a) GATT,[49] and was less generous with accepting Article XX(b) claims than they are currently.

More significantly, however, hopes that either provision would be a solution to the conflict diamonds issue could be jeopardized by the questionable nature of using the general exceptions to protect extraterritorial interests. The Appellate Body clearly accepts that Members are granted broad discretion in defining their own communities' morality and the level of trade measures necessary to protect such beliefs,[50] as well as admitting that the interest in protecting human life and health is so high as to permit the exception of trade measures that are not essential, but merely helpful to achieve that goal.[51] Yet, it has not stated that Members may use trade measures to pursue the protection of foreign populations. Another topic on which there exists a large literature, the permissibility of trade measures designed to protect interests extraterritorially is still ambiguous.[52] Unless the legality of trade measures aimed to protect persons abroad is admitted as within the ambit of Article XX GATT, the potential for liability of WTO-KP governments is left unchanged.

Another suggestion was to simply wait and see whether a WTO Member which was not a KP participant would actually bring an Article XIII GATT case against a WTO-KP government trading partner in the WTO. Implicit in this line of thought was that any such claimant would be particularly poorly viewed by other members of the international community. Since WTO disputes must be brought by a WTO Member (there is no independent WTO enforcement mechanism beyond the Mem-

[49]The first Appellate Body report to interpret the public morals exception in Article XX(a) GATT was the EC-Seals case. European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R and WT/DS401/AB/R, paras. 5.194–5.203 (22 May 2014). This had been preceded by the US-Gambling case, interpreting the invocation of the public morals exception in the GATS, Article XIV(a). See United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, paras. 6.457–6.474 (10 November 2004); United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, paras. 293–299 (7 April 2005).

[50]EC-Seals, WT/DS401/AB/R at para. 5.199.

[51]Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R and WT/DS169/AB/R, paras. 161–162 (11 December 2000); Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, paras. 179, 210 (3 December 2007).

[52]Offor and Walter (2017), p. 160. For a good overview of the numerous angles to this question, see Bartels (2002). See also de Mestral (2014).

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bers themselves), this would be so unlikely as to diminish the potential for liability to near zero. The reasonableness of this approach, however, did not assuage the professed fears of the doubters in the KP.

The most controversial claim was that aiming at the human rights aspects of the diamond trade. This posited that "conflict diamonds" and non-conflict diamonds were not comparable (in the terminology of the WTO, not "like") products, and therefore that there was no MFN obligation on WTO members to treat them equivalently. These voices argued that the fact that the KPCS's trade restrictions were limited to "conflict diamonds," themselves defined to be diamonds that had been used to finance rebel movements, meant that the trade in licit stones was an entirely separate matter. The former could therefore be subject to regulations and restrictions different from, and less advantageous than, those to which non-conflict stones were.

This type of argument is referred to as a non-product related process and production method, or "NPR PPM," issue. By permitting otherwise identical products to be considered "not like" products for purposes of the WTO non-discrimination obligations because of differences in their lifecycle, the acceptance or rejection of NPR PPMs would go to the heart of the WTO system's relationship with non-trade values such as human rights, labour standards, or environmental protection. Abundantly written about[53] and seemingly increasingly accepted as legitimate policy tools, the NPR PPM question has been neither squarely accepted nor rejected by WTO legal decision-makers as of yet. While advocates of prioritizing non-trade values vehemently argue for NPR PPMs' legitimacy as distinguishing products,[54] others firmly reject the idea that production (or end-of-lifecycle) differences should be relevant for the products' position on the market.

4.4 The Path Taken

The ultimate solution was found in the suggestion to request a waiver from the WTO for WTO Members participating in the KP. The waiver, an instrument provided for in Article IX.3 of the WTO Agreement Establishing the World Trade Organization (WTO Agreement), is a decision taken by the Ministerial Conference (or General Council) which grants a limited exemption from a particular obligation in order to

[53]The literature on PPMs is huge. An excellent overview of the multiple considerations at stake is the 2002 article written by Steve Charnovitz. Charnovitz S, The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality, 27 Yale J. Int'l L. (2002), text available at: http://digitalcommons.law.yale.edu/yjil/vol27/iss1/4 (last accessed 4 September 2017).

[54]See, e.g., Potts J, The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy (IISD, 2008), text available at: http://www.iisd.org/library/legality-ppms-under-gatt-challenges-and-opportunities-sustainable-trade-policy (last accessed 3 September 2017).

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pursue a particular goal recognized by the other WTO Members as being legitimate.[55] The text of the following paragraph describes the utilization of the waiver:

> 4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than 1 year shall be reviewed by the Ministerial Conference not later than 1 year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.[56]

As seen in the text, the waiver is a time-limited exemption and one tied to a particular context—the Member receives a waiver for a particular time or until the situation demanding the waiver changes, whichever comes first. If the situation develops, the waiver conditions can be changed or ended entirely.

The Ministerial Conference granted a waiver for WTO-KP governments on 27 May 2003.[57] The text recalls the "the trade in conflict diamonds is a matter of serious international concern" and recognizes "the extraordinary humanitarian nature of this issue," as well as pointing out the Security Council's support of the KPCS. It then continues, stating in relevant part:

> *Considering* that, in light of the foregoing, exceptional circumstances exist justifying a waiver from paragraphs 1 of Article XIII, 1 of Article I, and 1 of Article XI of the GATT 1994 with respect to the trade in rough diamonds;
>
> *Decides* as follows:
>
> 1. With respect to the measures taken by a Member listed in the Annex necessary to prohibit the export of rough diamonds to non-Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme, paragraphs 1 of Article I; 1 of Article XI; and 1 of Article XIII of the GATT 1994 are waived as of 1 January 2003 until 31 December 2006.
> 2. With respect to the measures taken by a Member listed in the Annex necessary to prohibit the import of rough diamonds from non-Participants in the Kimberley Process Certification Scheme consistent with the Kimberley Process Certification Scheme, paragraphs 1 of Article I; 1 of Article XI; and 1 of Article XIII of the GATT 1994 are waived as of 1 January 2003 until 31 December 2006.
> 3. This waiver also applies in respect of measures implementing the Kimberley Process Certification Scheme taken by any Member not listed in the Annex to this Decision that desires to be covered by the present waiver and that notifies the Council for Trade in Goods accordingly.
>
> [. . .]

[55] See WTO Agreement, Article IX.3 (setting out the procedural steps required for the granting of a waiver).

[56] WTO Agreement, Article IX.4 (emphasis supplied).

[57] Decision of 15 May 2003, WT/L/518 (27 May 2003).

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Perhaps most importantly in terms of systemic analysis of human rights and trade, the waiver was explicitly non-committal as to whether or not the Scheme was in fact a violation of the WTO-KP's WTO obligations:

> Noting that this Decision does not prejudge the consistency of domestic measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions, and that the waiver is granted for reasons of legal certainty [. . .].[58]

The significance of this statement can hardly be overstated. For, although I continue to consider the waiver a poor instrument for addressing the KPCS's possible incompatibility with WTO rules as a technical matter,[59] the real problem is that this waiver not only sidesteps the "is it or isn't it" question, it implicitly answers the subsequent question of "if the KPCS does violate the WTO rules, should WTO-KP governments face possible trade retaliation if they would continue to pursue the human rights goals of the KPCS?"

This goes much beyond a mild concern that "[. . .] the WTO continues to be shy of integrating non-trade concerns into the international trading framework, and it is structurally difficult for it to achieve such integration other than by extending derogations."[60] The greater implication of this type of WTO-sanctioned "go ahead" is not a problem of the WTO being "shy"—it is that the WTO is flexing the dominance of trade flows over human rights protection. By refusing to address the relative position of KPCS rules with WTO obligations, the waiver decision suggests that human rights concerns will never achieve equal status with trade rules in the trading system.

Here I find Catherine Mackinnon's insights into dominance, difference, and inequality, originally intended as a feminist legal theory, helpful in understanding the trade and human rights dialogues. In particular, dominance, difference and inequality can be brought into the analytical framework of viewing human rights *through the lens of* trade law. "Inequality," Mackinnon says, "comes first; differences come after."[61] The problem with this—for the subordinated one—is that equality, though posed as neutral, principled, and objective, is defined by the dominant paradigm. Thus, it requires all or everything which is not dominant to be measured against the dominant to determine whether it can be considered equal—but the comparison occurs against the framework established by the dominant paradigm

[58]Decision of 15 May 2003, WT/L/518 (27 May 2003).

[59]See Nadakavukaren Schefer (2005). Indeed, since writing that article, the KPCS waiver has been extended twice (each for six more years), with the latest decision set to expire (or be up for renewal) on 31 December 2018. See Extension of Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, WT/L/876 (14 December 2012). There seems, moreover, no resolution of the diamond-conflict chain in many of the African countries where these links were first detected. As a result, this "temporary" instrument for an "extraordinary" situation, appears destined to continue indefinitely.

[60]Ankersmit L, Lawrence J, and Davies G, Diverging EU and WTO perspectives on extraterritorial process regulation, 21 Minn. J. Int'l L. Online 14, 76 (2011–2012).

[61]Mackinnon (1987a), p. 7.

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as the norm. "To know if you are equal, you have to be equal to somebody who sets the standard you compare yourself with."[62] Thus, to find equality, one has only two choices, to be like the dominant class or to be in the inferior class *as determined by the dominant class*.[63] As such, one can never be equal, because any difference is made relevant by, and therefore supports, the inequality.

Although the dominance/difference theory was never intended to be applied to international trade relations, it can aid the analysis of the relationship between the dominant framework of liberal trade and the subordinated (although professed equal) interest of WTO Members in protecting human rights. Viewed from the theory of dominance/difference, the KPCS waiver clearly indicates that human rights concerns—even those of such extreme importance as the mutilation and killing of civilian populations—remain subordinated to the goals of liberalized trade and therefore need an exception from the rules which only the trade system Members themselves can grant.

5 Regulating Dirty Gold: International Attempts to Rid the Gold Supply Chains of Human Rights Abuses

The attempted regulation of gold supply chains is a relatively recent phenomenon. The realization that gold mining often occurs under conditions in which the labor rights of the miners are violated is not new, of course.[64] Neither are the complaints of environmental damage caused by the extraction process and the allegations by indigenous peoples of violations of their cultural and property rights.[65] Nevertheless, the "conflict" element of the gold trade did not emerge fully onto the international political (and security) stage until the mid-2000s, when the United Nations spoke out on the linkage between the gold trade and weapons flows in the Democratic Republic of the Congo (DRC). Already under sanction, the DRC's failure to control illicit financing of arms sales was sharply criticized by the experts reviewing the situation on the ground. In a 2007 report, the Expert Group on—asserted:

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[62]Mackinnon (1987b), p. 22.

[63]Mackinnon (1987c), p. 71.

[64]E.g., Wilson (1972); Hilson (2012), available at: http://www.sciencedirect.com/science/article/pii/S0305750X1200054X (last accessed 2 October 2017).

[65]Salomons (1995), text available at: https://ac.els-cdn.com/037567429400039E/1-s2.0-037567429400039E-main.pdf?_tid=a3fd64d0-a75c-11e7-81c8-00000aacb35d&acdnat=1506940379_feabcec28bde092f9cb7844f092730e4 (last accessed 2 October 2017); Harvard Law School International Human Rights Clinic, The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand (2016); Centre for Environmental Rights, Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga (May 2016), https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf (last accessed 2 October 2017).

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> 37. The Group can confirm that the most profitable financing source for armed groups remains the exploitation, trade and transportation of natural resources. The tightly intermingled economic interests of illegal armed groups with those of legitimate businesses and of local populations do not allow a clear demarcation to be made between embargo violators and legitimate actors. All supply chains from areas controlled by armed groups are compromised.[66]

The report continued to point out the numerous sites of particularly heavy trade in minerals, including gold, which formed a nearly uncontrollable financial source for the purchase of weapons used in the fighting occurring in the country.[67] Set amid a civil war of equal brutality to the earlier insurrections in West Africa, the trade in "conflict gold"—along with other conflict minerals such as tin, tungsten, and coltran[68]—became an issue of international concern.

The international community response began with a broad focus on trying to rid the market of all of these conflict minerals.[69] Partly as a result of the wider scope and multiple industries involved in the conflict minerals campaign, the approach taken ultimately diverged significantly from the Kimberley Process' methods.

In the beginning, however, the international community attacked the problem in familiar ways. The United Nations Security Council imposed embargoes on the export of natural resources from DRC and surrounding countries[70] and NGOs such as Global Witness engaged in campaigns to inform western publics and the industries using such minerals of the security and human rights issues.[71] From the beginning, however, the idea of "conflict minerals" encompassed more than simply minerals from which the sales profits were benefitting rebel groups. Instead, the focus was on minerals taken from territories in which there were armed conflicts

[66]Letter dated 16 July 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2007/423, para. 37 (18 July 2007).

[67]Letter dated 16 July 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2007/423, paras. 61–74 (18 July 2007).

[68]These are the minerals referred to as the "3Ts," used heavily in the electronics industry (coltran is tantalum ore).

[69]See Geenen S, African Artisanal Mining from the Inside Out: Norms and Power in Congo's Gold Sector, Chapter 6 (Routledge 2016), available in part at: https://books.google.ch/books?id=c_NWCgAAQBAJ&pg=PT229&lpg=PT229&dq=Traceability+Initiative+for+Artisanal+Gold&source=bl&ots=QHCShaJCGZ&sig=vxsItDTxAmFrHnBELRa-L9VmoKQ&hl=de&sa=X&ved=0ahUKEwign-f87pLWAhXDtRoKHbqfDEYQ6AEIVjAF#v=onepage&q=Traceability%20Initiative%20for%20Artisanal%20Gold&f=false (last accessed 7 September 2017).

[70]Security Council Resolution 1857, S/RES/1857 (2008); S/RES/2021 (2011); S/RES/2078 (2012); S/RES/2136 (2014); S/RES/2198 (2015); S/RES/2277 (2016); S/RES/2293 (2016); S/RES/2360 (2017).

[71]Partnership Africa Canada, All that glitters is not gold (2014), text available at: https://impacttransform.org/wp-content/uploads/2017/09/2014-May-All-That-Glitters-is-not-Gold-Dubai-Congo-and-the-Illicit-Trade-of-Conflict-Minerals.pdf (last accessed 24 April 2018); Global Witness, River of gold (2016), text available at: https://www.globalwitness.org/en/campaigns/conflict-minerals/river-of-gold-drc/ (last accessed 24 April 2018).

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occurring. The presumption was therefore that no matter who was benefitting from the sale of such minerals, the sales were likely to be connected with abuses of human rights. This presumption was not unfounded: miners and the small-scale business people at every point along the local supply chain were exposed to brutality (assaults, rape, and murder) and threats by not only insurrection fighters, but also by DRC government forces and organized crime. Unlike the limited focus of the Kimberley Process's "conflict diamonds," then, the conflict mineral issue was very broad from the beginning.

By the second half of the 2000s, the UN embargos were evidently failing to even substantially reduce the supply of Congolese minerals. The focus therefore shifted away from trying to eliminate conflict mineral directly to trying to increase the demand for certifiably non-conflict minerals. The advantage of this approach was that it acknowledged the DRC's limited governance capacity to address the complexities of supervising and securing hundreds, if not thousands, of possible points of illicit supply and placed the onus of implementation on those who were the purchasers of the minerals—a smaller and more easily regulated group of players. Corporate due diligence and supply chain management therefore became the key catchwords of conflict mineral discussions.

Focusing on corporate conduct, in turn, meant that the emphasis of international rules would shift away from the United Nations and toward states and—to the extent states were unwilling to legislate domestically—to soft law instruments encouraging responsible corporate behaviour.

The United States Congress was one of the first to issue binding rules, passing the as the Dodd-Frank Act in 2010.[72] Under §1502, the Securities and Exchange Commission was to require that all companies sourcing minerals from the DRC report on their due diligence efforts to identify the source and supply chain controller of their conflict mineral purchases from the DRC and surrounding countries, with the main aim of enhancing the transparency of supply chains.[73] Thus, while it encouraged purchasers to seek out conflict-free suppliers, there are no particular prohibitions on buying such minerals as long as this is audited and reported. The uncertainty surrounding the Dodd-Frank Act's future status aside, its provisions reflect an approach to regulating supply chains that seems appealing to states—other jurisdictions have or are also developing or considering legislation to require transparency from gold trading companies that source from conflict-affected or high-risk countries.[74] By requiring transparency in purchasing and auditing due diligence efforts, governments can balance calls for "doing something" against extraterritorial human

[72]The Dodd-Frank Act was mainly aiming to restore stability to the financial system by creating new oversight agents, enhancing consumer protection rules, and increasing the transparency of financial institutions' activities.

[73]Dodd-Frank Act, § 1502(b).

[74]See Swiss Federal Department of Foreign Affairs (2017) Expert study on the Swiss gold sector: final draft of 6 November 2017, pp. 108–136 (examining the gold supply chain regulations of South Africa, Dubai, and India). See also discussion of Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations

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rights abuses with businesses' fears of being held legally accountable for practices over which they have little control (and perhaps even less appetite to police).

Soon after Dodd-Frank, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas ("DDG") promoted internationally oriented rules fostering active corporate due diligence in companies' procurement of minerals that stem from geographic areas that are likely to be tainted by illegal or human rights violation-fostering products. The DDG composed a supplementary set of rules specifically for gold in 2012, and have particularly addressed the questions of due diligence in relation to purchases of artisanal gold. Examining these rules from the perspective of comparing them to the KPCS and the WTO law implications, several things emerge as particularly significant.

First, as set forth above, instead of defining its scope in terms of "conflict gold," the DDG Supplement on Gold addresses the supply-chain of gold from "conflict-affected and high-risk areas." The gold included in the scope, unlike the rough diamond-only approach of the KPSC, may be refined—it mentions three sources of gold that it includes: raw ("mined"); worked ("recyclable" or "grandfathered stocks"); or "mixed" (from both mined and recyclable and/or grandfathered). By moving beyond the mine, the DDG Supplement acknowledges that harm can arise at any point along the supply chain.

Even more striking, however, is the much-expanded scope of the harms. Whereas the KPCS's extremely narrow definition of conflict diamonds could suggest that the real concern with their trade lies in the potential of financing anti-governmental insurrection, the DDG expresses a more victim-oriented view, looking to territories "characterised by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law."[75]

Clearly, this much-expanded view of the harm is more aligned to the lived reality of dangers to individuals whom the measures are intended to help. By adopting an experience-based approach (knowing of abuses by state actors, of criminal acts by non-insurgents, and the mistreatment of individuals in situations where the rule of law is weak), the approach is much more convincing as a Guidance document. On the other hand, it makes the assignment to companies of protecting against the presence of gold tainted by all such acts clearly something more resembling of an ideological aim than a realistic target.

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for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ 2017, L 130/1 above at III.

[75] OECD, OECD due diligence guidance for minerals from conflict-affected and high-risk areas 3d ed., Supplement on gold (August 2016) (emphasis in original).

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Dream or target, the OECD Guidance promotes a five-step governance "framework" for companies to adopt. While three of these steps relate to internal strategies to identify and manage risks, the fourth and fifth steps call for "independent third-party audits" and annual reporting of the due diligence efforts taken.[76] Adding to the 2011 DDG's generally applicable advice, the Supplement on Gold sets out a tailored framework. Since gold is often traded in small quantities, the Guidance includes support for the use of certified and sealed packages for shipments, of including the right to conduct unannounced inspections in contracts, of identifying and discussing the sources of gold with refiners, and keeping track of all payments made to governments, agents, and security forces for each shipment.[77]

Most importantly, perhaps, the Supplement directs attention to the particular issue of artisanal and small-scale gold miners (ASM). For the OECD, as well as the UN, US, and EU, the prevalence of artisanal miners at the beginning of the conflict gold supply chain increases the likelihood that the gold is tainted by violations of human rights. Not only are the chances of an individual miner to protect him- or herself against armed troops small in comparison to the ability of large mining companies doing so, but there may be an active willingness on the part of individual miners to profit from the existence of demand for their gold from insurgent groups, corrupt officials, or organized crime networks.[78] Thus, the majority approach to gold supply chain management is to encourage a formalization of ASM sources and channel purchasing toward the large or medium-sized mining companies.

5.1 Other Standards

The gold industry has its own initiatives to ensure conflict-free supply chains. The most notable among these is the World Gold Council's Conflict-Free Gold Standard.[79] The Standard applies to mining companies themselves, and is self-described as

[76] OECD, Recommendation of the Council on due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas, 25 May 2011—C/MIN(2011)12/FINAL, amended on 17 July 2012—C(2012)93, Annex I.

[77] OECD, Recommendation of the Council on due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas, 25 May 2011—C/MIN(2011)12/FINAL, amended on 17 July 2012—C(2012)93, Annex, Supplement on gold.

[78] OECD, Recommendation of the Council on due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas, 25 May 2011—C/MIN(2011)12/FINAL, amended on 17 July 2012—C(2012)93, Annex, at pp. 84–86. (unklar)

[79] World Gold Council, Conflict-Free Gold Standard (October 2012), available at the link on the page http://www.gold.org/who-we-are/our-members/responsible-gold/conflict-free-gold-standard (last accessed 8 September 2017).

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> a mechanism by which gold producers can assess and provide assurance that their gold has been extracted in a manner that does not cause, support or benefit unlawful armed conflict or contribute to serious human rights abuses or breaches of international humanitarian law.[80]

Aiming to encourage companies to abide by local law, to refrain from bribery or corrupt practices, to disclose payments made to government agents, and to restrain security forces from violating human rights, the Standard goes even further toward improving corporate responsibility than do the OECD Guidance documents upon which the Standard also relies. Notably, it repeats the scepticism of the DDG Supplement on Gold regarding sourcing from ASM.

Further standards in the industry include the London Bullion Market Association's Responsible Gold Guidance and its Good Delivery List. This set of rules requires due diligence as set out in the OECD DDG in order for suppliers to remain on the Association's Good Delivery List. Tying the company's efforts to ensure responsible supply chain management to the traditional quality standard of gold bar is a further push toward a de facto—although not de jure—firming up of the principles behind making gold conflict-free.

As the implementation of the standards is mainly accomplished by publishing reports to recount internal assessment processes, it is difficult for external observers to accurately say whether or not the standards are "working." Industry experts seem convinced that these standards are changing the way business is done,[81] however, and certainly the awareness-raising effects of having such standards at all is a positive step toward encouraging more sustainable supply chains. Still, there is room for continued concern, particularly as news of failures in the oversight of supply chains come to light.[82] Moreover, the highly fragmented nature of the gold supply chains—not only in the mining of gold by artisanal and small-scale diggers, but also in the jewellery-making sector of countries such as India—leave the extensive reporting requirements that are the centrepiece of the gold supply chain initiatives open to being ignored by large segments of the industry.[83]

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[80]World Gold Council, Conflict-Free Gold Standard (October 2012), available at the link on the page http://www.gold.org/who-we-are/our-members/responsible-gold/conflict-free-gold-standard (last accessed 8 September 2017).

[81]Personal discussion with manager of a large gold refiner on 13 January 2018 in Basel, Switzerland.

[82]Dubai's problems with fraud and smuggling are highlighted in a United Nations report. Final report of the Group of Experts on the Democratic Republic of the Congo (S/2017/672/Rev.1) published on August 16th 2017, available at: http://www.un.org/Docs/journal/asp/ws.asp?m=S/2017/672/Rev.1.

[83]See Swiss Federal Department of Foreign Affairs (2017) Expert study on the Swiss gold sector: final draft of 6 November 2017, p. 136 (discussing India's informal and disperse gold jewelry making sector as a possible hurdle to effective enforcement of industry standards).

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6 Conclusion

The Kimberley Process Certification Scheme's WTO compatibility is not in question. For better or worse, the program to certify exports and imports of rough diamonds as "conflict-free" is the subject of a waiver of WTO obligations for any WTO Member that is a Kimberley Participant. Thus, in principle, the Scheme's discriminatory market access restrictions will be deemed legitimate for purposes of the WTO rules for as long as the roughs are traded by rebel troops to fund their egregious violations of civilians' human rights. The legal questions specific to the WTO system (are "blood diamonds" like non-blood diamonds? Would the general exceptions of the GATT Agreement apply to the importing restrictions and discrimination required by the Scheme's Participant-only trading circle? Is the certification requirement itself a technical regulation that falls afoul of the rules on use of technical barriers to trade?) as well as the WTO system's rules' relation to international human rights and humanitarian law are avoided for a safe answer to whether WTO Members may legally join the Kimberley Process Scheme.

Although significantly different from the Kimberley Process Certification Scheme's approach to restricting trade in conflict diamonds, the current move to regulate gold trade may end up similarly avoiding a WTO validity test. How the broad base of conflict-free gold standards will fare under the WTO rules has not yet been tested, and may never be tested. Yet, while its wider area of focus may seem to suggest that it would have a more difficult time fitting within the confines of liberal market access and strict non-discrimination, by focusing on the entire supply chain rather than only on the exportation and importation of gold as a product, the relevance of WTO rules becomes much more tenuous.

As they currently are, the target of the gold trading rules—the companies of the gold industry—do not fall within the direct scope of WTO law. As WTO obligations apply to governmental measures only, to the extent that due diligence "requirements" are suggestions for companies to follow for purposes of good relations with the community or customers, the WTO rules have no real relevance for them.

However, where due diligence requirements become part of national law, the same analysis must occur regarding market access and non-discrimination as was the case with the KPCS. In terms of market access, the main relevant difference between conflict diamonds and minerals from conflict areas is that the obligation to review supply chains and submit an explanation for why the minerals are required for production purposes is—under current formulations of the rules—not an obligation to not trade. Rather, it is a transparency obligation: the company is to notify or report on the existence of the trade, but is not prohibited from trading, even where the gold is clearly tainted. True, the expected effect of the transparency requirement is that there will be a drop in the demand for such gold, but it is not a restriction on the supply. This, then, removes the clear violation of Article XI GATT from the potential WTO claims.

The most such reporting would be is a non-tariff barrier. The next question to ask is would it be subject to the rules of the TBT Agreement? As a mere reporting

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requirement, it would not appear to fall within the definition of "technical regulation" set forth in the Agreement. However, if it were to be so categorized, given that TBT rules apply without the availability of the general exceptions of Articles XX and XXI GATT, the requirement that the regulation be non-discriminatory would push WTO Members toward making such reporting requirements as broad as possible—applying to all trade in gold, independent of source territory. Interestingly, it would in this way be a potential boon to the interests of protecting human rights. It would also, however, become much more burdensome for companies purchasing gold.

The optimal regulation of supply chains, then, seems to be the one least likely to violate the WTO rules. It is also, however, the one most burdensome on individual companies who will bear the costs of diligently investigating their supply chains. As a result, even where WTO obligations themselves can be managed to not actively block human rights, it remains to be seen if there is the political will among traders to bring the system far enough to help.

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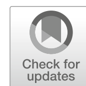
Beyond Antagonism: Legal Protection of Foreign Investment in the Natural Resources Sector



Tarcisio Gazzini

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1 Introduction

The natural resources sector has traditionally been, and continues to be, a key sector for profitable projects of foreign investors and the economic development of States. Studying investments in the natural resources sector is particularly important in view of the implications and potential impact these investments may have upon a variety of private and public interests, including the protection of the environment and human rights.

It is appropriate to start this note by briefly defining natural resources (Sect. 2). Two important notions need then to be discussed, namely permanent sovereignty over natural resources (PSNR) and sustainable development, as both play a pivotal role in elaborating a balanced regulation of foreign investment in the natural resources sector (Sects. 3 and 4). This paves the way to a concise inquiry into delicate questions related to the exercise of regulatory powers by States (Sect. 5). Moving to the substantive law, the paper will finally focus on the protection of the

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environment, human rights and corporate responsibility, and good governance (respectively, Sects. 6–8).[1]

2 Definition of Natural Resources

Common working definitions of 'natural resources' are quite straightforward, yet rather vague. According to the Organisation for Economic Co-operation and Development (OECD), for instance, "[n]atural resources are natural assets (raw materials) occurring in nature that can be used for economic production or consumption".[2] In the trade context, likewise, natural resources have been defined as "stocks of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their raw state or after a minimal amount of processing".[3]

Yet, natural resources are generic terms and as such difficult to define. Generic terms relate to, or are descriptive of, a whole group or class. They are not "static" and their meaning tend to evolve in time.[4] Those using these terms in legal instruments, most importantly international treaties, legislation and contracts, should be aware that they are susceptible to a change in meaning and should accordingly accept the related risks. As recently held by the International Court of Justice (ICJ),

> where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[5]

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[1] On the settlement of disputes concerning investment in the natural resources sector, see Ortino and Tabari (2016), p. 496.

[2] OECD, Glossary of Statistical Terms, http://stats.oecd.org/glossary/detail.asp?ID=1740.

[3] WTO (2010), p. 46. For a full discussion on the definition, see Rutten and Mwangi (2014), p. 51.

[4] See *Namibia (South West Africa)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, para 53. In *United States - Import Prohibition of certain Shrimps and Shrimps Products*, WT/DS58/AB/R, 12 December 1998, para 130, the WTO Appellate Body, pointed out that the generic term 'natural resources' in Article XX (g) GATT 1996 is "by definition, evolutionary". As noted by Higgins R, Declaration appended to *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, *I.C.J. Reports 1999 (II)*, p. 1045, para 2, a generic term is a "known legal term, whose content the parties expected would change through time".

[5] *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, para 66. In para 70, the Court further pointed out that generic terms "must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning". In *Aegean Sea Continental Shelf (Greece/Turkey), Judgment, I.C.J. Reports 1978*, p. 3 at p. 32, para 77, the Court held that where a term can be classified as generic "[t]he presumption arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time".

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References to natural resources or foreign investment in the natural resources sector remain rather uncommon in investment treaties. Investment treaties rarely contain a definition of natural resources, as they normally apply to all sectors, with significant exceptions such as the Energy Charter Treaty (ECT)[6] or the Economic Community of West African States (ECOWAS) Protocol on Energy.[7] Investment treaties occasionally refer to the use of economic resources,[8] the rights conferred with regard to the cultivation, extraction and exploitation of natural resources,[9] measures related to the protection and conservation of (living or non-living exhaustible) natural resources,[10] or measures necessary to protect and conserve the environment, including all living and non-living natural resources.[11]

Domestic legislation, on the contrary, often offers detailed definitions of natural resources, which normally consist of rather comprehensive yet non-exhaustive lists of various categories of natural resources. This is typically the case when legislation specifically deals with natural resources. Article 3 of the Organic Law for Sustainable Use of Natural Resources, promulgated in Peru in 1997, is an interesting example. It reads:

> Natural resources are considered to be any component of nature, which can be used by human beings to satisfy their needs and which has a current or potential value in the market, such as:
>
> superficial and subterranean waters;
>
> the soil, subsoil and lands for their capacity for greater use: agricultural, livestock, forestry and protection;
>
> biological diversity: such as species of flora, fauna and microorganisms or protists; the genetic resources, and the ecosystems that support life;
>
> hydrocarbon, hydro-energetic, wind, solar, geothermal and similar resources;
>
> the atmosphere and the radio spectrum;
>
> minerals;
>
> others considered as such.

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[6]Concluded on 17 December 1994 and entered into force on 16 April 1998, at https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

[7]Concluded on 31 January 2003. Article 40 provides for the provisional application of the treaty pending its entry into force, at http://investmentpolicyhub.unctad.org/Download/TreatyFile/5477.

[8]See, for instance, the preamble of the BIT between Finland—Montenegro, in which the parties agreed that a stable framework for investment will contribute to maximising the effective utilisation of economic resources. The preamble of the model BIT elaborated and subsequently abandoned by Norway recorded the desire of the contracting parties "to maximize effective and sustainable utilization of economic resources."

[9]See, for instance, SADC Model BIT Article 2.II.7.

[10]See, for instance, Article XVII of the BIT between Canada and Egypt BIT (1996), or Article 3 c. (iii) of the BIT between the United States and Uruguay.

[11]See, for instance, Article 16.1 (v) of the Indian Model BIT.

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> The natural landscape, as long as it is an object of economic exploitation, is considered a natural resource for the purposes of this Law.[12]

Indeed, a precise definition of natural resources facilitates the implementation of the legislation, clarifies the relationship between investors and local authorities, prevents having misplaced expectations, and directs domestic courts and investment tribunals in qualifying investments for the purpose of the relevant legal instruments.

3 Permanent Sovereignty over Natural Resources

The principle of permanent sovereignty over natural resources (PSNR) is of key importance for the regulation of foreign investment in the natural resources sector. In *Democratic Republic of Congo* v. *Uganda*, the ICJ held that the principle of PSNR, as expressed in General Assembly Resolutions 1803,[13] 3201[14] and 3281,[15] is "a principle of customary international law".[16] This finding seems to have found broad support in literature, with several learned authors pointing out that PSNR first emerged as soft law and then matured into customary international law.[17] While there is no harm in defining PSNR as a principle of customary international law, its evolution from soft law into such a principle, and the issue of the existence of such a principle before those resolutions, remain unclear.

It seems preferable to consider PSNR as part and parcel of the notion of sovereignty, understood as "the territorial authority of a state over everything within its territory includ[ing] sovereignty over the state's natural resources".[18] The very concept of sovereignty was introduced and developed in political theory in the context of the power of the State over "everything within the State".[19]

[12]Ley Orgánica Para el Aprovechamiento Sostenible de los Recursos Naturales, 25 June 1997, at http://www2.congreso.gob.pe/sicr/cendocbib/con4_uibd.nsf/94F1B8549C309A4005257B830064833E/$FILE/26821.pdf.

[13]Resolution 1803 (XVII), 14 December 1962.

[14]Resolution 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974.

[15]Resolution 3281 (XXIX), Charter of Economic Rights and Duties of States, 12 December 1974.

[16]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, para 244. That PSNR does not apply—as held by the Court—in the context of an international armed conflict remains questionable.

[17]Schrijver (1997); Hobe (2015), p. 1; Schrijver (2015), p. 15, esp. pp. 24–26; Tyagi (2015) p. 588.

[18]Jennings and Watts (1992), p. 384.

[19]*Idem*., p. 125; likewise Malanczuk (1997), p. 17, notes that "[t]he theory of sovereignty began as an attempt to analyse the internal structure of a State. Political philosophers though that there must be, within each State, some entity which possessed supreme legislative power and/or supreme political power".

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From this perspective, PSNR is inherent in the exercise of sovereignty over a portion of the globe, without any demonstration on the existence, nature or content of any underlying right being necessary. As persuasively pointed out by Sornarajah, the General Assembly resolutions mentioned above

> [a]ssert[ed] a generally established proposition of international law. No State, developed or developing, doubts the proposition that it has total control over all economic activities which takes place within its boundaries. This is a self-evident principle of state sovereignty.[20]

It is particularly telling that Resolution 626 (VII) reiterated that "the right of peoples freely to use and exploit their natural wealth and resources is *inherent in their sovereignty*" (emphasis added).[21] Likewise, Resolution 1803 (XVII) upheld "the inalienable right of all States freely to dispose of their natural resources." Neither resolution introduced any development of international law or revealed any emerging or new right. Quite the contrary, both merely recognized a fundamental element of the exercise of State sovereignty.[22]

It has been argued that, since PSNR developed in the era of decolonization, it would be "inappropriate to invoke this concept in a case involving two African countries".[23] The argument is inconsistent with the qualification of PSNR as a customary principle as maintained by the ICJ, contradicts the well-established understanding of sovereignty and ultimately misreads the significance of the proclamation of PSNR in the post-colonial context.

The resolutions adopted by the General Assembly up to the proclamation of the rights and duties of States within the attempt to establish a New International Economic Order (NIEO) did not aim at rewriting the law completely, but rather at invoking "one of the most powerful doctrines of international law", namely the sovereignty of States,[24] in order to tackle the colonial legacy. The new States did not need to assert their sovereignty over the natural resources, as this was inherent in their being sovereign States.[25] Their objective was to regain full control over the natural resources in respect to which foreign investors had legally protected interests, i.e. concessions.

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[20] Sornarajah (2010), p. 83.

[21] Resolution 626 (VII), 21 December 1952. In *China – Rare Earths*, WT/DS331R, WT/DS332R and WT/DS433R, 22 March 2014, para 7.270, the Panel described PSNR as "a corollary of statehood".

[22] In *Crystallex International Corporation* v. *Bolivia*, ICSID Case No. ARB(AF)/11/2, Award, 16 April 2016, para 674, the Tribunal held that foreign investors have no "right" to a permit under international law, because "a state would always maintain its freedom to deny a permit if it so decides".

[23] Judge *ad hoc* Kateca, dissenting opinion in *Congo v. Uganda*, above note 16, p. 378.

[24] Subedi (2016), p. 38.

[25] In this regard, it is worth noting that the preamble of the recent legislation on natural resources, proclaimed that Tanzania "*being a sovereign state* has permanent sovereignty over all natural wealth" (emphasis added), Natural Wealth and Resources (Permanent Sovereignty) Act 2017, 28 June 2017, at https://www.madini.go.tz/wp-content/uploads/2017/12/Natural-Wealth-and-Resources-Permanent-Sovereignty-Act-2017.pdf.

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The crux of the matter was not *whether* the new States possessed PSNR but *how* it could be exercised.[26] Accordingly, they put forward a number of calls for normative change, the most important of which concerned the conditions for lawful expropriation. The right to expropriate has never been disputed by developed or developing States. What has been contentious for decades was the concrete exercise of this right, and more precisely the applicable law and the determination of compensation in this context.

The aim of the newly established States was to bring the issue of expropriation under the reach of domestic law at the expense of international law. This was fully articulated in Article 2(2)(c) of General Assembly resolution 3281.[27] The newly established States' call, however, failed to muster the necessary support to bring about a normative change. The resolution was persuasively considered as an expression of *lexferenda* in the *Texaco* arbitration.[28]

Other calls, having more political than legal content, accompanied the legal discourse on PSNR. They included, most prominently, the promotion of the economic and social advancement of all peoples and their standard of living, the acceleration of the economic and social advancement of less developed countries, the expansion of technical cooperation and transfer of knowledge, the diversification of economic activities and the enhancement of the industrialization process.[29] On the economic level, the emphasis was on the distribution of the profits related to the exploitation of natural resources, which "must be shared in proposition freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources".[30]

Later, PSNR was linked to and considered as "a basic component of the right to self-determination".[31] The link was subsequently confirmed in common Article 1 of the two UN International Covenants, according to which all peoples have the right of self-determination and *may* freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.[32]

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[26]In this regard, Article 18.1 of the ECOWAS Protocol on Energy reads: "The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law".

[27]Note 15. As maintained by Bernie et al. (2009), p. 191, the resolutions "[w]ere primarily directed at asserting the right to nazionalize or control foreign-owned resources and industries, free from some of the older rules which protected foreign investments".

[28]*Texaco Overseas Petroleum Company* v. *Libya*, Award, 19 January 1977, 17 ILM 1978 1, para 88.

[29]See, for instance, General Assembly resolution 1515 (XV), 15 December 1960.

[30]Resolution 1803, note 13.

[31]Ibidem.

[32]International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, signed on 16 December 1966 and entered into force, respectively, on 23 March 1976 and 3 January 1976.

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A complete catalogue of the calls associated with the principle of PSNR was eventually developed within the attempt to establish the NIEO.[33]

Regardless of the appropriateness to link PSNR to a well celebrated but still rather obscure right such as self-determination, it must be emphasized that PSNR was not a novelty insofar as it proclaimed the exercise of the rights related to the exploitation of natural resources as being part and parcel of the very notion of sovereignty. The legal added value of the principle of PSNR proclaimed by developing countries has to be sought in the corollary attached to it, namely the claim to dispose of existing contracts and other agreements on the basis of domestic law, rather than international law.[34] The claim found the firm opposition of developed countries and failed to introduce the normative change it aspired to. In this regard, international law must be seen as 'a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular States unilaterally put forward claims of the most diverse and conflicting character [. . .] and in which other decision-makers [. . .] weight and appraise these competing claims [. . .], and ultimately accept or reject them'.[35]

After decades of sharp division, in recent years the legal position of developed and developing States on expropriation has eventually converged. Today, it is generally accepted that the—never disputed—right to expropriate must satisfy four basic conditions, which are found in virtually all investment treaties, including those concluded between developing countries,[36] and considered as being part of customary international law. According to Article 13(1) of the ECT, for instance, foreign investments shall not be nationalized, expropriated or subjected to a measure or measures having an effect equivalent to nationalization or expropriation, except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.[37]

[33]Wälde (1998), p. 771.

[34]As pointed out by Brownlie (1979), p. 263, "it is difficult to decide to what extent, if at all, the Declaration on the Establishment of a New International Economic Order of 1974 evidences any specific development in customary international law. Probably it does not, since the right to nationalize was not denied in the existing law and it was the conditions under which nationalization occurred which were the object of persistent debate".

[35]McDougal (1955), p. 354.

[36]See, for instance, Article 5 (1) of the BIT between Egypt and Vietnam.

[37]It is however, worthwhile noting that some States have brought expropriation back to the realm of domestic law as most prominently South Africa. The South African Protection of Investment Act (2015), at https://www.thedti.gov.za/gazzettes/39514.pdf, in particular, has pegged the protection of property to Article 25 of the Constitution. Such developments, nonetheless, do not affect the obligations of South Africa under the relevant investment treaties and customary international law.

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4 Sustainable Development

The other notion that deserves attention when dealing with foreign investment in the natural resources sector is sustainable development. The notion of sustainable development is "inherently complex"[38] and difficult to qualify in strict legal terms. It has its roots in environmental protection and has evolved through an intellectual exercise aimed at expressing "[the] need to reconcile economic development with the protection of the environment."[39]

According to a minimalist view, sustainable development is a "label for a general policy goal which may be adopted by states unilaterally, bilaterally, or multilaterally"[40] and its main legal significance consists in assisting judges in establishing priorities and accommodating conflicting norms (so-called interstitial normativity)[41] as well as guiding and inspiring those involved in the adoption and implementation of the relevant legal instruments.

Alternatively, sustainable development may be treated as an umbrella concept, or a convenient way to synthesize several rules, principles and policy commitments.[42] The normative content of sustainable development, therefore, must be determined by putting together the normative contents of the relevant rules, principles and policy commitments. This may change in time, due to the evolution of the underlying rules or general principles, or the emergence and inclusion of new ones. This approach has two main advantages. On the one hand, it anchors the normative content of sustainable development in the relevant underlying rules and principles and their evolution; on the other hand, it provides a dynamic and coherent umbrella to all of them.

The International Law Association's Committee on Sustainable Development, while admitting "a continued and genuine reluctance to formalise a distinctive legal status,"[43] has identified seven principles that are instrumental in pursuing the objective of sustainable development, namely:

1. the duty of States to ensure sustainable use of natural resources;
2. the principle of equity and the eradication of poverty;
3. the principle of common but differentiated responsibilities;
4. principle of the precautionary approach to human health, natural resources and ecosystems;
5. principle of public participation and access to information and justice;
6. the principle of good governance; and
7. the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.[44]

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[38]Bernie et al. (2009), p. 54. Alternatively, sustainable development can be seen as a *matrix*, see Barrel (2016), p. 3, at 4.

[39]*Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, *Judgment, I.C.J. Reports 1997*, p. 7 para 141.

[40]Lowe (1999), p. 30.

[41]Idem, pp. 31–34.

[42]Sands (1995), p. 53.

[43]Final Report, Sofia Conference (2012), para 36.

[44]New Delhi Declaration on the Principles of International Law Relating to Sustainable Development (2002), at www.ila-hq.org/en/committees/index.cfm/cid/25.

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These principles, embodying both right and obligations, are reminiscent of those included in the Brundtland Report, as follows: (a) reviving growth and changing its quality; (b) meeting essential needs for jobs, food, energy, water and sanitation; (c) ensuring a sustainable level of population; (d) conserving and enhancing the resource base; (e) reorienting technology and managing risk; and (f) merging environment and economics in decision-making.[45] To a certain extent, they also reproduce some of the calls underpinning the NIEO.

The notion of sustainable development has found its way into the preamble of several recent investment treaties and is expected to inform their interpretation and application. One of the most sophisticated references to sustainable development can be found in the Bilateral Investment Treaty (BIT) between Canada and Burkina Faso, in which the parties understood investment as "a form of sustainable development that meets present needs without compromising the ability of future generations to meet their own needs and that it is critical for the future development of national and global economies as well as for the pursuit of national and global objectives for sustainable development". In another BIT, the parties recognized "the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development".[46]

The channelling of foreign investment towards sustainable development features also at the domestic level. Article 5 of the Investment Law of Ethiopia, for instance, provides quite a comprehensive set of investment objectives, which are designed to realize the sustainable economic and social development of the country, and in particular

> to accelerate the country's economic development;
>
> to exploit and develop the immense natural resources of the country;
>
> to develop the domestic market through the growth of production, productivity, and services;
>
> to increase foreign exchange earnings (...);
>
> to encourage balanced development and integrated economic activity among the region and to strengthen the inter-sectoral linkage of the economy;
>
> to enhance the role of the private sector in the acceleration of the country's economic development;
>
> to enable foreign investment to play its role in the country's economic development;
>
> to create ample employment opportunities and to advance the transfer of technology (...).[47]

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[45] As synthesized by Sands (2012), p. 9.

[46] BIT between Morocco and Nigeria (not yet in force). In the same vein, the preamble of the COMESA Investment Agreement (not yet in force), recognises that 'direct investment is an important source of finance for sustaining the pace of economic, industrial, infrastructure and technology development; hence, the need to attract higher and sustainable level of direct investment flows in COMESA'.

[47] Likewise, Article 2 (d) (i) of the Namibian Investment Law (2016) aims at promoting sustainable economic development and growth through the mobilization and attraction of domestic and foreign investments that *inter alia* enhance "the economic development objectives of Namibia to build a prosperous, industrialised society with adequate direct investment to, among other things,

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Still at the domestic level, the recent Act adopted by Tanzania offers an interesting attempt to reassert the permanent sovereignty over all natural resources and to ensure that natural resources are exploited for the greatest benefit and welfare of the population.[48] Expressly relying on General Assembly resolutions 1803 and 3281, the Act declares four basic principles: (1) ownership and control over natural resources is exercised by the government on behalf of the population; (2) any arrangements related to the exploitation of natural resources concluded *before* or *after* the entry into force of the Act is subject to approval by the National Assembly; (3) for any such arrangement there must be a guaranteed return on investment to the Tanzanian economy; and (4) earnings obtained from such arrangements must be retained in Tanzanian banks and institutions. Reminiscent of the Calvo clause, the Act also establishes the exclusive competence of domestic judicial bodies and other organs to settle disputes related to the exploitation of natural resources.

With regard to principle (2), if the National Assembly believes that an arrangement is partly or entirely prejudicial to the interests of the population of Tanzania “by reason of unconscionable terms”; it directs the Government to renegotiate it. Unsuccessful re-negotiation unavoidably entails the cessation of the effects of the arrangement regarding the unconscionable terms. Importantly, the Tanzanian Act contains no indication as to the settlement of disputes that may arise out of such a procedure.

The introduction of a preventive control over new arrangements by the National Assembly over the relevant agreements can be seen as a welcome development. It enhances public participation, public scrutiny, transparency and accountability. The subsequent control over existing arrangements, on the contrary, remains problematic on several accounts, including—for the purpose of this paper—possible breaches of Fair and Equitable Treatment (FET) potential retroactive effects[49] and probable flow of and claims of indirect expropriation with regard to covered investment. It is argued that the Act under discussion should have been drafted more carefully and should have included adequate normative precautions, most prominently procedural safeguards, and the possibility of compensation and adequate judicial review. By opting for unilateral measures based on the political assessment of a vague and largely subjective notion such as “unconscionable terms”, Tanzania exposes itself to the risk of arbitral proceedings being brought against it on the basis of the arbitral clauses contained in the relevant treaties or contracts.[50] The outcome of these proceedings may be more

encourage the creation of employment, wealth, technology transfer, capacity building, value addition to natural resources and foreign currency generation”.

[48]The three main pieces of legislation were adopted on 28 June 2017: (a) Natural Wealth and Resources (Permanent Sovereign) Act; (b) Natural Wealth and Resources Contract (Review and Re-Negotiation of Unconscionable Terms) Act; and (c) Written Law (Miscellaneous Amendment) Act, all available at http://www.tcme.or.tz/resources/category/acts-and-regulations/P8.

[49]Interestingly, Section 12 of the Liberian Investment act (2010) expressly excludes any retroactive effects, at http://www.moci.gov.lr/doc/TheInvestmentActof2010(1).pdf

[50]It has been reported that several foreign investors in the natural resources sector (including Acacia Mining, AngloGold Ashanti and OreCorp) have started arbitral proceedings against Tanzania after the adoption of the legislation.

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onerous for the State than an expropriation carried out in accordance with the relevant legal requirements, or a negotiated agreement providing adequate compensation.

5 Regulatory Powers

Any inquiry into the legal protection of foreign investment, especially in the natural resources sector, must start with the undisputed right of the host State to manage the admission of foreign investment[51] and to exercise its regulatory powers in this context. The proclamation embodied in Article 2.2 of General Assembly Resolution 3281, that each State has the right "to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities"[52] is uncontroversial.

Equally uncontroversial, from a different perspective, is that foreign investments are subject to the jurisdiction of the host State and must comply with all relevant rules and regulations. The inclusion of a provision reiterating such obligation in a treaty, although not strictly speaking necessary, may reassure the State and assist arbitral tribunals. In this sense, Article 12.1 (Compliance with Law of Host State) of the Indian Model BIT reads:

> Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following:
>
> Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees;
>
> information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes;
>
> environmental Law applicable to the Investment and its business operations;
>
> Law relating to conservation of natural resources;
>
> Law relating to human rights;
>
> Law of consumer protection and fair competition; and
>
> relevant national and internationally accepted standards of corporate governance and accounting practices.[53]

[51]Unless otherwise bound by treaties, legislation or contractual obligations, States remain free to regulate the admission and establishment of foreign investment within their jurisdictions as a sovereign prerogative, see Sacerdoti (2000), p. 105; Gómez-Palacio and Muchlinski (2008), p. 227. See also UNCTAD, *Admission and Establishment* (UNCTAD, New York, Geneva, 2002), p. 11.

[52]Note 15.

[53]Note 11.

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Yet, the regulatory powers have to be exercised in accordance with the relevant international and domestic legal provisions. As pointed out by an International Centre for Settlement of Investment Disputes (ICSID) tribunal, "while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries".[54]

Another Tribunal held that

> [i]t is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.[55]

To a significant extent, foreign investment law is precisely about fixing the limits within which a State may exercise its regulatory powers, keeping in mind that "when a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them".[56] The crux of the matter is indeed striking a balance between, on the one hand, the need to create a stable and predictable legal framework to attract foreign investment through investment treaties, legislation and contracts, and, on the other hand, the need to preserve the capacity of States to properly pursue their economic and social policies.

The undisputed right of every State to "freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities"[57] must be exercised—throughout the entire life of the investment, i.e. from admission to termination—in accordance with the relevant domestic and international rules.

International treaties must be complied with in good faith as prescribed by the *pacta sunt servanda* principle, which has expressly been recognized *inter alia* in General Assembly Resolutions 1803 and 3281 (Chapter 1(j)).[58] It is worth recalling that States remain the masters of investment treaties, even though these treaties are intended to benefit primarily foreign investors. The fact that in investor-State disputes one of the parties is not a party to the treaty, furthermore, requires a

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[54] *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary*, ICSID ARB/03/16, Award, 2 October 2006, para 423. *TecnicasMedioambientalesTecmed, S.A.* v. *Mexico*, ICSID ARB (AF)/00/2, Award, 29 May 2003, para 119, "[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable".

[55] *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para 332.

[56] *Barcelona Traction, Light and Power Company, Limited*, Judgment, *ICJ Reports 1970*, p. 3, para 33.

[57] Article 2.1, General Assembly Resolution 3281, note 15.

[58] Respectively notes 13 and 15.

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"particular duty of caution" when interpreting these treaties,[59] as well as adequate protection of the acquired rights of investors in case of amendments.[60]

In addition to undertaking specific substantive or procedural obligations through the conclusion of investment treaties, the adoption of legislation and the conclusion of contracts, States may accept restrictions on their exercise of regulatory powers *vis-à-vis* foreign investors. Conversely, they may take some precautions at the normative level to safeguard their exercise of regulatory powers and minimize the exposure to claims of alleged violations of investors' rights.

From the first perspective, States may accept to abstain from exercising regulatory powers through so-called freezing and stabilization clauses. These clauses are normally found in contracts, especially in contracts related to projects in the extractive industries in sub-Saharan Africa, Eastern and Southern Europe, and Central Asia.[61] They have often been criticized for unduly undermining the capacity of States to meet their responsibilities with regard to the protection of collective interests and to pursue effective tax and economic policies.[62] Significantly, in 2016, Israel's Supreme Court struck down a natural gas plan, due to a freezing clause exempting foreign investors from regulatory changes in taxation, antitrust limitations and export quotas for 10 years. The Court's President explained that the stabilization clause "was made in contrast to the general principle of administrative law regarding the prohibition of shackling the authority's ability to govern. The government does not have the power to decide not to decide and not to act".[63]

Occasionally, freezing clauses can also be found in BITs. Article 12(3) of the BIT concluded in 1998 between Italy and Mozambique, for instance, reads:

> Whenever, after the date when the investment has been made, a modification should take place in laws, regulations, acts or measures of economic policies governing directly or indirectly the investment, the same treatment shall apply upon request of the investor that was applicable to it at the moment when the investment was agreed upon to be carried out.[64]

The clause neutralizes the exercise of subsequent regulatory powers to the extent that such exercise is detrimental to covered investors. The provision is rather broad

[59]Berman F, diss. op. in *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.* v. *Peru*, ICSID ARB/03/4, Annulment, 13 August 2007, para 9.

[60]*Enron Corporation and Ponderosa Assets, LP* v *Argentina*, ICSID ARB/01/3, Award, 22 May 2007, para 337, the Tribunal pointed out that "States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries".

[61]See, for instance, Shemberg A, "Stabilization Clauses and Human Rights," May 27, 2009, at http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES. See also Sheppard and Crockett (2010), p. 333.

[62]See Human Rights Council, "Principles for responsible contracts," May 25, 2011, A/HRC/17/31/Add.3.

[63]See Reich A, Israel's Foreign Investment Protection Regime in View of Developments in its Energy Sector, European University Institute Working Paper LAW 2017/02, at http://cadmus.eui.eu/bitstream/handle/1814/45005/LAW_2017_02.pdf?sequence=1.

[64]Identical or similar clauses are contained in Italy's BITs with Angola, Armenia, Azerbaijan, Bosnia, Cameroon, Kazakhstan, Macedonia, Moldova, Tanzania, Uganda, and Uzbekistan.

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as it applies generally to measures directly or indirectly governing investments. Furthermore, unlike contracts, it provides *all* investors of the other contracting party with an exemption from unfavourable laws, regulations, acts, or measures of economic policies that are adopted by the host country.

From the second perspective, States are increasingly uncomfortable with the risk that regulatory measures may violate or be perceived by arbitral tribunals as violating the rights of foreign investors, especially with regard to claims of indirect expropriation.[65] This type of expropriation, nowadays more frequent than direct expropriation obtained through the transfer of title to property, results from covert or incidental interference with the use of property, thereby depriving the owner, in whole or in significant part, of the use or reasonably expected economic benefit of property.[66] Drawing the line between non-compensable exercise of regulatory powers and indirect expropriation, however, remains rather problematic.[67] The significant legal uncertainty which still surrounds the notion of indirect expropriation unavoidably increases the exposure of States to claims of compensation.

With a view to reducing such exposure, States have developed several drafting techniques to better safeguard their policy space. This can be obtained, for example, by including general exceptions clauses in the investment treaty, which often specifically address *inter alia* regulatory measures in the natural resources sector.[68]

6 Protection of the Environment

Striking a balance between the protection of foreign investment, on the one hand, and protection of the environment, on the other hand, is a formidable challenge, especially in the natural resources sector, due to the often enormous economic

[65] According to UNECA (2015), p. 9, "foreign investment is heavily protected, with little or no responsibilities and obligations towards the host economy and the people, particularly in terms of protecting land, social, cultural, and environmental rights. This form of neglect, or contempt, creates a challenging environment for policymakers whose job is to address food security concerns and safeguard land and human rights", http://repository.uneca.org/handle/10855/23035.

[66] See, for instance, *Metalclad* v. *Mexico*, ICSID ARB(AF)/97/1, Award, 30 August 2000, para 103. In literature, see in particular: Christie (1962), p. 307; Dolzer (2003), p. 64; Reisman and Sloane (2004), p. 115; Fortier and Drymer (2004), p. 293; Newcombe (2005), p. 1; OECD (2005); Hoffmann (2008), p. 151; Montt (2009), pp. 231 ff.

[67] As noted by the Tribunal in *Lauder* v. *Czech Republic*, UNCITRAL, Award, 3 September 2004, para 200, "[t]he concept of indirect (or 'de facto', or 'creeping') expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property". In *Saluka* v. *Czech Republic*, Partial Award, 17 March 2006, para 263, the Tribunal conceded that "[i]nternational law has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law".

[68] See the survey conducted in K. Gordon, J. Pohl, *Environmental Concerns in International Investment Agreements. A Survey*, OECD Working Papers on International Investment 2011/01, at https://www.oecd.org/daf/inv/investment-policy/WP-2011_1.pdf.

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interests that is at stake, the pivotal role of the sector in the sustainable development of the country, and the risk of adverse and possibly long-lasting effects on the environment. Indeed, the relationship between foreign investment law and international environmental law is complex and, in some regards, even ambiguous.[69] Not surprisingly, environmental rules and principles are increasingly frequent in investment arbitration.[70] Yet, dispute settlement is only one—and arguably not the most important—of the points of contact, interaction, and possibly friction, between investment and environmental rules and principles.

Indeed, the challenge of finding a balance between the two is much wider and multifaceted, as it includes the need (a) to optimize the exploitation of natural resources; (b) to maximize its impact on economic growth; (c) to ensure the responsible and sustainable exploitation of natural resources; (d) to prevent or minimize damages to the environment; (e) to adopt remediation measures, if necessary; and (f) to channel foreign investment towards clean projects. The challenge is in the first place to design investment policies and adopt or negotiate legal instruments (investment treaties, legislation and contracts) that properly incorporate the rules and principles on protection of the environment. The challenge then continues with the implementation of those policies and instruments throughout the life of investment projects. In all the different phases of investment projects, the competent agencies and authorities of the State must interact with foreign investors, in order to create the conditions for the proper and effective execution of the project, to ensure respect for all relevant legal instruments, and to intervene through the appropriate regulatory or non-regulatory agencies, whenever necessary. Such interaction must occur in a manner consistent with the rule of law and transparency, whereas the investor must comply in good faith with all relevant obligations.

From the standpoint of States, the protection of the environment in the field of foreign investment is pursued though several types of commitments, having a general or specific character. States may include, either in the preamble or in the substantive provisions of investment treaties, a general pledge to promote sustainable development or to optimize the use of natural resources, as in the case of Article 12 Southern African Development Community (SADC) Protocol on Investment (Optimal use of natural resources), according to which “State Parties shall promote the use of their natural resources in a sustainable and an environmentally friendly manner”.[71]

Other investment treaties impose more specific obligations on the parties in relation to the protection of the environment. This may take different forms. A

[69]See Vinuales (2009), p. 244.

[70]See, for instance, Vinuales (2015), p. 1517. For two recent cases, see *W.R. Clayton, W.R. Clayton, D. Clayton, D. Clayton and Bilcon of Delaware Inc.* v. *Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (with dissenting opinion of McRae); *Pac Rim Cayman LLC v. El Salvador*, ICSID ARB/09/12, Award, 14 October 2016.

[71]See also the preamble of the ECT, in which contracting Parties recognized “the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy”.

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typical provision prescribes that the parties shall not relax their rules and regulations, presumably with a view to render their respective economies more attractive for foreign investments. This is the case, for instance, in Article 12(2) of the 2012 United States Model BIT, according to which

> [t]he Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party 'shall' ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

A more stringent standard is based on the combination of the preservation of the right of the parties to establish their own level of domestic environmental protection and environmental development policies and priorities, combined with the commitment to strive to ensure that their legislation provides for high levels of environmental protection, and shall strive to continue improving this legislation.[72]

States might also commit themselves to strive to minimize, in an economically efficient manner, harmful environmental impacts caused by investment, as well as to take precautionary measures to prevent or minimize environmental impacts and to recognize the so-called polluter pays principle. This is notably the case in Article 19 of the ECT, which has been followed in Article 19.1 of the ECOWAS Energy Protocol.[73]

Also from the standpoint of the treaty obligations of States, a potentially quite effective manner to minimize the risks of negative impacts of foreign investments on the environment is performing a Sustainability Impact Assessment (SIA). The SIA exercise is intended "to assess how the investment provisions under negotiation could affect economic, social, human right and environmental issues in [the concerned countries] and to make recommendations to maximise the benefits of the agreement and prevent or minimise potential negative impacts."[74] The SIA may then be complemented by the Environmental Impact Assessment (EIA), to be performed

[72]See, for instance, Article VII (1) of the BIT concluded in 2009 between Belgium-Luxemburg Economic Union and Colombia.

[73]Article 19.1 of the ECOWAS Energy Protocol reads: "Each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts [. . .] taking proper account of safety. In doing so, each Contracting Party shall act in a Cost-Effective manner. In its policies and actions, each Contracting Party shall strive to take precautionary measures to prevent or minimize environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, shall bear the cost of the avoidance, elimination, and clean-up of any pollution, as well as the cost of any other consequences of such pollution, including trans-boundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade".

[74]European Commission, Sustainability Impact Assessment (SIA) in support of an Investment Agreement between the European Union and the People's Republic of China, Interim Report (June 2017), at http://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155638.pdf.

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by foreign investors, and meant to ensure that specific investment projects are environmentally sound (see below).

Treaties may also deal with the protection of the environment from the perspective of the exercise of regulatory powers. Some of these declare that the treaty does not affect the right of the host State to adopt, maintain, or enforce any measures that it considers appropriate to ensure that any investment activities in its territory are undertaken in accordance with environmental law.[75] Other treaties are drafted in the form of exceptions, possibly using Article XX General Agreement on Tariffs and Trade (GATT) as a model. Depending on the drafting of the relevant clause, the host State can adopt the measures that are necessary,[76] or it considers to be necessary,[77] for the conservation of living or non-living exhaustible natural resources, provided that they are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or amount to a disguised restriction on international trade or investment. The self-judging or not self-judging character of these provisions dictate the type of review arbitral tribunals may pass over regulatory measures adopted by the host State.

Alternatively, States may agree that non-discriminatory regulatory actions by a party, that are designed and applied to protect legitimate public welfare objectives—such as public health, safety, and the environment—only in rare (i.e. exceptional) circumstances constitute indirect expropriation.[78] These clauses require arbitral tribunals to show the highest level of deference to the measures adopted by the host State.

From the standpoint of the investor, the obligation to protect and preserve the environment is incumbent upon the foreign investor in the first place under the domestic laws of several countries. According to Article 54 of the Foreign Investment Act of Cuba, for instance,

> foreign investment shall be encouraged, authorized and will operate in the context of the country's sustainable development, which means that, throughout all its stages, special attention will be given to the introduction of technology, the protection of the environment and the rational use of natural resources.[79]

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[75] See, for instance, Article VII (4) of the BIT between the Belgium-Luxemburg Economic Union and Colombia.

[76] Under Article 10 (1) of the Canadian Model BIT, for instance, "nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures *necessary inter alia* for the conservation of living or non-living exhaustible natural resources" (emphasis added).

[77] According to Article 16.1 of the Indian Model BIT, for instance, "nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which *it considers necessary* with respect *inter alia* to protecting and conserving the environment including all living and non-living natural resources" (emphasis added).

[78] See, for instance, the 2012 US Model BIT.

[79] For another examples, see Article 6 of the Indonesian Law Concerning Investment (2007); Section 17 of the Myanmar's Foreign Investment Law (2012); Article 7 of the Mongolian Law On Investment (2013); Article 56 of Gambia's Investment and Export Promotion Agency Act (2010).

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An important tool at the disposal of States to minimize the negative impact of foreign investment is the obligation of the foreign investor to perform an EIA or a Strategic Environmental Assessment (SEA), defined respectively as "a national procedure for evaluating the likely impact of a proposed activity on the environment,"[80] and an

> evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying-out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.[81]

Such an obligation may be prescribed in investment treaties, such as in Article 12 (1) of the ECOWAS Supplementary Act,[82] in domestic legislation,[83] or in contracts. There is no need to emphasise the importance of conducting an Environmental Impact Assessment in the natural resources sector[84] and it comes as no surprise that such an assessment is often at the heart of disputes on foreign investment in this sector.[85] What needs to be stressed is that, since fundamental and possibly long-term decisions hinge on the assessment of the environmental impact of foreign investment, strict compliance with the rule of law and the highest level of transparency and public participation must be ensured.

Furthermore, such an assessment is not confined to the initial authorization of the investment project, but must be designed in terms of allowing a review, and if necessary a correction of the initial assessment, should new evidence be available or prior errors become evident. Needless to say, this may lead to the amendment or even the withdrawal of the initial authorization, an issue that is to be dealt with the

[80] Article 1(vi), Convention on EIA in a Transboundary Context (1991), at www.unece.org/env/eia/about/eia_text.html. In literature, see Gehring (2011), p. 149; Collins (2010), p. 4; VanDuzer et al. (2013); Mayeda (2017), p. 131. In *Emilio AgustínMaffezini* v. *Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 67, the Tribunal pointed out that the "[e]nvironmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law."

[81] Article 2(6), UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (2003), at www.unece.org/env/eia/about/sea_text.html.

[82] Article 12.1 reads: "[i]nvestors and investments shall conduct an environmental and social impact assessment of the potential investment."

[83] The large majority of States have adopted domestic legislation imposing Environmental Impact Assessments. See, for instance, World Bank, *Environmental Impact Assessment Regulations and Strategic Environmental Assessment Requirements. Practices and Lessons Learned in East and Southeast Asia*, 2006, at http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/EIA&SEA-regional-review.pdf.

[84] See OECD Global Forum on International Investment, Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa, at https://www.oecd.org/env/1819582.pdf.

[85] For two recent examples, see *Adel A Hamadi Al Tamimi* v. *Oman*, ICSID ARB/11/33, Award, 3 November 2015 and *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID ARB/09/12, Award, 14 October 2016.

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greatest caution, the most rigorous adherence to the rule of law and an adequate level of transparency and public participation.

Especially in the natural resources sector it is crucial to foresee the conditions and modalities for remediation programs to mitigate possible detrimental effects upon the environment that are caused by foreign investment. This is often provided for in domestic legislation. An example is Article 29 of the Ecuadorian Investment Law (1997), according to which

> Los inversionistas extranjeros y nacionales, deberán conservar, preservar y restituir completamente los daños causados al medio ambiente y los recursos naturales. El Estado velará por el cumplimiento de esta disposición y en los casos pertinentes el Ministerio de Comercio Exterior, Industrialización y Pesca, previo informe del Ministerio de Medio Ambiente, podrá solicitar al COMEXI, prohibir total o parcialmente la operación de una empresa que estuviere ocasionando daños al medio ambiente y depredación de los recursos naturales.[86]

All the above normative tools contribute to ensuring that the foreign investment is conducive to sustainable development and minimizes environmental risks and detrimental effects of investment projects. States should carefully design and properly apply these tools within a stable and predictable legal framework. From this perspective, Article 26 of Mozambique's Investment Law 1993 can be seen as a successful attempt to combine the relevant key principles and notions. It reads:

1. Investors, and subsequently their companies, shall, in the process of elaboration, implementation and operation of their investment projects, carry out and submit the relevant studies and evaluations of the environmental impact and of any pollution and sanitation concerns that may result from their activities and the damages and/or wastes of their undertakings. Such studies and evaluations shall include any potential effects and/or implications on forest, geological and hydrological resources, whether within their area of concession or close to the peripheries of the areas in which the undertaking is being or is to be implemented and operated.
2. It shall also be the responsibility of said investors and companies to undertake appropriate measures for the prevention and minimisation of any negative environmental effects, particularly those identified in the environmental impact studies referred to in paragraph 1 of this Article, and subject to observance of the rules and guidelines issued by the competent authorities in this field, and in conformity with any legal provisions and any terms specified in the licence granted for the operation of the activity.
3. Those activities with levels of pollution and contamination likely to alter and negatively affect the environment or public health shall comply with restrictions established by law and/or issued by competent authorities, as well as to any rules or international agreements on such issues to which Mozambique has become a signatory.

[86] Ley de Promoción y Garantía de Inversiones (1997), at http://www.investmentpolicyhub.unctad.org/InvestmentLaw/law/58. For another example, see Australia National Environment Protection (Assessment of Site Contamination) Measures (1999), http://www.nepc.gov.au/nepms/assessment-site-contamination.

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7 Human Rights and Corporate Responsibility

This paper does not attempt to discuss the panoply of human rights legal instruments applicable in the field of investment in the natural resources sector.[87] More modestly, it offers some reflections on the protection of human rights in general, and from the standpoint of the local population (and indigenous peoples specifically), and of foreign investors, and of States.

With regard to the sources, a complex and heterogeneous web of instruments belonging to different legal orders, and having a different legal nature, concur in the protection of human rights in relation to investment in the natural resources sector. It is worth recalling that most investment treaties are manifestly asymmetrical, as they regulate the legal relationship between the host State and foreign investors, but impose obligations only upon the former. Equally important, they can be considered as a special category of human rights treaties, as they include a catalogue of provisions aimed at protecting the rights of foreign investors, ranging from safeguards on private property to fair and equitable treatment.[88]

Conversely, these treaties often completely disregard the human rights of other stakeholders.[89] Although references to the protection of human rights have found their way into the preamble of some investment treaties,[90] it remains that "few international investment treaties contain meaningful references to human rights".[91] Article 14 of the ECOWAS Supplementary Act on Investment is clearly one of the most progressive provisions on the protection of human and labour rights contained in investment treaties. It reads:

> Investors or investments shall, in keeping with their best practice requirements relating to their activities the size of their investments, strive to comply with on hygiene, security, health and social welfare rule sin force in the host country.

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[87] See Cotula (2012); Yilmaz-Vastardis and Van Ho (2015), p. 223; Francioni (2016), p. 66. In general, see, amongst many: Weiler (2004), p. 429; Puvimanasinghe (2007); Dupuy et al. (2009); De Schutter (2009), p. 137; Hirsch (2013), p. 85.

[88] Alvarez (1996–1997), p. 308, has described NAFTA's investment chapter as a human rights treaty for a special interest group.

[89] The UK House of Commons, Trade and Industry Committee, *3rd Report*, 1998–1999, para 52, at http://www.publications.parliament.uk/pa/cm199899/cmselect/cmtrdind/112/11201.htm, considered the superficial treatment reserved to environmental, social and human rights issues as one of the main reasons for the failure to conclude a Multilateral Agreement on Investment, under the auspices of the OECD.

[90] In the preamble of the BIT between Austria and Kosovo, for instance, the contracting parties *referred* to the international obligations and commitments concerning the respect for human rights.

[91] Cotula L, *Rethinking Investment Treaties to Advance Human Rights*, IIED Briefing, September 2016, at http://pubs.iied.org/pdfs/17376IIED.pdf. See also Mann H, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, OECD Global Forum, 27–28 March 2008, at http://www.oecd.org/investment/globalforum/40311282.pdf; Jacob M, *International Investment Agreements and Human Rights*, INEF Research Paper Series Human Rights, 03/2010, at http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf; Dupuy et al. (2009), p. 45.

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> Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvent human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and /or home State are Parties.
>
> Investors shall not by complicit with, or in assistance with others, including public authorities, violate human rights in time of peace or during socio-political upheavals.
>
> Investors investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work.

It remains that very few investment treaties incorporate substantive provisions on human rights. Yet, these provisions fall outside the relevant arbitral clauses. Making the rights included in those rights enforceable through arbitral proceedings would mean a true paradigm shift in investment treaty practice which is theoretically not impossible but rather unlikely to happen.[92]

As a result, the protection of human rights in the field of foreign investment continues to be essentially a matter of human rights treaties, legislation and other, often non-legally binding, instruments. For the purpose of this paper, a few considerations on land rights (especially of indigenous peoples) are appropriate, due to their importance in the natural resources sector.

With regard to land, the massive land acquisition for plantation agriculture in Africa, Asia and Latin America, a phenomenon known as “land grabbing”, has important repercussions on the life of the local community and often generates serious tension.[93] Yet, these developments “have not yet resulted in substantial shifts in the nature, content and penetration of international law in land governance arrangements, or in substantial development of land-related international law scholarship”.[94] The most tangible outcome of the reflection on the phenomenon is the non-binding 2012 Voluntary Guidelines on the Responsible Governance of Tenure.[95]

At the regional level, in 2014, the African Union, the African Development Bank and the United Nations Economic Commission for Africa jointly adopted the Guiding Principles on Large Scale Land Based Investments in Africa.[96] The principles are intended to contribute to the promotion of good governance and compliance

[92]Writing in Weiler (2004), p. 429, has proposed some draft articles that could be inserted in investment treaties in order to recognize and make enforceable the investment-related human rights of nationals of the host State. In line with the scope of application of most human rights treaties, it may be argued that these remedies should not be confined to nationals of the host State but should be generally available to those within its jurisdiction. At any rate, these remedies could be subjected to the exhaustion of domestic remedies. Contracting parties could also include a fork-in-the-road provision on the remedies offered under the investment treaty and under human rights treaties.

[93]See in general Jacur et al. (2015); see also above note 80.

[94]Cotula (2016), p. 139.

[95]At http://www.fao.org/docrep/016/i2801e/i2801e.pdf.

[96]At https://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf.

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with human rights, the recognition and protection of customary land rights, and the clear articulation of the rights and interests of all stakeholders in the relevant legislation and contracts.

At the national level, several countries have adopted legislation aiming, *inter alia*, at replacing legislation of the colonial era—redressing historical, social and economic inequality and injustice[97]—and more fairly redistributing land, which occasionally has caused controversy.[98] In some cases, the legislation relates to land reform and may affect the protection of foreign investors,[99] while in other cases the legislation relates to the protection of foreign investment, but contains important caveats and safeguards on the acquisition of land by local population.[100]

When the land in question affects indigenous peoples, international rules on the protection of indigenous peoples are furthermore applicable.[101] The Convention No 169 of the International Labour Organisation (ILO) on Indigenous and Tribal Peoples deserves to be singled out for its importance in the natural resources sector, even if it has been ratified by only 22 countries.[102]

The Convention prescribes, *inter alia*, to recognize the rights of ownership and possession of indigenous peoples over the lands which they traditionally occupy (Article 14), to safeguard the rights of indigenous peoples to the natural resources pertaining to their lands, including the right of these peoples to participate in the use, management and conservation of these resources (Article 15.1 and 15.2), and to refrain from removing indigenous peoples from their lands, except where necessary as an exceptional measure (Article 16.2 and 16.3). It remains to be seen to what extent these provisions can be considered as reflecting customary international law. In *Grand River Enterprises et al.* v. *United States*, the Respondent and Canada took a clear stand against such a possibility. They argued that the Convention was not

[97]See, for instance, the South African Protection of Investment Act (2015), note 37.

[98]See, in particular, *Bernardus Henricus Funnekotter and others* v. *Zimbabwe*, ICSID ARB/05/6, Award, 22 April 2009.

[99]See, for instance, Indian Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (2013), at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96426/113950/F1682977291/IND96426.pdf.

[100]See, for instance, the South African Protection of Investment Act, note 37.

[101]See Lenzerini (2014), p. 192.

[102]ILO Convention 1969 adopted on 27 June 1989, entered into force on 5 September 1991, at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169. It is part of the domestic legal system of, and is directly applicable in, almost all the countries that have ratified it. In many of these countries, and especially in South America, the convention enjoys a higher rank than ordinary legislation or even constitutional status. See also ILO, *Application of Convention No. 169 by Domestic and International courts in Latin America – A Casebook*, November 2009, at http://www.ilo.org/indigenous/Resources/Publications/WCMS_123946/lang%2D%2Den/index.htm. See also the 2004 AkwéKon Voluntary Guidelines, at https://www.cbd.int/doc/publications/akwe-brochure-en.pdf. At the domestic level, see the Indigenous Investment Principles adopted by Indigenous Business Australia (IBA), at http://www.iba.gov.au/wp-content/uploads/IB7158_IPP-brochure_FA4.pdf.

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intended to codify customary rules, nor had it developed at the relevant time into customary rules.[103]

From the standpoint of foreign investors, the commitment and compliance with human rights and labour standards by multinational enterprises (MNEs) has been the subject of a hot debate for decades. After the failure to adopt a code of conduct on MNEs under the auspices of the UN,[104] the focus has shifted to non-binding instruments. This exercise has produced a series of non-binding guidelines and principles, most prominently the UN Human Rights Council Guiding Principles on Business and Human Rights[105] and the OECD Guidelines for Multinational Enterprises.[106]

Yet, corporate social responsibility has become an increasingly important concept. It can be defined as "how companies address the social, environmental and economic impacts of their operations and so help to meet our sustainable development goals."[107] The basic assumption behind the concept is that "recognizing corporate responsibility [...] is an economically efficient means of allowing firms to compete fairly in a global economy while enhancing social welfare and conforming to standards of international law".[108]

[103] Respondent's Counter Memorial on the Merits, 22 December 2008, p. 139. See also Article 1128 Submission, 22 December 2008, pp. 2–4.

[104] See Muchlinski (2007), pp. 660 ff.

[105] See UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework*, 16 June 2011, at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. In literature, see, in particular, Deva and Bilchitz (2013).

[106] At http://mneguidelines.oecd.org/guidelines. In literature, see, in particular, Ruggie J, Nelson T, Human Rights and the OECD Guidelines for Multinational Enterprises. Normative Innovation and Implementation Challenges, John F. Kennedy School of Government, Working Paper 66, May 2015, at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper.66.oecd.pdf.

[107] UK Government, Department for Business, Innovation & Skills, at www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-development/corporate-responsibility. The European Commission, COM(2001)366, 18 July 2001, at eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf, has considered Corporate Social Responsibility (CSR) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis." The Swiss State Secretariat for Economic Affairs has defined CSR as "the voluntary contribution of business to sustainable development which takes into consideration the interests of stakeholders. It encompasses the three dimensions of sustainable development; the economy, the environment and society", at www.seco.admin.ch/themen/00645/04008/index.html?lang=en. In literature see in particular, Bantekas (2004), p. 309; McCorquodale and Simons (2007), p. 598; De Schutter (2009), p. 137; Muchlinski (2011), p. 30.

[108] Brief of J. Stieglitz as *Amicus Curiae* in Support of Petitioners, p. 24, at https://harvardhumanrights.files.wordpress.com/2012/01/brief-of-joseph-e-stiglitz.pdf. For a comment of the decision, see Boschiero (2014), p. 3.

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Express references to corporate social responsibility can be found in BITs,[109] regional investment treaties,[110] and Free Trade Agreements (FTAs), such as the FTA between Canada and Peru, according to which

> [e]ach Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principles that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties therefore remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.[111]

Another interesting development from the perspective of enhancing the responsibility of foreign investors and redressing wrongful doings is the growing role of the home State. Under Article 20 of the BIT between Morocco and Nigeria, for instance, investors "shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state".[112] The provision may have a considerable impact on domestic litigation against investors—especially multinational companies—and help overcome jurisdictional hurdles and most prominently the *forum non conveniens* doctrine.

8 Good Governance

The rules and principles contained in international treaties, customary international law and domestic legislation applicable in the natural resources sector have greatly contributed to the progressive development of the concept of good governance, which "encompasses the role of public authorities in establishing the environment in which economic operators function and in determining the distribution of benefits as well as the nature of the relationship between the ruler and the rules".[113] The principle of good governance is also an important component of the notion of sustainable development.[114]

The three main pillars of the concept, namely the rule of law, public sector management and controlling corruption, will briefly be mentioned in this paper. The rule of law is a pervasive principle "of governance in which all persons, institutions

[109]See, for instance, Article 14 of the BIT between Canada and Mongolia.

[110]See, for instance, Article 16 of ECOWAS Supplementary Act on Investment.

[111]Article 810, at www.sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_text_e.asp#Cha08Art01. For a provision specifically on anti-corruption see Article 13 the ECOWAS Supplementary Act.

[112]Note 46.

[113]OECD, *DAC Orientation on Participatory Development and Good Governance*, OCDE/GD (93)191, 1993, at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(93)191&docLanguage=En.

[114]Note 44.

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and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".[115] It overlaps with the concept of FET, but is much broader, more comprehensive and, importantly, applies with regard to all stakeholders. Indeed, the rule of law affects every aspect of the exercise of *puissance publique* by States at all levels of the administration, as well as the conduct of private subjects, including foreign investors.

Public sector management is a multifaceted concept, which includes clear national development planning, fiscal discipline and sustainable redistribution of benefits, combined with enhanced transparency and public scrutiny. In the natural resources sector, Ghana's Petroleum Revenue Management Act, adopted in 2011 and amended in 2015, can be considered as a largely successful attempt to improve the management of the sector and to optimize its economic impact.[116] Perhaps more importantly than in other sector, in the natural resources sector transparency, clear and public procedures and policies on the allocation of contracts and licenses, as well as on the collection, redistribution and spending of revenue are of paramount importance. The Standards adopted in 2016 within the Extractive Industries Transparency Initiative (EITI)[117] are certainly a step in the right direction, together with domestic legislation, such as the Nigerian Extractive Industries Transparency Initiative Act 2007[118] and the Liberian Extractive Industries Transparency Initiative Act 2009.[119] Transparency works both ways, as recognized in Article 14 of Cameroon's 2002 Investment Charter, which requires both the private and the public sector to observe international standards of transparency with regard to the production, publication and dissemination of high-quality information.[120]

Finally, corruption in all its forms has often undermined the efficient exploitation of natural resources and the positive impact investment may have on all stakeholders. Natural resources related projects have often been a popular target for corruption practices of multinational companies and political or military elites, despite the existence of international treaties on the fight against corruption, such as the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[121] or the 2003 UN Convention against Corruption.[122]

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[115] UN Secretary General Report, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, S/2004/616, 23 August 2004, para 8.

[116] At http://www.petrocom.gov.gh/assets/petroluem-revenue-management-act815-2011-.pdf. In literature, see Amoako Tuffour and Ghannay (2016), p. 35.

[117] At https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english_0.pdf. In literature, see Wilson and Van Alstine (2017), p. 50.

[118] At http://www.petroleumindustrybill.com/wp-content/uploads/2012/07/neitiact.pdf.

[119] At http://www.leiti.org.lr/uploads/2/1/5/6/21569928/act.pdf.

[120] At http://investmentpolicyhub.unctad.org/InvestmentLaws/laws/45.

[121] At http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, 43 Parties. See also the 2009 OECD Recommendation, at http://www.oecd.org/daf/anti-bribery/44176910.pdf.

[122] At http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, 183 Parties.

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Corruption is also occasionally dealt with in investment treaties. Article 18.1 of the ECOWAS Supplementary Act is quite an interesting example, since it imposes certain obligations concerning corruption practices upon foreign investors, and in case a violation of such an obligation is established by a domestic tribunal, it deprives them of the right to institute arbitral proceedings. This is one of the still rare cases in which a sanction for a violation of an obligation by the foreign investors is built in an investment treaty.

9 Conclusion

Foreign investment law can be seen as a crossroads at which a variety of norms—having a different nature (most prominently investment treaties, legislation and contracts) and subject matter (ranging from standards of treatment of foreign investors to environmental rules and human rights)—meet, in a combined effort to legally protect the private and public interests of the different stakeholders. This creates a fertile ground for, on the one hand, tension and possibly conflict, and, on the other hand, mutual support and cross-fertilization. This is even more evident in the natural resources sector.

The search for "common or universal principles for resource management" has proved inconclusive.[123] Instead, a complex and heterogeneous web of different, and not always legally binding, instruments concur to the creation of a stable and predictable legal framework. Building such a framework is an incremental process that concerns a variety of actors, having different interests, agendas and bargaining powers. As any process of this kind, the trajectory is rarely regular and gaps and shortcomings are difficult to fill and overcome, due to the reluctance of the actors concerned to recalibrate the related legal instruments with a view to striking a better balance.

There are nonetheless several encouraging developments, both at the international and national level. In the background, the principle of PSNR and the concept of sustainable development are firmly consolidated. They continue to influence and inspire the progressive development of foreign investment law, and guide governmental agencies, legislative bodies, domestic courts and arbitral tribunals, and multinational companies.

An important step towards a more efficient and balanced legal framework on foreign investment in general, and in the natural resources sector in particular, has been the clarification and proper preservation of the right of States to exercise regulatory powers, through apposite provisions that were inserted in the relevant legal instruments, most prominently international treaties.

Furthermore, the protection of the environment and, to a lesser extent, of human rights, has eventually found its way into foreign investment law. Several

[123] Weiss and Scherzer (2015), p. 56.

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developments have been significant in the natural resources sector, including social and environmental impact assessments and corporate responsibility, as well as the emergence of the concept of good governance. Yet, the advancement has been fragmentary and irregular, and the available remedies for violations of the relevant standards remain rather weak.

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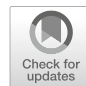
Reconsidering Sovereignty, Ownership and Consent in Natural Resource Contracts: From Concepts to Practice



Lorenzo Cotula

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1 Introduction

A wave of commercial investments in the natural resource sectors has rekindled debates about the place of contracts in the interface between economic governance and control over natural resources. Since the early 2000s, the boom and bust of commodity cycles—and the increasing and then declining pace of investment in the agriculture, mining, oil and gas sectors—have fostered lively discussions over whether host countries received a fair share of economic benefits, over the distribution of those benefits within national economies, and over the social and environmental impacts of commercial activities.

That foreign investment can play a role in the pursuit of sustainable development is widely recognised, including by the policy instrument that underpins the

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internationally agreed Sustainable Development Goals (SDGs).[1] Job creation, the generation of public revenues and improved access to markets and technology are commonly cited vehicles through which investments could advance the SDGs. The natural resource sectors provide sites of investment opportunity, including in many low and middle-income countries. At the same time, large-scale natural resource projects have often been accompanied by reports of social conflict and environmental degradation. Many low and middle-income countries experience a stark contrast between the hopes raised by their natural resource endowments and the everyday reality of deprivation that many people face.[2]

Contracts have featured prominently in these trends and debates. While licence-based regimes apply in some states and sectors, contracts often provide the legal basis for the implementation of natural resource projects—even more so in low and middle-income countries.[3] In addition, contract renegotiations over the past 15 years have been at the centre of many disputes between investors and states. This prominent place of investor-state contracts has underpinned what some scholars have called a "transactional view" of investment relations, whereby legal arrangements are structured, at least in part, around a bargain between the investor and the state.[4]

However, the "transaction" involves complex constellations of both commercial and non-commercial dimensions. In market-based economies, commercial viability provides the foundation of any investment activity. Contracts and contract renegotiations can affect the balance of risks and returns in any investment, and ultimately its profitability. At the same time, public policy issues are typically at stake—from taxation to labour relations, land rights and environmental protection. Recognising the non-commercial dimensions of natural resource contracts can shed new light on established practice: contractual provisions to promote legal stability in investor-state relations have come under scrutiny in the light of considerations, such as human rights, which were rarely factored into conventional analyses.[5]

In addition, contractual developments "on the ground" have questioned traditional approaches that frame investment relations exclusively in terms of bilateral arrangements between investors and states. The need for investors to establish workable relations with local actors has fostered the negotiation of community-investor agreements aimed at channelling benefits to the local economy.[6] Many companies have come to see these contractual arrangements as a strategy to promote support for the business, while some indigenous movements and non-governmental organisations (NGOs) have appropriated the language of partnerships to advance local claims to natural resources.[7]

[1] "Transforming Our World: The 2030 Agenda for Sustainable Development", United Nations General Assembly Resolution 70/1 of 25 September 2015, UN Doc. A/RES/70/1, e.g. para. 67.

[2] Ross (2015) and Venables (2016).

[3] See e.g. CCSI (2015), discussing the mining sector.

[4] Perrone (2017).

[5] Shemberg (2009).

[6] Szablowski (2010) and Loutit et al. (2016).

[7] Szablowski (2010).

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Taken together, these evolutions have prompted renewed public reflection on multiple aspects of natural resource contracts. Some early explorations focused on specific clauses in investor-state contracts—such as stabilisation clauses,[8] and environmental provisions.[9] Over time, the interrelatedness of contractual clauses and the need to consider the role of local actors in investment contracting led to more holistic approaches to understanding both the content of the contract, and its parties and formation process.[10] Significant developments have also occurred through the emergence of authoritative international guidance, including principles for addressing human rights issues in contracting processes,[11] learning materials on how to implement the principles,[12] and model contracts for natural resource projects.[13]

It is now clear that addressing the challenges associated with natural resource contracts involves not only ensuring that governments are in a position to get a fair deal in their negotiations with investors,[14] but also reconsidering the fundamental parameters on which contracting rests. Yet these deeper-level parameters are still underexplored. Questions remain, for example, about legal arrangements to ensure that states exercise sovereignty in the interest of their people; about how contracting can operate in multi-layered resource ownership systems, including where socially legitimate resource rights enjoy little recognition under national law; and about who should have the right to manifest their consent, at which stage and under what conditions, in the distribution of decision-making authority that underpins natural resource contracting.

This chapter explores these questions, focusing on the extractive industries and the agriculture sector.[15] It first examines, based on positive law, the foundations of natural resource contracts, focusing on the notions of sovereignty, ownership and consent. This conceptual exploration highlights that, while consent underpins the contract, the legal construction of (state) sovereignty and (resource) ownership sets parameters for the expression of consent—namely, the actors whose consent is required, the processes through which consent is formed and manifested, and the

[8]Amnesty International UK (2003, 2005), Cotula (2008), Shemberg (2009) and Johnson and Volkov (2013).

[9]Tienhaara (2011).

[10]Cotula and Tienhaara (2013), Odumosu-Ayanu (2014) and Gathii and Odumosu-Ayanu (2015).

[11]Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, "Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators", 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

[12]See e.g. the training modules developed by the United Nations Office of the High Commissioner for Human Rights (OHCHR) on the Principles for Responsible Contracts (www.ohchr.org/EN/Issues/Business/Pages/trainingmodules.aspx). See also Götzmann and Holst Jensen (2014) and Investment and Human Rights Project (2016).

[13]See e.g. the Model Mining Development Agreement released by the Mining Law Committee of the International Bar Association (http://www.mmdaproject.org/).

[14]Kaul et al. (2009) and Sauvant (2017).

[15]Forestry, hydro and genetic resources are outside the scope of this study.

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bounds within which consent can lawfully operate. The chapter then distils some practical implications for natural resource contracts, focusing on illustrative issues relating both to the substantive and procedural dimensions of the investor-state contract, and to reframing the contracting process around a wider range of resource right holders and affected actors. The findings provide pointers for piecing together the diverse and possibly conflicting commercial and non-commercial interests that are at stake in natural resource contracts.

2 The Foundations of Natural Resource Contracts

In broad terms, natural resource contracts involve the allocation of resource exploration and/or development rights to an investor, in exchange for considerations such as revenues, employment or infrastructure development. That said there is tremendous diversity in contractual practice. Contract formulations vary extensively, partly reflecting diversity in the relevant sectors (e.g. agriculture, mining and petroleum) and commodities (sugar cane, oil palm and rubber, for example). Diversity of contractual formulations also reflects differences in applicable national law and in the preferences of the contracting parties. The parties themselves vary, though in many jurisdictions the state plays an important role in natural resource contracts.

In addition, there is variation in the role the contract plays in governing natural resource investments: national law can establish a level-playing field for all investments sharing similar characteristics, and some states have moved towards standardised licences and greater reliance on national law, rather than fully negotiated contracts; but negotiated contracts are commonly used in many other countries, particularly low and middle-income ones.[16] In all cases, national and international law shape the foundations upon which any natural resource contract rests. The notions of sovereignty, ownership and consent are particularly important elements of these foundations. The legal contours of those notions affect who has the legal authority to enter into the contract, and through what process. They also affect the terms that those with the authority to conclude the contract can or must agree to.

2.1 Sovereignty

Under international law, states have permanent sovereignty over the natural resources located within their jurisdiction. This principle was enshrined in United Nations General Assembly Resolution 1803 of 1962,[17] and as an application of the

[16]For trends in the mining sector, for example, see CCSI (2015).

[17]General Assembly Resolution 1803 (XVII) of 14 December 1962.

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wider principle of territorial sovereignty, it reflects customary international law.[18] The concept of sovereignty is susceptible of multiple legal constructions, and its normative content has long formed the object of ambiguities and contestation.[19] Among other things, there has been debate about the actors with which sovereignty is vested. Inconsistent formulations, even within the same legal instrument, have created interpretive challenges. Key parts of Resolution 1803 refer to undefined "peoples and nations",[20] and international human rights instruments vest with "peoples" the arguably related but distinct right to freely dispose of natural resources.[21]

However, while human rights jurisprudence has consistently applied to peoples, including groups within states, the human right to freely dispose of natural resources,[22] international treaties explicitly frame *sovereignty* over natural resources as being the preserve of states.[23] More generally, the "Westphalian" configuration of international law has traditionally connected sovereignty to statehood.[24] One way to reconcile these complexities involves recognising that, at one level, sovereignty ultimately resides in the peoples, as explicitly affirmed in numerous national constitutions,[25] and is constituted through peoples exercising their right to self-determination; but that states provide the organisational structures through which

[18] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports (19 December 2005), para. 244.

[19] Koskenniemi (2005, 2017).

[20] General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 1. However, the fourth preambular paragraph refers to states.

[21] See e.g. common Article 1(2) of the International Covenant on Civil and Political Rights (New York, 16 December 1966) [hereinafter ICCPR], and of the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) [hereinafter ICESCR], referring to "peoples"; and Article 21 of the African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981) [hereinafter ACHPR], referring to both "peoples" (e.g. Article 21(1)) and "States Parties" (e.g. Article 21(4)). On this "peoples versus states" debate, see Duruigbo (2006), Doyle (2015) and Gilbert and Bernaz (2015).

[22] E.g. *The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v. Nigeria*, 27 October 2001, Communication No. 155/96, African Commission on Human and Peoples' Rights, paras. 55–58; *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*, 25 November 2009, Communication 276/03, African Commission on Human and Peoples' Rights, paras. 252–268; *African Commission on Human and Peoples' Rights v. The Republic of Kenya*, 26 May 2017, Judgment, African Court on Human and Peoples' Rights, paras. 191–201.

[23] E.g. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), Article 193; and United Nations Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), Article 3. It has been noted that General Assembly resolutions adopted after Resolution 1803 also tend to refer to "states" or "countries"; see Dam-de Jong (2015).

[24] See e.g. UN General Assembly Resolution 2625 (XXV) of 24 October 1970, particularly the principle of sovereign equality of states and related provisions.

[25] See e.g. 1991 Political Constitution of Colombia, Article 3; 1948 Constitution of the Italian Republic (as amended), Article 1; 2010 Constitution of Kenya, Article 1; 1987 Constitution of the Republic of the Philippines, Article II(1).

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sovereignty is held and exercised in international legal relations. The right to make laws has long been recognised as a key attribute of sovereignty,[26] and states have the right to regulate natural resources within their jurisdiction—including the modalities for allocating resource rights to commercial projects.

Contemporary international law configures state sovereignty as involving both rights and duties. Some such rights and duties reflect concerns about relations that transcend national boundaries, while others primarily regulate the relation between each state and its people. International environmental norms provide examples of the former. Article 3 of the Convention on Biological Diversity—a multilateral treaty ratified by the overwhelming majority of states—places in states both "the sovereign right to exploit their own resources pursuant to their own environmental policies", and "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[27]

While this provision refers to a "responsibility" rather than a "duty", the International Court of Justice has recognised that 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 is now part of the corpus of international law relating to the environment".[28] Another explicit statement of both rights and duties is contained in the United Nations Convention on the Law of the Sea: "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment".[29] In relation to investor-state disputes, arbitral tribunals have also elaborated on the notion that the sovereign right to regulate meets "boundaries" established by international obligations.[30]

This coexistence of both rights and duties in the contemporary framing of sovereignty is at the centre of relations between states and their people. The range of relevant relations is broad. Firstly, these relations link the state to the universality of its citizens. Centralised resource control has often enabled kleptocratic capture of natural wealth,[31] in patterns that involve not only "grand" corruption at high political

[26]Bodin (1992/1593).

[27]See also the similarly worded Principle 21 of the Stockholm Declaration on the Human Environment (Stockholm, 16 June 1972); and Principle 2 of the Rio Declaration on Environment and Development (Rio de Janeiro, 12 August 1992), which refers to both "environmental and developmental policies". The principle builds on earlier jurisprudence; see *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A., 1905 (Perm. Ct. Arb. 1938, 1941).

[28]*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, I.C.J. Reports (8 July 1996), para. 29.

[29]United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), Article 193.

[30]See e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award, 2 October 2006, ICSID Case No ARB/03/16, para. 423. For a discussion, see Guntrip (2016).

[31]Duruigbo (2006).

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levels but also more diffuse networks of rent-seeking and patronage.[32] Therefore, one relevant issue concerns the mechanisms whereby citizens can hold authorities to account for the way they manage natural resources.[33] Secondly, resource projects can test relations between states and identifiable groups within the national polity, who are holders of human rights (including the right to freely dispose of natural resources, where applicable) and are affected by project implementation. Tensions in these latter relations have found their way into growing human rights jurisprudence.[34]

In these regards, General Assembly Resolution 1803 affirms that permanent sovereignty over natural resources "must be exercised in the interest of [. . .] national development and of the well-being of the people of the State concerned".[35] Similar provisions have featured in subsequent resolutions.[36] On one level, this formulation seems coextensive with the affirmation of sovereignty. Written at the time of decolonisation, it signalled a shift away from natural resource policies that primarily responded to the interests of the colonial power: in the post-colonial configuration, national development and the wellbeing of the people in the newly independent state would be the sole criteria for the exercise of sovereignty over natural resources.[37] In addition, features of this provision seem inscribed in a logic of deference to sovereign space: the notion of wellbeing is not defined, and—by virtue of their sovereignty—states are well placed to determine their national development priorities and pursue the wellbeing-enhancing strategies that are most relevant to their contexts.

However, the plain language of a provision affirming that sovereignty must be exercised in the interest of the wellbeing of the people signifies more than simply deferring to the development priorities identified by states themselves. That language affirms both a sovereign *right* (to ultimate authority over natural resources) and a sovereign *duty* (to use that authority in the interest of the people). As decolonisation via the exercise of peoples' right to self-determination underpinned the emergence of a more truly universal system of international law, and as the notion of sovereignty was redeployed from a colonisation tool to a means for emancipation,[38] the solemn affirmation of permanent sovereignty over natural resources placed people at centre-stage, and framed sovereignty as involving *ab initio* both rights and duties that, in effect, put states at the service of their people.[39]

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[32]Bayart (1993) and Chabal and Daloz (1999).

[33]Gilbert and Bernaz (2015).

[34]Gilbert (2017) and Cotula (2017).

[35]General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 1.

[36]Dam-de Jong (2015).

[37]However, Resolution 1803 also requires states to observe foreign investment agreements; see para. 8 and Desta (2015). On the process that led to the formulation of Resolution 1803, see Schrijver (1997).

[38]On the historical relationship between sovereignty and imperialism, see Anghie (2004).

[39]See also Dam-de Jong (2015), Violi (2015) and Gilbert and Bernaz (2015).

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The "people", of course, is not a straightforward concept, whether philosophically or sociologically, given the conceptual complexities of political community and the substantial differentiation of interests, values and aspirations that may exist within that community. What constitutes the "well-being of the people" in any given situation, what policy measures can enhance it most effectively, and how to navigate the often inevitable distributive trade-offs can form the object of intense contestation.[40] As a matter of legal principle, however, the framing of Resolution 1803 means that a state that deliberately acted against its own people would violate its sovereign duties—even though, in practice, the undefined contours of those duties at first did not establish clear parameters for reviewing the legality of state conduct.

Since the adoption of General Assembly Resolution 1803, extensive developments in international law have brought greater clarity on the rights and duties associated with sovereignty over natural resources, providing more granular disaggregation of the relevant protected interests. Examples include the adoption of numerous human rights treaties and the incremental consolidation of international environmental norms. The relevance of these developments to the legal construction of sovereignty is corroborated by the international instruments that most recently reaffirmed the sovereignty of states over natural resources. For instance, Article 3 of the Convention on Biological Diversity explicitly links sovereignty to the Charter of the United Nations and to the "principles of international law".[41] The UN Charter inscribes the promotion of human rights among the very objectives of the United Nations[42]; and while there is debate about what was meant by "principles of international law", international norms requiring states to use natural resources sustainably have been deemed to qualify.[43]

By calibrating the interplay of rights and duties, developments in international human rights and environmental norms have reconfigured the parameters of sovereignty. Human rights norms illustrate this. Indeed, states cannot lawfully take measures that breach their international human rights obligations. Further, the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires its states parties to advance the progressive realisation of the rights affirmed in the Covenant "to the maximum of [their] available resources", which would include natural resources[44]; and the notion of "well-being of the people", which states are to realise in their exercising sovereignty, must arguably be interpreted in the light of internationally recognised human rights, including economic, social and cultural rights.[45] In addition, the right to (internal) self-determination that international

[40]Koskenniemi (2011).

[41]See also the identical formulations in Principle 21 of the Stockholm Declaration on the Human Environment (Stockholm, 16 June 1972); and Principle 2 of the Rio Declaration on Environment and Development (Rio de Janeiro, 12 August 1992).

[42]Charter of the United Nations (San Francisco, 26 June 1945), Articles 1(3) and 55(c).

[43]Glowka et al. (1994).

[44]ICESCR, Article 2(1). On the place of the ICESCR in international investment law, see Desierto (2015).

[45]Leader (2006).

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instruments recognise to indigenous peoples points to a notion of "shared" sovereignty the exercise of which is disaggregated into multiple decision-making sites within a single state.[46]

This brief examination of existing international law highlights that, in exercising permanent sovereignty over natural resources, states have both rights and duties. According to human rights norms, for example, states must: (1) in terms of process, ensure respect for human rights throughout public decision making relevant to the exercise of permanent sovereignty over natural resources, and (2) in substantive terms, ensure that public action upholds human rights, and take steps to maximise the contribution of natural resource development to realising human rights. This interplay of rights and duties has implications for natural resource contracts. The duties set *external* bounds, because states cannot lawfully conclude (or sustain private parties in concluding) contracts in ways that, in terms of content or process, would violate their international obligations. To comply with their duty not to harm the environment outside their jurisdiction, for example, states would have to ensure, through contractual provisions or national legislation, that investors adopt (or do not adopt) specified conducts that have a bearing on environmental impacts. The duties also establish *internal* parameters—that is, they affect "from within" the very purpose of the exercise of sovereign powers. For example, they require states to ensure that natural resource contracting promotes the progressive realisation of economic, social and cultural rights.

2.2 Ownership

While sovereignty refers to political organisation and is inherently centred on the public sphere, issues of ownership are relevant to both privately and publicly held rights to use, manage and transact valuable resources. Patterns in resource ownership have a bearing on natural resource contracting. One reason is that, beyond the great diversity of national law regimes, it is commonly recognised that a contracting party cannot transfer rights that it does not hold.[47] Put differently, who holds the resource rights, and the substantive content of those rights, will affect the identity of the contracting parties and the nature of the transaction. Unlike sovereignty, resource ownership is primarily governed by national law, and as discussed the enactment of national regulation is an attribute of sovereignty. As a result, legal arrangements can vary significantly in different jurisdictions—more than is possible to do justice to in the limited space available here. Further, while this section refers to ownership as a

[46] *Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004, paras. 30, 39–40, 56. See also Wiessner (2008) and Fox-Decent and Dahlman (2015).

[47] See the Latin maxims *nemo dat quod non habet* and *nemo plus iuris ad alium transferre potest quam ipse habet*.

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shorthand, configurations of resource rights can be complex and multi-layered, and they can encompass very diverse tenure set-ups.

In many jurisdictions, national law vests ownership of mineral and petroleum resources with the state. Private (non-state) rights to subsoil resources do exist in some countries. This includes arrangements that legally recognise customary or indigenous rights to subsoil resources, which in some cases have paved the way to joint ventures or partnership agreements between investors and indigenous groups—for example in Canada and South Africa.[48] In most countries, however, commercial mining and petroleum projects primarily involve licences issued by the state, or contracts with the state or a state-owned entity. Trends in land ownership present greater diversity, and globally there is extensive experience with land-related contracts awarded by non-state actors. In many low and middle-income countries, however, states own a substantial part or even all of the land, or they otherwise hold rights giving them substantial control over public lands that cannot formally be owned or alienated. This trend partly reflects historical legacies, including in the colonial period.[49] Legal forms vary both within and between jurisdictions, encompassing concepts such as trusteeship, *domaine public de l'état*, *domaine privé de l'état*, and *domaine foncier national*, among others. But in general terms, the state in these jurisdictions has the legal authority to allocate land on behalf of its people, and land-based investments such as agribusiness ventures tend to involve long-term leases or concessions granted by the state.

In these respects, natural resource contracting is connected to the realm of public law, presenting specificities compared to purely private, commercial transactions.[50] These public law dimensions flow not only from the role of states in managing natural resources, but also from the fact that states perform that role for the benefit of their people rather than as private owners—a circumstance that many national constitutions and laws explicitly affirm,[51] and that is meant to provide the basis for relations of accountability between the authorities and the people in whose interest those authorities are required to act.[52] In many other countries, however, part or most of the land is owned by actors located outside the sphere of government, ranging from private landowners to traditional authorities. This situation affects contractual

[48]For examples of legal recognition of customary/indigenous mineral rights, see, in South Africa, *Alexkor Ltd v. Richtersveld Community and Others*, Constitutional Court of South Africa (CCT19/03) [2003] ZACC 18; and in Canada, the Nisga'a Final Agreement (British Columbia, 27 April 1999), Articles 3.19–3.20.

[49]See Cotula (2016) for a fuller discussion.

[50]Classifications in terms of public and private law resonate to varying degrees in different jurisdictions. In some civil law countries, public-private law divides can have practical repercussions, for example for the jurisdiction of ordinary and administrative courts; but these dimensions do not operate in the same way in other countries, particularly in the common law tradition.

[51]See e.g. the 1945 Constitution of the Republic of Indonesia (as amended), Article 33(3); and Nigeria's Land Use Act 1978, Article 1. See more generally Gathii and Odumosu-Ayanu (2015).

[52]For an exploration of accountability in the context of agribusiness investments, see Cotula et al. (2017).

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arrangements: in jurisdictions where private land ownership is prevalent, land-based investments often involve private-to-private transactions; and where traditional authorities control a significant part of the land (in Ghana or Sierra Leone, for example), many commercial land leases are signed with those authorities.[53]

Even where the land is owned by non-state actors, the state sometimes plays a role in land contracts. First, eminent domain is widely considered an attribute of sovereignty, and national law typically empowers the government to compulsorily acquire land for a public purpose provided that certain conditions are met. While activating compulsory acquisition for commercial investments raises fundamental questions about the contours of "public purpose", some national laws expressly allow this,[54] and in practice states have made extensive use of compulsory acquisition to allocate rights to commercial projects. Second, where non-state actors, rather than government authorities, allocate resource rights directly to investors, separate contractual arrangements may govern relations between the investor and the state, covering issues such as tax incentives or legal stability. As a result, the connections with the sphere of public law are relevant to these situations as well. Contracts concluded by non-state actors can themselves present public law dimensions: depending on applicable law, traditional authorities may owe legally defined responsibilities towards the landowning community,[55] and their historical socio-political evolution or contemporary legal status may not be fully independent of the administrative apparatus of government.[56]

Ownership, under national law, of the resource at stake does not exhaust the full spectrum of rights and claims relevant to natural resource contacting. A few examples illustrate this point. Firstly, state ownership of subsoil resources may coexist with privately held rights to land and surface resources, which extractive industry contracts can affect. Secondly, even where the land is itself owned or controlled by the state, national law may protect rights to use and manage that land—for example, based on occupation, indigenous or customary rights, or stated-issued land leases. Depending on the context, these rights may be held by small-scale farmers, pastoralists, fisherfolk, forest dwellers or local residents, for example—including groups who qualify as indigenous peoples under international law. While in some national legal systems these use and management rights can pave the way to direct land transactions between right holders and external investors, in others local actors cannot allocate commercial contracts to investors directly,[57] or else the rights they can allocate would fall short of commercial needs in terms of tenure security, transferability or mortgageability,[58] so the state plays a key role in the transaction.

[53]E.g. Boamah (2014).

[54]See e.g. Tanzania's Village Land Act 1999, Section 4(2).

[55]E.g. Yeboah and Kakraba-Ampeh (2016), writing about Ghana.

[56]Mamdani (1996) and Ouédraogo (2006).

[57]See e.g. Knight (2010) and Tanner and Bicchieri (2014), writing on Mozambique's land and surface resource legislation.

[58]See World Bank (2013), which in relation to a commercial agriculture project in Senegal suggested an elaborate scheme of leases and subleases to circumvent such limitations.

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Thirdly, small-scale farmers, pastoralists, fisherfolk, forest dwellers or local residents may claim resource rights that are perceived to be socially legitimate at the local level but are not recognised or adequately protected by national law.

In all such situations, investment contracting can affect the claimed or legally recognised resource rights of third-party actors. This circumstance creates specific challenges compared to purely private contracts that transact resource rights between two parties alone, and is often among the root causes of conflicts associated with natural resource projects. International instruments provide guidance on how to navigate these challenges. The Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security (VGGT) are an international soft-law instrument endorsed in 2012 by the Committee on World Food Security, which is the top United Nations body in food security matters. In tying land and natural resources to food security and human rights, the VGGT call on states and investors to respect all "legitimate tenure rights", including indigenous and customary tenure rights, and including socially legitimate rights that are "not currently protected by law".[59] The VGGT provide guidance on handling resource rights issues in investment processes, including through local consultation and partnerships with local tenure right holders.[60]

International human rights instruments also have a bearing on this issue. The close connections between resource rights and human rights are widely recognised.[61] Examples of most obviously relevant human rights include the rights to property, to housing, to food (where people depend on natural resources for their food security), to enjoy one's own culture (where traditional cultures are connected to land and resources), to freely dispose of natural resources, and to self-determination, as well as indigenous peoples' rights to their ancestral territories—to name but a few internationally recognised human rights. That said, all human rights are interdependent and interrelated, so the interface between resource rights and human rights encompasses all internationally recognised human rights.[62] Regional human rights courts have consistently held that international law protects resource claims even if they are customary in nature and not recognised as ownership under national law.[63] Human rights jurisprudence has also identified the limits of eminent domain, for example by requiring, in relation to indigenous peoples, that states conduct environmental impact assessments, promote benefit sharing and seek free, prior and informed consent.[64]

[59] Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (11 May 2012), e.g. paras. 3.1, 3.2, 4.4, 5.3, 7.1 and section 12 [hereinafter VGGT]. The VGGT refer to land investments in general terms. In practice, however, they have been primarily applied to the agriculture sector, in line with the institutional mandate of the United Nations bodies that were involved in their development.

[60] VGGT, paras. 9.9, 12.6, 12.7 and 12.9.

[61] E.g. VGGT, paras. 1.1, 2.2, 3.2, 3B.1, 3B.4, 4.1, 4.3, 4.8, 4.9, 9.3, 12.4, 12.6, 12.8, 16.7, 16.9.

[62] VGGT, paras. 4.8.

[63] See for example the extensive jurisprudence of the Inter-American Court of Human Rights on the human right to collective property, discussed in Cotula (2017).

[64] E.g. *Saramaka People v. Suriname*, Judgment, Inter-American Court of Human Rights (28 November 2007), para. 134.

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The upshot is that diverse resource ownership patterns translate into different combinations of public and private elements in natural resource contracting, and considerable variation across sectors and jurisdictions. Privately held resource rights can underpin contracts led by non-state actors, but in many jurisdictions natural resource contracts involve the state or a state-owned entity. Even where the state formally owns the relevant resource under national law, however, authorities are not entirely free to transact resource rights. International instruments create spaces for other resource right holders to have their voices heard in contracting, and—depending on the jurisdiction—national law may establish comparable safeguards. So while resource ownership can enable public authorities to play an important role in contracting, this role coexists with a wider range of relevant resource right holders and affected actors, and it is subject to both internal and external parameters—because authorities must manage the resources in the interest of the people, and because they must come to terms with resource rights protected under national or international law.

2.3 Consent

While rules vary across jurisdictions, a contract is typically binding by virtue of the consent manifested by the parties. In natural resource contracts, consent is connected to issues of sovereignty and ownership. In relation to contracts between investors and states, international arbitral tribunals have clarified that, in expressing its consent to be bound by the contract, a state exercises its sovereignty.[65] In addition, the right to transact or alienate an asset is widely considered an attribute of ownership,[66] although restrictions may apply including to publicly owned assets. Conversely, the parameters of sovereignty and ownership limit the manifestation of consent. This is not only because, as discussed, a contracting party cannot transfer resource rights it does not hold. Wide-ranging legal obligations, including under international law, have further knock-on effects on consent.

It is commonly accepted in contract law that external bounds delimit the realm of the parties' consent. In transnational commercial transactions, for example, it is recognised that freedom of contract—that is, freedom to enter into a contract and determine its content—is restricted by the application of "mandatory rules, whether of national, international or supranational origins, which are applicable in accordance with the relevant rules of private international law".[67] Over a long-term historical trajectory, national laws in diverse areas such as rentals, labour and

[65]*Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, 19 January 1977, 53 ILR 389, paras. 66–68.

[66]See e.g. Penner (1997).

[67]UNIDROIT Principles of International Commercial Contracts 2016, Article 1.4.

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consumer protection have reconfigured the classical notion of freedom of contract,[68] and often extensive legal requirements shape what the contracting parties can lawfully agree. Comparably, in natural resource contracts the sovereign duties of states affect the range of commitments that states can lawfully consent to, and the safeguards that states must establish for the manifestation of consent in contracts between private parties.

Human rights obligations illustrate this point. Under international law, states have a duty to respect human rights—that is, to refrain from infringing on those rights; as well as a duty to protect human rights from interference by third parties, including business entities in the context of natural resource investments.[69] Failure to uphold these duties in natural resource investments has been found to violate human rights treaties.[70] It is worth recalling that businesses, for their part, have the responsibility to respect human rights—that is, “they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.[71] Therefore, expressions of consent for a natural resource contract between a state and a business entity would engage, at the same time, the duties of the state to respect and protect human rights, and the responsibility of businesses to respect those rights. In this context, a state could not lawfully consent to contractual provisions that are inconsistent with its duty to respect and protect human rights. In addition, states must provide the regulatory framework to ensure that any contracts between non-state actors respect human rights.

Besides setting external bounds for the manifestation of consent, the duty of states to exercise sovereignty and manage publicly owned resources in the interest of their people also establishes internal parameters that qualify consent from within. This configuration outlines even more far-reaching qualifications to the classic principle of freedom of contract. In private transactions, freedom of contract is mainly qualified through the external boundaries established by mandatory rules, so in principle the parties can autonomously determine their contracting objectives as long as legal requirements are complied with. In contracts involving the exercise of sovereignty, on the other hand, the manifestation of consent is inherently tied to the pursuit of public policy goals advancing the interest of the people that public authorities represent. For example, the duty of ICESCR states parties to progressively realise

[68]For a classic study, see Atiyah (1979).

[69]Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principle 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, 10 August 2017, E/C.12/GC/24.

[70]E.g. *The Social and Economic Rights Action Centre and The Centre for Economic and Social Rights v. Nigeria*, 27 October 2001, Communication No. 155/96, African Commission on Human and Peoples’ Rights, paras. 55–58.

[71]Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principle 11. If successful, the ongoing negotiation of a proposed treaty on transnational corporations and other business enterprises with respect to human rights could entail significant normative shifts in this area.

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economic, social and cultural rights to the maximum of their available resources, discussed above, requires those states to take steps to maximise the contribution that natural resource development provides to the realisation of human rights.

This duty of states to act in the interest of the people also has implications for the actors and processes involved in the formation and expression of consent. In investor-state contracts, national law may establish channels for parliament and citizens to influence public decisions underpinning the state's consent. Process-related parameters relevant to investor-state contracts are also established by international human rights law, including via political rights such as the right to vote and freedom of expression and association, and the rights of consultation and participation pertaining to indigenous peoples. These parameters disqualify possible manipulations of the framing delineated in General Assembly Resolution 1803, because public authorities cannot claim to advance the "well-being of the people" on the basis of paternalistic visions that take little account of the concerns and aspirations of those whose interests they are meant to pursue.

Besides framing the formation and manifestation of a state's consent in investor-state contracts, the parameters of sovereignty and ownership—including the links that connect resource rights to human rights—provide the normative basis for multi-actor processes whereby the contract rests, at least in part, on the consent of relevant resource right holders. In this context, the notion of consent has been deployed to advance interests not associated with state sovereignty that, in legal terms, may—or may not—involve formal resource ownership.

Free, prior and informed consent (FPIC) is a case in point. It features prominently in international instruments concerning indigenous peoples.[72] While the specifics vary depending on the instrument and the issue, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls on states to recognise the rights to the land, territories and resources that indigenous peoples own, occupy, use or possess[73]; and to consult indigenous peoples "in good faith" and "in order to obtain their free, prior and informed consent" before adopting measures or approving projects that may affect those peoples or their lands, territories or resources.[74] The International Labour Organisation's Convention No. 169 contains broadly comparable provisions.[75] Further, the UNDRIP provides more stringent parameters of consent for situations that involve relocating indigenous peoples.[76]

[72]Particularly the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, G.A. Res. 61/295, Articles 19 and 32(2) [hereinafter UNDRIP]; and Convention No. 169 of the International Labour Organisation Concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989), Article 6 [hereinafter ILO Convention 169].

[73]UNDRIP, Article 26.

[74]UNDRIP, Articles 19 and (using slightly different wording) 32(2).

[75]E.g. Articles 6 and 13–19 of ILO Convention 169. There are some significant differences, however. For comparative analysis of the UNDRIP and ILO Convention 169, see Rombouts (2017).

[76]Article 10 of the UNDRIP provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

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The notion of FPIC has also been developed in international human rights jurisprudence. In cases concerning commercial or development projects in the ancestral territories of indigenous or tribal peoples, the Inter-American Court of Human Rights has cited the UNDRIP and/or Convention 169 to configure FPIC as one element of the human right to collective property.[77] Although some judgments have referred more generally to the "right to consultation" rather than specifically to FPIC,[78] the Inter-American Court has clarified that consultation must be in good faith and "with the aim of reaching an agreement or obtaining consent".[79] Further, the Inter-American Court of Human Rights has deemed this duty to consult indigenous peoples to be a general principle of international law, applicable irrespective of any treaty obligations.[80]

These international norms have implications for natural resource contracts, because FPIC can affect the contracting process, and because FPIC exercises may themselves lead to partnership agreements.[81] It must be noted that FPIC has been at the centre of intense debates, partly owing to concerns that its application might undermine the ability of states to award resource concessions they deem necessary to promote national development. Different positions in these debates are reflected in diverse interpretations of what FPIC means in practice, ranging from a full-fledged "right to veto" (often advanced by indigenous movements and NGOs) to bureaucratic or box-ticking consultation exercises (often in the perspectives of governments and businesses, respectively).[82] In terms of positive law, jurists have noted that the duty to consult in good faith in order to obtain consent establishes "more than a mere right to be informed and heard but less than the right of veto"[83]; though as discussed the UNDRIP sets more stringent FPIC requirements for cases involving relocation. Rather than undermining the exercise of sovereign powers, FPIC seems consistent with a pluralist construction of sovereignty that rests on both rights and duties and recognises spaces for decentralised exercise of public authority.[84]

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[77] *Saramaka People v. Suriname*, Judgment, Inter-American Court of Human Rights (28 November 2007) para. 134. The African Commission on Human and Peoples' Rights followed this jurisprudential approach in *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*, supra, paras. 226–228.

[78] For example, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-American Court of Human Rights (27 June 2012), e.g. paras. 160, 163–167.

[79] *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-American Court of Human Rights (27 June 2012), para. 185.

[80] *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, Inter-American Court of Human Rights (27 June 2012), para. 164.

[81] Anaya (2013).

[82] Anaya and Puig (2016).

[83] Anaya and Puig (2016), p. 2. See also Rombouts (2017).

[84] See also Doyle (2015) and Fox-Decent and Dahlman (2015).

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3 From Concepts to Practice: Illustrative Issues

3.1 Investor-State Contracts

The configuration of the legal categories that underpin natural resource contracts—sovereignty, ownership and consent—has important practical implications. Some relate to the procedural and substantive dimensions of investor-state contracts. Others concern reframing the contracting process around a wider range of actors, including holders of legitimate tenure rights and people affected by project implementation. This section examines investor-state contracts, while the subsequent section explores community-investor and multi-actor contracts. Due to space constraints, the aim is to illustrate the issues rather than to discuss them comprehensively or in depth. Three examples illustrate implications for investor-state contracting processes. They concern issues of transparency, parliamentary approval and local consultation. The implications affect contractual practice, the wider governance frameworks it fits in, or the interpretation of general norms as they apply to contracting. Examples to illustrate content-related implications in investor-state contracts include stabilisation clauses and third-party rights.

Starting with transparency issues, there have long been concerns that opacity in contracting and non-disclosure of contracts create the breeding ground for corruption and deals that do not maximise the public interest.[85] These concerns have fuelled calls for transparency of contracts and contracting,[86] where transparency is considered a pre-condition for citizens to hold authorities to account for the way they manage collective resources. Human right law affirms this connection between transparency and political rights, with international jurisprudence having linked public access to investor-state contracts to freedom of thought and expression.[87] While empirical questions remain as to whether and how transparency translates into accountability, and while opinion is often divided on how to reconcile multiple commercial and non-commercial interests, there is substantial support for the proposition that, compared to purely commercial transactions, investor-state contracts should entail a different balance between transparency and confidentiality.

This support is reflected, for example, in authoritative international guidance providing for transparency and disclosure,[88] national laws mandating contract

[85] Ayine et al. (2005) and Rosenblum and Maples (2009).

[86] Rosenblum and Maples (2009), stating that "citizens have a right a right to know" how the government manages publicly owned resources (p. 15).

[87] *Claude Reyes and Others v. Chile*, Judgment, Inter-American Court of Human Rights, 19 September 2006.

[88] E.g. Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3, Principle 10. See also EITI (2016), Section 2.4(a).

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disclosure,[89] and growing initiatives to facilitate public access to contracts.[90] A significant number of extractive industry contracts are now publicly available, though many others are not and progress has been more limited in other sectors including agribusiness.[91] The public law dimensions involved in natural resource contracting, and the fact that authorities must act in the interest of their people, arguably strengthen the case for transparency and accountability,[92] and for deepening the (still tentative) transition towards normalising disclosure.

The second process-related example concerns the place of parliamentary approval in natural resource contracting. To ensure that states exercise their sovereignty and (where relevant) resource ownership in the interest of the people, some national constitutions establish safeguards for the expression of consent in investor-state contracts. In some jurisdictions, the constitution requires parliamentary approval as a condition for the state to perfect its consent.[93] There are questions about the difference these mechanisms can make in practice,[94] and the relevance of these requirements depends on the overall constitutional set up—particularly the nature of the relationship between the executive and the legislature. Where requirements do apply, complex legal issues can arise if the government concludes contracts without parliamentary approval. With regard to *treaties*, under international law a state cannot "invoke the fact that its consent to be bound by a treaty was expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance".[95]

An analogy may be drawn with *contracts*, and an argument may be made that constitutional requirements for parliamentary approval are rules "of fundamental importance" that an investor acting with due diligence should be aware of. However, some investor-state arbitral tribunals have deemed contracts to have effect despite the absence of the required parliamentary approval, holding that states were estopped from challenging in the arbitration the validity of contracts they had until then treated as valid.[96] Such interpretations could undermine the effectiveness of constitutional arrangements aimed at aligning a state's manifestation of consent with pursuit of public policy goals that connect natural resource development to enhancing the "well-being of the people" (in the language of Resolution 1803). Giving effect to

[89]E.g. Liberia Extractive Industries Transparency Initiative Act 2009, Article 5.

[90]ResourceContracts.org and OpenLandContracts.org.

[91]Webb et al. (2017).

[92]Miranda (2007).

[93]See e.g. Article 181(5) of the 1992 Constitution of the Republic of Ghana, and Article 71 of the 2010 Constitution of the Republic of Kenya.

[94]Depending on the context, for example, the government may structurally enjoy the support of the parliamentary majority, and members of parliament may lack the time and expertise needed to perform this role effectively.

[95]Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), Article 46(1).

[96]See e.g. *Bankswitch Ghana Ltd. (Ghana) v. The Republic of Ghana*, Award Save as to Costs, 11 April 2014, UNCITRAL, particularly paras. 11.71–11.97.

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the conceptual configuration of sovereignty, ownership and consent, outlined above, may require a different balance between investment protection and procedural propriety—expecting investors to identify any parliamentary approval requirements as part of due diligence processes and to bear the consequences of fundamental procedural defects.

The third process-related example concerns local consultation or FPIC requirements. These have implications for the structuring of contracting processes, for instance with regard to the sequencing of key decisions and contractual instruments. They also raise questions about the validity of contracts concluded in violation of applicable consultation or FPIC requirements, and about the legal value of representations government officials make during the negotiations. This latter point can illustrate the issues. Government representations could involve assurances to the investor that the land is free of encumbrances, or promises that the necessary permits will be issued. Interpreting fair and equitable treatment provisions contained in many international investment treaties, investor-state arbitral tribunals have considered that government representations can create "legitimate expectations" on the part of the investor, and that subsequent state conduct frustrating those expectations can violate the investment treaty.[97]

One question is whether government representations made before consulting affected resource right holders, and thus potentially in violation of applicable consultation or FPIC requirements, can create legitimate expectations. As discussed, international human rights instruments shape the parameters of state sovereignty and resource ownership, and authorities cannot lawfully take measures that violate human rights. Arbitral tribunals have held that the protection of human rights provides relevant context to frame the investor's expectations.[98] There is therefore a compelling argument that investors' expectations should not be considered legitimate if, in making the representations, authorities breached their duty to respect and protect human rights.[99] Businesses have a responsibility to respect human rights, including by conducting human rights due diligence,[100] and this arguably requires investors to ensure that their expectations are premised on respect for human rights.

With regard to the substantive content of contractual provisions, one issue is that the investor-state contract involves a bilateral relationship between two parties but the state has duties vis-à-vis third-party holders of (human, resource) rights. These rights/duties limit what states can lawfully agree to when concluding the contract.[101] This is partly reflected in the Guiding Principles on Business and Human Rights:

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[97] *International Thunderbird Gaming Corp. v. The United Mexican States*, Award, 26 January 2006, UNCITRAL, paragraph 147.

[98] *Urbaser S.A. and Corsorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, Award, 8 December 2016, ICSID Case No. ARB/07/26, paras. 622–624.

[99] Cotula (2016) and Cordes et al. (2017).

[100] Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 MarchPrinciples 11, 13 and 15.

[101] Leader (2006).

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Principle 9 affirms that "states should maintain adequate domestic policy space to meet their human rights obligations" when negotiating investor-state contracts.[102] This principle articulates, from a human rights perspective, the external parameters of consent, by guiding states not to agree to provisions that would unduly restrict their ability to advance human rights. In line with their non-binding nature, the Guiding Principles frame this provision in non-mandatory terms. As discussed, however, binding human rights law has reconfigured the legal contours of state sovereignty and resource ownership, with implications for the bounds of consent. An annex to the Guiding Principles contains Principles for Responsible Contracts that provide more detailed guidance on specific contractual issues.[103]

Stabilisation clauses illustrate this point. Broadly speaking, these clauses aim to shelter investments from adverse changes in law that could undermine the investors' rights or returns. There is great diversity in formulations. Some clauses purport to "freeze" applicable law to the norms in force at a specified time, excluding the application of subsequent legislation. On the other hand, so-called economic equilibrium clauses link adverse changes in law to requirements that the government restore the contract's economic equilibrium—for example, and depending on the wording, via contract renegotiation or possibly payment of compensation. Hybrid clauses combine freezing and economic equilibrium elements.[104]

Over the years, activists and jurists have raised concerns that a mechanical application of stabilisation clauses could constrain the implementation of deserving social, environmental or economic measures, including steps to realise human rights.[105] More stringent rules on community consultation, labour relations, health and safety, and environmental protection—to name but a few potentially relevant examples—could adversely affect investments and trigger the application of stabilisation clauses. The concern is that states may have to exempt projects from the new measures; or else that, if states must bear the costs those measures cause, they may be discouraged from acting in the first place, particularly where public finances are under strain.[106] As a result, people affected by the social and environmental impacts of natural resource investments could remain subject to obsolete ("stabilised") rules over often long contract durations.

The parameters of sovereignty, ownership and consent have a bearing on these issues. As the sovereign right of states to enter into contracts is qualified by their duty

[102]Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 March 2011, Principles 11, 13 and 15.

[103]Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3.

[104]Shemberg (2009) and Cameron (2010). More generally, see also Wälde and N'Di (1996) and Johnson and Volkov (2013). On the different issues raised by the stabilisation clauses found (arguably more rarely) in investment treaties, see Gazzini (2017).

[105]See e.g. Amnesty International UK (2003, 2005). On the environmental dimensions, see Tienhaara (2006), Cotula (2008) and Viñuales (2012).

[106]Amnesty International UK (2005).

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to respect and protect human rights, any stabilisation commitments would need to be drafted (or interpreted, if drafting was not explicit) as only covering issues that the state can lawfully transact. Measures that states adopt to comply with their human rights obligations would lie outside the scope of any stabilisation clauses.[107] The Principles for Responsible Contracts provide broadly consistent guidance with regard to the drafting of stabilisation clauses. According to Principle 4:

> Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's *bona fide* efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.[108]

The commentary to this principle clarifies that areas such as "labour, health, safety, the environment, or other legal measures that serve to meet the State's human rights obligations" should be excluded from the scope of freezing clauses, and that economic equilibrium clauses should not contemplate financial repercussions for human rights measures.[109] To be clear, this guidance does not suggest that stabilisation clauses formulated within such bounds would be desirable or well advised.[110] Investors and states may have different interests, with investors typically favouring stability, and states potentially being wary of arrangements that could affect their ability to regulate over time. However, the point made here is about legally inscribed limitations rather than judgments of policy opportunity: stabilisation clauses that purport to limit the right and duty of a state to comply with its human rights obligations would be at odds with international law; and a state's sovereign right lawfully to conclude contracts would not extend to clauses that conflict with international obligations. Depending on the jurisdiction, additional doubts may arise about the legality of stabilisation clauses—particularly those of the freezing kind—under constitutional law.

Besides delimiting the external bounds of what a state can lawfully agree to, the interplay of sovereignty, ownership and consent also influences the internal parameters of investment contracting. These parameters proceed from the duty of states to ensure that natural resource development benefits their people, which in turn stems from Resolution 1803 and the ICESCR, and—depending on the jurisdiction—from any national legislation requiring authorities to manage resources in people's interest. Natural resource contracts often involve complex policy choices, and wide political discretion, on how best to advance the public interest in diverse situations. For example, some states may favour contractual clauses that promote business,

[107] Leader (2006) and Cotula (2008).

[108] Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3, Principle 4.

[109] Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations – Guidance for Negotiators, 25 May 2011, UN Doc. A/HRC/17/31/Add.3. Principles for Responsible Contracts, Key implications of Principle 4.

[110] See the wording "if used" in Principle 4.

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employment and/or training opportunities for local actors, or that require investors to finance public infrastructure. At scale and depending on the circumstances, however, these provisions might affect the fiscal take. Other states may prefer to maximise public revenues instead, and use these revenues to sustain public services or promote inclusive development without delegating these functions to private sector operators. States can legitimately make different policy choices on such issues and trade-offs.

However, state conduct deliberately awarding commercial resource rights in the absence of any reasonably commensurate benefits being generated and earmarked to advancing human rights could come under scrutiny against the obligation of ICESCR states parties to progressively realise economic, social and cultural rights to the maximum of their available resources. There are also questions about legal arrangements that could facilitate more active roles for the people in whose interest authorities conclude the contract: insofar as any policy choices made involve contractual provisions that benefit third parties, one issue is whether those third parties can play any role in monitoring and enforcement. Examples of relevant investor-state contract provisions include requirements for the investor to finance local development funds, or to apply specified standards of compensation for land acquisition. In these cases, third parties such as relevant resource right holders and people affected by project implementation may benefit from contract compliance, yet they are often outside of the investor-state negotiation and contract.

It is accepted that contracts can create rights for third parties, depending on their circumstances and formulation.[111] Some scholars have argued for harnessing the "third party beneficiary principle", as it applies in some jurisdictions, to enable third parties to access legal remedies for investor-state contract provisions that create rights for them.[112] A pre-condition for this arrangement to work is that third parties know about the relevant clauses, which compounds the case for transparency. Applicable contract law has a bearing on third-party rights, and analytical work remains to be done to assess how third-party rights might work in diverse national legal frameworks. In more general terms, however, these exploratory reflections illustrate how (re)configuring the conceptual foundations based on positive law has wide-ranging practical implications for investor-state contracts and their governance frameworks—strengthening the case for transparency and for taking parliamentary approval requirements seriously; installing FPIC in contracting processes; restricting the bounds of "legitimate expectations" and any stabilisation clauses; and developing arrangements to ensure natural resource development advances economic, social and cultural rights.

[111] In relation to transnational commercial transactions, for example, Articles 5.2.1–5.2.6 of the UNIDROIT Principles of International Commercial Contracts cover third-party arrangements.

[112] Gathii (2014). See also OHCHR (2015).

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3.2 Community-Investor and Multi-Actor Contracts

The conceptual discussion highlighted that, under international law, the state represents its people and exercises sovereignty over natural resources. While in many jurisdictions land is privately owned, national laws tend to vest ownership of subsoil resources with the state for the benefit of the people. In many jurisdictions, the state also owns or control part or all of the land. National law typically empowers authorities to award commercial concessions. As a result, the state often plays an important role in natural resource contracting, though the extent and nature of this role vary across countries and sectors. This account emphasises the bilateral relationship between the investor and the state, with the investor being deemed to advance commercial interests (while upholding their responsibility to respect human rights), and the state to bear the public interest of its people (including those most directly affected by the project, and citizens at large).

More pluralist accounts of political organisation point to the complexities affecting the contours and operation of the state in real-life socio-political settings. Political economy factors can create misalignments between state action and the aspirations of the diverse constituencies the state is meant to represent. The distributive dimensions of natural resource investments compound these challenges: public revenues may accrue to the national level and their use may advance the priorities of those in power; while a disproportionate share of adverse impacts such as land acquisition and environmental degradation are felt at the local level. In effect, significant costs are borne by actors excluded from the investor-state contract.[113] These actors may have limited ability to influence the state's negotiating position. Partly reflecting these structural issues, many resource projects have triggered disputes between states and affected people. Human rights jurisprudence provides several examples of litigation originating from the contested award of natural resource concessions.[114] Reconfiguring the procedural and substantive parameters of the investor-state contract can go some way towards addressing these problems; but the challenge does question the bilateral (investor-state) framing of natural resource contracts.

Ultimately, investors need local support if their ventures are to thrive in the longer term. Coupled with local actors' advocacy for shifts in project approaches, this need has underpinned growing experience with community-investor contracts—a practice now documented in many countries from North and South America, Africa, Central Asia, Southeast Asia and Oceania.[115] The terminology used to describe these agreements varies (e.g. community development agreements, social responsibility agreements, partnership agreements), as does their content. Some scholars have discerned an ongoing transition from a narrow emphasis on social infrastructure (schools, health facilities) to more comprehensive agreements also encompassing employment and

[113] Gathii (2014).

[114] For a discussion, see Cotula (2017).

[115] O'Faircheallaigh (2013), writing on the mining sector.

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training, revenue sharing or joint venture arrangements, and/or continued community access to resources insofar not inconsistent with commercial activities.[116] However, research suggests that any such transition is not linear, and highlights the limitations of contractual practices often characterised by weak and unspecific formulations.[117] Further, empirical studies have documented shortcomings in the operationalisation of seemingly promising partnership models, for example pointing to inadequate consultation, limited effectiveness of board representation and/or lack of dividend payments in agriculture-related community-investor joint ventures.[118]

A relation exists between community-investor agreements and the configuration of sovereignty, ownership and consent. By aiming to ensure that people affected by resource projects participate in decision making and in the socio-economic benefits those projects generate, community-investor agreements offer one vehicle for states to exercise sovereignty over natural resources in the interest of the people, as required by General Assembly Resolution 1803, and ensure compliance with human rights norms. Alternative or complementary models are available, such as institutionalised vehicles for political participation, and legislation that uniformly regulates the distribution of socio-economic benefits created by all relevant investments.

In addition, community-investor agreements respond to resource ownership patterns. Recognising all socially legitimate tenure rights, as called for by the VGGT, provides local actors with a direct stake in contracting processes—because resource transactions should inevitably engage the actors whose resources are transacted. Where local groups own lands or resources, community-investor agreements can provide the main source of the investor's tenure rights, for instance in the form of land lease or joint venture arrangements.[119] For state-owned resources, local resource use rights or claims can provide the basis for the negotiation of community-investor agreements that, while not conferring commercial resource rights to investors directly, regulate other aspects of the relationship.

Multiple legal instruments sustain the relevance of community-investor agreements even if local actors lack formal resource ownership rights. National law may require investors to negotiate community-investor agreements as a condition for the state to award commercial concessions. International soft-law instruments such as the VGGT call for partnerships with affected resource right holders.[120] And regional human rights institutions have emphasised benefit sharing when interpreting the human right to collective property in connection with customary rights to natural resources.[121] While such national and international instruments

[116] O'Faircheallaigh (2013).

[117] Loutit et al. (2016).

[118] E.g. Majid Cooke et al. (2011), Lahiff et al. (2012) and Djiré et al. (2013).

[119] E.g. Boamah (2014), writing on Ghana's agricultural sector.

[120] E.g. VGGT paras. 12.6, 12.9, 12.10, 12.14.

[121] E.g. *Saramaka People v. Suriname*, Judgment, Inter-American Court of Human Rights (28 November 2007), para. 134. See also Morgera (2016).

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decouple community-investor agreements from outright resource ownership, evidence suggests that ownership can give local actors real leverage. In Australia and Canada, the more effective community-investor partnerships often seem tied to developments in native title (Australia) and land claims (Canada).[122]

The links with the notion of consent are also apparent. By providing a channel for local actors to express their consent to the project, the negotiation of a community-investor agreement could constitute an element of FPIC processes. A landmark report by the then UN Special Rapporteur on the Rights of Indigenous Peoples identified natural resource development by indigenous peoples themselves as the first-best option; but should this option not be available owing to the significant capital and know-how requirements, the report called for FPIC-based partnership agreements between businesses and indigenous peoples.[123] However, a community-investor agreement does not, in itself, signal FPIC: depending on the wording, local actors may be consenting to receiving certain benefits from a project they oppose but cannot do anything about,[124] and some community-investor agreements were concluded after the project was initiated (against requirements for consent to be *prior*).[125]

Community-investor agreements raise significant practical challenges. Three deserve particular attention. The first concerns the notion of "community". Contractual practice often uses this term (e.g. "community development agreement") and some national laws define it.[126] However, the notion raises difficult legal and philosophical questions, including about how to piece together multiple collective and individual interests. Further, groups vary considerably: "communities" can refer to an indigenous people, a number of indigenous peoples or groups within an indigenous people; or it can describe local residents united by geographic proximity and the impact of an investment who do not necessarily see the group as a stable source of social identity. This diversity has legal implications, reflected for example in the specific rights of indigenous peoples under international law.

In addition, social realities do not always fit legal categories: collective identities may present fluid boundaries and evolve over time, and communities may host divided opinions and social differentiation including based on wealth, gender, age or ethnicity. Questions arise about the representativeness and accountability of local leaders, and mechanisms for selecting community representatives vary greatly—from mobilising traditional leaders to establishing new bodies such as

[122]O'Faircheallaigh (2010).

[123]Anaya (2013).

[124]Odumosu-Ayanu (2015). However, some agreements explicitly affirm that the community supports the project (O'Faircheallaigh 2010).

[125]Gathii and Odumosu-Ayanu (2015).

[126]Examples include, in Mozambique, the Land Act 1997, Article 1(1) (defining "local community"); and in the Philippines, the Indigenous Peoples' Rights Act 1997, Article 3(h) (defining "indigenous cultural communities").

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elected committees, associations or cooperatives.[127] Potential divides have also been identified between the communities negotiating partnership agreements and the lawyers advising them.[128] Meaningful community-investor agreements rest on addressing such difficult issues about "community" and its representation. This may require significant investment in time and resources ahead of actual community consultations or negotiations. These dimensions concern the realm of practice more than law, but—in interrogating the nature of the actors expressing consent, and the process for doing so—they do raise issues about the legal frameworks governing social organisation and contracting processes.

The second set of challenges concerns the reality of developing community-investor agreements in contexts that typically involve significant imbalances in negotiating power.[129] These are likely to depend on factors affecting communities (such as social cohesion, strength of local organisations, quality of local leadership, technical and financial resources) and external forces (e.g. investor corporate policies, time pressures), but local actors are often at a disadvantage.[130] As a result, community members may experience frustrations, divisions and stress, and they may ultimately not obtain the terms they seek.[131] As has been pointed out for relations among states, the voluntarism inherent in the notion of consent belies the restricted freedom of action that can exist "when choices are between lesser evils", leading critical commentators to draw a distinction between tactical consent and genuine approval.[132] Again, these considerations concern practical rather than doctrinal issues, but they can entail legal reverberations. Communities may be exposed not only to unfavourable and even exploitative arrangements, but also to legal risks and possibly financial liabilities flowing from their being a party to the contract—particularly in community-investor contracts that encompass commercial dimensions, such as land leases or joint venture agreements.

These issues would require careful thinking through, especially where imbalances in negotiating power or in available legal and technical support place the community at a disadvantage. It is worth noting that, in relation to some other types of contractual negotiations involving significant power asymmetries (e.g. labour or consumer contracts), juridical configurations have historically tended to move away from an exclusive reliance on consent as the foundation of the contract, with regulation setting mandatory parameters that favour the weaker contracting party. Recent "modern slavery" legislation has also restricted the relevance of consent when determining if a person is held in slavery or required to perform compulsory labour.[133] These trends raise questions about the role that national and international

[127] O'Faircheallaigh (2013).

[128] Desai (2013).

[129] O'Faircheallaigh (2013).

[130] O'Faircheallaigh (2013) and Szoke-Burke and Cordes (forthcoming).

[131] Szoke-Burke and Cordes (forthcoming).

[132] Salomon (2008), p. 42.

[133] See for example the United Kingdom's Modern Slavery Act 2015, Sections 1(5) and 2(2).

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law can play in establishing the conditions for meaningful consent and possibly minimum substantive standards for any community-investor agreements.

The third set of issues concerns the place of the community-investor agreement in natural resource contracting, and particularly its relation to the investor-state contract. These dimensions can affect the relevance and legal bite of any community-investor agreement. In some cases, the community-investor and investor-state contracts appear to be entirely separate agreements, without effective mechanisms linking the two—an arrangement that can create problems during implementation. At the other end of the spectrum lie tripartite contracts, or tripartite transactions involving coordinated bundles of bilateral contracts, that bring together the government, the investor and communities within a single, multi-party contractual framework.[134] Yet other approaches involve separate community-investor and investor-state agreements, but link these agreements in procedural and/or substantive terms.

A few examples can illustrate the reverberations of these issues for the effectiveness of contracts in addressing community-investor relations. The interface between community-investor and investor-state contracts can affect sanctions for investor non-compliance with the community-investor agreement—including whether the state can terminate the investor-state contract for material breaches of the community-investor agreement. Process-related questions concern the sequencing between the two contracts: concluding the investor-state agreement first could limit options for the community-investor negotiation and undermine its usefulness for FPIC, which requires *prior* consent; but it could also provide one avenue for setting minimum parameters (e.g. on the terms of an outgrower scheme, were relevant to an agribusiness venture) that might help communities in their negotiation with the investor. Addressing these questions may require step-by-step contracting—whereby an initial investor-state contract outlines key specifics but keeps options open to enable FPIC and impact assessments; and a fuller investor-state contract is informed by the outcomes of those local processes including any community-investor agreements.

For all three sets of challenges, contractual and regulatory practice is yet to settle, and legal scholarship is still in its infancy. The effectiveness of community-investor agreements vis-à-vis other forms of regulation, including taxation-based benefit-sharing arrangements governed by national legislation, is yet to be rigorously assessed. Conceptually, however, trends towards multi-actor contracting align with a configuration of sovereignty, ownership and consent that recognises the interplay of both rights and duties in the construction of these legal categories.

[134] Odumosu-Ayanu (2014) and Gathii and Odumosu-Ayanu (2015).

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4 Conclusion

This study has explored how legal concepts can help to reframe contractual practice. The investigation highlighted the role that, in a "Westphalian" system, states tend to play as the organisational vehicles for holding and exercising sovereignty and, in many jurisdictions, resource ownership. At the same time, international legal instruments place people at the centre of concerns about sovereignty. The obligations that these instruments create—including via strong connections between human and resource rights—have redesigned the contours of state sovereignty. Depending on the jurisdiction, national law may vest important resource rights with non-state actors and set up arrangements to ensure that states manage publicly owned resources in the interest of the people. This overall configuration establishes both internal and external parameters for lawful state conduct, including the formation and manifestation of state consent in natural resource contracting. It also underpins more pluralist approaches whereby contracting rests, at least in part, on the consent of a wider range of resource right holders and affected actors.

Focusing on illustrative issues, the study then distilled the practical implications of this analysis. It found these implications to be wide-ranging—from the substantive content of contracts to their parties and formation process. Some such implications affect the substantive or procedural dimensions of investor-state contracts, or the framing and interpretation of the norms applicable to these contracts; while others set the scene for multi-actor contracting that involves not only investors and states but also actors affected by the investment. Each of these arenas has already experienced developments in contractual practice, including shifts towards greater contract transparency and growing experience with community-investor agreements; but the conceptual configuration of sovereignty, ownership and consent provides a more systemic foundation for addressing interrelated issues that have often been handled in isolation.

These findings underpin forward-looking agendas for both research and action. The still fluid nature of some areas of contractual practice, particularly in relation to multi-actor contracting, creates opportunities for action to develop new approaches. At the same time, difficult practical and conceptual questions remain—for example, on the conditions that need to be in place, where negotiating power is very imbalanced, for consent to meaningfully provide the normative foundation of the contract. Therefore, continuing analysis can helpfully inform the action, which could in turn generate lessons for both contractual practice and research agendas. In taking forward this work, the location of natural resource contracting at the interface between national and international law; the combined operation of diverse sectoral and cross-sectoral (e.g. human rights, environmental) norms; and the complex relations between the normative and the experienced—all point to the value of interdisciplinary approaches that cut across traditional boundaries between research and practice, and between academic disciplines.

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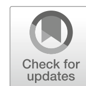
Fracking, Sovereignty over Natural Resources and International Investment Law



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1 Introduction

"Fracking" is one of the methods used to extract unconventional natural gas and oil from the underground. Unconventional natural gas includes shale gas, tight gas sandstone, coal bed methane and methane hydrates. Until recently, such deposits of gas were difficult and costly to extract. However, due to several circumstances the exploration and exploitation of such gas deposits has become economically viable, to the point where several states may turn from net gas importers to net gas exporters. One of these circumstances was the rise in oil and gas prices in the early 2000s and improvements to the extraction technique known as fracking.[1]

The "shale gas boom" has led to a significant increase in shale gas extraction projects, and energy companies have invested significantly in several jurisdictions in order to explore and extract deposits of natural gas that were previously considered unattractive. At the same time, the fracking technique, has been associated with environmental degradation in areas in which it is applied. It has been blamed for the pollution of ground water and the disruption of the natural habitat of flora and fauna. In response to these concerns, in at least one instance, a government that may have previously welcomed investment in the sector has withdrawn a permit that had been initially granted.[2]

Since, like other types of gas, shale gas is a natural resource that is deposited within the territory of a state, its exploitation is subject to the principle of permanent sovereignty over natural resources as articulated by the United Nations General Assembly in 1962. That principle foresees that states are free to determine whether, and if so, how, they wish to explore and exploit the natural resources located within their territory. Where foreign investment is attracted in order to facilitate the extraction of such natural resources, foreign commercial interests begin to interact with domestic policy considerations of a public health or environmental protection nature.

This contribution examines whether the domestic regulation of shale gas exploration and exploitation by means of fracking simply presents another example of the tensions that, by definition, exist between norms of international economic law guaranteeing protection of the commercial interests of foreign investors and such domestic norms, or whether the issue of fracking is of an altogether different nature. In doing so, this contribution first examines the shale gas boom and the "fracking" technique lying at its basis (Sect. 2). Subsequently, in the same section it explores the ways in which several jurisdictions have regulated shale gas extraction techniques at the national (and more local) level. In the next section, this contribution turns to an analysis of the principle of the permanent sovereignty over natural resources and the role it plays in respect of the extraction of unconventional natural gas (Sect. 3). By

[1]For further information on gas production, imports, exports, demands and prices see International Energy Agency (2017).

[2]See Lone Pine Resources Inc. v. The Government of Canada, ICSID Case No. UNCT/15/2 (further discussed in Sect. 4).

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examining the pending dispute between Lone Pine Inc. and Canada under Chapter 11 of the North American Free Trade Agreement ("NAFTA") the contribution aims to shed light on the relationship between domestic regulation of activities associated with a high degree of risk and uncertainty and the rights of investors engaged in providing such activities under international investment agreements (Sect. 4). Thereafter the contribution examines in more detail the underlying question of this article; whether the regulation of shale gas extraction simply presents another example of the tension between norms of international economic law and domestic regulatory autonomy, or whether it signals a deeper concern with the idea that decisions by sovereigns negatively affecting foreign commercial interests could be challenged before an international dispute settlement mechanism. In this regard, the contribution considers recent discussions and efforts at both the national and the multilateral level, not only to increase the regulatory autonomy of host states but also to improve the current system of investor state dispute settlement ("ISDS").

2 Shale Gas: Boom, Bust or Here to Stay?[3]

In simple terms, shale gas is natural gas which is trapped in fine-grained sedimentary rocks. In order to release the gas, through a combination of horizontal drilling and hydraulic fracturing,[4] a mixture of water, sand and fracturing fluids is injected into the ground under high pressure which then cracks the fractures open so that the gas can flow.[5] The technology is associated with environmental concerns and subject to public opposition in several jurisdictions resulting in some cases in moratoria or bans on national or local level.[6] In others, such as in the United States, it has however led to an industry revolution, creating jobs and economic and social prosperity in remote and historically poor areas, and improved the energy supply security of the entire country. However, public opposition is largely on the rise, not only in the jurisdictions where land owners do not directly profit from the profits (as in the European Union) but also in areas where said social and economic developments took place.[7] In the European Union, shale gas extraction is said to have "no social license to operate", and public opposition has resulted in some Member States, such as

[3]This section of the paper is to a large extent based upon Geraets and Reins (2016); refer to this article also for a detailed description of the technique, as well as the Production of shale gas and associated environmental concerns.

[4]For an overview of the different hydraulic fracturing stages see for example FracFocus.

[5]For a more detailed description of the technology and its environmental considerations refer to Middleton et al. (2017).

[6]For an overview and discussion refer to Fleming (2013).

[7]For a comparative analysis of amongst others the ownership system of mineral rights and its impacts on public perception and participation in the United States and the United Kingdom please refer to Whitton et al. (2017).

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Bulgaria[8] and France[9] imposing a ban on the exploration and extraction of hydrocarbons using hydraulic fracturing. The state of play and regulatory regimes are outlined in the following section.

2.1 Shale Gas Economics: State-of-Play

According to the U.S. Energy Information Administration, by 2040, shale gas is expected to satisfy 30% of world natural gas production. Surprisingly, to date shale gas so far is commercially extracted in only four countries, namely the United States, Canada, China and Argentina.[10] Estimates from 2013 identify the top ten countries with estimated technically recoverable reserves to be China, Argentina, Algeria, United States, Indonesia, Canada, Mexico, South Africa, Australia, Russia and Brazil.[11] Also some Member States of the European Union are carrying out exploratory drillings. To date, the **United States** is by far the biggest producer of shale gas,[12] has the longest history of extraction and is a driving force behind the worldwide shale gas boom. According to recent EIA estimates, shale gas will account for 70% of the total natural gas production by 2040. In 2015, it already accounted for over 50% or 42 billion cubic feet per day.[13] The United States is currently ranked fourth among the top 10 countries with technically recoverable shale gas resources.[14] The resource changed the energy landscape in the United States and turned it from a gas importer to a gas exporter. The commercial production of shale gas in **Canada** started in 2008, accounting for 4.1 billion cubic feet per day in 2015.[15] According to the U.S. Energy Information Administration outlook, it can reach 30% of the total natural gas production by 2040.[16] Resources are located mainly in northeast British Columbia (Montney formation), but also in other provinces and territories.[17] In the **European Union**, prospection and explorations are underway in several EU Member States, even if the shale gas activity is not pursued in a commercial manner yet in Europe. The European Commission's Joint Research

[8]See also Goldthau and Sovacool (2016).

[9]Act 2011-835 of 13 July 2011 (*Loi n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique*).

[10]U.S. Energy Information Administration (2016a), p. 21.

[11]U.S. Energy Information Administration (2013).

[12]U.S. Energy Information Administration (2016a), p. 21.

[13]Ibid.

[14]US Energy Information Administration (2013).

[15]For more information on the beginning of shale gas production and the environmental concerns in Canada, refer to Rivard et al. (2014).

[16]U.S. Energy Information Administration (2016b).

[17]Government of Canada (2018b).

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Center initially estimated that the Union has around 16 trillion cubic meters of technically recoverable resources.[18] However, these estimates have had to be corrected extensively over the years. Poland for example, had to correct the estimates of recoverable resources from 5.300 bcm to between 346 and 768 bcm.[19] The political context could not be more diverse among the Member States. Despite the corrections in estimates of recoverable resources and foreign drilling companies abandoning extraction projects in Poland, for a long time, Poland took the lead within the European Union promoting the shale gas exploitation process and becoming a leading commercial supporter in the future.[20] For this reason, Poland was often considered a "test case for European shale gas development" which would determine the further process in the EU.[21] However, the test did not go the way it was intended, not only because of the disappointing test drillings and corrections in estimates, but also because of growing opposition at the local level.[22]

Although the shale gas boom showed signs of a slowdown in the aftermath of the financial crisis, recent market reports suggest that the extraction of shale gas is still considered a relevant means to secure a state's energy supply.[23] This explains domestic regulation of shale gas extraction technology is worthy of consideration, as well as the constraints imposed by international economic law on governments seeking to impose such regulation.

2.2 Domestic Regulation of Shale Gas in the US, Canada and the EU (and Its MS)

The domestic regulatory approaches of shale gas differ considerably between the jurisdictions. This is not surprising, considering the different legal systems, constitutional structure and more concretely, experiences with shale gas extraction so far. In the United States, no federal regime regulates the extraction of unconventional gas. As a consequence, the States, under delegated authority mostly, are usually the locus for the implementation of legislation specifically on shale gas, but also on conventional oil and gas exploration and production activities. The State legislation in place, and the control exercised locally varies largely among the individual States.[24] Some states pre-empt most local regulation on oil and gas development.[25] In addition, in the United States, regulation on a regional level, e.g., the regulation of

[18] European Commission.

[19] Polish Geological Institute (2012).

[20] For more information see Orlen (2010), pp. 44–55.

[21] Meißner and Naumenko (2011), p. 9.

[22] See also Goldthau and Sovacool (2016).

[23] Financial Times (2018).

[24] Sinding (2013).

[25] NY ECL § 23-0303(2).

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water ecosystem services used within the shale gas extraction process, falls under the authority of the River Basin Commissions.[26] These commissions are multi-jurisdictional bodies with the power to adopt specific regulations applying to their river basin. For example, the Delaware River Basin Commission (DRBC), was created by legislation passed by Congress, and State level legislation passed in Delaware, New Jersey, New York and Pennsylvania, and it has legal authority over the Delaware River Basin and thus drilling operations in the Marcellus Shale formation.[27] As such, the Delaware River Basin Commission manages and regulates all activities taking place within its jurisdiction. More precisely, the Commission has the authority to regulate matters regarding water supply and conservation; water quality and pollution control; flood protection, flow and drought management; watershed management; project review, permitting and planning; regulation of withdrawals as well as several other issues.[28]

In Canada the provinces have the primary regulatory power over onshore energy resources, similar to that in the United States.[29] However, on Federal level, the Canadian Environmental Protection Act (CEPA) regulates the chemicals used in the hydraulic fracturing process. Other applicable federal legislation is for example the Fisheries Act, the Species at Risk Act and the Migratory Birds Convention Act.[30] The ten provinces and three territories have enacted their own legislation for the traction of oil and gas resources generally and some also for shale gas specifically.[31] In addition, the Canadian Association of Petroleum Producers has issued some guiding principles[32] and Seven Operating Practices[33] for hydraulic fracturing. One example of legislation adopted by a province, is Bill 18 entitled “An Act to limit oil and gas activities”. This Bill, adopted by the Province of Quebec in 2011, was ultimately challenged by an investor for allegedly violating its rights under Chapter 11 of NAFTA (see Sect. 4, below).

In the European Union, shale gas is regulated on various levels as an interplay of local, national and European legislation (which is transposed into national law).[34] At

[26]DRBC (2018).

[27]See for further information on the involvement of water and river basin commissions in the shale gas regulation process: ibid.

[28]DRBC (2009).

[29]See for a comparative analysis for the legal regimes in the United States and Canada: Carter and Eaton (2016).

[30]Government of Canada (2018b).

[31]For an overview refer to Government of Canada (2018a).

[32]Canadian Association of Petroleum Producers, as well as Beaudoin and Serry (2010).

[33]Canadian Association of Petroleum Producers (2012).

[34]This is because “energy” and “environment” are included as a shared competence under Articles 4 (2)(e) and (i) TFEU Accordingly “*the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*” (Article 2(2) TFEU).

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the European level, besides a non-binding Recommendation outlining minimum principles for the exploration and production of hydrocarbons,[35] there is no specific shale gas regulatory instrument. The regulation thus falls under general acts of environmental and/or (conventional) energy law. In 2011, the European Parliament released a study listing the 10 pieces of most relevant legislation applicable to shale gas extraction activities,[36] as well as a further 36 relevant EU Directives applicable to the regulation associated with the activity, including legislation on water, protection of the environment, safety at work, radiation protection, waste and chemicals.[37] Accordingly, the key pieces of legislation are the Mining Waste Directive,[38] the Ambient Air Quality Directive,[39] the Seveso II Directive,[40] the EIA Directive,[41] the REACH Regulation,[42] the Habitats and Birds Directive creating the NATURA 2000 network,[43] the Water Framework[44] and the Groundwater Directive.[45] In addition, between 2011 and 2013, the different European institutions commissioned several studies aimed at assessing both the general European regulatory system and the legal frameworks in selected Member States.[46] The main outcome of these studies was that, in the Member States, shale gas is most often subject to the general regulatory regime that is also applicable to conventional gas. Some member States, such as the United Kingdom introduced several changes regarding shale gas within existing legislation. There, key legislation and guidance are the Town and Country Planning Act 1990, the Planning and Compensation Act 1991, the Environment Act 1995,

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[35]Commission Recommendation from 22 January 2014 on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing, OJ [2014] L39/72 (“Recommendation”).

[36]Generally speaking, the entire European Union environmental *acquis* is applicable to shale gas activities, see also: Tomescu.

[37]DG for Internal Policies European Parliament (2011), pp. 53–60.

[38]Directive 2006/21/EC on the management of waste from extractive industries and amending Directive 2004/35/EC, [2006] OJ L 102/15.

[39]Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe, [2008] OJ L 152/1.

[40]Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances, [2007] OJ L 10/13, as amended.

[41]Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26/1.

[42]Regulation No. 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending certain Directives, [2006] OJ L 396/1.

[43]Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7, as amended and Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds, [2010] OJ L 20/7.

[44]Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy, [2000] OJ L 327/1.

[45]Directive 2006/118/EC on the protection of groundwater against pollution and deterioration, [2006] OJ L372/49.

[46]Such as Philippe and Partners (2011), Forster and Perks (2012) and Ballesteros et al. (2013).

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Petroleum Act 1998, the Energy Act 1976 and the Petroleum (Production) (Landward Areas) Regulations 1995.[47]

The aforementioned sections illustrate that the regulation of shale gas and other types of unconventional natural gas is largely a purely domestic, and sometimes even, a sub-national affair. This explains the divergence in regulatory approaches that have been adopted across different jurisdictions. Importantly, however, the right of states to extract natural resources from the underground beneath their territory follows from the explicit articulation at the international level that states (peoples and nations) possess a right to permanent sovereignty over their natural wealth and resources. The next section explores the tension between the domestic regulation of shale gas extraction technologies and projects, and the rights of foreign investors who have invested in them, from the perspective of the principle of permanent sovereignty over natural resources.

3 Natural Resource Exploitation and International Law

Similar to other types of natural gas, shale gas is a natural resource that can be extracted from the underground of the territory of a State. It is a type of "unconventional" natural gas that is extracted by means of a technique that is regulated differently across States as explained in the previous section. Under international law, the answer to the questions as to whether to extract it, and if so how and by whom, is governed by the concept of "permanent sovereignty over natural resources" ("PSNR"). This section explores the concept in more detail and explains the linkages between the idea of PSNR and the possibility for states to enable foreign investors to investment in their territory so as to enable resource extraction. It addresses the concept of investor-state dispute settlement and discusses how other, more recent norms of international law, such as declarations on sustainable development may signal a shift towards more (or renewed) regulatory autonomy of the host state, mainly in respect of measures taken in the public interest.

3.1 UN General Assembly Declaration on Permanent Sovereignty over Natural Resources (1962)

After the Second World War, the principle of permanent sovereignty over natural resources emerged as a norm of international law.[48] The principle "embodies the

[47] See DECC (2013), p. 14.

[48] Schrijver (2008); we refer to this contribution for an elaborate overview of the history of the principle of permanent sovereignty over natural resources.

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right of States and peoples to dispose freely of their natural resources". In 1958, the United Nations General Assembly decided to

> establish a Commission composed of Afghanistan, Chile, Guatemala, the Netherlands, the Philippines, Sweden, the Union of Soviet Socialist Republics, the United Arab Republic, and the United States of America to conduct a full survey of the status of this basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and further decides that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard shall be paid to the rights and duties of States under international law.[49]

The work of the Commission ultimately led to the adoption of the Declaration on Permanent Sovereignty over Natural Resources by the General Assembly in 1962.[50] In eight paragraphs, the Declaration describes the way in which peoples and nations can exercise their right to permanent sovereignty over their natural wealth and resources. The first paragraph stipulates that this must be done "in the interest of their national development and of the wellbeing of the people of the State concerned". The declaration also explicitly recognizes the fact that states endowed with natural resources may require foreign capital for the exploration, development and disposition of such resources. It provides that this should be done "in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities". The third and fourth paragraph of the Declaration provide rules on the treatment of foreign investors. For ease of reference, they are provided below in full:

> 3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.
>
> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

Paragraph 4 recognizes that "public utility, security, or the national interest" may serve as grounds or reasons for the nationalization, expropriation or requisitioning of

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[49]United Nations, General Assembly Resolution 1314 [XIII], "Recommendations concerning international respect for the right of peoples and nations to self-determination", 12 December 1958.

[50]United Nations, General Assembly Resolution 1803 [XVII], "Recommendations concerning international respect for the right of peoples and nations to self-determination", 14 December 1962.

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investments. It immediately adds, however, that where such nationalization, expropriation or requisitioning takes place, the (foreign) owner shall be paid "appropriate compensation". In case a dispute arises as to the amount or scope of the compensation, the "local remedies rule" applies. Nevertheless, the Declaration also foresees the possibility of settling the dispute through arbitration or international adjudication. It has been observed that thereby the Declaration sought "to reconcile the national standard proclaimed in the Calvo Doctrine advocated by the developing countries with the international minimum standard supported by the industrialized countries".[51]

In respect of the relationship between foreign investment, host states and dispute settlement, Paragraph 8 of the declaration further provides that:

> 8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

Thus, in sum, States may give authorization for the exploration and exploitation of the natural resources located in their territory to foreign investors (companies) and where they do so this shall be done under the rules of the national legislation in force and under the rules of international law. In case of disputes between investor and host-State the jurisdiction of the host-State shall be "exhausted" in principle, but "[u]pon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication." As has been stated by Barral, "permanent sovereignty protects the freedom of the State to choose its own path, regarding the exploration, exploitation and conservation of its natural resources"[52] It should however be noted that, because of the provisions relating to investment protection, the name of the declaration has been criticized. Indeed, Desta has argued that "it is a resolution as much about sovereignty over natural resources as it is about protection of foreign investment" and that "[b]y keeping the investment protection aspect of Resolution 1803 out of the title, the drafters left us with a false sense that this is the beginning of the Permanent Sovereignty over Natural Resources (PSNR) principle".[53] The question is however whether more recent developments signal a trend towards a greater emphasis on the sovereignty part, in that states are (re)-claiming their regulatory autonomy and are reconsidering both the substantive norms of investment law as well as the procedural aspects. These developments will be discussed in greater detail in subsequent sections of this contribution.

[51] Schrijver (2008).

[52] Barral (2016), p. 3.

[53] Desta (2016), p. 128.

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3.2 Other Relevant Norms of International Law

Increasingly, the debate over natural resources has shifted back and forth between a focus on the developmental and economic dimension and emphasis on the conservation and rational use of natural wealth and resources, in particular in light of the principle of sustainable development. In the UN Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration") of 1972, it was proclaimed, in Principle 21, that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Twenty years later, the Rio Declaration on Environment and Development added the term "and developmental" between the terms "environmental [and developmental] policies", thereby placing the "exercise of resource sovereignty not only in an environmental but also in a developmental context".[54] However, as Schrijver observes "permanent sovereignty serves no longer solely as the source of every State's freedom to manage its natural resources, but also as the source of corresponding international responsibilities requiring careful management and imposing accountability on national as well as international levels, taking into account international law on sustainable development including the interests of future generations".

In 2015, 17 Sustainable Development Goals (SDGs) were set up, based on a UN-Resolution "Transforming our world: the 2030 Agenda for Sustainable Development".[55] Goal 7 "Ensure access to affordable, reliable, sustainable and modern energy for all" aims inter alia at increasing "substantially the share of renewable energy in the global energy mix", and enhancing "international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology".[56]

Such goals must be taken into account when assessing developments taking place in the field of international economic law, where the interests of private operators may come into conflict with those of States seeking to pursue other objectives, such as those aimed at environmental protection or the sustainable management of natural resources.

[54] Schrijver (2008).

[55] Resolution adopted by the General Assembly on 25 September 2015, United Nations, A/RES/70/1.

[56] Ibid., p. 19.

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4 Fracking and International Economic Law: More than Just Another Example of the Tension Between Trade/ Investment Liberalization and Domestic Policy Considerations?

Natural resource extraction is, as was explained in Sect. 3, largely an affair that is regulated at the domestic level. The principle of permanent sovereignty over natural resources establishes that states remain free to decide whether they wish the resources located in their territory to be extracted, and if so, under which conditions. The sovereignty of states is constrained only and in as far as they have concluded investment protection agreements—in the form of Bilateral Investment Treaties ("BITs") or Free Trade Agreements ("FTAs") with investment protection chapters—with other states. These investment protection agreements provide the possibility for investors to file a claim for compensation against a host state to the extent that it considers its investment has been negatively affected by a regulatory measure adopted by that host state.[57] The system of investor-state dispute settlement has become increasingly controversial and subject to discussion over the past decade, mainly as a result of several high profile disputes in which investors challenged governmental measures adopted on grounds of public health or environmental protection considerations.

4.1 Lone Pine Resources v Canada

To date, the only dispute challenging a governmental measure relating to unconventional natural gas extraction ("fracking") was the Lone Pine Resources Inc. ("Lone Pine") versus Canada arbitration under Chapter 11 of NAFTA. In March 2011, the Government of Quebec imposed a de facto moratorium on shale gas exploration. Lone Pine filed a notice of intent to start arbitration proceedings in November 2012, in which it informed Canada of its intention to "bring an arbitration on behalf of its wholly owned subsidiary, Lone Pine Resources Canada Ltd., under Article 1117 of the NAFTA for the arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under the st. Lawrence River by

[57]Rules generally protect investors against (in)direct expropriation, discrimination, and require host states to accord "fair and equitable treatment" under a "minimum standard of treatment" provision. The open character of some of these norms is often criticized as providing arbitral tribunals with too much room for interpretation and the reform of investment protection chapters typically includes efforts to more clearly define the content of such open norms.

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the Government of Quebec without due process, without compensation, and with no cognizable public purpose."[58]

4.1.1 Can Permits and Licenses Constitute an "Investment"

In its notice of intent, Lone Pine had argued that it had "expended millions of dollars and considerable time and resources in Quebec to obtain the necessary permits and approvals from the Government of Quebec to mine for oil and gas in the province of Quebec, including beneath the St. Lawrence River". Then, it argued, "[s]uddenly, and without any prior consultation or notice, the Government of Quebec introduced Bill 18 into the National Assembly on May 12, 2011 to suspend all exploration for oil and gas in the province (except for the purposes of scientific studies onshore)". Moreover, according to Lone Pine, "Bill 18 also purported to revoke all permits pertaining to oil and gas resources beneath the St. Lawrence River without a penny of compensation".[59]

One of the questions before the arbitral tribunal is whether the River Permit constitutes an investment in the sense of NAFTA. Lone Pine argues that the permit granted gives it "a real right of the nature of an innominate severance of the State's ownership", and thereby an investment in the sense of Article 1101(1) of the NAFTA.[60] In its memorandum it had described the permit as follows:

> 187. Bill 18 terminated Lone Pine's River Permit Rights by revoking "[a]ny mining right" that had been issued "for the part of the St. Lawrence River west of longitude 64°31'27" in the NAD83 geodetic reference system or for the islands situated in that part of the river."
>
> 188. The River Permit is a discrete asset and qualifies as an investment as defined by the NAFTA: until they were revoked by Bill 18, the River Permit Rights were owned by the Enterprise and therefore indirectly owned and controlled by Lone Pine. Accordingly, there is a "legally significant connection" between Bill 18 and Lone Pine's investment in Canada to ground the Tribunal's jurisdiction, as required by Article 1101(1).[61]

Article 1139 of NAFTA provides that the term investment encompasses:

> (g): intangible property, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h): interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory. This definition of investment under the NAFTA specifically includes interests that arise under "contracts involving the presence of the

[58] *Lone Pine Resources Inc v Canada*, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement (8 November 2012) www.italaw.com/sites/default/files/case-documents/italaw1156.pdf.

[59] *Lone Pine Resources Inc v Canada*, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement (8 November 2012), para. 3, www.italaw.com/sites/default/files/case-documents/italaw1156.pdf.

[60] *Lone Pine Resources Inc v Canada*, Claimant's Reply to the Submissions of the United States of America and Mexico Pursuant to Article 1128 of the NAFTA (22 September 2017), para. 8.

[61] *Lone Pine Resources Inc v Canada*, Claimant's Memorial (10 April 2015), paras. 187–188 (footnotes omitted).

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investor's property in the territory of the Party, including turnkey or construction contracts, or concessions".

Lone Pine argues that the River Permit Rights satisfy both tests, whereas Canada has argued that the River Permit Agreements "did not grant any right". Moreover, Canada has argued that there was no "interest that arose from the commitment of capital because 'no expenditures' were made 'to obtain its interests in the River License, other than those made to acquire interests in the four Land Licenses'".[62] The claimant has argued *inter alia* that it was required to pay annual fees to Quebec in order to maintain the permit, and that this in turn constituted a commitment of capital.[63]

One of the predominant tests in international investment law to determine whether an investment exists was developed in *Salini*. The test stipulates that what is required is:

(1) a contribution of money or assets;
(2) a certain duration over which the project was to be implemented;
(3) an element of risk; and
(4) a contribution to the host state's economy.

Although not undisputed, it does seem to be the prevailing test at the moment and may provide guidance to the tribunal in *Lone Pine*.[64]

In another dispute involving concessions and permits relating to the extraction of natural resources, the *Pac Rim Cayman* tribunal was faced with a claim that the denial of environmental permits and exploitation concessions for a mining project led to a *de facto* ban on metallic mining in El Salvador. The investor had "sole ownership of certain Salvadoran mining companies that held rights conferred by exploration licenses, authorizations and permits, including the right to a mining exploitation concession in the area known as 'El Dorado'."[65] El Salvador contended in this regard that the investor had "acquired no right to any exploitation concession, nor any legal or property rights to any deposits".[66] The tribunal rejected the investor's claims and found that it would not have satisfied the requirements for an exploitation concession under the Salvadoran mining law.[67] Although this issue is somewhat different from the one at hand in the Lone Pine arbitration, it is interesting to note that investment arbitration have not been unwilling to accord deference to host states in certain recent cases. Whether this will influence the outcome in *Lone Pine* remains to be seen.

[62]*Lone Pine Resources Inc v Canada*, Claimant's Reply (Redacted) (22 July 2017), para. 256 (footnotes omitted).

[63]*Lone Pine Resources Inc v Canada*, Claimant's Reply (Redacted) (22 July 2017), para. 279 (footnotes omitted).

[64]Grabowski (2014).

[65]See http://investmentpolicyhub.unctad.org/ISDS/Details/356.

[66]Pac Rim Cayman LLC v. Republic of El Salvador, Award, Para. 9.15.

[67]Pac Rim Cayman LLC v. Republic of El Salvador, Award, Para. 8.44.

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4.1.2 The Revocation of the River Permit as Expropriation?

Lone Pine further argued that Bill 18 revoked the River Permit and thereby extinguished its ownership of the River Permit Rights in violation of Article 1110 (1) of NAFTA.[68] According to Lone Pine, "[t]he River Permit Rights are a discrete asset, capable of being the object of independent commercial transactions".[69] In support of its argument, it stated that

> Canada's purported concerns for the St. Lawrence River are disingenuous. First, the St. Lawrence River runs through highly industrialized areas of the St. Lawrence Valley where the Quebec government continues to allow industrial and commercial development. Second, if the revocation was genuinely motivated by concern for the St. Lawrence River, the revocation would have also applied to the major tributaries which feed the St. Lawrence.[70]

The Claimant also challenged the Quebec government for revoking the permits under the St. Lawrence River, despite an environmental assessment of shale gas in the Lowlands being underway. It stated that:

> Environmental assessments are intended to improve the government's understanding of potential environmental effects of given activity and also propose prevention or mitigation measures, with the aim of reducing or eliminating potential negative effects of a given project. Environmental assessments would thus provide the Quebec government with key information required to make appropriate legislative decisions about how to best regulate oil and gas activity.[71]

This can be seen as a challenge to what may be seen as a "precautionary" approach adopted by the Quebec government. In its reply to Canada's response, Lone Pine finally argues that:

> [In] the midst of an ongoing evidence-based approach to building a comprehensive understanding to the potential issues and effects of oil and gas exploration and development which would have properly equipped the government to make an informed decision on environmental protection, the Government of Quebec deviated from that approach and its own understanding of the scientific and environmental realities of hydrocarbon exploration, for a purely political purpose unconnected with an objective assessment of the relevant facts and science.[72]

The challenge facing the tribunal is therefore whether, under the current standard of review, governments are required to follow an evidence- and science-based approach to decision-making.

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[68] *Lone Pine Resources Inc v Canada*, Claimant's Memorial (10 April 2015), para. 227 (footnotes omitted).

[69] *Lone Pine Resources Inc v Canada*, Claimant's Memorial (10 April 2015), para. 236.

[70] *Lone Pine Resources Inc v Canada*, Claimant's Memorial (10 April 2015), para. 259.

[71] *Lone Pine Resources Inc v Canada*, Claimant's Memorial (10 April 2015), para. 270.

[72] *Lone Pine Resources Inc v Canada*, Claimant's Reply (Redacted) (22 July 2017), para. 443.

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4.1.3 The Scope of the Minimum Standard of Treatment

A third critical issue in the Lone Pine Arbitration is what, under the minimum standard of treatment under NAFTA, the concept of fair and equitable treatment should constitute. This standard is included in Article 1105 of the NAFTA and requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security". In the present dispute, Lone Pine argued, *inter alia*, that the revocation of the River Permit constituted conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic" in violation of the prevailing legal standard.[73] According to the Claimant, ultimately, Bill 18 was "an effort, despite the existence of regulatory means to protect the environment, to enact a political objective lacking scientific or evidentiary basis".[74]

4.1.4 Status of the Arbitration

The Lone Pine v Canada arbitration is currently still before the tribunal, which is composed of president V.V. Veeder (Appointed by the Parties), arbitrators David R. Haigh (Canada) (appointed by the Claimant) and Brigitte Stern (France) (appointed by the Respondent). A hearing was held in Toronto from 2 to 13 October 2017, followed by an additional hearing on the merits in Montreal on 24 November 2017. It is unclear when the Tribunal will issue its award.[75] The dispute raises a number of questions, both in respect of whether an extraction license or permit can constitute an investment capable of being (in)directly expropriated, as in respect of the standards a governmental decision-making process must meet.

4.2 The Changing Tide for Investment Arbitration Involving Natural Resources

Investment arbitrations, in which investors have challenged measures adopted by central or local governmental decisions aimed at the protection of natural resources, have resulted in increased attention to both the procedural and the substantive norms of the system of ISDS. States, acting at their national level, as well as at the international level, have taken action to safeguard their regulatory autonomy in

[73] *Lone Pine Resources Inc v Canada*, Claimant's Memorial (10 April 2015), paras. 280–322.

[74] *Lone Pine Resources Inc v Canada*, Claimant's Reply (Redacted) (22 July 2017), para. 567 and preceding paras.

[75] ICSID, Case Details: Lone Pine Resources Inc. v. Canada (ICSID Case No. UNCT/15/2), available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=UNCT/15/2 (last accessed at 30 April 2018).

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light of the increase in investment arbitrations in the natural resources sector. Although investment arbitration cases relating to the extracting industries and energy production sectors in Canada—such as the *Lone Pine* arbitration—and the United States have attracted significant attention and put the spotlight on the system of ISDS as a dispute resolution mechanism, other states are equally forced by their domestic constituencies to reconsider their approach. The subsequent sections address recent developments that touch upon the relationship between international economic law and the (domestic) sovereignty over natural resources and regulatory autonomy in that regard. Viñuales has already articulated the "need to better integrate domestic law and other norms of international law" such as environmental law.[76]

4.2.1 Domestic Legislation on Sovereignty over Natural Resources: Tanzania

This section examines the domestic regulatory action in respect of natural resources that has been taken in Tanzania, as well as the ISDS reform proposals that have been put forward at the international level. African countries are endowed with significant deposits of natural resources, such as minerals, oil, and gas.[77] As a result, several countries on the continent have been visited by foreign multinational companies from the extractive industry wishing to bring the investment needed for the extraction of such resources. In response to governmental measures adopted by several states, a number of these companies have initiated investor-state dispute settlement proceedings against their host state in order to receive compensation (Table 1).

The 19 investment cases against African states relating to activities in the natural resources industry represent almost a quarter (22.3%) of all investment arbitrations against African states. This significant number explains the reason for the renewed interested in ways to further safeguard the sovereignty over natural resources at the domestic level. One example of such interest can be found in Tanzania, which, in July 2017, adopted legislation that incorporated the principle of permanent sovereignty over natural resources explicitly in domestic legislation.[78] Tanzania has entered into Bilateral Investment Treaties ("BITs") with 20 countries and 11 of

[76]Viñuales (2015), p. 12.

[77]Desta (2016), p. 118.

[78]Republic of Tanzania (2017), Natural Wealth and Resources (Permanent Sovereignty) Act, 2017. Available at http://www.tcme.or.tz/resources/view/the-natural-wealth-and-resources-permanent-sovereignty-act-2017; Republic of Tanzania (2017), Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act, 2017. Available at http://www.tcme.or.tz/resources/view/the-natural-wealth-and-resources-contracts-review-and-re-negotiation-of-unc; Republic of Tanzania (2017), Written Laws (Miscellaneous Amendments) Act, 2017. Available at http://www.tcme.or.tz/resources/view/the-written-laws-miscellaneous-amendments-act-2017 (all last accessed at 30 April 2018).

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Table 1 Investment disputes in the natural resource sector against African states

No.	Host state	Year	Short case name	Economic sector and subsector
1	Gambia	2017	APCL v. Gambia	Mining and quarrying—support service activities
2	Ethiopia	2017	ICL Europe v. Ethiopia	Mining and quarrying
3	Lesotho	2016	Burmilla Trust and others v. Lesotho	Mining and quarrying
4	Uganda	2015	Total E&P v. Uganda	Mining and quarrying—extraction of crude petroleum and natural gas
5	Burundi	2014	Interprétol v. Burundi	Mining and quarrying—extraction of crude petroleum and natural gas
6	Egypt	2014	Unión Fenosa Gas v. Egypt	Mining and quarrying—support service activities
7	Egypt	2012	Ampal-American and others v. Egypt	Electricity, gas, steam and air conditioning supply
8	Egypt	2012	Maiman and others v. Egypt	Electricity, gas, steam and air conditioning supply
9	Lesotho	2012	Swissbourgh and others v. Lesotho	Mining and quarrying
10	Egypt	2012	Bahgat v. Egypt	Mining and quarrying—mining of metal ores—manufacture of basic metals
11	Zimbabwe	2010	Border Timers and others v. Zimbabwe	Agriculture, forestry and fishing—forestry and logging
12	Tanzania	2010	SCB v. Tanzania	Electricity, gas, steam and air conditioning supply
13	Algeria	2009	Mærsk v. Algeria	Mining and quarrying—extraction of crude petroleum and natural gas
14	South Africa	2007	Foresti v. South Africa	Mining and quarrying
15	Nigeria	2007	Shell v. Nigeria	Mining and quarrying—extraction of crude petroleum and natural gas
16	Egypt	2003	Joy Mining v. Egypt	Mining and quarrying
17	Congo	2003	Miminco v. Congo	Mining and quarrying—mining of metal ores
18	Burundi	2001	Goetz v. Burundi (ii)	Mining and quarrying—financial and insurance activities
19	Burundi	1996	Goetz v. Burundi (i)	Mining and quarrying

Source: authors' own table compiled based on the UNCTAD Investment Policy Hub (updated 31 December 2017). Available at http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector (last accessed at 30 April 2018)

these BITs are currently in force.[79] Tanzania's new Natural Wealth and Resources (Permanent Sovereignty) Act refers explicitly to the UN's Declaration on Permanent Sovereignty over Natural Resources. The Act provides, *inter alia*, that:

[79]See UNCTAD Investment Policy Hub, Bilateral Investment Treaties, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/222 (last accessed at 30 April 2018).

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4.

(1) The People of the United Republic shall have permanent sovereignty over all natural wealth and resources.
(2) The ownership and control over natural wealth and resources shall be exercised by, and through the Government on behalf of the People and the United Republic.
(3) The *First Schedule* and the Second Schedule shall have effect in relation to assertion by the People and the United Republic over permanent sovereignty over natural wealth and resources.

Whereby the First Schedule to the act includes an integral copy of the UN GA Declaration. As explained by Masamba, the Act indicates that permanent sovereignty entails:

- the need to obtain parliamentary approval before entering into natural resource agreements aimed at exploration, exploitation, or acquisition;
- the requirement that the proceeds of such activities should ensure the interests of the Tanzanian people;
- the requirement that the returns of such activities flow back into the local economy and that the government obtains "an equitable share" of ventures;
- the possibility for parliament to review all agreements;
- the requirement that investors in the mining sector act as "active participants in the growth of the Tanzanian economy".[80]

Importantly, section 11 of the Tanzanian Permanent Sovereignty Act stipulates in respect of ISDS proceedings that

11.

(1) Pursuant to Article 27 (1) of the Constitution, permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in *any foreign court* or *tribunal*.
(2) For the purpose of subsection (1), disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.
(3) For the purpose of implementation of subsection (2), judicial bodies or other bodies established in the United Republic and application of laws of Tanzania shall be acknowledged and incorporated in any arrangement or agreement.

Considering that Tanzania is a party to the aforementioned BITs, one could question the value of including this provision in the act. As suggested by Masamba, in order to effectuate this provision, "Tanzania could consider reviewing older national laws and its BITs for coherence with the Permanent Sovereignty act".[81] From a commercial perspective, the Tanzanian Permanent Sovereignty Act has been received with concern. In fact, some observers have even suggested that the act in itself may constitute a breach of the legitimate expectations of foreign investors in

[80] Masamba (2017).

[81] Ibid.

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Tanzania.[82] These responses indicate growing tension between governments that legitimately seek to protect their regulatory autonomy and foreign investors who seek to ensure that their interests arising from an investment are effectively and adequately protected. It reflects the continuing need for the assessment of standards of treatment that governments and states must accord to foreign investors. In this regard the essential question is how the right of foreign investors not to be subject to unfair or discriminatory treatment can be balanced and reconciled with the regulatory autonomy of host states, including their permanent sovereignty over natural resources.

Whether foreign investors should have redress against such treatment outside the domestic legal system of the state of investment is one of the crucial questions in international economic law. Its importance becomes particularly evident in disputes that relate to the permanent sovereignty over natural resources as the measures at issue in these disputes often seek to achieve societal objectives that relate to the preservation of such resources and their contribution to sustainable development of the state in question. Similarly, they may be adopted by host states with the objective of protecting the environment such as in the case of fracking. Where such measures are adopted, they may turn back or overturn decisions taken by predecessor governments. That ISDS as a mechanism is under intense scrutiny is also reflected by the approach taken by the current US administration. Indeed, in October 2017, United States Trade Representative (USTR) Robert Lighthizer openly criticized the basic idea underpinning ISDS:

> [. . .] I've had people come in and say, literally, to me, 'oh but you can't do this, you can't change ISDS. . . You can't do that, because we wouldn't have made the investment otherwise.' I'm thinking, 'well then why is it a good policy of the United States government to encourage investment in Mexico? My position is if the market makes that decision, then the market should make that decision. It's perfectly reasonable.'
>
> The bottom line is business says '[w]e want to make decisions and have markets decide. But! We would like to have political risk insurance paid for by the United States' government.' And to me that's absurd. You either are in the market or you're not in the market. [. . .][83]

[82]Lexology, Allen & Overy—New laws create potential for arbitration claims against Tanzania, 5 September 2017. Lexology, Winston & Strawn LLP—Tanzania's Legal Reform of the Natural Resources Sector Threatens Extractive Industries, 1 August 2017. Lexology, Jones Day—Tanzania Overhauls Mining Laws, Fines Investor US$190 Billion: Is Your Investment Protected?, 5 August 2017.

[83]USTR, Press Statement in Arlington, Virginia, 19 October 2017. Reported here https://insidetrade.com/trade/his-own-words-lighthizer-lets-loose-business-hill-opposition-isds-sunset-clause (last accessed 30 April 2018). See also, US House of Representatives, Committee on Ways and Means—Hearing on U.S. Trade Policy Agenda, The Honorable Robert E. Lighthizer, 21 March 2018, p. 20; available at https://waysandmeans.house.gov/wp-content/uploads/2018/05/20180321FC-Transcript.pdf, pp. 20–21.

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4.3 International Developments: The EU's MIC Proposal and the CPTPP

Away from the domestic level of individual states, recent developments at the international level also indicate a growing concern among states that current disciplines relating to the protection of foreign investment may impose undue constraints upon national regulatory autonomy. After having been confronted with significant public opposition to the concept of ISDS after the plans to include it in FTAs with the US (Transatlantic Trade and Investment Partnership, "TTIP") and Canada (Comprehensive Economic and Trade Agreement, "CETA"), the Commission, with the support of Member States such as The Netherlands, started working on a proposal to create a Multilateral Investment Court ("MIC").[84] Similarly, in the context of the recently concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), the contracting parties seem to have included provisions that seek to strengthen their "right to regulate" in respect of, inter alia, governmental measures aimed at environmental protection. This section addresses both developments in turn.

4.3.1 The EU's ICS and MIC

The European Union is deeply involved in the international reform efforts of investor state dispute settlement.[85] Its position on ISDS has evolved gradually over time. It is beyond the scope of this particular contribution to assess the changes proposed in the EU's Investor Court System ("ICS") in detail, especially since this has already been done extensively.[86] It is important to note, however, that recently the Commission's objective of moving towards a Multilateral Investment Court ("MIC") seems to have gained traction. Although some trading partners, such as Japan, have been somewhat reluctant to immediately except the Commission's proposals, others—such as Canada, Singapore, Vietnam, and, most recently, Mexico—have welcomed the proposal and accepted it as part of the new agreements they have concluded with the EU. This "coalition of the willing" or the "friends of ICS" may ultimately grow to a "critical mass" of countries that seek to establish a new, more institutionalized form of investor-state dispute settlement that replaces the current system of ad hoc-arbitration. In this regard it will be crucial to see how the US position in respect of ISDS will evolve. The statements by the current USTR appear to reflect a much more fundamental criticism of the system, and one that is based on the argument that the US should not cede sovereignty "in order to

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[84] See, inter alia, https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/brieven/2017/11/17/fiche-bij-kamerbrief-over-informatievoorziening-nieuwe-commissievoorstellen/fiche-bij-kamerbrief-over-informatievoorziening-nieuwe-commissievoorstellen.pdf (in Dutch), p. 2.

[85] Hoffmeister (2017).

[86] Reinisch (2017), p. 295.

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encourage people to outsource jobs". It is unlikely that the reformed mechanism of investor-state dispute settlement as articulated in the EU's ICS, would suffice to counter such fundamental criticism.

At the internal level of the EU, some questions remain to be answered. Indeed, the Court of Justice of the European Union in respect of the EU-Singapore Free Trade Agreement stated in Opinion 2/15 that "a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be [. . .] established without the Member States' consent".[87] This has resulted in the European Commission taking the approach of excluding investment protection chapters from FTAs, such as is the case with the EU-Singapore FTA and will be likely be the case for the EU-Japan Economic Partnership Agreement.[88]

4.3.2 The CPTPP

Similarly, in the recently concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) an explicit provision is included that seeks to protect host states' right to regulate. Article 9.16 of the CPTPP indeed provides that:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Whether such a more explicit articulation of the right to adopt, maintain or enforce measures otherwise inconsistent with the investment protection chapter of the CPTPP is sufficient to address the concerns of the opponents of the system remains to be seen. Moreover, one can justifiably raise the question whether this provision would, nevertheless, prevent an investor from, seeking compensation for the damages that result from the adoption, maintenance, or enforcement of such a measure. Indeed, this is precisely the point of investment arbitration; that governments may adopt measures they deem in the public interest, as long as they provide for appropriate compensation in case the interests of an investor are negatively affected beyond what is acceptable under the standard of treatment provided for in the relevant investment protection agreement.

These developments at the domestic and international levels indicate a growing concern with the system of investment protection as it stands today. Such concern becomes particularly evident when investment protection clashes with the application of technologies aimed at the extraction of natural resources, which are seen as carrying an uncertain amount of risk to human, animal, or plant life or health. That the EU now appears to lead the movement towards the reform of ISDS at the international level has been deemed "ironic, indeed hypocritical".[89] This

[87]ECJ, Opinion 2/15 of the Court, 16 May 2017, para. 282.

[88]Geraets and Reins (2016), p. 18.

[89]Desta (2016), p. 143.

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notwithstanding, the current climate seems to call for a reconsideration of the prevailing status quo in respect of investment protection. Regardless of historical positions, a calibration of investment protection mechanisms that guarantees governments right to regulate, whilst providing for protection against the most blatant violations of investors' rights, seems to be a step forward.

5 Conclusion

This contribution has explored several recent developments in respect of international investment law and its relation to the principle of permanent sovereignty over natural resources by examining a dispute in which a host state's regulatory autonomy in respect of the controversial "fracking" technique was at issue. The Lone Pine Resources v Canada investor state dispute settlement proceedings under Chapter 11 of NAFTA constitute the first challenge against a governmental measure that affected the interests of a company involved in the exploration and exploitation of unconventional natural gas. Although the dispute is by no means the first to deal with a challenge by an investor in the natural resources extraction industry against measures adopted for environmental purposes, it does represent a coming together of two developments that have attracted significant public attention.

First, the "fracking" technology that was surrounded by scientific uncertainty as to its long-term impact on the environment as well as with human health concerns. Second, the emergence of public opposition against ISDS in Canada, the US and the EU in light of the planned inclusion of an investment chapter in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the US-EU Transatlantic Trade and Investment Partnership (TTIP). The dispute highlights the increasing tension between regulatory autonomy of host states and investors' rights for compensation for. This tension has prompted governments globally to reconsider their approach towards investor-state dispute settlement. At the national level, examples such as that of Tanzania show that there is increased and renewed emphasis on the permanent sovereignty, as including the regulatory autonomy to determine under what conditions such resources may be extracted by foreign investors. The Tanzanian example shows that resource endowed states seek to safeguard their ability to regulate access to these resources. At the same time, the increase in investor-state arbitration disputes against Western/developed states, such as European states, as well as the US and Canada, has prompted them to assess critically the elements of the traditional ISDS system that made it popular among investors. This has not only resulted in proposals aimed at the reform of procedural aspects of ISDS, such as those advanced by the EU in its proposal for a Multilateral Investment Court (MIC), based on its Investor Court System (ICS), but also in a reconsideration of certain substantive norms of investment protection and an increased emphasis on the right to regulate as evidenced by the investment chapter included in the CPTPP.

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This contribution has shown that criticism of the traditional ISDS system has been fuelled by disputes against governmental regulation seeking to address the uncertainty and high risk associated with some innovative techniques, such as the fracking technique aimed at the extraction of unconventional natural gas. Although the *Lone Pine* arbitration is by no means the only investment dispute in the natural resource extraction sector, it does represent an instance of government regulation of a technique associated with a high degree of uncertainty being challenged on the basis that an investor claimed that its rights to an extraction permit were eradicated. In this regard, the arbitral tribunal hearing the case will have to decide whether such permits can constitute an investment and whether the regulatory act adopted by Quebec revoked and nullified these permits, and thereby led to the expropriation of the investment or the failure to comply with the minimum standard of treatment as articulated under NAFTA. The outcome of this dispute will not only be relevant for the parties involved, but will also provide further grounds for discussing both the procedural and the substantive norms of investor-state dispute settlement. Moreover, it will also shed light on the requirement on governments of host states to rely on scientific evidence in their decision-making.

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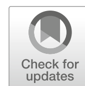
Towards a European Natural Resources Law?



Jörg Philipp Terhechte

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1 A European Natural Resources Law: Consolidation or Emergence of a (New) Field of Union Law/Policy?

Strictu sensu, a European natural resources law does not yet exist.[1] Even if the emergence of this legal field has already been subject to review in the past, the specific backgrounds and debates upon which such considerations were built are no longer up-to-date. In times of globalisation and an increased scarcity of resources, especially in Western industrialized nations as well as in the so-called "BRIC"-States (Brasil, Russia, India and China), the question arises whether there is a need for a general natural resources law, particularly with regard to deliberations such as safety, sustainability and efficiency in the supply of raw materials, instead of the deep-rooted North-South conflict or development aid.[2]

Against this background, the academic debate on natural resources at the European level focuses on the establishment of a genuine European natural resources law, and a corresponding European natural resources policy,[3] rather than on a thorough consideration of the existing commodity agreements[4] or on the role of the various legal disciplines relevant to this subject matter. Thus, a European natural resources law is on the verge of emerging, yet at the same time consolidating. On the one hand, the parameters and conditions for the creation of a natural resources law have changed dramatically. Therefore, it no longer has to be built upon already established and at times rigid legal structures. On the other hand, the novelties in the primary law of the European Union (EU), as introduced by the Treaty of Lisbon, have paved the way for the creation and consolidation of a European natural resources law. Today, EU natural resources law does not merely constitute a field of Union law that is rooted in environmental law and the respective environmental standards and principles, but rather a *hybrid* between environmental and economic law, which develops through many—yet overly regulated—fields of EU law. Recent Communications of the Commission provide further evidence to this effect.[5]

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[1] See critically Terhechte J P, In der Falle? Es droht eine Abschottung des Rechts – Europäische Rechtsgebiete wie das Rohstoffrecht verlangen eine Neupositionierung der Wissenschaft. Frankfurter Allgemeine Zeitung, 27 December 2012, p. 6.

[2] See Kebschull (1974); see more recently, Stockmann et al. (2010), p. 219 ff. Garret N and Piccinni A, Natural Resources and Conflict: A New Security Challenge for the European Union, SIRPRI Policy Brief, June 2012, https://www.sipri.org/sites/default/files/files/misc/SIPRIPB1206.pdf (last accessed 30 April 2018).

[3] The term *raw materials governance* is further explained in Terhechte (2012a), p. 89 ff.; for the definition of *Energy Governance* see Goldthau and Witte (2010).

[4] Pelikan (1990); Weberpals (1989); Habermayer (1985); Schraven (1982); Seitz (1975), p. 461 ff.; Wenzel (1961); Adebahr (1975), p. 467 ff.; Friderichs et al. (1976), p. 226 ff.; Mason (1946).

[5] See European Commission, "Critical Raw Materials for the EU"—Report of the Ad-hoc Working Group on Defining Critical Raw Materials, 2010; Risk & Policy Analysts Limited, Stockpiling of Non-Energy Raw Materials—Final Report for DG Enterprise and Industry, 2012; Commission Communication on the raw materials initiative—meeting our critical needs for growth and jobs in Europe, COM (2008) 699 final; Commission Communication tackling the challenges in commodity

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Which consequences may be drawn from these findings for EU law? What does the emergence of a new legal field, which escapes the well-established legal categories, say about the further development of European law and European integration? The Lisbon Treaty has provided an opportunity for the further consideration and (hopefully) solution of these questions due to the many innovations it entails. In particular, the changes brought about in the context of EU energy law (Art. 194 Treaty on the Functioning of the European Union; TFEU)[6] and the common commercial policy (CCP; Art. 206 TFEU)[7] are significant for the development of an EU natural resources law. Hitherto, the Lisbon Treaty has contributed to the consolidation of EU environmental law (Art. 191 ff. TFEU).[8] The implications of such consolidation for the creation of a European natural resources policy should not be underestimated, especially in light of the fact that EU natural resources law is located between economic and environmental law.

Subsequent to an analysis of the legal backgrounds for the creation of a European natural resources law (Sect. 2), which includes the definition of the term *natural resources* (Sect. 2.1), the commodity dependence of the EU on third states (Sect. 2.2), and current developments on the global raw material markets (Sect. 2.3) as well as the legal means to regulate these markets (Sect. 2.4), an attempt will be made to determine the essential features of the emerging European natural resources law (Sect. 3). The focus will be on the normative requirements of EU law (Sect. 3.1), the autonomy of a European natural resources law (Sect. 3.2) and ultimately, the momentum the Lisbon Treaty has provided for its creation (Sect. 3.3). Afterwards, the position of EU natural resources law in between the internal market rules as well as European environmental policy will be further untangled (Sects. 4 and 4.1), its objectives and principles determined (Sect. 4.2) and its linkage with and demarcation from national (Sect. 4.3) as well as international law (Sect. 4.4) clarified. It is obvious, that EU natural resources law requires a contextualization given its unique character (Sect. 5). Accordingly, the influence of the EU raw materials initiative (Sect. 5.1), the question regarding the components of a European natural resources law (Sect. 5.2) and the aligned challenges for the study of European law (Sect. 5.3) will be elaborated.

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markets and on raw materials, COM (2011) 25 final; an overview of the different raw material strategies employed by the G20 states may be found in Hilpert H G and Mildner S A, Fragmentation or Cooperation in Global Resource Governance?, Stiftung Wissenschaft und Politik Research Paper No. 1, March 2013, https://www.swp-berlin.org/fileadmin/contents/products/research_papers/2013_RP01_hlp_mdn.pdf (last accessed 14 March 2018); see further Ruta M and Venables A, International Trade in Natural Resources: Practice and Policy, CESifo Working Paper No. 3778, 2012, https://www.researchgate.net/profile/Anthony_Venables/publication/234146815_International_Trade_in_Natural_Resources_Practice_and_Policy/links/0046352cc64f7962b3000000/International-Trade-in-Natural-Resources-Practice-and-Policy.pdf (last accessed 14 March 2018).

[6]See Kahl (2009), p. 601 ff.; Hobe (2009), p. 219 ff.; Ehricke and Hackländer (2008), p. 579 ff.; Nettesheim (2010), p. 19 ff.

[7]Bungenberg and Herrmann (2011).

[8]See Epiney (2013), p. 98 ff.

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2 The EU in the Global Competition for Raw Materials

2.1 Raw Materials and Natural Resources Law

A uniform concept of *raw materials* exists in neither national nor European and international law.[9] The term is most commonly used in the context of *resource*s or *natural resources*. In English terminology, *raw materials* are referred to as *natural resources* or *commodities* without the provision of a binding definition.[10] The different terms are to some extent used synonymously, yet the meaning of the term *resources* is often understood to be broader than *raw materials*. In order to create a truly European natural resources law, a comprehensive definition of this term is necessary, since any new area of Union law will always be subject to debates on the demarcation of competences between the Union and its Member States.[11] The broader the definition of the term *raw materials* or more generally *resources* in European natural resources law is, the more likely it is that issues, with regard to the exercise of the Union's competence, it's scope, as well as the possibility to take regulatory action, arise.

The term *natural resources* is explicitly mentioned in Art. 191(1) TFEU, which provides that the Union's environmental policy shall contribute to the pursuit of a *"prudent and rational utilisation of natural resources."* Against this backdrop, natural resources are perceived as elements of the environment such as soil, water, air, flora and fauna, and especially mineral and energy resources.[12] Accordingly, the term *resources* in EU law is rather broad in nature, which makes it difficult to put a stronger focus on certain key elements of this term. Particularly with regard to certain principles, such as the EU's waste management principles, as emphasised in various communications and documents of the Union, it proves difficult to manage these principles if they are interpreted in light of the rather broad definition of resources.

The term *raw materials*, on the other hand, is predominantly used in the framework of economic relations. *Raw materials* are classified as *primary commodities* which may be found in nature and are usually subject to further processing (cf. Art. 56(1) Havana Charta 1948).[13] Most certainly, the scope of the term *raw materials* has widened throughout the years, e.g. through the differentiation between primary and secondary commodities (the latter are extracted through recycling).[14] Overall, the term has a less political—especially environmental—connotation than *resources*. At the same time, it is more tangible. *Raw materials* are mainly concerned with the economic dimension of their exploitation, distribution, processing and

[9]With regard to public international law see Dederer (2012), p. 37 ff.; Weiß (2009), para. 2.

[10]See e.g. Sanden et al. (2012), p. 15 ff.

[11]Proelß (2012), p. 161 ff.

[12]Käller (2012), para. 12.

[13]Schorkopf (2008), p. 235; see also Weiß (2009), para. 2.

[14]Ibid.

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recycling. From this perspective, *supply security* constitutes an economic problem, which may be mitigated through the adoption of legal measures typically used in economic law. Yet, the EU Treaties do not allow for a one-sided pursuit of purely economic goals in the framework of the EU's natural resources law respectively policy. For instance, Article 11 TFEU provides that *"environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities."* Thus, while EU natural resources law is in its core a field of law shaped by economic law, it still needs to have due regard to requirements derived from the principle of environmental protection, as well as sustainability.

2.2 The Commodity Dependence of the EU in a Global Context

In many areas, the EU is dependent on the importation of commodities.[15] The pertinent analysis illustrates that this situation will not change any time soon. On the contrary, the dependence on certain commodities will increase for decades to come. This begs the question how a durable supply of these commodities to the EU may be guaranteed. If one considers the key European industries, such as automotive and mechanical engineering, it is apparent that prosperity in the EU—to the creation of which the Union is obliged pursuant to Articles 2 and 3 TEU—is dependent on the availability of commodities at reasonable prices.

The 2010 focus report on trade in natural resources by the World Trade Organisation (WTO) further illustrates the dependence of the EU on commodity imports from third states.[16] The WTO-Report primarily relates to *natural resources*, but the term is used essentially identical to the term raw materials.[17] In 2008 the EU (27) was on top of the list of leading commodity-importing nations with a share of 22.9% in imports of the worldwide exports of natural resources, followed by the US and Japan. It is expected that the BRIC-States, such as China (already on fourth place) and India (sixth place), will follow suit and outpace Japan and South Korea. Brazil is already in 12th place. Overall, it demonstrates that the dependence on *natural resources* of industrialised nations and states, which emulate the industrial and economic model of the western states, is the biggest. Thus, it is clear that especially these states will have to think carefully how they may attenuate such

[15]Compare with the analysis provided for by the European Commission, "Critical Raw Materials for the EU"—Report of the Ad-hoc Working Group on Defining Critical Raw Materials, 2010, p. 24; see also Terhechte (2012a), p. 83 ff.

[16]World Trade Organization, World Trade Report: Trade in Natural Resources, 2010.

[17]Cf. p. 46 of the World Trade Report 2010, which defines *natural resources* as *"stocks of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their raw state or after a minimal amount of processing."* The requirement *economically useful* underlines the parallelism to the term *commodity* used above.

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dependence and at the same time create structures to ensure the security of supplies. The findings of the report are still accurate today as may be derived from the 2016 Report on Key Statistics and Trends in International Trade of the United Nations Conference on Trade and Development (UNCTAD).[18] Among other things, it analyses the export dependence of countries on natural resources. While within the EU, most of its Member States only depend on the export of commodities of less than 10%, which might also explain its need for raw materials, countries such as Brasil (30–50%), Russia (more than 50%) and the US (20–30%) have a rather high dependence on the export of their raw materials products. These questions are all the more pressing if the abstract dependence on natural resources of the EU is assessed in the context of the specific commodities the EU is dependent on and the countries (or export nations) from which the EU obtains them on the global commodity markets. The Russian Federation and Saudi Arabia hold the largest share in exports. Among the 15 leading commodity-exporting countries are states such as the Russian Federation, Saudi Arabia, the United Arab Emirates, Iran, Kuwait, Venezuela, Algeria, Nigeria and Angola, which are confronted with various problems of European and international law and whose relation to the EU is in some instances quite tense. Therefore, the EU has employed economic embargos based on Article 215 TFEU against some of these states in the past (this applies e.g. to Russia and Iran).[19] Other states are on the verge of becoming a so-called *failed state* (e.g. Nigeria) or exhibit strongly corrupt and authoritarian structures. Due to the political instability of many commodity-exporting countries, the stability of supplies to the EU will continuously be challenged. Consequently, the question of resource security or the security of supply is becoming more and more a question of national governance structures, the role of the rule of law, democracy as well as respect for fundamental and human rights, the fight against corruption etc. These parameters may further diversify if the role of European natural resources law is interpreted even more extensively and the question of sustainability is taken into account.

2.3 Developments on the Global Commodity Market

The problem of the EU's dependence on raw materials will not change in light of the current and foreseeable developments on the global market for commodities, but instead will become more precarious as time goes on. Next to an increased shortage of supply through usage, the entry of further actors with rather different geostrategic interests constitutes one of the main factors that has to be kept track of. In the face of these developments, it is not surprising that restrictions of international trade in raw materials are part of the day-to-day business.[20] While the motives for such

[18]UNCTAD, Key Statistics and Trends in International Trade, 2016, p. 22.

[19]An in-depth overview is provided in Schneider and Terhechte (2014), para. 39 ff.

[20]See in detail Terhechte (2012a), p. 83 ff.

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restrictions may vary, the crucial question will always be how these restrictions may be justified and legally classified under the existing legal framework for international commodity markets. Last but not least, this also begs the question of whether, through the increasing juridification of the international arena, important steps have already been taken to better control and mitigate these conflicts through law (e.g. arbitral tribunals etc.). While recent developments in the WTO indicate such tendencies, it may likewise be observed that on the global level there is a growing desire to not *overly regulate* certain aspects of international trade in raw materials but rather employ informal mechanisms to control these markets.

If, in the context of the development of export prices for primary products, the focus is placed on selected items such as energy, metals and food, a steady and disproportionate increase in prices may be evidenced for the period from 2000 to 2010. This may be for different reasons: next to a rising demand of these products, financial speculations and natural disasters may also push prices. It is clear that the EU will have to continue to obtain raw materials on the global markets and hence, will have to compete with other industrialised nations as well as the BRIC-states (without the Russian Federation) in the surge for raw materials. Altogether, the situation will become more complex in nature rather than simpler, irrespective of whether this is due to new actors entering the market or the steady increase of commodity prices (by virtue of higher demands). Given this initial situation, the need for a concept of a European natural resources law becomes all the more apparent. The price increase for energy-related raw materials (oil, gas and coal) is rather worrying. The current situation in Ukraine is testament to the fact that resource security or security of the supply of resources is not just concerned with economic ratios but has become a question of policy-making and ultimately of war and peace. This emphasises that a European natural resources law should also be open to legal contents derived from the EU's external (trade) policy and related questions.

2.4 The Legal Structure of the Global Commodity Market

The conclusions drawn above raise the issue of whether European and international law are equipped to provide for adequate means of regulation and distribution to better control commodity trading. Bearing in mind the continued importance of the principle of sovereignty in international law—even though it should rather be understood as limited sovereignty—there are no established principles yet, which could potentially function as a global distribution constitution or statue. Obviously, such a constitution could theoretically lead to further limitations in sovereignty-based thinking.[21] Therefore, the legal structure of the global commodity market is derived from sectorial approaches as well as unilateral violations and their reparation instead of general principles of international law. Nonetheless, WTO law already

[21]Dederer (2012), p. 37 ff.

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provides for a rather comprehensive approach to this matter, especially since a number of raw material-related disputes have been brought before the Dispute Settlement Body (DSB).[22] Next to WTO law, there are quite a few important commodity agreements in place.[23] In some sectors, these agreements are still highly relevant and intend to create a kind of international raw materials authority. Whether such undertakings will be successful in the long-term is highly debatable. The issue of price inflation mentioned above shows that it is not just the result of an increased demand for raw materials but especially of systematic speculation on the commodity markets.

3 Requirements of European Union Law

Even after the entry into force of the Lisbon Treaty, the law of the European Union does not, in principle, know or comprise a separate policy field termed *raw materials*. Yet, the Treaties contain many provisions, which function as a legal basis for the creation of such a legal discipline. Therefore, as a first step, it is necessary to place the subject of *raw materials* in the context of EU law. Based on this, the legal foundations of a European natural resources law (Sect. 3.1), the question of whether it indeed constitutes an independent field of European law (Sect. 3.2), and its relation to other fields of Union law (Sect. 3.3) will be determined.

3.1 Legal Foundations

The EU has been founded—if it may be called that—as a *commodity community* and, in many regards, continues to be one far beyond its founding days. While the European Coal and Steal Community (ECSC) was primarily concerned with the strategic relevant fields of coal and steel,[24] the European Economic Community (EEC) placed more importance on the management of certain commodity and

[22] The most prominent example constitutes the decision of the WTO's Appellate Body in the dispute with China regarding rare soil, see WTO, Panel Report, China-Measures Related to the Exportation of Various Raw Materials (China—Raw Materials), WT/DS394R (USA), WT/DS395R (European Communities) and WT/DS398R (Mexico); see also Paschke (2013), p. 97 ff.; more recently the Appellate Body affirmed its conclusion, since China failed to remove some of the restrictions already criticized in the previous proceedings before the WTO with respect to certain forms of rare soil or earths, see WTO, Appellate Body Report, China—measures related to the exportation of rare earths, tungsten, and molybdenum (China—Rare Earths), WT/DS431/AB/R (USA), WT/DS432/AB/R (European Union), WT/DS433/AB/R (Japan); more general on WTO law and raw materials see Cossy (2012), p. 281 ff.; Terhechte (2010), p. 61 ff.

[23] Weiß (2009); Schorkopf (2008), p. 233 ff.

[24] See Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 UNTS 140, Art. 2.

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production markets in fundamental sectors—especially agriculture and fisheries. Eventually, also, the European Atomic Energy Community (EURATOM) constitutes in one way or another a type of commodity community, since the peaceful use of nuclear energy is central to its mandate. Thus, the legal foundations for the genesis of a genuine European natural resources law are manifold, even though an express reference to raw materials or natural resources law is nowhere to be found in the Treaties. At the same time, environmental perspectives shape EU law. Article 3(3) Treaty on the European Union (TEU), for instance, obligates the Union to

> work for the sustainable development of Europe based on balanced economic growth [. . .] and a high level of protection and improvement of the quality of the environment.

Correspondingly, the EU's environmental policy shall pursue a *"prudent and rational utilisation of natural resources"* (Art. 191(1) TFEU). The protection of the environment must in any case be respected in the context of an emerging European natural resources law, even if it were designed beyond any considerations of environmental law, since the protection of the environment constitutes a horizontal objective of the EU. This means that it has to be respected in any decision the EU wishes to take independent of whether it is directly part of the EU's environmental policy or belongs to a complete different policy field (Art. 11 TFEU). In light of the above, European natural resources law could simply be seen as a branch of European environmental law. Admittedly, such a narrow point of view is prone to critique and problems. While European environmental law is primarily concerned with the protection of the environment, European natural resources law is rather concerned with the distribution of resources including the external political implications such an approach might have.

3.2 Natural Resources Law as an Independent Field of Law?

At Union level, the creation and further development of an autonomous natural resources law seems logical. Looking at the history of European integration, it becomes apparent that the European Communities constituted largely *commodity communities*.[25] The ECSC was created for the sole purpose of jointly controlling the coal and steel industries of its Member States. The European Community (EC), on the other hand, may be labelled as an *agricultural community*, especially at the time of its foundation, since the creation of a common agricultural policy (CAP) played an important role—and still does today (cf. Art. 38 ff. TFEU). In the framework of the EU's environmental policy, sectors such as fishery, the regulation of the import of raw materials as part of the common commercial policy as well as more generally the EU's objective to achieve a *"prudent and rational utilisation of natural resources"* are relevant. Having a closer look at the European provisions shows

[25] Schorkopf (2011), para. 1.

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that Union law always aspires to establish a type of *internal control* over raw materials, their exploitation and production before any external matters are regulated. The global trade of commodities, the EU's dependence on raw materials as well as related legal issues are, however, not or only marginally reflected in the EU's existing regulatory framework.

Other legal cultures and legal orders are considerably more progressive. In US Law, *Natural Resources Law* has always been an autonomous legal discipline.[26] Besides, common law also does not know of a clear-cut separation or rather shielding of different legal fields (public law—civil law—criminal law). For this reason, *Natural Resources Law* constitutes a horizontal discipline, which is continuously becoming more diverse (e.g. in *Oil & Gas Law*).[27] Ultimately, it is located between environmental, economic and private law. The European approach, however, should go beyond the approach of US law due to its geostrategic position. While US law is built upon the tacit premises, that raw materials are (always) available, the scarcity of raw materials is of primary concern in European natural resources law. Therefore, it should be complemented with the relevant aspects of this problem in the field of the EU's common foreign policy, common commercial policy and competition policy. In other words, it should adopt a sort of *foreign distribution perspective*. Thus, EU natural resources law may also be understood as an evolution of the German mining law.[28]

3.3 The Momentum of the Treaty of Lisbon

Even though Member States are well aware of the rather critical position of the EU on the global commodity markets, the *raw materials problem* did not play an important role in the reform efforts of the Lisbon Treaty.[29] Nonetheless, it does not mean that the Lisbon Treaty did not have an impact upon the creation of a European natural resources law. On the contrary, the consolidation of a number of rather important policy fields facilitated the possibility to identify coherent structures and regulatory approaches upon which a European natural resources law can be built. This may be underlined by three concrete examples: the consolidation of the European energy policy by the Lisbon Treaty (Sect. 3.3.1),[30] the strengthening of the

[26]See Fischman (2007), p. 721 ff.; MacDonnell and Bates (2010); Blanco and Razzaque (2011); regarding the developments in US law see Terhechte (2012a), p. 91 f.

[27]See further Lowe (2009); Alramahi (2013).

[28]With regard to the role model function of German mining law in the context of legal research in the field of raw materials see e.g. Kühne (2001), p. 370 f.

[29]On the Lisbon Treaty see Nowak (2011); Terhechte (2008a), p. 143 ff.; Hatje and Kindt (2008), p. 1761 ff.; Streinz et al. (2010).

[30]See e.g. Kahl (2009), p. 601 ff.; Nettesheim (2010), p. 19 ff.

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foreign policy profile of the Union (Sect. 3.3.2)[31]—especially in the field of the common commercial policy (Sect. 3.3.3),[32]—and lastly, the (light) reforms introduced in European environmental law (Sect. 3.3.4).[33] It also allows for a determination of the centre of gravity of European natural resources law, which is located between internal market and environmental law—yet, with a predominantly international perspective. Obviously, there are many aspects, which require an in-depth analysis. Here, it may suffice to look at the connecting factors first, in order to get to the bottom of one of the many different directions of research on a natural resources law.

3.3.1 The Consolidation of the European Energy Policy

The Treaty of Lisbon has introduced an explicit legal basis for the EU's energy policy, namely Article 194 TFEU.[34] Pursuant to the objectives set out in Article 194 (1) TFEU, European energy law primarily aims at ensuring the functioning of the energy market, ensuring supply security of energy in the Union, the promotion of energy efficiency and energy saving and the development of new and renewable forms of energy as well as the promotion of the interconnection of energy networks.[35] Already, these objectives exhibit what may be termed *the ability to generalise*. According to the communication of the European Commission, these meta-strategic objectives—the distribution on the markets, the security of supply as well as efficiency—are not only applicable in the context of the European energy policy, but similarly in the EU's natural resources policy. Yet, the achievement of the thus defined objectives is limited by Article 194(2) TFEU, which leaves Member States a lot of room for regulation with respect to their own energy policies and objectives. These limitations are further qualified by Article 194(3) TFEU, which requires unanimity if measures of a fiscal nature are enacted. Bearing in mind the strategic importance of energy policy—be it on a national or supranational level—such restrictions are rather unsurprising. Yet, they may further complicate the creation of a coherent and effective Union policy on energy and negatively affect

[31] Eeckhout (2012), p. 57; Koutrakos (2013), p. 22 ff.; Thym (2008), p. 173 ff.; Fischer (2008), p. 56 ff.

[32] Bungenberg and Herrmann (2011); Tietje (2009), p. 1 ff.

[33] Epiney (2013), p. 42.

[34] See in more detail Prontera (2017); Talus (2013); Delvaux (2013); Braun J. F, EU Energy Policy under the Treaty of Lisbon Rules—Between a New Policy and Business as Usual, EPIN Working Paper No. 31, February 2011, https://www.ceps.eu/system/files/book/2011/02/EPIN%20WP31%20Braun%20on%20EU%20Energy%20Policy%20under%20Lisbon.pdf (last accessed 15 March 2018), p. 1 ff.; Baumann and Turek (2008), p. 157 ff.; Ehricke and Hackländer (2008), p. 579 ff.; Fischer (2009), p. 50 ff.; Hobe (2009), p. 219 ff.; on the European Constitution see Maichel (2005), p. 55 ff.

[35] Nettesheim (2011a), para. 7.

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the emerging EU natural resources law, given the particular importance of energetic raw materials for the Union.

3.3.2 The Strengthening of the Foreign Policy Profile of the Union

The realignment of the foreign policy profile of the EU in the context of its common foreign and security policy (CFSP; Art. 23 ff. TEU), as well as the (new) concept of EU natural resources law have to be recognised in the *foreign distribution perspective* of European natural resources law to the extent that such perspective is implied.[36] It will most likely become easier for the EU to act on the international plane as regulator of commodity trade and as actor on the international markets in general. Among other things, the legal personality of the EU has been explicitly recognized and unitized in Article 47 TEU.[37] From an institutional perspective, the Lisbon Treaty has brought about many significant changes, such as the coupling of the offices of the High Representative for Foreign Affairs and Security Policy and the vice-president of the European Commission.[38] Thus, a coherent appearance from an institutional point of view is guaranteed. Even beyond security-related aspects, the CFSP contains further *raw materials-related* dimensions, such as the possibility to use military interventions as a means to secure the supply of raw materials.[39] The binding nature of the objectives set out in Articles 21 and 23 TEU permit the establishment of a direct connection to the common commercial policy (cf. Arts. 205 in conjunction with 207(1) TFEU). In other words, the CFSP and the CCP are committed to achieve identical objectives, which makes a coherent external natural resources policy possible in the first place.[40] The aim of achieving identical objectives as well as the *institutional coupling* of the Commission and the CFSP facilitate the pursuit of a European raw materials diplomacy as well as the uniform treatment of raw materials-related subjects in the framework of the CFSP as well the CCP.

3.3.3 The Extension of the Competences in the Common Commercial Policy

The common commercial policy is an exclusive competence of the Union (Art. 3(e) TFEU). Pursuant to Article 207(1) TFEU it comprises:

> changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

[36]Luzarraga (2008), p. 231 ff.; Herrmann (2008), p. 114 ff.

[37]See Terhechte (2012b), para. 3 ff.

[38]Martenczuk (2008), p. 941 ff.

[39]See Schmahl (2012), p. 213 ff.

[40]On this see Engbrink (2014).

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In light of the rather wide range of subjects covered by the CCP, it is evident that the EU should also play a central role in the international trade with raw materials. Without a doubt, raw materials may be classified as goods.[41] The competences of the EU in the CCP have been extended so far, that Member States feared that only the EU is competent to represent their trade-related interests in the forum of the WTO.[42] Although such a scenario is still a far cry away from materialising, it is in any case self-evident that the EU would primarily conduct disputes over raw materials under the auspices of the WTO. In turn, existing strategic partnerships of the Member States relating to raw materials (e.g. Germany-Mongolia[43]) might no longer be in conformity with the CCP and, therefore, require careful (re-)consideration.

3.3.4 The Development of EU Environmental Law

Finally, the changes brought about by the Treaty of Lisbon in the framework of EU environmental law also need to be evaluated; though these should rather be seen as minor corrections than fully-fledged changes.[44] In the context of the horizontal objectives of the EU, environmental policy has lost its unique character (ex Art. 6 Treaty Establishing the European Community; TEC) and has been reduced to a normal policy field of Union law (see Art. 11 TFEU). Still, the horizontal objective of *the protection of the environment* is closely related to and refined by the objective of *sustainable development*.[45] While a concrete definition of sustainability in Union law still needs to be found, it is clear that it entails and unifies aspects such as solidarity amongst the generations as well as ecological compatibility. In principle, both aspects need to be respected with regard to exhaustible raw materials. While a European natural resources law should purely focus on the *import of energetic raw materials*, it is self-evident that environmental and sustainability aspects play a pivotal role in its creation and the dogmatic shaping of its objectives and principles. Albeit, the Lisbon Treaty most certainly did not have in mind the creation of a primate of environmental principles.

[41] Schorkopf (2011), para. 6 ff.

[42] Bungenberg (2009), p. 206.

[43] Cf. Agreement between the Government of the Federal Republic of Germany and the Government of Mongolia on cooperation in the fields of raw materials, industry and technology, 13 October 2011; see further Dahlmann and Mildner (2012); Dahlmann A and Mildner SA, Deutschlands Rohstoffpartnerschaften: Modell mit Zukunftscharakter?. Konrad-Adenauer-Stiftung Analysen und Argumente No. 137, November 2013, http://www.kas.de/wf/doc/kas_36104-544-1-30.pdf?131120143826 (last accessed 15.03.2018); Nowrot (2013); Wallenoeffer (2011), p. 132 ff.

[44] Vedder (2012), p. 11 ff.

[45] See Commission Communication on a thematic strategy on the sustainable use of natural resources, COM (2005) 670 final; Calliess (1998), p. 559 ff.; Žvelc (2012), p. 174 ff.; More generally on the term *sustainability* see Kahl (2008).

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4 Underlying Structures and Demarcation

A European natural resources law may take shape through demarcation and counter terms. It is plain to see that the normative foundations of this field of law are to be found in the provisions on the internal market as well as the European environmental policy, because the Treaties recognise neither a separate natural resources policy nor a clearly structured natural resources law (see Sect. 4.1 below). Closely related to this is the question of which role national law plays in the framework of a European natural resources law (Sect. 4.2) and which impulses may be derived and received from international law (Sect. 4.3).

4.1 Natural Resources Law in Between the Internal Market and Environmental Policy

European natural resources law is an inherently hybrid field of law, which has to fall back on objectives, instruments and configurations of other fields of Union law in order to determine and develop its own structure. Thereby, different priorities require further attention. In particular, written EU law contains a lot of cross connections and overlaps with European environmental law. The coupling of natural resources law with environmental law is in some respects owed to their historical evolution. Therefore, Article 191 TFEU consciously underlines this circumstance, even though it is more concerned with the efficient use of natural resources than the security of their supply.[46] Nonetheless, recent developments show that the naturally perceived connection between natural resources and environmental law results in a rather narrow perspective on the matter. This runs the risk that the problems relating to the (fair) distribution of raw materials on the global commodity markets and the dependence of the EU on these raw materials are not sufficiently scrutinised. Environmental law constitutes more a *law of consequences* than a *law of distribution*. Currently, and due to the dependence of the EU on imports of raw materials, it seems as though the question of distribution is at the forefront.

This means that European natural resources law transcends environmental law in many regards. Therefore, emphasis has to be put on European economic law, including its external dimensions. Thereby, it is out of question that raw materials constitute *goods* pursuant to Article 28 TFEU and are subject to the free movement of goods within the Union.[47] Similarly, EU customs law demonstrates many linkages with natural resources. Amongst others, it regulates the specific modalities of their importation. However, EU customs law does not follow a certain *logic specifically relating to raw materials*. The treatment of raw materials is determined based

[46] Nettesheim (2011b), para. 74 ff.

[47] Schorkopf (2011), para. 8.

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on different logics, which underlie the different areas of EU customs law.[48] In light of the dependence of the EU on certain raw materials, this thought should be subject to further elaboration. Is it possible to simplify the import of raw materials, if administrative customs procedures are made easier and more transparent and are conducted in a *raw materials-specific* manner? Though, it has to be born in mind that the classification and underlying structures of raw materials are based upon the Harmonised System (HS) of the World Customs Organization (WCO). A modification might easily create a special system of the Union, which might be incompatible with obligations and requirements derived from international law.

In the end, the CCP and European competition policy (as supplemented by the EU's energy policy) are at the centre of the discussions surrounding the security of supply of the Union. In so far as the mechanisms for the distribution of raw materials on the global commodities market are concerned, these legal fields contain the most overlaps with the fundamental problem. While cartel and competition law (Art. 101 ff. TFEU) is there to ensure the free and fair distribution of raw materials within the internal market and prospectively also on the global market,[49] the CCP aims to liberalise trade in the respective goods. Finally, the energy and environmental policies of the Union determine the overall framework and the objectives to be attained, which contributes to the sharpening of the EU's natural resources law and clarifies those areas in which Member States will continue to regulate themselves (such as in the case of fiscal taxes).

4.2 *The Objectives and Principles of a European Natural Resources Law*

To the extent that it is accepted that European natural resources law lies at the interface between environmental and internal market law, the next step concerns the question of which principles and objectives are to be attained with it. Keeping in mind the closeness of natural resources law to economic and environmental law, it is evident that one of the objectives constitutes the guarantee of the security of supply of raw materials for the Union.[50] Next to this, principles such as the sustainability of supplies as well as the efficiency in the use or exploitation of raw materials need to be respected.[51] It is needless to say that all objectives set out in Articles 3 and 21 TEU are similarly imperative for the EU's natural resources law. These objectives

[48]Ibid.

[49]See in detail with the example of the Organization of the Petroleum Exporting Countries (OPEC) Terhechte (2008c).

[50]Proedrou (2012); Frey (2013); see also the contributions in Peimani (2011); as well as Bahgat (2006), p. 961 ff.

[51]See Commission Communication on a thematic strategy on the sustainable use of natural resources, COM (2005) 670 final; Reimer and Tölle (2013), p. 591; see also Rehbinder (2012).

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may be implemented through the different Union policies. While the need to guarantee security of supply is anchored in the CCP and competition law, sustainability and efficiency questions are rather derived from environmental and energy law. The respective instruments to achieve the set policy goals may be inferred from the different policy fields, provided that the general objectives and principles of the Union are still adhered to.

4.2.1 Security of Supply

One of the policy objectives of the EU's energy policy is ensuring security of energy supply in the Union pursuant to Article 194(1)(b) TFEU. While paragraph (a) of Article 194(1) TFEU does pursue the functioning of the energy market, paragraph (b) goes a step further by requiring sovereign action if and where the market does not function.[52] Accordingly, this already provides a useful indication for the potential objective of ensuring security of raw materials supply. In the framework of Union law the security of supply or rather its establishment does constitute a sovereign task. This means that, in so far as the global and the Union raw materials market does not guarantee the security of supply of raw materials, Member States and the EU institutions are asked to create such security. The Union may base its actions on instruments derived from its energy policy, but it may go beyond that by using instruments which are derived from Article 21 TEU, the CCP (Art. 206 TFEU) or European competition law.

4.2.2 Sustainability

Sustainability is especially important in the context of the Union's environmental policy pursuant to Article 191 TFEU. Apart from that, Article 3(3) TEU also requires the EU to conduct its policies in light of the overall goal of sustainable development. Thereby, the term sustainable development has to be read in the context of the establishment of the internal market and does entail the attainment of economic as well as social goals (such as balanced economic growth and price stability, a highly competitive social market economy, full employment etc.). Therefore, *sustainability* embodies a positive goal of European integration, even though the determination of its exact content is not easy. It can be assumed, though, that it is predominantly concerned with having oversight over future developments or generations. For European natural resources law, this means that the global trade in commodities and the use or exploitation of commodities should not be guided by the short-term goal of maximising profits but instead by the long-term assessment of potential consequences. The principles of security of supply and sustainability go hand in hand, in the sense that both do not just apply to the present but indeed extend to the

[52] Hirsbrunner (2012), para. 16.

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future. Still, the consequences drawn from the principle of sustainability have not played a role in the current practice of EU natural resources law. The EU institutions have recognised this major deficit and are now making an effort to develop counterstrategies.[53] While not being a counterstrategy *per se*, but rather evidence of the temporal relevance of sustainability, the EU has committed itself to the Sustainable Development Goals (SDGs), adopted by the United Nations in 2015, which aim to end poverty, protect the planet and ensure prosperity.[54] Having said that, it will most certainly not become any easier for the EU to establish itself as a global player with long-term strategic objectives on the global commodity market.

4.2.3 Efficiency

Efficiency is of particular importance in the context of European natural resources law. Due to the fact that the term *raw materials* is divided into primary and secondary raw materials, the subject of *recycling* has been upgraded and therefore, requires the interpretation of Union law in light of efficiency. Initially, the term *efficiency* relates to the most optimal use of raw materials. To the extent that European natural resources law contributes to efficiency, its internal control has to be taken account of. This means that European natural resources law is not only concerned with the positioning and legal control of the global trade in raw materials, but also the legal structure of the exploitation and recycling of raw materials within the EU, which has to be organized in accordance with efficiency goals.

4.2.4 The General Objectives and Principles of Union Law

Next to the established objectives of security of supply, sustainability and efficiency in the trade and exploitation of raw materials, European natural resources law has to adapt to the fundamental values of the EU. This is the result of the interplay between Articles 3 and 21 TEU and the respective preambles to the European Treaties, the different strategic goals of the EU policies as well as the horizontal clauses contained in the Treaties (Art. 9 ff. TFEU). In light of the manifold problems which have been experienced in the global extraction of natural resources (examples: blood diamonds, child labour, social imbalances, corruption etc.), it seems as though these ties to the fundamental values of the Union are relevant in order to create a European natural resources law which fully respects European constitutional law.

[53]Commission Communication, on a roadmap to a Resource Efficient Europe, COM (2011) 571 final.

[54]See United Nations, General Assembly Resolution Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1; on the commitment of the EU to these goals see Commission Communication on next steps for a sustainable European future European action for sustainability, COM (2016) 739 final; Council Conclusions on a sustainable European future: The EU response to the 2030 Agenda for Sustainable Development, No. 10370/17, 20 June 2017.

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4.3 European Natural Resources Law and National Law

A fundamental question in the creation of a European natural resources law constitutes its demarcation from the law of the Member States. This question is all the more pressing since, in recent years, many national initiatives have been adopted, whose relation to EU law is unclear. In that respect, initiatives such as arranged *resources partnerships* between Member States and third states[55] or the proposal to create *strategic purchasing groups*,[56] which strengthen the demand position of companies, have to be mentioned. Already these examples are testimony to the fact that national violations in the field of natural resources may easily result in a fully-fledge competence conflict between EU and national law. Given the strategic importance of raw materials, not only for the European Union, but especially for the national economies of the Member States, such competence questions will only gain in importance. A clear demarcation of competences should therefore be one of the major priorities of European natural resources law. Interestingly enough, many competences, which are of utmost importance to the creation of a European natural resource law, already belong to the exclusive competence of the Union. This is the case with respect to the European customs policy, the CCP and partially the CAP.

4.4 European Natural Resources Law and International Law

In the wake of the internationalisation of European law, the relation of *new* policy fields to international law is of major significance.[57] Many questions, which arise with respect to the global trade in commodities, concern their import and export and are therefore questions of international law.[58] At the centre of international law is the idea that the sovereignty of states may be contained through natural resources. The United Nations Resolution on the Permanent Sovereignty over Natural Resources of 1962 should be understood to that effect.[59] Obviously, the resolution was adopted at a time when post-colonial debates were at the centre of attention and is therefore in many respects no longer authoritative today.[60] Under the auspices of the CFSP and the CCP the European natural resources law will have to attempt to prevent unilateral violations by the Member States in order to enable a coherent representation of the Union in the global competition for raw materials. Many doubts with respect to the

[55]For details see Nowrot (2013).

[56]Similar to the suggestions made by the former Germany minister for economic affairs Rainer Brüderle; see critically Kamann (2012), p. 101 ff.

[57]For an example in European administrative law see Terhechte (2011), para. 53 ff.

[58]See Weiß (2009); Herdegen (2014), p. 1 ff.; Schorkopf (2008), p. 233 ff.

[59]United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources," UN GA/Res. 1803 XVII (1962).

[60]Dederer (2012), S. 38 ff.

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legal status of the Union under international law have been solved and allow it to take full account of the intergovernmental and supranational structures of EU law in its external relations.

5 The Framework of the European Raw Materials Initiative

European natural resources law has to be viewed in light of the current political developments and the realities of the global commodity markets. The European Commission recognised this years ago. Since the EU already possesses many *legal competences in the field of raw materials*, it has called for the creation of an autonomous natural resources policy to stay competitive in the global surge for raw materials. Through the raw materials initiative, it has set up political and legal strategies, which shall support the secure and sustainable supply of raw materials to the EU from third states (see Sect. 5.1). Closely related is the question of which elements European raw materials governance needs to exhibit (see Sect. 5.2) and which challenges European law has to overcome in light of these developments (Sect. 5.3).

5.1 The European Raw Materials Initiative

Within the scope of the raw materials initiative, the European Commission sets various objectives.[61] An objective of strategic importance constitutes the protection of the access of the European Union to raw materials. Therefore, a fair and durable supply of raw materials from the global markets needs to be secured.[62] Apart from that, the Commission is also of the view that the supply of raw materials should be continued and optimized to guarantee a sustainable supply of the EU in the future.[63] Lastly, also resource efficiency is considered to be one of the pillars of the raw materials initiative, since a decrease in the demand for primary resources may be guaranteed through higher material recovery rates.[64] Thus, the topic of *recycling* is of primary importance.[65] While the creation of a European natural resources policy

[61]Commission Communication on the raw materials initiative—meeting our critical needs for growth and jobs in Europe, COM (2008) 699 final.

[62]Ibid, p. 6.

[63]Ibid, p. 9.

[64]Ibid, p. 10; see also Orbie (2007), p. 297 ff.

[65]See Commission Communication, Closing the loop—An EU action plan for the Circular Economy, COM (2015) 614 final.

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is not explicitly spelled out in the Commission's Europe 2020 strategy,[66] it is indicated and may be implied from its strong focus on sustainability.

Yet, the Commission is well aware of the fact that these objectives may not solely be achieved through clever law making. Instead, the raw materials initiative counts on a goal-orientated natural resources policy, which entails a European raw materials diplomacy next to the exhaustion of the available legal tools.[67] It is thus the Commission, which for example envisages strategic partnerships and political dialogue to ensure the access to raw materials, especially critical raw materials (CRMs).[68] Through transparency efforts, the raw materials industries of developing countries shall be supported. This applies to the investment climate in the respective countries and the sustainable growing and harvesting of natural resources. In the context of raw materials diplomacy, more attention has to be paid to *knowledge sharing* with other international organisations (World Bank, Extractive Industries Transparency Initiative, International Monetary Fund, African Development Bank). More recent examples of the Commission's activities in this field constitute the European Innovation Partnership (EIP) on raw materials,[69] the Steel Action Plan[70] as well as the EU's Strategy for Forest-based Industries.[71]

A closer look at the European raw materials initiative indicates that European law has to play its role in the achievement of these objectives. Thus, it mentions the CCP and competition law, which indicates that the EU will not only attempt to achieve its objectives through diplomacy or through its development policy, but also through legal means. Admittedly, such an approach would require the elimination of

[66]Commission Communication Europe 2020—A strategy for smart, sustainable and inclusive growth, COM (2010) 2020.

[67]Commission Communication on the raw materials initiative—meeting our critical needs for growth and jobs in Europe, COM (2008) 699 final, p. 6; With respect to the need of such approaches see Goldthau (2010), p. 25 ff.; see more recently on this Commission Staff Working Document, Report on Critical Raw Materials and the Circular Economy, SWD (2018) 36 final.

[68]The Commission regularly publishes a list of critical raw materials in order to reflect production needs as well as market and technological developments based upon its own methodology. See third list of CRMs Commission Communication on the 2017 list of Critical Raw Materials for the EU, COM (2017) 490 final; European Commission, Methodology for establishing the EU list of EU critical raw materials—Guidelines, 2017.

[69]The EIP is a platform for stakeholders (Member States, NGOs, industry, academia etc.) to receive high-level guidance on innovative approaches to tackle the challenges related to raw materials. See European Commission, The European Innovation Partnership (EIP) on Raw Materials, https://ec.europa.eu/growth/tools-databases/eip-raw-materials/ (last updated 30 April 2018); European Commission, Strategic Implementation Plan (SIP) of the EIP, https://ec.europa.eu/growth/tools-databases/eip-raw-materials/en/content/strategic-implementation-plan-sip-0#Read%20EIP%20docs (last updated 30 April 2018).

[70]Commission Communication on an action plan for a competitive and sustainable steel industry in Europe, COM (2013) 407 final.

[71]Commission Staff Working Document, A blueprint for the EU forest-based industries, SWD (2013) 343 final; Commission Communication, A New EU Forest Strategy: For Forests And The Forest-Based Sector, COM (2013) 659 final.

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discrepancies (e.g. privileged export subsidies) which still exist, so that the law constitutes a credible source for the different fields of action.[72]

5.2 A European Raw Materials Governance

The formulation of a European raw materials initiative and the related policy-agenda manifest that a truly European natural resources law should not only be looked at from an internal market perspective, but that it forms part of an overall strategy. Hence, the development of a European raw materials governance is the obvious conclusion.[73] Therefore, it will be important that new instruments and a coherent application of the law create a legal structure upon which a successful governance approach may be pursued. A step in the right direction would be the inclusion of the creation of a European natural resources law in the Treaties, e.g. through the inclusion of an objective to this effect, which is combined with a provision for the autonomous regulation of the European raw materials or natural resources policy. Only if the law remains transparent and provides for clear connecting factors, may it be given its place within the raw materials governance.[74]

5.3 The Challenges for European Law

Both the European raw materials initiative and the question regarding the contour of European raw materials governance depict that European law will have to contextualise the traditional fields of Union law from a horizontal perspective. This does not only entail the viewing of the law from a perspective of needs, but also the role model effect of US law for the creation of new legal fields.[75] Up until now, European environmental law and its objectives and instruments have followed the periodical developments in the USA.[76] Similar tendencies may be observed in European economic law, especially competition law.[77] These are, however, just rather general milestones. A European natural resources law has to be based upon

[72]Terhechte (2012a); Küblböck K, The EU Raw Materials Initiative—Scope and Critical Assessment, Austrian Research Foundation for International Development, Briefing Paper No. 8, September 2013, https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Briefingpaper/BP8_eu_raw_materials.pdf (last accessed 30 April 2018).

[73]Ibid.

[74]The EU's attempts in the context of *conflict minerals* might serve as an example see further on good governance with respect to conflict minerals Nowrot (2017).

[75]See also Terhechte (2011), para. 11.

[76]Ibid.

[77]With regard to the impact of US law on European competition law see Terhechte (2004), S. 192 ff.; Terhechte (2008b).

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national natural resources law to the extent that there are already national developments in that direction. Ergo a comparative analysis of the different national legal orders is important to determine common structures and the distribution of competences. This is also true for the relation between EU law and international law, which may further develop with regard to the global trade in commodities under the auspices of the WTO and through the conclusion of raw materials agreements.

6 Conclusion

Currently, European natural resources law is developing as a new area of reference in Union law. Thereby, it consciously bypasses traditional categories and may only unfold through an interdisciplinary approach, which combines the perspectives of the rule of law, politics, the economy and sustainability. Such an approach also allows for a reasonable use of the term governance in legal studies, since natural resources law is mainly concerned with the complex phenomenon of its logistics, which often go beyond what may be simply regulated through law. The distribution of raw materials in global competition often alternates between state control and the free market.[78]

In light of the importance of raw materials for the European economy, the example of the US natural resources law may provide it with various development steps which need to be taken. Yet, the question of competence between the EU and its Member States most certainly goes beyond the scope of regulation of US law. There are compelling reasons to believe that the question of competence will become even more important in the near future. Through the introduction of a competence catalogue, the Lisbon Treaty has laid the foundations for the codification of a European natural resources law.

For the moment, it seems as though European natural resources law is a project driven by academia. Nonetheless, developments in the Member States, the structures of EU law as well as legal practice speak a different language, namely that EU primary law should provide for a clear structure for the regulation of natural resources. Considering that European natural resources law constitutes in its most fundamental structures (import and export of raw materials, customs treatment etc.) an exclusive Union competence, it seems rather likely that it will be integrated into the TFEU as an autonomous policy field next to environmental and energy policy. Moreover, it should be integrated as a general objective in Article 3 TEU, to enshrine the secure and sustainable supply of raw materials to the EU in the teleology of the Union. This would overcome not only the uncertainties relating to the objectives contained in Article 191 TFEU, but also the necessity of the Union to take action based on the flexibility clause (Art. 352 TFEU). Apart from that, the many horizontal connections European natural resources law has with the other internal market

[78] Schorkopf (2008), p. 235.

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policies also contributed to the perception that the creation of a separate legal field is the logical consequence. Thus, it is the Member States as *masters of the treaties* who are charged with the creation of the necessary legal structures to enable the Union to stay competitive in the global surge for raw materials.

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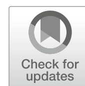
The EU Legal Framework on Trade in Timber and Timber Products: Recent Developments in the Implementation and Enforcement of the Timber Regulation



Concetta Maria Pontecorvo

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1 Introduction

Illegal logging (that is, the harvesting of timber in contravention of the laws and regulations of the country of harvest[1]) and the associated deforestation are a global problem with significant negative economic, environmental and social impacts.[2] In economic terms illegal logging results in lost revenues and other foregone benefits.

The author is indebted to Valentina Grado (*Professore Associato* of International Law, University of Naples 'L'Orientale') for her insightful comments on earlier drafts. This chapter is dedicated to the memory of Professor Ulrich Beyerlin.

[1]In a broader sense, illegal logging covers a wide group of illegal activities, such as harvesting, transport, processing and trade of timber, and evasion of fees and taxes related to these activities.

[2]Brack D (2007) Illegal Logging. Chatham House Briefing Paper, London, pp. 1–2.

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In environmental terms it is associated with climate change, desertification, soil degradation, loss of biodiversity and forests. In social terms illegal logging can be related to conflicts over land and resources, the disempowerment of local and indigenous communities, corruption and armed conflicts. Moreover, illegal logging activities also undermine the efforts of responsible operators, by making available cheaper but illegal timber and timber products in the market place.[3]

Forests are often perceived as 'private goods'. But the global benefits they provide (i.e. sinks for carbon, habitat for biota, weather-regulating services) show that they can also be properly regarded as 'public goods'. Such public good character has stimulated a significant 'global interest' in the sustainability of forest management practice employed in forested countries. The international community has therefore pursued several strategies to address illegal logging and deforestation[4]; but to date these have often proved of only limited success. Whatever the merits of these various strategies, throughout the period of their application in the 1990s and 2000s illegal logging and rapid deforestation persisted.[5] At the current rate of loss, it has been estimated that the tropical rainforest could disappear within 100 years.[6] In response to continued forest loss, around the turn of the millennium interest grew in the possibility of (indirectly) addressing deforestation by focusing on *trade* in illegal timber.[7] It is under such a perspective that the European Union has been active for over a decade and has taken a leading role in creating a market for *legal* timber.

The European Commission's policy to fight illegal logging and associated trade was defined back in 2003, with the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan.[8] The latter has led in its turn to two key pieces of legislation creating, respectively, *voluntary* and *compulsory* regimes for ensuring the legality of the timber imported into the EU internal market. The first of these legislative instruments, the FLEGT Regulation,[9] was adopted in 2005. It allows for the *control*

[3]See extensively Pontecorvo (2011), pp. 17–39. Compare also Nellermann C (2012) Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World's Tropical Forests. UNEP and INTERPOL.

[4]See extensively Pontecorvo (2011), pp. 97–136; Pontecorvo (2013); Brack and Hayman (2001).

[5]See *inter alia* Food and Agriculture Organization (FAO) of the United Nations (2010) Global Forest Resources Assessment 2010. Rome, pp. 15–17.

[6]See for example National Geographic, 'Deforestation', available at https://www.nationalgeographic.com/environment/global-warming/deforestation/ (last accessed 6 August 2017).

[7]See Brown et al. (2008), pp. 5–6. Restricting imports to allow only timber that complies with relevant laws of the country where it was harvested should, in principle, eliminate illegal harvests driven by foreign demand and reduce the contribution of illegal logging to deforestation. Obviously, deforestation could continue even if all logging were done legally; but eradicating illegality from the sector would, at least, enhance the ability of governments to require sustainable practices.

[8]Commission Communication of 21 May 2003 on 'Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan' COM (2003) 251 final (hereinafter FLEGT Action Plan (2003)).

[9]Council Regulation (EC) 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber in the European Community, OJ L 347/1 (2005) (hereinafter FLEGT Regulation (2005)), adopted under article 133 TEC.

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of the entry of timber to the EU from countries concluding bilateral Voluntary Partnership Agreements (VPAs) with the EU and it also enacts the so called 'FLEGT licensing scheme'. The second legislative instrument, the EU Timber Regulation (EUTR),[10] was proposed by the Commission in October 2008 and adopted by the EU Parliament and by the Council in October 2010. It is aimed at *preventing* the introduction of illegally logged timber on the EU internal market, by (a) prohibiting the placing for the first time on such a market of timber and timber products harvested in violation of the legislation of the country of logging and (b) requiring (*inter alia*) operators to conduct 'due diligence' to ensure that the timber products which they trade in have a legal origin. The Timber Regulation has become, as a matter of fact, the leading pillar in the execution of the EU FLEGT Action Plan.

The EUTR entered into application on 3 March 2013, becoming applicable on all EU Member States. The Regulation is a potentially powerful tool to help the EU to exclude illegal timber from its market and to contribute to its broader objectives of environmental protection and sustainable development.[11] Taking into account that the EU counts for about 40% of global forest product imports,[12] it clearly has a substantial potential to influence the *global* timber trade through domestic legislation.[13]

In 2015 the EU Commission completed a review of the effectiveness of the EUTR during its first 2 years of implementation and it also published a detailed report showing both progress and the remaining challenges in this respect. Furthermore, interesting development have been recently occurring also in the (national) enforcement of the Regulation, with the first court cases on EUTR implementation being examined by national courts in several EU Member countries. These court decisions show that 4 years after its entry into application the EUTR's regulatory system is actually starting to take effect in practice.

[10]Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products *on* the market, OJ L 295/23 (2010) (hereinafter Timber Regulation (2010)), adopted under article 192.1 TFEU.

[11]On this point see also Buckrell and Hoare (2011).

[12]According to FAO data, in 2008, 2009 and 2010 the EU accounted for, respectively, the 45%, 43% and 41% of global forest product imports (FAO, Forestry Trade Flows, FAOSTAT database, available at http://faostat.fao.org/site/628/default.aspx). However, only 20% of timber imports come from tropical countries, and this portion is declining rapidly because of the economic downturn in Europe and increasing barriers to trade in tropical timber products (see UN Economic Commission for Europe and FAO (2013) Forest Products Annual Market Review 2012–2013).

[13]However, it should be admitted that the EUTR's value to the struggle against illegal logging actually depends on its ability to withstand a (at the moment only hypothetical) challenge in the World Trade Organization. To date, WTO Panels have never confronted a regulation quite like the EUTR. Unlike previously litigated regulations, the EUTR (as we will see) seeks to limit trade on the basis of *foreign* definitions of legality rather than imposing *its own* substantive requirements. On the issue of the EUTR Regulation's consistency with WTO law (which is behind the scope of this study) see Geraets and Natens (2014), pp. 439–454; Fishman and Obidzinski (2014), pp. 265–274.

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In the light of the above, an analysis of the EU Timber Regulation seems to be very timely. This chapter is aimed particularly at examining the original content, scope and recent normative evolution of the EUTR's regulatory system (par. 2), as well as at investigating both its very effectiveness in the light of its actual implementation by EU member countries (par. 3) and its recent enforcement by EU member countries' national courts (par. 4). Such an analysis is also useful (*rectius*, legally prodromal) to discuss on: *first*, the position of the Timber Regulation within the whole EU anti-illegal logging policy framework; *second*, the role that EUTR (as a *unilateral* EU trade regulatory measure) could possibly provide as a 'model' for other EU legislative regimes equally trying to ensure that EU trade with other countries may contribute to both sustainable development and the protection of human rights; *third*, the significance of some (legally relevant) 'signals' emerging from its recent national implementation case-law; and *finally*, the coherence of the EU regime on forest governance—as a whole—with the EU *values* (i.e. sustainable development and human rights) lastly recognised by the Lisbon Treaty as general inspiring principles of its external action in general and of its external trade policy in particular.

2 The EU Regime on Timber (and Timber Products) Trade

At the international level attention first turned to the problem of illegal logging in the late 1990s, but early initiatives involved only limited binding commitments.[14] One of the more significant early efforts was the World Bank's Forest Law Enforcement and Governance (FLEG) Programme.[15] Although FLEG conferences resulted in action plans for curbing illegal logging, these were in fact mere 'political statements of intent', which did not included implementing mechanisms.[16] However, these efforts did reflect the growing international focus on illegal logging.

[14]For example, the G8 Group released an Action Programme on Forests in 1998, which simply obliged G8 members to reflect on their internal measures for combating illegal logging, make efforts to improve transparency in the international trade and work to realize international pledges to combat timber-related corruption: see G8 (1998) Report on the Implementation of the G8 Action Programme on Forests: Annex B—G8 Action Programme on Forests. In 2002 the United States announced a President's Initiative against Illegal Logging, having the goal of assisting developing countries to address illegal logging within their borders but not including any firm commitments: see White House, President's Initiative against Illegal Logging, 14 February 2002. On other initiatives see Brown et al. (2008), pp. 6–8.

[15]Launched in 2001, FLEG was comprised of regional processes in which governments joined together in making policy commitments to strengthen forest governance.

[16]See Brown et al. (2008), p. 8.

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2.1 The First Pillar: The FLEGT Action Plan (2003) and the FLEGT Regulation (2005)

Building on this trend, on 21 May 2003 the EU Commission launched the Action Plan on Forest Law Enforcement, Governance and Trade, then endorsed by the European Council of Ministers on November of the same year.[17] Much like the earlier FLEG Programme, the Action Plan promised support for governance reform; but it also sought to create a *market incentive* to curb illegal logging, using a licensing mechanism (based on bilateral partnership agreements with timber-exporting countries) to *promote* trade in *legal* timber. More specifically, the FLEGT Action Plan sets out the EU policy to fight illegal logging and associated trade through a series of measures available to this extent to the EU and its Member States. The Plan covers, in particular, both supply and demand side measures to address illegal logging and it targets several key regions and countries (Central Africa, Russia, Tropical South America and Southeast Asia), which together contain nearly 60% of the world's forest and supply a large proportion of internationally traded timber. A key element of the FLEGT Action Plan is the *voluntary licensing scheme* it establishes with a view to ensuring that only legally harvested timber is imported into the EU from countries agreeing to take part in the scheme.[18]

The internal EU legal framework for this scheme (and for putting the whole FLEGT Action Plan into effect) is the so-called FLEGT Regulation, adopted in December 2005 and followed in 2008 by an implementing regulation.[19] The FLEGT Regulation allows indeed for the control of the entry of timber to the EU market from countries concluding with the EU bilateral FLEGT Voluntary Partnership Agreements (VPAs).[20] Once agreed, the VPAs will include commitments and action from both parties to halt trade in illegal timber, notably with a 'licensing scheme'[21] to verify the legality of timber exported to the EU.[22] The VPAs also promote better

[17]As stated in the Commission's communication establishing it, the *ratio* of the Action Plan is to address "the growing problem of illegal logging and the related trade" which is named as one of the Commission's priorities.

[18]Brack (2005), pp. 33–37.

[19]Commission Regulation (EC) 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ L 277/23 (2008).

[20]FLEGT Regulation, art. 4.1.

[21]Exporting countries commit themselves in particular to establish national licensing schemes that verify the legality of their shipments of timber and timber products to the EU.

[22]The concept underlying such a scheme is that by granting 'FLEGT licenses' *solely* for timber whose legality could be verified, illegal timber from partner countries can be excluded from the European market. In one respect the VPAs system is similar to another trade scheme in which the EU is heavily involved: the Kimberly Process Certification Scheme (KPCS), seeking to eliminate trade in 'conflict diamonds'. In a similar way that VPAs use FLEGT licenses to certify timber (as legal) and restrict trade between VPAs countries and the EU to *certified* timber, the KPCS certifies rough diamonds (as 'conflict free') and restricts participants to trading *only* in such

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enforcement of forest law and promote an inclusive approach involving civil society and the private sector.[23] Once a VPAs is in place, all covered timber and timber products exported from a partner country into the EU[24] have to comply with the licensing system. The FLEGT Regulation formed the basis for a series of prolonged negotiations of bilateral voluntary partnership agreements with major timber producing countries.[25] These VPAs contain detailed rules on the regulation of logging, the enforcement of legislation, the licensing of timber by the exporting VPA country as well as on the monitoring and verification of the functioning in practice of the system.[26] If it can be ensured in this manner that the law is applied on paper and enforced in practice throughout its territory, the exporting country can issue 'FLEGT licenses' for shipment of timber destined to the EU market.[27] The EU countries, in their turn, in principle will accept the FLEGT licensed timber as proof of legality. A functioning VPA relationship opens thus the EU doors for timber from exporting countries.[28]

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diamonds. However, it should be also recognized that there are at least two important differences between the VPAs system and the KPCS. First, whereas the former regulates the timber trade *only* between the EU and countries with which it has negotiated agreements, the KPCS prohibits participants from trading rough diamonds with *any* country that does not meet the scheme's minimum requirements. Second, while these minimum requirements are *all* set forth by the KPCS instrument, the FLEGT Regulation, on the other hand, provides *a basic outline* for VPAs (requiring, for example, the establishment of a timber legality standard and certain institutional structures) while most details are negotiated on an individual basis with partner countries.

[23] After the adoption of the FLEGT Regulation the European Commission has been given a mandate from the Council of Ministers of the EU to conduct negotiations in view of concluding such FLEGT VPAs. While the EU Commission is leading these negotiations, EU member States play a key role in supporting the negotiations and implementation.

[24] Annex II of the FLEGT Regulation lists a number of categories of timber products that are to be covered by all VPAs and their corresponding Harmonized System (HS) Tariff Classification headings. Individual VPAs may cover *additional* timber and timber products.

[25] The first VPA to be signed was with the Ghana, followed by the Republic of Congo, Cameroon, Indonesia, the Central African Republic and Liberia. Negotiations are ongoing with Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam.

[26] The loggers and other traders need to meet all applicable laws and regulations of the VPA country that regulate origin and production process, subsequent processing, transport and trade activities. The licensing authorities are to verify that the timber has been legally produced in accordance with the applicable legislation.

[27] Indonesia was the first country in the world start issuing 'FLEGT Licenses' on the 15 November 2016.

[28] To date the VPA with Indonesia is, however, the only one that started operating (at the end of 2016).

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2.2 The Second Pillar: The EU Timber Regulation (2010)

Few years after the adoption of the FLEGT Regulation, as it became clear that not all major timber-producing countries were *actually* willing to conclude Voluntary Partnership Agreements,[29] existing EU instruments showed to be not very effective in tackling illegal logging and trade. Therefore, the adoption of stronger measures to this extent emerged as an urgent need. It was under these circumstances that on 20 October 2010 the Regulation 995/2010 of the European Parliament and of the Council (commonly named as 'Timber Regulation' and referred to by its acronym EUTR) was adopted.[30]

2.2.1 The Regulatory Framework of the Timber Regulation

The Timber Regulation is as a matter of fact the second pillar the EU's regulatory framework on forest governance and, also, its most recent and significant addiction. It aims, in general, to address the economic, social and environmental impacts of illegal logging. For this reason, it lays down the obligations of operators who place timber and timber products for the first time on the EU internal market.[31]

In particular, the Regulation counters the trade in illegally harvested timber and timber products through three key obligations. First of all, it prohibits the introduction of such timber to the EU market. The prohibition is complemented in turn by two sets of further obligations, imposed respectively on Member States and on certain non-State actors that carry out timber-related economic activity in Europe, that is 'operators' and 'traders'. An 'operator' is defined in the Regulation's Article 2 (c) as any natural or legal person who *places* timber or products thereof (for the first time) on the European market.[32] The same provision also defines 'placing on the market' as the supply by any means, irrespective of the selling technique used, of timber and timber products *for the first time* on the market. An 'operator' is to be distinguished from a 'trader', who is any natural or legal person selling or buying timber or timber products previously placed on the European market by operators.[33]

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[29] As it was relatively easy to keep on putting illegally harvested timber on the EU market, the conclusion of VPAs was *not* an urgent matter for these countries.

[30] Compare the Regulation's Preamble, explicitly recognising that the scale and urgency of illegal logging and related trade require "a *complement to* and *strengthening of* the system of VPAs" (italics added).

[31] See Timber Regulation, art. 2 (a)–(b). Timber products covered by the Regulation are listed in the Annex, with the corresponding HS Tariff Classification headings. For a comment, see Levashova (2011) and among Italian scholars Di Stefano (2013).

[32] Timber Regulation, art. 2 (c).

[33] Timber Regulation, art. 2 (d). A Guidance Document, issued by the Commission in 2013, contains more detailed definitions of terms used in the Timber Regulation: see EU Commission, Guidance Document for the EU Timber Regulation September 2013 (hereinafter Commission's Guidance Document (2013) available at http://ec.europa.eu/environment/forests/pdf/final%

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As to the prohibition established by the Regulation, it is the very core element of its legislative framework. Article 4.1 prohibits the placing on the EU internal market of 'illegally harvested' timber and products derived from such a timber. Hence, the Regulation has in its essence significant extraterritorial effects, addressing issues and concerns that took place *outside* the EU territory.[34] Whether the timber is 'legal' depends indeed on whether it was harvested in accordance with the applicable legislation *in the country of harvest*[35] (even if it is not an EU country[36]). Specifically, the prohibition under Article 4.1 applies (only) to timber and timber products enumerated on a long list included into the Regulation's Annex.[37] Moreover, according to Article 3 EUTR, two categories of timber are *automatically* considered being legally harvested for the purpose of the Regulation. The first category includes the timber embedded in timber products covered by VPAs (i.e. products originating in a VPA partner country and listed in the VPA). If these products comply with the requirements set out by the FLEGT Regulation and corresponding implementing provisions, they shall be considered to have been legally harvested. The second category consists of timber that is from species listed in Annex (A, B or C) to EU Regulation n. 338/97 (so called Wildlife Regulation[38]) and which comply with that Regulation and corresponding implementing provisions. Such timber shall also be considered to have been legally harvested.[39]

20Guidance%20document.pdf (last accessed 9 September 2017). The Guidance Document was updated by the Commission in February 2016: see Commission notice of 12 February 2016, C (2016) 755 final (hereinafter Commission's Guidance Document (2016)) available at http://ec.europa.eu/environment/forests/pdf/eutr_guidance.zip (last accessed 9 September 2017).

[34]See Ankersmit et al. (2012), p. 59. It is important to consider that the Regulation does not prohibit importing illegally harvested timber as such; therefore, it is not, strictly speaking, a border measure. However, it is worth nothing that, contrary to the text of the Timber Regulation, the above-mentioned Commission's Guidance Document uses the term 'importing' instead of 'placing on the market'.

[35]See Timber Regulation, art. 2 (e)–(h). In this respect, according to art. 2 (g) the elements of the (national) legislation to be taken into account include: (1) the rights to harvest timber within legally gazetted boundaries, (2) due payments and duties, (3) environmental and forest legislation, (4) legal rights of third parties concerning land use and land tenure, and (5) trade and custom formalities.

[36]This may pose questions as to the WTO-consistency of the Regulation. On this point see Geraets and Natens (2014).

[37]As mentioned above, instead of imposing a blanket prohibition on *all* timber or timber products, the EUTR adopt a *selective* approach, specifying in its Annex which types of timber and timber products are subject to the regulation's prohibition.

[38]Council Regulation (EC) 338/1997 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61/1 (1997).

[39]The exemption of this category of timber from the EUTR's application has to be seen within the broader context of wildlife protection and taking into account that the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is uniformly implemented by means of the Wildlife Regulation in all EU Member countries. While CITES encompasses three appendices (each of which contains a list of species and regulates their trade), the Wildlife Regulation contains four categories of species (listed in Annexes A–D). For species listed in its Annex A or B (corresponding to all CITES Appendix I and II species, some Appendix III species and some non-CITES species) the conditions for trade established by the Wildlife Regulation are *more restrictive* than those set forth by CITES.

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To realise the prohibition established by its Article 4.1 the Regulation imposes, as mentioned above, two distinct sets of obligations on: (a) EU Member States, and (b) the actors ('operators' and 'traders') involved in timber-related economic activity in Europe. As far as Member States are concerned, they are required by the Regulation first of all to designate at least one 'Competent authority' to implement its provisions.[40] These authorities are charged in particular with checking whether operators fulfil their (due diligence) obligations[41]; they are however also required to cooperate with each other, with the EU Commission and with governmental authorities in non-EU countries[42] to ensure compliance with the Regulation.[43] Furthermore, Member States are required to report to the Commission on the application of the EUTR every 2 years, so to enable reviews of its effectiveness in order to make legislative adjustment if deemed necessary.[44] Finally, they are also entitled to adopt (their own) penalties in cases of violations of the Regulation's provisions.

With respect to the obligations applying to non-State economic actors, as mentioned they are fashioned for two (well-distinct) groups: i.e. 'operators' and 'traders'. The latter are required—merely—to ensure that the timber and timber products they deal in can be traced along the supply chain. Therefore, 'traders' must (simply) retain records, going back at least 5 years, of (1) the operators and (where applicable) other traders that have supplied their inventories, and (2) of any traders whom they have supplied timber or timber products to.[45] 'Operators', on their side, face more demanding requirements under Article 4 of the Regulation. The companies who place timber products on the EU market for the first time must indeed exercise 'due diligence',[46] to ensure that they do not place illegally harvested timber or timber products on such a market.[47] The Regulation provides that it is in fact up to the companies placing timber on the internal marketplace to verify that the timber from non-VPAs countries is 'legal'; and it establishes, in this respect, what is described as

[40]See Timber Regulation, art. 7, and art. 10–12.

[41]In this respect, art. 10.5 of the Timber Regulation specifies that where following the checks shortcomings have been detected by the competent authorities, they "may issue a notice of remedial actions to be taken by the operator". The same provision also provides that "depending on the nature of the shortcomings detected, Member States may take immediate measures, including *inter alia*: a) seizure of timber and timber products; b) prohibition of marketing of timber and timber products".

[42]Through information sharing and other means.

[43]Timber Regulation, art. 12.

[44]Timber Regulation, art. 20. A third (however only optional) obligation is established for Member countries by art. 13, under which these States *may* choose to facilitate non-State actor compliance with the Regulation by sharing information on illegal logging and by offering legal and other assistance.

[45]Timber Regulation, art. 5. The same provision states that any competent authority may request these information to traders and they must be prepared to provide it.

[46]Timber Regulation art. 4.2.

[47]The fact that due diligence is only required to 'operators' represents a concession by the Regulation's drafters, who recognised that the due diligence provisions might prove quite burdensome to 'traders', and wished to avoid imposing on them unnecessary administrative costs (see in this respect article 4.2 of EUTR, at recital 15).

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a ‘due diligence system’ that these ‘operators’ must implement. Regardless of whether the ‘operator’ itself or a monitoring organisation[48] develops the due diligence system,[49] such a system must comprise three (key) elements: (1) information gathering, (2) risk assessment and (3) risk mitigation. As to the first element of the due diligence system, the Regulation demands in particular that the company collects verifiable data on the origin of the timber. To this respect, relevant information that ‘operators’ must collect and retain includes the supply chain tracking data,[50] but extends to the country and location of harvest, the quantity and description of each product (as well as the names of the tree species represented) and the documents or other information which demonstrate that all timber in the operator’s inventory has complied with the relevant laws of the country in which it was harvested.[51] As to the second component of the due diligence system—the risk assessment procedure—the Regulation establishes that, depending on the circumstances existing in the country, ‘operators’ must analyse and evaluate the *likelihood* that the timber they introduce to the market was harvested illegally. In this respect, the Regulation provides a list of specific risk assessment criteria to consider; but the list in non-exhaustive and additional criteria may be considered if they help to

[48]The Regulation at its art. 8 provides for ‘Monitoring organisations’ (to be) recognised by the European Commission. These organisations, which are private entities, are established to provide EU ‘operators’ with operational due diligence systems. ‘Operators’ can thus develop their own system of due diligence or use one developed by a monitoring organisation.

[49]The fact that in art. 4.3 the Regulation gives ‘operators’ the choice to either maintain and apply their own due diligence system, or to use a due diligence system maintained by a recognized ‘monitoring organisation’ is (perhaps) another effort to lower the compliance costs. This flexibility mechanism is especially important, because the Regulation does not specify which laws an ‘operator’ must be familiar with to ensure that timber and timber products were harvested legally; it simply lists—as mentioned—the legislative areas that contain the particular laws that must be adhered to. Moreover, monitoring organisations may be better positioned than ‘operators’ to follow legal developments in multiple timber-exporting countries. The EUTR also provides in art. 8 the criteria to be followed in granting recognition to monitoring organisations, sets out the requirements they must follow and establishes a protocol by which competent authorities must audit monitoring organisations and (where necessary) withdraw recognition. Further details on the process of recognizing and withdrawing recognition from monitoring organisations are provided by the clarifying Commission Regulation 363/2012 of 23 February 2012, OJ L115/12 (2012) (hereinafter Commission Regulation 363/2012); while further direction as to the frequency and nature of the audits that must be conducted of monitoring organisations (and as to the detailed rules concerning the due diligence system) are provided by a second clarifying regulation, Commission Regulation 607/2012 of 6 July 2012, OJ L177/16 (2012) (hereinafter Commission Regulation 607/2012) on which see also below.

[50]That is, name and address of the supplier to the operator and name and address of the trader to whom the timber and timber products have been supplied.

[51]Timber Regulation, art. 6.1 (a). Similar to ‘traders’, ‘operators’ are under the obligation to keep relevant information for 5 years and available to competent authorities upon request.

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determine the likelihood of illegal harvest.[52] The final element of the due diligence system is the risk mitigation procedure. Any risk identified at the risk assessment stage that is not 'negligible'[53] must be mitigated by 'operators' by using measures that are 'adequate' and 'proportionate'.[54] These measures could include requiring additional information, third-party verification, or other actions.

'Operators' and 'traders' that violate their obligations under the Regulation are subject to penalties. These may include fines, seizure of inventory and suspension of the authorization to trade.[55] The Regulation further specifies that penalties shall be 'effective, proportionate and dissuasive'[56]; the Regulation devolves however authority to Member States to define their own penalties.[57] Member States have indeed wide discretion under the Regulation to choose both the form and the severity of the penalties they will apply within their territory. Moreover, Member States must each decide whether violations require a particular level of intent to warrant penalty. It is obvious that penalty design may, in fact, strongly affect the level of risk that operators are likely to embrace in choosing to deal in timber with a spectre of illegality.[58] The establishment of severe penalties by EU Member States would, in turn, also provide a strong incentive for timber-exporting countries to negotiate VPAs, to eliminate the uncertainty that operators face in deciding whether to deal in their timber.

As to the scope of the Timber Regulation, it should be noted that if on the one hand its provisions covers *all* companies that put timber on the EU market for the first time (no matter whether they are transnational companies, small companies or medium sized enterprises), on the other hand the scope of the Regulation is limited however in other ways. Indeed, *only certain* types of timber and timber products are

[52]See Timber Regulation, art. 6.1 (b). The first group of criteria that must be considered is the *information* collected at the information-gathering stage, which is specific to the timber or timber product at issue. The second category of criteria concerns the *context* where the harvesting took place. With respect to this context, the specific criteria for the risk assessment enumerated in art. 6.1 (b) are: (a) assurance of compliance with applicable legislation (which may include certification or other third-party-verified schemes covering compliance with such legislation); (b) prevalence of illegal harvesting of specific tree species; (c) prevalence of illegal harvesting (or practices) in the country of harvest (and/or in the sub-national region where the timber was harvested), including consideration of prevalence of armed conflicts; (d) presence of sanctions on timber trade by the UN Security Council or the Council of the EU; and (e) complexity of the supply chain of the particular timber or timber product at issue.

[53]'Negligible' is not defined in the Timber Regulation; but (as we will see) it does so the above mentioned Guidance Document for the EUTR released by the Commission in September 2013 and revised in February 2016.

[54]See Timber Regulation, art. 6.1 (c).

[55]See Timber Regulation, art. 19.

[56]See Timber Regulation, art. 19.2.

[57]See Timber Regulation, art. 19.

[58]The establishment by Member States of severe penalties, eventually combined with the possibility that operators could be found liable for mere negligent violations (or—even—on the basis of strict liability) could significantly chilly timber imports from sources with even a hint of illegality.

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covered by its provisions,[59] while (too) many products made out of timber (i.e. printed papers—such as books, magazines and newspapers, clothes hangers, seats, tools and musical instruments) are exempted from the Regulation.[60]

As a whole, the regulatory framework established by the Timber Regulation is clearly devoted to increase the proportion of legally harvested timber on the international market by incentivising timber-exporting countries to stop illegality with a view to facilitating access to the (lucrative) European market. The crucial instrument employed by the Timber Regulation to achieve this target (the prohibition on the introduction for the first time of illegal timber to the EU internal market) is an important rule lending itself to easy application. However, was it to stand alone, the prohibition would admittedly only be of very limited utility. Unless indeed a court in a timber-exporting country was to declare timber in a particular shipment (or timber originating from a particular concession) to be illegal, it would be quite difficult for European courts deciding disputes arising under the Timber Regulation to determine the legal status of such timber. The latter courts are indeed not only quite unfamiliar with foreign laws (those of the exporting countries) and probably (often) also unable to read many of such laws in their original language, but also geographically far from the relevant evidence. Moreover, as courts in developing countries (from which most of internationally traded wood is harvested) only rarely weigh in on the legality of harvested timber, European courts will not be able (either) to simply apply foreign legal rulings. Hence, the EUTR's provision on due diligence (which specify in what manner illegality has to be determined) is—as a matter of fact—very crucial to actualising the import prohibition. By enforcing the Regulation's due diligence provision, instead of relying on (quite unlikely) rulings by courts in timber-exporting countries, the EU member States' courts can make use (and in fact, as we will see, they are recently *actually* starting making use) of other evidence in deciding whether the timber entering the EU market has been legally harvested.

2.2.2 The Commission's Delegated and Implementing Regulations (2012)

The Timber Regulation also provides for the adoption of delegated and implementing measures by the Commission aiming, respectively, at supplementing the Regulation's content and at ensuring its uniform implementation by Member countries. Consequently, following consultation with relevant stakeholders, in February and July 2012 the Commission adopted two acts of secondary legislation

[59]Such as, solid wood products, flooring, plywood, pulp and paper. As already mentioned, the timber products covered by the Regulation are listed in its Annex, using the EU Customs code nomenclature.

[60]On this point see, for instance, Drew C., Barker T. (2016) Analysis of potential European Union Timber Regulation scope changes. WWF Report, illustrating that 67% (by value, and 20% by volume) of products that contain or may contain wood do *not* fall under the scope of the Regulation.

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on the Regulation 995/2010, to complete its regulatory framework on *specific* issues on which implementation guidance seemed to be necessary and useful.[61]

Particularly, on 23 February 2012, in the light of the power recognised under EUTR's Articles 6, 8 and 14 and in accordance with article 290 of the Treaty on the Functioning of the European Union (TFEU),[62] the Commission adopted the delegated regulation 363/2012 establishing the (procedural) rules for its recognition and withdrawal of recognition of national monitoring organisations. Moreover, in line with EUTR's Preamble (recital 29) and in order to ensure uniform condition for implementation, on 6 July of the same year the Commission also adopted its implementing regulation n. 607/2012. It includes detailed rules both on the frequency and nature of the checks by Member States' competent authorities on the monitoring organisations (to verify that they comply with the requirement of the Regulation) and on the risk assessment and risk mitigation measures which are part of the 'due diligence system'.[63]

With respect to the latter measures (the most relevant to our analysis), Article 2 of the Commission's implementing Regulation specifies that operators have to apply the due diligence system "to each specific type of timber or timber product supplied by a particular supplier within a period not exceeding 12 months, provided that the tree species, the country or countries of harvest or, where applicable, the sub-national region(s) and concession(s) of harvest remain unchanged". Article 3 clarifies, in its turn, in which cases further information needs to be provided by operators on (a) the full scientific name of tree species, (b) the sub-national region where the timber was harvested and (c) the concession of harvest. Finally, Article 4 specifies the criteria that certification or other third-party verified schemes referred to in the second paragraph of Article 6.1 (b) and in Article 6.1 (c) have to meet to be taken into account in the risk assessment and risk mitigation procedures.

2.2.3 The Commission's Guidance Document for the Timber Regulation (2013, 2016)

During the consultation process for elaborating the Commission's secondary acts on Timber Regulation and after holding numerous bilateral meeting (with stakeholders,

[61]Under such a perspective, in March and April 2011 two stakeholder meetings were held in particular to discuss different options and best practices for the recognition of monitoring organisations. The two meetings were also an occasion to exchange views on best options for risk assessment and risk mitigation procedures.

[62]See EUTR's Preamble, at recital 28 ("The Commission should be empowered to adopt delegated acts in accordance with article 290 of the TFEU concerning the procedures for the recognition and withdrawal of recognition of monitoring organisations, concerning further relevant risk assessment criteria that may be necessary *to supplement* those already provided for in this Regulation and concerning the list of timber and timber products to which the Regulation applies", italics added).

[63]On the implementing powers conferred in this respect on the Commission see the EUTR's Preamble, at recital 29.

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experts from Member States and members of the FLEGT Committee[64]), a common view emerged that not all issues regarding the EU Timber Regulation could *adequately* be addressed in the secondary legislation. This for a number of reasons, such as (*inter alia*): (a) the limits in scope of the Commission's implementing powers, (b) the risk to restrict operators unnecessarily, by setting up a (too) rigid due diligence system, (c) the risk to obviate their responsibility to adequately exercise due diligence. Hence, it was agreed that a *guidance document* was necessary to better address the outstanding issues related to the EUTR and its non-legislative acts that had emerged as being in need for further clarification.

Consequently, the Guidance Document for the EU Timber Regulation[65] was published by the Commission in September 2013, after being discussed and elaborated with the assistance of the FLEGT Committee.

The document contains a series of guidelines, clarifications and definitions on ten issues included in as many chapters.[66] They are preceded by an introduction (illustrating the possible role and legal relevance of these guidelines for States and operators) and are followed by two Annexes.[67] The list of issues covered by the Guidance document is considered by the Commission as 'open' to be eventually revised (that is, to be further expanded and supplemented) in the light of the experience made in the application of the Timber Regulation.[68]

[64]The FLEGT Committee includes officials of EU countries and works with the Commission (article 11 FLEGT Regulation (2005)).

[65]Commission's Guidance Document (2013).

[66]These are: (1) the definition of 'placing on the market' (relevant to art. 2 EUTR); (2) the definition of 'negligible risk' (art. 6 (c) EUTR); (3) the clarification of 'complexity in the supply chain' (art. 6 (b) EUTR); (4) the clarification of the documents showing timber's compliance with applicable legislation of the exporting country (art. 2 (f)–(h) and art. 6.1 (a) EUTR); (5) the clarification of the product scope of packaging materials (as referred to in art. 2 (a) EUTR and in its Annex), and of the "waste" and "recovered" products (as referred to in recital 11 and in art. 12 EUTR); (6) the role of third parties verified schemes in the process of risk assessment and risk mitigation (recital 9 of Preamble and art. 6 EUTR, art. 4 Commission's implementation regulation n. 607/2012); (7) the regular evaluation of the due diligence system (art. 4 EUTR); (8) the concept of 'composite products' (art. 6.1 EUTR), (9) the concept of 'forest sector' (art. 2 EUTR); (10) the treatment of CITES and FLEGT-licensed timber (art. 3 EUTR).

[67]The two Annexes contain, respectively, an illustration of how the interpretation of 'placing on the market' provided by the guidelines would apply in practice and examples of information on 'composite products' that operators are required to collect under the due diligence system.

[68]Consequently, in February 2016 (3 years after the EUTR's entry into application on 3 March 2013) the Commission published, as mentioned, a *revised* version of the Guidance Document for the EU Timber Regulation: see Commission's Guidance Document (2016).

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As for the Guidance's chapters most relevant to our analysis, the document for instance defines important terms of the Timber Regulation (e.g. 'placing on the market'[69] and 'negligible risk'[70]), gives examples of cases in which a company would be considered an 'operator'[71] and clarifies around the documents showing timber's compliance with applicable legislation,[72] 'complexity

[69]According to the definition provided for in this respect by chapter 4 of the Guidance, timber is considered to be 'placed on the market' if it is (*simultaneously*) supplied: (a) "on the internal market" (which means that "timber must be physically present in the EU, either harvested there or imported and cleared by customs for free circulation. . ."), (b) "for the first time" (given that timber products already placed on the EU market or derived from timber products already placed on such a market are not covered by the Regulation) and (c) "in the course of a commercial activity" (that is, "for the purpose of processing or for distribution to commercial or non-commercial consumers or for use in the business of the operator itself"). Consequently, according to the Guidance 'placing on the market' should be understood as occurring "when an operator first makes timber or timber products available on the EU market for distribution or for use in the course of his commercial activity". Moreover, to enable clear, logical and consistent identification of the 'operators' involved in the 'placing' on the EU internal market, the same chapter of the Guidance first recognises that "it is necessary to define 'operators' according to how their timber is made available on such market" (which vary depending on whether the timber is harvested inside or outside the EU); then provides for three different definitions in this respect (1) for timber harvested within the EU, (2) for timber harvested outside the EU, and (3) for timber or timber products imported to the EU. Finally, it underlines that *all* 'operators' (whether EU or *non-EU based*) must comply with the prohibition on placing illegally harvested timber on the market and the obligation to exercise due diligence. Furthermore, in Annex I a series of examples outlining how the interpretation of 'placing on the market' works in practice is included.

[70]Chapter 6 defines it as a finding that "no cause for concern can be discerned" following a full risk assessment. Admittedly, in spite of the non-legally binding nature of the Commission's guidelines, courts might well find this definition very useful when interpreting the EUTR in the course of a litigation. More in general, on the *actual* relevance of the Commission's guidelines in recent case-law on EUTR see *amplius* below.

[71]See for details Annex I to the Guidance Document (2013).

[72]Chapter 4 specifies that such documents must be collected "for the purpose of the risk assessment and should not be viewed as a self-standing requirement". It also provides that "the obligation to obtain documents (or other information) should be interpreted broadly", as different regulatory regimes exist in different countries and not all of them require issuing specific documentation. Therefore, according to the Guidance such obligation "should be read as including: ì) official documents issued by competent authorities, ii) documents demonstrating contractual obligations, iii) documents showing company policies, iv) codes of conducts; v) certificates issued by third party verified schemes, etc. . . .".

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of the supply chain',[73] 'the role of third parties verified schemes'[74] and 'composite products'.[75]

With respect to the scope and content of the revision made to the Guidance Document in 2016 by the Commission in the light of the experience made in the first 3 years of application of the Regulation, the updated version presents some interesting amendments and additions when compared to the previous 2013 edition. In the revised text the main modified elements include, in particular: (1) the clarification of the requirements for documents showing timber's compliance with applicable legislation,[76] and (2) the treatment of CITES-unlisted timber products made of CITES-listed species[77]; while the additions concern: (3) a new chapter on the treatment of Agents,[78] and (4) a new chapter on the treatment of Monitoring organisations.[79]

As to particularly the issue of the requirements for the documents showing timber's compliance with the country of harvest's legislation, the updated Commission's Guidance provides for important details. It establishes first of all that, in order to be able to exercise due diligence in accordance with Article 6.1 of EUTR operators "*must be able to evaluate* the *context and reliability* of the documents they collect [as well as] *to show they understand the links between the different information* in the documents". It also requires operators to assess these documents "*as a whole*, with traceability *throughout the supply chain*" as well as to check "whether the different documents *are in line with each other*. . ., what exactly each document proves. . .and *the reliability and validity of each document* (meaning the *likelihood of it being falsified or issued unlawfully*). . .". Second, operators are (very significantly) required "to *take into account the risk of corruption* specifically in relation to the forestry sector. . ."; and, in cases where such a risk is not negligible, according to the guidelines "*even official documents* issued by authorities *cannot be considered reliable*" by operators. Furthermore, recognising that various sources provide generally available information about the level of corruption in a country

[73]In EUTR art. 6 complexity of supply chain is explicitly listed among the risk assessment criteria and it is therefore relevant to the risk assessment and risk mitigation part of the due diligence exercise. The Guidance Document in its chapter 3 stresses that the timber tracking back to its place of harvest may be more difficult if the supply chain is complex and that "failure to establish necessary information at any point in the supply chain can increase the possibility of illegally harvested timber entering the chain". However, it also underlines that "it is not the length of the supply chain that makes it difficult to identify the information requires by art. 6.1 (a)-(b) EUTR" and that the complexity of the supply chain in fact "increases with the number of processors and middlemen between the place of harvest and the operator. . . or when more than one species or timber sources are used in the product". The Guidance also includes a list of questions, which operators might use in order to assess the complexity of the supply chain.

[74]See for details Guidance Document (2013) at Chapter 6.

[75]See Guidance Document (2013) at chapter 8.

[76]Cf. the revised Guidance document (2016), at chapter 4.

[77]Cf. the revised Guidance document (2016), at chapter 10 b.

[78]Revised Guidance document (2016), chapter 11.

[79]Revised Guidance document (2016), chapter 12.

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(e.g. the Transparency International's Corruption Perception Index—CPI) and that "a low CPI shows that *further verification may be required* (meaning that special care is necessary when checking the documents as there might be a reason to doubt their credibility). . .", the Guidance Document stresses that "*the higher the risk* of corruption in a specific case, *the more it is necessary* to get *additional evidence* to *mitigate the risk* of illegal timber entering the EU market. . .".[80] Admittedly, these elucidations significantly specify and 'operationalize' (the actual content of) the 'risk-based' due diligence obligation that EUTR establishes for the operators of the timber sector interested in placing for the first time their timber on the EU internal market.

Relevant clarification on EUTR's provisions is also included in the (new) chapter on the treatment of agents, when defining the possible role of these actors and their position with respect to the obligations established by the Regulation's Articles 2, 6 and 10. It is clarified indeed that in the timber industry the 'agent'[81] may act in the behalf of the supplier or of the buyer and may be also based in a different country of that of the importers; but that in all cases the contractual partners are the supplier and the buyers, while the agent is (only) an intermediary. Moreover, taking into account that some agents may be unable or unwilling to share certain detail of their contacts or supply chain with the importer (often for commercial reasons), it is recognised that in such cases importers may in fact be "*prevented from accessing the basic information necessary to exercise due diligence*" as required for operators under the EUTR. In relation to the operators' due diligence requirements under EUTR, the Guidance document clarifies however that these requirements "*remain the same* regardless of whether or not they use an agent"; and that if an agent who provides timber to an operator "is unable or unwilling to provide sufficient information for that operator to exercise satisfactory due diligence, *the operator should alter its supply lines to be able to do so*". Furthermore, as to the responsibility of national competent authorities under EUTR to carry out checks on operators, the document stresses that such responsibility "is *not affected* by the involvement of an agent. . . [and] the operator should still be checked by the competent authority of the country in which the timber is placed on the market". Finally, in case an operator is supplied with timber via an agent based in a different country, the Commission's document clarifies that the competent authorities responsible on the operator "*may wish to cooperate* with the competent authority, or other authorities, in the country where the agent is based, or elsewhere".[82]

As regards finally the implementation of EUTR's Article 8, Article 8 of the Commission Regulation 363/2012 and Article 6 of the Commission Regulation

[80]See the revised Guidance document (2016), at chapter 4, p. 7 (italics added). Examples of such additional evidence provided for by the Guidance document include: third-party-verified schemes, independent or self-conducted audits or timber-tracking technologies (e.g., with genetic markers or with stable isotopes).

[81]Defined as a representative working in the name of, and for the account of, a principal to a contract.

[82]See the revised Guidance document (2016), at chapter 11, pp. 13–14 (italics added).

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607/2012, the (new) chapter 12 of the Commission's Guidance provides details on the use by operators of 'due diligence certificates' in third countries.[83] The Guidance significantly stresses indeed that "receiving such a certificate *does not relieve* an operator to exercise due diligence as described under art. 6 EUTR" and that if a monitoring organisation (or its non-EU sister company) issues such a certificate, it "*should specify that this does not relieve* the operator of the due diligence obligation". The above-mentioned certificate may however "be used as a part of a due diligence system, similar to other documents that show compliance (e.g. legality assurance system certificates)..." and, in this case, the operator "*should establish precisely what the certificate certifies* and the frequency of checks as part of their due diligence". Moreover, according to the Guidance Document the operator "*should also have a contact point at the company that performs the check*" in case of further questions or need to verify the certificates' validity.[84]

Coming to the legal nature of the Commission's Guidance Document, it is worth mentioning that the same document's Introduction explicitly indicates that the Guidance does *not* have in itself a legally-binding effect, its (sole) purpose being rather "to provide explanations on certain aspects of the EU Timber Regulation and the two Commission non-legislative acts". It also specifies that the document "does not replace, add or amend anything to the provisions of the Regulation n. 995/2010, the Commission Regulations n. 363/2012 and 607/2012, which constitute the legal basis to be applied".[85] With respect to the possible role of the Guidance the Introduction, after having clarified that the issues it addresses "should not be considered is isolation as they, rather, must be used in conjunction with the legislation [they refers to]", adds that the whole document can certainly "be a useful reference material for everyone who will have to comply with the EUTR", as it provides important elucidations on parts of the legislative text that are or may be difficult to understand. On the other hand, the document may also "serve *to guide national competent authorities and enforcement bodies in the process of implementation and enforcement* of this legislative package".[86] A point, the latter, on which we will come back when discussing on recent (first) national case-law on Timber Regulation.

In the light of the above it is self-evident that, notwithstanding the non-legally binding nature of the Commission's Guidance Document, the clarifications and details it provides for (to the provisions of EUTR's legislative framework in general

[83]The issue arises from the fact that some operators have been presented with certificates issued by non-EU sister companies of monitoring organisations and in some cases the operators (seem to) have been informed that these certificates relieve them from the obligation to exercise due diligence; but, the legislation does not explicitly address the treatment of such certificates.

[84]See the revised Guidance document (2016), at chapter 12, pp. 14–15 (italics added).

[85]Commission's Guidance Document (2013), p. 1.

[86]Commission's Guidance Document (2013), italics added. See also footnote 1 at p. 1 of the revised Guidance document (2016) (stating however that "Nothing in this guidance document either replaces or substitutes direct reference to the instruments described", and reiterating also that "only the European Court of Justice can make final judgments on the Regulation's interpretation").

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and to those of its due diligence system in particular) significantly specify, elucidate and 'operationalize' the content of such framework. Consequently, in the light of the Commission's guidelines the EUTR's regulatory framework seems to be *better* (and possibly *more uniformly*) implementable and enforceable for—respectively—operators and national competent authorities on the one hand and for national courts on the other. This is particularly relevant, as far as our analysis is concerned, with respect to the elucidation and detailing of the obligations of the due diligence system, which are crucial as mentioned for the very effectiveness of the whole EUTR's legislative framework.

2.3 The Role of the Timber Regulation Within the EU's and International Anti-Illegal Logging Legislative Framework and Its Possible Relevance for Other Regulatory Regimes

Before discussing in next paragraph recent EUTR implementation practice as emerging from its periodical evaluation made by the EU Commission in the light of Member countries' biennial reports, some brief remarks seem to be useful on the role and importance of the Timber Regulation as a regulatory instrument. This both within the EU's and international anti-illegal logging legislative system and—also—as a model for other regimes equally trying to promote sustainable development and human rights protection in the EU trade with other countries.

The entry into application of the Timber Regulation in March 2013 completes, as a matter of fact, the EU's anti-illegal logging regulatory framework inaugurated by the FLEGT Action Plan and further developed by the FLEGT Regulation with the establishment of its first (*voluntary*) pillar, based—as mentioned—on the *bilateral* VPAs mechanism. The introduction in such a framework, by the Timber Regulation, of a second (*binding*) pillar based on a *unilateral* trade prohibition measure and—above all—on a *mandatory* due diligence system for the operators placing timber and timber products on the EU internal market, gives rise indeed to the most comprehensive legislative efforts to combat illegal logging in the world.

The very relevance of the Timber Regulation within the *EU* legislative framework on forest governance in general and in that against illegal logging in particular emerges, first, from the fact that it reduces the proportion of illegally harvested timber on the EU market (by incentivizing third States to stop illegality with a view to access the EU market). In this way, EUTR contributes to *overcome* the limits of effectiveness shown by the EU anti-illegal logging regime when *only* based on its VPAs pillar.[87] Secondly, by prohibiting the placing on the EU market for the first time of illegal timber and imposing on non-State economic actors of the timber

[87]Given, as mentioned, the very limited interest of timber-exporting countries in entering into these agreements in absence of an *explicit* prohibition to place 'illegal timber' on the EU internal market.

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sector a due diligence obligation the EUTR *also* creates an *actual* (though indirect) *positive incentive* for timber-exporting countries *to negotiate* partnership agreements with the EU in order to benefit (via the emission of the related 'FLEGT license') of an automatic and 'preferential' access to the EU internal market for their timber. In such a way, the EUTR not only *complete* the EU anti-illegal logging regulatory system but it also contributes to the *further development* of such system, by creating the factual condition for a strong interest of third (timber-exporting) countries in the negotiation of VPAs with the EU.

Moreover, the EUTR's normative package also adds a significant value to the *international* framework on forest governance. This in terms of contribution it provides both to the efforts to halt deforestation and forest degradation, conserve biodiversity, reduce desertification and address climate change; and—also—to those aimed at reducing the economic and social impacts of illegal logging. At the same time, taking into account that—as already mentioned—the EU is a highly significant market for trade in timber worldwide, its legislative framework aimed at preventing the introduction of 'illegally harvested' timber to the EU internal market has a (potentially) significant relevance also in terms of *actual* reduction of the *global* scale of such a trade at the international level.

A further point of relevance of the Timber Regulation within the international regulatory regime on forest governance arises from the fact that, as explicitly recognized by the Regulation's Preamble, in several timber-exporting countries (above all those where national legislation against illegal logging is either not adequate or not effectively implemented and enforced) trade in illegally harvested timber can also indirectly fuel armed conflicts.[88] Under such a perspective the EUTR provides the EU with the opportunity to play a role not only in the promotion of economic development in the countries exporting timber to the EU internal market but also—indirectly—in the political stability and *security* of these countries.

As to the peculiar relevance of EUTR as a *regulatory* instrument, it relates to the fact that the Timber Regulation is the first EU legislative instrument establishing due diligence *obligations* on the operators of a specific economic sector. In other words, EUTR is the first *regulatory* instrument that finally fosters a 'good governance model' of harvesting in third (timber exporting) countries by making *binding* a due diligence system on the timber trading companies interested in placing their (timber) products on the EU internal market. Moreover, it is worth noting that the

[88] Above all in certain highly 'fragile States' (that is, politically unstable and economically backward African countries—such as the Democratic Republic of Congo or the Central African Republic), where illegal timber harvesting and the related trade are often a significant financing instrument for armed groups (with or without the involvement of transnational organized crime networks and, possibly, of terrorist groups): see Lawson S (2014) Illegal Logging in the Democratic Republic of the Congo. Chatham House Energy, Environment and Resources Paper PP 2014/03, Global Witness (2017) The EU's Responsibility to Act on Conflict Timber. Briefing, June 2017 (available at https://www.globalwitness.org/en/reports/eus-responsibility-act-conflict-timber-new-framework-action/ last accessed 3 September 2017), and Global Witness (2015) Blood Timber. Report, July 2015 (available at: www.globalwitness.org/en-gb/campaigns/forests/bloodtimber/ last accessed 3 September 2017).

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EUTR's (*sectorial*) regulatory framework of forest governance is based on (and turns around) a *risk-based* mandatory system of due diligence, which—as a matter of fact—anticipates and preludes to the adoption at the *global* level (by the United Nations through their 2011 Guiding Principles on business and human rights[89]) of an *international* standard of due diligence equally based on the *risk* of human rights adverse impacts (though non-legally binding).

Last (but not least), as a sectorial *binding* instrument aimed at promoting environmentally sustainable development, economic growth, social benefits, political stability and therefore security in the countries exporting timber to the (highly lucrative) EU internal market, the Timber Regulation can certainly be—even—a significant and useful 'regulatory model' for other EU regimes that are equally aimed at promoting these values *through trade*. The most significant parallel that may be drawn in this respect is that with the case of conflict minerals, a sector where—as it is well known—the EU is at present actively engaged in the development and implementation of a legislative framework aiming (via a due diligence obligation on importers) both at preventing fueling conflicts and serious human rights violations and at promoting sustainable economic development in mineral-rich countries.[90] Further relevant fields where the EUTR legislative regime could play an 'exemplary role' may be those of biofuels[91] and palm oil.[92]

[89]United Nations (2011), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises and included in UNSRSG Final report to the Human Rights Council—A/HRC/17/31). The UN Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

[90]Regulation (EU) 821/2017 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130/1 (2017). See for a comment Grado (2019); van der Velde S (2017) The End of Conflict Minerals on the EU Market? ASSER Policy Brief No 3 2017-01, Asser Institute, March 2017.

[91]Directive (EU) 1513/2015 of the European Parliament and of the Council of 9 September 2015 amending Directive (EC) 70/1998 relating to the quality of petrol and diesel fuels and amending Directive (EC) 28/2009 on the promotion of the use of energy from renewable sources, OJ L 239/1 (2015).

[92]Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information of food information to consumers, OJ L 304/18 (2011).

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3 EUTR Implementing Practice 5 Years After Its Entry into Application: Where Do We Are?

The EU Timber Regulation entered into application on 3 March 2013. Since then it is legally binding on all EU Member States, which are consequently responsible for laying down effective, proportionate and dissuasive penalties and for enforcing its provisions.[93]

In accordance with EUTR's Article 20, in 2015 the Commission completed its (first) review of the Regulation's effectiveness during its first 2 years of implementation.[94] The outcomes of such review were included in an *ad hoc* report released on 18 February 2016.[95]

The Commission's report finds that, generally speaking, the EU is on track to achieve its objectives to combat illegal logging and associated trade in illegal timber, though (some specific) challenges remain. Among the positive trends actually visible the Commission namely mentions the fact that EU operators are gradually taking steps to ensure the legality of their suppliers and that there is more awareness of the problem of illegal logging amongst EU consumers.[96] Moreover, the Regulation seems to have also encouraged producer countries to develop systems assessing compliance with the requirements of the legislation. However, according to the report more effort is needed from both Member States and the private sector, to ensure effective and efficient application of the Regulation.[97]

More specifically, it emerges from the report that since 2014 there has been significant progress in the implementation of Timber Regulation across the EU. While indeed in July 2014 there were 18 non-compliant Member States, in June 2015 the number was reduced to 4 (Greece, Hungary, Romania and Spain). Moreover, against these persistent non-compliant Member States in 2015 the

[93]A table with information (as at 22 February 2017) on the state of implementation of the Regulation by EU Member countries (showing whether and how they comply with their obligations) can be found at http://ec.europa.eu/environment/forests/pdf/EUTR_implementation_scoreboard_22_02_17.pdf last accessed 15 September 2017. The table does not include, however, an assessment whether the penalties applicable to infringements of the provisions of the Regulation laid down by the Member States are effective, proportionate and dissuasive.

[94]The implementation review was made on the basis of Member States' biennial reports and inputs received through a public consultation and direct contacts with a broad range of stakeholders (including private sector and civil society). The results of the consultation are publicly available at the link http://ec.europe.eu/environment/forests/eutr_report.htm, where the individual Member States' implementation reports are also available. The latter reports cover however only the period March 2013–March 2015 (while the progress recorded after March 2015 is not included).

[95]EU Commission, 'EUTR Implementation Report' of 18.2.2016, COM (2016) 74 final (equally available at http://ec.europe.eu/environment/forests/eu-report.htm). According to EUTR's art. 20, the results of the evaluation will be used by the Commission to further improve the implementation and application of the Regulation.

[96]EUTR Implementation Report, at p. 4.

[97]EUTR Implementation Report, at p. 12.

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Commission launched infringement procedures. Further infringement procedures have been recently also opened against Slovak (April 2017) and Belgium (October 2017).

4 Recent National EUTR Case Law: Signals of an Emerging 'Due Diligence Jurisprudence'?

Three years after it came into application, the Timber Regulation started showing its 'teeth' as to the actual enforcement of its provisions at the national level, with the appearance in 2016 of the first court cases on the Regulation before the national judges of the EU member countries. Several courts in EU member States[98] have indeed recently recognised[99] that the due diligence obligation had not been adequately implemented by operators[100] importing timber or timber products from third countries to the EU internal market.[101] A brief overview of this case-law (and of some relevant decisions adopted by national competent authorities) is useful not only to highlight some interesting points that are starting to emerge from the evaluation by national judges of both EUTR's provisions and of its implementing legislation, but also to identify possible trends arising from such recent case-law (and decisions).

Some interesting Swedish enforcement cases concern teak imports to the EU internal market from Myanmar, a large timber-exporting country whose forest legislation and harvesting practices have been often heavily criticised by NGOs.[102]

[98] I.e. Sweden, the Netherlands, Germany, France and Great Britain.

[99] In cases brought before them by national timber-importing companies sanctioned by governmental competent authorities for violating EUTR's provisions.

[100] As mentioned, according to EUTR and its implementing legislation and guidelines, the operators should have ensured that the timber they trade in was logged in compliance with the legislation of the country of harvest, should have provided extensive evidence of this (above all in countries of harvesting prone to corruption) and should have adopted risk mitigation measures.

[101] Mainly, from Myanmar, Cameroon, Brazil and the Democratic Republic of Congo.

[102] In October 2016 the London based NGO Environmental Investigation Agency (EIA), on the basis of the findings and substantiated concerns emerged from its investigations on Myanmar's teak exports to the EU (see EIA (2016), Overdue Diligence. Teak export from Myanmar in breach of EU rules, October 2016, available at https://eia-international.org/wp-content/uploads/EIA-Overdue-Diligence-FINAL.pdf), submitted legal complaints in five EU Member countries (Belgium, Denmark, Germany, Italy and the Netherlands) on placements of Burmese teak from Myanmar into the EU. These complaints regarded alleged insufficient due diligence process carried out by nine operators under the EUTR. The EIA ascribed the lack of compliance to insufficient information provided to the operators by the Myanmar Timber Enterprise (MTE). Moreover, in January 2017 EIA raised further substantiated concerns regarding also import of teak from Myanmar by operators in Belgium and the UK. Consequently to EIA's complaints, the relevant competent national authorities started investigating on the substantiated concerns raised by the EIA's report on the placement of teak from Myanmar into the EU. For instance, in March 2017 the Danish authorities issued an injunction to all Danish operators importing from Myanmar; on 21 March 2017 the German authorities issued an injunction to 11 companies known to have imported timber from

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First, on 5 October 2016 the Administrative Court of Jönköping *confirmed* the decision by the Swedish competent Forest Agency (*Skogsstyrelsen*) to sanction a timber-importing company (Almträ Nordic) for non-compliance with the due diligence requirements under the EUTR when it imported teak from Myanmar.[103] The relevance of this first Swedish court case on EUTR arises from the fact that the importer Almträ Nordic did possess a document (the so called 'Green Folder') demonstrating that its timber complied with Myanmar's forest legislation.[104] However, despite *formal* possession of these papers, the Swedish Forest Authority was *not persuaded* that the timber was *actually* 'legally harvested' in line with EUTR's provisions.[105] Such distrust by the Forest Authority (and its consequent request to Almträ Nordic of further evidence) was fully justified in fact by the many reports showing that Myanmar exports huge amounts of illegally logged timber (possibly with the 'help' of MTE's employees)[106]; and it is also fully in line with the Commission's Guidance Document for the EUTR.[107] Against the Court decision no appeal was brought by Almträ Nordic, which rather announced it would stop its (direct) import of timber from Myanmar. A second equally interesting Swedish case on the enforcement of EUTR concerns a further recent initiative (March 2017) by the Swedish competent Forest Agency. The latter first sent an *injunction* to a timber

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Myanmar in recent years, informing them on the necessity to provide more detailed information on the supply chain and proof. Furthermore, a search warrant was issued by the German Public Prosecutor's office in Kiel (for two shipyards in Rendsburg and Kiel, in order to aid investigation into the use of teak from Myanmar) while in April 2017 the same Prosecutor's Office found that the German shipyard Nobiskrug used illegally sourced teak in the construction of "Sailing Yatch A". At the time of writing, national competent authorities (or, as we will see, even courts) in the Netherlands, Denmark, Sweden, Belgium, Germany and the UK have ruled that teak imports from Myanmar are unable to comply with EUTR. Cases submitted by EIA to national competent authorities are still pending in Italy and Spain. On 5 October 2017, the Italian competent authority (Ministry of Agricultural, Food and Forestry Policies, Ministero delle politiche agricole, alimentari e forestali MIPAAF) issued a guidance document specifically aimed at assisting operators and control authorities in the proper interpretation of EUTR's provisions—and particularly those of its due diligence system—in relation to the import of timber from Myanmar ('Guidelines for direct import of wood from Myanmar').

[103]Förvaltningsrätten Jönköping (Administrative Court Jönköping), case n. 2985-16, *Almträ Nordic AB v. Skogsstyrelsen*) 5 October 2016.

[104]These folders are compiled by the company Myanmar Forest Products Merchants' Federation (MFPMF) and include the permits issued by the State-owned company Myanmar Timber Enterprise (MTE, the sole official seller of timber and timber products from the country) and other official documents.

[105]Even if the areas where timber had been harvested were identified by the 'Green Folder', the latter according to the Forest Authority did not include the (required) documentation *clearly tracking* the timber supply chain (from MTE back to the forest of harvest).

[106]See e.g. EIA (2016).

[107]As mentioned, the Commission Document clearly explains (*inter alia*) that shortcomings in national governance significantly undermine the actual reliability of the documents proving compliance with applicable national legislation of the country of harvesting; and that it is therefore necessary "to take into account" the level of corruption existing in each specific country (see Guidance Document (2016), p. 7). These were precisely the circumstances existing in Myanmar.

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importing company (Retlog) to mitigate the risk for a Thai product containing Burmese teak; then—due to the lack of improvement of its due diligence system—the authority *prohibited* the company from importing teak from Myanmar.[108] What makes this case interesting is that, though the importer (even) hired Bureau Veritas to visit MTE with a view to clarifying the origin of the imported teak, this was still not sufficient to demonstrate that the timber was legally harvested as the visit did not provide *any further* information on the production process.[109] The Swedish Agency therefore (rightly) interprets and applies the due diligence rules of EUTR[110] in a way that makes more difficult for companies importing timber from countries with high level of corruption.[111]

It is worth mentioning that following the Swedish developments on timber (teak) imports to the EU market from Myanmar, the Danish authorities on 17 March 2017 released in their turn a formal *injunction* against *all* Danish operators, ordering them to stop introducing into the country's market Myanmar's teak.[112] On the same day the Myanmar Ministry of Natural Resources and Environmental Conservation (MONREC) reacted to these developments, by a statement recognising that their current country system may be complex for external parties and may also present challenges for operators to demonstrate the chain of custody required for due diligence under the EU Timber Regulation. The Burmese authorities also stressed to be committed to improving these systems and have been working on developing a comprehensive Timber Legality Assurance System (MTLAS) that will meet

[108]The prohibition decision adopted by the authority (the first in Sweden under the EUTR) *only* applies however to a specific teak Thai product (containing Burmese teak) imported by Retlog from a specific Thai supplier. In other words, the decision only prohibits the company from placing on the EU internal market the *specific* teak Thai product (also made by Burmese teak) from its specific Thai supplier.

[109]Skogsaktuellt, Biltemas logistikföretag förbjuds att sälja teak från Burma, 22 March 2017, (available at http://www.skogsaktuellt.se/artikel/53420/biltemas-logistikforetag-forbjuds-att-salja-teak-fran-burma.html).

[110]Such interpretation is indeed totally in line with EUTR (unequivocal) prohibition to place illegal timber on the EU internal market and the way the due diligence rules are formulated. Moreover, it has to be kept in mind that the revised Commission's Guidance Document clearly explains that the higher the risk of corruption in a specific case, the more it is necessary to get additional evidence to mitigate the risk of illegal timber entering the EU market; and it also mentions third-party schemes as a means of obtaining such additional evidence (p. 7). According to the Forest Agency, Retlog neither adequately implemented EUTR's provisions nor was able (by the visit of Bureau Veritas to MTE) to provide the required further evidence on the origin of the imported timber.

[111]Further *prohibition decisions* have been issued by the Swedish competent authority in May and July 2017. The first against imports from Taiwan of Burmese teak (decision not appealed) while the second against teak import directly from Myanmar. Moreover, two Swedish operators have recently *voluntary* stopped sourcing teak from Myanmar via Singapore and Vietnam. On these developments see Briefing Note for the Competent Authorities implementing the EU Timber Regulation, June–July 2017, p. 1.

[112]See Mizzima, Denmark sanctions entire Myanmar teak industry, 16 March 2017 (available at http://www.mizzima.com/business-domestic/denmark-sanctions-entire-myanmar-teak-industry).

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international best practice standards.[113] Moreover, in August 2016 Myanmar adopted a nationwide (temporary) logging *moratorium* that lasted till the end of March 2017. In June 2017 Myanmar also published a draft Forest Law, reported to include stricter penalties for—*inter alia*—illegal harvest of timber or misuse of harvesting permits, including fines and imprisonment.[114]

Equally interesting are also the recent rulings on EUTR of two Dutch courts, concerning timber imports (respectively) from Cameroon and from Brazil. In the first court case, on 24 May 2017 the District Court Noord Holland, rejecting an appeal by the importing company (Fibois VB Purmerend) against a previous decision by the Dutch competent authority (the Netherlands Food and Consumer Product Safety Authority, *Nederlandse Voedsel- en Warenautoriteit*—NVWA),[115] *confirmed* the decision of the authority to sanction the importer for not having collected sufficient verifiable information.[116] According to the Court, the company—in particular—did not identify the origin of the shipment of timber and its risk inventory did not meet the requirements of the Timber Regulation. Moreover, as none of the risk-limiting measures required by the situation in Cameroon was taken by the importer Fibois, the Court agreed with the competent authority that the EUTR's due diligence requirements have not been fully met and, consequently, the authority was allowed to sanction the importing company. Furthermore, in another more recent court case the Amsterdam District Court (ruling on an appeal by Greenpeace Netherlands against a previous decision of the Dutch competent authority NVWA) on 4 July 2017 decided that NVWA failed to enforce the EUTR without a proper reason in a number of cases where Dutch companies had imported timber from Brazil without complying with the EUTR's due diligence requirements.[117] Greenpeace Netherlands had originally requested the Dutch authority to inspect several companies importing timber from the Brazilian Amazon region and to sanction those non-compliant with the EUTR's due diligence system. Upon this request, inspections were carried out and showed that, in fact, several Dutch

[113] See Ministry of Natural Resources and Environmental Conservation (MONREC), Statement of progress in Timber Legality Assurance in Myanmar, 16 March 2017.

[114] Briefing Note for the Competent Authorities implementing the EU Timber Regulation, June–July 2017, p. 4.

[115] According to the NVWA the timber importer Fibois did not comply with the EUTR rules when introducing a shipment of Azobé timber from Cameroon on the Dutch market. It therefore adopted a sanction measure whereby the operator would forfeit € 1,800 for each cubic meter of wood and/or timber product placed on the EU market up to a maximum of € 90,000. Interestingly, the NVWA's reasoning is (correctly) grounded on the fact that, given the high level of corruption in Cameroon, there is a high chance that the wood was not legally harvested and the company should have consequently exercised more caution.

[116] *B.V. X* v *de staatssecretaris van Economische Zaken*, Rechtbank Noord-Holland 24-05-2017, AWB—16 5358, ECLI:NL:RBNHO:2017:4474 (available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNHO:2017:4474).

[117] *Stichting Greenpeace Nederland* v *de staatssecretaris van Economische Zaken*, Rechtbank Amsterdam 4-7-2017, AMS 15/5067, ECLI:NL:RBAMS:2017:4926 (available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2017:4926).

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operators were non-compliant with the Timber Regulation. However, the request for prosecution submitted by Greenpeace was rejected by the authority, which only issued written warnings to non-compliant importers.[118] As mentioned, such decision of the authority was appealed by Greenpeace before the Amsterdam District Court, which (correctly) found the Dutch enforcement policy unreasonable where it classified violations of EUTR's Articles 4.2, 4.3 and 5 as minor issues resulting in warnings only for first time offenders. Moreover, the Amsterdam Court recalled that the Timber Regulation was adopted in October 2010 and entered into application in March 2013, thereby allowing operators a *significant* amount of time to prepare for complying with its obligations. Lastly, the Court set out that when companies violate the law, the latter must be enforced and authorities can decide not to do so *only* in special circumstances, which were lacking however in the case at issue. Consequently, the decision of the Dutch authority not to prosecute importers non-compliant with EUTR was considered insufficiently motivated and hence *rejected* by the Court, which ordered the NVWA to take a new decision in 6 weeks.[119]

Besides the above mentioned Swedish and Dutch cases, similar court decisions on EUTR have been adopted over the last months in other EU member countries. In Germany, for instance, the administrative court of Cologne (*Verwaltungsgericht Köln*) *dismissed* an action against a measure of confiscation of shipments of timber (wengé wood) imported in Germany via Belgium from the Democratic Republic of Congo[120] which had been adopted in 2013 by the German competent authority.[121] In

[118]NVWA refused to sanction the companies notably on the ground that the rules *were still rather new* and it found therefore reasonable to provide operators with a further possibility to bring their business operations in line with the *new* legal regime. As a matter of fact, a guidance document on the enforcement policy under the Dutch nature protection legislation prescribed warnings to first offenders: see NVWA, Specific Intervention Policy Nature Protection Legislation (*Specifiek interventiebeleid natuurwetgeving*), IB02-SPEC08 natuur, version 2.1 of 16-07-2015.

[119]Under a further recent development, last 26 October 2017 the Dutch competent authority NVWA has found other timber-importing companies (Boogaert Hout and one other unidentified timber importer) to be in breach of the EUTR's due diligence requirements, for placing Burmese teak on EU internal market. The importer has now a 2-months grace period to comply with the EUTR's obligations otherwise it will be fined € 20,000 per cubic meter for any further non-compliant Burmese teak it places on EU markets (see https://englishnvwa.nl/news/2017/10/26/preventive-measure-issued-against-two-dutch-companies-for-breaching-the-rules-regarding-illegal-logging). The case of Boogaert Hout was submitted to Dutch authorities by the NGO Environmental Investigation Agency in October 2016. This NVWA decision follows similar outcomes by competent national authorities in Denmark, Sweden, Belgium, Germany and the United Kingdom, where (as mentioned) similar cases were submitted by EIA (in the light of the finding of its investigations being illustrated in its October 2016 report 'Overdue diligence'). A further two cases submitted by EIA, concerning the companies World Wood and Gold Teak Holdings, are still being investigated by Dutch authorities (see: https://eia-international.org/major-dutch-timber-company-found-breach-european-timber-regulation, last accessed 2 November 2017).

[120]Briefing Note for the Competent Authorities implementing the EU Timber Regulation, April–May 2017, p. 1.

[121]German Federal Agency for Agriculture and Food (*Bundesanstalt für Landwirtschaft und Ernährung*, BLE).

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its ruling the German Court agreed with the competent authority's findings that the falsified supporting documents justified the confiscation. Furthermore, in Germany after reports of illegal logging in Myanmar, the national competent authority also carried out checks on companies importing teak from this country. On findings that none of them complied with EUTR's due diligence requirements, such authority issued *injunctions* ordering the operators to take additional measures to endure that the risk of illegality is reduced to a negligible level.[122] Significantly in March 2017 the same authority also warned operators importing timber from Myanmar that the EUTR due diligence obligation requires them to go *beyond* official documentation and to trace timber back to not only the country but also the region of origin. Operators were warned that, in the future, if they do not comply with the injunctions, they might be imposed sanctions.

In France, the Tribunal of La Rochelle is investigating a number of companies importing timber from the Democratic Republic of Congo, after Greenpeace France filled a criminal complaint against them. Greenpeace claimed that companies were violating EUTR obligations (i.e. the prohibition to import illegal timber and the obligation to conduct due diligence).[123] Finally, in the United Kingdom last 25 October 2017 at Westminster Magistrates Court a company (Angora 2011 Limited, trading as Lombok) was *convicted* (and fined £ 5000 plus costs) after pleading guilty at the first hearing for failing to exercise the required due diligence under EUTR when placing artisan sideboard on the markets imported on June 2016 from India.[124]

The above illustrated recent EUTR enforcement practice shows, first of all, that *all* companies placing timber on the market for the first time fall under the scope of the Timber Regulation, no matter whether they are transnational corporations, medium or small sized companies. Moreover, the EUTR's enforcement practice made by EU member countries' court rulings (but also, *lato sensu*, by national competent authorities' decisions) against those operators of the timber sector violating or not adequately complying with the Regulation's requirements also shows that EUTR is starting to take (actually) effect. Indeed, if until recently it seemed that EU member States' competent authorities were (sometimes) 'not willing' (and in other

[122] See http://www.ble.de/DE/Themen/Wald-Holz/Handel-Holz/handel-holz.node.html.

[123] This follows a previous case against illegal timber imports from the DRC, also brought by Greenpeace France, which was closed by the public prosecutor: see Client Earth, EUTR News, March–May 2017, p. 5.

[124] A previous breach of relevant EUTR provisions had earlier been identified by the British competent authority and it led to a *notice of remedial action* being served on Lombok on 28 April 2015. This was followed by a *warning letter* dated 7 October 2015 when the company failed to comply with notice. On October 2016, the authority's officers visited Lombok's central London showroom and found the required due diligence checks had not been made for an artisan sideboard for sale imported from India. See UK Government, Press Release: Company fined for failure to check product was made from legally-harvested timber, 1 November 2017 (available at http://www.gov.uk/government/news/company-fined-for-failure-to-check-product-was-made-from-illegally-harvested-timber, last accessed 2 November 2017).

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cases 'not fully able') to start enforcing EUTR,[125] the recent court decisions from Sweden and the Netherlands and the rulings from some other EU national judges show that the situation is starting significantly changing.

Overall, these cases can also actually help operators, competent authorities and judges in other EU member countries to better understand, apply and enforce EUTR in practice. At the same time, the court cases enforcing EUTR's provisions significantly contribute (and they will increasingly do so in the future) to creating a body of 'due diligence jurisprudence', able in its turn to (further) clarifying the details of the obligations of due diligence for timber importers thereby operationalising EUTR's due diligence requirements. In this respect, the Commission's Guidance Document for the EUTR certainly contribute to provide for more clarity on important practical aspects of the due diligence system.

Finally, it is clear that the way in which 'due diligence' is interpreted (and enforced) within the EUTR regime could, also, be quite relevant to (and useful for) other EU legislative regimes where due diligence obligations are imposed on EU importers.

5 Concluding Remarks

In conclusion, the EU's legislative framework on timber trade—based, on the one hand, on the unilateral and binding EUTR's regulatory pillar and, on the other, on the bilateral and voluntary VPAs' pillar—can play a relevant role in improving timber governance in producing countries and, therefore, in contributing to the sustainable (environmental, economic and social) development of both these countries and (indirectly) of the EU itself.

Moreover, in fostering sustainable development and human rights in third countries *through trade mechanisms* (either binding or voluntary) establishing unilateral or bilateral conditional access to the EU internal market for foreign timber and timber products,[126] the EU's legal framework on timber governance is—also—in line with the recent evolution experienced by EU external trade policy in the light of the general objectives of its external action as established by Article 21 of the TEU.[127] That is, with the Lisbon Treaty's call on the EU external action to take environmental and human rights values 'on board'.

[125] As the Dutch Greenpeace case shows, there was sometimes a sort of reluctance by national authorities to apply the relevant EUTR's provisions even in cases when operators were found not being in compliance with the Regulation's due diligence system.

[126] Cf. also, recently, Douma (2017), Douma and van der Velde (2016) and Geraets and Natens (2015).

[127] See, *inter alia*, also for further bibliographical references Cremona (2017) and Vedder (2013).

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The International Legal Regime Applicable to the Mineral Resources of the Deep Seabed

Joanna Dingwall

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1 Introduction

In the coming decades, deep seabed mining beyond national jurisdiction may well become a commercial reality.[1] The mining industry is increasingly looking seawards due to advances in subsea technology coupled with rising material consumption and

The views expressed herein are those of the author alone and do not necessarily represent the views of the Scottish Government or the University of Glasgow.

[1]The analysis in this article of the status of the deep seabed mining regime and the extent of mining activities is current as at 1 August 2018. All web links cited in this article are correct also as at that date.

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anticipated scarcity of terrestrial mineral resources.[2] In 2016, the Secretary-General of the International Seabed Authority ("ISA") predicted that the commercialisation of deep seabed minerals beyond national jurisdiction is 'well within reach' and 'attainable in the foreseeable future.'[3] Since then, both interest and investment in deep seabed mining has continued to grow amongst a range of actors.

In this context, this article will evaluate the international legal regime applicable to deep seabed mining beyond national jurisdiction. Both this regime and the body which governs it, the ISA, were established by the United Nations Convention on the Law of the Sea of 1982 ("UNCLOS" or the "Convention").[4] The overwhelming majority of States are parties to UNCLOS. As of August 2018, UNCLOS has 168 States Parties, including the European Union.[5] Much of the content of UNCLOS is recognised as having the status of customary law, binding on all States irrespective of whether or not they are parties to the Convention.[6]

Under UNCLOS, the deep seabed beyond national jurisdiction (the "deep seabed" or the "Area") is defined negatively. All parts of the deep seabed which do not otherwise fall within the national jurisdiction of coastal States form part of the Area.[7] National jurisdiction of coastal States extends through a series of maritime zones. Allowing for the vagrancies of geography and competing claims by littoral States, travelling outwards from any given shoreline, one will generally encounter the relevant coastal State's territorial sea; contiguous zone; exclusive economic zone ("EEZ") and continental shelf.[8] Depending on geomorphological and geological factors, certain States are entitled to claim an extended continental shelf going beyond 200 nautical miles ("nm") from their coastline.[9]

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[2]Fouquet and Lacroix (2014), pp. 3–5; see also Shukman D, 'Deep Sea Mining "Gold Rush" Moves Closer', *BBC News Online* (London, 18 May 2013) <www.bbc.co.uk/news/science-environment-22546875>; Minter A, 'Seafloor Gold Rush Could Have Alarming Impact', *The Japan Times* (Shanghai, 21 August 2016) <www.japantimes.co.jp/opinion/2016/08/21/commentary/world-commentary/seafloor-gold-rush-alarming-impact/#.W2sBQLllJaQ>.

[3]ISA Press Release, 'Commercialization of Marine Minerals in Deep Seabed Well Within Reach, International Seabed Authority Secretary-General States as He Introduces Annual Report' (19 July 2016) SB/22/11.

[4]United Nations Convention on the Law of the Sea (adopted and opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (English language version at 397), art 156 (establishment of the ISA). The ISA is an autonomous international organisation headquartered in Jamaica.

[5]United Nations Division for Ocean Affairs and the Law of the Sea ("**DOALOS**"), 'Chronological List of Ratifications of, Accessions and Successions to the Convention and the Related Agreements' (3 April 2018) <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>.

[6]Churchill and Lowe (1999), p. 24; Boyle and Chinkin (2007), p. 380; Noyes (2014), pp. 52–56.

[7]UNCLOS, art 1(1): '"Area" means the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. Unless otherwise indicated, references in this article to the deep seabed and the Area both refer to the "Area" as defined in UNCLOS, art 1(1).

[8]UNCLOS, arts 3 (territorial sea), 33 (contiguous zone), 57 (EEZ) and 76 (continental shelf).

[9]UNCLOS, art 76(4)–(6).

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From zone to zone, coastal States have differing obligations and rights. However, one of the common denominators throughout all of these zones is that coastal States have the exclusive right to authorise and regulate exploration and exploitation of natural resources within their national jurisdiction.[10] Beyond these zones—beyond national jurisdiction—the position changes. This Area belongs to no one State. Instead, it constitutes the 'common heritage of mankind'.[11] The ISA acts as the custodian of the Area, regulating it and granting mining contracts to allow participants to explore for and exploit deep seabed mineral resources.[12]

To put the scope of the ISA's remit into perspective, the deep seabed constitutes almost three quarters of the entire global seabed. As the Area is defined negatively, its exact size cannot be determined until the resolution of all coastal State claims to extended continental shelves. The determination of these claims is an ongoing process. However, the 'best estimate' of the surface area of the Area beyond national jurisdiction is approximately 260 million square kilometres[13] (or around 72% of the total surface area of the oceans[14]).

As will be discussed below, many States, State institutions and private entities have applied to the ISA to secure exploration rights over large swathes of the deep seabed. Of the existing contractors, the following States or their nationals are particularly active in deep seabed exploration beyond national jurisdiction: China, Russia, South Korea, Japan, India, France, Germany and the UK. To date, China, Russia and South Korea are the only States to hold exploration licences in relation to all three types of mineral for which exploration is currently permitted (namely, polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts).

Commercial interest in the resources of the deep seabed is increasing amongst a variety of private actors. Key industry players such as Canadian mining giant, Nautilus Minerals Inc., and US defence conglomerate, Lockheed Martin, are already undertaking exploratory activities in the Area. Against this backdrop, this article will consider the international legal framework which applies to deep seabed mining activities. This article will address the following key questions: what types of mineral resources are present in the deep seabed and come within the ambit of the UNCLOS regime? By what means does the Convention's deep seabed mining regime operate: what are its fundamental principles and its licensing process? And,

[10] UNCLOS, arts 2(2), 56(1)(a), 77(1)–(2) and 81.

[11] UNCLOS, art 136.

[12] UNCLOS, arts 153, 157(1) and see also Annex III; the definition of deep seabed resources will be discussed in this article below in Sect. 2.1, while the ISA's licensing regime will be assessed in Sect. 3.2.

[13] Lodge (2014), p. 290.

[14] Eakins BW and Sharman GF, 'Volumes of the World's Oceans from ETOPO1' (National Oceanic and Atmospheric Administration, National Geophysical Data Centre 2010) <www.ngdc.noaa.gov/mgg/global/etopo1_ocean_volumes.html> (the surface area of the oceans is 361.9 million square kilometres).

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finally, what types of mining activities are being undertaken in the deep seabed thus far pursuant to the Convention?

In order to answer these questions, this article will proceed as follows. Section 2 will introduce the types of mineral resources which can be found in the Area. As Sect. 2 will explain, the differing legal regimes applicable in the varying maritime zones have considerable legal implications as to whether or not certain resources (as defined in each zone) can be exploited with or without the permission of the coastal State (in zones of national jurisdiction) or the Authority (in the Area), as the case may be. Thereafter, Sect. 3 will offer an insight into the Convention's deep seabed mining regime and its key parameters, including the licensing process under the regime and the extent to which actors are undertaking mining activities in the Area at present. Finally, Sect. 4 will finish with concluding remarks on the status of the deep seabed mining regime.

2 Mineral Resources of the Deep Seabed

The deep seabed is home to an array of valuable mineral resources.[15] As this section will illustrate, mineral resources are present in various deep sea locations, including volcanic ridges, rocky outposts and amongst the sediment of the ocean floor. By way of contrast and comparison, Sect. 2.1 will begin by briefly clarifying the extent of national jurisdiction and the legal definitions of natural resources within coastal State maritime zones as compared to the Area. This is an important preliminary matter, as it determines the scope of resource types which fall within the Convention's deep seabed mining regime. Once this is established, Sect. 2.2 will address the issue of resource distribution in maritime zones, before explaining which types of resources are most commonly found in the Area. Following this analysis, Sect. 2.3 will provide dedicated focus on a category of deep seabed resource which is attracting current commercial interest: rare earth elements.

2.1 A Comparison of Natural Resource Rights Within Coastal State Maritime Zones and the Area

As noted above, the oceans can be divided into a series of maritime zones, each with different legal implications; namely, the territorial sea, the contiguous zone, the EEZ,

[15]See e.g., International Seabed Authority, 'Marine Mineral Resources' (2003) <www.isa.org.jm/files/documents/EN/Brochures/ENG6.pdf>; Hein J, 'ISA Briefing Paper 02/12 – Prospects for Rare Earth Elements from Marine Minerals' (May 2012) <www.isa.org.jm/files/documents/EN/Pubs/BP2.pdf>; Fouquet and Lacroix (2014), pp. 3–4.

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the continental shelf and the Area.[16] Although the focus of this article is on the deep seabed beyond national jurisdiction (i.e., the Area), this introductory Section will briefly address the extent of national jurisdiction and the definitions of natural or mineral resources within the various maritime zones in order to clarify the zones and resource types which fall under the jurisdiction of coastal States or the ISA, as the case may be.

Definitions of natural or mineral resources vary throughout the zones of national jurisdiction and the Area. The form of a resource and the region within which it is located has a decisive impact on the legal regime, which applies to it. Bederman cuts across the sometimes confusing array of terminology with the following helpful point:

> If these zones sound mystifying (and they are to most international lawyers), keep one simple point in mind. The closer to shore that a particular activity or resource is located, the more likely it will come under the control, jurisdiction, or regulatory authority of the nearest coastal state. Conversely, the farther one moves from shore, the more coastal state authority decreases (. . .).[17]

Within the maritime zone closest to the shoreline—the territorial sea—the coastal State possesses equivalent rights over all resources as it does on land.[18] Seawards of the territorial sea lie the overlapping contiguous zone and EEZ.[19] In these zones, coastal States retain rights over a broad range of resources. Within the EEZ, 'natural resources' are defined as including both 'living and non-living resources' found within the seabed and subsoil and in the water column above.[20]

Beyond the territorial sea and partially overlapping with the contiguous zone and the EEZ is the continental shelf. The continental shelf comprises the seabed and subsoil, which extends beyond the territorial sea and forms a 'natural prolongation' of the coastal State's land mass beneath the sea.[21] This submerged prolongation of the coastal State's land mass consists commonly of three distinct parts, each with different resource implications. First, there is the continental shelf itself: an area of thick sediment in relatively shallow waters.[22] Second, there is the continental slope. The slope is the point at which the shelf gives way to a steep descent. Thirdly and

[16] UNCLOS, arts 3 (territorial sea), 33 (contiguous zone), 57 (EEZ) and 76 (continental shelf), 1 (1) and Part XI (the Area).

[17] Bederman (2002), p. 169.

[18] UNCLOS, art 2(2); the territorial sea may extend up to a limit not exceeding 12 nm from a coastal State's baselines (art 3).

[19] The contiguous zone extends from the outer limit of the territorial sea up to a maximum of 24 nm from the coastal State's baselines (UNCLOS, art 33(2)). Partially overlapping with the contiguous zone, the EEZ also extends from the outer edge of the territorial sea, but spans up to a maximum of 200 nm from the coastal State's baselines (UNCLOS, arts 55, 57).

[20] UNCLOS, art 56(1)(a).

[21] UNCLOS, art 76(1); on the concept of 'natural prolongation', see also Symonds et al. (2000), pp. 27–29; McDorman (2015), pp. 185–186.

[22] Pidwirny M, 'Physiography of the Ocean Basins' *Fundamentals of Physical Geography* (2nd edn, 2006) <www.physicalgeography.net/fundamentals/10p.html>.

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finally, there is the continental rise. The rise is the more gradual descent immediately beyond the slope, which is formed by sediment cascading from the shelf and slope above. Taken together, the shelf, the slope and the rise constitute the 'continental margin'.[23]

Subject to competing claims by littoral States, a coastal State possesses inherent sovereign rights over its continental shelf up to 200 nm from its baselines.[24] If scientific and technical data confirms that the outer edge of a coastal State's continental margin extends beyond 200 nm from the State's baselines, that State is entitled to an 'outer' or 'extended' continental shelf ("ECS").[25] A State seeking to exert an ECS must do so by way of submission to the UN Commission on the Limits of the Continental Shelf ("CLCS").[26]

Within its continental shelf (including any ECS), a coastal State possesses exclusive sovereign rights to explore and exploit its natural resources.[27] Unlike in the EEZ, where the coastal State has sovereignty over living and non-living natural resources throughout the entire water column, in the continental shelf, the rights of coastal States over natural resources are more narrowly defined.[28] Within the continental shelf, the definition of 'natural resources' extends to include only mineral and other non-living resources located in the seabed and subsoil together with bottom-dwelling sedentary species.[29] The differing definitions of natural resources in the EEZ and the continental shelf has most impact in any areas of ECS. Within the ECS (i.e., beyond the 200 nm limit of the EEZ) only the more limited definition of natural resources found in UNCLOS, Article 77(4) applies.

In further contrast, the definition of 'resources' in the Area is narrower again: omitting the inclusion of living resources of any description, sedentary or otherwise.[30] In relation to deep seabed mining in the Area, the Convention defines 'resources' as 'all solid, liquid or gaseous mineral resources in situ in the Area at

[23] UNCLOS, art 76(3).

[24] UNCLOS, art 76(1), (10), 77(3).

[25] UNCLOS, art 76(1). UNCLOS sets out a complex process for determining the outer edge of the continental margin in Article 76(4)–(7). Article 76(5) allows the line of fixed points establishing the outer limits of the ECS to extend up to whichever is further offshore of either: (1) 350 nm from the coastal State's baselines; or (2) 100 nm from the 2500 metre isobath (a line connecting the depth of 2500 m).

[26] UNCLOS, art 76(8); on the role of the CLCS, see Jensen (2014), p. 182. For analysis and critique of the ECS claim process and its impact on the establishment of defined boundaries for the Area, see Franckx (2010), p. 543.

[27] UNCLOS, arts 77(1)–(2) and 81; see also art 82 (pursuant to which a portion of any coastal State revenues generated by exploitation of non-living ECS resources must be distributed equitably by the ISA).

[28] Cf. UNCLOS, arts 56(1)(a) (EEZ) and 77(4) (continental shelf).

[29] UNCLOS, art 77(4). For analysis of the scope of sedentary species for the purposes of this definition, see McDorman (2015), p. 186; Prescott (2000), p. 80.

[30] See UNCLOS, art 133(a).

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or beneath the sea-bed, including polymetallic nodules'.[31] Once extracted from the Area, such resources are referred to as 'minerals'.[32] Given that the UNCLOS deep seabed mining regime does not apply to living resources, there is controversy as to the extent to which marine genetic resources constitute part of the common heritage of mankind.[33] Therefore, in June 2015, the UN General Assembly voted to develop a treaty to complement UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, on which work is now underway.[34]

As this Section has demonstrated, both the location of a resource and its form are factors, which determine the applicable legal regime. Resources present within the zones of national jurisdiction, which are caught by the definitions of natural resources within these zones fall within coastal State jurisdiction. To explore for or exploit such natural resources, one must secure coastal State permission. Conversely, mineral resources within the Area, as defined in UNCLOS, Article 133, fall within the ISA's remit and can only be explored or exploited with ISA authorisation. The remainder of this article will now focus on the mineral resources present typically in the deep seabed (in the rest of Sect. 2) and the legal regime, which governs these resources (Sect. 3).

2.2 Mineral Resources of the Deep Seabed Beyond National Jurisdiction

Now that Sect. 2.1 above has clarified the legal definition of resources in the Area (as contrasted to equivalent definitions in the zones of national jurisdiction), this

[31]UNCLOS, art 133(a).

[32]UNCLOS, art 133(b). For the purposes of this article, the terms mineral resources, resources and minerals will be referred to interchangeably to connote all non-living, solid, liquid or gaseous mineral resources found on or recovered from the deep seabed.

[33]Consideration of this issue is beyond the scope of this article. For analysis, see e.g., De La Fayette (2009), p. 221; Matz-Lück (2010); Leary (2012), p. 375; Kirchner-Freis and Kirchner (2014); Marciniak (2017).

[34]UNGA Res 69/292 (19 June 2015); see also Scovazzi (2015), p. 61. To that end, the General Assembly ("**GA**") established a Preparatory Committee ("**PrepCom**") to make recommendations on substantive elements of the draft treaty text. During 2016 and 2017, PrepCom held four sessions. In July 2017, at its fourth session, PrepCom adopted a report to the GA proposing elements to be considered in the development of a new treaty regulating marine biodiversity beyond national jurisdiction (also known as "**BBNJ**"). PrepCom recommended also that the GA should convene an intergovernmental conference to negotiate a treaty text regulating BBNJ; for an overview of the PrepCom's work and relevant documents see DOALOS webpage <www.un.org/depts/los/biodiversity/prepcom.htm>. In accordance with PrepCom's recommendations, the Intergovernmental Conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of BBNJ (the BBNJ Intergovernmental Conference) is due to hold its first session at the UN headquarters in New York in September 2018.

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leads to the question as to which specific types of mineral resources can be found in the deep seabed? The differing geological composition of the various maritime zones has significant ramifications upon resultant resource distribution. A product of its history, the continental shelf is rich in organic matter and sediment. Previously, much of the land, which now forms the shelf, was above water. However, the shelf was submerged due to rising water levels at the end of the glacial period. In contrast, the deep seabed Area was forged from hardening lava, as the continents moved apart.[35] As the Area formed, most organic matter was extinguished by burning lava. That is why much of the Area is constituted of heavy, rock-based material that sits much deeper than the shelf.

Exploration and exploitation of the resources of the continental shelf is at a far more advanced stage than comparable activities within the Area. Although continental margins vary in size and composition, they typically yield various non-living resource types. Common shelf resource types include sand, gravel and placer deposits of various minerals (such as gold, diamonds, ilmenite and tin) together with industrial minerals such as phosphorites.[36] Hydrocarbons, including natural gas and petroleum, are often found on the continental shelf, and they may be present on the slope and the rise.[37] Due to the heavier, rock-based structure of much of the deep ocean floor, the types of resources present diverges from those found on the continental margin. Deep sea resource types are dominated by metallic minerals.

The vast majority of the deep ocean floor falls within the Area. However, due to varying continental shelf attributes, some States possess swathes of deep ocean floor within their inherent 200 nm continental shelf entitlement. As a result of this, mining of the deep ocean floor is likely to commence soon within national jurisdiction of certain territories such as the Cook Islands and Papua New Guinea.[38] These mining activities within deep waters of national jurisdiction will afford a barometer as to the viability of deep seabed mining within the Area and in many respects may determine the prospects for the deep seabed industry in the longer term.

As will be considered further in Sect. 3 below, the ISA maintains a licensing regime for the exploration and exploitation of the Area's mineral resources. Part of the ISA's regulatory role over deep seabed mining includes the power to progressively develop a comprehensive Mining Code to regulate exploration and

[35]Plate tectonic theory explains that the continents moved apart through the process of seafloor spreading; The British Geographer, 'Plate Tectonic Theory' The British Geographer Blog <http://thebritishgeographer.weebly.com/plate-tectonic-theory.html>; see also Pinet (2003), p. 80.

[36]Prescott (2000), pp. 77–79; ISA 'Marine Mineral Resources' (n 15), pp. 1–2; Schröder (2014), pp. 64–65.

[37]As Prescott notes, 'continental slopes may offer better hydrocarbon prospects than the rises as they receive more organic matter from the land (. . .). By comparison, the rises normally receive comparatively low amounts of terrestrial organic matter'; Prescott (2000), pp. 75–76. See also ISA 'Marine Mineral Resources' (n 15) p. 1.

[38]For example, Nautilus Minerals has a contract with Papua New Guinea to commence sulphide mining activities. If Nautilus's Solwara 1 Project proceeds, it is due to be the world's deepest mining venture yet at depths of 1600 m.

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exploitation for all forms of resources in the Area. At present, this Mining Code extends to cover exploration activities in respect of three particular types of metallic minerals: polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. These resources can be found throughout the Area, although they tend to be clustered most heavily in particular locations, determined by the nature of their formation.

The first of these resource types, polymetallic nodules, are potato-sized rock deposits on the ocean floor, found typically at depths of between around 4000 and 5000 m.[39] They contain manganese, iron and other metals, such as copper, nickel and cobalt in varying concentrations. Nodules form through a process of accretion, typically involving the gradual precipitation of dissolved metals onto a hard core, such as a prehistoric shark's tooth.[40] The process of nodule formation is incredibly slow, with increases in nodule diameter that can be measured in millimetres per million years.[41]

Although nodules occur in various global locations, they are concentrated most heavily in four particular regions.[42] The largest of these, the Clarion-Clipperton Fracture Zone ("CCZ"), is an area roughly the size of Europe, located west of Mexico towards Hawaii. Two other nodule hotspots also within the Area can be found in the Peru Basin and the central Indian Ocean. Finally, there is the Penrhyn Basin: an area rich in nodules in the central western Pacific Ocean, predominantly within the EEZ of the Cook Islands.[43] The concentration of manganese nodules per square metre of sea floor in each of these locations is 15 kg/m^2, 10 kg/m^2, 5 kg/m^2 and 25 kg/m^2 respectively, although in certain areas within the CCZ, nodule concentration can be as dense as 75 kg/m^2.[44] Altogether, the volume of certain metals found within deep seabed nodules, such as manganese, may exceed known volumes of terrestrial reserves.[45]

In contrast to nodules, which lie on the deep sea floor, sulphides emanate most commonly from hydrothermal vents on the mid-ocean ridge, where tectonic plates

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[39] Glover and Smith (2003), p. 229; ISA 'Marine Mineral Resources' (n 15) 2; although note that nodules can be found as deep as around 6500 m: Schröder (2014), p. 66.

[40] Glover and Smith (2003), p. 229; Schröder (2014), pp. 68–69.

[41] For example, Schröder cites a growth rate of 'only about one to 3 millimetres per million years' in respect of certain types of polymetallic nodules: Schröder (2010), p. 146; see also Schröder (2014), p. 68. Autun Purser, ecologist at the Helmholtz Centre for Polar and Marine Research, perhaps sums up this slow process most vividly in his remark that such nodules are 'half a millimetre thicker than when Napoleon or Julius Caesar was walking around'; Milliken G, 'Mining For Smartphone Metals Could Kill Rare and Beautiful Deep Sea Creatures' (Motherboard, 23 December 2016) 2 <https://motherboard.vice.com/en_us/article/mining-for-smartphone-metals-could-kill-rare-and-beautiful-deep-sea-creatures>.

[42] Schröder (2014), pp. 66–67.

[43] As this area is within the national jurisdiction of the Cook Islands, it falls to the Cook Islands to regulate exploration and exploitation of the natural resources within it; on this, see also Sect. 2.1 above.

[44] Schröder (2014), pp. 66–67.

[45] Schröder (2014), p. 66.

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meet. In these locations, volcanic activity produces distinctive chimneys ('black smokers') spewing forth dark billowing clouds of mineral-rich seawater, which accumulates, gradually on the ocean floor as sulphide deposits.[46] Alternatively, sulphides may also be present within iron-rich deep sea mud.[47] Normally found at depths of anywhere between 500 and 4000 m, sulphides typically comprise iron, copper and zinc and may contain quantities of gold and silver.[48] As with the other categories of deep seabed mineral, the precise composition of sulphide deposits varies depending on their location.[49]

The final type of mineral to which the UNCLOS deep seabed mining regime extends currently is cobalt-rich ferromanganese crusts, which form commonly on seamounts, rocky outcrops and ridges in the sea floor and contain elements such as manganese, iron, cobalt, nickel and lead. Typically found at depths of anywhere between 600 to 7000 m (although most commonly at depths of around 4000 m and above), these 'pavement-like' crusts form over many millions of years through a process similar to the formation of polymetallic nodules.[50] Cobalt crusts can be found globally, but their highest volumes are within the Pacific Ocean, especially in an area southwest of Japan known as the Prime Crust Zone ("PCZ").[51]

These are the three types of mineral resources most commonly found in the Area. However, as technology advances and scientific knowledge increases, other resource types could be recoverable in the future. While recovery of hydrocarbons from the Area is less likely, given the predominantly rock-based composition of the deep ocean floor,[52] there is some potential that resources, possibly including hydrocarbons, could straddle the boundary between the Area and the sediment-rich continental margin.[53] Climate change and other environmental factors may also impact the resources of the Area over time. Perhaps centuries from now, as continental shelves erode, resource distribution in the area straddling the continental margin and the Area will look very different from its present day composition.

Returning to the present day context, it remains an open race as to which of the three deep seabed resources types currently regulated by the ISA may be first to be exploited. Although nodules exploration has been ongoing for the longest duration,[54] sulphides exploitation within deep sea waters in national jurisdiction may

[46]ISA 'Marine Mineral Resources' (n 15) 2; Schröder (2010), p. 148; Schröder (2014), p. 82.

[47]Glover and Smith (2003), pp. 231–232; Schröder (2010), p. 151; Schröder (2014), p. 91; one such occurrence of metalliferous mud lies 2000 m deep in the Red Sea.

[48]Schröder (2010), p. 146; ISA 'Marine Mineral Resources' (n 15) p. 2.

[49]Schröder (2010), p. 148; Schröder (2014), p. 87.

[50]Glover and Smith (2003), p. 231; see also Schröder (2010), p. 148; Schröder (2014), p. 76; ISA, 'Cobalt-Rich Crusts' (March 2008) <www.isa.org.jm/files/documents/EN/Brochures/ENG9.pdf>.

[51]Schröder (2014), pp. 74–75.

[52]See, e.g., Tuerk (2014), p. 283 citing estimates that 97% of offshore hydrocarbons deposits are within the maritime zones of national jurisdiction.

[53]See, e.g., Becker-Weinberg (2014), especially Ch 9 (concerning resources that lie between the continental shelf and the Area).

[54]See discussion of this in Sect. 3.3 below.

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well commence before commercial activities begin in the Area.[55] Irrespective of which specific resource type is the first to be recovered from the Area, a category of deep seabed resource, which is piquing current commercial interest is rare earth elements ("REEs"). Notably, deep seabed minerals, such as the three types discussed in this Section, may contain traces of REEs. These REEs are highly desirable commodities, essential for use in various high-tech industries. Given that global interest is increasing over potential sources of REEs within the deep seabed, Sect. 2.3 directly below will now turn to consider certain implications of deep seabed mining for REEs.

2.3 Deep Seabed Mining for Rare Earth Elements

As noted in Sect. 2.2 above, seabed minerals often contain traces of REEs. These elements are much sought after commodities: essential for use in the manufacturing of green energy technology (such as solar panels, wind turbines and hybrid cars). They are also indispensable in weapons manufacturing and in the electronics industry for the production of high-tech gadgets such as smart phones, laptops and flat-screen televisions.

Amidst increasing global calls for sustainable energy and the growing trend of corporate divestment from fossil fuels, there is emerging awareness that elements derived from deep seabed minerals could play a pivotal role in the process of lowering carbon emissions. Indeed, this poses one of the key conundrums inherent within deep seabed mining. Delivery of green energy requires sufficient raw materials to create the necessary technology. As terrestrial sources dwindle, does the pursuit of sustainable, clean energy justify the potential environmental dangers posed by extraction of these raw materials from the deep seabed?[56] There may be no easy answer to that question.

Within the past decade, China enjoyed a near total monopoly on worldwide production of REEs. In 2009 and 2010, China was responsible for over 97% of the global supply.[57] However, to the shock of its trading partners, in 2010, China imposed strict export limits on its domestically produced REEs. As a result of China's export restrictions, global demand far outstripped supply and the price of

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[55]See discussion at n 38 above and accompanying text.

[56]On this 'conundrum', see, e.g., Shukman D, 'Renewables' Deep-sea Mining Conundrum' *BBC News Online* (London, 11 April 2017) <www.bbc.co.uk/news/science-environment-39347620>; Raworth S and Shukman D, 'Deep Sea Mining' (BBC1, News at 10, 11 April 2017); Carrington D, 'Is Deep Sea Mining Vital for a Greener Future – Even if it Destroys Ecosystems?' *The Guardian* (London, 4 June 2017) <www.theguardian.com/environment/2017/jun/04/is-deep-sea-mining-vital-for-greener-future-even-if-it-means-destroying-precious-ecosystems>.

[57]US Department of the Interior and US Geological Survey, *Mineral Commodity Summaries 2011* (2011) <http://minerals.usgs.gov/minerals/pubs/mcs/2011/mcs2011.pdf>.

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certain REEs spiked by as much as 3000%.[58] Following successful challenge by the EU, the US and Japan, the World Trade Organisation ordered China to relax its export restrictions.[59] As such, the price of REEs has stabilised.[60] Nevertheless, concerns about the security of the supply chain remain.[61]

In the context of these geopolitical uncertainties, investors are paying increasing attention to the deep seabed as a potential source of REEs.[62] As explored in Sect. 2.2 above, the composition of deep seabed minerals varies depending on factors such as location and formation process. REEs have been discovered within various samples of deep seabed minerals, including nodules, sulphides and crusts. For example, REEs may be extracted as by-products in the mining of both nodules and sulphides,[63] and cobalt crusts in particular may pose a promising source of REEs.[64]

In what may signal a tenable alternative to terrestrial extraction, recent discoveries highlight the wealth of accessible REEs on the deep seabed both within national jurisdiction and within the Area. For example, sampling various areas of the ocean floor, experts discovered numerous sites containing deep sea mud with high concentrations of REEs.[65] Their estimates indicate that an area of only 1 square kilometre in the Pacific Ocean has the potential to yield one-fifth of the current annual world consumption of REEs.[66] Another site measuring around 5 square kilometres in the central North Pacific has the potential to satisfy nearly the entire global annual consumption of REEs.[67]

As noted previously, certain States—including oceanic islands, such as the Cook Islands—possess swathes of deep ocean floor within their inherent 200 nm continental shelf entitlement. The Cook Islands has discovered the presence of significant quantities of REEs on the deep ocean floor within its EEZ. Experts estimate that the

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[58]Rowlatt J, 'Rare Earths: Neither Rare, Nor Earths' *BBC News Online* (London, 23 March 2014) <www.bbc.co.uk/news/magazine-26687605>.

[59]WTO, *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum – Report of the Panel* (26 March 2014) WT/DS431/R and Add.1/WT/DS432/R and Add.1/WT/DS433/R and Add.1, adopted 29 August 2014; upheld by Appellate Body Reports: WTO, *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum – Report of the Appellate Body* (7 August 2014) WT/DS431/AB/R/WT/DS432/AB/R/WT/DS433/AB/R.

[60]Rowlatt (n 58).

[61]Houses of Parliament, Parliamentary Office of Science and Technology, 'Deep-Sea Mining' (POST note 508, September 2015) 2 <http://researchbriefings.files.parliament.uk/documents/POST-PN-0508/POST-PN-0508.pdf>.

[62]Coles (2014), pp. 8–10.

[63]Hein et al. (2013), p. 51. See also Hein, 'ISA Briefing' (n 15) 1–2; Fouquet and Martel-Jantin (2014), p. 63 et seq.

[64]In addition to the citations at n 63 directly above, see also ISA, 'Cobalt-Rich Crusts' (n 50) 2; Schröder (2014), pp. 74–76 (which notes in particular that 'in the southern area of the PCZ, comparatively high elements of rare earth elements are found in crusts').

[65]Kato et al. (2011), pp. 535, 535. Kato note that REE-rich mud appears to be concentrated mainly in two regions: the eastern South Pacific and the central North Pacific (535).

[66]Kato et al. (2011), p. 535.

[67]Kato et al. (2011), p. 538.

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polymetallic nodules within the national jurisdiction of the Cook Islands, which consist of a relatively high REE content as compared to other seabed nodules, have ‘significant resource potential’.[68]

Similarly, Japan has discovered high concentrations of REEs in deep sea mud within its national jurisdiction. This discovery was made at depths of between 5600 and 5800 m near the island of Minami-Torishima, within Japan’s EEZ.[69] Japan is responsible for over half of global REE consumption for use in its environmental, electronics and car industries.[70] Following the discovery near Minami-Torishima, Japanese scientists indicated that the contents of a single vessel mining in this area could supply Japan with 60% of its annual REE requirements.[71] Another discovery, which evidences the REE potential of deep seabed resources, was made recently within the Atlantic Ocean, on Tropic Seamount, an underwater mountain 270 nm from Tenerife.[72]

Overall, the volume of REEs available from the deep seabed could potentially exceed global land reserves.[73] Deep seabed mining could be a viable means by which to secure a reliable supply chain of REEs, insulated from potential geopolitical ruptures. Moreover, some experts argue that mining the deep seabed for REEs may pose environmental advantages as compared to terrestrial mining for these metals. The process for removing REEs from the deep seabed could be less invasive than equivalent land-based mining, impacting a significantly smaller footprint and absent the toxic waste products, which are engendered by land-based mining.[74] In this context, global excitement is growing over potential deep seabed mining for REEs in both national and international deep seabed areas.

[68]Hein et al. (2015), p. 97. See also Neate R, ‘Seabed Mining Could Earn Cook Islands “Tens of Billions of Dollars”’ *The Guardian* (London, 5 August 2013) <www.theguardian.com/business/2013/aug/05/seabed-mining-cook-islands-billions>.

[69]University of Tokyo, Graduate School of Engineering, ‘Discovery of Rare Earths Around Minami-Torishima’ (Research News, 2 May 2013) <www.u-tokyo.ac.jp/focus/en/articles/a_00145.html>.

[70]Evans-Pritchard A, ‘Japan Breaks China’s Stranglehold on Rare Metals with Sea-Mud Bonanza’ *The Telegraph* (London, 24 March 2013) <www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/9951299/Japan-breaks-Chinas-stranglehold-on-rare-metals-with-sea-mud-bonanza.html>.

[71]Evans-Pritchard A (n 70).

[72]Tropic Seamount is rich in crusts containing REEs and other elements, which may be attractive for use in green energy technology, such as tellurium: Shukman, ‘Renewables’ Deep-sea Mining Conundrum’ (n 56).

[73]Kato et al. (2011), p. 538.

[74]Hein, ‘ISA Briefing’ (n 15), p. 3; Kato et al. (2011), p. 535; Coles (2014), p. 8.

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3 The UNCLOS Deep Seabed Mining Regime

As Sect. 2 above has established the main types of mineral resources, which can be found in the Area and their perceived commercial, attractiveness, this section will provide an overview of the UNCLOS deep seabed mining regime. Firstly, Sect. 3.1 will address the key parameters of the regime and its founding principles. Secondly, Sect. 3.2 will consider the regime's licensing process for exploration and exploitation of deep seabed minerals. Finally, Sect. 3.3 will assess the extent to which actors are already undertaking mining activities in the Area at present.

3.1 Key Aspects of the Deep Seabed Mining Regime

The existence of polymetallic nodules on the deep ocean floor was discovered by the HMS Challenger expedition in the late 1800s.[75] Notwithstanding this early discovery, it was not until the middle of the twentieth century that the economic prospects of deep seabed resources began to excite the international community. In the 1960s, amidst the space race and growing competition to explore new frontiers, the hidden riches of the deep began to seem enticingly close.[76] During this era, increasing interest in deep seabed resources led to a rift within the international community, exposing a gulf between the views of developing States versus industrialist States.[77] As a result of this, the deep seabed mining regime contained within the Convention has an arduous negotiating history.[78] Reflecting on the UNCLOS negotiating conference (UNCLOS III), Koskenniemi and Lehto explain that '[t]he disagreement which underlay the debate concerned the capacity of market liberalism v. socialism to produce the general good. This was, of course, a disagreement which the Conference could not discuss in the open.'[79]

Just as the deep seabed, itself bears the geological and geomorphical scars of its evolution throughout the millennia, so too is the regime, which governs it, pockmarked by its history and turbulent development. As leading commentary on the law of the sea has remarked, '[n]o sketch can do its baroque architecture justice.'[80] The deep seabed mining regime is spread across various instruments.

[75] Murray and Renard (1891).

[76] See, e.g., Mero (1965); UNGA First Committee (22nd Session) 'Speech by Arvid Pardo' (1 November 1967, 3 p.m.) UN Doc A/C.1/PV.1516, 2.

[77] Higgins (1994), pp. 129–133; Koskenniemi and Lehto (1996), p. 537; Churchill and Lowe (1999), pp. 224–226.

[78] For analysis of this, see Boyle and Chinkin (2007); see also Koskenniemi and Lehto (1996), pp. 536–552; Churchill and Lowe (1999), pp. 224–229.

[79] Koskenniemi and Lehto (1996), p. 553.

[80] Churchill and Lowe (1999), p. 231, fn 25 (this comment relates to the pioneer investor scheme within the regime which the UNCLOS III negotiations devised to appease existing deep seabed

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The main body of it is contained within Part XI of UNCLOS, together with Annex III to the Convention (which sets out the licence application process and the conditions for deep seabed mining). In practice, in order to ensure sufficient support for UNCLOS amongst industrialised States, the regime as originally embodied in the Convention required substantial modification. Therefore, in 1994, States adopted the Agreement on the Implementation of Part XI of UNCLOS ("1994 Agreement").[81]

Hailed as a 'masterpiece of diplomatic ingenuity', the 1994 Agreement eliminated some of the more controversial aspects of the original UNCLOS scheme for deep seabed mining, which were the source of long-running opposition to the regime by industrialised States.[82] In essence, the 1994 Agreement reduced certain regulatory aspects of the deep seabed mining regime and endeavoured to render it a more 'market-orientated' approach.[83] Both Part XI of UNCLOS and the 1994 Agreement are to be interpreted and applied as if they constitute a single instrument. However, in the event of discrepancy between them, the provisions of the 1994 Agreement are decisive.[84]

Although UNCLOS and the 1994 Agreement contain the legal framework, which applies to the Area, they envisage a system whereby the ISA shall progressively develop a comprehensive Mining Code to regulate exploration and exploitation for all forms of resources in the Area. For that purpose, the regime endows the ISA with broad powers to adopt any rules, regulations and procedures, which are necessary for the conduct of mining activities in the Area.[85]

Key features of the overall system are as follows. The UNCLOS deep seabed mining regime is underpinned by the principle that the Area's mineral resources

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investors; however, this comment by Churchill and Lowe is equally applicable to the UNCLOS deep seabed mining regime as a whole).

[81] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force provisionally 16 November 1994 and definitively 28 July 1996) 1836 UNTS 3. For analysis of the 1994 Agreement and its impact, see Oxman (1994), p. 687; Brown (1995), p. 5 ff.; Sohn (1994), p. 696. See also commentary by Nordquist et al. (2002), pp. 54–68.

[82] Koskenniemi and Lehto (1996), p. 549 (and see generally pp. 536–552). For further elaboration on the evolution of the regime see also Churchill and Lowe (1999), pp. 224–229; Brown (2001), Ch 2; Holmila (2005), p. 187; Noyes (2012), pp. 459–460; Tuerk (2014), pp. 280–282; Fritz (2015), pp. 450–452.

[83] See, e.g., the Preamble to the 1994 Agreement, which notes the 'political and economic changes' which occurred in the period between the adoption of the UNCLOS text in 1982 and the conclusion of the 1994 Agreement, including the shift towards 'market-orientated approaches' within the international community.

[84] 1994 Agreement, art 2(1).

[85] UNCLOS, arts 140(2), 145, 160(2) (f), 162(o), 165(2) (f), and Annex III, art 17; Annex to the 1994 Agreement, sections 1(1), (5) (f)–(g), (15). See also Harrison (2011a), pp. 122–123, 152 (for analysis of the ISA's far-reaching powers to progressively develop the Convention's deep seabed mining regime).

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constitute the common heritage of mankind.[86] No State or entity can unilaterally claim sovereignty over deep seabed mineral resources.[87] Deep seabed mining in the Area must be performed with the oversight and permission of the ISA and only 'for the benefit of mankind as a whole'.[88] To this end, the deep seabed mining system must take into account the interests of developing States and promote their effective participation.[89] One aspect of this is that the ISA must develop mechanisms to guarantee equitable sharing of financial and other economic benefits derived from the Area.[90] Another significant element of the deep seabed regime is the protection of the marine environment.[91]

The ISA plays a key role as the custodian of the deep seabed, with regulatory control over deep seabed mining activities.[92] The ISA is constituted by three principal organs: the Assembly, in which all States Parties are represented; the 36-member Council elected by the Assembly, which constitutes the ISA's executive organ; and the Secretariat, which is responsible for the ISA's administration.[93] Importantly from a legal perspective, the ISA is assisted also by its Legal and Technical Commission ("LTC") which is an organ of the Council.[94] As will be discussed further in Sect. 3.2, the Authority has a mining arm, the Enterprise, but it is not yet operational.[95]

As noted above, the ISA is entrusted with the progressive expansion of the deep seabed mining regime through development of the Mining Code. Thus far, the ISA has adopted three sets of regulations, which concern exploration activities for three types of minerals (namely, polymetallic nodules, polymetallic sulphides

[86]UNCLOS, art 136; the principle that the Area's resources form the common heritage of mankind is protected from amendment (see UNCLOS, art 311(6)).

[87]UNCLOS, art 137(1).

[88]UNCLOS, art 140(1); see also arts 153, 157(1) and Annex III.

[89]UNCLOS, arts 148, 152(2).

[90]UNCLOS, art 140(2), see also art 160(2)(f)(i).

[91]See, e.g., UNCLOS, arts 145, 147. For analysis of issues concerning environmental protection in deep seabed mining see Redgwell (2006); Wolfrum (2014); Scovazzi (2014), p. 181; Jaeckel (2015), p. 93.

[92]UNCLOS, art 137(2); see also arts 153 and 157(1) and Annex to the 1994 Agreement, section 1 (1). The ISA's licensing process for deep seabed mineral exploration and exploitation will be explored in Sect. 3.2, directly below.

[93]UNCLOS, arts 158(1), 159–162, 166.

[94]UNCLOS, arts 163, 165; the Council elects members to the LTC based on qualifications relevant to deep seabed mining, including legal and technical expertise.

[95]UNCLOS, art 170; Annex to the 1994 Agreement, section 2.

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and cobalt-rich ferromanganese crusts[96]), together with some environmental recommendations.[97]

Despite rising anticipation levels, the commercialisation of deep seabed mining faces fundamental obstacles, especially in legal terms. One key challenge will be completion of a suitable regulatory regime to govern the entire lifecycle of deep seabed mining operations. A crucial aspect of this challenge is the need to develop a regime for exploitation, which takes account of the understandable environmental concerns posed by deep seabed extraction.[98] Deep seabed mining faces considerable opposition from a range of actors, including many NGOs. For example, the Deep Sea Mining Campaign, which is an association of NGOs and concerned individuals including Oxfam Australia and Mining Watch Canada, is calling for a moratorium on all deep seabed mining in both international and national waters.[99] Greenpeace also decries the advance towards exploitation of deep seabed minerals, citing concerns for the sensitive and unexplored ecosystems of the deep seabed.[100]

The ISA Secretary-General has recognised that this is a crucial test for the industry, stating in 2013 that '[t]he challenge is to develop an exploitation regime, including a fiscal framework, that fosters commercially viable exploitation and at the same time benefits mankind as a whole.'[101] In recognition of this challenge, the ISA is currently developing an expanded Mining Code to regulate the forthcoming exploitation phase. In July 2018, the ISA released the current version of the Draft Exploitation Regulations.[102] The ISA is working to finalise them by 2020, on the

[96]ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (adopted 13 July 2000) ISBA/6/A/18 (updated 25 July 2013) ISBA/19/C/17 ("**Nodules Regulations**"); ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted 7 May 2010) ISBA/16/A/12/Rev.1 ("**Sulphides Regulations**"); ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area (adopted 27 July 2012) ISBA/18/A/11 ("**Cobalt Regulations**").

[97]See, e.g., ISA LTC 'Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts arising from Exploration for Marine Minerals in the Area' (1 March 2013) ISBA/19/LTC/8.

[98]For a scientific assessment of some of the environmental concerns posed by deep seabed mining, see Sharma (2015), p. 204. For detailed legal consideration of the balance between commercial mineral exploitation and protection of the Area's marine environment, see Jaeckel (2017); see also Gjerde (2012), p. 839.

[99]Deep Sea Mining Campaign <www.deepseaminingoutofourdepth.org/>.

[100]Greenpeace International, 'Deep Sea Mining' (Background, 20 March 2014) <www.greenpeace.org/international/en/campaigns/oceans/marine-reserves/deep-sea-mining/>.
Greenpeace, alongside over 70 other NGOs, is part of the Deep Sea Conservation Coalition (an umbrella movement seeking to protect and preserve deep sea ecosystems): Deep Sea Conservation Coalition <www.savethehighseas.org/>.

[101]Odunton NI, ISA Secretary-General 'Statement to the Twenty-Third Meeting of the States Parties to the United Nations Convention on the Law of the Sea' (10 June 2013).

[102]ISA LTC, 'Draft Regulations on Exploitation of Mineral Resources in the Area' (9 July 2018) ISBA/24/LTC/WP.1/Rev.1 (Draft Exploitation Regulations).

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basis of extensive stakeholder consultation.[103] Once extraction of mineral resources commences, the ISA will oversee the redistribution of financial and other economic benefits derived from the resources of the Area.[104]

3.2 The Licensing Process for Deep Seabed Mineral Exploration and Exploitation

The licensing process for entities wishing to explore or exploit deep seabed minerals is contained within the UNCLOS regime, as modified by the 1994 Agreement and further developed by the ISA's Mining Code to date.

Article 153 of UNCLOS contains the heart of the licensing system. Pursuant to Article 153, activities in the Area may be carried out either by States Parties to the Convention or by 'state entities or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States'.[105] This requirement of nationality or control is echoed within all the ISA's exploration regulations to date.[106] Accordingly, if a non-State entity wishes to secure a licence to explore for deep seabed resources, it must obtain sponsorship from all States of which it is a national, and '[i]f another State or its nationals exercises effective control, the sponsorship of that State is also necessary.'[107]

[103]The ISA has been developing the Draft Exploitation Regulations by means of a process of collaboration with interested stakeholders, including States, State entities, private corporations, environmental groups and civil society. On the basis of stakeholder consultation, the LTC originally released an initial working draft of regulations and standard contract terms concerning mineral exploitation in the Area in July 2016; ISA LTC, 'Report – Developing a Regulatory Framework for Mineral Exploitation in the Area' (July 2016) <www.isa.org.jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf>. Since then, there have been two further iterations of the draft (in August 2017 and April 2018) before the release of the current draft in July 2018; see ISA Secretariat, 'Draft Regulations on Exploitation of Mineral Resources in the Area' (8 August 2017) ISBA/23/LTC/CRP.3* and ISA LTC, 'Draft Regulations on Exploitation of Mineral Resources in the Area' (30 April 2018) ISBA/24/LTC/WP.1.

[104]These benefits are to be shared equitably, on a non-discriminatory basis, through a mechanism still to be devised by the ISA; UNCLOS, art 140(2). Although the ISA has yet to develop the rules applicable to the equitable sharing of profits derived from deep seabed mining, in formulating such rules, the ISA must take the interests and needs of developing States into particular consideration; UNCLOS, art 160(2)(f)(i).

[105]UNCLOS, art 153(2)(b).

[106]Nodules Regulations, reg 9(b); Sulphides Regulations, reg 9(b); Cobalt Regulations, reg 9(b).

[107]*Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) ITLOS Reports 2011, 10, para 77; see also UNCLOS, Annex III, art 4(3); and reg 11(1)–(2) of the Nodules, Sulphides and Cobalt Regulations.

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States Parties, and entities which have secured appropriate sponsorship, are eligible to submit an application to the ISA to conduct exploration or exploitation activities. They make their application by seeking ISA approval of a formal written plan of work.[108] The Council is responsible for approval of applications, and it may do so upon LTC recommendation.[109] Once the application is approved and signed, it takes the form of a contract between the ISA and the contractor.[110]

A key aspect of the UNCLOS regime as originally envisaged was that it would be a 'parallel' system.[111] In accordance with this parallel system, States and State sponsored entities would be permitted to explore for and exploit seabed resources in tandem with the ISA's mining arm, the Enterprise.[112] To facilitate this process, the Convention incorporates a system of 'site banking'.[113] Pursuant to this approach, a contractor's plan of work must identify a total area for exploration or exploitation which is 'sufficiently large and of sufficient estimated commercial value to allow two mining operations' and 'indicate the coordinates dividing the area into two parts of equal estimated commercial value'.[114] On the basis of that information, the ISA must designate one part of the submitted area as a 'reserved area'.[115]

It was originally anticipated that mining activities in the reserved area would be conducted 'solely' by 'the Authority through the Enterprise or in association with developing States.'[116] However, in an effort to resolve one of the most intractable issues, which was preventing UNCLOS from entering into force, the 1994 Agreement suspended the role of the Enterprise indefinitely.[117] In accordance with modifications enacted by the 1994 Agreement, the State or entity, which contributes a particular area to the ISA as a reserved area, now has the right of first refusal to enter into a joint venture agreement with the Enterprise for exploration and exploitation of that reserved area.[118] If the right of first refusal is not exercised, it is open for

[108]UNCLOS, art 153(3), Annex III, art 3.

[109]UNCLOS, arts 153(3), 165(2)(b) and Annex III, art 6; Annex to the 1994 Agreement, sections 1 (6), 3(11).

[110]UNCLOS, art 153(3) and Annex III, art 3(5); see also Annex to the 1994 Agreement, section 1(6) (a)(i).

[111]See Nordquist et al. (2002), p. 297, *et seq* on the development and negotiation of the parallel system in the context of the drafting of UNCLOS, art 153.

[112]UNCLOS, art 153(2).

[113]Nordquist et al. (2002), p. 297.

[114]UNCLOS, Annex III, art 8.

[115]See UNCLOS, Annex III, art 8 and Annex to the 1994 Agreement, section 1(10).

[116]UNCLOS, Annex III, art 8; see further Annex III, art 9. See also UNCLOS, Annex IV, which contained the Statute of the Enterprise (much of which has been modified de facto by the 1994 Agreement).

[117]Section 2(1) of the Annex to the 1994 Agreement provides that 'the Secretariat of the Authority shall perform the functions of the Enterprise until it begins to operate independently of the Secretariat', while section 2(2) specifies the conditions that must be met for the Enterprise to come into operation. As Yet, the Enterprise has not become operational.

[118]Annex to the 1994 Agreement, section 2(5).

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developing States and entities sponsored by them, including private actors, to apply to explore and exploit the reserved area.[119]

Throughout the duration of deep seabed mining operations, the ISA possesses broad powers to oversee the performance of the contract, including by monitoring performance, inspecting installations and enforcing compliance with contractual terms.[120] Together with the pivotal role of the ISA in the mining process, in respect of non-State entities, State sponsorship remains a crucial mechanism throughout the life of mining operations and beyond.

The Seabed Disputes Chamber (the "Chamber") of the International Tribunal for the Law of the Sea ("ITLOS") addressed the important role of the sponsoring State in its Advisory Opinion of 2011.[121] The key purpose of sponsorship is to ensure that 'the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems.'[122] The contract with the ISA is also instrumental to this end. Due to the contractual relationship between the ISA and the contractor, the contractor becomes directly bound to adhere to the Convention's deep seabed mining regime.[123]

Importantly, the sponsorship relationship also provides a direct means by which to secure State responsibility on the part of the sponsoring State in respect of activities by entities, which it sponsors. Pursuant to Article 139 of UNCLOS, States Parties have the responsibility to ensure that any activities that they (or State-sponsored entities) conduct in the Area are performed consistently with Part XI of UNCLOS. In the event that a State Party fails to discharge this responsibility, it will be held responsible at international law. A State Party will not be liable for damage caused by an entity that it has sponsored only in the event that the State Party has taken 'all necessary and appropriate measures to secure effective compliance' by the sponsored entity.[124] In order to satisfy this obligation, sponsoring States have the:

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[119]UNCLOS, Annex III, art 9(4). In relation to sulphides and cobalt crusts exploration, the ISA modified the site banking system further, permitting an applicant seeking permission to explore for sulphides or cobalt-rich crusts to offer an equity interest in a joint venture arrangement to the Enterprise instead of submitting a reserved area: Sulphides Regulations, regs 16, 19; Cobalt Regulations, regs 16, 19.

[120]See, e.g.: UNCLOS, art 153(4)–(5), 157, 160, 162, 165; Annex III, art 18; Annex to the 1994 Agreement, section 1(1). The wide regulatory and enforcement powers of the ISA are reflected also in the Mining Code; see, e.g., the standard clauses to mining contracts in the fourth annex of the Nodules, Sulphides and Cobalt Regulations, at sections 10, 14, 21.

[121]*ITLOS Advisory Opinion* (n 107) para 74 (affirming that the 'notion of "sponsorship" is a key element in the system for the exploration and exploitation of the resources in the Area').

[122]*ITLOS Advisory Opinion* (n 107) para 75; as the Chamber acknowledged, this end is also achieved by virtue of the ISA's regulations, which apply to all contractors.

[123]Karavias (2013), p. 124 ('[t]he Standard Clauses [to the ISA contract], in turn, transpose the content of the [UNCLOS] provisions regarding activities in the Area and of the [ISA] Regulations into the contractual arrangement, thus providing a nexus between [UNCLOS] and the secondary law enacted by the ISA and the contract for exploration.'); see also Harrison (2011a), p. 123.

[124]UNCLOS, art 139(2); see also UNCLOS, arts 138 and 153(4); and Annex III, art 4(4).

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> [R]esponsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State, however, shall not be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures, which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.[125]

This obligation upon the State sponsor 'to ensure' compliance is a due diligence obligation 'to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.[126] In addition to this obligation 'to ensure', State sponsors are subject to direct obligations, including duties to apply the precautionary approach and best environmental practices.[127] Consequently, State sponsorship plays a vital function in obliging sponsoring States to adopt robust compliance measures in respect of sponsored entities.

As noted in Sect. 3.1 above, once extraction of mineral resources commences, the ISA will oversee the redistribution of financial and other economic benefits derived from the resources of the Area. As the levels of fees and royalties that miners must pay remains to be determined, together with the term of exploitation contracts, there is significant uncertainty at present for contractors seeking to determine financing arrangements for deep seabed mining ventures. However, as analysis in Sect. 3.3, directly below, will demonstrate, notwithstanding the nascent nature of the current regime, participation in the Area is increasing. Various States, State actors and private entities are positioning themselves to take advantage of the perceived opportunities afforded by extraction of deep seabed resources.

3.3 The Current Extent of Deep Seabed Mining Activities

Deep seabed mining activities in the Area have thus far been confined to the exploration stage.[128] Industry experts are cautious about the prospects for deep seabed mining in light of the sheer costs involved in mineral extraction, together with factors such as fluctuating metal prices.[129] However, significant investment has

[125] UNCLOS, Annex III, art 4(4).

[126] *ITLOS Advisory Opinion* (n 107), para 110.

[127] *ITLOS Advisory Opinion* (n 107), para 122; see further Freestone (2011), p. 755; Harrison (2011b), p. 517; Plakokefalos (2012), p. 134.

[128] On the parameters of the deep seabed and the definition of mineral resources within it, see Sect. 2.1 above.

[129] Sharma (2011), pp. 28–31; see also, e.g., Egan M, 'Copper, Aluminium and Steel Collapse to Crisis Levels' *CNN Money* (New York, 9 December 2015) <http://money.cnn.com/2015/12/09/investing/oil-prices-metals-crash-crisis-levels/>.

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been made by contractors in the Area, and there are signs that commercialisation of the industry may be realised in the future.[130]

As of August 2018, the ISA has signed mining contracts with a total of twenty-nine contractors for exploration in relation to the three regulated minerals types (nodules, sulphides and cobalt crusts). These figures include a notable spike in the number of applications and contracts granted in recent years. As recently as early 2011, only eight applications for exploration had been approved; by the end of 2015, that figure had more than tripled.

Of the deep seabed licences agreed to date by the ISA, the most commonly granted have been licences to explore for polymetallic nodules. The ISA has approved seventeen such licences. All but one of the nodules licences are in respect of areas of the seabed in the CCZ.[131] The remaining nodules licence relates to an area in the Central Indian Ocean Basin.

Of all the mining activities in the Area, those related to polymetallic nodules have been ongoing for the longest period. Six contracts for nodules exploration were due to expire in 2016 and one in 2017, having reached the end of their 15-year terms. During its 21st Session in July 2015, the ISA adopted procedures and criteria for extension of approved plans of work for exploration.[132] Thereafter, during its 22nd Session in July 2016, the ISA extended the first six contracts each for a period of 5-years, after which time the Council 'invites the applicants to be ready to proceed to exploitation'.[133] During the ISA's 23rd Session in August 2017, the ISA extended the remaining contract, which was due to expire, for an additional 5-year period, on similar terms.[134] In practice, however, commercial production of nodules will not be able to begin until the ISA has finalised appropriate regulations on exploitation: a matter, which is ongoing.[135]

The ISA has granted seven licences for sulphides exploration. Of the seven sulphides licences which the ISA has issued, four relate to areas in the Indian

[130]See, e.g., Latimer C, 'Seabed Mining: Plunging into the Depths of a New Frontier' *Australian Mining* (Australia, 10 August 2011) <www.australianmining.com.au/features/seabed-mining-plunging-into-the-depths-of-a-new-fr>; Shukman, 'Deep Sea Mining "Gold Rush" Moves Closer' (n 2); Goldenberg S, 'Marine Mining: Underwater Gold Rush Sparks Fears of Ocean Catastrophe' *The Observer* (London, 2 March 2014) <www.theguardian.com/environment/2014/mar/02/underwater-gold-rush-marine-mining-fears-ocean-threat>; Minter A (n 2).

[131]For discussion of the CCZ, see n 42–44 and accompanying text.

[132]ISA Council, 'Decision of the Council relating to the procedures and criteria for the extension of an approved plan of work for exploration pursuant to section 1, paragraph 9, of the annex to the Agreement relating to the Implementation of Part XI of UNCLOS' (24 July 2015) ISBA/21/C/19*.

[133]ISA Press Release, 'Seabed Council Puts Forward Two Candidates for Election of Secretary-General; Approves Six Exploration Contract Extensions; Begins LTC Election Debate' (18 July 2016) SB/22/9; for the draft decisions by the Council to approve the extensions, see ISA Council 'Draft Decisions' (all dated 14 July 2016) ISBA/22/C/L.4–L.9.

[134]ISA Council, 'Decision of the Council relating to an application by the Government of India for extension of a contract for exploration for polymetallic nodules between the Government of India and the Authority' (10 August 2017) ISBA/23/C/15.

[135]See discussion in above at n 102–103 and accompanying text.

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Ocean (including areas on the Central Indian Ridge and the Southwest Indian Ridge). The remaining three licences concern areas on the Mid-Atlantic Ridge on the floor of the Atlantic Ocean.

The ISA has granted five licences for cobalt crusts exploration. Four of these licences concern areas in the Western Pacific Ocean. The fifth licence relates to an area on the Rio Grande Rise, which is located in the South Atlantic Ocean.

Various actors are conducting exploratory activities in the Area, including States, State enterprises and private actors. Currently, the 29 existing contracts are held by the following actors: 1 international consortium of States (exploring for nodules);[136] 4 States (holding 8 contracts between them to explore for a mixture of nodules, sulphides and cobalt crusts);[137] 11 State enterprises, State institutions or State-controlled corporations (holding 15 contracts in total to explore for nodules, sulphides or cobalt crusts);[138] and 4 private corporations (holding 5 contracts between them to explore for nodules).

All four of the private corporate contractors are exploring for polymetallic nodules in the CCZ. The first of them is Tonga Mining Offshore Limited, a Tongan national and wholly-owned subsidiary of Nautilus Minerals Inc. Shareholders in Nautilus include various major natural resource and mining companies, such as MB Resources, Metalloinvest, Anglo American and Teck Resources. The second ISA corporate contractor is G-Tec Sea Minerals Resources NV, a Belgian national. Thirdly, UK Seabed Resources Ltd ("UKSRL"), a UK national, holds two contracts with the ISA. UKSRL is a subsidiary of US defence giant, Lockheed Martin. Finally, the fourth private corporation to enter an ISA contract was Ocean Mineral Singapore Pte Ltd ("OMS"). OMS is a Singaporean national, owned by fellow Singaporean: Keppel Corporation, one of the world's largest offshore and marine groups. Minority shares in OMS are held by UKSRL and Lion City Capital Partners Pte Ltd, a Singaporean private investment company.

Therefore, despite the uncertainties and risks inherent within deep seabed mining endeavours, increasing exploratory activities—especially by private investors—evidence that the industry may be moving towards commercialisation in the future.

[136]This contractor is Interoceanmetal Joint Organization (comprising Bulgaria, Cuba, the Czech Republic, Poland, Russia and Slovakia).

[137]These four States are India, Poland, Russia and South Korea.

[138]These eleven entities possess nine nationalities between them, with Chinese entities holding four contracts, French, German and Japanese entities holding two contracts each, and entities controlled by Brazil, the Cook Islands, Kiribati, Nauru and Russia holding one contract each.

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4 Conclusion

At the turn of this century, to some extent deep seabed mining in the Area seemed to be 'further off than ever before'.[139] Interest in polymetallic nodules appeared to have 'dwindled to the point where commercial exploitation of these resources [seemed], at best, a remote possibility.'[140] The tide may be turning. Although the challenges to commercial operation remain significant, it could soon be both economically feasible and technologically viable to recover mineral resources from the Area.[141]

As this article explored in Sect. 2 above, the deep seabed beyond national jurisdiction is home to a wealth of mineral resources, including various metallic minerals such as polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. In particular, commercial interest has been piqued by discoveries of rare earth minerals on the deep seabed, essential both for green energy technology and to fuel ever-growing dependence on electronics and high-tech gadgets.

Within international law, a detailed legal framework for deep seabed mining activities can be found within the Convention and associated instruments, including the 1994 Agreement and the Mining Code. As considered in Sect. 3 above, this regime enshrines the central role of the ISA as the regulator and overseer of deep seabed exploration and exploitation activities. In accordance with the ISA's licensing process, commercial investment in deep seabed mining is growing amongst an array of actors, including States, State entities and private investors. As the ISA continues to grant more contracts and swathes of the seabed become earmarked for exploration activities, there is now a tangible sense of momentum within the deep seabed mining community.

At present, mining activities within the Area have been confined to the exploration phase. As set out in this article, a critical factor in determining the future feasibility of the industry will be the precise shape of the regulatory regime governing extraction of deep seabed minerals beyond national jurisdiction. UNCLOS and related instruments provide the basic legal framework applicable to the Area, but the precise workings of the regime remain to be determined. In practice, commercial exploitation of the deep seabed cannot begin until the ISA has adopted regulations governing exploitation, a process which is ongoing and likely to take some time. Regulations governing environmental aspects of mining will also be vital. As the ISA works to implement these regulations and enhance the Mining Code, through detailed consultation with stakeholders, this next phase will be a fundamental step towards the long-term realisation of commercial activities within the Area.

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[139] Lodge (2002), p. 294.

[140] Ibid.

[141] ISA Press Release, 'Commercialization of Marine Minerals' (n 3); see also United Nations Environment Programme, 'Wealth in the Oceans: Deep Sea Mining on the Horizon?' (Global Environmental Alert Service, May 2014) available at <https://na.unep.net/geas/archive/pdfs/GEAS_May2014_DeepSeaMining.pdf>; Houses of Parliament, 'Deep-Sea Mining' (n 61).

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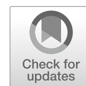
Natural Resources and the Arctic



Fernando Loureiro Bastos

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1 Introduction

In January 2018, the Bureau of Ocean Energy Management (BOEM) released the 2019–2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program. This document represents the presentation of a new strategy for the exploration and exploitation of oil and natural gas on the continental shelf of Alaska (with the possible exception of the North Aleutian Basin).[1] Although the document provides very relevant elements for an environmental framework of the activities that may be developed in this maritime space, its main objective is to guarantee the

[1]2019–2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program, January 2018, https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024 (last accessed 6 March 2018), Figures 1 and 2: OCS Alaska Planning Areas, pp. 1–4.

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energy autonomy of the United States in the short and medium term and to obtain a leading position in this economic area.[2]

The alteration of the position of the United States of America[3] regarding the use of the continental shelf adjacent to Alaska for oil and natural gas exploration does not appear to be consistent with the model of cooperation that has been developed over the past two decades by the Arctic States, in particular through the Arctic Council. The latest result of such international cooperation is the conclusion of the negotiations on the draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, on 30 November 2017 (signed at Ilulissat, 3 November 2018). The purpose of this international commitment is to prevent commercial fishing permits from being issued for the Central Arctic Ocean until sufficient scientific data on the species in this region have been collected and analysed and a strategy for sustainable catches has been put in place.

It should be considered that interest in the Arctic is not restricted to the Arctic coastal states. This has been demonstrated by the progressive development of an integrated European Union policy for the Arctic (Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic[4]) and by the disclosure by China, on 26 January 2018, of a white paper entitled China's Arctic Policy.[5]

It should be noted that the territorial and maritime area described as 'Arctic' may vary according to the natural criteria used for its definition, whether by the temperature (the 10C isotherm), ecology (Arctic tree line) or geography (the Arctic Circle

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[2]In this sense, in the 2019–2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program, January 2018, https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024 (last accessed 6 March 2018), p. 1, it is stated that "[t]he development of a new National OCS Program at this time is a key aspect of the implementation of President Donald Trump's America-First Offshore Energy Strategy, as outlined in the President's Executive Order (E.O.) 13795 (April 28, 20179, and Secretarial Order 3350 (May 1, 2017)", being simultaneously emphasized that "[t]his Draft Proposed Program (DPP) would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019-2024 period. Including at this stage nearly the entire OCS for potential oil and gas discovery is consistent with advancing the goal of moving the United States from simply aspiring for energy independence to attaining energy dominance".

[3]About the national Arctic policy doctrines of the United States of America, the Russian Federation, Canada and the European Union see Golitsyn (2014), pp. 470–480.

[4]Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic, prepared by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 27 April 2016 (JOIN (2016) 21 final). On the evolution of the European Union's position vis-à-vis the Arctic see Airoldi (2014).

[5]The white paper: China's Arctic Policy, 26 January 2018, http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm (last accessed 6 March 2018), has the following structure: I. The Arctic Situation and Recent Changes; II. China and the Arctic; III. China's Policy Goals and Basic Principles in the Arctic; IV. China's Policies and Positions on Participating in Arctic Affairs (1. Deepening the exploration and understanding of the Arctic; 2. Protecting the eco-environment of the Arctic and addressing climate change; 3. Utilizing Arctic Resources in a Lawful and Rational Manner; 4. Participating Actively in Arctic governance and international cooperation; and 5. Promoting peace and stability in the Arctic).

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or areas north of 60N).[6] When analysing the question of the use of natural resources in the Arctic, the most appropriate approach for setting the boundaries of the Arctic region seems to be the use of the criteria applied by the Arctic Council Participating States, in particular for the elaboration of studies carried out by the Arctic Monitoring and Assessment Programme (AMAP).[7,8]

The Arctic is inhabited by four million people, with indigenous communities estimated at about one-tenth of the total population (the uncertainty being the result of there not being specific date relative to the ethnic populations in the states concerned). Indigenous populations are distributed among seven of the eight Arctic States, with the exception of Iceland, the most important being the Saami, distributed throughout Finland, Sweden, Norway and the Northwest of Russia, and the Inuit (Iñupiat) in Alaska, the Inuit (Inuvialuit) in Canada,[9] and the Inuit (Kalaallit) in Greenland. Belonging to different ethnic groups, and distributed by diverse communities with distinct characteristics,[10] the livelihoods and survival of indigenous populations are dependent on the methods of the traditional exploitation of natural living resources, particularly the capture of marine mammals.[11]

Although the exploitation of natural resources in the Arctic is still, in many cases, merely potential, the possibility of this happening in the near future is a consequence of climate change. In 2004, in the study Impacts of a Warming Arctic[12] it was stated that, "[a]nnual average arctic temperature has increased at almost twice the rate as that of the rest of the world over the past few decades, with some variations across the region", hence that there has been "[i]ncreasing precipitation, shorter and warmer winters, and substantial decreases in snow cover and ice cover are among the

[6]On this matter see Rothwell (1996), pp. 23–25.

[7]The geographical coverage of the Arctic Monitoring and Assessment Programme covers areas south of the Arctic Circle, "as far south as 51.1 degrees N (James Bay, Canada)" and "extends from the High Arctic to the sub-Arctic areas of Canada, the Kingdom of Denmark (Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation", See https://www.amap.no/about/geographical-coverage (last accessed 6 March 2018).

[8]In this sense, Henriksen (2018), p. 593.

[9]On the specific legal regime applicable to the Inuvialuit see the Agreement between the Committee for Original Peoples' Entitlement, representing the Inuvialuit of the Inuvialuit Settlement Region, and the Government of Canada dated June 5, 1984 (with subsequent amendments), reproduced in *The Western Arctic Claim. Inuvialuit Final Agreement as Amended*, Inuvialuit Regional Corporation, See https://www.inuvialuitland.com/resources/Inuvialuit_Final_Agreement.pdf (last accessed 6 March 2018).

[10]About areas of heightened cultural significance see Huntington et al. (2013), pp. 101–115.

[11]In this sense, Larsen (2010), pp. 85–87, which states that "[t]he livelihoods of a significant number of indigenous people—including also many non-indigenous residents—continue to depend largely on harvesting and use of living terrestrial, marine, and freshwater resources. Many of these resources are used as food and for clothing and other products, and make important contributions to the cash economy of local households and communities" (p. 86). On the international legal regime applicable to the indigenous peoples of the Arctic see Koivurova (2016), pp. 360–361.

[12]ACIA, Impacts of a Warming Arctic: Arctic Climate Impact Assessment, Cambridge University Press, 2004, https://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786 (last accessed 6 March 2018).

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projected changes that are very likely to persist for centuries".[13] These results were corroborated by the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013), when it was stated that "[t]he Arctic region will warm more rapidly than the global mean, and mean warming over land will be larger than over the ocean (very high confidence)",[14] and also that "[t]he annual mean Arctic sea ice extent decreased over the period 1979 to 2012 with a rate that was *very likely* in the range 3.5 to 4.1% per decade (range of 0.45 to 0.51 million Km2 per decade), and *very likely* in the range 9.4 to 13,6% per decade (range of 0.73 to 1.07 million Km2 per decade) for summer sea ice minimum (perennial sea ice)".[15]

It should be noted that the consequences of climate change in the Arctic can be appreciated in very different ways, according to the perspective adopted. The effects of climate change are evaluated in a predominantly negative way when the ongoing changes in the Arctic are considered according to an environmental perspective and the maintenance of the traditional living conditions of indigenous populations. From an opposite perspective, the reduction of the frozen areas and changes in the models of economic use of spaces can be qualified as potentially positive when analysed from a western anthropocentric perspective of the use of natural resources (very different from the one that has been used traditionally by the indigenous communities living in the Arctic[16]).

Probably the most obvious and widespread facet of the potential positive consequences of climate change in the Arctic has been the increased navigation routes in the region, with the particular mention of four routes,[17] viz. the Northern Sea Route, the Northwest Passage,[18,19] the Northeast Passage and the Central Arctic Ocean Route. The existence of new Arctic routes may reduce the shipping distance between destinations in Europe, Asia and North America, with decreases in days spent at sea

[13]ACIA, Impacts of a Warming Arctic: Arctic Climate Impact Assessment, Cambridge University Press, 2004, https://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786 (last accessed 6 March 2018), p. 10.

[14]"Summary for Policymakers", in Stocker et al. (2013), p. 20.

[15]"Summary for Policymakers", in Stocker et al. (2013), p. 9.

[16]On the issue see Cambou and Smis (2013) and Enyew (2017).

[17]A map with the various routes can be found in Sander et al. (2014), p. 37.

[18]About the Northwest and Northeast Passages see Golitsyn (2014), pp. 469–473; Scott and Vanderzwaag (2015), p. 734, in respect of the jurisdictional tensions caused by the application of the legal regime of the straits used for international navigation to the Russia's Arctic straits and to the Northwest Passage.

[19]In the study ACIA, Impacts of a Warming Arctic: Arctic Climate Impact Assessment, Cambridge University Press, 2004, https://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786 (last accessed 6 March 2018), p. 10, it is emphasized that "[s]easonal opening of the Northern Sea Route is likely to make trans-arctic shipping during summer feasible within several decades. Increasing ice movement in some channels of the Northwest Passage could initially make shipping more difficult".

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and fuel consumption, but they are not likely to result in a replacement of the traditional maritime routes.[20]

The last decade has also witnessed an increase in tourism in the Arctic, consisting of an increase in the number of tourists and the diversification of places that have been visited for recreational purposes.[21,22]

2 The International Legal Regime of the Arctic and Its Relevance to the Economic Use of Natural Resources

2.1 The International Legal Regime Applicable to the Arctic's Land and Maritime Spaces

Since frozen surfaces are a distinctive feature of the Arctic, it is important to make a distinction between ice-covered land and waters that are temporarily or permanently frozen, owing to the different regulations that are applied to them by international law. The international legal regime of the various regions of the Arctic varies depending on whether we are dealing with land covered by ice or frozen waters that can be regulated by the international regimes of the various maritime spaces provided for by the International Law of the Sea.

The legal regime of territorial sovereignty applies to terrestrial territories covered by ice, which are considered to be exclusive, is incompatible with uses by third States which are not authorized. For waters which are temporarily or permanently frozen, different international legal regimes apply, and these vary according to whether those waters are designated to be inland waters, territorial sea, contiguous zone, exclusive economic zone or high seas.[23] The outer limits of the maritime

[20]In this sense, Raspotnik and Rudloff (2012), pp. 6–7, argue that "the often positively potential of the new maritime corridors does not only depend on the continuous melting of Arctic sea ice and the mentioned reduction in sailing distances, but will be decisively influenced by economic parameters, legal aspects and geopolitical/geostrategic considerations".

[21]The main ports operating in the Arctic are: Churchill in Canada, Murmansk in Russia, and Prudhoe Bay in the United States of America.

[22]On this question, see Maher et al. (2014), with an analysis of the cases of Alaska, Canada, Iceland, Faroe Islands, Sweden, Finland and Russia; and Grimsrud (2017). Data on Arctic tourism can be found at NOEP—National Ocean Economic Program, of the Middlebury Institute of International Studies at Monterey—Center for the Blue Economy, http://www.oceaneconomics.org/arctic/tourism/tourData.aspx (last accessed 6 March 2018), with reference to Canada, Greenland, Sweden, Finland, Iceland, Norway, United States of America, Russia, Denmark, and the Arctic Expedition Cruise Operators (AECO).

[23]With regard to the United States of America the customary international law in force in this matter applies, taking into consideration that the United States has not yet ratified the United Nations Convention on the Law of the Sea. In this sense, Golitsyn (2014), p. 465, states that "it may be assumed that, with the exception of the deep seabed mining, the United States considers all other provisions of UNCLOS applicable to the Arctic Ocean as customary international law". On the

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spaces subject to the sovereignty or jurisdiction of coastal states depends on the baselines that have been fixed by the coastal States,[24] and these cannot exceed the limits authorized by the International Law of the Sea, namely 12 nautical miles to the territorial sea, 24 nautical miles to the contiguous zone and 200 nautical miles to the exclusive economic zone. The exercise of powers by the coastal State on the continental shelf does not require a claim for up to 200 nautical miles, and the possibility of its extension beyond the external limits depends on a submission to the Commission on Limits of the Continental Shelf established by the United Nations Convention on the Law of the Sea.[25]

The extent of the high seas and that of the Area is dependent on the outer limits of the maritime spaces of the coastal states, namely the exclusive economic zone and the continental shelf. The marine Arctic, including the Arctic ocean and adjacent areas, such as the Bering Sea and the Barents Sea, is 14 million square kilometres in extent, of which an estimated 2,800,000 square kilometres can be qualified as high seas.

The land and maritime borders of the coastal States of the Arctic region are very relevant with regard to the evaluation of the use of natural resources in the Arctic for three reasons. Firstly, the exploitation of natural resources in the territory of States is subject to the principle of territorial sovereignty. Secondly, coastal States have sovereign powers to exploit the natural resources available in the maritime spaces adjacent to their land territories that must be harmonized with the uses recognized to third States, especially with regard to the freedom of navigation. And, thirdly, international maritime spaces (the high seas) and internationalized maritime spaces (the Area[26]) shall be determined according to the spaces subject to the sovereignty and jurisdiction of the coastal States. In relation to these facts, the importance for the Arctic States to negotiate and conclude bilateral agreements on the delimitation of

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discussions concerning the ratification by the United States of America of the United Nations Convention on the Law of the Sea, the compilation of documents entitled 21st Century Complete Guide to the Law of the Sea Treaty (LOST). U. N. Convention on the Law of the Sea (UNCLOS). Commercial, Seabed Ocean Mining, Maritime Rights, and Military Implications, Progressive Management Publications. At the ISAB—International Security Advisory Board, Report Arctic Policy, September 21, 2016, https://www.state.gov/documents/organization/262585.pdf (last accessed 6 March 2018), p. 39, it is recommended that "the United States should make ratification of UNCLOS an urgent national priority", taking into account that "ratification will promote American stability, security and presence in all oceanic contexts—particularly in the Arctic region—and it will enable the United States to have a voice at UNCLOS tribunals on claims asserted in the Arctic by Russia and others and in the future development of UNCLOS as an institution".

[24]On the issue see Golitsyn (2014), pp. 476–479, with reference to the position of the United States of America on the subject; and Scovazzi (2016), pp. 172–177.

[25]On the issue see Rahbek-Clemmensen (2015); and Scott and Vanderzwaag (2015), pp. 732–734.

[26]According to Scott and Vanderzwaag (2015), pp. 733–734, "[w]hat areas of the deep seabed will remain beyond national jurisdiction remains to be seen. A prevalent view among authors is that once the outer continental shelves of the five Arctic coastal States are partitioned, only two relatively small areas will lie beyond national jurisdiction".

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their maritime borders can be understood and the maritime zones of potential conflict between States of the region are almost non-existent.[27]

Other than the situation in Antarctica,[28] which is an ice-covered land territory with a specific international legal regime, the Arctic is not governed by particular rules of international law, nor is it foreseeable that it will be in a near future.[29] Indeed, in the: Ilulissat Declaration of 28 May 2008, the five coastal States of the Arctic Ocean—Canada, Denmark, Norway, the Russian Federation and the United States of America—declared that they had adopted the International Law of the Sea as the appropriate international legal framework for the management of issues such as the "delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research and other uses of the sea". This position was reinforced by the very relevant and expressive statement that, "[w]e therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean".[30] The European Union declared, on 27 April 2016, in the Joint Communication to the European Parliament and the Council, entitled An integrated European policy for the Arctic, and prepared by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, that "the UN Convention on the Law of the Sea (UNCLOS) provides a framework for managing the Arctic Ocean, including the peaceful settlement of disputes".[31] A similar position was adopted by

[27]In this sense, Scott and Vanderzwaag (2015), pp. 729–734, refer to the existence of four situations of potential conflict: (1) the maritime boundary between Canada and the United States in the Beaufort Sea; (2) the dispute between Canada and Denmark (Greenland) with respect to Hans Island, an uninhabited islet, located in Nares Strait of the Kennedy Channel, with a dimension of about 1 square kilometre; (3) the application of the regime of 200 nautical miles fisheries protection zone to the Svalbard Archipelago under the Treaty of Spitsbergen; and (4) the possibility of overlapping claims related to the of the outer limits of the continental shelves beyond 200 nautical miles (Canada and the United States in the Beaufort Sea; Canada and Denmark/Greenland and Russia in the Arctic Basin; and Norway (Svalbard) and Denmark/Greenland). A graphic representation of the maritime boundaries can be found in the maps available on the website of IBRU—Centre for Borders Research, da Durham University: (1) Maritime Jurisdiction and Boundaries in the Arctic Region Russian Claims https://www.dur.ac.uk/ibru/resources/arctic/ (last accessed 6 March 2018); and (2) Status of Arctic Waters Beyond 200 Nautical Miles from Shore, https://www.dur.ac.uk/ibru/resources/arctic/ (last accessed 6 March 2018).

[28]On this issue see Mucci and Borgia (2014); Scott and Vanderzwaag (2015), pp. 738–745.

[29]On the international legal regime applicable to the Arctic see Vanderzwaag (2010), pp. 47–60. A listing of the international legal regime applicable to the Arctic can be found in Sahu (2016), pp. 83–95.

[30]Regarding the possibility of the Arctic being described as a semi-closed sea, for the purposes of applying Part IX of the United Nations Convention of the Law of the Sea, Winkelmann (2017), p. 886, states that "[n]either the five Arctic coastal States nor the Arctic Council have ever officially referred to the Arctic Ocean as a semi-enclosed sea. Other States—including the remaining Arctic Council Member States—would hardly adhere to such an assumption with its inherent exclusiveness. Thus, the question remains formally open. Many of the activities implemented by the Arctic Council in the Arctic Ocean relate to tasks suggested in Art. 123".

[31]Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic, prepared by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 27 April 2016 (JOIN (2016) 21 final), p. 14.

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China, which calls itself a "Near-Arctic State", on 26 January 2018, in the China's Arctic Policy, by stating that, "States from outside the Arctic region do not have territorial sovereignty in the Arctic, but they do have rights in respect of scientific research, navigation, overflight, fishing, laying of submarine cables and pipelines in the high seas and other relevant sea areas in the Arctic Ocean, and rights to resource exploration and exploitation in the Area, pursuant to treaties such as UNCLOS and general international law".[32]

The international legal regime referred to above must be harmonized with the international conventional regime applicable to the Spitsbergen archipelago or Svalbard (in accordance with the Norwegian naming), concluded in Paris on the 9 February 1920.[33] In accordance with Article 1, "the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen" was recognized, with the consequence that "[s]hips and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters" (article 2). In accordance with Article 2, Norway "shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters". Article 3 embodies the rights of States which are party to the Treaty on Spitsbergen in particularly broad terms, by providing that "[t]he nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without any impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality". The fundamental issue with regard to the application of this conventional international regime at present is whether its geographical scope covers only the territorial sea or must identically include maritime spaces, such as the continental shelf and the exclusive economic zone, the concepts of which emerged only after its conclusion.[34]

While a consideration of issues related to the exploitation of natural resources, especially the living natural resources, could take into account an ecosystem approach, the political boundaries amongst the States of this region, whether land or maritime, are still of decisive importance to this field of the uses of natural resources.

[32]China's Arctic Policy, I. The Arctic Situation and Recent Changes, 26 January 2018, http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm (last accessed 6 March 2018).

[33]Treaty between Norway, The United States do America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920, http://library.arcticportal.org/1909/1/The_Svalbard_Treaty_9ssFy.pdf (last accessed 6 March 2018). Data on the Svalbard can be found in Wang and Kristiansen (2017).

[34]According to Scott and Vanderzwaag (2015), p. 732, "Norway has somewhat defused the controversy by allowing fishing access to various states within the FPZ [fisheries protection zone], largely based on their historical fishing in the area".

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2.2 The Arctic Council

Over the past two decades, through the Arctic Council, the five Arctic Ocean coastal States, together with Finland, Iceland and Sweden, have been playing a decisive and innovative role in the management of arctic affairs.[35] The Arctic Council is presented by its promoters as being "the leading intergovernmental forum promoting cooperation, coordination and interaction among the Arctic States, Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular on issues of sustainable development and environmental protection in the Arctic". In these terms, by its not being an intergovernmental organization nor having been given concrete powers of action, the implementation of the guidelines, assessments and recommendations is the exclusive task of the participating Arctic States.

The Arctic Council was created by the Declaration on the Establishment of the Arctic Council, dated 19 September 1996, signed in Ottawa, Canada, and based on the Arctic Environmental Protection Strategy (AEPS). On 21 January 2013, an agreement was signed between the Norwegian Minister of Foreign Affairs and the Arctic Council Secretariat Director on the establishment of the Arctic Council Secretariat in Tromso, Norway.[36]

The Ottawa Declaration was signed by representatives of the governments of the eight States of the Arctic Region, which call themselves Arctic States: Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden and United States of America. In accordance with para. 1 of the Ottawa Declaration, the Arctic Council was "established as a high-level forum". According to para. 1 (a) of the Ottawa Declaration, the Arctic Council was established to: "provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental

[35] In this sense, Brigham et al. (2016), p. 9, maintain that "[t]he Arctic Council is in many ways a marvel. Perhaps the first true post-modern regional organization, representing a new kind of region-building, it has not so much blazed a trail as invented and occupied a unique space in international relations: one that has privileged cooperation and consensus to the point that it has withstood broader political tensions between Russia and the West; has provided meaningful inclusion of indigenous peoples and other non-state actors; and prioritized environmental protection using scientific and traditional knowledges as its evidence base". On the evolution of the Artic Council, see Koivurova (2016), pp. 350–354, which states that "[c]urrently, the Arctic States have taken at least some steps to counter the vast challenges ahead, by consolidating the Arctic Council as an institution and choosing to prepare for the eventuality of climate-change Arctic through hard-law instruments. Even if some have suggested stronger institutional responses to govern the 'new arctic', Arctic states have chosen the path of consolidating existing regulatory frameworks and negotiating new sectorial ones, also regarding the exploitation of natural resources" (p. 364).

[36] The authentic text, in English, of the Host Country Agreement between the Government of the Kingdom of Norway and the Arctic Council Secretariat on the Legal Status of the Secretariat and Privileges and Immunities of the Secretariat and its staff members can be found on the site of the Arctic Council, https://oaarchive.arctic-council.org/handle/11374/1655 (last accessed 6 March 2018).

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protection in the Arctic". In a footnote to para. 1 (a) of the Ottawa Declaration, it is expressly stipulated that "[t]he Arctic Council should not deal with matters related to military security". In the Joint Communiqué of the Governments of the Arctic Countries on the Establishment of the Arctic Council it was further reaffirmed that "[m]inisters viewed the establishment of this new intergovernmental forum as an important milestone in their commitment to enhance cooperation in the circumpolar North".

The Arctic Council is composed of the States that signed the Ottawa Declaration and Permanent Participants, whose number should be "at any time less than the number of members". Permanent Participants are: "Arctic organizations of indigenous peoples with a majority Arctic indigenous constituency, representing: (a) a single indigenous people resident in more than one Arctic State; or (b) more than one Arctic indigenous people resident in a single Arctic state", pursuant to paragraph 2 of the Ottawa Declaration. In January 2018, six organizations representing the Arctic indigenous peoples have status as Permanent Participants: the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, the Inuit Circumpolar Council, the Russian Association of Indigenous Peoples of the North, and the Saami Council.

In accordance with para. 3 of the Ottawa Declaration, it is envisaged that there may be observers in three categories: "non-Arctic states",[37] "inter-governmental and inter-parliamentary organizations, global and regional",[38] as well as "non-governmental organizations".[39] The granting of observer status involves taking into

[37]In January 2018, 13 Non-arctic States were approved as Observers to the Arctic Council: France (2000); Germany (1998); Italy (2013); Japan (2013); Netherlands (1998); China (2013); Poland (1998); India (2013); Republic of Korea (2013); Singapore (2013); Spain (2006); Switzerland (2017); United Kingdom (1998). Regarding the states with observer status in the Arctic Council, with reference to the aspiring Arctic Council Observer States (Turkey, Mongolia and Greece), see ISAB—International Security Advisory Board, *Report Arctic Policy*, September 21, 2016, https://www.state.gov/documents/organization/262585.pdf (last accessed 6 March 2018) pp. 11–17.

[38]In January 2018, 13 Intergovernmental and Inter-Parliamentary Organizations have an approved observer status: ICES—International Council for the Exploration of the Sea (2017); IFRC—International Federation of Red Cross & Red Crescent Societies (2000); IUCN—International Union for the Conservation of Nature (2000); Nordic Council of Ministers (1998); Nordic Environment Finance Corporation (2004); NAMMCO—North Atlantic Marine Mammal Commission (2000); OSPAR Commission (2017); SCPAR—Standing Committee of the Parliamentarians of the Arctic Region (1998); UN-ECE—United Nations Economic Commission for Europe (1998); UNDP—United Nations Development Programme (1998); WMO—World Meteorological Organization (2017); e WNC—West Nordic Council (2017).

[39]In January 2018, 13 Non-governmental Organizations are approved Observers in the Arctic Council: ACOPS—Advisory Committee on Protection of the Seas (2000); AINA—Arctic Institute of North America (2004); AWRH—Association of World Reindeer Herders (2000); CCU—Circumpolar Conservation Union (2000); IASC—International Arctic Science Committee (1998); IASSA—International Arctic Social Sciences Association (2000); IUCH—International Union for Circumpolar Health (1998); IWGIA—International Work Group for Indigenous Affairs (2002); NGS—National Geographic Society (2017); NF—Northern Forum (1998); OCEANA (2017); UArctic—University of the Arctic (2002); WWF—World Wide Fund (1998).

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consideration the following criteria: that they (1) "accept and support the objectives of the Arctic Council defined in the Ottawa declaration"; (2) "recognize Arctic States' sovereignty, sovereign rights and jurisdiction in the Arctic"; (3) "recognize that an extensive legal framework applies to the Arctic Ocean including, notably, the Law of the Sea, and that this framework provides a solid foundation for responsible management of this ocean"; (4) "respect the values, interests, culture and traditions of Arctic indigenous peoples and other Arctic inhabitants"; (5) "have demonstrated a political willingness as well as financial ability to contribute to the work of the Permanent Participants and other Arctic indigenous peoples"; (6) "have demonstrated their Arctic interests and expertise relevant to the work of the Arctic Council"; and (7) "have demonstrated a concrete interest in and the ability to support the work of the Arctic Council, including through partnerships with members states and Permanent Participants bringing Arctic concerns to global decision-making bodies".[40]

The work of the Arctic Council is carried out by six Working Groups: (1) the Arctic Contaminants Action Program (ACAP) that "acts as a strengthening and supporting mechanism to encourage national actions to reduce emissions and other releases of pollutants"; (2) the Arctic Monitoring and Assessment Programme (AMAP) that "monitors the Arctic environment, ecosystems and human populations, and provides scientific advice to support governments as they tackle pollution and adverse effects of climate change"[41]; (3) the Conservation of Arctic Flora and Fauna Working Group (AFF) that "addresses the conservation of Arctic biodiversity, working to ensure the sustainability of the Arctic's living resources"; (4) the Emergency, Prevention, Preparedness and Response Working Group (EPPR) that "works to protect the Arctic environment from the threat or impact of an accidental release of pollutants or radionuclides"; (5) the Protection of the Arctic Marine Environment Working Group (PAME) that "is the focal point of the Arctic Council's activities related to the protection and sustainable use of the Arctic marine environment"; and (6) the Sustainable Development Working Group (SDWG)[42] that "works to advance

[40]The criteria for admission of observers are set out in the Arctic Council Observer Manual, https://oaarchive.arctic-council.org/handle/11374/939 (last accessed 6 March 2018), adopted at the 2013 Kiruna Ministerial Meeting, with amendments introduced in October 2015 (Anchorage), and in October 2016 (Portland).

[41]AMAP has produced a series of scientifically-based assessments of the pollution status of the Arctic, such as: AMAP Assessment 2002: The Influence of Global Change on Contaminant Pathways to, within, and from the Arctic; AMAP Assessment 2002: Persistent Organic Pollutants in the Arctic; Arctic: Arctic Climate Impact Assessment; AMAP Assessment 2006: Acidifying Pollutants, Arctic Haze, and Acidification in the Arctic; Assessment 2007: Oil and Gas Activities in the Arctic—Effects and Potential Effects (volume 1 and volume 2); AMAP Assessment 2011: Mercury in the Arctic; AMAP Assessment 2013: Arctic Ocean Acidification; AMAP Assessment 2015: Human Health in the Arctic; and AMAP Assessment 2015: Radioactivity in the Arctic.

[42]The SDWG works according to six broad thematic areas: (1) Arctic Human Health issues and the wellbeing of people living in the Arctic; (2) Sustainable economic activities and increasing community prosperity; (3) educational and cultural heritage, including indigenous languages;

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sustainable development in the Arctic and to improve the conditions of Arctic communities as a whole”.[43]

The Arctic Council meets biannually,[44] with “meetings of senior officials taking place more frequently, to provide for liaison and co-ordination” (para. 4 of the Ottawa Declaration). The decisions of the Arctic Council are taken “by consensus of the Members” (para. 7 of the Ottawa Declaration), and “[t]he Arctic Council should regularly review the priorities and financing of its programs and associated structures” (para. 9 of the Ottawa Declaration). As a forum for intergovernmental cooperation, the Arctic Council does not have a budget for the activities it promotes, and its projects are funded by one or more Arctic States. The administrative budget is funded in equal parts by the eight States participating in the Arctic Council.

In the Ilulissat Declaration, in 1998, the five Arctic Coastal States assumed “a stewardship role in protecting” the Arctic Ocean as a “unique ecosystem”, but simultaneously recognized the role that “other interested parties” could play. There are three relevant examples of such extended cooperation.

Firstly, the three binding international commitments that were negotiated within the framework of the Arctic Council: (1) the Agreement on Cooperation on Aeronautical and Maritime Search in the Arctic, signed at the Nuuk Ministerial meeting of 2011 (Greenland), which entered into force in January 2013; (2) the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, signed at the Kiruna Ministerial meeting in May 2013 (Sweden); and (3) the Agreement on Enhancing International Arctic Scientific Cooperation, signed in Fairbanks on 11 May 2017 (Alaska).

Secondly, on 16 June 2015, the Arctic Five were involved in the creation of a founding document providing the framework for future legal action in the Arctic Ocean: the Declaration Concerning the Prevention of Unregulated High Seas

(4) management of natural, including living, resources; (5) adaptation to climate change; and (6) infrastructure development.

[43]The Arctic Council may also establish Task Forces and Expert Groups to carry out specific work. In January 2018, during the Chairmanship of Finland (2017–2019), the Tasks Forces currently operating are: the Task Force on Arctic Marine Cooperation (TFAMC), since 2015, and the Task Force on Improved Connectivity in the Arctic (TFICA), since 2017. Between 2011 and 2013, an Ecosystem-Based Management Expert Group developed four framework documents and a final report, which include a policy commitment, a definition of ecosystem-based management in the Arctic, a set of principles for ecosystem-based management in the Arctic, and a set of high-priority activities for coordinating and improving the ecosystem-based management work of the Arctic Council. At the Arctic Council Ministerial Meeting in Iqaluit (2015) an Expert Group in support of implementation of the framework for action on Black Carbon and Methane was established in order to assess the progress of the implementation of the Arctic Council Framework for Action on Black Carbon and Methane periodically.

[44]Ten ministerial meetings of the Arctic Council took place between 1998 and 2017: (1) Iqaluit, Canada, 17 and 18 September 1998; (2) Barrow, United States of America, 12 October 2000; (3) Inari, Finland, 9 and 10 October 2002; (4) Reykjavik, Iceland, 24 November 2004; (5) Salekhard, Russian Federation, 26 October 2006; (6) Tromso, Norway, 29 April 2009; (7) Nuuk, Greenland, 12 May 2011; (8) Kiruna, Sweden, 15 May 2013; (9) Iqaluit, Canada, 24 and 25 April 2015; and (10) Fairbanks, United States of America, 11 May 2017.

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Fishing in the Central Arctic Ocean (Oslo Declaration).[45] The States signing the Oslo Declaration have undertaken to authorize "commercial fishing" only to vessels with their flag when "one or more regional or sub-regional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with recognized international standards". Although it contained only political obligations, it was the basis for the negotiation and conclusion of a draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, on 30 November 2017.

And, finally, the third example, the contributions they gave to the conclusion of the International Code for Ships Operating in Polar Waters (or Polar Code), within the framework of the International Maritime Organization. In accordance with its preamble "the Code acknowledges that polar water operation may impose additional demands on ships, their systems and operation beyond the existing requirements of the International Conventional for the Safety of the Life at Sea (SOLAS), 1974, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto as amended by the 1997 Protocol, and other relevant binding IMO instruments". Pursuant to para. 4 (Structure of the Code) of the Introduction the "Code consists of Introduction, parts I and II. The Introduction contains mandatory provisions applicable to both parts I and II. Part I is subdivided into part I-A, which contains mandatory provisions on safety measures, and part I-B containing recommendations on safety. Part II is subdivided into part II-A, which contains mandatory provisions on pollution prevention, and part I-B containing recommendations on pollution prevention".[46]

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[45]On the Oslo Declaration, see Molennar (2015), which stresses that, p. 5, "the Arctic Five's pro-active and precautionary efforts and commitments, and implicit dismissal of a *laissez-faire, laissez-aller* attitude".

[46]According to para. 3 (Sources of hazards) of the Introduction, "the Polar Code considers hazards which may lead to elevated levels of risk due to increased probability of occurrence, more severe consequences, or both: 1) ice (...); 2) experiencing topside icing, with potential reduction of stability and equipment functionality; 3) low temperature (...); 4) extended periods of darkness or daylight (...); 5) high latitude, as it affects navigation systems, communication systems and the quality of ice imagery information; 6) remoteness and possible lack of accurate and complete hydrographic data and information, reduced availability or navigational aids and seamarks with increased potential for groundings compounded by remoteness, limited readily deployable SAR facilities, delays in emergency response and limited communications capability, with the potential to affect incident response; 7) potential lack of ship crew experience in polar operations, with potential for human error; 8) potential lack of suitable emergency response equipment (...); 9) rapidly changing and severe weather conditions (...); and 10) the environment with respect to sensitivity to harmful substances and other environmental impacts and its need for longer restoration".

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3 An Overview of the Economic Use of Natural Resources in the Arctic

3.1 Introductory Elements

The economic use of natural resources in the Arctic, as a consequence of the reduction of ice-covered areas, has been presented in recent years by the media as a scramble carried out by a number of States, with particular emphasis on the States of the region. This way of presenting the matter does not, however, adequately reflect the reality in the light of the fact that the rules of international law applicable to land and sea are clearly identified and are contrary to any attempt to appropriate maritime areas that are not subject to the sovereignty or jurisdiction of coastal States. In that sense, Article 89 United Nations Convention on the Law of the Sea (UNCLOS) provides expressly that, “[n]o State may validly purport to subject any part of the high seas to its sovereignty”.

At the same time, it can be argued that the absence of a specific international legal regime for the Arctic, based on principles similar to those of States in the Antarctic, is an intentional option for coastal States and third States to maintain their freedom of action necessary for the economic appropriation of the natural resources in the region.[47] The affirmation of the application of the International Law of the Sea to the maritime spaces is highly significant to the extent that the existing international legal regimes are almost entirely dedicated to the use of natural resources both on the high seas, because the freedom of fishing is recognized to all States (article 87 (1) para. (e) UNCLOS), and also in areas subject to the jurisdiction of coastal States, such as the exclusive economic zone and the continental shelf. This enshrines the exclusivity of the sovereign rights of the coastal States to exploit their natural resources, both living and non-living. In this sense, Article 56 (1) para. (a) UNCLOS provides that, in its exclusive economic zone, the coastal State has “[s]overeign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil”. In consonant terms, paragraph 1 article 77 of UNCLOS states that the “coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources”.[48]

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[47]In this sense, Dupuy and Viñuales (2015), p. 115, that “[t]he possibility of appropriation of Arctic resources is governed by the basic international rules applicable to the exercise of sovereignty and sovereign rights by States over land and maritime spaces”.

[48]In accordance with Article 77 (4) UNCLOS, the natural resources covered by the legal status of the continental shelf “consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil”.

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It should be noted that the economic exploitation of natural resources in the Arctic is currently heavily constrained by the rules of environmental law, both the domestic laws of the Arctic States and also as a result of the application of the existing international law in this field. There are 18 large marine ecosystems in the Arctic region: viz. Faeroe Plateau, Iceland Shelf and Sea, Greenland Sea, Norwegian Sea, Barents Sea, Kara Sea, Laptev Sea, East Siberian Sea, East Bering Sea, Aleutian Islands, West Bering Sea, Northern Bering-Chukchi Seas, Central Arctic, Beaufort Sea, Canadian High Arctic-North Greenland, Canadian Eastern Arctic-West Greenland, Hudson Bay Complex and Labrador-Newfoundland.[49] It is particularly significant that States have a "duty to take, or to co-operate (. . .) in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources" (article 117 UNCLOS), and should cooperate "with each other in the conservation and management of living resources in the areas of the high seas", in accordance with article 118 UNCLOS. The pursuit of economic exploitation in the Arctic may also be subject to limits of action of a private origin, such as the ones adopted by companies[50] under corporate social responsibility, in order to ensure scrupulous compliance with environmental obligations.[51,52]

The natural resources that can be economically exploited in the Arctic can be divided into two categories, living natural resources and non-living natural resources. The first category covers animal species with economic value, with particular emphasis on fish. The second category includes non-renewable resources such as oil, natural gas, minerals,[53] and aggregates.[54]

In the last few decades, some animal species have ceased to be qualified as natural resources and have come to be integrated into an autonomous classification as

[49]A synthesis on area, characteristics, fish/fisheries/ecosystem of the Arctic large marine ecosystems can be found in Blomeyer et al. (2015), pp. 30–32. On areas of heightened ecological importance see Skjoldal et al. (2013).

[50]It should be borne in mind that, as LARSEN (2010) points out, p. 94, "[b]ecause of the lack of financial resources along with the cost of extraction, Northern resource development is largely carried out by big corporations including multinational corporations".

[51]On the issue Koivurova (2013); Koivurova (2016), pp. 360–367; Tiainen et al. (2015), pp. 144–145.

[52]The position expressed in this domain in the China's Arctic Policy, 26 January 2018, http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm (last accessed 6 March 2018), is particularly significant when it is asserted that, "[t]he Arctic has abundant resources, but a fragile ecosystem. China advocates protection and rational use of the region and encourages its enterprises to engage in international cooperation on the exploration for and utilization of Arctic resources by making the best use of their advantages in capital, technology and domestic market".

[53]An up-to-date overview of the exploration of Arctic mineral resources can be found in Boyd et al. (2016); Lindholt (2017).

[54]The NOEP—National Ocean Economic Program, of the Middlebury Institute of International Studies at Monterey—Center for the Blue Economy, http://www.oceaneconomics.org/arctic/NaturalResources/ (last accessed 6 March 2018), divides the Arctic Natural Resources at: Fisheries (Fisheries Data); and Arctic Extractives (Oil & Gas Data; Minerals Data; and Aggregates Data).

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environmental goods, endowed with specific international protection regimes. In the Arctic this category is composed of marine mammals, with the particular exception of their being allowed to be captured for consumption by the indigenous communities. To this end, the Agreement on the Conservation of Polar Bears, signed in Oslo on 15 November 1973 by Canada, Denmark, Norway, the Union of Soviet Socialist Republics and the United States of America, after establishing in Article I (1) that "[t]he taking of polar bears shall be prohibited", accepts that the catch may be conducted "by local people using traditional methods in the exercise of their traditional rights" (Article III (1) para. (d)), and also "wherever polar bears have or might have been subject to taking by traditional means" (Article III (1) para. (e)).[55]

3.2 Fishing

Arctic fishery can be pursued in two types of maritime spaces: on the one hand, in maritime spaces subject to the sovereignty and jurisdiction of coastal States, such as inland waters, territorial seas and exclusive economic zones; and, on the other hand, on the high seas. Regarding fishing in the high seas, the Arctic coastal States adopted a set of provisional measures through the Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean of 16 July 2015, in accordance with which "[w]e will authorize our vessels to conduct commercial fishing in the high seas only pursuant to one or more regional or subregional fisheries management organizations or arrangements that are or may be established to manage such fishing in accordance with recognized international standards". The regulation of catches in accordance with a sustainable fishing regime will be stepped up by the entry into force of the draft Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, mentioned before, with the participation of the five coastal States of the Arctic and also of China, Iceland, South Korea, Japan, and the European Union. According to the information provided by the US Department of State, on 30 November 2017, "[t]he Agreement will establish and operate a Joint Program of Scientific Research and Monitoring with the aim of improving the understanding of the ecosystem(s) of this area and, in particular, of determining whether fish stocks might exist in this area that could be harvested on a sustainable basis. The Agreement envisions the possibility that one or more additional regional management organizations or arrangements may be established for this area in the future".[56]

[55] On the issue, Henriksen (2018), pp. 629–633; Potts (2010), pp. 73–76, to conclude that "[t]he Arctic has several regimes that operate and overlap in the same marine space. Despite this "patchwork quilt" approach a relatively healthy fisheries stock has been successfully maintained" (p. 76).

[56] US Department of State, Diplomacy in Action: Meeting on High Seas Fisheries in the Central Arctic Ocean, 28–30 November 2017: Chairman's Statement, https://www.state.gov/e/oes/ocns/

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According to data from Fisheries Management and the Arctic in the Context of Climate Change:

- "633 species, of which 63 are classified as mainly Arctic, 32 Arctic-boreal, 457 Boreal and 81 as widely distributed. Of the 633 species, 80 (12,6%) are freshwater species, while 44 (6,9%) are found in both marine and fresh water, with 16 species mainly restricted to Arctic waters"[57];
- "[t]he most important commercial fish species are North-east Arctic cod (*Gadus morhua*), North east Arctic haddock (*Melanogrammus eaglefinus*), saithe (*Pollachius virens*), redfish (*Sebastes mentella* and *S. marinus*), Greenland halibut (*Reinhardtius hippoglossoides*), long rough dab (*Hippoglossoides platessoides*), wolffish (*Anarhichas lupus*, *A. minor and A. minor and A. denticulatus*), European plaice (*Pleuronectes platessa*), Barents Sea capelin (*Mallotus villosus*), Polar cod (*Boreogadus saida*) and immature Norwegian spring-spawning herring (*Clupea harengus*)"[58]; and
- "real catches are apparently considerably greater than found in the official statistics for FAO Statistical Area 18 (Arctic Sea). Reconstructed catches for the period from 1950 to 2006 indicate that total catches (950,000 t) are actually 75 times higher than the sum of the catches reported for FAO Statistical Area 18, with most of the catches from the Russian Arctic".[59]

With regard to the same study,

> [t]here is a general consensus that climate change will result in increased productivity in the Arctic, and that with increasing temperature, there will be a "borealization" of the Arctic fish community, with potential for some species to expand their distribution to the Arctic. Among species with such potential are Polar cod, capelin and Greenland halibut,[60]

although there is a warning that

> [t]he potential for increases in abundance and expansion vary from species to species, and endemic fish species might suffer. This is limited by a set of constraints including environmental and habitat preferences of species, as well as species adaptation capacity.[61]

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opa/rls/276136.htm (last accessed 8 March 2018). On the issue of conservation of living marine resources in areas beyond national jurisdiction see Henriksen (2018), pp. 624–628.

[57]Blomeyer et al. (2015), p. 32.

[58]Blomeyer et al. (2015), p. 35, which state that "[i]n addition to fish, there are 67 terrestrial mammals, 35 marine mammals, 154 terrestrial and freshwater birds that breed in the Arctic, 45 marine birds that breed in the Arctic, 6 amphibians and approximately 5000 marine invertebrates".

[59]Blomeyer et al. (2015), p. 37. According to the synthesis available in NOEP—National Ocean Economic Program, of the Middlebury Institute of International Studies at Monterey—Center for the Blue Economy, "[s]ince 2015, over 8 million metric tons have been harvested from Arctic waters each year for commercial, artisanal, subsistence, and recreational uses, after declining from its peak of 17 million tons in 1968" (Arctic Fisheries Data, organized by Daniel Pauly and Dirk Zeller of the University of British Columbia, with detailed references to Arctic Country, Exclusive Economic Zone (EEZ), Years Landed, Fishing Entity (Country), Fishing Sector, and Species, http://www.oceaneconomics.org/arctic/fisheries/fisheriesData.aspx (last accessed 6 March 2018).

[60]Blomeyer et al. (2015), p. 14.

[61]Blomeyer et al. (2015), p. 98.

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3.3 Oil and Natural Gas

Oil exploitation began onshore in the 1920s and this was extended five decades later to offshore exploration. Although in the presence of sparsely populated territories, the decision-making in some states, particularly Canada, is long and time-consuming because of the need to resolve issues related to the ownership of oil and gas deposits owing to the different levels of administrative division involved, and the necessity to take into account the participation of the traditional communities.[62,63]

In 2009, Philip Budzik of the Oil and Gas Division of the U.S. Energy Information Administration, stated that, "[a]pproximately 61 large oil and natural gas fields have been discovered within the Arctic Circle in Russia, Alaska, Canada's Northwest Territories, and Norway. 15 of these large 61 large Arctic fields have not yet gone into production: 11 are in Canada's Northwest Territories, 2 in Russia, and 2 in Arctic Alaska".[64]

Economically profitable oil and natural gas exploration in the Arctic, according to Budzik, must take into account the following constraints: (1) "[h]arsh winter weather requires that the equipment be specially designed to withstand the frigid temperatures"; (2) "[o]n Arctic lands, poor soil conditions can require additional site preparation to prevent equipment and structures from sinking"; (3) "[t]he marshy Arctic tundra can also preclude exploration activities during the warm months of the year"; (4) "[i]n Arctic seas, the icepack can damage offshore facilities, while also hindering the shipment of personnel, materials, equipment, and oil for long time periods"; (5) "[l]ong supply lines from the world's manufacturing centres require equipment redundancy and a larger inventory of spare parts to insure reliability"; (6) "[l]imited transportation access and long supply lines reduce the transportation options and increase transportation costs"; and (7) "[h]igher wages and salaries are required to induce personnel to work in the isolated and inhospitable Arctic".[65]

In 2014, the Strategic Assessment of Development of the Arctic, made the following synthesis on the oil and natural gas existing in the Arctic:

> A decade ago, the Arctic accounted for about 25% of the world's natural gas and 10% of oil production. Yet most parts of the Arctic remain largely untapped. Those undiscovered resources could amount to 90 billion barrels of oil, up to 50 trillion cubic metres of natural gas and 44 billion barrels of natural liquids (NGLs), according to the U.S. Geological Survey (USGS). That is about 13% of the world's undiscovered, technically recoverable oil and up to 30% of global gas reserves, and some 84% of it is offshore. Undiscovered natural gas is likely to be three times more abundant than oil in the Arctic and is largely concentrated in Russia[66]

[62]On the issue, Banks (2010), pp. 105–114.

[63]On the issue, Pelaudeix (2015), pp. 5–9.

[64]Budzik (2009), October 2009, http://www.akleg.gov/basis/get_documents.asp?session=28&docid=741 (last accessed 6 March 2018), p. 4.

[65]Budzik (2009), October 2009, http://www.akleg.gov/basis/get_documents.asp?session=28&docid=741 (last accessed 6 March 2018), p. 9.

[66]Luszczuk et al. (2014), p. 74.

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In 2017, the chapter of the study Economy of the North 2015, by Lars Lindholt and Solveig Glomsrod, dedicated to the exploration of oil and natural gas in the Arctic in a context of climate change,[67] presented the following data on reserves, production[68] and projections for future development:

- "The Arctic contains huge resources of oil and natural gas which amounts to 11 and 26 per cent, respectively, of the global undiscovered resources, i.e. excepted to be worthwhile extraction from a business point of view"[69];
- "Arctic Russia is a giant petroleum producer in Arctic and global context, with 95 per cent of the total Arctic petroleum today (and 90 per cent of total Russian petroleum production). Arctic Russia has as much as 70 per cent of total Arctic resources in terms of undiscovered gas reserves, of which almost 90 per cent are found offshore"[70];
- "Canada starts out with a steady growth in gas supply from low levels, almost matching the production level of Alaska in the mid-2030's, before production flattens out after 2040. Such a rapid development of Canada's gas reserves probably depends on the development of the much debated (and delayed) Mackenzie pipeline that can transport gas form the North West Territories and south to Alberta oil sands and further. Lower gas prices and indigenous rights have postponed the project several times"[71];
- "Alaskan oil production today is mainly taking place on the North Slope, which covers the Central Arctic state lands and adjacent waters of the Beaufort Sea. Notice that as much as 28 per cent of the total arctic undiscovered oil resources are found in Alaska. Over time, investment in new discoveries contributes to a rapidly rising production. Alaskan future oil production increases steadily, and supply in 2050 is around 50 Mtoe above the present level. Substantial future increase in Alaskan oil production first of all requires that all onshore areas including the area of the Arctic National Wildlife Refuge (ANWR) and the National Petroleum Reserve Alaska are accessible. Over 90 per cent of the Alaskan undiscovered oil is found onshore on the North Slope as well as offshore in adjacent areas in the Arctic Ocean closer to land than the Chukchi Sea"[72];
- "Greenland has as much as 18 per cent of total Arctic undiscovered oil, but no reserves have been proven (profitable and recoverable). However, Greenland has the longest lead times and highest costs. Hence, production starts as late as from around 2035."[73]

With regard to Alaska, the 2019–2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program confirms that the areas available for the exploration of oil and natural gas can be considerably extended. In that sense, it is stated that,

> [t]his Draft Proposed Program (DPP) would make more than 98 percent of the OCS [Outer Continental Shelf] available for oil and gas leasing during the 2019-2024 period.

[67]"Arctic petroleum extraction under climate policies", in Lindholt and Glomsrod (2017).

[68]Data on the production of oil and natural gas in the Arctic can be found in the NOEP—National Ocean Economic Program, of the Middlebury Institute of International Studies at Monterey—Center for the Blue Economy, http://www.oceaneconomics.org/arctic/extractive/extractSearch.aspx?xtype=petro (last accessed 6 March 2018) with reference to Countries, Minerals (Natural Gas and Crude Oil), Regions e Production Year (from 1970 to 2016).

[69]Lindholt and Glomsrod (2017), p. 79.

[70]Lindholt and Glomsrod (2017), p. 80.

[71]Lindholt and Glomsrod (2017), p. 82.

[72]Lindholt and Glomsrod (2017), p. 83.

[73]Lindholt and Glomsrod (2017), p. 83.

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In terms of time, it is identically confirmed that,

> [p]roduction from exploration and development in newly available OCS areas will likely not occur for a decade or more, and then will continue for another 30 or 40 years or longer.[74]

4 Outlook of Natural Resources Law and the Arctic

The concrete future use of Arctic natural resources is primarily dependent on extremely difficult geographic and climatic conditions even when one takes into account their potential mitigation that may result from climate change.

Although the bulk of natural resources capable of economically relevant exploitation, with particular emphasis on oil and natural gas, are located in areas subject to the territorial sovereignty or maritime jurisdiction of the coastal States, the peculiarities of the Arctic have led to the creation and functioning of a particularly innovative governance regime. When one takes into consideration the fact that the Arctic coastal states continue to act in accordance within the parameters of state sovereignty, the results of the cooperation amongst them must be highlighted with particular attention given to the activities developed by the Arctic Council and the conclusion of international environmental commitments. The originality of the institutional structure of the Arctic Council should be noted particularly with regard to the fact that it allows the participation of non-state entities, even though its programmes of action are funded directly by the participating States.

Given the above, an adequate understanding of the matter of the economic use of the natural resources that can be found in relation to the Arctic means that due consideration should be given to six different aspects.

First, to be considered is the freedom of action that the Arctic coastal states intend to continue to maintain in this area of the planet, especially with regard to the United States and Russia, notably by not creating a conventional international legal regime similar to that operating in the South Pole.

Secondly, the option for the use of the International Law of the Sea as the international legal framework, explicitly affirmed in the Ilulissat Declaration and subsequently reaffirmed by the European Union and China, allows their actions to take place in the context of a consensual legal regime, particularly in relation to the fixing of the respective areas of jurisdiction and the diverse uses of the sea.

Thirdly, the activities of the Arctic coastal States and third States, notably in the fishing sector, should be assessed in accordance with a basic distinction among maritime areas subject to the sovereignty and jurisdiction of coastal States, international maritime spaces (the high seas), and internationalized maritime spaces (the

[74] 2019–2024 National OCS Oil and Gas Leasing Draft Proposal on the Size, Timing, and Location of Sales, p. 1. At 100 US dollars per barrel, Alaska Arctic (Beaufort Sea and Chukchi Sea) could account for a quarter of US oil production.

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Area), owing to the bilateral agreements that have been concluded for the delimitation of its maritime borders.

Fourthly, instead of a scrambling for the existing natural resources, States with an interest in their exploration, particularly for fishing on the high seas, have sought to find mechanisms based on cooperation in terms of the United Nations Convention on the Law of the Sea.

Fifthly, because of the extremely high investments required to pursue the exploitation of mineral resources that can be found on the Arctic and the reduced number of potential interested parties, the economic activities can be subjected to a demanding environmental framework, notably according to the studies that have been developed on these matters within the Arctic Council.

Sixthly, based on a precautionary approach, States interested in fishing in the Arctic high seas have sought to create a legal framework for activities in this international maritime space that takes into consideration the existing environmental developments in area, especially by enshrining the principles developed and established in the last two decades in the field of the international law of the marine environment.

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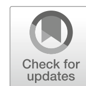
Mining in Outer Space: Legal Aspects



Mahulena Hofmann and Federico Bergamasco

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1 Introduction

For several years, outer space has become the focus of projects planning exploration and excavation of its precious natural resources. These projects are not primarily concerned with minerals that could be used on Earth, but instead seek to exploit matter that can be further processed in outer space for the purposes of promoting scientific exploration, servicing space objects, enhancing living conditions in outer space, or creating new space structures. The implementation of these projects requires further thorough scientific research, accompanied by the detailed imagery of potential mining sites, as well as the development of mining technologies that are capable of working in zero-gravity.[1] The progress in technologies which allows for

[1]Lenard (2017).

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landing on asteroids or comets, to mention the ESA's project Rosetta as one example,[2] has shown that these plans are not science-fiction.

The appearance of many start-ups in this area signals that this sphere can also offer a viable commercial model. While it is clear that time is needed to overcome numerous technical problems before the first mineral is commercially excavated in outer space, the output of the research and of the development of accompanying technologies can be offered much earlier.

In several countries, intense private activities on space resources exploitation and extraction have been developed. In the United States, Planetary Resources, Inc., an asteroid mining company[3] envisaged to transform asteroid water into rocket fuel within a decade and eventually to harvest platinum-group metals from space rocks.[4] Deep Space Industries (DSI)[5] intends to change the economics of the space industry by providing the technical resources, capabilities and system integration required to prospect for, harvest, process, manufacture and market in-space resources. These resources, found on near Earth asteroids, are planned to provide energy and supplies for the space economy. The company wants to produce water, propellant and building materials to serve growing space markets.

For Japan, space resources development may be a promising industry in the future[6] as symbolised by the Hayabusa Project, where a spacecraft operated by the Japanese Aerospace Exploration Agency succeeded in landing on the surface of a small near-Earth asteroid returning samples of the materials back to the Earth. The Japanese private company Ispace, Inc.[7] is a lunar exploration company with a vision of extending the human presence into outer space. Its focus is on precious minerals on the surface of the Moon and an estimated 6 billion tons of water ice at its poles. The plans concentrate on producing fuel from the lunar water for fuel stations established in space and on expanding the capacities of space transportation systems. To achieve these aims, Ispace is developing micro-robotic technology for transportation service to and on the Moon.

There are reports stating that China is planning to exploit resources like titanium, helium-3 and water from the far side of the Moon.[8] Its Chang'e lunar exploration program is an on-going robotic mission to the Moon based on the White Papers on China's Space Activities[9] led by the China National Space Administration. There is

[2]ESA: Europe's Comet Chaser, 1 December 2017, http://www.esa.int/Our_Activities/Space_Science/Rosetta/Europe_s_comet_chaser (last accessed 1 December 2017).

[3]See https://www.planetaryresources.com/2011/01/planetary-resources-opens-doors/ (last accessed 20 December 2017).

[4]Wall M: Asteroid Mining May Be a Reality by 2025, 11 August 2015, https://www.space.com/30213-asteroid-mining-planetary-resources-2025.html (last accessed 20 December 2017).

[5]See http://deepspaceindustries.com (last accessed 20 December 2017).

[6]Mizushima et al. (2017), p. 546.

[7]See http://ispace-inc.com/ (last accessed 20 December 2017).

[8]Goswami: N, China's Unique Space Ambitions, The Diplomat, 3 August 2016, https://thediplomat.com/2016/08/chinas-unique-space-ambitions/ (last accessed 20 December 2017).

[9]Shouping (2017), p. 20 et seqq.

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also information available that investments are being made in asteroid exploration.[10]

Intense space resources programs are pursued in the United Arab Emirates and Luxembourg. After the Government of Luxembourg announced its "Space-Resources.lu" initiative in February 2016, several companies decided to establish their European subsidiaries in the country, including Planetary Resources and Deep Space Industries.[11] Furthermore, the Government of Luxembourg concluded bilateral cooperation agreements with Portugal, United Arab Emirates Portugal, United Arab Emirates, Japan and China aimed at the exchange of information and strengthening cooperation in the field of space activities.[12]

2 Legal Issues

These activities are not welcome everywhere. Surprisingly, the Russian Federation, which in 2013 included space resources mining in its key political document in the area of space activities approved by the President of the Federation called "The Keystones of State Policy of Russian Federation in the Area of Space Activities for the Period till 2030 and with a Further Perspective"[13] turned into one of the most active critics of these projects, especially in the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS).[14] Also, the official approach of Belgium, one of the 18 parties of the 1979 Moon Agreement (MA) remains more than reserved.[15] The proliferation of space resources projects boosted a passionate discussion also in the academia. Whereas some authors already deliberate how to develop practicable rules

[10]Mizushima et al. (2017), p. 546.

[11]For instance, *OHB Venture Capital GmbH*, Munich, and LuxSpace SARL., Betzdorf, Luxembourg (both subsidiaries of OHB SE) have established a company known as Blue Horizon SARL., or *Rama*, a private space company located in Luxembourg planning to commercialise space resources in the solar system which is acquiring advanced technologies and intellectual property from Russia, Europe and other space faring countries to help to build an advanced technology hub. On 15 November 2017, US based Spire signed a cooperation agreement with the Government of Luxembourg to open a European HQ in the Grand Duchy, www.spaceresources.public.lu (last accessed 20 December 2017).

[12]With Japan on 27 November 2017, with UAE on 10 October 2017 and Portugal (2017), http://www.spaceresources.public.lu/en.html (last accessed 20 December 2017).

[13]Document No. Pr-906, approved by the President of the Russian Federation on 19 April 2013.

[14]See e.g. Reviewing opportunities for achieving the Vienna Consensus on Space Security encompassing several regulatory domains, Working paper submitted by the Russian Federation in the 53rd Session of the Scientific and Technical Subcommittee, UN Doc. A/AC.105/C.1/2016/CRP.15, 16 February 2016.

[15]See e.g. Contribution from Belgium to the discussion under UNCOPUOS Legal Subcommittee on item "General exchange of views on potential legal models for activities in exploration, exploitation and utilization of space resources" in the 56th Session of the Legal Subcommittee, UN Doc. A/AC.105/C.2/2017/CRP.19, 28 March 2017.

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for the implementation of these programs,[16] others explain the reasons for their lack of consent with these activities.[17]

The positions towards space mining are divided in principle along three main lines: are space resources projects compatible with the non-appropriation principle of the 1967 Outer Space Treaty (OST)? Are they respecting applicable environmental rules? Do they correspond to the "province of mankind" requirements?

3 International Legal Framework

3.1 Principle of Non-appropriation

The central international legal source of the law of outer space is the 1967 Outer Space Treaty.[18] It enjoys a very high recognition among States[19] and is considered by many scholars and practitioners to constitute customary international law.[20] Its Article II states that

> outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

For the opponents of space mining, this provision means that nothing in outer space might be "appropriated" because, in their view, any extraction, whether by a State or a non-governmental entity of any material from any celestial body necessarily implies a kind of such "appropriation."[21] Furthermore, this thread of argumentation is considered to be further supported by the existence of the later adopted and more precise 1979 "Moon Agreement"[22] that declares, in its Article 11(1), that the natural resources of the celestial bodies constitute the "common heritage of mankind" and prohibits, in its Article 11(3), that any "natural resources in place" shall become property of any entity or person. As a later document compared to the Outer Space Treaty, the Moon Agreement is considered by some to be "an expression of

[16] Mizushima et al. (2017), p. 543 et. seqq.; Frank (2017).

[17] E.g. Volynskaja (2016), 291 et. seqq.; De Man (2017); Hobe and De Man (2017).

[18] Treaty on Principles Governing the Activities in the Exploration and Exploitation of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205, entered into force on 10 October 1967.

[19] Status of International Agreements relating to activities in outer space as at 1 January 2017, UN Doc. A/AC.105/C.2/2017/CRP.7, 23 March 2017.

[20] On the legal character of the Outer Space Treaty see e.g. Hobe et al. (2009); Von der Dunk (2015).

[21] Volynskaja (2016), p. 296.

[22] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1363 UNTS 3, entered into force on 11 July 1984.

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subsequent state practice" enabling clarification in the interpretation of the older document.[23]

These arguments can be countered by referring to Article I (1) OST, which guarantees the freedom of exploration and use of outer space. The purpose of space mining activities is considered to be neither any "appropriation" of parts of outer space nor of space resources *in situ*. Instead, the sole aim of any such activities is their extraction, use and commercialisation, without any territorial demands or titles as to the celestial bodies (or parts thereof) concerned.[24] It should be stressed that the Moon Agreement has been ratified by only 18 States,[25] thus its limitations concerning space activities resulting from the common heritage principle are binding only upon its Parties and it cannot constitute international customary law. Furthermore, the Moon Agreement cannot be considered as subsequent State practice in the sense of Article 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT) either; quite to the contrary: there is even a Joint Statement of its States Parties dating from 2008 and proclaiming that the common heritage of mankind principle does not constitute an obstacle to space mining initiatives.[26] Finally, this line of thought points to the legal regime of the High Seas under the 1982 UN Convention on the Law of the Sea (UNCLOS), in particular to the regulation of fishing, allowing the States Parties, in principle, to freely fish in the High Seas, as a relevant analogy.

3.2 The Environmental Perspective

The second debated issue is whether and how the entities planning to implement space resources activities envisage to comply with the international legal environmental requirements applicable in outer space. Similar to the non-appropriation principle, these norms are few and very general.

[23]IISL Directorate of Studies, Background Paper, 2017, http://iislweb.org/docs/IISL_Space_Mining_Study.pdf (last accessed 20 December 2017), p. 9.

[24]Mizushima et al. (2017), p. 548.

[25]Status of International Agreements relating to activities in outer space as at 1 January 2017, UN Doc. A/AC.105/C.2/2017/CRP.7, 23 March 2017.

[26]Despite of the declaration which stipulates that this joint statement is based on experience of States parties to the Agreement of the 1979 Moon Agreement and does not, in any manner, constitute a joint position or an authoritative interpretation of the provisions of the mentioned treaties or resolutions, Joint Statement on the benefits of adherence to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979 by States Parties to that Agreement, UN Doc. A/AC.105/C.2/2008/CRP.11, 2 April 2008.

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3.2.1 General Character of the Rules

The main reason for this situation is the fact that the central instrument of international space law, the 1967 Outer Space Treaty, was drafted in a period when few States had space capabilities and the interest of the space community was mainly dedicated to space science and exploration.[27] Attention for environmental matters was rather low and as a consequence there is one single provision, the second sentence of Article IX OST, that abstractly discusses outer space environmental protection.[28] It requires that States shall pursue studies of outer space, including the Moon and other celestial bodies and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, when necessary, shall adopt appropriate measures for this purpose. While this second sentence addresses directly the protection of the environment and specifically the forward and backward contamination, the rest of the Article focuses on the interest of States Parties by establishing different general principles: the principle of cooperation and mutual assistance; the principle of due regard for the interests of other States Parties; and the duty to undertake consultations with other States Parties in cases of expected harmful interference. The part dedicated to environmental protection of the extra-terrestrial environment, thus, appears to have only a marginal relevance in the larger context of the Article.

In addition to the embedding of the environmental rule in the body of Article IX, many commentators consider its lack of terminological precision as one of its major shortcomings. This fact, quite common to all the space treaties,[29] proves to be particularly undermining to the potential role of Article IX for the adoption and enforcement of environmental protection measures.

3.2.2 Applied to Space Mining

The first problem is connected with the vague contours of the term “celestial bodies” as one of the objects of protection. Article IX OST classifies the extra-terrestrial environment into three categories: outer space, the Moon and other celestial bodies. While outer space and the Moon give rise only to limited doubts as to their identification,[30] the great variety of natural objects present in the solar system makes the term “celestial body” potentially debatable. Currently, according to the International Astronomical Union, known natural objects that can be found in the solar system include the Sun, the planets, the Moon, the moons of other Planets,

[27] Hofmann (2010), p. 63.

[28] Gupta (2016), p. 24.

[29] Qizhi (1988), p. 125.

[30] It has to be recalled, however, that the legal delimitation between airspace and outer space is still subject of debate. See De Oliveira Bittencourt Neto (2015).

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NEOs, asteroids, comets, dwarf planets, trans-Neptunian objects and Kuiper Belt objects.[31] In absence of any autonomous definition in the *corpus juris spatialis*, the purpose and spirit of the Treaty would be better served by an expansive interpretation of "celestial body" to include all natural bodies within the solar system, excluding only the Earth.[32]

The second problem is that the scope of application of the Article is restrictive with regard to the kind of activities concerned. A literal interpretation of the second paragraph limits the duty of States Parties to avoid harmful contamination only in the pursuance of "studies of outer space" and "space exploration". In the protection of the space environment, thus, there is an apparent departure from the general scope of application of the Outer Space Treaty—covering both the exploration and the use of outer space—and a limitation of such protection to the first kind of activities. Since the entry into force of the Treaty in 1967, technological developments have multiplied space activities that do not fall under the category of "studies" and "exploration". Not only direct exploitation activities such as space mining would be left outside, but also traditional uses of outer space such as the operation of satellites for telecommunications, Earth observation and satellite navigation.[33]

Third, the core element of the second paragraph is the concept of "harmful contamination" and the related duty upon States Parties to avoid it. It is not sufficiently precise, however, to identify which type of degradation of the outer space environment is prohibited and to what extent.[34] The presence of the term "harmful" suggests at first that contamination is not per se prohibited and thus that exploration activities are lawful even if to a limited degree contamination is caused.[35] It is not defined, however, what "harmful" means, i.e. the distinction between legal and non-legal contamination remains obscure. Also the term "contamination" lacks a definition. This seemingly leaves it open to cover both the biological and non-biological kind, thus encompassing not only the classical notion of "forward contamination" but also the release of chemical and radioactive contaminants.[36] It is however open whether it would cover also environmental modifications of different kind, such as the alteration of the topography and geology of a celestial body, or even its full consumption, which would be typical consequences of upcoming large-scale human activities like space mining. It is also debatable why there is a different terminology for the protection of the terrestrial environment.

[31] Lyall and Larsen (2009), p. 176.

[32] Tennen (2009–2010), p. 797. It would be debatable, however, whether a celestial body—such as a small asteroid—artificially removed from its orbit and under human control would still be deemed as a celestial body or whether it would fall within the category of "space object".

[33] This would imply the lack of relevance of Article IX with regard to a growing issue such as orbital space debris, or an aberrant interpretation such as its applicability only to the debris created by scientific satellites.

[34] For a general overview of the various types of extra-terrestrial environment contamination see Kramer (2014), p. 217.

[35] Lyall (2010), p. 57.

[36] Lyall (2010), p. 58.

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While the term “adverse change” has a much broader scope than “harmful contamination” and is easier to be proven, the specification that it shall derive from the “introduction of extra-terrestrial matter in the environment of the Earth” makes it more circumstantiated and easier to enforce. The Article, therefore, seems to stress more on the environmental protection of the Earth rather than of space and celestial bodies.[37]

Fourth, the generic terms “appropriate measures” and “where necessary” do not add any meaningful content to the obligation, confirming the high level of abstractness of the provision. The remaining and prevalent part of Article IX, focused on the protection of States Parties interests, suffers from a similar level of ambiguity, by leaving terms like “guided” and “corresponding interest” without further specification.

3.2.3 Environmental Protection According to the Moon Agreement

These problems are partially remediated by the 1979 Moon Agreement whose Article 7(1) elaborates on the subject of environmental protection. It widens the scope of Article IX’s second sentence OST by explicitly extending it also to the “exploitation” phase of space activities and by stating the duty of States Parties to “prevent the disruption of the existing balance of its environment.” Such disruption can take place by the introduction of “adverse changes,” by its “harmful contamination through the introduction of extra-environmental matter,” or “otherwise.” Although the concept of “harmful contamination” remains undefined, it is beyond doubt that these specifications give a more circumstantiated meaning to the provision. States Parties, furthermore, have the obligation to inform the UN Secretary General about the measures undertaken to prevent the disruption of the existing balance of the space environment. As stated before, however, the Moon Agreement has a very limited practical application. As of 2017, only 18 States have ratified it[38] and its relevance remains therefore mostly theoretical.

3.2.4 COSPAR Planetary Protection Policy

An additional instrument to be mentioned is the COSPAR Planetary Protection Policy. COSPAR (Committee on Space Research) is a Scientific Committee of ICSU (International Council for Science) established in 1958.[39] Its objectives are to promote on an international level scientific research in space and to provide a forum for the discussion of problems that may affect scientific space research. One of

[37] Gupta (2016), p. 27.

[38] UNOOSA, Status of International Agreements relating to activities in outer space as at 1 January 2017, UN Doc. A/AC.105/C.2/2017/CRP.7, 23 March 2017.

[39] See https://cosparhq.cnes.fr/ (last accessed 20 December 2017).

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its main tasks is advising the UN and other intergovernmental organisations on space research matters or on the assessment of scientific issues in which space can play a role. In 1964 COSPAR elaborated the Planetary Protection Policy, which has been reformulated in 2002 and was lastly amended in 2011.[40] It develops international standards in the form of recommendations with the main purpose to avoid contamination of planetary environments by biological contaminants or terrestrial microbes that could compromise current or future scientific investigations, particularly those searching for indigenous life. Despite its non-binding nature, the Policy has the potential to be relevant for space mining, as it does not make any distinction as to the purposes of the space mission. Additionally, in the Preamble it recognises itself as a tool "to provide accepted guidelines to guide compliance with the wording of the OST and other relevant international agreements," making explicit reference to Article IX OST.[41] Its main limitations are the relatively narrow scope of application, as it focuses exclusively on biological contamination and its recommendatory nature, given that it would be still premature to consider it as an element of international customary law.[42] In its present formulation, therefore, the Planetary Protection Policy is likely to have a limited impact on space mining. Its evolutionary nature, however, suggests that it may be invested of a more prominent role in the upcoming years.

In conclusion, the only universal rule on the protection of environment of outer space, Article IX second sentence OST, stipulates that States "shall" avoid harmful contamination and the intent of the drafters was allegedly to establish a legally binding obligation. However, the ambiguity of the terms leaves much room for discretion. As a consequence, its provisions seem to be too vague to be actually enforceable in the practice.[43] Therefore, it is difficult to require those States Parties of the Outer Space Treaty planning to mine in outer space to respect more than these general rules. It would be advisable, though, to invite these States Parties to accept unilateral environmental obligations and to comply with the recommendatory rules on debris mitigation.[44]

[40]See https://cosparhq.cnes.fr/sites/default/files/pppolicy.pdf (last accessed 20 December 2017).

[41]COSPAR Planetary Protection Policy 2011, Preamble, https://cosparhq.cnes.fr/sites/default/files/pppolicy.pdf (last accessed 20 December 2017).

[42]Hofmann (2017).

[43]Apking (2005), p. 447.

[44]Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, endorsed by UNCOPUOS at its 50th session and contained in UN Doc. A/62/20, Annex, p. 47, 2007.

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3.3 *Outer Space as "Province of All Mankind"*

Article I OST declares that the exploration and use of outer space, including the Moon and other celestial bodies, shall be "the province of all mankind."[45] This provision is embedded between the rules stating that the exploration and use of outer space shall be carried out for the benefit and in the interest of all countries and the principle of freedom of exploration and use of outer space. The Cologne Commentary on Space Law considers Article I as "one of the most important, but also of the most disputed provisions of the entire Outer Space Treaty,"[46] and it concludes that the notion of "province of mankind" brings this lead provision of the Treaty "in line with the legal regulation of human activities in other common spaces, such as activities on the High Seas and the Deep-Sea Bed."[47]

The "benefit" element of Article I OST has been further developed by the recommendatory 1996 UN Space Benefits Declaration.[48] After having repeated the "province of mankind" in its Preamble, it stipulates that "States are free to determine all aspects of their participation in international cooperation in the exploration and use of outer space on equitable and mutually acceptable basis" (para. 2) and it requires that "contractual terms in such cooperative ventures" are "fair and reasonable" and in "full compliance with the legitimate rights and interests of the parties concerned."

At the treaty level, the 1979 Moon Agreement also reiterates the "province of mankind" principle (Article 4), again in a close neighbourhood with the "benefit" clause. However, the Moon, celestial bodies and their natural resources[49] are declared by Article 11 para. 1 to be "the common heritage of mankind" (CHM). This principle finds its expression in particular in Article 11(5) which envisages an establishment of an international regime to govern the exploitation of these resources "as such exploitation is about to become feasible." Here, the Cologne Commentary refers to the fact that "there is no unique feature or specific meaning of the CHM in all its manifestations." While different interpretations may be put forward, the proper meaning of the CHM can only be determined in the context of its use and for the purpose of the future applicable regulatory regime.[50] Furthermore, "the CHM does

[45]To compare, a comparison with the system of the International Telecommunication Union can be useful: the Constitution of the ITU, BTS 24 (1996), declares (Article 44) radio frequencies and any associated orbits, including the geo-stationary orbit "limited natural resources" which must be used rationally, efficiently and economically, so that countries may have "equitable access" to those.

[46]Hobe et al. (2009), p. 27.

[47]Hobe et al. (2009), p. 27.

[48]Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of All States, taking into Particular Account the Needs of Developing Countries, adopted by General Assembly in its Resolution 51/122 of 13 December 1996, UN Doc. A/RES/51/122.

[49]Through Article 1 of this Agreement, Moon means also other celestial bodies, as well as the orbits around or other trajectories to or around these.

[50]Hobe et al. (2013), p. 395.

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not have any meaningful impact on the current exploration and use of the natural resources on the Moon outside the future exploitation regime to be established."[51] "States Parties (to the Moon Agreement) are expected to make good faith efforts to convene an international conference and to negotiate for the purpose of reaching an agreement, but they would not be bound to reach an agreement on an international regime," thus the proposed international conference might even "reject the principle CHM, or give a new and liberal scope to this principle."[52]

The modification mechanisms of both treaties (Article XV resp. 17) or the convening of an international conference as envisaged by Article 18 MA have not yet been relied upon. Ten years after its entry into force, or any time after the Agreement has been in force for 5 years, the issue of the revision of the Agreement can be raised which can also include the question of the international regime to govern the exploitation of natural space resources. In line with this rule, in 1994, 10 years after the entry into force of the Moon Agreement, the Resolution of the UN General Assembly A/RES/49/34 of 30 January 1995 took note of the recommendation of the UNCOPUOS that the General Assembly, at its current session, in considering whether to revise the Moon Agreement, should not take any action (para. 42).

3.3.1 Moratorium on National Legislation?

In this particular situation, several scholars,[53] but also of representatives of some Member States of the UNCOPUOS, consider that there exists a moratorium on any national legislation dealing with space resources activities,[54] in other words "such exploitation shall take place under the conditions laid down in the Outer Space Treaty which are to be shaped in an appropriate international legal order multilaterally."[55] The arguments supporting this position can be traced back to the "province of mankind" principle, but even more so to the international legal regime pertaining to the Moon and other celestial bodies as established in the Moon Agreement based on the principle of "an equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests of the developing countries, as well as the efforts of those countries which have contributed to the exploration of celestial bodies, shall be given special consideration" (Article 11(7)). The model usually referred to with respect to any international regime of distribution of resources found

[51]Hobe et al. (2013), p. 397.

[52]Hobe et al. (2013), p. 397. "as we have seen in the case of the amended UNCLOS".

[53]See e.g. Hobe and De Man (2017).

[54]So can be interpreted e.g. Working paper submitted by the Russian Federation in the 53rd Session of the Scientific and Technical Subcommittee, UN Doc. A/AC.105/C.1/2016/CRP.15, 16 February 2016.

[55]Results of the IISL Background Paper, p. 45, 2017, http://iislweb.org/docs/IISL_Space_Mining_Study.pdf (last accessed 20 December 2017).

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on celestial bodies is a structure based on the regulations on deep seabed mining provided for in Part XI of the afore-mentioned 1982 UNCLOS[56] and its complementing 1994 Agreement relating to the implementation of this Part XI.[57]

Without any doubt, a multilateral regime would be the best option for developing activities related with space resources because it would avoid many uncertainties and fears and could unify or at least harmonise the application of national legislations regulating its authorisation and supervision. However, the requirement of the Moon Agreement to adopt a corresponding multilateral regime has been already substantially qualified by its parties;[58] moreover, it is clear that the Agreement is binding only upon those States which ratify it and cannot be considered—as shown above—to have developed any customary law effect.

But even provided that there would be an international cooperative regime governing space resources activities, there is no compelling indication, neither in international nor in European law, as to the point in time when such regime was to be finalised and adopted. As an example, supporting this assessment are the 1986 UN Principles Related to Remote Sensing of the Earth from Outer Space.[59] The Preamble of the Principles refers to the 12 years which were needed to adopt the document. During this time, not only did actual Earth observation quite intensively take place, but also the US 1984 Land Remote-Sensing Commercialization Act[60] was adopted which, to our knowledge, did not provoke any harsh reaction from other States.

Moreover, the position that no national legislation might be adopted before a multilateral document was agreed upon is difficult to accept also for formal grounds. No one would seriously contest the fact that the States are sovereign in the framework of their jurisdiction and free in adopting legal acts as long as they do not contravene international and in case of the members of the European Union, European Union law. In this context, reference can be made to the 1923 Permanent Court of International Justice (PCIJ) *Lotus* case where the PCIJ stated that in absence of an explicit prohibition given by international law, States may exercise their jurisdiction.[61] Therefore, it seems justified to conclude that, first, the envisaged

[56]UN Convention on the Law of the Sea, 1833 UNTS 3.

[57]The 1994 Agreement established an International Seabed Authority (Article 1) as a body responsible for concluding the contracts with the investors, and an Enterprise (Article 2) entering into joint ventures with the contractors, Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, OJ 1994 L 215/10.

[58]Joint Statement on the benefits of adherence to the Agreement Governing the Activities States on the Moon and Other Celestial Bodies of 1979 by States Parties to this Agreement, UN Doc. A/AC.105/C.2/2008/CRP.11, 2 April 2008.

[59]Adopted by the General Assembly in its resolution—Principles relating to remote sensing of the Earth from space, UNGA Res. 41/65, UN Doc. A/RES/41/65 of 3 December 1986.

[60]Public Law 98-365, 98th Congress, H.R. 5155, 17 July 1984, 98 Stat. 451.

[61]The S.S Lotus Case (France v. Turkey), P.C.I.J. Ser. A, No. 10, p. 4 (1927), see (with critical remarks) Bogdandy, Rau (2006), Lotus, The Max Planck Encyclopaedia of Public International Law, June 2006, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e162?prd=EPIL (last accessed 16 February 2018).

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future space resources extraction and commercialisation activities, as long as they respect the provisions of the Outer Space Treaty, do not violate currently applicable international law and that, consequently, States are entitled to legislate on their space activities, including space resources activities.

The question as to the existence of a moratorium imposed on the activities pursued in outer space can be looked at also from the perspective of State practice. In addition to the US 1984 Land Remote-Sensing Act, other examples of domestic legal steps preceding the developments of the international rules can be given. The 2016 Outer Space Act of Denmark defined outer space as the area located more than 100 km about sea level,[62] Article 18 of the 1991 Constitution of Bulgaria even declares that the State shall exercise "sovereign rights" with respect to geostationary orbital positions allocated to it,[63] despite of the fact that the question of definition and delimitation of outer space has been on the programme of UNCOPUOS for many years and has not yet been resolved by any binding document.

3.3.2 Content of the Multilateral Regime

A further question concerns the expectations connected with the content of an envisaged multilateral regime. It is questionable whether the model of the 1994 Agreement establishing institutions responsible for concluding contracts with investors for the purpose of deep seabed mining is the best way to follow. Until now, only a very limited number of such contracts have been concluded and there are good reasons to question whether the existing complicated and expensive structure is an attractive pattern to be followed, especially for developing countries.

To compare, the regime adopted by the UN Remote Sensing Principles can be described as a cooperative regime based on commercial principles. According to their Preamble, the aim of the principles is "strengthening of international cooperation in this field," by carrying out these activities "for the benefit and in the interests of all countries, irrespective of their degree of economic. . ." and other development and taking in "particular consideration the needs of the developing countries" (Principle II). However, the participation in remote sensing activities is based on "equitable" and "mutually acceptable terms" (Principle V). Also, the access of sensed States to primary data, processed data and analysed information concerning their territory should be accorded "on reasonable cost terms" (Principle XII).

A similar approach is followed by the multi-stakeholder Hague Space Resources Working Group which published, in September 2017, the "Draft Building Blocks for the Development of an International Legal Framework on Space Resources

[62]Outer Space Act, Denmark, Act no. 409 of 11 May 2016.

[63]Constitution of the Republic of Bulgaria, prom. SG 56/13 July 1991 as amended.

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Activities."[64] In this document, this international group stressed that a future international framework should create an enabling environment for space resource activities that takes into account all interests and benefits all countries and humankind. This framework, addressed to States and international organisations, must be consistent with international law, should promote consistency and predictability among domestic frameworks of States and internal frameworks of intergovernmental organisations and prevent disputes arising out of space resources activities (Building Block (BB) 4).

According to the Hague Group, the envisaged international framework should enable the unrestricted search for space resources; the attribution of priority rights to operators to search and/or recover space resources *in situ* for a maximum period of time within a maximum area upon registration in an international registry; and provide for the international recognition of such priority rights (BB 6). According to its BB 10, States and international organisations authorising space resources activities should be permitted to establish safety zones to assure safety and to avoid any harmful interference with space resources activity. In relation to potential disputes, the international framework "should encourage recourse by States, intergovernmental organisations and operators to the amiable resolution of disputes, for example by developing procedures for consultation or promoting the 2011 Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities" (BB 18).

This document should, in the formulation of The Hague Building Blocks, serve as a basis for negotiations on an intentional framework and recommendations on an implementation strategy. It will be interesting to see to what extent these pragmatic rules will influence the present discussions in the UNCOPUOS, especially in its Legal Sub-Committee in the framework of the item "General Exchange of views on potential legal models for activities in exploration, exploitation and utilization of space resources."[65]

4 National Legislation in Force

4.1 National Legislation and the Outer Space Treaty

Article VI OST prescribes that the activities of non-governmental entities in outer space shall require authorisation and continuing supervision by the appropriate State Party to the Treaty. This requirement has been fulfilled by the States Parties by many

[64]The Hague Working Group Draft Building Blocks on Space Resources Activities 2017, http://law.leiden.edu/organisation/publiclaw/iiasl/working-group/the-hague-space-resources-governance-working-group.html (last accessed 20 December 2017).

[65]See e.g. Report of the Committee on the Peaceful Uses of Outer Space, UN Doc. A/72/20, 60th Session—7–16 June, 2017.

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quite diverse mechanisms: some of them authorise national space activities on an informal basis; others have used legislation adopted for other than space purposes. The majority of space faring countries, however, decided to adopt—at least as regards activities of certain intensity—specific legislation which defines the substantive conditions for obtaining the authorisation, the procedure to be followed, as well as eventual sanctions for violating its provisions. These legal rules are not fulfilling any mere self-purpose as the "appropriate State Party" shall bear international responsibility for national activities in outer space, that is for assuring that national activities are carried out in conformity with the provisions set up in the OST (Article VI).

In view of the planned intensity of space resources activities, first the US and later Luxembourg decided to adopt specific legislation which would enable them to define the conditions for authorisation of space mining activities and to create a transparent procedure for obtaining the licenses.

4.2 The US Legislation[66]

The 2015 US Commercial Space Launch Competitiveness Act[67] made the US the first country to have adopted a national regulatory framework for space mining activities, a step which, in the terms of the working paper of the Russian Federation to the Scientific and Technical Subcommittee of the UNCOPUOS amounted to being a "manifestation of total disrespect for the international law order."[68]

Title IV of the Act (short title: "Space Resources Exploration and Utilization Act of 2015", Sec. 401) specifically authorises citizens of the United States (hereinafter US citizens) "to possess, own, transport, use and sell the asteroid resource or space resource" they obtain "in accordance with applicable law, including the international obligations of the United States" (§ 51303). The Act defines a "space resource" as an "abiotic resource in situ in outer space" including minerals and water (§ 51301(2)) and an "asteroid resource" is a "space resource found on or within a single asteroid" (§ 51301(1)).

The aim of Title IV is to "facilitate commercial exploration for and commercial recovery of space resources by United States citizens" (§ 51302). According to the legislation, three conditions have to be fulfilled in order to benefit from the rights guaranteed by the Act. First, the entity involved in space resources activities must be a US citizen. According to Title 51 of the US Code entitled National and

[66]This part is partly based on Leterre, Providing a Legal Framework for Sustainable Space Mining Activities, Master Thesis, University of Luxembourg, 2017, https://wwwen.uni.lu/recherche/fdef/satellite_communications_and_space_law/publications (last accessed 20 December 2017).

[67]US Commercial Space Launch Competitiveness Act, 129 STAT. 704.

[68]Working paper submitted by the Russian Federation in the 53rd Session of the Scientific and Technical Subcommittee, UN Doc. A/AC.105/C.1/2016/CRP.15, 16 February 2016.

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Commercial Space Programs,[69] US citizens are natural persons with US citizenship and legal entities directly submitted to US law. Further, if they are entities "organized or existing under the laws of a foreign country," they are eligible to benefit from the applicability of the Act provided that a "controlling interest"[70] of the entity is held by US citizens (natural or legal persons).

Second, in addition to the citizenship requirement, space mining companies must obtain an authorisation by the US authorities (§ 51302). As a preliminary measure, Title IV has required the US President to submit to Congress a report determining a specific process of authorisation of commercial exploitation of space resources as the existing procedures were not applicable to space mining activities. The White House Office of Science and Technology Policy report (its Appendix) of 4 April 2016[71] categorically confirmed that "no person that is subject to the jurisdiction and control of the United States may, directly or through any subsidiary or affiliate, conduct missions in outer space without authorization." As there is no specific authority competent to authorise space resources activities which would require a parliamentary act, the US Government decided to use, as a temporary solution—the "Federal Aviation Administration's (FAA) payload review process" to issue mission authorisations.[72] This procedure is based on interagency cooperation, especially with the Department of State and limited to procedural aspects of mission authorisation.[73] The first application on this temporary legal basis was raised in 2016 by the US company Moon Express, Inc. and an authorisation for the specific mission awarded accordingly.[74]

Third, Section 403 of the Act contains a Disclaimer of Extraterritorial Sovereignty. It clearly states, that by the enactment of this Act, the United States "does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body." This provision corresponds to the high value attached to the international obligations of the US. Such obligations are mentioned four times: as a criterion for the legality of commercial recovery of space resources (§ 51302 a 2), as a limit for the freedom of US citizens to engage in commercial

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[69] National and Commercial Space Programs, 51 U.S.C. § 50902 (1996) (US), https://www.law.cornell.edu/uscode/text/51/50902 (last accessed 20 December 2017).

[70] An interest of 41% is presumed sufficient; see Aeronautics and Space, 14 CFR 401.5, https://www.law.cornell.edu/cfr/text/14/401.5 (last accessed 20 December 2017).

[71] Office of Science and Technology Policy (OSTP), Report on On-orbit Authority, as Required by the Commercial Space Launch Competitiveness Act (Public Law 114-90) (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/csla_report_4-4-16_final.pdf (last accessed 20 December 2017).

[72] Masson-Zwaan and Palkowicz (2017), pp. 11–12.

[73] Gabrynowicz, Title IV of the 2015 U.S. Commercial Space Launch Competitiveness Act, 27 March 2017, http://www.unoosa.org/documents/pdf/copuos/lsc/2017/symp-05.pdf (last accessed 20 December 2017).

[74] Gabrynowicz, Title IV of the 2015 U.S. Commercial Space Launch Competitiveness Act, 27 March 2017, http://www.unoosa.org/documents/pdf/copuos/lsc/2017/symp-05.pdf (last accessed 20 December 2017).

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recovery of space resources free from harmful interference (§ 51302 a 3), as an explanation for the need to appoint an authority responsible for authorisation and supervision of space resources activities (§ 51302 b 1) and finally, as a criterion for the legality of the legal title to the resources obtained in outer space (§ 51303). While one can only speculate about the reasons to include these criteria in the Act, it is incontestable that international law is part of the US national legal order; for the potential user of the legislation who is or might not be aware of the Outer Space Treaty or the Liability Convention this reminder might be, however, useful.

4.3 The Legislation of Luxembourg

The 2017 Law on the Exploration and Use of Space Resources of Luxembourg[75] was inspired by the US model of implementing Article VI of the Outer Space Treaty. Until the entering into force of this legislation, the amended 1991 Law on Electronic Media[76] was the only basis for authorising space activities in Luxembourg, albeit restricted to the authorisation of "satellite systems" and therefore hardly capable to deal with activities connected to space resources extraction.

With the announcement of Luxembourg's intent to explore the potential use of space resources, the legislative work started. Based on the conclusions of the Study on Legal and Regulatory Aspects of Space Resources Utilization of the University of Luxembourg,[77] the Draft legislation was submitted to the Parliament by the Minister of Economy on 15 November 2016 and was later revised as a result of the Opinion of the *Conseil d'État* of 7 April 2017. On 27 July 2017, the law was adopted and entered into force on 2 August 2017.

The legislation deals generally with "space resources" without making a distinction between space and asteroid resources. In contrast to the US legislation, this central notion is not closely defined in the body of the law; according to the Explanatory Statement, there are abiotic resources that can be found *in situ* in outer space and that can be extracted. According to Article 2(4), this Law shall not apply to satellite communication, orbital positions or the use of frequency bands.

[75]Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace (Mémorial a, no 674 du 28 juillet 2017).

[76]Law of Electronic Media of 27 July 1991, Luxembourg, http://www.legilux.public.lu/leg/a/archives/2010/0241/a241.pdf (last accessed 20 December 2017).

[77]Hofmann, Prüm, Von Der Dunk, Tronchetti (2016) Study on Legal and Regulatory Aspects of Space Resources Utilisation in Luxembourg, not published.

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Article 1 of the Law declares that "space resources are capable of being appropriated." The reasoning by the legislator is based, *inter alia*, on an analogy with the rules governing the High Seas.[78] Contrary to §5130 of the US law, the provision on the persons, both natural and legal, possibly entitled to benefit from the application of the Law, is more general and in particular not limited to the citizens of Luxembourg—even legal entities owned in full by non-Luxembourg citizens or fully controlled by legal entities domiciled outside Luxembourg are entitled to benefit from the Law as long as they are themselves registered in Luxembourg. The condition "in accordance with international law" which originally was part of the corresponding provision in the Draft Law was moved into the part dealing with authorisation following the recommendation made in the above-mentioned Opinion of the *Conseil d'État* of 7 April 2017, which explained that "international law has by its nature a hierarchical value above the internal law, without any need of precision." Furthermore, "international law mentioned in the Draft would not have any direct effect for the citizens and would bind Luxembourg only."[79] Today, Article 2(2) of the Law states that an authorised operator may only "carry out the activity" in space resources area "in accordance with the conditions of authorization and the international obligations of Luxembourg."

The remainder of the Law deals with the authorisation procedure with which it is necessary to comply in order to perform activities in this area. No person can explore or use space resources without holding an authorisation from the minister or ministers in charge of the economy and space activities (Article 2) on a personal and non-assignable basis (Article 5). The authorisation shall be granted for a specific "mission" (Article 3) performed for commercial purposes. The crucial conditions for obtaining an authorisation are as follows. The applicant must be either a public company limited by shares (*société anonyme*), a corporate partnership limited by shares (*société en commandite par actions*), a private limited company (*société à responsabilité limitée*) of Luxembourg law or a European Company (*société européenne*) having its registered office in Luxembourg (Article 4). The shareholders of the operator may be Luxembourg or foreign, natural or legal persons.[80]

The operator to be authorised must have its central administration and the registered office in Luxembourg (Article 7 para 1). It must have a robust scheme of financial, technical and statutory procedures and arrangements through which the mission is planned and implemented (Article 7 para 2). At least two persons must be responsible for the management of the operator, both of which must possess adequate professional experience (Article 9).

[78] See Luxembourg law on the exploration and use of space resources entered into force, Arendt Publication: Newsflash, 2 August 2017, http://www.arendt.com/publications/pages/luxembourg-law-exploration-use-space-resources-into-force.aspx (last accessed 13 February 2018).

[79] Opinion of the Conseil d'État, Luxembourg of 7 April 2017, p. 9.

[80] Luxembourg law on the exploration and use of space resources entered into force, Arendt Publication: Newsflash, 2 August 2017.

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The application must be accompanied by all useful information for the assessment thereof and the emission program (Article 6). For example, the identity of the shareholders or members with a qualified holding of at least 10% of the capital or the voting rights in the operator or, in the absence of such holdings, the identity of the twenty largest shareholders or members must be disclosed pursuant to Article 8(1). If the "suitability" of those shareholders or members to ensure a "sound and prudent operation" which criteria are defined in Article 8(2), is not satisfactory, the authorisation "shall be refused" according to Article 8(2).

The application for the authorisation must be accompanied by a risk assessment of the mission (Article 10 para. 1) and the authorisation shall be conditional upon the existence of financial bases that are appropriate to the risk associated with the mission (Article 10 para. 2). The authorisation may be accompanied by additional conditions which can determine the activities to be carried on or outside the territory of Luxembourg, or the modalities for the supervision of the mission (Article 12).

For each application, a fee shall be set by the Ministers which shall range from 5000 to EUR 500,000 depending on the complexity of the application (Article 13). Implementing Article VI OST, Article 15 declares that the ministers in charge of the economy and space activities are "in charge of the continuing supervision of the missions for which an authorization has been granted."

Article 16 of the Law deals with the "responsibility for damage."[81] According to this provision, the operator is fully responsible for any damage caused at the occasion of the mission, including all preparatory works and duties. The granting of an authorisation for a mission does not dispense from the need to obtain other approvals or authorisations, e.g. any business license or the necessary frequencies assignment.

If the conditions of the authorisation are no longer met, or the operator does not make use of the authorisation within 36 months after it being granted, it can be withdrawn (Article 14). The violation of the Law entails criminal law consequences ranging from a monetary fine to a term of imprisonment (Article 18).

5 Conclusion

Space resources activities have a potential to boost existing space activities and enable further long-time projects, including the long-stay of human beings in outer space. This positive momentum should be taken into account when discussing their future international regime.

In relation to the appropriation of space resources, the Outer Space Treaty is very general and does not formulate any respective prohibition; the more detailed Moon

[81] "L'exploitant qui a obtenu un agrément pour une mission est pleinement responsable des dommages causés à l'occasion de la mission, y inclus à l'occasion de tous travaux et devoirs de préparation."

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Agreement is not binding more than its 18 States Parties. Consequently, for the States who are not party of the Moon Agreement, space resources activities are not per se violating international law.

The Outer Space Treaty is also very general in relation to the environmental obligations the States have to comply with when authorising the activities of non-governmental entities. Despite this fact and in order to ensure the sustainability of their own activities, the space actors should be invited to adopt unilateral environmental obligations and to comply with the recommendatory Space Debris Mitigation Guidelines.

As the Moon Agreement does not represent any customary rule of international law, it is, therefore, not capable to impose a moratorium on space resources activities or on the adoption of domestic space resources legislation on other States than its own Parties, provided that these activities or legislative acts are in compliance with international law. The "province of all mankind" principle of the Outer Space Treaty does not prescribe any specific regime of distributing the space assets, provided that space activities are carried out for the benefit of and in the interests of all countries and the UN Remote Sensing Principles show that an international cooperative regime based on commercial principles could be one of the alternatives how the future regime could be drafted.

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Part II
Regions

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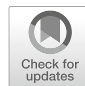
Trade in Energy: The Case of the Eurasian Economic Union



Seljan Verdiyeva

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1 Introduction

The Eurasian Economic Union (EAEU) came into being on May 29, 2014. The members of the union are the Russian Federation, Kazakhstan, Belarus, Armenia and the Kyrgyz Republic. Energy dialogue forms an important part of this union, as two out of five members of the EAEU—Russia and Kazakhstan possess significant supplies of global energy resources. Meanwhile, the rest of the members—Belarus, Armenia and the Kyrgyz Republic are largely dependent on energy imports and this has resulted in the economic union with different aspirations for trade in energy.[1]

The views expressed in the paper belongs to the author only and do not reflect the opinion of her employer. The author takes full responsibility for all the views expressed.

[1]98% of energy in Belarus originate from Russia. Armenia can only meet 35% of its energy demand. Kyrgyz Republic's dependence on energy import is 50%.

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Currently, the parties aim to conclude the formation of the common energy market by 2025, however there are a number of hurdles blocking the successful achievement of this goal.

This article gives context about the common energy market of the EAEU and elaborates on the obstacles for energy integration in the EAEU. It argues that formation of common energy market is being hindered through the lack of trust between the members, monopolization of the energy sectors, non-coordination of national energy policies, lack of fair competition in the energy market and dependence on a single source of energy, mainly fossil fuel in overall energy mix.

The article is organized as follows: The first section describes how energy integration is handled in the regional trade agreements in the world, second section gives context about the Eurasian Economic Union, third section analyzes the energy trade within the Eurasian Economic Union, common energy market, energy transit in the region and energy commitments of the EAEU members in the World Trade Organization. The last section describes the blockages on the way of formation of common energy market.

2 Energy in Regional Trade Agreements

Energy can be classified both as goods and services. As goods, energy includes all forms, such as oil, gas, electricity, coal, wood, renewables like atomic energy, solar, wind and hydro-energy, as well as biofuels. Energy as a service, on the other hand, covers everything from extraction of energy until delivery to final consumers. This entire process encompasses distribution, transportation, exploration, development, transmission, generation, production, extraction, marketing, consumption and management of the energy.[2] It should be noted that multilateral trade agreements of World Trade Organization (WTO) do not contain provisions specifically on energy, as during the Uruguay round, the founding members did not feel the necessity to include energy as a specific sector in the WTO agreements. It was generally believed that common multilateral trade rules of WTO would be enough to regulate trade in energy.[3] Therefore, in WTO, the only rules concerning specifically the energy were on transit and transportation, which were included in the GATT (General Agreement on Tariffs and Trade) and further developed in the Trade Facilitation Agreement.

Nonetheless, focus on trade in energy has been gradually increasing in the multilateral trade negotiations. It can be clearly seen that acceding countries to the WTO are more frequently requested to commit to the energy liberalization.[4] However, energy issues are more and more tackled in the regional trade agreements

[2]WTO Council for Trade Special Session, USA proposal on energy services S/CSS/W/24, 18 December 2000.

[3]Cottier et al. (2011), p. 211.

[4]VanGrasstek (2013), p. 137.

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(RTA) platform than the WTO.[5] Yet, still only a few RTAs in the world contain provisions specifically dedicated to the liberalization of energy goods and services. One reason behind this is that energy resources are gathered asymmetrically among the RTA partners and therefore, liberalization of trade in energy goods and services result to benefit one side more than another. Thus, most RTAs are usually limited with provisions on promotion of the use of sustainable energy and renewables, as well as energy efficiency and security.[6] These provisions are most of the times intertwined with the provisions on advancing climate change mitigation measures and energy efficiency.

One of the few RTAs which regulate trade in energy is NAFTA—North-American Free Trade Agreement, which has specific chapter called “Energy and basic petrochemicals” in its founding treaty. Here the parties affirm their desire to liberalize the energy trade gradually. The provisions in this chapter apply to both energy goods, as well as services associated with such goods. The parties undertake not to apply quantitative restrictions, minimum or maximum price restrictions, as well as export taxes on energy and basic petrochemicals with some exceptions.[7] However, even NAFTA’s energy trade liberalization is very limited in its application, as the treaty reaffirms prohibition of foreign ownership in Mexico’s oil and gas sector.[8] This was dominated by Mexico’s policy at the time and can be a clear example how RTAs comprised of members with diverse energy policies can be an obstacle for the liberalization of trade in energy.

ASEAN (Association of South-East Asian Nations) and Mercosur also have policies on energy integration. Though, initially energy were not included in the founding treaties of these two RTAs, the subsequent documents have covered issues such as renewables, interconnection of power grids and energy efficiency. In Mercosur, energy integration is administered through the Memorandum of Understanding on Electricity Exchange and Integration,[9] Memorandum of Understanding on Gas Exchanges and Gas Integration among Mercosur Member States,[10]

[5]Leal-Arcas et al. (2016), p. 5.

[6]Energy issues are also tackled within international energy organizations which tire to unify and coordinate energy policies of their member states on different aspects, such as transit policies, stabilization of energy prices in world market, promotion of use of renewable energy, mitigation of effects of energy on climate change. Among these multilateral platforms we can name Energy Charter, Organization for Petroleum Exporting Countries, International Renewable Energy Agency, International Energy Agency, as well as forums of environmental organizations dealing with multilateral energy regulation.

[7]NAFTA, the North American Free Trade Agreement: a guide to customs procedures (1994), Washington, DC: Dept. of the Treasury, U.S. Customs Service: Supt. of Docs., U.S. G.P.O.

[8]Leal-Arcas et al. (2014), p. 33.

[9]Memorandum of Understanding on Electricity Exchange and Electrical Integration in MERCOSUR MERCOSUR/CMC/DEC No. 10, 23 July 1998.

[10]Memorandum of Understanding on Gas Exchanges and Gas Integration among Mercosur Member States MERCOSUR/CMC/DEC No. 10/99, 7 December 1999.

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Framework Agreement on Regional Energy Complementation,[11] as well as Action Plan for Cooperation in Biofuels.[12] ASEAN's energy integration is aimed at connecting the energy grids of the region. It has adopted four energy plans to interconnect the region. The last one—"Plan of Action for Energy Cooperation 2016 - 2025: Enhancing Energy Connectivity and Market Integration to Achieve Energy Security, Accessibility, Affordability and Sustainability for All" aims to connect power grids and facilitate multilateral electricity trade, interconnect gas pipelines in the region, increase the share of renewables, facilitate clean coal technologies, cooperate in the nuclear energy sector, increase energy efficiency and conservation.[13]

However, the model for the rest of the world in liberalization of energy trade has been European Union. EU has achieved major milestones in this regard. Even the first steps towards the formation of the EU was taken with the establishment of European Coal and Steel Community and European Atomic Energy Community. Thus, common market for coal and nuclear energy was already formed in the 1950s. The legal basis of the functioning of the common energy market is Article 194 of the Treaty on Functioning of European Union.[14] Currently, EU has built quite well-functioned common energy market and has moved from national market to integrated internal energy market due to the adopted three energy packages to achieve this aim. Between 1996–2009, interconnection of energy systems of member countries were increased, rules on competition and unbundling were developed, retail market was liberalized, Agency for Cooperation of Energy Regulators was established to assist national regulators, electricity cross-border trade was improved and many other steps were taken.[15] In 2015, EU adopted Energy Union Framework Strategy[16] and in November 2016, it adopted the document "Clean Energy for all Europeans".[17] The latter akes energy integration into a further level by developing rules for energy union, promotion of the use of renewables and security of supply, which is a major policy issue for the EU. Indeed, nowadays, the other RTAs, including the EAEU look for and learn from EU in taking steps for the formation

[11] MERCOSUR Framework Agreement on Regional Energy Complementation, 9 December 2005.

[12] MERCOSUR Action Plan for Cooperation in Biofuels MERCOSUR/CMC/DEC No. 49/07, 17 December 2007.

[13] ASEAN Plan of Action for Energy Cooperation 2016–2025 is the fourth action plan. The previous action plans covered the period 1999–2004, 2004–2009 and 2010–2015.

[14] Other relevant provisions are: Article 122 on security of supply, Articles 170–172 on energy networks, Articles 216–218 on external energy policy, as well as Article 114 on internal energy market. Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, pp. 47–390.

[15] Serena (2014), pp. 14–15.

[16] Communication from the European Commission: a framework strategy for a resilient energy union with a forward-looking climate change policy, COM (2015) 080 final, 25 February 2015.

[17] Communication from the European Commission: clean energy for all Europeans, COM (2016) 860 final, 30 November 2016.

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of common energy market, as EU's achievement in interconnection of national energy policies are worth commending.[18]

3 Eurasian Economic Union: Context

EAEU is a regional integration union inspired after the EU. The idea behind this union was first introduced by Kazakhstani president Nazarbayev in 1994 and it was actively lobbied by the Russian Federation. But this suggestion did not become a reality at that time mostly because of the political circumstances, as timing and conditions were not ripe for this initiative. In the meantime, several attempts were made to integrate post-Soviet countries into one union, but most of these attempts were not durable and failed.

The biggest step towards integration came with the conclusion of bilateral and Commonwealth of Independent States (CIS) free trade agreements between the countries in the region which created conditions for the free movement of goods in the post-Soviet space. CIS free trade agreement was updated based on the WTO provisions and socio-economic needs in 2011. This agreement served as a foundation for further integration attempts. The road towards the establishment of the EAEU was intensified since 2007. Russia, Kazakhstan and Belarus became the signatories to the Treaty on the Establishment of the Customs Union.[19] The Customs Union was launched in 2010. Single economic space was launched in 2012 and the Eurasian Economic Commission was delegated powers for administration of further integration policy.[20] The Treaty on the Establishment of Eurasian Economic Union (hereinafter EAEU Treaty) was signed on May 29, 2014 and came into force a year later.[21] Soon Armenia and the Kyrgyz Republic officially joined the membership of the EAEU.[22]

It should be noted that formation of the EU has been a great learning process for other regional blocks, including the EAEU. The latter has been looking to and learning from the achievements of the EU. Therefore, not surprisingly, institutions of the EAEU are fairly similar to the EU. However these similarities remain purely structural, as in substance there are important differences in decision-making

[18]Qlazyev et al. (2013), p. 10.

[19]Treaty on the Establishment of the Customs Union between Russia, Belarus and Kazakhstan (6 October 2007).

[20]Treaty on the Eurasian Economic Commission, 18 November 2011, https://docs.eaeunion.org/ru-ru (last accessed 30 October 2016).

[21]Treaty on the Establishment of the Eurasian Economic Union, 29 May 2014, https://docs.eaeunion.org/en-us (last accessed 30 October 2016).

[22]Armenia signed the EAEU treaty on October 10, 2014 and Kyrgyz Republic signed it on December 23, 2014.

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process, enforcement and judicial powers.[23] The EAEU has four tiers of governance and the fifth tier – financial regulatory body is supposed to be established by 2025. Supreme Eurasian Economic Council is the first tier of the governance, which is led by the presidents of the member states. It sets the course of policy for the EAEU. The second main body is the Eurasian Intergovernmental Council, which is led by prime ministers. It supervises proper implementation of the EAEU Treaty and tasks third tier and executive body of the EAEU – Eurasian Economic Commission with relevant work. The Commission develops proposals for integration and lays ground for effective functioning of the EAEU. Lastly, the judicial matters are handled with the EAEU court, located in Minsk.

Another difference is that, unlike the EU, the EAEU considers itself purely economic organization. The founding treaty of the EAEU emphasizes that the EAEU is an international organization for regional economic integration. Indeed, in comparison with the EU, the EAEU does not have an integrated common foreign policy or as a matter of fact, common policy on security, justice, human rights and social matters. Nonetheless, major motivation behind the establishment of the EAEU seem quite political. First and foremost, aspiration of the Russian Federation to unite the post-Soviet countries in its orbit in a prototype of the Soviet Union is obvious. The union has also been actively searching for enlargement of its membership, which also serves as a tool to expand the sphere of influence of Russia, a segment of larger foreign policy of Russia. There are other factors such as provision of geopolitical security for Armenia and the Kyrgyz Republic, as well as, support for the preservation of governing regimes in all the countries in the EAEU by Russia.

The EAEU's policy of enlargement has been ongoing in several directions.[24] Creation of "Great Eurasia"—common economic space extending to the whole Eurasia—is a part of the policy which necessitates closer ties with the EU. However, the EU has been reluctant on any kind of cooperation with the EAEU, even more so after the annexation of the Crimea by Russia and events in Ukraine.[25]

On the Asian front, the integration has been quite successful. A first FTA of the EAEU was signed with Vietnam and entered into force in 2016. There are at least three dozen of other countries exploring the possibility of deepening their economic ties with the EAEU. Among these Asian countries, special attention deserves China, which has an important impact in the region, especially in the Central Asia. The EAEU and China already concluded a trade deal to integrate EAEU projects into the "Silk Road Economic Belt" initiative of China. This trade deal serves for strengthening of "The EAEU – China partnership".[26]

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[23]Suleymenov T, Denejniy vopros: pochemu Evraziyskomu soyuzu ne nujna yedinaya valyuta (Money problem: why Eurasian Union does not need common currency). RBK, 17 June 2016, http://www.rbc.ru/opinions/economics/17/06/2016/5763dfff9a794704a8e9d0f3 (last accessed 12 October 2016).

[24]Trudnosti sopryajeniya (Challenges for integration). Respublika, 17 February 2016, http://www.eurasiancommission.org/ru/nae/news/Pages/17-02-2016-1.aspx (last accessed 12 October 2016).

[25]Yeliseyev (2015), p. 7.

[26]Kommentariy: Putin pozval Yevropu v Bolshuyu Yevraziyu (Commentary: Putin invited Europe to the Great Eurasia). DW, 17 June 2016, http://dw.com/p/1J8tk (last accessed 2 July 2016).

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4 Energy in the Eurasian Economic Union

4.1 Energy Policies of the EAEU Members

Two out of the five members of the EAEU—Russia and Kazakhstan possess significant global energy resources. Russia accounts for the most of the trade in energy in the EAEU. It is the world's largest crude oil producer, the second largest natural gas producer, the top producer of electric power, world's third exporter of coal, as well as the nuclear energy producing country. However, energy trade of Russia with the EAEU countries are not large, as the EAEU and the CIS are not the biggest export markets for Russia. In fact, the main Russian export markets for energy resources are the EU and Asian countries. The EU and Russia are somewhat inter-dependent in this energy relationship. The EU has been importing almost one third of its energy from Russia, while Russia has been exporting more than half of its energy to the European markets.[27]

Energy accounts for the 40% of the budget revenues for Russian Federation, therefore trade in energy is an important revenue source for this country.[28] As such, any fluctuations of prices in energy market affects the economy a great deal and makes Russia vulnerable to external shocks. Indeed, this was clearly seen during the downfall of oil prices in 2014 and onwards, which resulted in devaluation of the Russian currency, budget cuts and loss of the significant government revenues.[29]

Though not as a large producer as Russia, Kazakhstan's energy resources are also significant in terms of the region where it is located. To be precise, among the post-Soviet Union countries, Kazakhstan is the second largest producer of energy resources, after Russia.[30] In the world, Kazakhstan ranks among the top 20 oil producing countries. Kazakhstan is also the world's top country for production of uranium, as well as it is the top coal producer among the Central Asian countries. However, being land-locked country, it is dependent on its neighbors for the transit of its energy resources. Currently, Kazakhstan is using routes via Russia, the Caspian Sea and China to transport its energy resources. On the other hand, Kazakhstan also acts as a transit country for transportation of Turkmenistan's gas to China.

It should be noted that both Russia and Kazakhstan have state monopolization in the energy sector. In case of Kazakhstan, it is "Kazmunaygaz", which is the state-trading agency of Kazakhstan that controls the energy sector. It is the sole government agency for the development, extraction, refinery and transportation of hydrocarbon resources.[31] Ministry of Energy of Kazakhstan—central executive

[27] Aalto (2008), p. 7.

[28] Jaffe and Manning (2001), p. 133.

[29] Grushevenko (2015) The effects of lower oil prices in Russia. National Bureau of Asian Research briefs, http://nbr.org/research/activity.aspx?id=561 (last accessed 10 January 2018).

[30] Yesdauletova (2009), p. 38.

[31] See more at http://www.kmg.kz/eng/ (last accessed 29 October 2017).

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body for energy policy—has delegated to "Kazmunaygaz" regulation of the planning, project building, construction of the oil and gas transport infrastructure, transportation via oil and gas pipelines, subsequent storage and use of oil and gas infrastructure.

The same applies to Russia. "Gazprom" is the Russian sole monopoly company for gas extraction, development, transportation and sale. In the field of oil, the situation is different, as there are multiple companies such as "Rosneft", "Transneft", "Gazprom-neft", "Lukoyl", "Tatneft" and etc. Among them two companies are distinguished. "Transneft" is the monopoly in Russia for transportation of oil. "Lukoyl" is responsible for exploration, extraction, refinery and sale of oil and gas fields in Russia and abroad, including Kazakhstan as well.

Other members of the EAEU are largely dependent on the import of energy resources. For instance, Armenia's energy sector depends on Russia. In fact, Russian subsidiary company "Gazprom Armenia" controls 100% of the gas supply and sale to Armenia. Armenia also possesses nuclear energy, as its Metsamor nuclear plant provides significant amount of electricity for the domestic use. But the plant itself poses huge ecological risk to the country, as well as to its neighbors. In fact, this plant has been cited as the most dangerous nuclear facility in the world by "National Geographic", as it had outlived its normal 30 years life span for more than a decade now.[32]

The Kyrgyz Republic owns vast hydrocarbon resources and generates half of the electricity for its needs by hydrocarbon power. The share of hydropower on general electrical mix has been around 90% making the country dependent on single energy source.[33] The Kyrgyz Republic possesses limited amount of gas, however due to the geographical difficulties of extraction and exploration, it imports gas from Uzbekistan.[34] Its gas sector belongs completely to the Russian companies now. In 2013, during a severe shortage of energy, the Kyrgyz Republic has sold entire gas sector to the Russian "Gazprom" for just 1 USD in exchange for the forgiveness of its former gas debts.[35]

Among these countries, Belarus is of special attention, because it serves as an important route for the transit of the Russian energy. 97% of energy imports to Belarus come from Russia and more than 80% of the Belarusian energy use is dependent on Russia.[36] Belarus imports Russian oil at subsidized prices and then re-exports this oil at global market prices, which generates an important revenue source for Belarus. In exchange for this subsidized prices, Belarus has become a

[32]Lavelle and Garthwaite (2011) Is Armenia's nuclear plant the world's most dangerous? National Geographic, https://news.nationalgeographic.com/news/energy/2011/04/110412-most-dangerous-nuclear-plant-armenia/ (last accessed 29 October 2017).

[33]Aminjonov (2016), p. 6.

[34]Aminjonov (2016), p 7.

[35]Russia's Gazprom buys KyrgyzGaz State Co. for 1 USD. Ferghana International Information Agency, 31 July 2013, http://enews.fergananews.com/news.php?id=2677&print=1 (last accessed 27 December 2017).

[36]Balmaceda (2006), p. 6.

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close ally of Russia and actively participates in implementation of foreign policy of the latter. The relationship of these two countries are peculiar. From time to time, Russia provides economic baits to Belarus in the form of forgiving of debts. For instance, in 1996 the two countries signed an agreement, where Russia let go of Belarusian debt for gas in exchange for the lease of military telecommunication objects.[37] Though Belarus receives the most subsidized gas prices within the CIS region, it has been demanding even lower prices for gas.[38] In this regard, Belarus has numerously called for the revision of the EAEU treaty and acceleration of the work for the formation of the common energy market.[39]

4.2 Energy in WTO Commitments of EAEU Members

Energy commitments of the EAEU members in the WTO accession packages considerably differ in their scope of liberalization. The Russian Federation has tried to limit any commitment in the energy sector by scheduling only services incidental to mining, services incidental to energy distribution and related scientific and technical consulting work.[40] Even when scheduled, the scope of these commitments is very narrow. For instance, services incidental to mining cover only consultancy services. Related scientific and technical consulting work, which encompasses geological, geophysical and other research services, subsurface surveying, excludes the field work from the scope of the commitment. The Russian Federation also scheduled specific limitation to production sharing agreements. These types of agreements are signed between the government and energy extracting companies. Based on these limitations, the Russian Federation grants priority status to its juridical persons as suppliers, contractors, carriers in the production sharing agreements. Moreover, Russia introduces nationality requirement, by specifying that 80% of the employees on such contracts should be Russian nationals.

Kazakhstan's schedule of services is more liberal compared to Russia. For instance, if Russia only committed to consultancy services regarding services incidental to mining, Kazakhstan took a deeper liberalization and opened up this sector to foreign participation. The only limitation is that juridical persons have to be in the

[37] Balmaceda (2006), p. 8.

[38] Currently Belarus pays 132 USD for thousand cubic meters of gas. The country demands lower prices for gas because the world prices have gone down, Russia refuses to do so. From 2016, Belarus started to pay 73 USD for thousand cubic meters of gas. As retaliation, Russia decreased the export of the oil to Belarus which resulted in the loss of export duty revenues to Belarus. The trade war between the countries on the gas prices is still ongoing.

[39] 'Lukashenko prizval "provesti revisiyu" doqovora o Evrazes' (Lukashenko called for the "revision" of the EAEU treaty). Ria novosti, 28 October 2016, https://ria.ru/economy/20161028/1480193958.html (last accessed 6 November 2016).

[40] WTO Russian Federation Schedule of Specific Commitments: GATS/SC/149 5, November 2012.

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form of a juridical person of Kazakhstan.[41] However, services incidental to energy distribution still cover only consultancy services. Unlike Russia, Kazakhstan took full commitment in related scientific and technical consulting work.

The Kyrgyz Republic has a fairly liberal services schedule. It has fully liberalized most of its energy related services, such as services incidental to mining, engineering services, pipeline transport. Services incidental to energy distribution is partly liberalized.

Armenia has no energy commitments and Belarus is not a member of the WTO yet.

4.3 Transit of Energy

Transit of energy is also significant for this region. In this regard, relationship of the EAEU members to the Energy Charter Treaty is quite interesting. The Energy Charter Treaty is unique, because it provides protection for investment, tackles transit issues in detail and provides for dispute settlement for energy transit. Specifically, under the Energy Charter Treaty, there are obligations for the contracting parties to ensure the smooth and non-interrupted transit of energy flows and create non-discriminatory environment by providing national/most-favored treatment, as well as protection against non-commercial risks. Out of all EAEU members, only two—Russia and Belarus signed the Energy Charter Treaty. Russia accepted provisional application of it until the ratification.[42] However, in 2009 Russia refused to ratify it and formally gave the notice of it to the Secretariat and stopped the ratification process as a whole. Belarus is applying the Treaty provisionally pending ratification.

The move of Russia to pull out of Energy Charter clearly shows that the country was not willing to take full commitment in the transit of energy and be bound with the dispute settlement for such matters. As Russia is a transit country for the Central Asian energy resources, this step could have been taken with the motivation to control the transit, as well as to have the advantage of influence over these countries. Also, by taking this step, Russia might have aimed to limit potential impact of future investment disputes in its energy sector. This specifically applies to Yukos, whose shareholders arbitrated against Russia's expropriation of the company.[43]

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[41] WTO Kazakhstan Schedule of Specific Commitments: WT/ACC/KAZ/93/Add 2, 23 June 2015.

[42] Pominova I (2014) Risks and benefits for the Russian Federation to participate in the Energy Charter: comprehensive analysis. Energy Charter Secretariat Knowledge Center http://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Russia_and_the_ECT_en.pdf (last accessed 09 September 2017), p. 1.

[43] Russia's withdrawal from Energy Charter Treaty. http://www.nortonrosefulbright.com/knowledge/publications/22691/russias-withdrawal-from-the-energy-charter-treaty (last accessed 31 October 2017).

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4.4 Common EAEU Energy Market

Since two major energy producing countries are among the membership of the EAEU, not surprisingly energy is one of the driving forces for the integration. As common energy market meant that EAEU members would have equal rights as the local companies to access Russian energy resources, it has been a considerable motivation for Belarus, the Kyrgyz Republic and Armenia in their decision to join the EAEU. Once a common energy market is formed within the EAEU, it will be the largest economic benefit for these countries.

The Eurasian Economic Union Treaty has special chapter XX on energy which is even further elaborated on Annexes N21, 22 and 23. The Treaty discerns the common oil and petroleum products market, common gas market and common electricity energy market.[44] These annexes to the EAEU treaty elaborates the coverage of the common energy markets. The EAEU Treaty specifies the deadlines by which these markets have to be operational. These are 1 July 2019 for the common electricity market and 1 January 2025 for the other energy markets.[45] It is noted in the EAEU Treaty that an international treaty with the EAEU members had to be concluded before the launch of these markets, as well as action plans and concepts papers should be developed in advance.

4.4.1 Common Gas Market

Annex No22 of the EAEU treaty is devoted to the issues such as cooperation, market access, natural monopolies, pricing policy for common gas market. The main principle is that import and export duties are not being applied for the intra-EAEU trade.[46] This was a concession sought by Belarus, and later by Armenia and the Kyrgyz Republic. Besides that, the annex has provisions on harmonization and approximation of the legislation, as well as on environmental safety.[47] The main pre-condition for the formation of the common gas market is the economic

[44] Treaty on the Establishment of the Eurasian Economic Union: Article 81, 83 and 84, 29 May 2014), www.docs.eaeunion.org (last accessed 2 November 2017).

[45] Treaty on the Establishment of the Eurasian Economic Union: Article 104, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2017).

[46] Annex 22 to the EAEU Treaty, Protocol on Rules for the access to the services of natural monopolies in the sphere of transportation of gas through gas transporting systems, as well as price formation and tariff policy, Article: 3.1, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2016).

[47] Annex 22 to the EAEU Treaty, Protocol on Rules for the access to the services of natural monopolies in the sphere of transportation of gas through gas transporting systems, as well as price formation and tariff policy, Article: 3.4–3.5, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2016).

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profitability. In other words, the EAEU members should have such market prices that it should be economically beneficial to sell gas to the EAEU members.[48] The EAEU itself does not regulate volume, price and tariff, leaving this to the authority of national governments.[49] Thus, energy producing countries—Russia and Kazakhstan still maintain their sovereignty over these issues. The economic benefit pre-condition also gives a chance for this countries to move away from the common market commitment if they find it non-profitable.

On 31 May 2016, concept of the formation of the common gas market was adopted.[50] According to this concept, formation of the common gas market is conditioned upon the development of the internal gas markets of the members. The concept ensures that internal needs in the gas of the member are answered with the resources of the given member or other members and in some cases even the third countries.[51] However, the price formation and other commercial/technical conditions of the transportation of the gas are determined with the bilateral agreements. Also, in case of threats to economic and energy security of a member, it has a right to adopt relevant regulative steps, which means that it can limit application of common energy market in such cases.[52]

The common gas market is envisaged to be formed in several stages. The first stage covers the period until 2020, when the legislation is to be harmonized, access to information is provided, norms and standards for gas are unified, formation of indicative balance of gas of the union and adoption of the rules for the auctions on the gas are completed. The second stage covers period up to 2021 when one or more auctions on gas are operational in the EAEU territory, members have access without barriers to the auctions located in the territory of other members and they have access to the gas transportation systems of each-other. The third and final stage covers the period up to 2025 when the agreement on common market for gas enters into force, the supply of gas through bilateral agreements or auctions are ensured freely and the members adopt the price for gas which is equally beneficial to all the members.

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[48]Annex 22 to the EAEU Treaty, Protocol on Rules for the access to the services of natural monopolies in the sphere of transportation of gas through gas transporting systems, as well as price formation and tariff policy, Article: 5, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2016).

[49]Annex 22 to the EAEU Treaty, Protocol on Rules for the access to the services of natural monopolies in the sphere of transportation of gas through gas transporting systems, as well as price formation and tariff policy, Article: 7, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2016).

[50]Decision N7, dated 31 May 2016 of the Eurasian Economic Council on the concept of the formation of common gas market of the EAEU.

[51]Decision N7, dated 31 May 2016 of the Eurasian Economic Council on the concept of the formation of common gas market of the EAEU, Article 3.

[52]Decision N7, dated 31 May 2016 of the Eurasian Economic Council on the concept of the formation of common gas market of the EAEU.

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4.4.2 Common Oil and Petroleum Products Market

Annex 23 of the EAEU Treaty regulates common oil and petroleum products market.[53] Again, tariffs for the transportation services of oil and petroleum products are in the hands of national authorities.[54]

The concept of formation of common oil and petroleum products market was adopted on May 31, 2016.[55] Major principles reflected in the document are ensuring competition in the energy market with the exclusion of the services of natural monopolies for the transportation of oil and petroleum products; removing administrative, technical and other principles in the common market; non-discriminatory access of the members to common oil and petroleum products market; ensuring commercial and transport infrastructure of common oil and petroleum products market; prioritizing supply of needs of EAEU members in oil and petroleum products; non-application of quantitative restrictions in mutual trade; harmonization of legislation for technical and commercial infrastructure of common market; unification of norms and standards for oil and petroleum products; ensuring favorable conditions for attraction of investments and ensuring ecological safety.[56]

Again, as the case was with the common market of gas, mutual trade of the members in the common market can be realized through either bilateral agreements, or through auctions. The oil and petroleum products price formation is realized through market prices, excluding services of the natural monopolies for transportation of oil and petroleum products, where prices are formed by national authorities.[57] Thus, profitability of selling gas to the member states are ensured. The following principles are further applied: (1) tariffs are formed based on national legislation; (2) tariffs for legal persons cannot be higher than the tariffs determined for the legal persons through the territory of which oil and petroleum products are transported; (3) members are not obliged to offer lower tariffs than the tariffs determined for legal persons through territory of which oil and petroleum products are transported.[58]

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[53] Annex 23 to the EAEU Treaty, Protocol on Rules for organization, governance, functioning and development of common oil and petroleum products market, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2016).

[54] Annex 23 to the EAEU Treaty, Protocol on Rules for organization, governance, functioning and development of common oil and petroleum products market, Article 7, 29 May 2014, www.docs.eaeunion.org (last accessed 2 November 2016).

[55] Decision N8, dated 31 May 2016 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU oil and petroleum products market.

[56] Decision N8, dated 31 May 2016 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU oil and petroleum products market, Article 4.

[57] Decision N8, dated 31 May 2016 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU oil and petroleum products market, Article 4.

[58] Decision N8, dated 31 May 2016 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU oil and petroleum products market, Article 9.

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Similarly to the common gas market, the common oil and petroleum products market is also formed in three stages. The first stage covering 2016–2017 envisaged adoption of the program of formation of such market, the second stage covering 2018–2023 envisages realization of actions included in the program and the last stage covering 2024 envisages conclusion and adoption of international agreement on common oil and petroleum products between the members.[59]

4.4.3 Common Electricity Energy Market

In 2015, the EAEU adopted the concept for the formation of the common electricity market.[60] Belarus agreed to the concept with a special opinion stating that common electricity market will not be fully operational until the common gas market is formed. The concept determines several main tasks for the common electricity market, such as development and increase of the efficiency of the market mechanisms for mutual trade in electricity energy, increasing transparency of the price formation, creating conditions for the access without barriers to the services of natural monopolies on electricity energy (as long as technical conditions technical capabilities make it possible and with the condition that these services will be as a priority used for the internal needs in the transmission of interstate energy), creating conditions for the access of the producers and consumers of the electricity energy to the electricity energy market of the members (with pre-condition of taking into account the national interests), increasing opportunities for the mutual trade in electricity energy, decreasing the increase rate of the prices of electricity energy for final consumers and creating favorable conditions for the investment in electricity energy objects.[61]

According to the concept, common electricity market is to be created based on the parallel functioning electricity systems of the members. Thus mutual trade is to be handled both through the bilateral agreements, as well as through the centralized auctions. The price formation for the bilateral agreements and the centralized auctions will be different. While prices for electricity energy will be determined within the bilateral agreements, in auctions the prices will be formed based on the algorithms of the common electricity market regulations.[62] A special program for the formation of common electricity market was developed by the EAEU Commission, but the document is still pending for the adoption by the Supreme Eurasian Economic Council.

[59]Decision N8, dated 31 May 2016 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU oil and petroleum products market, Article 10.

[60]Decision N12, dated 8 May 2015 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU electricity market.

[61]Decision N12, dated 8 May 2015 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU electricity market, Article 2.

[62]Decision N12, dated 8 May 2015 of the Supreme Eurasian Economic Council on the adoption of the Concept of common EAEU electricity market, Article 9.

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5 What Is Blocking Energy Integration Within the EAEU?

Though EAEU has been advocating a union of strong economic ties which steadily moves towards the creation of the common energy market, there are certain blockages on the way to achieve this goal. These blockages are both political and economic.

The most important obstacle on the way to deeper energy integration within the EAEU is the lack of trust of the members to each-other, and especially to the hub of this union—the Russian Federation. This stems mainly from the Russian policy of using energy as a foreign diplomacy tool, showcased in many instances in Ukraine, Georgia or the Baltic states.[63] Many of the countries in the region are dependent on energy import from Russia or in the case of Kazakhstan, on the transit of energy through Russia. So, potential disrupt of the supply of the energy, as well as potential prevention of the transit of energy could be quite burdensome for these countries. Another factor to take into consideration for the mistrust among the members is that they do not want the EAEU to turn into the disguised Soviet Union and the history repeating itself. The threat of the loss of sovereignty is therefore an important factor that make members cautious to trust the EAEU and the Russian Federation.

Secondly, energy markets of the member countries lack accountability and transparency. Though the EAEU promises more transparency for the energy administration, the current practice is far from that. One clear example for this is the famous “Yukos” case where Russia forcibly broke down and acquired assets of the largest energy company at the time in Russia—“Yukos” worth of billions of dollars. Though international courts such as the Permanent Court of Arbitration, the European Court of Human Rights, Arbitration Institute of Stockholm Chamber of Commerce ruled the unlawfulness of this expropriation act, the Russian verdict was never changed.[64] This case alone shows that fair competition conditions in the energy market are hardly present in the EAEU.

Thirdly, energy markets of the EAEU members are largely monopolized. These markets are focused on supply-side approach and are not open to competition. Even when there is not a monopoly, the companies operating in the energy sector come under tight control of the government. In comparison with the EU, which opened its market to competition gradually and as a result, now consumers can freely choose their suppliers, the EAEU has not taken any steps to achieve this goal and therefore, in the EAEU consumers cannot choose their suppliers. On the contrary, energy companies in the EAEU are dominated by presence of oligarchs which contribute to the lack of transparency and competition.[65] As a result, the government has not been

[63] Newnham (2011), p. 134.

[64] Yukos ruling of Permanent Arbitration Court demanding 50 billion USD is the largest amount of arbitration award in the world history, which was later rejected by local court in the Hague. See: Newcombe (2015), p. 283.

[65] Smith K (2010), Lack of transparency in Russian Energy Trade: The Risks to Europe. Center for International and Strategic Studies Publication, https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/100702_Smith_LackOfTransparency_Web.pdf (last accessed 11 January 2018), p. 2.

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interested in changing the existing system. Furthermore, energy prices are strictly regulated by the government and though they are subsidized, these prices are still high for many households.[66]

Fourthly, national energy policies of the countries are fragmented and uncoordinated with each-other. Members do not consult the EAEU Commission on the development of new energy routes or energy policies. These matters are in the authority of the national authorities. This trend seems to remain so for the foreseeable future.

Last but not least, the current national energy policies are largely dependent on fossil fuels and vulnerable to external shocks. Even in the case of the Kyrgyz Republic, which uses hydropower, the winter months bring severe shortages of energy. Renewables, such as solar and wind power cover only little percentage in the overall energy mix. However, it is worth to note that all of the EAEU members have signed the Paris Convention and taken relevant commitments to achieve its goal of taking relevant measures to mitigate climate change.[67] Russian Federation has committed to 75% reduction of greenhouse gas emission to 1990s levels by 2030. Kazakhstan's commitment is 15% unconditional reduction and further 25% reduction subject to investments and access to technology and other means. Armenia did not set its contribution in percentage, rather by the reduction per capita. So, it aims to reduce by 2050 annually 5.4 ton emissions per capita. Belarus's contribution is 28% by 2030. Kyrgyz Republic undertook to reduce 13.75% by 2030 and took conditional commitment of 30% reduction if necessary investment was attracted.[68] As it can be seen, there are different commitment levels across the EAEU countries. Russia has taken a considerable amount of commitment in this regard, the result of which is yet to be seen.

The EAEU Treaty has provisions on transparency, facilitation of trade and competition. However, the law is mostly silent over the issues mentioned above. Moreover, it is not wide-spread among the members to take disputes to the court. Most of the cases within the EAEU is settled bilaterally through political consultations. So far, there has only been one instance where a member state lodged a complaint about non-compliance of the other member in the EAEU Court (out of 13 cases since the establishment of the EAEU Court).[69] This was the case which the Russian Federation filed against Belarus regarding Belarusian customs restricting the transit of certain goods. The court in its judgment accepted this measure as being

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[66]Gusev (2013) How to profit from rising energy prices in Russia. Energy post, http://energypost.eu/how-to-profit-from-rising-energy-prices-in-russia/ (last accessed 27 March 2018).

[67]Paris convention, adopted within the United Nations Framework Convention for Climate Change, aims to put the rise of global temperature below 2 C above pre-industrial levels and avoid further increase. The agreement is implemented through nationally determined contributions by each party.

[68]All the commitments of the EAEU members in achieving aims of Paris Convention can be accessed at Paris Convention INDC submissions portal: http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx (last accessed 27 March 2018).

[69]The reference point is the period from the start of functioning of the EAEU Court up until 1 August 2017.

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partly contrary to the EAEU Treaty.[70] Moreover, though the EAEU court can adopt a decision which is mandatory for the parties to implement, it does not have a power to change the laws and regulations of the EAEU, nor the members.[71] So, it means that even when the EAEU court would rule that certain practice is a violation of the EAEU Treaty rights and obligations, it cannot require cancellation of it, as it remains prerogative of the EAEU Commission or national authorities to do so. As a result, institutional efficiency of the EAEU court is fairly limited.

6 Conclusion

This paper argues that even though EAEU has great ambitions for common energy market, yet there are certain obstacles for energy integration. These obstacles are the lack of trust of the EAEU members to each-other and mainly to the Russian Federation, lack of sufficient transparency and accountability in the energy sector, existence of state governed energy monopolies, lack of fair competition rules, uncoordinated energy policies, as well as dependence on single energy source in the overall energy mix.

While it took EU several decades to gradually create pre-conditions for the establishment of the common energy market that it is present now, the EAEU is trying to achieve this in a much accelerated manner. As a result, natural course of development of integration within the EAEU is hindered. Moreover, there is not enough political will and commitment from all members to push forward for the full liberalization of energy services in the common energy market in the EAEU. There is a great likelihood that if the trajectory remains the same and if the countries do not see real, tangible benefits of staying in the EAEU, it would become another "only on paper" functioning entity in the post-Soviet space, like the CIS or former customs unions established in this region.

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[70] Russian Federation - Republic of Belarus Case N CE-1-1/1-16-BK (Russian Federation).

[71] Statute of the Court of Eurasian Economic Union, Annex 2 to the EAEU Treaty, Article 101.

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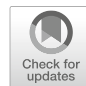
Regional Integration in the Caribbean: CARICOM and the Caribbean Court of Justice



David S. Berry

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1 Introduction

The Caribbean Community (CARICOM) is one of the most longstanding regional integration arrangements. Established in 1973 it continues under its current 2001 *Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy* (*RTC*).[1] Like other regional organisations CARICOM has several

[1]CARICOM was created by the *Treaty Establishing the Caribbean Community* (adopted 4 Jul 1973, in force 1 Aug 1973) 949 UNTS 17 ["*Treaty*"]. This was replaced by the *Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy* (adopted 5 Jul 2001, in force 1 Jan 2006) 2259 UNTS 293 ["*RTC*"]. For further

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executive organs representing state interests, a Secretariat providing technical support and a final treaty-interpreting court, the Caribbean Court of Justice (CCJ).[2] However unlike most other regional organisations the Members of CARICOM primarily hail from a dualist legal tradition and the regional court also serves as a final appellate court. These two differences have impacted upon the development of Caribbean regional integration law in interesting ways.

This chapter introduces readers to Caribbean integration law by briefly examining both CARICOM and the seminal jurisprudence of the CCJ. After a briefly placing CARICOM in its historical and economic context, the chapter reviews the CCJ's development of regional integration law, looking at many of the seminal original jurisdiction cases of the Court, in roughly chronological order. This structure allows us to better grasp the different stages of development of the court's jurisprudence. The chapter concludes by comparing some of these Caribbean developments with parallel developments in the European Union, before offering some final observations.

2 Brief Historical and Economic Overview

Attempts at regional integration in the Commonwealth Caribbean can be traced back to the nineteenth century when British authorities sought to create structures to enable them to more easily administer the region.[3] These efforts failed as a result of lack of support of the plantocracy, amongst other reasons. Indigenous integration efforts can be traced back to Caribbean labour leaders in the 1930s and post 1945.[4]

The most ambitious attempt at integration, again linked to colonial imperatives, was the creation of the West Indies Federation in 1956.[5] The West Indies Federation was founded upon a constitution, which provided for an Executive Council, two Houses of Parliament, a Prime Minister and Governor General. Shortly after its inauguration, however, differing views about the purpose and the scope of authority of the Federation produced conflict, which was inflamed when the leader of the Jamaican opposition party, Alexander Bustamante, suggested that Jamaica should seek independence. When Bustamante came to power and started independence negotiations with the UK, the other major regional power—Trinidad and Tobago—followed suit. The federal experiment collapsed as a result. This was perhaps

information on the process leading to the entry into force of the *RTC*, and the regime it creates, see Berry (2014), pp. 8–67.

[2]The CCJ was created by the *Agreement Establishing the Caribbean Court of Justice* (adopted 14 Feb 2001, entered into force 23 Jul 2002) 2255 UNTS 319 ["*Agreement*"]. The Court was inaugurated on April 16, 2005. See generally, Berry (2014), pp. 383–436.

[3]For historical overviews see e.g. Berry (2014), pp. 17–31; Müllerleile (1996), pp. 31–75.

[4]See e.g. Springer (1962), pp. 3–8.

[5]For discussions of the Federation see Springer (1962); Müllerleile (1996), pp. 31–75.

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Table 1 Members and associate members of the Caribbean Community

Members (15)	Associate members (5)
Antigua and Barbuda	Anguilla
The Bahamas	Bermuda
Barbados	British Virgin Islands
Belize	Cayman Islands
Dominica	Turks and Caicos Islands
Grenada	
Guyana	
Haiti	
Jamaica	
Montserrat	
St. Kitts and Nevis	
St. Lucia	
St. Vincent and the Grenadines	
Suriname	
Trinidad and Tobago	

Key:
Bold = "more developed countries" as designated by Article 4 of the *RTC*
Italics = not yet parties to the *RTC* but are Members of CARICOM

inevitable, since the West Indies Federation generally preserved UK colonial authority. In addition, most of the leaders of the time would have seen federation as a means to an end (independence) rather than an end in itself. Importantly, this desire for independence remains a powerful force in Caribbean integration today, with the dialectic between sovereignty and supranationalism remaining skewed in favour of sovereignty.

Following the collapse of the West Indies Federation the English-speaking Caribbean attempted a more limited form of economic integration under the Caribbean Free Trade Association (CARIFTA) in 1965.[6] CARIFTA was transformed into a Caribbean common market and became part of the Caribbean Community structure in 1973.[7]

CARICOM at present has expanded beyond the English-speaking, Commonwealth Caribbean to include Dutch-speaking (Suriname) and French-speaking (Haiti) Members. All 15 Members share the bitter experience of colonialism and the 13 English speaking Members share common law legal systems (Table 1).

Six of the Members of CARICOM are designated as "more developed countries" (MDC) under Article 4 of the *RTC*, with the remainder by default falling under the category of "less developed countries" (LDC). The criteria for this distinction are not spelled out in the *RTC*, but the status of a member may be changed under Article 5 of

[6]Müllerleile (1996), p. 41.
[7]See the *Treaty*. For commentary see Geiser et al. (1976).

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the *RTC* by a majority decision of the head organ of CARICOM, the Conference of Heads of Government.

The MDC/LDC distinction for Members is interesting and provides an important insight about the nature of CARICOM. Although all CARICOM Members would fall within the category of developing states on a global economic scale, there are important distinctions between them in terms of resources, size and economic development. The territory of some CARICOM Members, for example, lies on continental land masses, whereas others are made up of one or more islands. Territorial sizes ranging from close to 200,000 square kilometres (Guyana) to 102 square kilometres (Montserrat), and over half of CARICOM's Members are smaller in territorial size than New York City.[8] Economic data related to Members also varies widely, ranging from a per capita GDP of nearly US$50,000 (Cayman Islands, an Associate Member), to just over US$5000 (Jamaica) and to just over US $800 (Haiti).[9] These variations are reflected in the *RTC* itself, in which an entire chapter—Chapter 7—makes special provision for, and allows derogations by, "Disadvantaged Countries, Regions and Sectors" including LDCs.

In terms of overarching principles, goals and objectives, CARICOM's Single Market and Economy (CSME) aims to improve, amongst other things, living standards, employment, trade, international competitiveness, coordination of foreign and foreign economic policies, and functional cooperation (Article 6 *RTC*).[10] The ambition of its trade regime, as set out in Article 78(2)(a) is to achieve "full integration of the national markets of all Member States of the Community into a single unified and open market area." The CSME includes the non-discrimination and Most Favoured Nation principles (Articles 7–8 *RTC*), and establishes a general undertaking to ensure performance of all obligations arising out of the *RTC* (Article 9).

More generally, the *RTC* can be seen to establish a common market. This requires Members to: remove all impediments to trade between themselves, pursue common commercial relations (such as through a Common External Tariff or CET), allow free factor mobility, and promote the four freedoms: free movement of goods, persons, services and capital.[11] In terms of promoting the free movement of goods the *RTC* prohibits import and export duties, charges of equivalent effect, discriminatory internal taxes, quantitative restrictions and measures equivalent to quantitative restrictions.[12]

[8]For an overview of data on CARICOM Members see e.g. Berry (2018).

[9]Berry (2018).

[10]See generally, Berry (2014), pp. 247–311.

[11]See *RTC*, chapters 3 and 5.

[12]See *RTC* Articles 1, 87, 88, 90 and 91.

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3 Nature of the Caribbean Court of Justice

The ultimate legal organ entrusted with the responsibility of ensuring the effectiveness of Caribbean Community law is the CCJ. The CCJ has two forms of jurisdiction, appellate and original. In its appellate jurisdiction, as set out in the *Agreement Establishing the Caribbean Court of Justice* [*Agreement*], the CCJ acts as a final court of appeal on matters of domestic law.[13] In its original jurisdiction—which is so termed because cases can be filed directly before the CCJ in the first instance—the CCJ is granted original, compulsory, exclusive, final and binding competence to interpret and apply the *RTC*.[14] The Court's original jurisdiction is set out simultaneously in the *RTC* and the *Agreement*, although in the event of conflict between the two the court has indicated a preference for the later treaty, the *RTC*.[15]

The *RTC* provides several different bases for the original jurisdiction of the Court, including jurisdiction over requests for: advisory opinions (Article 212), rulings related to anti-competitive conduct (either brought by the CARICOM Competition Commission or a Member State (Articles 175–176)), interim measures (Article 218), intervention by third parties (*Agreement* Article XVIII), and for revision of its judgments (Article 219). The Court's jurisdiction over contentious cases is set out in Article 211(1) of the *RTC* as follows:

> 1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:
>
> (a) disputes between the Member States parties to the Agreement;
>
> (b) disputes between the Member States parties to the Agreement and the Community;
>
> (c) referrals from national courts of the Member States parties to the Agreement;
>
> (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.

Of these four bases for jurisdiction, the one under which all of the original jurisdiction cases so far have arisen is that of application by *persons*, as provided for in Articles 211(1)(d) and 222. No cases have arisen under the other jurisdictional bases. It is unlikely that many cases will come before the Court under Article 211(1)(a) or (b) since, on the one hand, litigating disputes between Members will be politically costly, and on the other, disputes between Members and CARICOM will more likely be resolved within the organs themselves. CARICOM itself is unlikely to bring

[13]See Article XXV of the *Agreement*.

[14]See *RTC* Articles 211 (compulsory and exclusive), 213 (original, meaning disputes may be filed directly before the CCJ without reference to a prior judicial body), 215 (binding), 216 (compulsory), 219 (final, by implication), 221 (legally binding precedents). See also *Agreement* Articles III (2) (final), XII (exclusive), XV (binding), XVI (compulsory), XXI (judgments to constitute legally binding precedents).

[15]See *Trinidad Cement Ltd and TCL Guyana Inc v Guyana* [2009] CCJ 1 (OJ) (special leave) paras [25]–[27].

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Members before the CCJ since it is financially dependent upon their contributions. One promising form of jurisdiction is that over referrals of questions regarding the interpretation or application of the *RTC* by national courts (under Articles 211(1)(c) and 214). Although no matters have been heard under this jurisdiction yet, the Court's referral jurisdiction is analogous to, and may have the same potential as, the European Court of Justice's preliminary rulings procedure.[16]

4 Overview of the Decisions of the Caribbean Court of Justice

Let us examine some of the key cases from the jurisprudence of the Court in its original jurisdiction in order to understand how it has helped to strengthen and develop CARICOM's regional integration movement.[17]

4.1 *Trinidad Cement Limited and TCL Guyana Inc v. Guyana*

The first case to be brought before the CCJ involved a suit by two companies against Guyana for the latter's unilateral suspension of the common external tariff (CET) on non-Community origin cement, which is set at 15%. This suspension was granted without the authorisation of the Secretary General or the Council for Trade and Economic Development (COTED).[18] The Trinidadian parent company, Trinidad Cement Limited, which was in the business of producing cement, and its Guyanese subsidiary, TCL Guyana Incorporated, which packaged cement, both alleged losses as a result of the Guyanese waiver.

The case went through a number of different stages. Since it was the first original jurisdiction case the CCJ expressly invited CARICOM Members and the Community to make submissions as third parties.[19]

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[16] See Article 19(3)(b) of the *Treaty on European Union* and Article 267 of the *Treaty on the Functioning of the European Union*, both reproduced in the *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, OJ 2016 C 202, as available through http://eur-lex.europa.eu/collection/eu-law/treaties.html (20 June 2018).

[17] All of the CCJ's original jurisdiction cases are available through the Court's website: http://www.ccj.org/judgments-proceedings/original-jurisdiction-judgments (25 June 2018). In citing these cases the Court's neutral citation numbers have been used. An additional, descriptive term in parentheses has also been included at the end of each citation to indicate the stage of the case which the judgment concludes.

[18] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), paras [5]–[6] and [9].

[19] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2008] CCJ 1 (OJ) (interim order). See also *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), paras [6]–[8].

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At the first formal stage of the case the applicant was required to make out a case for special leave to appear before the Court in its original jurisdiction.[20]

Guyana admitted that it had waived the CET without permission from the relevant CARICOM organs, but denied that the applicants had locus standi.[21] In examining its jurisdiction over applications by persons the Court reviewed the *RTC* in its context, applied the interpretive principles of the 1969 *Vienna Convention on the Law of Treaties*,[22] and came to the conclusion that the purposes of the *RTC* include those of "transforming the CARICOM sub-region into a viable collectivity of States for the sustainable economic and social development of their peoples."[23] The CCJ also held that in this regard:

> the CSME is regarded as an appropriate framework or vehicle for achieving this end and that private entities, "and in particular the social partners", are to play a major role in fulfilling the object and goals of the RTC. The CSME is intended to be private sector driven.[24]

The CCJ then concluded that the Contracting Parties to the *RTC* had intended that private entities should be "important actors in the regime established by the RTC; [and] that they should have conferred upon them and be entitled to enjoy rights capable of being enforced directly on the international plane."[25]

The Court next assessed the mechanism through which private entities may enforce their rights at the regional level, namely, Article 222 of the *RTC*:

> ARTICLE 222
>
> Locus Standi of Private Entities
>
> Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:
>
> (a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and
> (b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and
> (c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:
>
> (i) omitted or declined to espouse the claim, or

[20] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave).

[21] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), para [34].

[22] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), paras [10]–[13]; *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, in force 27 Jan 1980) 1155 UNTS 331.

[23] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), para [13].

[24] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), para [13].

[25] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), para [18].

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(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and

(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

The first challenge raised by Guyana was regarding the required status of the applicant. Guyana argued that the use of the term "national" in the parallel provision of the *Agreement* required satisfaction of the test for nationality set out in Article 32 of the *RTC*. The Court rejected this argument.[26] The requirement is simply that one fall within the category of "Persons, natural or juridical, of a Contracting Party" as stated in Article 222 itself. For juridical persons the Court held that it was sufficient that a company "be incorporated or registered in a Contracting Party", and both applicants satisfied this requirement.[27]

The Court applied Article 222 to the applicants. Article 222(a) requires proof, at the level of an "arguable case",[28] that a right or benefit accrues to a person *directly*. This would have been a challenge to the applicants on a textual interpretation of the *RTC*, since the vast majority of its provisions are addressed to Members or the Community, *not* to persons. However in a seminal move, in paragraph [32] of its decision, the Court held that the *RTC* could create correlative rights for persons:

> Rights and benefits under the RTC are not always expressly conferred although some of them are, for example the rights referred to in Articles 32 and 46. Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the Contracting Parties. Unless specifically otherwise indicated, the obligations set out in the RTC are imposed on Member States (or a class of Member States) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures directly to the benefit of private entities throughout the entire Community.

This correlative rights doctrine is fundamental to Community law. With it the Court arguably transformed a treaty which creates rights and obligations for states and a regional organisation into one which creates rights for Caribbean citizens.

A challenge arose in relation to one of the applicants and the requirements of Article 222(c). Under a textual or literal interpretation it would have been hard to see how TCL Guyana Inc could bring a claim against its state of nationality, Guyana.[29] However the Court examined the provision in its context and employed the teleological approach in order to determine that the wording of Article 222(c) was meant

[26] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), paras [25]–[28].

[27] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), paras [28] and [29].

[28] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), para [33].

[29] See *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), para [38].

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to avoid duplication of suits.[30] The Court therefore held that TCL Guyana Inc had standing under the provision.

At the merits hearing the claims of the applicants were aided considerably by Guyana's express admission that it had breached the *RTC*.[31] As a result the case became focused on issues related to liability, loss, proof of loss, and available remedies.[32] The first major issue was simply whether Guyana could be liable for its admitted breach of the *RTC*. In answering this question the CCJ relied upon the European Court of Justice's (ECJ's) decision in *Francovich and Others v Italian State* and held that a similar form of state liability applies under the *RTC*:

> This Court holds that a similar principle applies under the RTC and that the new Single Market based on the rule of law implies the remedy of compensation where rights which enure to individuals and private entities under the Treaty are infringed by a Member State. But State liability in damages is not automatic. A party will have to demonstrate that the provision alleged to be breached was intended to benefit that person, that such breach is serious, that there is substantial loss and that there is a causal link between the breach by the State and the loss or damage to that person.[33]

This form of state liability differs substantially from that in the *Francovich* case, which concerned a directive which was not directly effective, and gave rise to liability in national law. Instead, at least for the present, state liability in CARICOM exists only at the regional level under the CCJ's original jurisdiction.

Applying the test for liability the Court was unable to find sufficient evidence of loss causally connected (sufficiently proximate) to Guyana's breach, and thus the applicants were not eligible for damages[34] (let alone exemplary or punitive damages, which the Court held are not accepted at international law).[35] The Court did, however, make a coercive order against Guyana requiring it "to re-impose the CET within 28 days of the date of this order and to maintain it thereafter until and unless a suspension is authorised by COTED or the Secretary-General pursuant to Article 83."[36]

The case did not end at this point, however, since Guyana applied to the Court for a stay of execution (interpreted to be a request for a stay of proceedings or extension of time for compliance) 1 day before the deadline for re-imposition of the CET.[37]

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[30] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 1 (OJ) (special leave), paras [38]–[44].

[31] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), para [18].

[32] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), para [23].

[33] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), para [27] [citing Cases C-6/90 and C-9/90 *Francovich and Others v Italian State* [1991] ECR I-5357 (ECJ)]. See also ibid paras [24]–[26].

[34] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), paras [33]–[34].

[35] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), paras [35]–[40].

[36] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 5 (OJ) (merits), para [43].

[37] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2009] CCJ 6 (OJ) (stay of execution).

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The Court refused this request, but Guyana did not fully comply with the Court's order until January 8, 2010, 4 months after the deadline.[38] This led the applicants to bring contempt proceedings. The Court refused to make a contempt order and instead issued a declaration that Guyana was in breach of Article 215 of the *RTC*, the provision requiring compliance with judgments of the Court.[39]

It is interesting to note that although Guyana delayed its compliance with the Court's order (and later did in the *Rudisa Beverages* case), it did eventually comply in full.[40] In this sense the CCJ has proved relatively effective in enforcing Community law.[41]

4.2 Trinidad Cement Limited v. CARICOM

The second original jurisdiction case to be heard by the Court was the one brought by Trinidad Cement Limited against CARICOM, this time challenging the granting of two suspensions of the CET on cement by organs of the Community, one in relation to Jamaica and the other in relation to Suriname and six Eastern Caribbean states.[42] In granting special leave, the Court responded decisively to an assertion that allowing a challenge by a private party to CARICOM would hinder its development and constrain state sovereignty. The court flatly rejected such an idea and held that CARICOM operates under the rule of law:

> By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. A challenge by a private party to decisions of the Community is therefore not only not precluded, but is a manifestation of such a system. Therefore it is not correct to say that by such challenge the functioning of the Community will be greatly hindered or that the exercise of state sovereignty by Member States parties to the Revised Treaty would be unduly constrained. The rule of law brings with it legal certainty and protection of rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.[43]

[38] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2010] CCJ 1 (OJ) (contempt).

[39] *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* [2010] CCJ 1 (OJ) (contempt), para [25].

[40] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits).

[41] For comparisons of the more difficult experiences of other regional tribunals see e.g. Madsen et al. (2018) and Alter et al. (2016).

[42] *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), [2009] CCJ 4 (OJ) (merits).

[43] *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), para [32].

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This is a powerful statement and provided a firm base for the Court's adoption of doctrines such as state liability, seen above, and judicial review in the context of Community law.

In the merits phase of the case the Court was required to assess the scope of its jurisdiction over CARICOM. The CCJ held that the scope of disputes set out in Article 187 of the *RTC* was not limited to inter-state disputes, and could embrace disputes involving the Community.[44] Citing its previous statement about the applicability of the rule of law to CARICOM—a principle which the Court highlights is "a fundamental principle accepted by all the Member States of the Caribbean Community"—the Court held that the power of judicial review of discretionary decisions of CARICOM organs is implicit in its mandate.[45] The CCJ also indicated that its power of judicial review includes a power to issue coercive remedies.[46]

In coming to such a position the Court extended the rule of law to the main participants in Community law—the Members and the Community itself. Since no decision of the CCJ has recognised an *obligation* of Community law attaching to an individual, the court has not been required to extend the rule of law principle to cover other actors. However this would be a logical extension of the principle.

Two other matters are notable from the Court's judgment on the merits of this case. First, in examining the rules related to suspension of the CET the Court clarified the appropriate procedures and competences of Community organs related to suspension. It also expanded upon existing competences. For example, the Court extended the grounds for suspension to include a new ground of timeliness of supply (adding to grounds of non-production, non-production of sufficient quantities and non-production of sufficient quality).[47] Second, the Court robustly interpreted the requirement of consultation by the Community with national authorities, as set out in Article 26 of the *RTC*. In fact the Court chastised the Secretary General for not undertaking proper consultation before authorising a suspension.[48]

4.3 *Johnson v. CARICAD*

The third case involved a suit by a natural person, Doreen Johnson, against the Caribbean Centre for Developmental Administration (CARICAD), for her wrongful

[44] *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), para [36].

[45] See *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), paras [38] and [41].

[46] *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), para [43].

[47] *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), paras [52] and [55]–[56].

[48] *Trinidad Cement Limited v. CARICOM* [2009] CCJ 2 (OJ) (special leave), para [68].

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dismissal, other alleged contractual and Constitutional law breaches, and discrimination on grounds of nationality.[49]

Although this could have been the first potential suit from a natural person, special leave was denied to Ms Johnson because CARICAD was held not to be a valid respondent under the *RTC*. The Court noted that the *RTC* allows suits to be brought against the Community for actions of its organs or bodies, and against Members. It does not allow suits to be brought against Institutions, including CARICAD, which unlike organs do not act on behalf of the Community and cannot bind it.[50] The Court also noted that even if CARICAD were a proper defendant, the only issues justiciable before the Court would be rights and obligations arising under the *RTC*.[51] As a result this case clarified which entities could be sued before the Court in its original jurisdiction, and the subject matter of such suits.

4.4 Hummingbird Rice Mills v. Suriname and CARICOM

The *Hummingbird* case involved a challenge by the applicant to the unilateral suspension of the CET by Suriname on wheat or meslin flour from the Netherlands.[52] The applicant also sued CARICOM for doing little to stop or correct the suspension. In a manner similar to the case of *Trinidad Cement Limited and TCL Guyana Inc v. Guyana* the Court held that the defendant state, Suriname, had breached its obligations under Article 82 of the *RTC* by suspending the CET without authorisation from CARICOM, and so declared.[53] In relation to Hummingbird's allegations about the inadequacy of the actions taken by Community organs, the Court held that the Secretary General did not authorise the suspensions, and COTED had in fact refused them.[54] However the question arose as to whether the relative inaction of either organ amounted to dereliction of duty. The Court examined the competences of the Secretary General under Article 24 but was pressed to find a duty placed upon the Secretary General to do more than he had done, namely, "to keep reminding Suriname of the decisions of the COTED requiring that Suriname impose the CET on flour."[55] The CCJ therefore dismissed the allegation of unlawful conduct in relation to the Secretary General.[56] With respect to COTED, although the Court

[49] *Johnson v. CARICAD* [2009] CCJ 3 (OJ) (special leave), para [3].

[50] *Johnson v. CARICAD* [2009] CCJ 3 (OJ) (special leave), paras [14]–[15].

[51] *Johnson v. CARICAD* [2009] CCJ 3 (OJ) (special leave), para [19].

[52] *Hummingbird Rice Mills v. Suriname and CARICOM* [2011] CCJ 1 (OJ) (special leave), [2012] CCJ 1 (OJ) (merits), [2012] CCJ 2 (OJ) (costs).

[53] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), para [24].

[54] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), paras [27]–[28].

[55] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), para [38].

[56] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), para [38].

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was sympathetic to the applicant's views that COTED could have taken a more robust approach to its institutional responsibilities (and indicated that four and a half years was too long for a private actor to await the enjoyment of treaty rights), the CCJ nevertheless was cautious in indicating what more COTED could have done.[57] Curiously, the Court identifies the three-quarters majority voting requirement for COTED's decisions as being onerous,[58] even though this decision-making procedure represents a vast improvement over the unanimity procedures of the original 1973 CARICOM treaty.

The Court also was unable to find any kind of sanctioning authority on the part of COTED, and indicated that such authority must be stated expressly in the *RTC*.[59] This approach is perhaps overly formalistic and appears to be at odds with the Court's earlier jurisprudence. Likewise, the artificial distinction suggested by the Court between the ability of *Members* to ask for permission from COTED to adopt sanctions, and the ability of *COTED* to require Members to impose sanctions, is far from persuasive.[60] Such a distinction ignores the fact that COTED is itself made up of Members who can vote with the relevant majorities to decide any matter falling within the competence of COTED. Such decisions are binding once validly made, and can be made even if slightly less than one quarter of the membership opposes them. In other words, a minimum of 12 of the 15 Members on COTED could vote on whether a particular Member (the 13th) was acting in compliance with the *RTC* in relation to the CET. If the vote carries, those Members could then vote to establish a regime authorising Members to take actions to correct the behaviour of the delinquent state.

This unwillingness of the Court to interpret the *RTC* robustly so as to allow organs of CARICOM to effectively control the behaviour of Members is noteworthy for two reasons. Firstly, these passages are remarkable because the CARICOM Secretariat itself advocated a position of relative powerlessness. This is a far cry from the ambitious posture usually assumed by the European Commission, for example, in relation to competences. Secondly, the Court expressly limits CARICOM organs even though such limitations were not strictly required for the judgment. This could have a tremendously chilling effect in a legal system where the Court's judgments create stare decisis.[61]

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[57] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), paras [46]–[47].

[58] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), paras [47]–[48].

[59] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), para [49].

[60] *Hummingbird Rice Mills v. Suriname and CARICOM* [2012] CCJ 1 (OJ) (merits), para [50].

[61] For more on stare decisis and the CCJ see *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention).

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4.5 *Trinidad Cement Limited v The Competition Commission*

The next case demonstrates the perhaps unanticipated side effect of Trinidad Cement Limited's aggressive litigation strategy—the increased attention paid to the company by regional authorities, including CARICOM's Competition Commission (Commission).[62]

In its application Trinidad Cement Limited challenged the Commission's decision to initiate an investigation under Article 175 of the *RTC* of anti-competitive business conduct with respect to the TCL Group of Companies. Trinidad Cement Limited "alleged that the Commission acted wrongly in initiating and conducting the investigation in two main regards: (a) there had been no proper request for the investigation; and (b) the Commission had failed to respect the rights of TCL as 'an interested party' within the meaning of Article 175 of the [*RTC*]."[63] In its defence the Commission argued that the Court lacked jurisdiction, inter alia, because the Commission was excluded from being a respondent under the *Johnson v CARICAD* rule—as not being an Organ or Body of the Community.[64] It withdrew this submission but the Court nevertheless considered the status of the Commission under the *RTC* and other instruments and determined that it had the capacity to be sued in the Court's original jurisdiction.[65]

In answer to the first question posed by the applicant the Court reviewed the correspondence between, and decisions of, COTED, the Secretary General and the Commission in relation to the request for an investigation.[66] Although there may have been irregularities, these had been remedied to the extent of making the request valid.[67] With respect to the applicant's assertion that it fell within the category of "interested parties" as described in Article 175, the Court reviewed the different stages of a Commission investigation. The CCJ held that, at least at the preliminary stage where the Commission is required to consult with interested parties to determine whether or not to commence an investigation, Trinidad Cement Limited would not fall under that term.[68] More broadly the Court held that "[i]n principle, therefore, the Court finds that a party complained of does not fall within the expression 'an interested party' as that expression is used in the Revised Treaty."[69]

Such a conclusion should come as no surprise to readers familiar with investigations of competition authorities in other regions of the world. As the CCJ itself

[62] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits).

[63] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [3].

[64] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [10].

[65] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), paras [11]–[13].

[66] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), paras [29]–[37].

[67] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [37].

[68] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [25].

[69] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [26].

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highlighted, there may be prudent reasons not to notify a potential target in order to safeguard the effectiveness of the investigation.[70]

As a final point it should be mentioned that the Court spent some time at the end of its judgment providing "observations" on the work of the Commission and its Rules of Procedure.[71] The Court criticised areas of the Rules of Procedure where appropriate safeguards had not been provided or where the Rules deviated from the authorising provisions of the *RTC*. The CCJ noted that it was "axiomatic that the Rules must conform to the letter and spirit of the Revised Treaty and that this Court, as guardian of the Treaty, is entitled to pronounce on the validity of any rule that is in conflict with the Treaty."[72]

Two things should be highlighted about this section of the judgment. First, it reveals the willingness of the Court to engage in detailed analysis of issues not central to the judgment (to engage in 'obiter dicta', to use a common law term). This strategy may be explained by the Court's desire to assist the Community during its early stages of development. Secondly, the Court arrogates to itself the role of "guardian" of the *RTC*. This may be contrasted with the EU system, where the Commission exercises this role.

4.6 Shanique Myrie v Barbados

The next case, the first one successfully brought by a natural person—Ms Shanique Myrie—did more to draw the attention of the people of the region to the Court's original jurisdiction than any of the previous cases.[73] It provided the Court with the opportunity to pronounce on a range of issues, clarify many areas of Community law, and foreshadow potential future developments.

The facts are summarised by the Court in paragraph [2] of its judgment on the merits as follows:

> On 14 March 2011, the Claimant, Ms Shanique Myrie, then 22 years old, arrived at the Grantley Adams International Airport (the "GAIA") in Barbados. Far from being welcomed, she was denied entry. According to her testimony she was never told why. She claims that in the process she was subjected to insults based on her nationality and to an unlawful body cavity search in demeaning and unsanitary conditions. Her luggage was also searched but none of these searches revealed any contraband substances. Ultimately, Ms Myrie was not allowed to enter Barbados and was instead detained overnight in a cell at the airport and deported to Jamaica the next day.[74]

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[70] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [25].

[71] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), paras [45]–[48].

[72] *Trinidad Cement Limited v The Competition Commission* [2012] CCJ 4 (OJ) (merits), para [45]. For a similar statement about the Court's role see *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [27].

[73] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention), [2013] CCJ 3 (OJ) (merits).

[74] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [2].

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Ms Myrie sued Barbados for violation of a range of rights, from international human rights, to her right to free movement under Articles 45–46 of the *RTC* and a 2007 Decision of the Conference of Head of Government, to discrimination contrary to Article 7 of the *RTC*, to violation of her MFN status under Article 8 of the *RTC*.[75]

The first judgment of the Court in the case dealt with Jamaica's application to intervene. Ms Myrie had been granted special leave to appear before the Court and her state of nationality, Jamaica, had "expressly agreed that she should herself bring her claim against Barbados in lieu of Jamaica espousing it on her behalf."[76] However, rather than seeking to be a party in the case, Jamaica applied to intervene. The respondent state, Barbados, objected. The Court permitted the intervention and invited other CARICOM Members and the Community to participate in the matter as third parties.[77]

A critical issue that was addressed in the Court's intervention judgment—in addition to providing guidance on the powers of, and restrictions attaching to, intervenor[78]—was the applicability of the doctrine of stare decisis to judgments of the Court in its original jurisdiction. The meaning of Article 221 of the *RTC*, which is subtitled "Judgment of the Court to Constitute Stare Decisis", had to be addressed because Jamaica's ability to intervene depended upon its being able to demonstrate that it had a "substantial interest of a legal nature" which would be affected by the case.[79] If Article 221 created a true system of stare decisis, then Jamaica and all other Members would be affected by a decision of the Court, since it would create a binding precedent for all similar future cases.

The text of Article 221 provides that "[j]udgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219." Such text could be read literally so as to limit the binding force of decisions to the *parties* in the case before the Court. However the CCJ held that Article 221 was not so restricted and instead created a system of stare decisis.[80] This makes the CCJ's original jurisdiction novel, if not unique, for international courts and tribunals.

In its judgment on the merits the Court substantially developed Community law in a number of areas.[81] In relation to decisions of organs of CARICOM, the Court interpreted Article 240 of the *RTC*—the provision allowing for transformation of regional decisions into national law before they become effective at the national

[75] See *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [3]–[4].

[76] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention), para [2].

[77] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention), paras [35]–[36].

[78] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention), paras [33]–[34].

[79] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention), paras [8]–[9].

[80] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ) (intervention), para [20].

[81] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits).

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level—so as not to affect the *immediately binding* nature of Community decisions at the regional level.[82] As summarised by the CCJ in its judgment:

> [51] Although it is evident that a State with a dualist approach to international law sometimes may need to incorporate decisions taken under a treaty and thus enact them into municipal law in order to make them enforceable *at the domestic level*, it is inconceivable that such a transformation would be necessary in order to create binding rights and obligations *at the Community level*.
>
> [52] Article 240 RTC is not concerned with the *creation* of rights and obligations *at the Community level*. The Article speaks to giving effect to such rights and obligations *in domestic law*. . .
>
> [55] . . . in the absence of any indication to the contrary a valid decision of a Community Organ or Body taken in fulfilment or furtherance of the RTC or to achieve the objectives of the Community is immediately binding at the Community level.[83]

This point is critical to ensure the uniformity and effectiveness of Community law. The binding force of a decision cannot be dependent upon subsequent transformation of that decision into the domestic legal systems of all Members.

The Court also reiterates the point made in *Johnson v CARICAD* that the Court's original jurisdiction is limited to issues of Community law. It therefore has no jurisdiction to hear the applicant's claims related to potential violations of international human rights treaties.[84] However the Court does reserve the right to apply rules of international law, as expressly authorised by Article 217 of the *RTC*, and this means that the Court "can and must take into account principles of international human rights law when seeking to shape and develop relevant Community law."[85]

In relation to the free movement rights asserted by the applicant, the Court closely examined the 2007 Decision of the Conference, which provided:

> **THE CONFERENCE**
>
> **AGREED** that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and can move in the Caribbean Community, subject to the rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds.
>
> **NOTED** the reservation entered by **Antigua and Barbuda** in this regard.[86]

The Court held that although the text of the decision did not use operative words like "decided" it nevertheless represented a binding decision.[87] The "reservation" entered

[82] Article 240(1) of the *RTC* reads: "Decisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States."

[83] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [51]–[52] and [55].

[84] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [10].

[85] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [10].

[86] As reproduced in *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), at para [43] (emphasis in the original).

[87] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [45].

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by Antigua and Barbuda had not amounted to a veto and the subsequent practice of Members of the Community demonstrated acceptance that a binding decision had been made.[88]

In looking at the effect of the Conference decision, the Court placed it within the context of other provisions of the *RTC* which allow free movement of persons, such as Article 45 (goal of free movement) and Article 46 (right to seek employment by CARICOM Skilled Nationals), and the articles related to the right of establishment and provision of services, both as set out in Chapter 3 of the *RTC*.[89] These provisions allow free movement to defined groups of Community nationals. The Conference decision, in contrast, extends a particular form of free movement to all Community nationals.[90]

The Court held that the Conference decision gave "every Community national the right to enter any Member State and stay there for up to six months. The right conferred is expressed as an entitlement to 'an automatic stay' or 'a definite entry' of six months upon arrival."[91] Such movement also must be hassle free.[92] With respect to the two restrictions to movement set out in the Conference decision—undesirability or being a charge on public funds—the CCJ held that as exceptions to, or restrictions upon, a right, arguments justifying actions taken on these grounds must be interpreted narrowly and strictly, with the burden of proof resting firmly upon the defendant state seeking to justify refusal of entry.[93]

In order for a state to justify refusal on grounds of *undesirability*, as a threat to public morals, national security and safety, or national health, the Court held that a state must be able to demonstrate that the Community "national presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" and "actually pose[s] or can reasonably be expected to pose such a threat."[94] In addition the threat must be "genuine, present and sufficiently serious", must be to do something prohibited by law, and must be one for which nationals "are routinely prosecuted or otherwise subjected to some legal sanction."[95] In applying this test, the Court held that Barbados had not proved that Ms Myrie fell under this category of being an undesirable person, and therefore she could not be refused entry on this basis.[96]

In relation to the second potential ground for refusal, being a *charge upon public funds*, the Court held that the relevant factors to consider would be the level of funds possessed, or which could be made available, to the person seeking entry for their

[88] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [47].
[89] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [58]–[61].
[90] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [62].
[91] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [62].
[92] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [63].
[93] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [65] and [67].
[94] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [70].
[95] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [71].
[96] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [73]–[74].

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period of intended stay.[97] The Court therefore rejected the necessity of showing funds for the total period of stay guaranteed by the Conference decision (6 months).[98]

The Court also set out the procedural guarantees which must be made available to a CARICOM national seeking entry to another Community state. Such a national (1) must be promptly provided with the reasons for his or her refusal in writing (although there may be an exception if vital security interests are affected and justifiable under Article 225 of the *RTC*), (2) and must have the right to consult an attorney, consular official of his or her own country, or family member, and (3) must be accorded the right to challenge the decision before both a higher-placed official (at the airport) or before a judge.[99] These procedural guarantees are far-reaching and they dramatically change the way in which visitors must be treated by immigration and customs officials when travelling in the CARICOM region. Importantly, they also can be argued to set out a kind of model for treatment of Community nationals when a state seeks to deny CARICOM rights—a model that could be transposed to other areas of Community law (for example, to a refusal of the right of establishment, or refusal of the right to provide services). In such cases it would be reasonable to expect that a national official must justify a denial in writing, that the person whose right has been denied will have the ability to contact a legal representative, and that the denial must be challengeable immediately before a higher placed official and ultimately before a court of law.

The Court did not uphold other aspects of Ms Myrie's claim, including violations of her rights under Articles 7 and 8 of the *RTC*, primarily as a result of lack of proof of discrimination.[100] In relation to her denial of entry, however, she was awarded both pecuniary and non-pecuniary damages, the former in compensation for financial losses and the latter as damages for the serious breaches of her right of entry into Barbados without hassle and harassment.[101] The Court expressly rejected the availability of exemplary or punitive damages in Community law.[102] This was the first case in which the Court granted damages, a matter for which the Court had been criticised in the past, and was notable for also allowing non-pecuniary damages.

Before leaving the *Myrie* case it should also be noted that the Court foreshadowed two possible future developments for Community law, without actually implementing them in the case at hand. The first was a hint by the Court about the possibility of supremacy of Community law. The Court held, at paragraph 69 of its judgment, that

[97] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [75].

[98] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [76].

[99] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [77]–[83].

[100] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [88]–[92].

[101] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), paras [94]–[100].

[102] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [94].

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> Implementation of the very idea and concept of a Community of States necessarily entails as an exercise of sovereignty the creation of a new legal order and certain self-imposed, albeit perhaps relatively modest, limits to particular areas of State sovereignty. *Community law and the limits it imposes on the Member States must take precedence over national legislation, in any event at the Community level*. It follows from the above that a refusal on the basis of "undesirability" may be based on national law and on Community law, with the proviso that where national law does not conform with the parameters laid down by Community law, it will be the latter that ultimately must prevail.[103]

The above highlighted passage is particularly striking when juxtaposed against the dualist legal systems of most CARICOM Members, which would require transformation of Community law in order to give it any force in domestic law. However, this passage does not give rise to the kind of supremacy of Community law found in the EU as a result of ECJ cases like *Costa* and *Simmenthal*, because of the wording after the comma.[104] Supremacy in CARICOM, at least for the present, is restricted to the Community level; it does not apply at the national level.

The second development foreshadowed in the *Myrie* case is the availability of the principle of indirect effect or conform interpretation. This is suggested in paragraph 80 of the judgment where the Court states:

> A violation of Community law is not so much caused by the existence of domestic laws that seemingly contradict it but by whether and how these laws are applied in practice. The Court observes in this respect that the *domestic courts of Barbados, including this Court in its appellate jurisdiction, are constrained to interpret domestic laws so as, if possible, to render them consistent with international treaties such as the RTC*.[105]

Again, however, the Court does not go quite as far as the ECJ. Domestic law is to be interpreted "if possible" so as to be consistent with the *RTC*.[106]

4.7 Maurice Tomlinson v Belize and Trinidad and Tobago

The idea of administrative implementation of legal obligations, raised by the phrase "how these laws are applied in practice" in the quotation from the *Myrie* case above, gave rise to challenges in the subsequent case of *Maurice Tomlinson v Belize and Trinidad and Tobago*.[107] In that case Mr Tomlinson identified what he argued were

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[103] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [69] (emphasis added).

[104] CJEU, Case 6/64 *Costa v ENEL* [1964] ECR 585 and CJEU, Case 106/77 *Amministrazione delle Finanze v Simmenthal* [1978] ECR 629.

[105] *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ) (merits), para [80] (emphasis added but citations omitted).

[106] Compare, for example, CJEU, Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para [26], or CJEU, Joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer v. Deutsches Rotes Kreuz* [2004] ECR I-8835.

[107] *Maurice Tomlinson v Belize and Trinidad and Tobago* [2014] CCJ 2 (OJ) (special leave) [2016] CCJ 1 (OJ) (merits).

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clear inconsistencies between domestic statutes and Community law, inconsistencies which created great legal uncertainty.

The Court ultimately held that the practices of Belize and Trinidad and Tobago were compliant with the *RTC* and that in any event Tomlinson had not proved a violation of his rights as a result of application of the laws on the part of either state.[108] However it could be argued that the Court should have gone further and required states to amend or repeal laws which were in apparent conflict with the *RTC* (rather than simply suggest that in principle such legislation should be harmonised).[109]

4.8 Rudisa Beverages & Juices NV v Guyana

The *Rudisa Beverages* case was the first to involve a challenge to a charge of equivalent effect to an import duty.[110] The applicants alleged that an environmental tax which was levied on all non-returnable beverage containers imported into Guyana, including Community-origin goods, but which was not also applied to Guyanese products, violated the *RTC*. The 1995 tax pre-dated the *RTC*, of which Guyana is a party; Guyana transformed the *RTC* into its domestic law by means of a Caribbean Community Act 2006.[111]

Guyana conceded that the tax was illegal so long as it was discriminatory, but sought to excuse itself by indicating that the Government had tried to pass amending legislation but had been thwarted in Parliament.[112] The Court rejected this submission and noted that the *pacta sunt servanda* rule applies to the entire state, including all of its organs. The Court also reminded Guyana that a state cannot invoke its

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[108] *Maurice Tomlinson v Belize and Trinidad and Tobago* [2016] CCJ 1 (OJ) (merits), paras [30]–[38] (Belize) and [39]–[55] (Trinidad).

[109] In *Maurice Tomlinson v Belize and Trinidad and Tobago* [2016] CCJ 1 (OJ) (merits), at para [56] the CCJ explained:

> [T]he Court wishes to state that it is not to be taken as condoning the indefinite retention on the statute book of a national law which in appearance seems to conflict with obligations under Community law. Member States should ensure that national laws, subsidiary legislation and administrative practices are transparent in their support of the free movement of all CARICOM nationals. This is a necessary aspect of the rule of law, which, as the Court has indicated, is the basic notion underlying the Caribbean Community. In principle, national legislation should expressly be harmonized with Community law. Any permanent or indefinite discord between administrative practices and the literal reading of legislation is undesirable as the rule of law requires clarity and certainty especially for nationals of other Member States who are to be guided by such legislation and practice. [Citations omitted].

[110] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits).

[111] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [7].

[112] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [17].

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internal laws for failing to comply with its treaty obligations.[113] In addition the CCJ reminded Guyana of the binding obligation which it had accepted when it ratified the *RTC*, as expressed in Article 9.[114]

Interestingly, the Court suggested that Guyana could have disapplied the offending section through the doctrine of implied repeal. The Caribbean Community Act, as a later piece of Guyanese legislation, could have had that effect.[115] This suggestion could prove to be a useful tool for national courts if confronted with similar challenges. However it can be argued to fall prey to the same level of uncertainty raised in the *Tomlinson* case: a person would not know whether an inconsistent law would be upheld, or be deemed to have been repealed, until the matter was finally decided by a court of law.

In looking at the tax the Court noted that its "noble purpose" cannot excuse its discriminatory impact. The CCJ held that it was a prohibited import duty under Article 87(1).[116] In its judgment the Court ordered Guyana "to adopt such legislative or other measures necessary to ensure that goods of Community origin are not subjected to the tax in question",[117] and ordered Guyana to refund the taxes wrongly collected, with interest, to a total of over US $6 million.[118] This amount represented a significant sum for Guyana. Repayment was delayed and the amount ultimately was subject to further negotiations between the parties.[119] However, as with the earlier *Trinidad Cement* case, Guyana eventually complied with the Court's judgment.

4.9 SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana

Perhaps because of such challenges, in its most recent original jurisdiction case, one which involved a nearly identical factual matrix—*SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana*—the CCJ produced a slightly different result.[120] The applicant companies in this case had been subject to the same illegal environmental

[113] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), paras [17]–[18].

[114] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), paras [19]–[20].

[115] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [20].

[116] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [22]. Note that the definition of "import duties" is defined in Article 1 of the *RTC* as including "any other charges of equivalent effect".

[117] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [27].

[118] *Rudisa Beverages & Juices NV v Guyana* [2014] CCJ 1 (OJ) (merits), para [39].

[119] Guyana's difficulties in paying the total of US $7.72 million in reimbursement and interest ordered by the Court led to negotiations between the parties and an eventual mutually-agreed settlement for US $6.22 million. See e.g., 'Gov't still paying off balance on RUDISA settlement', Stabroek News, February 18, 2016, available at http://www.stabroeknews.com/2016/news/stories/02/18/govt-still-paying-off-balance-rudisa-settlement/ (24 June 2018).

[120] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits).

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tax and sought reimbursement of the amounts paid.[121] Guyana, however, offered a more robust two-pronged defence. Firstly, it claimed that the companies should not be reimbursed the taxes wrongly paid because they would have passed them off to their consumers in their pricing; secondly, the companies should not be entitled to a full reimbursement because they had failed to challenge the tax at the earliest opportunity (the "laches" defence).[122] After analysing the law related to unjust enrichment, including the jurisprudence of the ECJ, the CCJ rejected the first defence.[123] Guyana itself had been unjustly enriched.[124]

With respect to the laches defence, Guyana was more successful. The CCJ discussed the international legal rules related to prescription, due diligence in asserting rights, and limitation periods.[125] Taking into account practices in CARICOM Members, the Court determined that a reasonable period to allow a claimant to commence proceedings before the CCJ in its original jurisdiction would be a period of five (5) years:

> Leaving aside the position in Suriname which is a clear outlier in this regard, the Court finds that a period of five years is neither too long nor unduly short for a claimant to commence proceedings. The Court considers that this time limit will protect states from being vexed by claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses may well have no accurate recollection. It will above all encourage claimants to bestir themselves and file suit in a timely fashion. This 5-year period permits adequate access to justice and is consistent with both international and regional standards. It will run from the time that the claimant knew or at the very least reasonably should have known that the defendant State was in breach of the treaty.[126]

Applying this limitation to the case, the CCJ determined that the applicants could claim reimbursement of taxes paid during the period from 5 years preceding the date upon which they brought their action to the date of their last payment (just before bringing the action), plus interest.[127]

This is an unusual position—perhaps unique for an international tribunal to take in relation to claims brought before it, in the absence of restrictions in its constituent treaty. It could be criticised as unjustly enriching the state which imposed the illegal

[121] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), paras [1]–[5].

[122] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), para [5].

[123] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), paras [14]–[37].

[124] Cf *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), paras [38]–[39].

[125] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), paras [40]–[55].

[126] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), para [56].

[127] *SM Jaleel & Co Ltd & Guyana Beverages Inc v Guyana* [2017] CCJ 2 (OJ) (merits), para [58].

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tax. It could also be criticised on grounds of retroactively, and it is interesting that the Court did not choose to make its ruling prospective.[128]

4.10 Cabral Douglas v Dominica

The final case involved a claim by a natural person regarding an attempt to exercise the right of free movement of services under the *RTC*.[129] Interestingly, the case never made it to the merits stage, since special leave was denied by the Court. Leave was denied even though the arguments canvassed appear to have gone beyond the "arguable case" threshold previously applied by the Court for special leave. This was unfortunate for the applicant, who no doubt would have benefited from the expanded argument allowed at the merits phase. It suggests a possible raising of the threshold for applications by persons by the CCJ.

The applicant, Cabral Douglas, challenged the refusal of Dominica to allow a Jamaican entertainer known as "Tommy Lee Sparta" to enter the country to perform at a concert he had organised. The Court assessed his claim but rejected it on the basis that he was not able to demonstrate a right enuring directly to himself, as required under Article 222(a) of the *RTC*.[130] The Court held that the applicant could not demonstrate a right arising under either Article 36 or 37 of the *RTC*. The former prohibited new restrictions, and the latter required removal of restrictions, on the provision of services. The Court noted that Article 36 requires cross-border provision of services, in a similar manner to the four modes set out in the regime of the GATS, but that the applicant in the case had been merely a middleman, a local service supplier, and not a cross-border provider of entertainment services.[131] The CCJ also rejected the applicant's argument about having a correlative right to receive services since his position could not be assimilated to that of a patron, and in any event such a right was contingent upon the lawful entry of the performer into the state.[132]

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[128]For an example of prospective application of a decision by the ECJ, one which would have had far-reaching economic consequences, see e.g., CJEU, Case 43/75 *Defrenne v SABENA* [1976] ECR 455.

[129]*Cabral Douglas v Dominica* [2017] CCJ 1 (OJ) (special leave).

[130]*Cabral Douglas v Dominica* [2017] CCJ 1 (OJ) (special leave), para [35].

[131]*Cabral Douglas v Dominica* [2017] CCJ 1 (OJ) (special leave), paras [20]–[22]. In this regard, however, it should be noted that the Court analysis of Article 36(4)(b) of the *RTC* could be argued as being too restrictive. This provision protects the supply of services "(b) in the territory of one Member State to the service consumer of another Member State." Given that the applicant was organising (in the Court's own words in ibid para [1]), "an international concert to mark the opening of the annual carnival in Portsmouth," it would appear likely that some of the concert goers would have been from other CARICOM Members.

[132]*Cabral Douglas v Dominica* [2017] CCJ 1 (OJ) (special leave), para [28].

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5 Conclusions and Comparisons with the EU

As a way of rounding off the above analysis of the jurisprudence of the CCJ it might be useful to focus more clearly on some of the similarities and differences between its jurisprudence and that of the ECJ.

The first, most striking difference is (for the present) the limitation of the enforceability of Community law to the regional level, via the CCJ's original jurisdiction. This limitation is supported by the CARICOM's vision of the CCJ as the exclusive interpreter and applier of the *RTC*, but is challenged by the existence of the Court's own referral jurisdiction under Article 214 (which parallels the ECJ's preliminary rulings procedure).[133] Further, although some of the essential foundations of the EU's doctrine of direct effect already may be found in the CCJ's jurisprudence (e.g., the creation of a new legal order and correlative rights accruing to persons),[134] some doubts appear justified in the Caribbean context. This context includes a CARICOM made up primarily of Commonwealth Caribbean states and territories, which are wedded to their sovereignty, and which demonstrate a firm commitment to the dualist conception of the relation between international and domestic law. It also includes a difference in jurisdictions of the two regional tribunals, with the CCJ having jurisdiction over claims brought by persons for breaches of the *RTC* and Community law.

A second difference between the Caribbean and EU, directly related to the first, is the limitation on the scope of state liability in the Caribbean. As seen above, the CCJ's notion of state liability is one restricted to liability at the regional level—to claims in the original jurisdiction. State liability, at least for now, does not exist at the national level in the same way as in the EU.

Thirdly, although one could argue that the foundations have been laid for two developments, namely, supremacy of Community law and indirect effect/conform interpretation, at least for now the relevant passages in the CCJ's jurisprudence can be argued to represent foreshadowing rather than implementation.

These differences will ensure that the study of Caribbean integration law remains fascinating for some time to come. The CCJ has demonstrated an ability carve its own unique path in developing regional economic integration, one that carefully balances the need to enforce the *RTC* in a manner than ensures uniformity of Community law, on the one hand, and the need to respect the sovereignty of Members and their common law legal systems, on the other. The CCJ has been remarkably successful, in a short period of time, and has shown itself adept at using a range of regional and international legal material, from decisions of the ECJ, to the law of treaties, to general public international law.

It would be remiss, however, to conclude without acknowledging what may appear to be a slight change in direction in the final two original jurisdiction cases mentioned above. The *SM Jaleel* and *Douglas* cases could be argued to reveal a

[133]See *RTC* Article 211 (compulsory and exclusive) and *Agreement* Article XII (exclusive).

[134]See *Trinidad Cement Ltd and TCL Guyana Inc v Guyana* [2009] CCJ 1 (OJ) (special leave).

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slight cooling off, or slowing down, in the development of regional integration law by the Court. The imposition of a retroactive limitation on the scope of claims in *SM Jaleel* and the refusal of special leave in *Douglas* (despite what appears to be an arguable case), could be argued to be a sign that the Court is taking a pause in what has otherwise been a very rapid development of Community law.

This may indeed be the case. However it is hoped that the use of mechanisms such as pauses and foreshadowing (rather than concrete implementation), do not represent a change in direction. The CCJ, in a manner similar to other regional courts and tribunals, may simply be giving Members the chance to catch up and make the changes that will be necessary to ensure the effective functioning of Community law. It is hoped that the CCJ quickly regains its momentum and moves to promote ever deeper integration in the CARICOM region.

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Part III
Institutions

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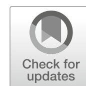
Recent Developments in International Investment Law



Catherine Titi

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1 Negotiations, Ratifications, Terminations

In 2016, 37 new international investment agreements (IIAs) were concluded, comprising 30 bilateral investment treaties (BITs) and 7 treaties with investment provisions (TIPs).[1] This brought the total number of IIAs to 3324 by the end of 2016.[2] Among the IIAs concluded in 2016, two were megaregionals: the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific

Due to space limitations, a discussion of substantive protection standards in new investment treaties and outcomes in investment arbitration are outside the scope of the present chapter.

[1]UNCTAD, *World Investment Report 2017*, UN, p. 111.

[2]UNCTAD, *World Investment Report 2017*, UN, p. 111. UNCTAD has replaced the term 'other international investment agreements' with 'treaties with investment provisions'. This is more appropriate given that UNCTAD's database contains not only BITs and agreements with investment chapters, but also agreements that may make only passing mention of investments, and which therefore could not be considered, properly speaking, to be 'international investment agreements'. However, for the sake of simplicity, the term 'international investment agreements' is used.

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Partnership (TPP). Negotiations of other megaregionals, such as the Regional Comprehensive Economic Partnership (RCEP), continue to be underway.[3] Between January and June 2017, ten additional IIAs were signed. Of these, five were BITs.[4] At the regional level, 2017 saw the conclusion of the intra-MERCOSUR (*Mercado Común Sudamericano*) Cooperation and Facilitation Investment Agreement, operational within the framework of the Treaty of Asunción,[5] and signed on 4 April 2017.[6]

The intra-MERCOSUR Cooperation and Facilitation Investment Protocol was negotiated on the basis of the Brazilian model cooperation and facilitation investment agreement (CFIA) finalised in 2015. Brazil concluded its first CFIA on 30 March 2015 with Mozambique. Between April and November 2015, five more CFIAs came into being, respectively with Angola, Mexico, Malawi, Colombia, and Chile. In 2016 and 2017, Brazil continued negotiations on the basis of its model CFIA. Besides the intra-MERCOSUR Cooperation and Facilitation Investment Agreement, the Brazilian CFIA served as model for the Economic and Trade Expansion Agreement (ETEA) signed between Brazil and Peru on 29 April 2016. Negotiations are also said to be concluded with India and Jordan.[7]

Until very recently, Brazil had been known for its reluctance to embrace investment protection obligations through international investment treaties. Although it signed a number of BITs in the 1990s, these treaties were never ratified. The model CFIA aimed to remove traditional barriers to the congressional ratification of BITs, notably through an exclusion of ISDS and a limitation of the expropriation standard to direct expropriation.[8] This has created an expectation that the CFIAs should be ratified. Although at the time of writing such ratification is pending, it is worth noting Presidential Decree No. 8863 of 28 September 2016, which formally established the national focal points or ombudsman for foreign investments provided for in Brazilian CFIAs.[9] It seems further that Brazil's CFIAs with Mexico and Peru have become the first Brazilian IIAs to be approved by the Brazilian Congress.[10]

While Brazil is re-evaluating its traditional absence from the international investment law scene, in 2016 and 2017, some states continued to question their

[3]Megaregionals are discussed in Sect. 2 below.

[4]See http://investmentpolicyhub.unctad.org/IIA/ (last accessed 19 June 2018).

[5]Article 26(1) of the MERCOSUR Cooperation and Facilitation Investment Protocol.

[6]See http://investmentpolicyhub.unctad.org/IIA (last accessed 19 June 2018).

[7]Martins J, Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments, *Investment Treaty News*, 12 June 2017, https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/ (last accessed 19 June 2018).

[8]Titi (2016) and *passim*.

[9]The Decree is available at http://www.planalto.gov.br/ccivi_03/_ato2015-2018/2016/decreto/D8863.htm (last accessed 19 June 2018).

[10]Martins J, Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments, *Investment Treaty News*, 12 June 2017, https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/ (last accessed 19 June 2018).

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engagement with the system. In 2016, at least 18 IIAs were terminated. Thirteen of these were unilaterally terminated, one was terminated by consent, and four were replaced by a new treaty. Between January and September 2017, at least 30 IIAs were terminated.[11] Twenty-eight of these were unilaterally terminated and two were replaced by a new treaty. Between 2016 and September 2017, all known terminations but three concerned BITs. None of the terminated BITs was replaced by a new treaty. The two most active countries in terminating IIAs were Ecuador (16 terminations), India (15 terminations) and Indonesia (12 terminations). Between them, the three countries unilaterally terminated 41 BITs, thus clearly raising doubts as to their engagement with the system.

Ecuador's case is probably the most striking. On 16 May 2017, Ecuadorian President Rafael Correa put an end to 16 Ecuadorian BITs concluded with Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela.[12] Ecuador had previously terminated ten BITs; nine BITs in 2008 (with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay) and one BIT in 2010 (with Finland).[13] With the 2017 BIT terminations, Ecuador has put an end to all its BITs. With the exception of Ecuador's BITs with the Dominican Republic, Guatemala and Uruguay, all other BITs are still in force due to survival clauses.[14] Ecuador's most recent BIT denunciations follow a period of heightened questioning of the international system of investment protections: in 2009, Ecuador became the second out of three states to denounce the ICSID Convention[15]; a 2008 constitutional reform introduced, inter alia, a provision in the Ecuadorean Constitution, according to which '[t]reaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into'[16]; subsequent

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[11]The information provided in this paragraph is based on UNCTAD's IIA Navigator, with the exception of 16 terminations of Ecuadorean BITs, which, at the time of writing, are not yet reflected in the IIA Navigator http://investmentpolicyhub.unctad.org/IIA (last accessed 10 July 2018).

[12]Ecuador, Presidential Decrees Nos 1399-1414 of 16 May 2017. On this Muñoz (2017); See further Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report, *Investment Treaty News*, 12 June 2017, https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/ (last accessed 19 June 2018).

[13]See http://investmentpolicyhub.unctad.org/IIA (last accessed 10 July 2018).

[14]Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report, *Investment Treaty News*, 12 June 2017, https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/ (last accessed 19 June 2018).

[15]See ICSID, List of Contracting States and other Signatories of the Convention (as of April 12, 2016), available at https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf (last accessed 19 June 2018).

[16]Article 422 of Ecuador's 2008 Constitution. The text of the Constitution is available at http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html (last accessed 19 June 2018), an English translation is available at: http://pdba.georgetown.edu/Constitutions/Ecuador/english08.

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jurisprudence of Ecuador's Constitutional Court held that a number of arbitration clauses in Ecuadorian BITs were unconstitutional.[17] Significantly, the above constitutional provision does not object to 'regional arbitration entities' and Ecuador has been the main driver behind ongoing negotiations in the context of the Union of South American Nations (UNASUR) on the creation of a regional dispute settlement centre for investment disputes.[18]

Ecuador's 2017 BIT denunciations follow the recommendation of the report of the Ecuadorian Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Investment Arbitration System (*Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones*—CAITISA).[19] CAITISA's report was published in May 2017.[20] CAITISA was constituted in 2013 to 'audit' Ecuador's BITs; its members included some prominent investment law personalities, such as Argentina's former Attorney General, Osvaldo Guglielmino, and known sceptics, such as Muthucumaraswamy Sornarajah.[21]

India came second in the number of recent BIT denunciations. The country is said to have sent notices of termination to 58 countries in order to put an end to respective BITs. It is uncertain at this stage whether the purpose of these terminations is to renegotiate new investment instruments on the basis of India's new model BIT of 2015.[22] In the case of 25 BITs that cannot as yet be unilaterally terminated, India has proposed a Joint Interpretative Statement[23] intended to amend investment provisions

html (last accessed 19 June 2018); On the revision of Ecuador's Constitution, see Nowrot K, International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism, *Beiträge zum Transnationalen Wirtschaftsrecht* 96, 2010. See further Titi (2014); Fach Gómez (2011), pp. 447–483; For an account of more recent developments in Ecuador, see Muñoz (2017).

[17]Titi (2014). For a detailed account, Muñoz (2017).

[18]For recent developments in this respect, see Fach Gómez and Titi (2016b), pp. 511–514; Fach Gómez K and Titi C, El centro de solución de controversias en materia de inversiones de Unasur, *Investment Treaty News* 7 (3), August 2016a.

[19]See in general http://www.caitisa.org (last accessed 19 June 2018).

[20]CAITISA, Auditoría integral ciudadanade los tratados de protección recíproca de inversionesy del sistema de arbitraje en materiade inversiones en Ecuador, informe ejecutivo, May 2017, http://caitisa.org/index.php/home/enlaces-de-interes (last accessed 19 June 2018); For a discussion, see this Muñoz (2017).

[21]The list of CAITISA's members is available at http://caitisa.org/index.php/home/2015-06-29-09-48-53 (last accessed 19 June 2018).

[22]See Freehills HS, Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries, *Arbitration Note*, 16 March 2017, http://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/ (last accessed 19 June 2018).

[23]The Joint Interpretative Statement, dated 8 February 2016, can be accessed at: http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf (last accessed 19 June 2018).

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in order to bring them in line with its 2015 Model BIT.[24] Indonesia is the third country in the number of recent BIT denunciations, although it participates in the RCEP negotiations and it is put about that it may be developing a model BIT. In 2016, Indonesia was reported to be preparing a Draft Government Regulation on the settlement of investment disputes purportedly aimed to 'enhance legal certainty in terms of ease of doing business and investment in Indonesia'.[25]

Lastly, it is worth noting two further revisions of, respectively, an investment treaty and a model investment treaty. In 2016, the South African Development Community (SADC) revised Annex 1 of the SADC Finance and Investment Protocol. Amendments comprise, inter alia, the introduction of an article on the right to regulate,[26] provisions on 'regional cooperation on investment' and on investment promotion agencies,[27] and removal of ISDS[28]; under the new rules state-state procedures only are available before the SADC Tribunal.[29] In 2016, Russia issued a Regulation on Entering into International Treaties on the Encouragement and Mutual Protection of Investments, which replaced the Russian Model BIT and established new guidelines for the negotiations of investment agreements.[30] It is of interest to note that the Regulation appears to exclude application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

2 Megaregionals

Negotiations on CETA were formally concluded in 2014 but the agreement changed substantially after 'legal scrubbing'. On 29 February 2016, the new text of CETA was released. In the meantime, the European Union had presented its proposal for an international investment court in the Transatlantic Trade and Investment Partnership (TTIP). As far as it was publicly known, CETA had until that stage provided for

[24]Joint Interpretative Statement, 8 February 2016, http://indiainbusiness.nic.in/newdesign/upload/Consolidated_Interpretive-Statement.pdf (last accessed 19 June 2018).

[25]Indonesia, Ministry of Finance, Government Currently Preparing Draft of Government Regulation on Settlement of Investment Dispute, 21 June 2016.

[26]Article 12 of Annex 1 of the Agreement amending Annex 1 of the SADC Finance and Investment Protocol.

[27]Articles 20 and 21 of Annex 1 of the Agreement amending Annex 1 of the SADC Finance and Investment Protocol.

[28]Article 26 of Annex 1 of the Agreement amending Annex 1 of the SADC Finance and Investment Protocol.

[29]Article 26 of Annex 1 of the Agreement amending Annex 1 of the SADC Finance and Investment Protocol. See further Peterson LE, Investigation: in aftermath of investor arbitration against Lesotho, SADC member-states amend investment treaty so as to remove ISDS and limit protections, *Investment Arbitration Reporter*, 20 February 2017.

[30]Klimov Y and Panov A, Russia's new guidelines on future bilateral investment treaties, Norton Rose Fulbright International arbitration report, 2017, Issue 8, http://www.nortonrosefulbright.com/files/international-arbitration-review-issue-8-148807.pdf, pp. 30–31 (last accessed 19 June 2018).

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traditional ISDS, i.e. investment arbitration, but in the text unveiled in February 2016, the ISDS mechanism had been redefined and provisions on an international investment court formed now part of the agreement. The European Union's international investment court is discussed below in Sect. 3. In October 2016, Canada, the European Union and its member states issued a Joint Interpretative Instrument to accompany CETA relating among others to the right to regulate and investment protection.[31]

One of the thorny issues between the European Union and its member states was the question of whether EU investment agreements are to be concluded as pure EU agreements without member state participation or whether such agreements rely on a shared competence, and therefore need to be jointly concluded by both the EU and the member states ('mixed' agreements). To allow for a swift signature, the Commission decided to propose CETA as a mixed agreement.[32] According to EU Trade Commissioner Cecilia Malmström, '[f]rom a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and [the European Commission understands] the need for proposing it as a 'mixed' agreement, in order to allow for a speedy signature'.[33] After initial opposition from the Walloon regional government,[34] CETA was eventually signed on 30 October 2016 and part of it came into provisional application on 21 September 2017. The investment chapter and the investment court system are outside the scope of the treaty's provisional application.[35] The road to CETA's ratification may know yet further hurdles. At the time of writing, the CJEU is seised of the question of whether CETA's investment dispute settlement mechanism is compatible with EU law. This is discussed below in Sect. 3.

The issue of EU competence, exclusive or shared, to conclude international investment agreements was discussed more thoroughly in 2016 and 2017 in relation to the European Union-Singapore free trade agreement (FTA), although negotiations on its investment chapter were concluded in October 2014.[36] In June 2015, the Commission informed the Trade Policy Committee that the agreement had been

[31]Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 27 October 2016, http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf (last accessed 19 June 2018).

[32]European Commission, Press release, European Commission proposes signature and conclusion of EU-Canada trade deal, 5 July 2016, http://europa.eu/rapid/press-release_IP-16-2371_en.htm (last accessed 19 June 2018).

[33]European Commission, Press release, European Commission proposes signature and conclusion of EU-Canada trade deal, 5 July 2016, http://europa.eu/rapid/press-release_IP-16-2371_en.htm (last accessed 19 June 2018).

[34]Bartunek RJ and Blenkinsop P, Belgium Breaks Deadlock over EU-Canada Trade Pact, *Reuters*, 27 October 2016, www.reuters.com/article/us-eu-canada-trade-idUSKCN12R0XQ (last accessed 19 June 2018).

[35]European Commission, CETA explained, http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/ (last accessed 19 June 2018).

[36]CJEU, Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:376, para. 8.

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initialled.[37] Consequently, the Commission sought an Opinion from the Court of Justice of the European Union (CJEU) under Article 218(11) of the Treaty on the Functioning of the European Union (TFEU) concerning the apportioning of competences between the Union and its Member States.[38] The Commission contended that the European Union had exclusive competence to sign and conclude the EU-Singapore FTA.[39] In her Opinion issued on 21 December 2016, Advocate General Sharpston considered that the EU-Singapore FTA could only be concluded jointly by the EU and the Member States, i.e. as a mixed agreement.[40] The CJEU issued its Opinion 2/15 on 16 May 2017. According to this, the EU-Singapore FTA falls in its greater part within the exclusive competence of the European Union, except for the following provisions which fall within the shared competence of the EU and its Member States: (a) the provisions on investment protection insomuch as they relate to forms of non-direct investment, such as portfolio investment; (b) the provisions on investor-state dispute settlement; and the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) insomuch as these provisions relate to the agreement's investment chapter (Chapter 9) and to the extent that the latter relate to issues of a competence shared between the EU and the Member States.[41] In other words, following Opinion 2/15, the European Union's competence with respect to investment protection has been defined as 'partly exclusive and partly shared'.[42] Following Opinion 2/15, the European Commission appears to be considering splitting its FTAs from international investment agreements, in a reversal of the proclaimed trend towards more preferential trade and investment agreements, so that it can conclude FTAs on the basis of its exclusive competence and investment treaties on the basis of its newly-defined mixed competence.[43]

[37]CJEU, Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:376, para. 9.

[38]Court of Justice of the European Union, Press release No. 147/16, Advocate General Sharpston considers that the Singapore Free Trade Agreement can only be concluded by the European Union and the Member States acting jointly, 21 December 2016, https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160147en.pdf (last accessed 19 June 2018).

[39]CJEU, Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:3.

[40]CJEU, Opinion of Advocate General Sharpston, Opinion procedure 2/15, 21 December 2016, ECLI:EU:C:2016:992.

[41]CJEU, Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:376, para. 305.

[42]European Commission, Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM(2017) 493 final, 13 September 2017, p. 4.

[43]von der Burchard H, Juncker proposes fast-tracking EU trade deals, *Politico*, 31 August 2017, Updated 4 September 2017, http://www.politico.eu/article/juncker-proposes-fast-tracking-eu-trade-deals/ (last accessed 19 June 2018). See further European Commission, Proposed new architecture for splitting EU FTAs and EU investment agreements, http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/08/COM-proposal-splitting-trade-deals.pdf (last accessed 19 June 2018).

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It is worth noting that the European Commission is holding discussions with Singapore in order to align the 'investment protection provisions in the draft agreement' with the EU's new approach.[44] This statement should be understood to refer among others to the introduction of the EU's international investment court. EU-Japan negotiations are also afoot. On 6 July 2017, the European Union and Japan reached 'an agreement in principle on the main elements of an Economic Partnership Agreement'.[45] However, negotiations on the treaty's investment chapter are ongoing and the EU has 'put its reformed Investment Court System on the table' as well as its 'work towards the setting up of a Multilateral Investment Court'.[46]

In parallel, the future of a number of investment treaties, especially megaregionals, engaging the United States has become uncertain under the Trump administration. Despite an EU-US joint report published on 17 January 2017,[47] TTIP negotiations are on hold and no formal engagement has taken place with the new US administration.[48]

Beyond the European Union, the signing of TPP on 4 February 2016 by 12 states, including all three parties to the North American Free Trade Agreement (NAFTA), was soon eclipsed in the US by the state's withdrawal from the agreement. On 23 January 2017, soon after US President Trump assumed office, a Presidential Memorandum was issued 'Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement'.[49] Consequently, and according to the Office of the US Trade Representative (USTR), a letter was issued 'to signatories of the Trans-Pacific Partnership Agreement that the United States has formally withdrawn from the agreement per guidance from the President of the United States. The letter emphasizes the commitment of the United States to free and fair trade, and encourages future discussions on "measures designed to promote more efficient markets and higher levels of economic growth."'[50] The text of the TPP agreement is made available on the website of the USTR 'for reference

[44]See http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last accessed 19 June 2018).

[45]See http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last accessed 19 June 2018).

[46]See http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (last accessed 19 June 2018).

[47]European Commission and Executive Office of the President of the United States, US-EU Joint Report on TTIP Progress to Date, 17 January 2017, http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155242.pdf (last accessed 19 June 2018).

[48]European Commission, Transatlantic Trade & Investment Partnership Advisory Group, Meeting report, 9 March 2017, http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155484.pdf, p. 2 (last accessed 19 June 2018).

[49]Trump DJ, Memorandum for the United States Trade Representative, Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 23 January 2017.

[50]See https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership (last accessed 19 June 2018).

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purposes' only.[51] Following US withdrawal from the agreement, the 11 remaining TPP states are moving forward with TPP, and their representatives have agreed that should the US decide to rejoin the agreement they shall help it do so.[52]

At the same time, on 2 February 2017, US President Trump announced the United States' intention to renegotiate NAFTA.[53] In a letter dated 18 May 2017, United States Trade Representative Robert Lighthizer notified the US Congress that the President intends to open negotiations with Canada and Mexico to modernise NAFTA. Accordingly, NAFTA should:

> include new provisions to address intellectual property rights, regulatory practices, state-owned enterprises, services, customs procedures, sanitary and phytosanitary measures, labor, environment, and small and medium enterprises. Moreover, establishing effective implementation and aggressive enforcement of the commitments made by [US] trading partners under [US] trade agreements is vital to the success of those agreements and should be improved in the context of NAFTA.[54]

Outside Europe and North America, negotiations have continued on RCEP. Negotiations on RCEP were initially launched in 2012. RCEP is a prospective agreement among the member states of the Association of Southeast Asian Nations (ASEAN), i.e. Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam, and Australia, China, India, Japan, South Korea and New Zealand. It involves a number of negotiating parties that are also parties to TPP. The 19th meeting of the RCEP Trade Negotiating Committee (TNC) was held in July 2017 in Hyderabad, India and the next RCEP TNC at the time of writing will be held from 17 to 28 October 2017 in Songdo, Incheon, Korea.[55] During the 5th RCEP Ministerial Meeting, held on 10 September 2017 in Pasay City, in the Philippines, RCEP Ministers agreed to 'make utmost effort to achieve significant outcomes of the RCEP by end of 2017 to bring negotiation closer to its successful conclusion'.[56]

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[51] See https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership (last accessed 19 June 2018).

[52] BBC News, TPP trade deal will continue without Trump, 21 May 2017, http://www.bbc.com/news/39990686 (last accessed 19 June 2018).

[53] See https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces (last accessed 19 June 2018).

[54] The letter is available at: https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf (last accessed 19 June 2018); See also USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement, May 2017, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces (last accessed 19 June 2018).

[55] Australia, Department of Foreign Affairs and Trade, Nineteenth Round of Negotiations—18 to 28 July 2017, Hyderabad, India, 3 August 2017.

[56] Joint Media Statement, The Fifth Regional Comprehensive Economic Partnership (RCEP) Ministerial Meeting, 10 September 2017, Pasay City, Philippines.

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3 The Establishment of an International Investment Court and Multilateral Reform of ISDS

In 2016 and 2017, the European Union intensified its endeavours to create an investment court system (ICS), first bilateral, then multilateral.[57] The investment court proposal was first unveiled on 16 September 2015, when the European Commission revealed an informal negotiating text for TTIP between the EU and the United States on the creation of a permanent investment court; the court's vocation would be to replace the current system of investor-state dispute settlement.[58] The Commission's text served as the blueprint for the official proposal which was endorsed by the EU and became public on 12 November 2015.[59] On 2 December 2015, the European Commission announced that negotiations on an EU-Vietnam FTA were completed and that the new agreement contains a permanent dispute resolution mechanism with an appellate body.[60] In February 2016, the new text of CETA was released, amending the earlier text's dispute settlement mechanism to include the EU's international investment court. A particularity of CETA is that the agreement commits both the EU and Canada to pursue negotiations on the creation of a *multilateral* investment court. According to Article 8.29 of CETA, '[t]he Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements'.[61] The ambition to establish a multilateral investment court was reiterated in the EU-Canada Joint Interpretative Instrument accompanying CETA, according to which:

> CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up

[57] On the EU's proposal for a permanent investment court, see in general Titi (2017b).

[58] European Commission draft TTIP text on investment, 16 September 2015. The draft proposal is available at http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm (last accessed 19 June 2018). For an overview of this early draft, see Titi (2015); Masiá EF, Hacia la creación de un Tribunal Internacional de Inversiones, *La Ley* 6612/2015.

[59] The proposal is available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

[60] European Commission, News, EU and Vietnam finalise landmark trade deal, 2 December 2015, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409 (last accessed 19 June 2018).

[61] For a discussion on the multilateral investment court, see Titi (2017b); Kaufmann-Kohler G and Potestà M, Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?, *CIDS Research Paper*, http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf (last accessed 19 June 2018); Titi (2018).

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> once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.[62]

In a statement in late October 2017 entered on the occasion of the adoption by the Council of the decision authorising the signature of CETA, the European Commission and the Council noted that 'the Council supports the European Commission's efforts to work towards the establishment of a multilateral investment court, which will replace the bilateral system established by CETA, once established'.[63] On 21 December 2016, the European Commission launched a public consultation on its proposal for a multilateral reform of investment dispute resolution,[64] which built on the European Commission's Inception Impact Assessment of 1 August 2016.[65] The consultation aimed to collect stakeholders' views on the EU's approach to investment dispute settlement and options for multilateral reform, including notably the establishment of a permanent Multilateral Investment Court (MIC). The consultation also included questions on the possible establishment of a Multilateral Appeal Tribunal.[66] The consultation was completed on 15 March 2017 and revealed 'overall broad support for a multilateral reform of investment dispute settlement', although the European Commission acknowledged that some questions are pending, especially in relation to 'technical aspects'.[67] The summary report of the public consultation was documented in the European Commission's Impact Assessment report that was released on 13 September 2017.[68]

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[62]Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 27 October 2016, http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf, p. 6 (last accessed 19 June 2018).

[63]Statement 36 (Statement by the Commission and the Council on investment protection and the Investment Court System ('ICS') of the Statements and Declarations to be entered on the occasion of the adoption by the Council of the decision authorising the signature of CETA, 27 October 2016, http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf (last accessed 19 June 2018).

[64]European Commission, Questionnaire on options for a multilateral reform of investment dispute resolution, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 (last accessed 19 June 2018).

[65]European Commission, Questionnaire on options for a multilateral reform of investment dispute resolution, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 (last accessed 19 June 2018); See also European Commission, Consultation Strategy, Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution, 1 August 2016, http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf (last accessed 19 June 2018).

[66]European Commission, Questionnaire on options for a multilateral reform of investment dispute resolution, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 (last accessed 19 June 2018).

[67]European Commission, Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM(2017) 493 final, 13 September 2017, p. 5.

[68]European Commission Staff Working Document, Impact Assessment on Multilateral reform of investment dispute resolution, annexed to the Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, SWD(2017) 302 final, 13 September 2017.

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Simultaneously with the launch of the European Commission's public consultation, in December 2016, the European Commission and Canada co-hosted an intergovernmental expert meeting in order to facilitate the creation of a permanent multilateral investment court, available for disputes under existing and future investment treaties.[69] The EU's intention has been to allow transition to the Multilateral Investment Court not only for future EU investment agreements but also for EU member state BITs authorised under Regulation No. EU 1219/2012.[70] On 13 September 2017, the European Commission issued a Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.[71]

At the same time, while the Union is actively pursuing the establishment of the investment court system, on 6 September 2017, Belgium submitted a request for an Opinion to the CJEU on the compatibility of the European Union's investment court system with EU law.[72] The concern is pertinent in light of recent opinions by the CJEU, including Opinion 1/09 on the European and Community Patents Court[73] and Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR).[74] These opinions focus on whether the proposed dispute settlement systems are compatible with the interpretive monopoly of the CJEU over EU law. The European Commission has aimed to draft the investment court system in a way so as to 'bypass' the CJEU's Opinions' objections.[75] It is also worth noting that the European Union is already party, together with the member states, to the Energy Charter Treaty (ECT), which provides for ISDS.

Belgium's request for an Opinion follows an internal agreement between the Federal Government and the Governments of the federated entities that was reached on 27 October 2016 on the signing of CETA.[76] In particular, the agreement contained 'a national unilateral declaration regarding the Belgian conditions for

[69] European Commission, Press release: European Commission and Canadian Government co-host discussions on a multilateral investment court, Brussels, 13 December 2016, http://europa.eu/rapid/press-release_IP-16-4349_en.htm (last accessed 19 June 2018).

[70] European Commission, Inception Impact Assessment, Establishment of a Multilateral Investment Court for investment dispute resolution, 1 August 2016, p. 3.

[71] European Commission, Recommendation for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM(2017) 493 final, 13 September 2017.

[72] Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, Minister Reynders submits request for opinion on CETA, https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta (last accessed 19 June 2018).

[73] CJEU, Opinion 1/09, European and Community Patents Court, 2011, ECR I-1137.

[74] CJEU, Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014.

[75] Titi (2017b).

[76] Titi (2017b); See also Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, CETA—Belgian Request for an Opinion from the European Court of Justice, https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (last accessed 19 June 2018).

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signing CETA, for which the undertaking was made to request an opinion from the Court of Justice of the European Union (CJEU) regarding the compatibility of certain aspects of CETA with the European Treaties, in particular with [regard] to Opinion 2/15'.[77] Consequently, Belgium's request for an Opinion had been in preparation since December 2016 by a working group made up of representatives of the Federal Government and the Governments of the federated entities.[78] Concretely, Belgium's request for an Opinion concerns the compatibility of the EU's investment court system with: (a) the exclusive competence of the CJEU to interpret EU law; (b) the general principle of equality and the 'practical effect' requirement of EU law; (c) the right of access to courts; and (d) the right to an independent and impartial judiciary.[79] The questions submitted to the CJEU extend beyond the 'traditional' concerns about the proposed dispute settlement system's compatibility with the jurisdictional autonomy of the CJEU. The Belgian request for an Opinion further notes that Belgium does not take any position regarding the questions that have been put to the CJEU and that it 'is also conscious of the fact that the ICS is the first step towards the creation of a multilateral Investment Court which, in the long run, shall become the responsible legal institution to resolve conflicts between investors and states'.[80]

Following the European Union's proposal for the establishment of a multilateral investment court, multilateral reform of investment dispute settlement and the creation of a multilateral investment court have started to be discussed also in different contexts. On 14 July 2017, at its 50th session, the United Nations Commission on International Trade Law (UNCITRAL) entrusted its Working Group III with a mandate to study the possible reform of investor-state dispute settlement.[81] Working Group III will (a) identify and examine concerns regarding the current machinery of investment dispute settlement; (b) consider whether reform is desirable in light of the identified concerns; and (c) if so, 'develop any relevant solutions' to be recommended to UNCITRAL.[82] It was agreed that in discharging its mandate the Working Group should dispose broad discretion and that 'any solutions devised

[77]Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, CETA—Belgian Request for an Opinion from the European Court of Justice, https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (last accessed 19 June 2018).

[78]Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, Minister Reynders submits request for opinion on CETA, https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta (last accessed 19 June 2018).

[79]Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, CETA—Belgian Request for an Opinion from the European Court of Justice, https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (last accessed 19 June 2018).

[80]Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, CETA—Belgian Request for an Opinion from the European Court of Justice, https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (last accessed 19 June 2018).

[81]United Nations, Report of the United Nations Commission on International Trade Law, Fiftieth session (3–21 July 2017), A/72/17, para. 264.

[82]United Nations, Report of the United Nations Commission on International Trade Law, Fiftieth session (3–21 July 2017), A/72/17, para. 264.

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would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s)'.[83] The latter observation is aligned with UNCITRAL's working methods.

At the multilateral level, UNCITRAL has already produced in recent years its Rules on Transparency in Treaty-based Investor-State Arbitration[84] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). Since the beginning of 2016, six more states have signed the Mauritius Convention, bringing the total of signatories to 22.[85] In December 2016, Canada became the second state to ratify the Mauritius Convention, following Mauritius's 2015 ratification. In April 2017, Switzerland became the third country to ratify the Mauritius Convention, thus triggering the clock for the Convention's entry-into-force on 18 October 2017.[86]

4 Alternatives to ISDS

As the debate about ISDS deepens, a minority of states have started to opt for alternatives to ISDS and to introduce dispute prevention policies (DPPs) in their investment agreements. DPPs aim to minimise the number of conflicts that escalate into formal disputes.[87] Dispute prevention can require the establishment of institutional structures,[88] it can be pursued unilaterally but also bilaterally, and it can involve cooperation between the contracting parties.

One of the innovations 'introduced' by Brazilian CFIAs is the establishment of ombudsmen or, so-called, focal points. Dispute prevention in CFIAs is made possible through two institutions, a joint committee and national focal points or ombudsmen. The latter are the focus of the present discussion. According to the Brazilian model, national focal points are designated by each party.[89] In Brazil, they are established within the Chamber of Foreign Trade (CAMEX),[90] the Council of Ministers of the Brazilian Chamber of Commerce, an inter-ministerial body for foreign trade, presided by the Minister of Development, Industry and Foreign

[83]United Nations, Report of the United Nations Commission on International Trade Law, Fiftieth session (3–21 July 2017), A/72/17, para. 264.

[84]UNCITRAL's Transparency Rules came into effect on 1 April 2014.

[85]See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (last accessed 19 June 2018).

[86]See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (last accessed 19 June 2018).

[87]UNCTAD (2010), p. xiv.

[88]UNCTAD (2010), p. xiv.

[89]Article 17(1) of the Brazilian Model CFIA of 3 March 2016 (version 2.3.1) (hereinafter Brazilian Model CFIA).

[90]Article 17(2) of the Brazilian Model CFIA.

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Trade.[91] Focal points' main task is to assist investors from the other party in their territory.[92] Their role is simultaneously one of dispute prevention as it is one of investment promotion and facilitation. Their responsibilities include: endeavouring to follow the recommendations of the Joint Committee and interact with their counterpart in the other contracting party; following up on requests and enquiries of the other party or of investors of the other party with the competent authorities; assessing, in consultation with relevant public authorities, suggestions and complaints of the other party or investors of the other party and recommending actions to improve the investment environment; seeking to prevent disputes in investment matters, in collaboration with public authorities and relevant private entities; and providing information on regulatory issues.[93] The contracting parties shall use the focal points, and the Joint Committee, to exchange information on business opportunities, procedures and requirements for investment.[94] The focal points 'shall promptly reply to notifications and requests' by the other party or its investors,[95] and they 'shall act in coordination with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties'.[96] Although the model CFIA provides for state-state dispute settlement,[97] this does not become available until the dispute has become 'the object of consultations and negotiations between the Parties' and has been examined by the Joint Committee.[98] The Brazilian model's national focal points or ombudsmen are inspired by the Korean Office of the Foreign Investment Ombudsman.[99] However, an important difference exists between the two: while the Korean Office of the Foreign Investment Ombudsman is a unilateral mechanism established without need for reciprocity, focal points according to the Brazilian model are conventional mechanisms that need to be established in both contracting states. Certainly, the challenge that remains in this framework is the pending ratification of Brazilian CFIAs.

Another mechanism that has been used in recent IIAs and offers an 'alternative' to ISDS is the so-called filter mechanism.[100] Filters are perceived as forming part of states' endeavours to narrow the scope for arbitral review of host state policies.[101] The European Commission's 2014 Public consultation on modalities for investment

[91] CAMEX's functions are established by Decree n. 4.732/2003.

[92] Article 17(1) of the Brazilian Model CFIA.

[93] Article 17(4) of the Brazilian Model CFIA.

[94] Article 18(1) of the Brazilian Model CFIA.

[95] Article 17(6) of the Brazilian Model CFIA.

[96] Article 22(1) of the Brazilian Model CFIA.

[97] Article 23 of the Brazilian Model CFIA. See further e.g. Article 15 of the Brazil-Mozambique CFIA; Article 15 the Brazil-Angola CFIA; Article 13(6) of the Brazil-Malawi CFIA.

[98] Article 22(2) of the Brazilian Model CFIA.

[99] See http://ombudsman.kotra.or.kr/eng/index.do (last accessed 19 June 2018).

[100] On filters in general, see Titi (2017a).

[101] Johnson et al. (2016), p. 44.

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protection and ISDS in TTIP, one of the first official documents to make use of the term ‘filter’, referred to the mechanism in the following terms:

> [S]ome investment agreements have introduced mechanisms which grant the regulators of the Parties to the agreement the possibility to intervene (through a so-called *“filter” to ISDS*) in particular ISDS cases that involve measures ostensibly taken for prudential reasons. The mechanism enables the Parties to decide whether a measure is indeed taken for prudential reasons, and thus if the impact on the investor concerned is justified. On this basis, the Parties may therefore agree that a claim should not proceed.[102]

Filters in that context were limited to prudential measures. More generally, filters allow contracting parties to intervene in investment dispute settlement involving sensitive measures and to determine whether these measures have been taken for the stated reasons. Where a filter exists, it is up to the contracting parties to decide whether a treaty exception applies. The investment tribunal seised of the dispute may not proceed until the parties, or the parties’ financial authorities or tax authorities, etc., or a state-state tribunal have delivered their report or decision. Filters resemble provisions on joint interpretations by the parties, since determination of a given question is remitted to the parties. However, in contrast with joint interpretations of treaty provisions *in abstracto* and binding on tribunals for all subsequent cases, filters concern the concrete application rather than interpretation of a given rule, and most notably an exception or defence. Some very recent treaties to incorporate filters include CETA,[103] the Canada-Mongolia BIT (2016)[104] and the Canada-Hong Kong BIT (2016).[105] Filters in some Canadian treaties provide for recourse to interstate arbitration where the parties cannot agree between them on whether an exception is a valid defence to the claim of the investor.[106] In these cases, the ‘report’ of the interstate tribunal is binding on the investor-state tribunal.[107]

Beyond DPPs and filters, an alternative to ‘traditional’ ISDS that is gaining some currency in recent years, in name if not yet in practice, is mediation. At the institutional level, in July 2016, the Energy Charter Conference adopted a Guide on Investment Mediation, an explanatory document to help investors and governments decide whether to use mediation and how to prepare for it.[108] The Guide, which was prepared with the support of the International Mediation Institute (IMI), the International Centre for Settlement of Investment Disputes (ICSID), the

[102]See http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (last accessed 19 June 2018).

[103]E.g. Article 13.21(3) and Annex 13-B (*Understanding on the application of art 13.16.1 and 13.21*) of CETA.

[104]E.g. Article 21 of the Canada-Mongolia BIT.

[105]E.g. Article 14 of the Canada-Hong Kong BIT.

[106]E.g. Article 22 of the Canada-Hong Kong BIT.

[107]Article 22(4) of the Canada-Hong Kong BIT.

[108]Energy Charter Secretariat, Guide on Investment Mediation, 19 July 2016, http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf (last accessed 19 June 2018); See also http://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/ (last accessed 19 June 2018).

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Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration of the International Chamber of Commerce (ICC), UNCITRAL and the Permanent Court of Arbitration (PCA), is designed to facilitate the amicable settlement of investment disputes, encourage contracting states to consider the use of mediation on a voluntary basis and 'to consider the good offices of the Energy Charter Secretariat'.[109] The initiative of the Energy Charter Conference builds on recent institutional attempts to encourage and expand on mediation or conciliation (consider for instance the 2012 Investor-State Mediation Rules of the International Bar Association (IBA), the 2014 International Chamber of Commerce (ICC) Mediation Rules, and the 2014 SCC Mediation Rules). Provisions on mediation are also included in CETA.[110]

5 Intra-EU BITs

The last topic discussed in this chapter concerns continuing developments in relation to the fate of bilateral investment treaties between EU Member States (intra-EU BITs). The majority of EU member states' BITs have been concluded with countries outside the European Union, since investments within the Union are subject to a system of multilevel protection that comprises, among others, the fundamental freedoms of the internal market, the protection of fundamental rights in EU law and the European Convention on Human Rights (ECHR).[111] However, a minority of BITs, initially about 190 in number, often concluded between EU Member States and Central and Eastern European countries prior to the latter's accession to the European Union, are BITs engaging as treaty partners on both sides EU member states.[112] These treaties have formed the centre of a heated debate, notably with respect to the question of their compatibility with EU law, sometimes raised in the context of investment disputes brought on the basis of intra-EU BITs.[113] In the course of this debate, the European Commission has had ample opportunity to make its view known that intra-EU BITs are incompatible with EU law. Two EU Member States, Italy and Ireland terminated all their intra-EU BITs; in the case of Ireland, this meant terminating all its BITs.[114] Nonetheless, and despite some erratic terminations, intra-EU BITs continued and continue to exist.

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[109]Energy Charter Secretariat, Guide on Investment Mediation, 19 July 2016, http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf (last accessed 19 June 2018); See also http://www.energycharter.org/media/news/article/conference-endorses-guide-on-investment-mediation/ (last accessed 19 June 2018).

[110]Article 8.20 of CETA.

[111]Bungenberg and Titi (2014), pp. 316–322.

[112]Bungenberg and Titi (2014), pp. 316–322.

[113]For a discussion, see Bungenberg and Titi (2014).

[114]See http://investmentpolicyhub.unctad.org/IIA (last accessed 19 June 2018).

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On 18 June 2015, the European Commission initiated infringement proceedings against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) in order to request that they bring their intra-EU BITs to an end.[115] The letters of formal notice sent to the Member States in question followed earlier exchanges with the European Commission which resulted in no action being taken on the part of the Member States.[116] At the same time that the infringement proceedings were initiated, the European Commission aimed to initiate an 'administrative dialogue' with the remaining 21 Member States with intra-EU BITs in force.

On 7 April 2016, Austria, Finland, France, Germany and the Netherlands published a 'non-paper' on intra-EU investment treaties.[117] The 'non-paper' comes from five among the EU's most active investment treaty negotiators, of whom some have been targeted by the Commission's infringement proceedings and some have strongly opposed in the past the exercise of the EU competence. The 'non-paper' suggests that the member states are motivated by a wish to reach 'a compromise solution' for the termination of intra-EU BITs.[118] It proposes the conclusion of an agreement among all EU member states that would foresee the phasing out of existing intra-EU BITs and, significantly, would 'afford European investors operating within the internal market appropriate guarantees, both as a matter of substantive and procedural protection'.[119] Concretely, the five delegations considered that it would be necessary to provide for 'a *binding and enforceable settlement mechanism* for investment disputes',[120] and identified three main options: (a) the CJEU; (b) modelling the proposed dispute settlement system on the Unified Patent Court; (c) the Permanent Court of Arbitration (PCA).[121] In the latter case, EU member states could agree on a special *compromis* for intra-EU investment disputes, which could be drafted on the basis of the 'the EU proposal for an Investment Court System in TTIP and other EU trade agreements (permanent arbitrators, strict ethic rules, appeal facility, etc.)'.[122] The delegations signing the 'non-paper' considered

[115]European Commission, Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last accessed 19 June 2018).

[116]European Commission, Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18 June 2015, http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last accessed 19 June 2018).

[117]Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016. The publicly available version of the non-paper is undated.

[118]Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 1.

[119]Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 2.

[120]Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 11, emphasis in original.

[121]Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 12.

[122]Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 12.

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that given the 'time and legal constraints deriving from the first two options, [. . .] an *alternative* dispute settlement scheme built upon an already existing framework such as the PCA would be preferable in order to achieve the phasing out of intra-EU BITs within a reasonable timeframe'.[123] In other words, the delegations appear to condition the phasing out of intra-EU BITs on giving investors access to arbitration for all intra-EU investment disputes. To mitigate the impact of this statement, the 'non-paper' suggests that this would be only a 'provisional scheme that would be subsequently replaced by a permanent solution for investment disputes within the internal market'.[124] It is interesting to note that some of the signatories of the 'non-paper' have vociferously opposed ISDS in EU investment treaties, however appear to fully endorse it at home for intra-EU investment disputes. No continuation has been given to the 'non-paper's' proposal.

On 29 September 2016, the European Commission sent a reasoned opinion to Austria, the Netherlands, Romania, Slovakia and Sweden in relation to their intra-EU BITs.[125] Pursuant to Article 258 of the TFEU, the Commission delivers a reasoned opinion if it considers that a member state has failed to comply with an obligation under the EU Treaties, and reasoned opinions are only one step prior to bringing the matter before the CJEU. According to a European Commission Fact Sheet summarising the issue:

> Many of these intra-EU BITs were agreed in the 1990s. They were mainly struck between existing members of the EU and those who would become the "EU 12", the Member States joining in 2004 and 2007. They were aimed at reassuring investors at a time when private investors - sometimes for historical and political reasons – might have been wary of investing in those countries. Since the enlargement, such 'extra' reassurances should not be necessary, because EU rules in the single market, such as the freedom of establishment and the free movement of capital, already provide a legal framework for cross-border investments. All Member States are subject to the same EU rules, which equally provide protection for EU investors.[126]

The saga of the fate of intra-EU BITs continues.

6 Conclusions

International investment law has continued to grow, to animate discussions and debates, and create challenges in 2016 and 2017. The role of the European Union has been particularly significant, dominating policy decisions through continuing negotiations of megaregionals, its proposal for an international investment court and its

[123] Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 13, emphasis added.

[124] Non-paper from Austria, Finland, France, Germany and the Netherlands, *Intra-EU Investment Treaties*, 7 April 2016, para. 13.

[125] See http://europa.eu/rapid/press-release_MEMO-16-3125_en.htm (last accessed 19 June 2018).

[126] See http://europa.eu/rapid/press-release_MEMO-16-3125_en.htm (last accessed 19 June 2018).

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insistence on the need for multilateral reform of ISDS, but also through the prominence of its internal dilemmas on issues that require involvement of the CJEU. The new scepticism of the United States, a traditional proponent of international investment protections, vis-à-vis investment treaties and especially megaregionals is an outlier among North American trends but it is likely that it reflects a temporary policy shift. Finally, although some states continue to display hostility vis-à-vis investment protections, and increasingly BIT terminations testify to such hostility, the majority of states continue to engage with international investment law. Some reconsider the drafting of their investment protection standards. Such reconsideration is a normal process in order to amend investment treaties in light of acquired experience and new global legal settings and challenges. It is probable that investment treaty provisions and investment treaty models will continue to change advancing new trends in international investment law.

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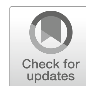
Renminbi Rising: The Inclusion of the Renminbi in the SDR Basket



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1 Introduction

The Special Drawing Right (SDR) was created by the International Monetary Fund (IMF or the Fund) in 1969 as a supplementary reserve asset in response to a shortage of official reserves. Separate from the IMF's other resources, the so-called SDR Department was established, and SDRs have periodically been "allocated" to the participants in the SDR Department (currently all 189 IMF members) in a total

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amount of SDR 204.2 billion (currently about US$290 billion).[1] The reserve asset nature of the SDR results from the fact that under the rules of the SDR Department, participants with a balance of payments need can request the exchange of their SDRs for the freely usable currencies of other participants (thus providing them with access to "unconditional liquidity").

The value of the SDR is based on a basket of currencies. As determined by the IMF's Executive Board (the Executive Board), currencies in the SDR basket must be issued by largest exporters and "freely usable". In the IMF's 2015 review of the SDR valuation (the "2015 Review"), the Chinese renminbi (RMB) was determined to be a freely usable currency and was included in the SDR basket.

The 2015 Review may likely have lasting impact on the international monetary system. It has triggered new interest to explore the broader role for the SDR. For China, it reflected international recognition of the RMB among top-rank international currencies as well as the country as an economic and financial superpower. Further, it was viewed as providing impetus, and is expected to continue helping, to promote the country's further economic liberalization. The 2015 Review's decisions also have significant operational implications for the IMF and its members.

This article provides background on the SDR and analyzes the 2015 Review decisions. Section 2 provides an overview on the establishment of the SDR and the functioning of the SDR Department. Section 3 briefly summarizes the evolution of the SDR valuation prior to the 2015 Review and analyzes the legal framework that guided the Executive Board in its 2015 decisions regarding the RMB. It discusses in particular the "freely usable currency" requirement that a currency has to meet under the current valuation framework for the SDR basket and that is of great significance for IMF financial operations. Section 4 concludes with an assessment of the decisions and the outlook going forward.

2 Creation of the SDR and Establishment of the SDR Department

2.1 Creation of the SDR

In 1969, through an amendment of its Articles of Agreement (the "Articles"), the IMF created the SDR as a supplementary international reserve asset, in the context of the Bretton Woods fixed exchange rate system. Under the fixed exchange rate system, countries needed official reserves to defend their exchange rate. However, the international supply of two key reserve assets – gold and the US dollar – proved inadequate for supporting the expansion of world trade and financial flows that was

[1]This amount is very small compared to about US$9 trillion of the total global holdings of international reserves. The SDR has so far played a relatively minor role in the international monetary system, well underperforming its intended purpose as a global reserve asset.

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taking place. Therefore, the international community decided to create a new international reserve asset under the auspices of the IMF. Soon after the creation of the SDR, the fixed exchange rate system collapsed and the world's major currencies shifted to floating exchange rate regimes. Additionally, the growth in international capital markets facilitated borrowing by creditworthy governments and many countries accumulated significant amounts of international reserves. These developments decreased the reliance on the SDR as a global reserve asset.[2]

2.2 SDR Department, SDR Allocations and the SDR Interest Basket

The 1969 amendment to the Articles established the SDR Department, separate from the IMF's quota and other resources which are held in the General Department.[3] Membership in the SDR Department is voluntary, and as of today, all IMF members are participants in the SDR Department. In addition, the IMF can authorize certain other official entities to hold and transact in SDRs (the so-called "prescribed holders").[4] Only the IMF, participants in the SDR Department, and prescribed holders may hold and transact in official SDRs, while other entities can denominate assets and liabilities in SDR but have no access to the SDR Department.

SDRs may be allocated by the IMF's Board of Governors only to participants in the SDR Department (and not to the IMF or prescribed holders) when there is a "*long term global need… to supplement existing reserve assets.*"[5] A total of 204.2 billion SDRs have been allocated by the IMF to its members to date, including most recently, an allocation of SDR 182.6 billion in 2009. Allocations are made in proportion to members' quotas at the time of the allocation.

The allocation of SDRs is at no cost to participants, but the use of SDRs can give rise to net creditor or net debtor positions in the SDR Department. As participants transact in SDRs, their holdings would fall below or rise above their allocation,

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[2]*See* http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR (last accessed 4 October 2018). Under the Second Amendment that became effective on April 1, 1978 it was envisaged that the SDR would become the principal reserve asset of the international monetary system; *see* Article VIII, Section 7.

[3]For background on the IMF's financial structure and operations, *see* IMF Financial Operations 2015, available at http://www.imf.org/external/pubs/ft/finop/2015/ (last accessed 4 October 2018).

[4]The IMF has authorized 15 institutions that perform the function of a central bank for more than one member and other official entities to hold SDRs. SDRs cannot be held by private entities or individuals. In the drafting of the First and Second Amendments, "there was strong resistance to the inclusion of private parties among the possible holders of SDRs" due to the concern that it would lead to the creation of a private market "in which SDRs were traded at a discount or a premium compared with the controlled values at which official holders may transfer SDRs". Gold (1981), p. 35.

[5]Article XVIII, Section 1(a). In the reverse circumstances, the IMF could also cancel allocated SDRs, wiping out a portion of global reserves.

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giving rise to either a net debtor position or a net creditor position, respectively. Participants would then have to pay a charge on their net debtor position or receive a payment on their net creditor position, both at the SDR interest rate. A small annual fee for the IMF's expenses in managing the SDR Department is also assessed to participants in proportion to their share in total allocations.[6]

The SDR interest rate is determined by the IMF. Under the IMF's current methodology, it is calculated weekly based on a 3-month interest rate instrument for each of the currencies in the basket. It has a floor of 0.05% (5 basis points) but otherwise fluctuates based on the market rates of the instruments in the basket.[7] Beyond its role in the SDR Department, the SDR interest rate plays a broader role in the IMF's finances. In particular, the basic interest rate for IMF credit (the so-called basic rate of charge) is established as the SDR interest rate plus a margin (currently 100 basis points). The SDR interest rate is also used to remunerate creditor positions in the General Resources Account resulting from the IMF's use of a member's currency,[8] and as the interest rate for IMF borrowing under the New Arrangements to Borrow and bilateral borrowing agreements.

2.3 The Use of SDR

The SDR is not a currency and does not give rise to a claim on the IMF. Rather, a participant in the SDR Department with SDR holdings has potential claim to obtain balances of freely usable currencies from other participants.[9] Specifically, participants can obtain freely usable currencies in exchange for their SDR holdings through voluntary exchanges or under a mandatory mechanism where IMF would designate members with strong external positions to accept SDRs from members with weak external positions in exchange for a freely usable currency.[10] In addition to this exchange of SDRs for currencies envisaged under the Articles, SDRs may only be used for operations and transactions that are authorized either expressly under the Articles, such as for quota subscription payments[11] and interest payments on IMF

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[6]Article XX.

[7]Article XX, Section 3 and https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr14484 (last accessed 4 October 2018).

[8]The rate of remuneration is not more than, nor less than four-fifth of, the SDR interest rate; *see* Article V, Section 9(a).

[9]Article XXX defines "freely usable currency".

[10]The SDR has the same properties as a swap line in that it allows holders access to foreign currency liquidity but without reliance on a single counterpart or specific currency. As a matter of practice, since 1987, all transactions in the SDR Department have taken place on a voluntary basis, with a significant number of participants buying and selling SDR under their voluntary standing arrangements.

[11]When a country joins the IMF, it is assigned a quota in the same range as the quotas of existing members of broadly comparable economic size and characteristics, and quotas are adjusted periodically to reflect members' evolving relative economic position in the world economy. A quota

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lending or reserve positions in the General Resources Account, or under decisions of the Executive Board, including the use of SDR in loans, to settle obligations, and also swaps.

The SDR also serves as the unit of account of the IMF and other international organizations such as the World Bank and the Bank for International Settlement (BIS), and IMF lending and borrowing are denominated in SDR. While third parties can also use the SDR as a unit of account or as denomination of financial assets (for example SDR denominated bonds), they are generally not permitted to hold official SDRs.[12]

3 SDR Valuation and the 2015 Review

The Articles do not set a value for the SDR, nor do they prescribe a specific method to be used for SDR valuation. Instead the Articles provide that the methodology for SDR valuation is determined by the Fund, subject to special majority requirements.[13]

The value of the SDR was initially linked to gold. Since 1974, the SDR value has been based on a weighted value of a basket of members' currencies, which is reviewed by the Executive Board at regular intervals of normally 5 years. First, the SDR valuation basket consisted of currencies of the 16 countries each of which had a share in world exports of goods and services in excess of 1%. In 1980, the IMF reduced the number of currencies in the SDR valuation basket to currencies of the five largest exporting members – then the US dollar, the British pound, the Japanese yen, Deutsch mark and French franc. Between 1980 and 2016, this basket was relatively stable, except for the replacement of the French franc and the Deutsch mark by the euro in 1999, and changes to the basket were limited to adjusting the weights of the currencies. In the context of the 2015 Review, a major change was

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determines a members' contribution to the capital of the IMF, its voting power in the IMF, its proportionate share in the IMF's allocation of SDRs to IMF members, and has a bearing on its access to IMF resources. For more information on quotas, *see* https://www.imf.org/en/About/Factsheets/Sheets/2016/07/14/12/21/IMF-Quotas (last accessed 4 October 2018).

[12]See also footnote 4 on "prescribed holders".

[13]Article XV, Section 2. SDR valuation decisions require a 70% majority of the total voting power or an 85% majority in case of fundamental changes. SDR valuation decisions are taken by the Executive Board. Under the Articles, the power to decide most matters is vested in the IMF's Board of Governors, the IMF's highest decision-making body consisting of one Governor per member (i.e. currently, 189 Governors). Except those matters for which power is directly conferred on the Board of Governors under the Articles, the Board of Governors has delegated all decision making, including the authority to determine the SDR valuation methodology, to the Executive Board, consisting currently of 24 Executive Directors. The Executive Board is responsible for conducting the IMF's business, and selecting the IMF's Managing Director who conducts, under the direction of the Executive Board, the ordinary business of the IMF. *See* for more background: Gianviti (1999), pp. 31–67.

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made when the Executive Board determined that the RMB would be a "freely usable currency" for IMF operations, and decided to add the RMB to the SDR basket, both with effect from October 1, 2016.

3.1 The Selection Criteria: Exports and Freely Usable Currency

The Executive Board adopted the export and freely usable currency criteria as the basis for selecting SDR basket currencies at the regular 5-yearly review of the SDR valuation in 2000. Specifically, the 2000 review decision provided that the currencies included in the SDR basket must be those (a) that are issued by the four IMF members, or by monetary unions that include IMF members, whose exports of goods and services during the past 5-year period had the largest value (*the exports criterion*); and (b) which have been determined by the IMF to be "freely usable currencies" (*the freely usable criterion*).

Until 2000, the export criterion had served as the sole criterion in the selection of the SDR basket currencies. Being a size-based criterion established on the basis of balance of payments data, the export criterion is intended to reflect a country's relative importance in global commerce, ensure an adequate supply of reserve assets, and limit the number of currencies in the basket.[14]

The freely usable criterion was introduced as a second criterion for currency selection for the SDR basket in 2000 to recognize the importance of financial transactions. Introducing the freely usable criterion into SDR valuation was seen as a way to ensure that the SDR contained those currencies that were most representative of use in the world trading and financial systems.

At the outset of the 2015 Review, it was agreed that the two criteria remained appropriate and that no major change in the currency selection criteria was required. As one of the world's largest exporters, China had already met the first of the two criteria in 2010 and had become the third largest exporter by 2015. Whether China could be considered to meet the second criterion, namely that the currencies used for SDR valuation be "freely usable" as determined by the IMF, was thus at the center of the 2015 Review.

[14] It should also be noted that a currency can only be replaced in the basket by another currency if the value of exports of the member or monetary union whose currency is not included during the relevant period exceeds those of a member or monetary union whose currency is included in the basket by at least 1%. This safeguards against temporary and minor fluctuations in export trends.

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3.2 Exports Criterion and Currency Based Approach

A refinement was made to the application of the export criterion at the time of the 2015 Review. In 2000, following the inclusion of the euro, the calculation of the value of exports of goods and services of the Euro Area excluded intra-currency union trade (i.e., trade of goods and services among members that are part of the union is not counted). Underlying this approach was the rationale that since the SDR should reflect the characteristics of the currencies rather than those of the issuing members, the currency should be the focus and not the member. This was referred to as the "currency based approach". The 2015 Review affirmed that the same currency based approach should be followed for members with more than one currency. This meant that for China, the value of exports was assessed at the mainland China level (where the RMB is issued), and excluded the exports of Hong Kong SAR, Macao SAR and Taiwan Province of China, which issue their own currencies. This adjustment made no difference to China's position as the world's third largest exporter of goods and services.

3.3 Freely Usable Currency Criterion

The key question for the 2015 Review was whether the RMB could be determined a "freely usable currency". The freely usable currency concept was introduced through the Second Amendment as a key operational concept for IMF operations but had effectively not been looked at in detail since 1978. That year, as part of the decisions taken in the context of the entry into force of the Second Amendment, the Fund determined the US dollar, the Deutsch mark, the French franc, the British pound and the Japanese yen as freely usable currencies. Following this initial determination, there was no major review thereafter, including when the euro was determined to be a freely usable currency, replacing the Deutsch mark and French franc in 1999.

The RMB was first reviewed for inclusion in the SDR basket in the context of the 2010 SDR review (when China for the first time had met the export criterion), but at the time there was broad agreement that the RMB could not yet be considered a freely usable currency.[15] As the internationalization of the RMB had progressed significantly between 2010 and 2015, the assessment of the RMB in 2015 required a comprehensive and in depth review of the origins, rationale, and operational implications of the freely usable concept as the backdrop for the assessment of the RMB.

[15] See http://www.imf.org/en/publications/policy-papers/issues/2016/12/31/review-of-the-method-of-valuation-of-the-sdr-pp4502 (last accessed 4 October 2018).

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3.3.1 The "Freely Usable Currency" Concept Under the Second Amendment

One of the key mandates of the IMF is to provide temporary financing under adequate safeguards to assist members "to correct maladjustments in their balance of payments".[16] IMF financing is not provided in a form of loans but rather structured as purchase transactions, under which a member receiving IMF financing (i.e., the purchasing member) would purchase from the IMF the currencies of other IMF members (i.e., the creditor members) with balances of its own currency.[17] The purchasing member would then use the purchased currencies to address its balance of payments need.[18]

To ensure that currencies obtained from the Fund are of actual use for the purchasing member, and to help maximize the usability of IMF resources, the concept of "freely usable currency" was introduced into the Articles of Agreement with the Second Amendment effective April 1, 1978.[19] Under this concept, the Articles define what a freely usable currency is and require creditor members whose currencies are not freely usable to exchange balances of their own currencies, if sold by the IMF, for a freely usable currency of their choice.

Article XXX (f) adopted under the Second Amendment defines "freely usable currency" to be a member's currency that "the Fund determines (i) is, in fact, ***widely used*** to make payments for international transactions, and (ii) is ***widely traded*** in the principal exchange markets". Under this definition, the "widely used" element is intended to ensure that the purchasing member can directly use the obtained currency to meet the member's balance of payment need (e.g., to pay for imports or repay external debts). The "widely traded" element is intended to ensure that if the purchasing member needs to exchange the obtained currency for other currencies to meet its balance of payment need (i.e., indirect use), there are markets with sufficient depth and liquidity to allow it to sell the obtained currency, even in a large amount,

[16] See Article I(v).

[17] The purchasing member would pay interest to the IMF on the purchased amount, and the IMF would remunerate each creditor member by paying interest on the amount of its currency sold to the purchasing member.

[18] See Article V, Section 3(b). Conversely, upon maturity, the purchasing member would be obligated to repurchase its own currency with payments in SDRs or the currencies of other members specified by the IMF. See Article V, Section 7(i). For further explanation of how IMF financial assistance works, *see* https://www.imf.org/external/pubs/ft/ar/2009/eng/pdf/webbox33.pdf (last accessed 4 October 2018).

[19] Prior to the Second Amendment, creditor members had no obligation to convert balances of their currencies purchased in an IMF financing transaction into a currency that the purchasing member could actually use to deal with its balance of payment needs, which were typically a limited number of reserve currencies. If a creditor member was unwilling to make such conversion, the IMF would unlikely sell balances of that member's currency and the IMF's holding of that currency would be effectively unusable. *See* Gold (1978).

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without substantial adverse exchange rate effect.[20] The reference to "principal exchange markets" in the wide trading element is understood to mean more than one principal exchange market, but not all principal exchange markets.

To provide a purchasing member with the assurance that it will receive a freely usable currency, a creditor member whose currency is not a freely usable currency is legally obligated at the time of its currency being sold by the IMF to provide a freely usable currency of its choice if so requested by the purchasing member.[21] As an operational practice, the purchasing members always receive a freely usable currency under arrangements that each member whose currency is used for purchase has put in place with the IMF indicating which freely usable currency it is willing to provide.[22] In a repurchase context similar obligations apply, i.e., when a repurchasing member needs to obtain a non-freely usable of another member, as specified by the IMF, to repurchase from the IMF the balances of its own currency, such other member is also under the legal obligation to ensure that its currency can be obtained against a freely usable currency of its choice.[23]

To be freely usable, a currency must be both "widely used" and "widely traded in principal exchange markets" and the key question is what each of these elements means. The interpretation is guided by the purpose of the "freely usable" concept in the context of IMF financing operations, namely to ensure that a currency purchased from the IMF can either be used by the purchasing member directly to meet its balance of payments needs (because it is "widely used") or it can be exchange into a currency that the purchasing member needs (because it is "widely traded in principal exchange markets").

[20]The concept of "freely usable" thus relates to market convertibility not official convertibility – in other words, it is not sufficient that a member stands ready to convert its currency into other currencies, but the conversion should be possible in foreign exchange markets. However, full convertibility is not required. A freely usable currency may be not fully convertible, e.g., if the issuing member maintains capital account restrictions. Indeed, in 1978 the Deutsch mark and the French franc were determined to be freely usable even Germany and France did not allow their currencies to be converted for certain capital transactions. Conversely, a fully convertible currency may not be "freely usable" because the demand for it may not be sufficient to be considered widely used and widely traded (e.g., the Swedish krona is fully convertible, but not freely usable).

[21]*See* Article V, Section 3(e)(i).

[22]A creditor member, whose currency is freely usable, is under no legal obligation to exchange the balance of its currency into another freely usable currency at the request of a purchasing member, but is only required to collaborate with the IMF and other members to enable the exchange (e.g., to facilitate the transfer of its currency to one or more third members that are willing to make the exchange). In addition, if the purchasing member is interested in such exchange, the creditor member has the right to request the exchange to be made through the creditor member for another freely usable currency selected by the creditor member. *See* Article V, Sections 3(e)(i) and (iv).

[23]*See* Article V, Section 7(j)(i) of the IMF's Articles of Agreement. All exchanges in both the purchase and repurchase transactions take place at the IMF official exchange rate for the currencies in question.

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3.3.2 Widely Used

The "widely-used" element is best measured by examining the degree to which payments for international trade, services, and financial account transactions are undertaken in a currency. It should be noted, however, that such data are not readily available on a systemic basis (e.g., there is only limited data on invoicing for international trade and service). Even where such data is available, it may not be reliable, because, for example, the lack of a uniform definition of "domestic" versus "international" transactions leads to inconsistent approaches in categorizing these transactions. The data issue is resolved by relying on indicators that serve as proxies (see below).

3.3.3 What Are "International Transactions"?

During the 2015 Review, a question on the meaning of "international transactions" in the phrase "in fact, widely used to make payments for international transactions" arose. How "international transactions" is defined is relevant for all indicators of the "widely used" element of the freely usable currency concept. An international transaction may refer, for example, to a transaction between residents of different countries or to a transaction between residents of the same country that use a foreign currency for the transaction. The question gained importance in the 2015 Review because of the focus on assessing whether the RMB is freely usable. Specifically, the People's Republic of China consists of four territories, mainland China, Hong Kong, Macao and Taiwan, each issues its own currency. Given the large volumes of transactions between residents of these four territories, whether or not these transactions are considered "international" would affect the assessment of how widely the RMB is used.

The answer is derived from the purpose of the "widely used" element of the freely usable currency definition, which is to ensure that a member purchasing another member's currency under IMF financing will be able to use it directly to meet its balance of payments need. The relevant balance of payments need for IMF financing is the balance of payments need between IMF members (i.e., reflecting the shortfall of the member, including all of its territories, in its trading and financing vis-a-vis other members). It is not, for example, the balance of payments need between various currency areas of the same member. As such, the type of payments that can provide an indication on the usability of a currency sold by the IMF in its financing are the payment transactions between members. Keeping in mind this overall objective and design of the wide use element, it was concluded that the "international transactions" in this context refer to transactions between members.[24]

[24]In the IMF's Articles, the term "international transactions" is also used in Article VIII, Section 2 (a) which prohibits IMF members, without the IMF's approval, to impose "restrictions on the making of payments and transfers for current international transactions". Under this Article, this

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3.3.4 Widely Traded

The "widely traded" element also needs to be interpreted from the objective of the freely usable currency concept, namely to ensure that a freely usable currency can be exchanged in markets for another currency to address balance of payments need without facing substantial adverse exchange rate effect. This is best assessed through observing across different markets the depth of trade of a currency and how exchange rates react upon the conversion of currency amounts in magnitudes common for IMF financing transactions.[25] It should also be noted here that as trading of foreign exchange is rather decentralized (i.e., over the counter), the availability of such data is limited. Moreover, there is no fully objective mechanism to test the market price reaction to the conversion of a large amount of a currency, since there could be multiple factors affecting market prices at each point and any large conversion would likely be broken up into smaller transactions to minimize price effects. As for the "wide use" element, proxies are required to assess wide use (see below).

3.3.5 What Are "Principal Exchange Markets"?

At the 2015 Review, the IMF also re-examined the characteristics of "principal exchange markets" ("widely traded in the principal exchange markets"). Until the mid-1990s, most foreign exchange transactions were conducted over telephone or in person and confirmed later by mail, telex or fax. This enabled the concentration of trading in certain geographical locations, such as London, New York and Frankfurt, which are major financial hubs with necessary supportive infrastructure for foreign currency trading. However, the evolution of modern market infrastructure, especially electronic trading, has helped integrate the trading hubs and transformed foreign exchange trading into a round-the-clock market. This evolution has allowed for foreign exchange trading to take place at any time without regard to location, thanks to a wide array of electronic networks, single-bank proprietary trading systems or other electronic communication networks. At the same time, however, foreign exchange trading volumes continue to be highest during the business hours of the major financial centers in Asia, Europe and North America.

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term has also been interpreted by the IMF to mean a transaction between residents of different IMF members, and not residents of the same member.

[25] A sizable IMF financing transaction, as assessed in the 2015 Review, could be, e.g. about SDR 5 billion (based on the actual five largest purchases between 2010–2015), or SDR 50 billion based on the then largest potential one time purchase by a member. Under the IMF's policy, the IMF would assign the amount of each large purchase to all members with strong balance of payment or reserve positions in proportion to their quota shares. All of these members may end up providing different freely usable currencies, and as a result, the amount of a particular freely usable currency received by the purchasing member may be uncertain.

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In light of the evolution of the market structure and consistent the purpose of assessing currency-specific market depth and liquidity, it was determined that "principal exchange markets" need to be considered in terms of three broad time zones, correspondingly roughly to the Asian, European and North American market hours, instead of geographical market locations.[26] Accordingly, for a currency to be widely traded, it needs to have sufficient market depth and liquidity in at least two of these three time zones.

3.3.6 The Role of Indicators and the Need for Judgment

Given there is no direct objective measurement of the use of a currency in payment for international transactions and the trading in principal exchange markets, the Executive Board has since 1978 relied on quantitative indicators as proxies for assessing wide use and wide trading. Prior to the 2015 Review, to assess wide use, the IMF relied on data of: (1) the currency composition of official foreign exchange reserves, reflecting the expectation that the larger the share of a currency in reserve, the more likely that currency is used for external payments, and (2) international banking liabilities and international debt securities denominated in a currency, measuring how widely a currency is used in international financial transactions. To assess wide trading, the IMF has relied on the data on volumes of currency trading as high volumes indicate market depth. For the 2015 Review these indicators were retained and refined, and a number of new indicators were added to assess the wide use element: (1) official holdings of foreign currency assets, (2) issuance of international debt securities (to complement the existing indicator on the stock outstanding), (3) cross-border payments, and (4) use of letters of credit for trade finance.

To determine whether a currency is freely usable, the Executive Board, however, ultimately needs to exercise its qualitative judgement in evaluating the quantitative indicators.[27] Since the quantitative indicators are only proxies to measure wide use and wide trading, they cannot be applied mechanistically. Further, the Articles do not prescribe a threshold or minimum levels of "use" and "trading" based on which a currency may be determined to be freely usable. Nor does the definition state "the most widely used" and "the most widely traded". In short, the Executive Board has a certain discretion in determining a currency to be freely usable.

[26]As previously described, the requirement that a freely usable currency be a currency "widely traded in principal exchange markets" is designed to ensure that there would always be principal exchange markets with sufficient depth and liquidity for a purchasing member in IMF financing to exchange the obtained currency, even in a large amount, for other currencies, without substantial adverse exchange rate effect.

[27]The Executive Board's determination of whether a currency is freely usable may be made by a majority of the votes cast. It should also be noted that under the IMF's rules and regulations, the IMF is required to consult with a member before its currency is put on, or removed from, the list of freely usable currencies. *See* Rule O-3(b) of the IMF's Rules and Regulations, adopted in 1978.

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That said, there are strong considerations for the Executive Board to keep the list of freely usable currencies short rather than long. A longer list would more likely include currencies that conform less fully with the wide use and wide trading requirements. Moreover, it is desirable that freely usable currencies be close substitutes so that no purchasing member would be at a disadvantage by receiving one freely usable currency rather than another freely usable currency in a Fund-related transaction.[28]

3.3.7 Determining the Free Usability of the RMB

Based on the clarified concept of the freely usable currency and informed by multiple indicators on wide use and wide trade, the Executive Board concluded that the RMB met both elements of wide use and wide trade, and determined the RMB to be a freely usable currency effective October 1, 2016.[29] The use of the RMB in international transactions has increased substantially in the last few years and, even excluding transactions among residents of China's territories, reached a sufficient level for the IMF to determine the RMB met the widely used requirement. Specifically, based on the then most recently available data, the RMB ranked 7th as the currency denomination of official foreign currency assets, accounting for about 1.1% of the global share at end-2014; 5th as the currency denomination of international banking liabilities, accounting for 1.8% of the global share by mid-2015; 9th as the currency denomination of outstanding international debt securities, accounting for 0.4% of the global share by mid-2015; 6th as the currency denomination of international debt securities issued during the first half of 2015, accounting for 1.0% of the global share during this period; 8th as the currency denomination of cross-border payments, accounting for 1.1% of the global share by mid-2015; and 3rd as the currency denomination of trade finance (letters of credit), accounting for 3.4% of the global share by mid-2015.[30]

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[28]The standard used for the purposes of determining the RMB to be freely usable would also apply to other currencies if a more comprehensive review of freely usable currencies were to be undertaken.

[29]The IMF made its determination in November 2015, but decided to delay the effectiveness of the freely usable determination until October 1, 2016 to provide sufficient lead time for the IMF and its members to enter necessary arrangements to prepare for the new role of the RMB as a freely usable currency in IMF financing and as a currency of the SDR basket.

[30]The RMB was not ranked in the wide use indicator of "official reserves" in the 2015 Review because there was no data in 2015 on IMF members' holding of RMB in their official reserves. The source of this data comes from the IMF's Currency Composition of Official Foreign Exchange Reserves (COFER), the IMF's database to which 146 IMF members, non-member economies and other reserve-holding entities provide quarterly data of their reserves on a voluntary and confidential basis. Only from October 1, 2016, reporters began to provide to the COFER database separate data on their official holdings of the RMB, together with other separately identified currencies (US dollar, Euro, British pounds, Japanese yen, Swiss franc, Canadian dollar and Australian dollar). At the end of both the fourth quarter of 2016 and the first quarter of 2017, the RMB ranked

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Table 1 International Financial Indicators (shares in percent of global total)

	Foreign exchange market turnover	Cross-border payments	International banking liabilities	International debt securities	Official foreign exchange reserves
	2016: April	2014: Q3–2015: Q2	2015: Q2	2015: Q2	2016: Q2
USD	43.8	42.7	52.8	42.6	63.4
EUR	15.6	35.4	28.5	39.0	20.2
GBP	6.4	4.1	5.8	9.9	4.7
JPY	10.8	3.4	2.6	1.9	4.5
RMB 1/	2.0	1.1	1.8	0.4	n.a.
Other	21.4	13.2	8.6	6.3	7.2

Sources: IMF staff calculations based on data from Bank for International Settlements; Haver Analytics; national sources; transactions values from SWIFT messages MT103 and MT202 excluding MT202COV; and IMF, Currency Composition of Official Foreign Exchange Reserves survey. 1/RMB ranked 8th in foreign exchange market turnover and cross-border payments, and 9th in international debt securities outstanding. It was not separately identified in data on reserves

The IMF also determined that the RMB meet the widely traded requirement as the trading of the RMB in Asian and European time zones were considered to be sufficiently deep to allow for the absorption of the RMB amounts in the magnitudes that could be sold in an IMF financing transaction.[31] In Asia, the RMB was among the most-traded currencies in the Asian time zone, with its average daily turnover measured in April 2015 of about US$205 billion. In Europe, the trading of the RMB, while growing, still constituted a small share; however, it was considered reasonably deep in the first part of the trading date in the European time zone as the daily RMB trading recorded in London already averages over US$40 billion (Table 1).

3.4 Addition of the RMB in the SDR Basket

The assessment of the RMB as a freely usable allowed the Executive Board to add the RMB to the SDR basket. Important considerations for its decision on basket inclusion were also that suitable market exchange rates, a 3-month interest rate instrument, and adequate hedging instruments were found to be available for the RMB. While these are not a formal requirement under the SDR valuation decision, they are critical aspects from an operational perspective for any SDR basket currency. The Chinese authorities also provided assurances on the free access of central

no. 7 among these top 8 currencies, accounting for about 0.8% of the total reported foreign exchange reserves. *See* http://data.imf.org/?sk=E6A5F467-C14B-4AA8-9F6D-5A09EC4E62A4 (last accessed 4 October 2018).

[31] *See* footnote 25 above.

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bank and other official SDR users to the on-shore foreign exchange and bond markets and the free transferability of RMB between mainland China and Hong Kong.

3.4.1 Exchange Rates

The daily valuation of the SDR requires the use of two exchange rates: an exchange rate from an international market for the determination of the SDR valuation in USD terms, and a second 'representative' rate for determination of the SDR value in local currency terms provided by the local authorities.[32] Under the relevant Executive Board decision, the value of the SDR in terms of the U.S. dollar is calculated daily by summing the values in U.S. dollars based on market exchange rates of the SDR basket currencies (USD, EUR, JPY, GBP and RMB) which are generally mid-market rates based on spot exchange rates observed at around noon London time, as provided by the Bank of England.[33] The representative rates, typically based on representative (local market) rates, are provided by the relevant central bank.

Both rates, as being applied to each freely usable currency, need to be market-based and used in markets to which IMF members, SDR users and their agents have access. This is because the daily calculation of the SDR exchange rate against the USD requires an exchange rate that is representative of exchange rates at which Fund members and other SDR users can execute transactions for the purposes of Fund operations and transactions, and for foreign exchange (FX) reserves management purposes. Likewise, the representative rates for the freely usable currencies should be market rates to ensure that no member is disadvantaged, regardless of which freely usable currency is used in Fund operations.

Due to capital controls applicable on mainland China, which do not apply to the special administrative region of Hong Kong, the RMB rates can vary even within China. The restricted access onshore rate (generally known as the CNY rate) and the unrestricted access offshore rate used in SAR Hong Kong (and outside China, generally known as the CNH rate) have typically tracked each other closely, but periodically there have been spikes in the spreads between the two exchange rates. This raised concerns for SDR valuation as the RMB rate used for valuation of the SDR in USD terms would need to be sourced from the Bank of England/FRBNY/ECB (for which there would need to be sufficient RMB trading and liquidity in those markets) and this rate would necessarily be the CNH (offshore) rate, whereas the representative rate provided by the People Bank of China for valuation of the SDR in local currency terms would be the CNY (onshore) rate. An additional concern for

[32]Rule O-2 of the IMF's Rules.

[33]An Executive Board decision (Decision No. 16069-(16/95), adopted October 26, 2016) states that mid-market rates at noon in the London exchange market as provided by the Bank of England will be used in the first instance. If the London markets are closed, New York market rates provided by the Federal Reserve Bank of New York will be used; and if both London and New York markets are closed, rates provided by the European Central Bank will be used.

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IMF members who are required by their domestic legislation to hedge foreign exchange exposures was that significant deviations between the two rates would imply that the CNH would provide a less perfect hedge for CNY exposures.

The impact of any divergence between CNH and CNY rates on SDR users would, however, largely be mitigated if SDR users have access to both the onshore and offshore markets for conducting investment and hedging transactions. In the context of the 2015 Review, China worked closely with IMF members to ensure such access and the authorities undertook critical steps to reform then existing capital controls.

3.4.2 Components of the SDR Interest Rate

While there is no legal requirement to do so, the SDR interest basket matches the SDR valuation basket in that short-term instruments for each currency in the basket are included in the interest rate basket and weighted according to the currency weights in the SDR basket so that return on SDRs closely tracks the return of its component currencies. Instruments in the SDR interest rate basket are expected to have certain characteristics, namely: (1) be broadly representative of the range of financial instruments that are actually available to investors in a particular currency, and the interest rate on the instruments should be responsive to changes in underlying credit conditions in the corresponding money market; and (2) have risk characteristics that are similar to the official standing of the SDR itself, i.e., have a credit risk profile of the highest quality, fully comparable to that of government paper available in the market or, in the absence of appropriate official paper, comparable to the credit risk on prime financial instruments. The instruments should also reflect the actual reserve asset choice of reserve managers, for example, as regards the form of the financial instrument, its liquidity, and maturity.

Identifying an appropriate 3-month RMB interest rate instrument for inclusion in the SDR interest rate basket was an additional operational requirement. A range of instruments were assessed (including the Shanghai Interbank Offered Rate or SHIBOR, the inter-bank repo market rate, the commercial bank certificates of deposit) before settling on the 3-month benchmark yield for treasury bonds published daily by the China Central Depository and Clearing Company (CCDC) for inclusion in the SDR interest rate basket.[34]

[34]The SHIBOR, repo rates, and certificate of deposit rates were considered not to reflect sovereign credit risk, and the latter two rates did not always move closely with underlying money market conditions. The 3-month benchmark yield for China Treasury bonds, on the other hand, was deemed the most directly comparable in terms of risk characteristics to the other instruments in the SDR basket as it is broadly responsive to changes in underlying credit conditions in mainland China's market (i.e., onshore market).

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3.4.3 Size of the SDR Basket

The SDR basket was expanded from four to five currencies with the addition of the RMB. This was intended to balance the need for a relatively small basket avoiding undue costs and complexity for users, with a basket that sufficiently represented currencies' use in international transactions. Equally importantly, retaining a four-currency basket in the event the RMB met the freely usable criteria would mean that one of the four existing currencies in the SDR basket at the time would need to be removed. Maintaining the basket at four currencies could have posed risks to the stability of the composition of the basket as the export shares of the fourth-largest (Japan) and fifth-largest (United Kingdom) exporters were close and their relative rankings had switched in the past. At the same time, the gap between them and the sixth-largest exporter (Korea) was substantial. The Executive Board thus determined it appropriate to expand the SDR basket to five currencies.

3.5 Currency Weights and Amounts in the SDR Basket

Once the currencies for the SDR basket are identified, their relative weights in the SDR basket need to be determined. At the 2015 Review, the Executive Board replaced the old weighting formula adopted since the 2000 Review of SDR valuation with a new formula taking into account exports (50%), reserves (16.66%), FX market turnover (16.66%) and international banking liabilities and international debt securities (16.66%). The currency based approach described above was used in the currency weighting calculations, meaning that the variables used in the weighting formula were measured: (1) for the euro, at the level of the European Union, treating intra-European Union as domestic, and (2) for the RMB, at the level of mainland China, treating Hong Kong, Macao SAR and Taiwan as international.

To facilitate a smooth transition between baskets, the SDR valuation methodology provides that on the first day of the new basket (transition day), the value of the SDR in U.S. dollars (and thus in all other currencies) be the same under the old SDR basket and the new SDR basket. As a matter of practice, the currency amounts of each currency in the SDR basket are determined on the last business day before the new SDR basket becomes effective and remain fixed over the SDR valuation period.[35] Each day during the valuation period thereafter, the value of the SDR (in U.S. dollars) is calculated as the sum of the currency amounts, valued at daily exchange rates of the currencies against the U.S. dollar.

[35]Currency amounts are determined such that, using average exchange rates for the 3-month period ending on the transition date, the share of each currency in the SDR corresponds to its weight as determined by the IMF. On the transition day, calculations are made to ensure that currency amounts correspond to the currency weights determined by the Board with minimal deviations while observing the principle that the value of the basket remains stable on transition day.

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4 Conclusion

The inclusion of the RMB in the SDR basket recognizes the important progress in the internationalization of the RMB over the last decade. While the RMB's role in the global economy is not at par with the US Dollar or the euro, the IMF membership through the Executive Board considered it sufficiently widely used and widely traded to determine it a freely usable currency and include it in the SDR basket. Operational concerns were also addressed in the review, in part through the Chinese authorities providing unimpeded access to RMB interest rate and exchange rate instruments for investment and hedging purposes to Fund members' central banks, and other SDR users, and the availability of a short-term instrument for the SDR interest rate basket.

The 2015 Review raised substantive legal and policy issues, many of which had not been considered since the late 1970s. Changes in how financial markets now work and data points currently available were factored into the discussions on legal interpretation, which were guided by the underlying purposes of the provisions in the Articles. The critical role of judgment in decision making by the Executive Board was highlighted at many points in the process.

The transition to the new SDR basket on October 1, 2016 was smooth. The introduction of the new SDR interest rate basket resulted in a small (9 basis points) increase in the SDR interest rate. The RMB can now be used in IMF financial transactions as a freely usable currency with no significant operational issues so far. The SDR interest rate which was hovering around its established floor of 0.05% before the 2015 Review has increased following the inclusion of an RMB interest rate instrument but not significantly. The next SDR valuation review is scheduled for 2021 when the IMF will again assess the appropriateness of the SDR valuation methodology and the currency composition of the SDR basket.

In the lead up to the 2015 Review, the Chinese authorities promoted the international use of the RMB in several ways including by entering into several bilateral currency swap arrangements and using the RMB as the currency of settlement in trade, and most importantly, by undertaking several far reaching domestic reforms towards liberalization of mainland China markets. In addition, following inclusion of the RMB in the SDR basket, China has promoted the use of the SDR. For instance, the World Bank issued SDR denominated bonds in China which were oversubscribed.[36]

The renewed interest in the SDR has also, once again, sparked a discussion of the role the SDR should or could play in the international monetary system. Various ideas on revamping the SDR are being explored, such as to optimize SDR allocations, to facilitate the issuance of SDR-denominated official and private financial instruments, and to increase the use of SDRs as a unit of account in international

[36]See https://www.worldbank.org/en/news/press-release/2016/08/31/world-bank-successfully-prices-oversubscribed-landmark-sdr-denominated-bond-in-china (last accessed 4 October 2018).

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trade pricing. Thus, despite the somewhat esoteric nature of the SDR, the 2015 Review may have left a long-term, significant impact on the international monetary system, as well as the IMF and its membership.

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Overview of WTO Jurisprudence in 2016

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1 EU – Fatty Alcohols: Panel Report

1.1 Facts of the Dispute

In this dispute, Indonesia challenged an anti-dumping determination by the EU concerning "fatty alcohols" imported into the EU from a number of countries, including Indonesia. "Fatty alcohols" is the collective name for chemical compounds that are used in the production of detergents, surfactants and personal care products.

The most important claim of this dispute—from a commercial as well as legal perspective—concerned a calculation adjustment that the European Commission (the anti-dumping investigating authority in this case) made to the export price of one of the Indonesian investigated companies. In anti-dumping investigations, the determination of dumping is based on a comparison of the normal value—the sales price or the cost of the product in its home market—and the export price, the sales price in the export market. Dumping exists if the export price is lower than normal value. Numerical adjustments by the investigating authority that increase normal value or that reduce the export price are of particular interest because they mathematically either increase a dumping margin or create one in the first place, which has significant commercial repercussions for both the exporter and the importing companies in the export market.

In this case, the EU Commission reduced the calculated export price by making a deduction to reflect the intervention of a sales entity related to the Indonesian producer and located in Singapore. The logic behind the Commission's adjustment was that, when a producer hires a trader to arrange its sales, it must pay the trader a commission or some other form of fee. The Commission initially made this

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adjustment for the two investigated Indonesian producers and subjected both companies to anti-dumping duties, emphasizing that, in this respect, the two producers were in an identical set of circumstances. However, following a judgment by the European Court of Justice in an unrelated case under EU law, the Commission re-opened the fatty alcohols investigation and determined that the two companies were in a fundamentally different situation. Based on this new assessment, the Commission cancelled the adjustment for one company (thereby eliminating the finding of dumping), but maintained the deduction for the other company.

1.2 Salient Legal Findings

1.2.1 Adjustment to the Export Price Under Article 2.4

Adjustments of the kind applied by the Commission to the export price of the investigated company fall under Article 2.4 of the Anti-Dumping Agreement. Indonesia argued that the Commission had acted inconsistently with that provision. The thrust of the argument was that the Singapore-based entity was the producer's sales department for the product at issue, in that it negotiated, arranged and conducted all sales and marketing activities. The Indonesia-based producer merely shipped the products to their final destination. Both companies were owned by the same group entity. Functionally, the two companies were thus, according to Indonesia, one single economic unit, albeit split up formally into legally separate entities. Indonesia argued that this was not a situation where an independent trader (for instance, a company like Cargill), unrelated to the producer, is hired by an unrelated producer to arrange that producer's sales. Indonesia also argued that the fact that the Singapore based entity retained a percentage of the sales price under a written transfer-pricing agreement, in order to ensure its own financing and cash-flow, this monetary flows/retention of this kind between related companies must be examined from the perspective whether the two companies are so closely intertwined that these monetary flows amount merely to shifting resources from one "pocket" to another "pocket" of a single entity. Further, in Indonesia's view, what matters for the adjustment under Article 2.4 is whether a genuine expense exists. Only in that case may an adjustment be made. A genuine expense exists when monetary funds leave an entity, such as when an independent trucking company is hired or when an independent trader organises a sale. However, if the trading entity (or a wholly-owned trucking department/company) is merely a formally separate part of the larger company, then monetary flows between the production and trading entities are merely company-internal allocation of funds, and selling expenses like salesmen salaries, are indirect selling expenses that cannot be adjusted for. Hence, Indonesia argued, it is crucial for the investigating authority to examine the structural, corporate, managerial and control links between the two entities, to determine if they should be treated as one or, instead, as operating at arm's length.

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The Panel rejected Indonesia's claim. The ruling relied, in part, on the finding of the Commission that, while the Singaporean entity intervened on the export side, there was no equivalent intervention of the Singapore sales entity on the domestic sales side (no written contract/transfer pricing agreement). This meant that a difference existed between the domestic and the foreign sales, a difference that in the Panel's view the investigating authority could legitimately adjust for. Beyond this fact, the Panel stated that the existence of what Indonesia referred to as a "single economic entity" is not dispositive of how the transaction should be treated, and that, even among closely related parties, the intervention of a "downstream participant" in a sales transaction may result in additional costs that may be adjusted for. The Panel concluded that the Commission had a sufficient evidentiary basis to conclude that, in this particular dispute, the adjustment was appropriate.

1.2.2 Non-attribution Under Article 3.5 and Disclosure of Verification Results Under Article 6.7 of the Anti-Dumping Agreement

In addition to the Article 2.4 claim, the Panel rejected Indonesia's challenges concerning the Commission non-attribution determination. Indonesia argued that the Commission had inadequately analysed whether, in addition to dumped imports, other factors were causing harm to the EU domestic fatty alcohols industry. For instance, Indonesia pointed out that the Commission had dismissed arguments concerning the effects of the pervasive 2008–2009 economic crisis in a single paragraph. Indonesia also pointed to other actual or potential factors. The Panel rejected each of these claims, holding the Commission's analysis to be adequate.

However, the Panel found the EU determination inconsistent for lack of a proper disclosure of the results of the on-the-spot verification, in violation of Article 6.7 of the Anti-Dumping Agreement. The Panel rejected the core of the EU's defense that equated the results of the verification, on the one hand, with the "essential facts" under Article 6.9 of the Anti-Dumping Agreement, on the other hand. Because WTO Members have the option of disclosing the results of the verification at the same time as they disclose the essential facts, the EU argued that the results of the verification can be read to reflect only those results that are essential, within the meaning of Article 6.9. The Panel found that these two categories of facts are distinct. The Panel then found that disclosure under Article 6.9 required, at a minimum, the part of the questionnaire response or other information for which supporting information was requested (during the verification visit), whether any further information was requested, and whether further documents were collected by the authorities. Moreover, the verification results should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies, in particular, in their questionnaire responses.

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1.3 Appeal

Indonesia appealed the panel report with respect to the Article 2.4 finding, and the EU cross-appealed the Panel's finding under Article 6.7. The Appellate Body upheld both panel findings. A more detailed description of the Appellate Body Report will be provided in next year's EYIEL issue.

1.4 Observations on the Salient Aspects of the Panel Report

There is only very limited case law concerning the treatment of related companies under the Anti-Dumping Agreement. Previous instances include the *US – Hot-rolled Steel* and, more relevantly for this dispute, the unappealed panel report in *Korea – Paper*. The latter case concerned the discretion of the investigating authority to treat two formally separate entities at once. In that dispute, the panel enumerated certain criteria relating to common management, ownership and control as the key indicia of whether two companies could be treated as a single entity. In the instant case, Indonesia argued that the investigating authority was required to examine these criteria in order to determine whether a flow of financial resources between two entities was an expense for the paying entity (the Indonesia-based producer), rather than a shifting of resources between two formally separate entities that, in reality, form one single economic entity.

Unfortunately, the Panel decided this dispute without ever directly addressing Indonesia's central argument. The Panel report provides practically no guidance on how to treat payments between related parties. The Panel accepts that some payments will result in adjustable expenses, and other payments will not; states that everything depends on case-specific circumstances; and the corporate ownership, management and control criteria proposed by Indonesia are not dispositive. Moreover, the panel report can even be understood to suggest that every time a separate "downstream" entity intervenes in a transaction, an adjustment can be made as if that entity were operating at arm's length, without the investigating authority having to verify whether that is indeed the case. But other than agreeing with the EU's determination in this particular case, the Panel does not interpret Article 2.4 and apply its interpretation to the facts before it to determine what then the proper (dispositive) criteria are that an investigating authority should examine by virtue of Article 2.4. The panel ruling is thus very unsatisfactory from both the case-specific and the broader systemic perspective.

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2 EU – Biodiesel: Panel Report and Appellate Body Report

2.1 *Facts of the Case*

The measure at issue in this dispute was again an EU Commission's dumping determination, this time on imports of biodiesel from Argentina. Argentine biodiesel is produced from soy bean oil, and the competing EU industry produces (less efficiently) mostly from rapeseed oil. Under a separate investigation, anti-dumping measures were also imposed on imports from Indonesia, which produces biodiesel from palm oil; Indonesia challenged that determination as a separate WTO dispute. In addition to the biodiesel anti-dumping duties ("as applied"), Argentina also challenged "as such" a provision under the EU's Basic Anti-Dumping Regulation, which is the legal framework under EU law that governs anti-dumping investigations.

2.2 *Salient Legal Findings*

2.2.1 Legal Foundations

The by far most important aspect of this case concerns the EU's adjustment methodology when calculating the cost of production of the investigated product.

By way of background, when an investigating authority determines the normal value on the basis of cost of production, it may occasionally disagree with the investigated company on the figures contained in the company's financial records. Under Article 2.2.1.1 of the Anti-Dumping Agreement, the investigating authority must, in principle, use the financial data as it finds them in the company's financial records. However, the authority is entitled to depart from these recorded costs, inter alia, when these costs do not "reasonably reflect" the costs of production. In practice, a frequent point of disagreement between companies and investigating authorities are issues concerning allocation of overhead costs to different products. Another practical example is transfer pricing between related entities. These examples, broadly speaking, concern technical accounting practices.

In contrast, in this dispute, the EU Commission rejected the costs of soy bean oil (the main raw ingredient for producing soy bean-based biodiesel) as recorded in the exporting companies' books for a much more fundamental reason. The Commission reasoned that the soy bean price in the Argentine domestic market was distorted, due to governmentally-imposed export restrictions that artificially lowered its price. Put differently, the Commission rejected the accurately recorded price/cost, without any objection to the accounting process or standard, but rather on the ground that, on the Argentina market writ large, the price of soybean oil was not what—according to the Commission—it should have been. The Commission then replaced the recorded value with a surrogate value, taken from internationally-quoted soy bean prices.

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Argentina challenged this cost calculation methodology under Article 2.2.1.1 of the Anti-Dumping Agreement, arguing that an investigating authority's objections about a market price in a WTO Member's market do not feature among the legitimate reasons under Article 2.2.1.1 for which a recorded value can be rejected.

The Panel agreed with Argentina. It found that Article 2.2.1.1 focusses on costs actually incurred, and not on costs that would have been incurred under an alternative set of circumstances in an allegedly undistorted market. The Panel found that the phrase "reasonably reflect" connotes the faithful and accurate depiction of information and refers to records of a producer/exporter that depict all the costs that the producer/exporter has incurred in a manner that is—within acceptable limits—accurate and reliable. The Panel also found support in other provisions of the Anti-Dumping Agreement (e.g. Article 6.10) that suggest that the cost of production are individual to each producer and thus cannot, in principle, be subject a standardized cost benchmark that would apply equally to all producers. The Panel also refused to follow the EU's argument to extrapolate from Article VI of the GATT the proposition "that the concept of 'dumping' is generally intended to cover any distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel."

The Panel thus found a violation of Article 2.2.1.1. The Panel went on to make a consequential finding that the EU had also violated Article 2.2, because it had applied a value that did not reflect the cost of production in the country of Argentina; the Panel pointed out that the EU's surrogate value had the explicit purpose to remove the alleged distortion in the Argentine market and was a cost benchmark from outside of Argentina.

The Panel nevertheless rejected Argentina's "as such" claim against a provision in the EU's Basic Anti-Dumping Regulation. Specifically, Argentina claimed that the same violation found under its "as applied" claim was effectively mandated by Article 2(5), second paragraph, of the Basic Anti-Dumping Regulation. Argentina argued that Article 2(5) required the EU, whenever it found that costs/prices were distorted, to discard the data in the producers' financial records and to resort to surrogate values. The Panel rejected Argentina's reading of EU law, finding that Article 2(5), second paragraph, became relevant only if (and after) the Commission found that the producer's records did not "reasonably reflect" the cost of production, and did not inform the Commission's inquiry whether the records indeed did reasonably reflect the cost of production.

On appeal, the Appellate Body upheld all of these Panel findings. On the "as applied" claims of Argentina, it found that the "reasonably reflect" condition in Article 2.2.1.1 refers to a situation in which the records sufficiently correspond or reproduce the costs incurred by the producer. It also rejected the EU's argument that the word "reasonably" in Article 2.2.1.1 introduced a general standard of "reasonableness" for all costs used in the cost-of-production benchmark. Rather, the Appellate Body found that an investigating authority has no "unfettered discretion to define subjectively" a benchmark of "reasonableness" in order to assess whether a producer's recorded costs are unreasonable.

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The Appellate Body also agreed with the findings under Article 2.2 of the Anti-Dumping Agreement. Here, both the EU and Argentina appealed. The EU argued that the Panel had found incorrectly that the costs used by the EU did not relate to cost of production in Argentina; the Appellate Body pointed out that the costs/prices used by the EU had been taken from an international pricing sources and were applied by the EU without any attempt to adjust these international values to the realities of the Argentine market.

Argentina, for its turn, argued that the Panel erred by accepting that, under Article 2.2, an investigating authority can use out-of-country cost benchmarks (even if it subsequently adjusts these benchmarks to the reality in the country of production). The Appellate Body again agreed with the Panel and distinguished between (international) information and costs. It found that, as long as the investigating authority adjusts international values/information to the specific circumstances of the country of production, it can act consistently with Article 2.2 by determining cost of production in the country of production all the while using international information. The Appellate Body did not have an opportunity provide guidance on how this adjustment would occur.

However, the Appellate Body explicitly limited the use of out-of-country information under Article 2.2 to situations in which the obligation under Article 2.2.1.1 does not apply or where relevant information from the exporter or producer under investigation is not available. Put differently, the Appellate Body's interpretation of Article 2.2 and the permissibility of relying on out-of-country information does not affect the duty of an investigating authority to fully comply with Article 2.2.1.1. Thus, Article 2.2 does not entitle an investigating authority to do under Article 2.2 what it is precluded from doing under Article 2.2.1.1.

The Appellate Body subsequently also upheld the Panel's findings on Argentina's as such claims, rejecting Argentina's arguments, which were based on a particular reading of the text of the EU's Basic Anti-Dumping Regulation. Like the Panel before it, the Appellate Body disagreed with Argentina's reading, stating that the relevant provisions did not mandate the investigating authority (the Commission) to act inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

2.2.2 Other Findings

The Panel rejected a number of additional claims by Argentina, concerning the determination of an appropriate profit margin for Argentine producers in the construction of cost of production under Article 2.4 of the Anti-Dumping Agreement, as well claims concerning the Commission's non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement. In contrast, the Panel found a violation by the EU of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Panel also found that the EU violated Article 9.3, because it applied a duty that exceeded the dumping margin. On appeal, the Appellate Body upheld the Panel's finding under Articles 3.5 and 9.3.

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2.3 Treaties

The cost adjustment methodology addressed in this dispute is but one incarnation of a broader trend in anti-dumping policies around the world. To a large extent—although not exclusively—these practices reflect the phasing out of the Accession Protocol of the People's Republic of China. Under Article 15 of the Accession Protocol, China could be treated as a non-market economy, and its normal value could be determined by alternative methodologies, usually involving surrogate countries. Without this legal basis, recourse to non-market calculation methodologies is possible only pursuant to the Ad Note Article VI, which requires that the country at issue essentially be a Stalinist command-style economy.

In order to address perceived market distortions (primarily in China, but also potentially in other exporting countries), investigating authorities have developed cost-adjustment methodologies that apply not to the exporting country as a whole, but rather to a specific industry, either that of the product at issue or an input product. Recorded costs are rejected, on the grounds that the market price is distorted due to governmental intervention such as subsidies, operation of state-owned enterprises, price controls and similar policies.

These cost adjustment methodologies will no doubt keep the dispute settlement system busy in the following years. The EU's implementation of the EU – Biodiesel ruling has consisted in elaborating a new cost adjustment methodology that does not appear very different from the old one. Essentially equivalent cost adjustment methodologies are used by investigating authority in a plethora of WTO Members. Based on the Appellate Body's findings in EU – Biodiesel, it is arguably very difficult to imagine that any of these methodologies—at least on an "as applied" basis—could withstand a WTO challenge. No matter what the technical details of any given methodology may be, any cost adjustment on the grounds typically put forward—distortions of the market—can be squared with the Appellate Body's ruling under Article 2.2.1.1 in EU – Biodiesel.

The real underlying problem is that, historically, dumping determinations have focussed on corporate pricing behaviour. Governmental distortions of the market could be taken into account under subsidies disciplines. The cost adjustment methodologies operate in a grey, interstitial zone between these two sets of policy areas. The policy justification of the users of these disciplines is that a country like China, with its idiosyncratic system sometimes dubbed as "state capitalism", with numerous subtle and less-subtle interventions, challenges the traditional distinction between corporate and state behaviour and between a market economy and a non-market economy. WTO dumping-related case law will remain fascinating for years to come (assuming the current US anti-WTO stance does not destroy the dispute settlement system before that).

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3 US – Washers: Panel Report and Appellate Body Report

3.1 Factual Background

This dispute concerns a challenge by Korea of certain United States "as such" and "as applied" anti-dumping measures as well as aspects of a countervailing duty (CVD) determination. Primarily, this dispute concerns the so-called third or asymmetrical comparison methodology under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. This methodology is intended to be exceptional, to be used when the two "normal" methodologies cannot take into account "appropriately" the factual circumstances at hand. The raison d'être of this methodology is to "unmask" "targeted dumping". In trade remedy policy, the term "targeted dumping" implies that an exporter will (deliberately) sell at low, dumped prices only to certain customers, or to customers within a certain region or during a certain time period; in the remainder of sales scenarios, the exporter will charge normal or higher prices, which allegedly serve to "cover up" the previously-mentioned, abnormally low sales to the targeted customers, regions or in the targeted time periods. Calculating country-wide averages would, in these circumstances, vindicate the evil dumper's nefarious designs, as average figures would "cover up" or "mask" the dumping by offsetting the dumped transactions with non-dumped transactions. Hence, the third methodology is intended to assist the investigating authority in "un-masking" this otherwise hidden targeted dumping.

Recourse to this third methodology greatly increased in the past years, in particular in the United States. The key driver of this trend has been the Appellate Body's outlawing of zeroing under the first and second methodologies in original dumping investigations. Manifestly, therefore, the third methodology is not being used for the purpose for which it had been designed—that is, for addressing the special case of targeted dumping. Instead, the true motivation has been to drive up the calculated dumping margins as much as possible, and to burden imports accordingly, by using the last remaining methodology under which—at least according to a view held by some in the trade remedy community—zeroing was still permitted.

In that sense, this dispute was also another episode of the broader zeroing saga in WTO dispute settlement. After a raft of disputes in the 2000s and early 2010s, the Appellate Body had clearly ruled that the practice of zeroing in anti-dumping investigation is inconsistent with multiple provisions of the Anti-Dumping Agreement. The term "zeroing" denotes a dumping margin calculation approach that, in various different incarnations and different procedural contexts, sets certain intermediate figures to zero instead of using the actually-obtained values. By modifying (or "manipulating", as some would say) intermediate figures in this manner, investigating authorities can calculate dumping margins that are higher than would otherwise be the case or the authorities create dumping margins in the first place.

Because the third methodology had previously been used very sparsely and thus many details concerning its application had not been elaborated in detail, the US Department of Commerce (USDOC) had to develop the applicable methodologies

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over time. Thus, over a certain period, the various parameters of the third methodology evolved under United States law. This included, for instance, the methodology to determine the existence of a "pattern" that justifies the use of the third methodology. For a while, the third methodology under United States law was something akin to a "moving target". It is for this reason that Korea's challenge related to two distinct tests or methodologies, one of which was referred to as the "Nails II" test (named after an investigation involving the product nails) as well as the successor of that methodology, the so-called differential pricing methodology (DPM). Both methodologies carry a strong mathematical or statistical component, neither of which can be explained in detail within the limits set for this article.

3.2 Salient Legal Issues

3.2.1 Interpretation of Article 2.4.2 Second Sentence

The Panel and the Appellate Body interpreted Article 2.4.2 of the Anti-Dumping Agreement with respect to multiple aspects of the third (asymmetrical) comparison methodology, thereby providing important guidance for future investigations. Below we provide a few highlights. The below discussion does not cover all of the technical details of the methodologies, due to the limited scope and overview nature of this article. It may also be noted that the findings below extend to both the Washers investigation ("as applied") as well as to the United States "as such" measures, as appropriate.

Existence of a Pattern of Significantly Differing Prices, Within the Meaning of Article 2.4.2 of the Anti-Dumping Agreement
One of the key questions addressed by the panel and the Appellate Body concerns the existence of a "pattern" of prices that differ significantly between purchasers, regions or time periods. It is the existence of that pattern that permits an investigating authority to avoid the application of the first two "normal" comparison methodologies. The first comparison methodology under Article 2.4.2 entails comparing a weighted-average normal value to a weighted-average export price (W-to-W methodology). The second methodology entails comparing the normal value and the export price of individual transactions (and subsequently combining them into one overall margin/result). An investigating authority is free to choose between one of these two "normal" methodologies.

In contrast, the third comparison methodology involves a comparison between a weighted-average normal value to individual export prices (hence the term "asymmetric"). Beyond determining the existence of a "pattern" of transaction prices that differ "significantly", the investigating authority must provide an explanation for why it (the authority) was unable to address this form of pricing behaviour through one of the "normal" comparison methodologies (W-to-W or T-to-T).

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By and large, the case raised two questions surrounding the existence of a "pattern". First, is it sufficient for the investigating authority to point purely to numerical/quantitative variations in the relevant prices or is something else required? Korea argued that an investigating authority must find numerically significantly differing prices, but in addition must also discuss potential reasons for these price differences. For instance, the differences may be explained by discounted sales during a particular holiday period, which in Korea's view should preclude a finding of targeted dumping. However, the panel held that a quantitative approach by the authority is sufficient, and that the investigating authority need not explore the reasons for the pricing pattern. The Appellate Body agreed with the panel that the investigating authority need not investigate the reasons behind the pricing pattern. Nevertheless, the Appellate Body corrected the panel and found that both a quantitative and qualitative explanations are required to determine the existence of a pattern; for instance the nature of the product or the markets may be relevant. Put differently, the Appellate Body appears to have struck a middle ground between the panel's and Korea's approach to identifying a pattern.

The second question related to the nature of the price variations assessed under the DPM, the United States second (and later in time) methodology. Under the DPM, USDOC as the investigating authority would combine all price variations (that is, both those higher and those lower than a benchmark value), as well as all price variations across purchasers, regions and time periods. By combining all of these price variations, the USDOC increased the likelihood of a "pattern" finding. Both the panel and the Appellate Body held that, in so doing, the United States had aggregated "random and unrelated price variations", thereby making an improper finding of a pattern. In a nutshell, both the panel and the Appellate Body held that only export prices lower than the benchmark should count for the pattern (and not those higher, because these sales do not qualify as dumped), and the price variations should be assessed separately for any chosen parameter (purchaser, region or time period), rather than combining them. The United States approach constituted a violation of Article 2.4.2, and the Appellate Body upheld that ruling. In that way, the panel and the Appellate Body raised the bar—in comparison to the US methodologies—for identifying a pattern under Article 2.4.2 of the Anti-Dumping Agreement.

Application of the W-to-T Methodology Outside of the Pricing Pattern

Another issue concerned the universe of export transactions to which the W-to-T methodology should be applied. The "pattern" of transactions with different prices will be only a subset of the total universe of export transactions. Should the W-to-T methodology be then applied to all export transactions or, instead, only to the "pattern" export transactions? Both the panel and the Appellate Body found that only the "pattern" transactions, rather than all export transactions, should be subject to the W-to-T methodology. They based themselves largely on the phrase "individual export transactions" in Article 2.4.2, drawing from this phrase the conclusion that the third methodology should be applied only to the transactions that justify its use.

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Because in some instances the United States had applied the W-to-T terminology to all export transactions, the United States was found to have violated Article 2.4.2, b.

Recourse to Zeroing in the Context of the W-to-T Methodology
Another important question was the use of zeroing under the W-to-T methodology. The United States had applied zeroing in the underlying investigation, which meant that it had converted to zero the margins of transactions in which the export price was higher than normal value. The Panel found that, because the focus of the W-to-T methodology was on "individual export transactions" within the pattern, each transaction should be considered in its own right and with equal weight, without regard for whether the export price is above or below normal value. Because the United States had, in contrast, privileged the weight of the transactions whose price was below normal value, it had failed to give all transactions the requisite equal weight. The Panel thus found a violation of Article 2.4.2 also on this count.

The Appellate Body upheld the ruling of the Panel. In a nutshell, the Appellate Body's reasoning followed that of the Panel, relying on the term "individual export transaction". It found that zeroing was not necessary in order to unmask dumping, contrary to what the United States argued, because the unmasking of targeted dumping was achieved already by limiting the W-to-T methodology to the export transactions within the pattern. The Appellate Body also rejected the United States' "mathematical equivalence" argument, according to which the use of the W-to-T methodology without zeroing would be equivalent to using the W-to-W methodology to the same subset of transactions, which would render the application of the W-to-T methodology meaningless and would reduce the second sentence of Article 2.4.2 to a nullity. The Appellate Body did not consider this argument valid, since the use of the third methodology in its view was properly to be confined to the "pattern" transaction only, rather than to all export transactions, unlike under the W-to-W methodology would have to be. Against this backdrop, any accidental mathematical equivalence in a particular case could not detract from the proper interpretation of the second sentence of Article 2.4.2.

One Appellate Body Member dissented from the majority view on this point, and found that zeroing was permissible under the third methodology. The dissenting Member built his argument on the exceptional nature of the third methodology and on the need to prevent "re-masking" of the targeted dumping (within the pattern), by requiring the investigating authority to offset below normal value transactions with above normal value transactions. Moreover, according to that Member, the phrase "prices of individual transactions" also supported this approach.

Requirement to Explain Why the Dumping Could Not Be Properly Taken into Account Through the W-to-W or T-to-T Comparison Methodologies
The final aspect discussed in this article is the duty of the investigating authority to justify its use of the third, exceptional methodology, by explaining why the price differences under Article 2.4.2 "cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison". In essence, the investigating authority must explain why the targeted

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dumping cannot be meaningfully "un-masked" by one of the two normal comparison methodologies.

In the Washers investigation, the USDOC's explanation focused on the W-to-W comparison methodology. The USDOC did not make a reference and did not provide any explanation with respect to the T-to-T methodology. The panel found this approach to be consistent with Article 2.4.2. In its view, the authority need not provide an explanation with respect to both "normal" comparison methods. The panel's reasoning revolved around the indefinite article "a" before the mention of the W-to-W and T-to-T methodologies, read in conjunction with the word "or" which is considered to be disjunctive and the word "comparison" in the singular. The panel also reasoned that requiring an explanation with respect to both normal methodologies would affect the initial discretion that an investigating authority has in choosing between these two methodologies.

The Appellate Body—rightly, in the authors' view—reversed the panel and held that the authority must provide an explanation with respect to both normal methodologies. The Appellate Body pointed out the panel's mistake in emphasizing the singular in "a comparison", because the equally authentic French version refers to the plural ("les comparaisons"). Moreover, requiring an explanation with respect to both the W-to-W and T-to-T before resorting to the W-to-T methodology is more in keeping with the "normal" nature of the first two methodologies and the exceptional nature of the third methodology.

An additional aspect was the "appropriateness" standard concerning of the United States' explanation pertaining to the W-to-W methodology. Under Article 2.4.2, USDOC was required to explain why the pricing differences could not be "appropriately" taken into account by using the "normal" comparison methodologies. USDOC had explained that the targeted dumping could not be meaningfully addressed by means of the W-to-W methodology because of the averaging effect of that comparison methodology, and because the first and third methodology yielded substantially different results. In the panel's view, this was insufficient, because averaging was in the very nature of the W-to-W methodology; the panels appears to have suggested that the investigating authority should examine, in this context, whether the pricing differences at issue might be due to circumstances other than targeted dumping. This is because investigating authorities should avoid applying the second sentence in factual circumstances that have nothing to do with targeted dumping. This finding was not appealed.

3.2.2 Regional Specificity Under Article 2.2 of the SCM Agreement[1]

Besides the many aspects of the third dumping comparison methodology, the dispute also included certain claims under the SCM Agreement. In a nutshell, the panel

[1]Panel Report, *US – Washers*, paras. 7.256 to 7.289. Appellate Body Report, *US – Washers*, paras. 5.206 to 5.241.

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rejected Korea's claims concerning the USDOC's CVD determination, which revolved around specificity and aspects of the calculation of the CVD. The Appellate Body, among other things, reversed two of the panel's three findings and instead found that USDOC had acted inconsistently with certain provisions of the SCM Agreement and the GATT 1994.

One interesting finding in this context—on which both the panel and the Appellate Body agreed—concerns regional specificity. Under Article 2 of the SCM Agreement, a subsidy has to be specific to be subject to the disciplines of the SCM Agreement; thus, an investigating authority in a CVD investigation must determine that a subsidy is specific. Specificity means that the subsidy is not spread across and broadly available throughout the entire economy, but instead is skewed to the benefit of a certain company or industry (or a subset of companies or industries).

Under Article 2.2, if a subsidy is available only to enterprises in a particular region, the subsidy is considered to be specific. In this dispute, the panel and the Appellate Body clarified that regional specificity exists even when the subsidy depends on a company having any assets, including those without legal personality (office, branch, production facility) in the specifically designated area, while the headquarters remain in a non-designated area. Put differently, if a subsidy is tied to a company's assets being in a particular region, the subsidy does not cease to be regionally-specific simply because these assets are not formally incorporated.

Another interesting clarification was that the relative size of the designated area is irrelevant. In the instant case, Korea had excluded access to a tax break for assets located in the Seoul Metropolitan area. Put differently, the Korean government created an incentive for companies to locate assets (factories, offices, etc.) outside of the Seoul Metropolitan area, to address the overcrowding of the Metropolitan area. Both the panel and the Appellate Body rejected the argument that a subsidy available throughout 98% of a country's territory should be deemed, effectively, to be as a good as a subsidy that is available throughout 100% of the territory. The territorial size of the region was held not to constitute a relevant criterion for rejecting regional specificity, because this interpretation reflects the function of the specificity criterion—to capture subsidy schemes that "direct resources to certain geographical regions within [a WTO Member's] jurisdiction[], thereby interfering with the market's allocation of resources".[2]

3.3 Observations on the Salient Aspects of the Panel and Appellate Body Report

This report is noteworthy for providing a first, but thorough interpretation of the second sentence of Article 2.4.2. It adds to the anti-zeroing case law and is likely to irritate further the pro-zeroing lobby in the United States; it fits into the broader

[2]Panel Report, *US – Washers*, para. 7.273. Appellate Body Report, *US – Washers*, para. 5.236.

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landscape of trade remedy case law that, by holding investigating authorities to the letter of the Anti-Dumping Agreement and circumscribing their already wide discretion, is unfortunately responsible for the current anti-WTO mood in the rather frighteningly myopic current United States administration and USTR leadership. From that perspective, it is somewhat unfortunate that the Appellate Body report includes a dissenting opinion on the use of zeroing under the third methodology.

4 US – Anti-Dumping Methodologies: Panel Report

4.1 Factual Background

This dispute concerns three different sets of measures. The first relates to the use of the so-called "targeted dumping" methodology in which the United States' Department of Commerce (USDOC) calculated the margin of dumping in three anti-dumping determinations on the basis of a weighted average-to-transaction (WA-T) methodology for the calculation of the margin of dumping. The second set of measures relates to the so-called "Single Rate Presumption" by which the USDOC presumes that all non-market economy (NME) exporters form part of a single entity controlled by the government, and therefore imposes a country-wide antidumping duty rate, unless each exporter individually proves that it operates under market conditions. This challenge was both "as such" and "as applied" in 13 original investigations and 25 administrative reviews. The third set of measures relates to what China calls "the AFA norm", which means that, "whenever the USDOC made a finding that an NME-wide entity failed to cooperate to the best of its ability, it adopted adverse inferences and, in determining the duty rate for the NME-wide entity, selected facts from the record that were adverse to the interests of such entity, and the exporters included within it". This challenge was both "as such" and "as applied" in 13 original investigations and 17 administrative reviews.

4.2 Salient Legal Findings

The Panel report covers a comprehensive analysis of each of the three sets of measures listed above. The Panel found that the USDOC had acted inconsistently with Article 2.4.2 in its application of the WA-T methodology in the three challenged determinations. Moreover, the Panel found that the Single Rate Presumption was inconsistent, as such and as applied, with Articles 6.10 and 9.4 of the Anti-Dumping Agreement. With respect to the AFA norm, the Panel found that the measure as such that China challenged did not constitute a norm of "general and prospective application" and declined to rule on the substantive claims. Moreover, the Panel exercised judicial economy with respect to the as applied claims concerning the AFA norm.

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4.2.1 The Use of the WA-T Methodology in Dumping Calculations (with Zeroing)

The Panel addressed several arguments by China under Article 2.4.2 of the Anti-Dumping Agreement. Most of these arguments were about the specific calculations made in the challenged determinations. The Panel found that the USDOC had made mistakes in its statistical model that led it to conclude erroneously that there existed a "pattern of export prices which differ significantly among different purchasers, regions or time periods" within the meaning of Article 2.4.2. Therefore, the Panel found that the USDOC had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by deciding to apply the exceptional WA-T methodology.

There are at least three relevant issues addressed by the Panel that have systemic implications. First, Article 2.4.2, second sentence, requires that, in using the exceptional WA-T methodology, an investigating authority must provide "an explanation as to why" the differences among purchasers, regions or time periods "cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison". China argued that the USDOC provided such an explanation with respect to weighed average-to-weighted average (WA-WA) but failed to provide an explanation regarding transaction-to-transaction (T-T).

The Panel recalled that a few months earlier, the panel in US – Washing Machines was confronted with the same question—i.e. whether an authority must provide explanations as to why both WA-WA and T-T are not appropriate to account for the differences among purchasers, regions or time periods. That panel had concluded that "the use of the indefinite article 'a' in the explanation clause of Article 2.4.2, combined with the disjunctive 'or,' and the use of the term 'comparison' in the singular . . ., shows that the requisite explanation needs to be provided only in respect of one type of comparison methodology, be it the WA-WA 'or' the T-T methodology".

In this dispute, the Panel took a different approach. It considered that the WA-T methodology in the second sentence of Article 2.4.2 is couched as an "exception" to both "normal" WA-WA and T-T methodologies. Relying on Appellate Body jurisprudence, the Panel concluded that the second sentence of Article 2.4.2 requires that "the explanation needs to be provided with respect to both of the normal methodologies", that is, both the WA-WA and T-T methodologies. Therefore, the Panel interpreted the second sentence of Article 2.4.2 of the Anti-Dumping Agreement differently from the panel in US – Washing Machines.

Second, China challenged the fact that the USDOC applied the WA-T comparison to all export transactions as opposed to the "pattern of export prices which differ significantly among different purchasers, regions or time periods". The Panel noted that the use of the word "individual" in the second sentence of Article 2.4.2 "suggests that the WA-T methodology will apply only to certain 'individual export transactions' and not all export transactions". These "individual export transactions" are those falling within the pattern of export prices that differs among purchasers,

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regions or time periods. Accordingly, the Panel found that the USDOC had acted inconsistently with the second sentence of Article 2.4.2 by applying the WA-T comparison to all export transactions.

Third, the Panel addressed whether the use of zeroing in the WA-T comparison was inconsistent with Article 2.4.2, second sentence, of the Anti-Dumping Agreement. The Panel recalled that the Appellate Body had found that the use of zeroing in the WA-WA and T-T methodologies was inconsistent with the Anti-Dumping Agreement and Article VI of the GATT 1994. Turning to the analysis of the second sentence of Article 2.4.2, the Panel found that this provision requires an investigating authority to compare the weighted average normal value with the prices of "individual" export transactions. This suggests that an investigating authority needs to have "particular regard to the price of each such export transaction, and particularly the intermediate comparison results generated from a comparison of the weighted average normal value with each such transaction, so as to not disregard the 'individual' characteristics of the prices of such transactions". The Panel concluded that the use of zeroing is "proscribed" under the WA-T methodology because "an investigating authority fails to have proper regard to the 'individual' characteristics of the prices of those export transactions which are found to be higher than the normal value".

In concluding that zeroing is impermissible under Article 2.4.2, second sentence, of the Anti-Dumping Agreement, the Panel rejected the United States' argument that, in the absence of zeroing under the WA-T methodology, the second sentence of Article 2.4.2 would "be rendered inutile" as the margins of dumping calculated through the WA-T methodology will be "mathematically equivalent to those calculated through the WA-WA methodology". The Panel concluded that the "mathematical equivalence advocated by the United States holds only in specific circumstances"—i.e. when the authority uses a WA-T for the in-pattern transactions and WA-WA for the out-of-pattern transactions on the basis of the same normal value under both methodologies. The Panel noted that authorities may use normal values under each of these methodologies on the basis of different time periods, in which case the alleged "mathematical equivalence" would not arise.

4.2.2 The Country-Wide Duty Rate for NME Countries

The "As Such" Challenge

China challenged that the USDOC adopted a norm of general and prospective application, called the Single Rate Presumption, which presumes that all of the NME exporters are part of a single entity under government control, and thereby assigned a single, country-wide anti-dumping duty rate, unless each exporter proves to the USDOC that it operates under market conditions. If such showing is made, the exporter would be entitled to an individual anti-dumping duty rate. According to China, the Single Rate Presumption is inconsistent with Articles 6.10 and 9.4 of the Anti-Dumping Agreement.

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The Panel began by assessing whether the alleged "norm of general and prospective application" existed. The Panel analysed over 100 USDOC determinations, the USDOC Policy Bulletin No. 05.1, the Antidumping Manual, a number of Court decisions, and the templates for NME exporters to apply for separate rates to conclude that the Single Rate Presumption, as described by China, constitutes a norm of general and prospective application.

The Panel then assessed China's substantive claims. It took note that a very similar measure imposed by the European Union—i.e. the Individual Treatment test—had been addressed by the panel in EC – Fasteners (China) and EU – Footwear (China), and that the very same USDOC measure challenged by China had already been addressed by the panel in US – Shrimp II (Viet Nam). These panels had all found those measures to be inconsistent with Articles 6.10 and 9.4 of the Anti-Dumping Agreement.

The Panel observed that Article 6.10 requires that, "as a general rule", exporters be entitled to an individual margin of dumping and that this obligation is subject to the limited exceptions set out in the WTO covered agreements. The Panel then set out to ascertain whether paragraph 15 of China's Accession Protocol contained one such exception and recalled that the Appellate Body had already held that paragraph 15 "establishes special rules regarding the domestic price aspect of price comparability", but does not contain "an open-ended exception that allows WTO Members to treat China differently for other purposes such as the determination of export prices or individual versus country-wide margins and duties".

On the basis of the existing WTO jurisprudence, the Panel concluded that nothing in the covered agreements allows authorities to depart from the general rule to grant individual margins of dumping to exporters on the grounds that those exporters do not operate under market conditions. The Panel thus found that the Single Rate Presumption is inconsistent with Article 6.10 of the Anti-Dumping Agreement. Similarly, because the Single Rate Presumption precludes the USDOC from specifying individual antidumping duties and name the individual suppliers of the product concerned, as required under Article 9.4 of the Anti-Dumping Agreement, the Panel found that the measure at issue is also inconsistent with that provision.

On the one hand, it could be said that this Panel report limited itself to reapplying the existing body of jurisprudence that had been developed in relation NME-wide duty rates—i.e. in EC – Fasteners (China), EU – Footwear (China), and US – Shrimp II (Viet Nam). On the other hand, the Panel report addressed novel arguments concerning the interactions between different paragraphs of the Working Party Report on China's WTO accession, such as paragraphs 26, 43 through 49, 171 through 176, and 147 through 152. The analysis of these paragraphs, however, did not change the conclusion that the Single Rate Presumption is inconsistent with Articles 6.10 and 9.4 of the Anti-Dumping Agreement.

The "As Applied" Challenge

As explained, China also challenged the application of the Single Rate Presumption in 38 anti-dumping determinations—i.e. 13 original investigations and 25 administrative reviews. The Panel found that the Single Rate Presumption was effectively

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applied in these determinations and therefore concluded that such application was inconsistent with Articles 6.10 and 9.4 of the Anti-Dumping Agreement.

4.2.3 Whether the AFA Norm Constitutes a Norm of "General and Prospective Application"

The "As Such" Challenge

China also challenged the so-called AFA norm, which is an "unwritten" norm by which, "whenever the USDOC made a finding that an NME-wide entity failed to cooperate to the best of its ability, it adopted adverse inferences and, in determining the duty rate for the NME-wide entity, selected facts from the record that were adverse to the interests of such entity, and the exporters included within it". The Panel analysed the relevant excerpts in the Anti-Dumping Manual, decisions by the US Court of International Trade and 73 USDOC anti-dumping determinations to conclude that China had established the "precise content" of the unwritten norm it was challenged.

Next, the Panel assessed whether that unwritten norm had "general and prospective application". The Panel found that the Antidumping Manual was couched in permissive terms, whereas the decisions by the US Court of International Trade could not support China's assertion that the alleged AFA norm had general and prospective application. With respect to the 73 USDOC determinations, the Panel "agree with China that the USDOC's treatment of a non-cooperating NME-wide entity in the 73 determinations reflects more than mere repetition of conduct". However, relying on the Appellate Body report in Argentina – Import Measures, the Panel noted that the "prospective application" of a measure "must achieve a certain degree of security and predictability typically associated with rules or norms" that goes beyond mere practice. The Panel did not see that "degree of security and predictability" in the evidence provided by China and therefore concluded that China had failed to establish that the AFA norm constituted a norm of general and prospective application. As a consequence, the Panel declined to rule on the substantive claims under Article 6.8 and paragraph 7 to the Anti-Dumping Agreement.

The "As Applied" Challenge

With respect to China's claim concerning the application of the AFA norm in 30 anti-dumping determinations—i.e. 13 original investigations and 17 administrative reviews—the Panel first recalled that these 30 determinations were part of the 38 determinations in respect of which the Panel had previously found to be inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement because the determination that an NME-wide entity existed was incorrectly based on a presumption—i.e. the Single Rate Presumption.

Moreover, the Panel took note of the fact that the application of the AFA norm in the 30 challenged determinations proceeded on the premise that there was an NME-wide entity to which adverse facts available would be applied. Therefore,

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since the existence of the NME-wide entity in each of these determinations was incorrectly presumed, the Panel found no need to address the additional claims regarding the inconsistency of the AFA norm with Article 6.8 and paragraph 7 to the Anti-Dumping Agreement. For the Panel, "[a]ny new or modified measure that the United States may adopt to implement the Panel's findings regarding the application of the Single Rate Presumption in the 30 challenged determinations must accord with Articles 6.1 and 6.8, paragraphs 1 and 7 of Annex II, and the first sentence of Article 9.4 of the Anti-Dumping Agreement". Therefore, the Panel exercised judicial economy with respect to the application of the alleged AFA norm in 30 anti-dumping determinations.

5 EC – Fasteners (21.5): Appellate Body Report

5.1 Facts of the Case

This is a compliance proceeding regarding an anti-dumping measure taken to comply with recommendations and rulings of the Dispute Settlement Body (DSB) in EC – Fasteners (China). "Fasteners" is generic term for bolts, screws and washers.

Upon the adoption of the panel and the Appellate Body reports in the original dispute on 23 July 2012, the European Union initiated a "review investigation" to implement the DSB recommendations and rulings. The review investigation resulted in Council Implementing Regulation (EU) No 924/2012 (the implementing measure), which concluded that "the injurious dumping determined in the original investigation [wa]s confirmed", and revised the anti-dumping rates applicable to certain fasteners from China.

China filed a WTO complaint under Article 21.5 of the DSU arguing that the implementing measure was inconsistent with Articles 2.4, 2.4.2, 3.1, 4.1, 6.1.2, 6.2, 6.4, 6.5, 6.5.1 and Article VI:1 of the GATT 1994.

The Panel found that the implementing measure was inconsistent with Articles 2.4, 2.4.2, 3.1, 4.1, 6.2, 6.4, and 6.5 of the Anti-Dumping Agreement. The European Union appealed all of the Panel findings under these provisions. In its report, Appellate Body upheld the Panel's findings of inconsistency.

5.2 Salient Legal Findings

The Appellate Body report addressed a vast array of issues under the Anti-Dumping Agreement. However, this dispute generally concerned legal issues on which there is already extensive jurisprudence, including in the original panel and Appellate Body reports. The following sections highlight certain discrete developments that the Appellate Body report in this dispute presented.

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5.2.1 Ex Post Explanations in Confidential Information Under Article 6.5 of the Anti-Dumping Agreement

The Panel concluded that the European Commission (the Commission) acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by according confidential treatment to information concerning the list and characteristics of the Indian company's fasteners. This information was the basis on which the Commission calculated normal value. The Panel found that the Commission accorded confidential treatment to this information without conducting an objective assessment of whether such information was confidential by nature or whether the Indian company had provided good cause.

The European Union appealed that finding arguing, inter alia, that it had "explained repeatedly" to the Panel that there was "strong competition between Pooja Forge and the Chinese producers in the after-sales market in India", and that a "significant" risk existed "in view of the particularly competitive situation in the India market". The Appellate Body observed that the European Union's argument constituted "ex post rationalization" and that "it would have been incongruous with the applicable standard of review for the Panel to have determined whether the Commission had objectively assessed whether Pooja Forge had shown good cause for the confidential treatment of the information at issue on the basis of ex post rationales provided by the European Union in the course of the current WTO dispute settlement proceedings".

The Appellate Body thus concluded that the requirement in Article 6.5 of the Anti-Dumping Agreement to provide "good cause" before granting confidential treatment is violated if such showing is lacking in the request for confidential treatment and in the authority's published reports and related supporting documents.

5.2.2 The "Dialogue" Required in Article 2.4, Last Sentence, of the Anti-Dumping Agreement

The Panel found that the Commission had acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to put the Chinese producers on notice with regard to the type information that was required for purposes of the comparison between normal value and export prices for purposes of the last sentence of Article 2.4.

On appeal, the Appellate Body observed that Article 2.4 of the Anti-Dumping Agreement consists of several sentences. The first refers to the obligation "to ensure a fair comparison" between export price and normal value. The Appellate Body also held that exporters play a role in this process—specifically they "bear the burden of substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4".

The Appellate Body then went on to analyse the last sentence of Article 2.4, which requires that the authority "indicate to the parties in question what information

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is necessary to ensure a fair comparison". This provision provides for a "dialogue" between the authority and the interested parties as to what information is required to substantiate requests for adjustments in the comparison under the first sentence of Article 2.4.

In addition, the Appellate Body agreed with the Panel in finding that this dialogue under the last sentence of Article 2.4 is of "particular relevance" in the context of an investigation involving an NME, given that normal value is not based on prices or costs in the country under investigation.

The Appellate Body further considered that, normally, the dialogue under the last sentence of Article 2.4 must take place prior to issuing the essential facts under Article 6.9 of the Anti-Dumping Agreement. However, it did not foreclose the possibility that, on certain occasions, the essential facts letter could be the appropriate vehicle through which to comply with the procedural requirements in the last sentence of Article 2.4 of the Anti-Dumping Agreement.

Accordingly, the Appellate Body upheld the Panel's interpretation of the last sentence of Article 2.4 of the Anti-Dumping Agreement.

5.2.3 The Issue of Whether the Authority May Disregard Certain Product Models in Conducting the Comparison Required in Article 2.4.2

Another interesting issue in this dispute is the fact that the Commission disregarded transactions in relation to certain product types which did not match any of products sold by the Indian company, whose data was used to calculate the normal value. The Panel found that the Commission's approach was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement because, in its view, once a product has been defined by the authority, "a margin of dumping that excludes certain export transactions [within the like product] cannot be said to have been calculated for the investigated product as a whole" as required under Article 2.4.2.

On appeal, the Appellate Body recalled that an authority may, in using the WA-WA methodology, adopt the "multiple averaging" approach whereby the like product is divided into several categories or products types. However, the Appellate Body agreed with the Panel that "the term 'all comparable export transactions' means that a Member 'may only compare those export transactions which are comparable, but [] it must compare all such transactions'", and that, "where an investigating authority has chosen to undertake multiple comparisons, the results of all of those comparisons must be taken into account in order to establish margins of dumping for the product as a whole".

For the Appellate Body, once the like product has been defined, an authority is not allowed to exclude transactions of products within that definition since this would not be consistent with the requirement in Article 2.4.2 that "all comparable export transactions" be taken into account. If for certain products, no matching transactions are found on the export price side of the comparison, the Appellate

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Body recalled that the authority could under Article 2.4 make adjustments to account for the differences that affected price comparability.

Accordingly, the Appellate Body upheld the Panel's interpretation and application of Article 2.4 with respect to a situation in which an authority excluded certain transactions of products falling within the like product on the grounds that no matching transactions are available.

5.2.4 The Domestic Industry Defined as Those Companies That Were Cooperating and Agreed to Be Included in the Injury Sample

The Panel found that the Commission acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement by defining the domestic industry by reference to the domestic producers that explicitly stated their agreement to be part of the injury sample. The Panel considered that the Commission's approach suffered from "a self-selection process that introduced a material risk of distortion" in the definition of domestic industry.

In upholding the Panel, the Appellate Body recalled its previous jurisprudence to the effect that the conditioning of inclusion in the domestic industry definition on the willingness to be included in the injury sample creates a "material risk of distortion" because it only takes into account those producers willing to cooperate and excludes those that oppose the investigation or do not wish to cooperate. For the Appellate Body, the Commission's approach conflates the definition of the domestic industry and the selection of the injury sample; the former is the universe of producers that is by definition wider than the sample of cooperating producers.

Accordingly, the Appellate Body upheld the Panel's finding that the Commission's approach to the definition of the domestic industry is inconsistent with Article 4.1 of the Anti-Dumping Agreement because it introduced "a material risk of distortion"; and with Article 3.1 of the Anti-Dumping Agreement because the injury determination was based on an erroneously defined domestic industry.

The Panel and the Appellate Body reports were adopted by the DSB on 12 February 2016. At the DSB meeting of 23 March 2016, the European Union informed the DSB that it had repealed the anti-dumping duties on fasteners from China.

6 India – Solar Panels: Panel Report and Appellate Body Report

6.1 Factual Background

The measures at issue in this dispute were local content requirements imposed by India under the so-called Jawaharlal Nehru National Solar Mission. The declared

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objective of the Indian government was to turn India into a global leader in solar energy as well as to contribute to efforts to combat climate change. The Solar Mission in turn was part of the broader "Made in India" campaign, aiming to encourage both Indian and foreign companies to produce in India.

The measures carried a strong sense of déjà-vu for those familiar with the Canada – Feed-In Tariff dispute, decided in 2013. The Indian government would enter into long-term power purchase agreements with solar power developers, guaranteeing a certain rate of return for 25 years. In order to be eligible for these contracts, the energy producers at issue were compelled to use in their production facilities certain Indian-manufactured cells and modules. These local content requirements were tightened over time. In the early stages of the Solar Mission programme, a portion of solar cells and modules was permitted to be sourced from abroad; in the later stages, the local content requirement became more extensive, until virtually no foreign energy-generating equipment could be used without losing access to the long-term power purchase agreement. The dispute was brought by the United States. The dispute was brought due to the significant size of the Indian market; in addition, the United States expected a strong precedential effect, given that local content rules of this type (including in the renewable energy arena) are wide-spread among WTO Members.

6.2 Salient Legal Findings

6.2.1 Article 2 of the TRIMS Agreement and Articles III:4 and III:8(a) of the GATT 1994

The United States challenged the measures under Article 2 of the TRIMs Agreement which provides that "no Member shall apply any TRIM that is inconsistent with the provisions of Article III of the GATT 1994". The TRIMs Agreement includes an "illustrative list" of measures that are inconsistent with Article III:4 of the GATT 1994. The type of measures relevant for this dispute were "those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products of domestic origin or from any domestic source".

The Panel therefore examined Article III:4. Among India's arguments, a prominent line of defense was that the measures at issue were government procurement measures within the meaning of Article III:8(a), which would have removed them from the scope of Article III:4 and thus from the scope of the illustrative list under the TRIMS Agreement. India's main problem was that—even assuming the government's purchase and resale of electricity could be qualified as "purchased for governmental purposes and not with a view to commercial resale"—the Appellate Body had held in Canada – Feed-in Tariffs that the product procured and the product discriminated had to be in a "competitive relationship". In the India – Solar Panels dispute, just like in Canada – Feed-in Tariffs, the product discriminated against and

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the product procured were not the same and did not appear to be in a competitive relationship. The product discriminated against was the energy-generating equipment, whereas the product procured by the government was electricity. India's creative arguments that the generation equipment was an "integral input" to the purchased electricity and that, by purchasing electricity generated from the cells and modules at issue, the Indian government was effectively procuring the cells and modules, fell on deaf ears. The panel thus found that the Indian local content requirements violated India's obligations under the GATT Article III:4 and the TRIMs Agreement, and were not covered by the government procurement derogation in Article III:8(a).

The Appellate Body upheld the Panel finding. It emphasized that, although inputs can play a role in the determination whether two products are in a competitive relationship, a consideration of inputs does not displace the competitive relationship standard. The Appellate Body also found that the measures at issue were not distinguishable from those at issue in Canada – Feed-In Tariffs.

6.2.2 India's Defense Under Article XX(j)

As another line of defense, India relied on the rarely-invoked sub-paragraph (j) under Article XX. Article XX(j) provides that WTO Members may maintain measures "essential to the acquisition or distribution of products in general or local short supply". The historical purpose of this provision was to ensure that, in the post-World War II period, governments would be able to restrict (in particular) exports, in order to ensure that products in short supply would be available for the local population. The operation of Article XX(j) is subject to a proviso that that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures "shall be discontinued as soon as the conditions giving rise to them have ceased to exist." Moreover, the last sentence of Article XX(j) envisaged a review process by the GATT Membership, which had been extended multiple times—in an inconclusive manner—during the GATT era.

India argued before the Panel that solar cells and modules are "products in general or local short supply" in India, within the meaning of Article XX(j) on account of its lack of domestic manufacturing capacity. The panel rejected this defense. In essence, the panel reasoned that lack of domestic manufacturing capacity was distinct from a shortage of a particular product, because Article XX(j) does not distinguish between domestic and imported products. Thus, as long as imported products are available to meet local demand, short supply within the meaning of Article XX(j) does not exist. The Panel also rejected India's argument that Article XX(j) could cover products that could, at some point in the future, become in short supply.

The Panel findings were upheld by the Appellate Body. The Appellate Body agreed with the Panel that Article XX(j) does not limit the scope of potential sources of supply to "domestic" products manufactured in a particular country. It thus rejected India's argument that a lack of "sufficient" domestic manufacturing capacity

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will necessarily constitute a product "shortage" in a particular market. It also found that India had not identified any disruptions in imports, such that it was not clear why domestic manufacturing capacity would be required to address future demand. Like the Panel, the Appellate Body therefore dismissed India's defence under Article XX (j).

6.2.3 India's Defense Under Article XX(d)

India also invoked as a defense Article XX(d). Under this provision, the defendant has to demonstrate that the incriminated measure is a tool to enforce another, WTO-consistent measure. India argued that the local content requirements were measures necessary to enforce certain both domestic and international legal provisions related to energy security and renewable energy targets.

The case offered an interesting opportunity for the panel and the Appellate Body to define the scope of measures that qualify as "laws and regulations" to be enforced through the challenged measure.

Among the international measures listed by India featured the preamble of the WTO Agreement, the UN Framework Convention on Climate Change and the Rio Declaration. The main question was whether these instruments had been incorporated into Indian law or had direct effect, as this was found by the Panel to be the key criterion under Article XX(d) in the light of the Appellate Body's findings in Mexico – Softdrinks. The panel denied that question. On the domestic side, the main issue was whether the measures invoked by India constituted legally enforceable rules of conduct in the Indian legal system, as opposed merely programmatic objectives and hortatory norms that would have to be further specified and elaborated on by the Indian legislature or regulatory agencies. Applying this criterion, the panel rejected the National Electricity Policy, the National Electricity Plan and the National Action Plan on Climate Change as "laws or regulations" under Article XX (d). It found only Article 3 of the Indian Electricity Act to be relevant, which was a provision that mandates the Government to prepare a national Electricity Policy and tariff policy. The panel was sceptical whether Article XX(d) covered measures taken by the Government towards its own compliance with a provision (as opposed to measures taken to ensure compliance of legal subjects other than the Government, such as corporations or private citizens). In any event, the panel found that it could not discern any link between Article 3 of the Electricity Act and the domestic content requirements at issue.

Here again, the Appellate Body largely confirmed the panel's approach. The Appellate Body noted that in determining whether a responding party had identified a rule that falls within the scope of 'laws or regulations' under GATT Article XX(d), a panel should consider factors such as the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member. The panel should also consider the degree of specificity of the relevant rule, whether the rule is legally enforceable, including, e.g. before a court of law; whether the rule has

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been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and the penalties or sanctions that may accompany the relevant rule. If based on these criteria the measure appeared to be "hortatory, aspirational, declaratory, and at times solely descriptive", it did not qualify under Article XX(d). The Appellate Body cautioned, however, that to the extent that the panel may have suggested that the laws or regulations were limited solely to legally enforceable rules of conduct, this would be incorrect. It is not entirely clear what precisely the Appellate Body meant in this context, and the Appellate Body Report does not contain an example to illustrate this distinction.

The Appellate Body also agreed with the panel ruling on the international measures, finding that the international instruments India identified were not rules that form part of its domestic legal system and fall within the scope of "laws or regulations" under Article XX(d).

6.2.4 Reflections on the Salient Aspects of the Panel and Appellate Body Report

This case is interesting as a rare and probably only occasion on which Article XX (j) was analyzed by the WTO dispute settlement bodies. Given its narrow scope and the interpretation resulting from this dispute—that "shortage" is to be assessed taking into account imports—Article XX(j) will likely return to its existence of dormant oblivion in the dark recesses of Article XX.

The case also confirmed the previous findings under Article III:8(a) of the GATT 1994, that for the government procurement exception to become applicable, the product discriminated against must be the same as, or in a competitive relationship with, the product procured. The one remaining question remaining open in this area is, as the Appellate Body indicated in footnote 523 of the Report in Canada – Feed-in Tariffs, whether Article III:8(a) applies in the context of inputs incorporated into the procured goods. For instance, assume that the government procures cars, but stipulates that only cars with domestic tires are eligible. Under the Appellate Body's "competitive relationship" standard, this scenario may not benefit from the Article III:8(a) derogation, because the discriminated product is tires, but tires are not in a competitive relationship with cars. On one view, this is desirable, because the scope of Article III:8(a) should not be stretched too far. On another view, excluding this scenario from the derogation effectively requires the procuring government to exclude foreign cars altogether from the procurement process, rather than only the foreign tires. Hence, a procuring government (not subject to the Government Procurement Agreement) wishing to support its domestic tire makers cannot choose to limit the protectionist effect of its procurement policies to those tires, but must instead move the discrimination to the much higher level of discriminating against foreign cars. It is not clear that this is a good idea from a policy stand-point; it may make sense to permit a government to limit the discrimination to an input. The

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Appellate Body may have been hinting at this scenario in footnote 523. While this expands the scope of application of Article III:8(a), this expansion can be clearly policed and does not lead to a slippery slope, at the end of which a scenario like in India – Solar Panels would escape the strictures of Article III:4. There is a distinction between expanding Article III:8(a) to cover inputs, on the one hand, and expanding it to cover upstream generation equipment, on the other hand.

Finally, this case is interesting in how it further clarifies the scope of "laws or regulations" under Article XX(d), both with respect to domestic and international measures.

7 EC – Large Civil Aircraft (21.5): Panel Report

7.1 Facts of the Case

This dispute concerns the EU's alleged failure to comply with the findings of the Panel and the Appellate Body in the EC – Large Civil Aircraft case, which concerned certain illegal subsidies granted by the EU to Airbus large civil aircraft. In particular, the US argued in this compliance dispute that (1) the EU had failed to take appropriate steps to remove the adverse effects or withdraw the subsidies under dispute in the original proceedings; and that (2) two series of measures bearing a close connection with the original proceedings, the "Launch Aid"/"Member State Financing" (LA/MSF) contracts for Airbus A350XWB and A380 respectively, constituted new prohibited export and/or import substitution subsidies.

7.2 Salient Legal Findings

The Panel conducted a four-step analysis of the US' claims. First, it reviewed a series of actions which the EU claimed to constitute "steps" taken to secure compliance with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings (Sect. 7.2.1); thereafter, it examined whether the A350XWB LA/MSF measures fell within the scope of the dispute (Sect. 7.2.2), to then proceed with the merits of the prohibited subsidy claims in respect of the A350XWB and A380 LA/MSF measures (Sect. 7.2.3). Finally, the Panel addressed the EU's alleged failure to "withdraw" the subsidies under dispute or "take appropriate steps to remove [their] adverse effects" (Sect. 7.2.4).

7.2.1 EU Actions Constituting Actual Compliance Steps

In its compliance communication of 1 December 2011, the EU had identified no less than 36 actions allegedly taken to comply with the DSB recommendations and

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rulings. After carefully examining the purported compliance steps, the Panel opined that only two of them could be said to be grounded in any specific conduct related to the subsidies or their adverse effects, i.e. the imposition of additional fees for the use by Airbus of the Bremen Airport runway extension, and the revision of the terms of Airbus' lease agreement regarding on use of the Mühlenberger Loch industrial site in Hamburg.

With respect to the remaining 34 actions, the Panel noted that, rather than constituting actual compliance steps, they represented but an assertion of facts or presentation of arguments in support of the following positions on the law advanced by the EU: "(a) the adopted rulings and recommendations give rise to no compliance obligation at all, under the terms of Article 7.8 of the SCM Agreement, with respect to expired subsidies; (b) an expired subsidy means that it has been "withdrawn" for the purpose of Article 7.8 of the SCM Agreement; (c) an expired subsidy cannot cause adverse effects in the context of a proceeding initiated under Article 21.5 of the DSU; and (d) the passage of time, and events that have taken place over the passage of time, have diluted the causal link established in the original proceeding such that the challenged subsidies are no longer a 'genuine and substantial' cause of adverse effects in the post-implementation period."

7.2.2 Scope of the Compliance Dispute

In the original dispute, the US had failed to establish the existence, as of July 2005, of an LA/MSF commitment measure for the Original A350 constituting a specific subsidy within the meaning of Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Subsequently, Airbus abandoned the A350 programme, and the governments of France, Germany, Spain as well as the UK turned began to support the A350XWB programme instead. As LA/MSF for the A350XWB did not exist at the time of the original dispute, naturally, no findings were made in the respect to the same.

As the A350XWB LA/MSF measures had not, nor could they have been, declared by the EU to constitute measures taken to comply with the original proceedings, in order to determine whether any claims related thereto pertained to the compliance dispute the Panel was called upon to apply the 'close nexus' text, requiring the existence of a 'particularly close relationship' between the declared measures, the measures in casu and the original recommendations and rulings. As a threshold issue, the Panel clarified that this was not to be equated to an alleged requirement of an existence of "an overarching measure derived from the identification of an alleged pattern in instances of the application of such measure". The Panel determined that, in the instant case, such "particularly close relationship" existed since: (1) both the A350 and A350XWB measures were loan agreements; (2) they contained the same core repayment terms; (3) they had been concluded between virtually the same parties, for the same purpose of financing Airbus large civil aircraft; (4) the effects of the new measures could undermine the compliance with the original ruling; (5) the new aircraft would replace the aircraft under dispute

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in the original proceedings; and (6) the adoption of the A350XWB measures before the ruling on the A350 measures was not capable of severing the link of the nature and effects of the A350XZB measures with and the original recommendations and rulings and the EU's compliance acts.

7.2.3 Issues Concerning Prohibited Subsidies

As a preliminary matter, the Panel was first required to determine whether the United States' prohibited subsidy claims fell within the scope of the proceedings. With respect to the claims under Article 3.1(a) of the SCM Agreement in relation to certain A380 LA/MSF measures, the Panel reasoned that, even though the Appellate Body had addressed but not completed the analysis of the same in the original proceedings, those could be brought before the compliance Panel, for "to accept that the United States' unresolved Article 3.1(a) claims should be excluded because of the absence of any relevant 'measures taken to comply', in a situation where the A380 LA/MSF measures are already properly before us would unduly elevate form over substance." In contrast, the Panel found that claims brought under Article 3.1(a) of the SCM Agreement in relation to the A380 LA/MSF measures, which had neither been introduced before the original Panel nor did they relate to measures taken to comply with the latter's findings, were outside the scope of the dispute.

On substance, the Panel rejected both the 3.1(a) (for A380 and A350XWB LA/MSF) and 3.1(b) (A350XWB) subsidy claims. In this connection, it first examined whether the A350XWB measures conferred a benefit (as the US did not dispute their characterization as financial contributions), concluding after a long analysis of the general corporate borrowing rates and project-specific risk premia that the rates expected under the A350XWB LA/MSF contracts were lower than the relevant market benchmark.

Having found that the A350XWB measures constituted subsidies, and the A380 measures constituting subsidies as per the findings of the original Panel and the Appellate Body, the 21.5 Panel turned to its de facto contingency analysis under Article 3.1(a) of the SCM Agreement. It found that, while the subsidies were granted in anticipation of export performance, the relevant Ratios Analyses did not demonstrate that the measures were contingent upon it. On Article 3.1(b), the Panel noted that payment under the contracts so long as the manufacturer engaged in domestic production activities was neither evidence of de jure nor of de facto contingency. In particular, drawing on Article III:8(b) GATT 1994 as relevant context, the Panel held in so many words that "[the provision] confirms that, without more, the mere payment of subsidies to firms so long as they engage in domestic production activities should not be interpreted as imparting to such subsidies a discriminatory element as among domestic and foreign goods in a manner that Article III may discipline." As such, the Panel dismissed the claim of contingency on import substitution under Article 3.1(b) of the SCM Agreement.

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7.2.4 The EU's Failure to Take Appropriate Steps to Withdraw the Subsidy or Remove Its Adverse Effects

Upon dismissing the prohibited subsidy claims, the Panel turned to Article 7.8 of the SCM Agreement and the US' contention that the EU had not taken "appropriate steps to remove the adverse effects or withdraw the subsidy", as required by that provision. In essence, the Panel was requested to determine whether the EU had brought its measures into conformity with its obligation under Article 5 of the SCM Agreement not to cause adverse effects to the interests of other Members though its subsidies.

The EU averred that it had complied with its obligations under Article 5, and consequently Article 7.8 of the SCM Agreement, as the lives of the French, German and Spanish LA/MSF subsidies for Airbus A300B/B2/B4, A300–600, A310, A320, A330/A340 as well as the UK subsidies for A320 and A330/A340 had come to an end. This raised the question of whether the coming to an end of the life of a subsidy is tantamount to withdrawal for the purposes of Article 7.8 of the SCM Agreement, where the subsidy's long-term adverse effects persist.

The Panel reasoned that, where a subsidy ceases to exist not due to an "intervening event", such as its repayment or alignment with a market benchmark, but rather, because the total period of time over which its projected value is expected to materialize passively transpires, such subsidy is not "withdrawn" for the purposes of Article 7.8 of the SCM Agreement. By and large, the Panel suggested that it would be absurd to equate the materialization, i.e. the full granting of a subsidy, to a withdrawal. This line of reasoning appears to blur the distinction between the withdrawal of a subsidy and the removal of its adverse effects. Indeed, in the instant dispute, it was the long-term adverse effect of the subsidies that continued to exist, rather than the subsidy itself. The above interpretation essentially reads into Article 7.8 of the SCM Agreement a requirement to remove the subsidy and its adverse effects, rather than providing Members with a choice between the two options.

Moreover, and in support of the above, the Panel stressed the fact that Article 5 of the SCM Agreement, with which compliance was sought, was "effects-based"; as such, compliance with the same could not be found where the subsidy in question expired before the implementation period, yet its effects persisted. In consequence, the Panel found that the EU had failed to comply with its obligation to withdraw the relevant subsidies under Article 7.8 of the SCM Agreement.

The Panel then proceeded to an examination of the adverse effects produced by the LA/MSF subsidies, to ultimately conclude that the EU had failed to take appropriate steps to remove the same since:

a) the "product" effects of the challenged LA/MSF subsidies were a "genuine and substantial" cause of displacement and/or impedance of United States LCA in the markets for single-aisle LCA in the EU, Australia, China and India; twin-aisle LCA in the EU, China, Korea and Singapore; and very large LCA in the EU, Australia, China, Korea, Singapore and the United Arab Emirates;

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b) the "product" effects of the LA/MSF were a "genuine and substantial" cause of significant lost sales in the global markets for single-aisle, twin-aisle and very large LCA;
c) the effects of the aggregated capital contribution subsidies and certain regional development grants "complemented and supplemented" the "product" effects of the aggregated LA/MSF subsidies and, therefore, were a "genuine" cause of serious prejudice to the interests of the US.

8 US – Tax Incentives: Panel Report and Appellate Body Report

8.1 Facts of the Case

This is one of a series of disputes arising in connection with subsidies granted by the EU and the US to their respective civil aircraft industries. In this case, the EU challenged seven tax measures for civil aircraft introduced by the state of Washington under Engrossed Substitute Senate Bill (ESSB) 5952. The latter amended and extended measures introduced in 2003 under House Bill (HB) 2294, which had previously formed the basis of the US – Large Civil Aircraft dispute (2nd complaint).

In particular, the EU challenged three measures pertaining to the state of Washington's business and occupation (B&O) tax, i.e.: a low B&O tax rate of 0.2904% for specified business activities; B&O tax credits for aerospace product development; and B&O tax credits for property and leasehold excise taxes (property taxes on the use of public property by a private party, the property in this case being commercial airplane manufacturing facilities). Further, the EU challenged two measures pertaining to its retail sales tax, i.e. its principal source of tax revenue, collected from customers by businesses making retail sales in Washington State, as well as its use tax, i.e. a tax on the use of goods or certain services when sales tax has not been paid. The EU specifically took issue with exemptions from such taxes for certain computer hardware, software, and peripherals, as well as certain construction services and materials. Finally, the EU complained against exemptions from leasehold excise and personal property taxes, both in connection with port district facilities used to manufacture superefficient airplanes.

The EU maintained that all seven measures identified above constituted subsidies contingent upon the use of domestic over imported goods, contrary to Articles 3.1 (b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The EU developed its argumentation by reference to two 'siting' provisions under ESSB 5952, i.e. provisions governing the availability of the aerospace tax measures. The First Siting Provision related to all of the measures, rendering them contingent upon the siting of a significant commercial airplane manufacturing program in the state of Washington. In this connection, the parties agreed that the Boeing 777X was the relevant version or variant of commercial airplane that served

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as the basis for fulfilment of the First Siting Provision, and that the latter had in fact been fulfilled. The Second Siting Provision concerned specifically the continued availability of the B&O aerospace tax rate, which it made contingent upon the siting of “any final assembly or wing assembly” of that commercial airplane which served as the basis for fulfilment of the First Siting Provision.

8.2 Salient Legal Findings

The Panel found that a financial contribution existed under all measures, and that a benefit was thereby conferred to the domestic industry (Sect. 8.2.1). Moreover, the Panel determined that the First and Second Siting Provisions, whether considered separately (Sects. 8.2.2 and 8.2.3) or jointly (Sect. 8.2.4), did not make any of the subsidies de jure contingent upon the use domestic over imported goods. Ultimately, the Panel found that the Siting Provisions, considered jointly, made the reduced B&O tax rate de facto contingent upon the use of domestic over imported goods (Sect. 8.2.5).

8.2.1 The Aerospace Tax Measures Are Subsidies Within the Meaning of Article 1 of the SCM Agreement

The EU argued that the aerospace tax measures amounted to financial contributions in the form of revenue foregone under Article 1.1(a)(1)(ii) of the SCM Agreement. As a preliminary matter, the Panel clarified that when challenged “as such”, “[t]he foregoing of revenue is constituted by the government’s promise to do so, and not only by particular instances of it being done”, concluding that the foregoing of revenue in the future, as it had been pleaded in casu, could amount to a financial contribution. Thereafter, it determined whether each of the challenged measures amounted to such foregoing of revenue. First, it addressed the B&O tax rate of 0.2904% applicable to the manufacture and sales of commercial airplanes and components, as well as the manufacture and sale of tooling for use in manufacturing of commercial airplanes and components. It determined that the general B&O rates applying to the activities in question should serve as the benchmark against which the 0.2904% rate should be juxtaposed. The latter being significantly higher than the former, the Panel concluded that the rate at issue accounted for revenue foregone.

The Panel then addressed the B&O tax credit for aerospace product development, i.e. a credit applied against a taxpayer’s B&O tax liability, calculated as 1.5% of expenditures on the development of commercial airplanes and their components, as well as machinery and equipment used in relation to commercial airplanes and their components. As with the B&O aerospace tax rate, the general B&O tax regime (rather than other types of taxation that existed in Washington State) was found to constitute the appropriate benchmark for the B&O tax credit for aerospace product development. The Panel then readily found that the credit offset B&O tax liability that would otherwise be due in the absence of the credit, thus being tantamount to

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revenue foregone. In respect of the B&O tax credit for property and leasehold excise taxes, the Panel followed the same line of reasoning and reached the same conclusion.

Thereupon, the Panel turned to the computer sales and use tax exemptions. It acknowledged that the sales and use taxes evidenced a tax regime structure with specific exemptions targeted at defined beneficiaries. It observed, however, that exemptions should not be of greater value than the rules; consequently, it determined that the generally applicable sales and use taxes should serve as a benchmark for comparison, and that exemptions therefrom amounted to revenue foregone. In respect of the construction sales and use tax exemptions, the Panel largely followed the same reasoning.

Lastly, the Panel addressed the leasehold excise tax exemption, and determined the relevant benchmark to be the 12.84% leasehold excise tax that would otherwise apply. Following an analysis similar to that performed for the computer and construction sales and use tax exemptions, the Panel concluded that a financial contribution existed in the form of revenue foregone. The same conclusion was then reached in respect of the leaseholder property tax exemption. The Panel, finally, determined that a benefit was conferred under all measures, since the relief from taxation otherwise was neither generally available to market participants, nor did it exist as a general condition in the marketplace, which was enough to satisfy the "better off" test. Consequently, all measures constituted subsidies under Article 1 of the SCM Agreement.

8.2.2 The First Siting Provision, Considered Separately, Does Not Make the Measures De Jure Contingent

The Panel then turned to the examination of the element of contingency upon the use of domestic over imported goods, to ascertain whether the subsidies were prohibited under Article 3.1(b) of the SCM Agreement. It first examined the EU's claim that the subsidies were de jure contingent as per the text of ESSB 5952, and in this context, it first looked into whether the subsidies were contingent by virtue of the First Siting Provision, considered separately. It found that contingency could neither be read directly into the law, nor made out of it by necessary implication.

In particular, the Panel determined that the ESSB 5952 made the measures contingent upon a positive determination by the Department of Revenue of the state of Washington that a "significant commercial airplane manufacturing program" had been sited, between 1 November 2013 and 30 June 2017, in the state of Washington. I.e., upon the manufacture within the state of Washington of (1) a commercial airplane with a carbon fibre composite fuselage, or carbon fibre composite wings, or both; and (2) fuselages and wings for such commercial airplanes.

The Panel did not see in the text of the First Siting Provision a requirement that would make the measures contingent upon a determination that domestic goods will be used, noting that, rather, the Provision was silent as to the use of imported or domestic goods. Further, it reasoned that nothing in the language of the First Siting

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Provision would per se and necessarily exclude the possibility for the airplane manufacturer to use wings or fuselages from outside the state of Washington. Lastly, it observed that the First Provision did not prevent the manufacturer from terminating all production of wings or fuselages and only using wings and fuselages manufactured outside the state of Washington, upon having received the relevant financial contributions. In essence, the only contingency the Panel could detect was that the manufacturing be sited within the state of Washington, rather than that domestic products be used; as such, it found no de jure contingency within the meaning of Article 3.1(b) of the SCM Agreement.

8.2.3 The Second Siting Provision, Considered Separately, Does Not Make the Measures De Jure Contingent

Next, the Panel considered whether the Second Siting Provision, analyzed separately, was de jure contingent. It found that contingency could not be read directly into the law, nor made out of it by necessary implication. It noted that the Provision stipulated that the 0.2904% B&O aerospace tax rate would cease to apply if any final assembly of an airplane or wing assembly that was the object of a positive siting determination by the Department of Revenue under the First Siting Provision were to be subsequently sited outside the state of Washington. The Provision was therefore silent as to the use of imported or domestic goods, and the only contingency was that the manufacturing (including by final assembly) of all these products not be sited outside the state of Washington.

8.2.4 The First and Second Siting Provisions, Considered Jointly, Do Not Make the Measures De Jure Contingent

The Panel then examined EU's contention that the two Provisions "act[ed] together to maximize trade distortions in favour of domestic goods and to the detriment of competitive opportunities for imported goods." It summarily dismissed the claim reiterating its previous conclusions that the First and Second Siting Provisions were silent as to the use of imported or domestic goods. It determined that considering them jointly would "not produce any elements that might have been obscured by considering them separately."

8.2.5 The First and Second Siting Provisions, Considered Jointly, Make the B&O Tax Rate De Facto Contingent

For the purposes of its de facto contingency analysis, the Panel determined that it would be "artificial" to look into the siting provisions separately, and proceeded only to a joint analysis. In this context, it emphasized the Second Siting Provision's reference to wing assembly, observing that, "if the manufacturer were to relocate

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outside Washington State the wing assembly of the 'significant commercial airplane manufacturing program' that had been previously sited in Washington State in accordance with the First Siting Provision (namely, the 777X programme), the legal consequence would be the termination of the availability of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under that programme." The Panel was thus convinced that the use by the manufacturer of wings produced outside of Washington State would likely result in a determination by the Department of Revenue that some wing assembly had been sited outside of Washington State, which would in turn lead to the loss of the B&O aerospace tax rate.

The Panel observed, moreover, that rather than aiming at preventing Boeing from relocating the 777X aircraft entirely outside Washington State, or from establishing a parallel 777X production program outside Washington State, the Second Siting Provision concerned the "use" of goods that entered into the production process for the 777X, as a condition for the continued availability of a subsidy. Lastly, the Panel addressed the argument that wings, as identifiable and complete products, never come into existence in the production process of the 777X. It summarily dismissed the argument, noting that Article 3.1(b) does not require the identification of a specific good in order to be applied to a particular situation.

Consequently, the Panel found that, being a subsidy contingent upon the use of domestic over imported wings, the reduced B&O tax rate violated Article 3.1(b) of the SCM Agreement.

8.3 Appellate Body Report

The EU appealed the Panel's negative findings on de jure and de facto contingency, whereas the US filed a cross-appeal, targeting the Panel's positive finding on de facto contingency, specifically with respect to the First and Second Siting Provisions considered jointly. The Appellate Body report was circulated on 4 September 2017. The findings contained therein will be described in further detail in the next volume of the European Yearbook of International Economic Law.

In relation to the EU's arguments on contingency, the Appellate Body opined that the Panel had merely found the First and Second Siting Provisions to relate to the location of certain assembly operations within Washington and to be silent as to the use of domestic or imported goods, rather than articulating a legal standard that required the use of domestic goods to the complete exclusion of imported goods. Moreover, the Appellate Body observed that even if Boeing were to use domestically produced wings, this would not denote a condition, reflected in the text of the Siting Provisions, or arising by necessary implication therefrom, requiring the use of domestic over imported goods. As such, it upheld the Panel's negative findings on contingency.

On the US' cross-appeal, the Appellate Body reiterated that the loss of the B&O aerospace tax rate was triggered by the location of the siting of the wings, rather than

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their origin. It then determined that the Panel had not sufficiently addressed arguments raised by the US in support of this contention and, in consequence, reversed the Panel's finding on de facto contingency in respect of the First and Second Siting Provisions.

9 Colombia – Textiles: Appellate Body Report

9.1 Facts of the Case

This dispute concerns the imposition by Colombia of a "compound tariff" on the importation of certain textiles, apparel, and footwear classified under Chapters 61 through 64 of Colombia's Customs Tariff. The compound tariff was composed of an ad valorem levy of 10% of the customs value of goods, and a specific levy, which varied according to the customs classification of the goods and their import price. Colombia established price thresholds to distinguish between imports that it considered had artificially low prices ("illicit imports"), and all other imports ("licit imports").

In the panel proceedings, the Panel did not consider it necessary to rule on Colombia's claim that the obligations contained in Article II:1(a) and (b) of the General Agreement on Tariffs and Trade (GATT 1994) were not applicable to "illicit trade" because the compound tariff applied to all the relevant imports without distinguishing as to whether the operations were considered licit or illicit; and found that the compound tariff exceeded the levels bound in Colombia's Schedule of Concessions (Schedule) (40% and 35% ad valorem, as applicable) in violation of Articles II:1(b), first sentence, and accorded less favourable treatment to imports than that provided in Colombia's Schedule, contrary to Article II:1(a). The Panel further found that Colombia had failed to demonstrate that the compound tariff was justified under Articles XX(a) or XX(d) of the GATT 1994. Colombia appealed these findings.

9.2 Salient Legal Findings

The Appellate Body found that the Panel acted inconsistently with its duty under Article 11 of the Understanding on rules and procedures governing the settlement of disputes (DSU) to make an objective assessment of the matter, including an objective assessment of the applicability of the relevant covered agreements, in finding that it was unnecessary to rule on Colombia's claim that Article II:1(a) and (b) of the GATT 1994 were not applicable to "illicit trade". The Appellate Body concluded that Article II:1(a) and (b) does not exclude what Colombia classifies as "illicit trade", and upheld that, in the instances identified in the Panel Report, the compound tariff exceeds the bound tariff rates in Colombia's Schedule, and is therefore

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inconsistent with Article II:1(a) and (b) of the GATT 1994. In addition, the Appellate Body reversed the Panel's findings under Article XX. It found that the compound tariff was "designed" but not "necessary" to protect public morals under Articles XX (a), or to ensure compliance with Article 323 of Colombia's Criminal Code (which prohibits money laundering) under Article XX(d).

9.2.1 The Appellate Body Concluded That the Text of Article II:1(a) and (b) of the GATT 1994 Does Not Exclude What Colombia Classifies as "Illicit Trade", and Upheld the Panel's Finding That the Compound Tariff Was Inconsistent with These Provisions

The Appellate Body found that the Panel had acted contrary to Article 11 of the DSU by concluding that it was not necessary to interpret whether Article II:1(a) and (b) of the GATT 1994 applied to what Colombia considers "illicit trade". According to the Appellate Body, the Panel's statement that the measure does not apply "solely" to illicit trade operations implies that the measure applied, or could apply, to some transactions classified by Colombia as illicit trade, and therefore, the Panel was required to address the interpretative issue before it.

In completing the legal analysis, the Appellate Body rejected Colombia's claim that Article II:1(a) and (b) of the GATT 1994 apply to what Colombia considered "illicit trade". Article II:1(a) provides that a Member shall accord to the "commerce" of other Members treatment no less favourable than that provided for in its Schedule. Article II:1(b) provides that the products described in a Member's Schedule may not, on their "importation", be subject to ordinary customs duties, or other duties or charges, that exceed that Member's bound tariff rates. Colombia argued that the terms "commerce" and "importation" do not cover what Colombia considers to be "illicit trade" because "it would make no sense for Article II to oblige a Member to accord favourable treatment to the entry of goods that violate the legal formalities and requirements of the destination country". The Appellate Body agreed with Panama's argument that the scope of the terms "importation" and "commerce" in Article II:1(a) and (b) of the GATT 1994 is not qualified with respect to the nature or type of "commerce" or "importation", or the reason or function of the transaction, in a manner that excludes what Colombia considers to be illicit trade; and that a Member seeking to address concerns regarding money laundering may do so through the general exceptions of Article XX of the GATT 1994.

The Appellate Body further dismissed Colombia's additional arguments that, inter alia, the object and purpose of the Preamble of the GATT 1994, as well as other provisions of the GATT 1994 and the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement) supported Colombia's interpretation of the relevant provisions. In consequence, the Appellate Body upheld the Panel's finding that, in the instances identified in the Panel Report, the compound tariff exceeded the bound tariff rates in Colombia's Schedule, and it was therefore inconsistent with Article II:1(a) and (b) of the GATT 1994.

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9.2.2 The Appellate Body Found That the Compound Tariff Was "Designed" but Not "Necessary" to Protect Public Morals

For a measure to be justified under Article XX, if must be provisionally justified under one of the subparagraphs of Article XX, and it must comply with the requirements of the chapeau of the same provisions. With respect to the provisional justification under Article XX(a), the measure must be "designed" to protect public morals, and it must be "necessary" to protect such public morals. Colombia argued that the Panel applied an "overly demanding" standard in assessing whether the compound tariff was designed to protect public morals, by requiring it to demonstrate the "effectiveness" of the challenged measure. The Appellate Body found in favour of Colombia, and stated that the examination of the "design" of a measure is not a "particularly demanding step" of the Article XX(a) analysis in comparison to the assessment of the "necessity" of the measure. The Appellate Body further stated that a measure is "designed" to protect public morals when there is a "relationship between th[e] measure and the protection of public morals", that is, when the measure is "not incapable of" protecting public morals. According to the Appellate Body, when several Panel's findings are read together, it was clear that the compound tariff was not incapable of combating money laundering. In consequence, the Appellate Body found that the compound tariff was "designed" to protect public morals under Article XX(a) of the GATT 1994. With respect to the "necessity" of the compound tariff, however, the Appellate Body found that there was a lack of sufficient clarity regarding the degree of contribution of the measure to the objective of combating money laundering and the degree of trade-restrictiveness of the measure. Based on the foregoing, the Appellate Body found that Colombia had not demonstrated that the measure was "necessary" to protect public morals.

9.2.3 The Appellate Body Found That the Compound Tariff Was "Designed" but Not Necessary to Ensure Compliance with Article 323 of Colombia's Criminal Code

For a measure to be provisionally justified under Article XX(d), the measure must be "designed" to secure compliance with laws or regulations that are not themselves inconsistent with the GATT 1994; and the measure must be "necessary" to secure such compliance. The Appellate Body found that the Panel erred in concluding that Colombia had failed to demonstrate that the measure was "designed" to secure compliance with Article 323 of Colombia's Criminal Code (which prohibits money laundering). According to the Appellate Body, when several Panel's findings are read together, it was clear that the compound tariff was not incapable of securing compliance with the relevant provision. In consequence, the Appellate Body found that the compound tariff was "designed" to secure compliance with Article 323 of Colombia's Criminal Code. The Appellate Body further noted that the Panel erred in failing to assess the "necessity" of the measure. In completing the legal analysis, the

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Appellate Body found, however, that there was a lack of sufficient clarity regarding the degree of contribution of the measure and its trade-restrictiveness. Based on the foregoing, the Appellate Body found that Colombia had not demonstrated that the compound tariff was "necessary" to ensure compliance with Article 323 of Colombia's Criminal Code.

9.3 Observations on Salient Aspects of the Appellate Body Report

The Appellate Body's finding that the text of Article II:1(a) and (b) of the GATT 1994 does not exclude what Colombia classifies as "illicit trade", clarifies that WTO Members may not unilaterally qualify multilateral obligations. Rather, a Member seeking to address concerns regarding money laundering or any other legitimate policy objective may do so through the general exceptions of Article XX of the GATT 1994.

This Appellate Body Report also clarified the legal standard for the determination of whether a measure is "designed" to fulfil a certain policy objective under Article XX of the GATT 1994. Before this report, the legal standard to determine "whether the measure [was] one designed to achieve that [] policy objective" was unclear. In this report, the Appellate Body clarified that a measure is "designed" to fulfil a certain policy objective, if there is a relationship between the measure and the relevant policy objective, that is, if the measure is "not incapable of" fulfilling that policy objective. This standard seems to make it easier for the defendant to discharge its burden of proving that a measure is "designed" to fulfil a certain policy objective. To successfully justify a measure under Article XX, however, a Member must still prove that the measure is "necessary" to fulfil the relevant policy objective. The necessity analysis involves a more in-depth and holistic analysis of the relationship between the measure and the relevant policy objective, which requires the weighing and balancing of different factors usually including the assessment of reasonably alternative measures.

10 Russia – Tariff Treatment: Panel Report

10.1 Facts of the Case

In this dispute, the European Union (EU) challenged 12 measures related to Russia's tariff treatment of certain agricultural and manufacturing products. The EU argued that the Common Customs Tariff of the Eurasian Economic Community (CCT) of the Eurasian Economic Union (EAEU) required Russia to impose duty

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rates in excess of its bound duty rates in its Schedule of Concessions (Schedule). The EU argued, therefore, that Russia was acting contrary to its obligations under Article II:1 (b), first sentence, and Article II:1(a) of the General Agreement on Tariffs and Trade (GATT 1994). The first 11 measures challenged by the EU were customs duties provided for in the CCT. Measure 12 concerned an unwritten measure, the "systematic duty variation" (SDV), which consisted in "systematically according certain clearly described types of tariff treatment that lead, in each individual instance of such tariff treatment, to duties being levied in excess of bound rates".

The Panel divided its analysis of the EU's claims in three categories: (1) claims that Russia imposed ad valorem duty rates in excess of Russia's bound ad valorem duty rates (concerning measures 1–6); (2) claims that Russia imposed combined duty rates in excess of Russia's bound duty rates (concerning measures 7–11); and (3) claim that Russia imposed the SDV resulting in an unspecified number of combined duty rates in excess of Russia's bound duty rates. "Combined" duty rates are "mixed" duty rates, i.e. "expressed in terms of alternative rates, one as an ad valorem rate and the other as a specific rate that serve[s] as a minimum rate of duty".

10.2 Salient Legal Findings

The Panel found that, with respect to measures 1–11, Russia was required to impose duties that were in some instances "in excess" of its bound duty rates, contrary to Article II:1(b), first sentence. Since the Panel had found that measures 1–11 were inconsistent with Article II:1(b), first sentence, it exercised judicial economy with respect to the EU's consequential claim under Article II:1(a) of the GATT 1994, with the exception of measure 6, for which the EU provided an independent claim. In that respect, the Panel found that the EU had failed to demonstrate that measure 6 accorded treatment less favourable to imports than that provided for in Russia's Schedule. With respect to measure 12, the Panel found that the evidence submitted by the EU had failed to establish the existence of the SDV, and in consequence, that the EU had failed to establish that the SDV was inconsistent with Article II:1(b), first sentence, or with Article II:1(a).

10.2.1 The Panel Found That Article II:1(b), First Sentence, of the GATT 1994 Prohibits Any "Excess" in the Imposition of Duties, Even If That Excess Is Balanced or Offset by the Imposition of Lower Duties

Before addressing the EU's specific claims, the Panel addressed some preliminary issues concerning the interpretation of Article II:1(b), first sentence. In particular, the Panel found that the term "in excess of" in Article III:2 of the GATT 1994, which

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provides for non-discriminatory internal taxation, should be interpreted harmoniously with the term "in excess of" in Article II:1(b) of the GATT 1994. In light of the foregoing, the Panel found that Article II:1(b) admits no de minimis exception. Accordingly, any excess in the imposition of duties is prohibited, even if minimal, and even if the excess is balanced or offset (at the same time or later) by duties imposed on identical products that are below a WTO Member's bound duty.

10.2.2 The Panel Found That Measures 1–11 Were Inconsistent with Russia's Obligations Under Article II:1(b), First Sentence, of the GATT 1994

The determination of whether WTO Members impose excessive duties requires a comparison between the tariff treatment accorded by the challenged measure, and the bound level established in the responding Member's Schedule. This comparison is straightforward when the applied and bound duty rates are both expressed in ad valorem terms. For example, with respect to measures 1–6, it was straightforward for the Panel to find that the ad valorem duty rates required to be imposed by the CCT were in excess of Russia's ad valorem bound duty rates.

In contrast, this comparison is less straightforward when the challenged measure consists in combined duty rates, (i.e. rates expressed in terms of alternative rates, one as an ad valorem rate, and the other as a specific rate that serves as a minimum rate of duty), and the bound duties are expressed in ad valorem terms. In those cases, an ad valorem equivalent of the combined duty rate has to be obtained by calculating an import price level in relation to which the ad valorem duty rate would be the same as the ad valorem equivalent of the combined duty rate (so called, break-even price). After assessing the break-even prices calculated by the EU, the Panel found that the combined duty rates required by the CCT with respect to measures 7–11 were higher than Russia's bound levels for imports at or below specified break-even prices. The Panel further found that there was no evidence that Russia applied a ceiling or cap that would prevent such duties from being applied.

10.2.3 The Panel Made Findings on a Measure That Provided for the Future Application of a Duty Rate and Was Not Implemented at the Time of Panel's Establishment

The parties disagreed on whether measure 6 existed at the time of Panel's establishment, and, if it existed, on whether the Panel should make findings on the measure as it existed at the time of the Panel's establishment, or as amended. Measure 6 imposed an ad valorem duty rate (15%) to be applied as of 1 January 2016 (some 9 months after the Panel's establishment). This duty rate exceeded Russia's bound duty rate (5%). However, this duty rate was never implemented. Before its implementation, Russia imposed a temporary ad valorem duty reduction (5%) until the end of 2015. Following the Panel's establishment, Russia imposed a constant ad valorem duty

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rate (5%) applicable as of 1 September 2015. Thus, in essence, measure 6 was never implemented.

Russia argued that by virtue of the temporary duty reduction (5%), measure 6 did not exist as described by the EU, and requested the Panel to examine the amended measure. The EU did not dispute that measure 6 was amended, but insisted, that at the time of the Panel's establishment, both the future applied duty rate (15%) and the temporarily reduced rate (5%) existed and were contained in a binding legal instrument, and thus, requested the Panel to make findings on measure 6 from the "vantage point" of the Panel's establishment. The Panel found in favour of the EU, and stated that it was "unable to agree with Russia that a measure in force on the date of the Panel's establishment 'does not exist' simply because it will be implemented at a later time". The Panel declined to make findings on the amended measure in the absence of a specific request from the EU to do so, but it reflected the amendment of the measure in its recommendations under Article 19.1 of the DSU.

Before addressing the WTO-consistency of measure 6 at the time of Panel's establishment, the Panel determined, among others, whether it could make findings with respect to the future applied duty rate (15%); and whether the temporary reduction of the duty rate (5%) could eliminate a possible finding of inconsistency with respect to the future applied duty rate (15%). In US – Superfund, a GATT panel determined that a mandatory measure that is not yet into force can be challenged "as such" where the entry into force of the measure is automatic at a future date and does not depend on further legislative action. In light of this GATT panel report, and the text of the legal instrument containing measure 6, the Panel found that the future applied duty rate (15%) was "definitive, and was expressed as occurring automatically and by virtue of the measure itself, without any need for implementing or other intervening action. The fact that the EAEU could, and in fact did, pass a new Decision modifying the duty rate for the tariff line in question does not demonstrate that the future applied duty rate was discretionary. To the contrary, if it was not for the adoption of Decision No. 85, the applied duty rate as from 1 January 2016 would have been 15%". In light of the foregoing, the Panel concluded that, in principle, an existing measure may be challenged "as such", even if that measure mandates WTO-inconsistent action that will take place only in the future. The Panel further noted that such a challenge is of particular importance in the context of Article II:1 (b), first sentence, that it is intended to protect not only existing trade, but also the security and predictability needed to conduct future trade.

Furthermore, the Panel assessed whether the temporary reduction of the duty rate (5%) could eliminate a possible finding of inconsistency with respect to the future applied duty rate (15%). Russia argued that the Panel should find no inconsistency with Article II:1(b), first sentence, because the temporary reduction of the duty rate (5%) suspended the application of the future duty rate (15%). The Panel rejected Russia's argument because the EU's challenge focused on the imposition of the future applied duty rate (15%) once the temporary reduction of the duty rate (5%) would cease to exist, not during its application. Based on the foregoing, the Panel found that measure 6 existed at the time of Panel's establishment; and that this measure mandated the imposition from 1 January 2016 of a future applied duty rate

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(15%) in excess of Russia's bound duty rate (5%) contrary to Article II:1(b), first sentence.

10.2.4 The Panel Found That the EU Failed to Prove the Existence of the SDV

The Panel rejected the EU's claim that Russia imposed the so-called SDV (measure 12). The Appellate Body noted in Argentina – Import measures that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant". According to the EU, the SDV consisted in "the systematic application of particular types of tariff treatment to a significant number of tariff lines [of the CCT], resulting in a general practice" inconsistent with Russia's tariff bindings. To determine that the SDV existed, these elements had to be proven cumulatively.

The Panel noted that the EU had used the term "systematic" for describing different elements of measure 12. In particular, it used the expressions "systematic application" and "systematic duty variation". The Panel considered that it was important when dealing with a term that is a definitional characteristic of a measure to identify a clear and unchanging meaning of the term, so that it would be possible to "pin down, as it were, the measure whose consistency with the covered agreements is contested." The Panel found that the term "systematic" in the EU's expressions meant "done according to a system, plan, or organized method or effort", referring to "a situation where individual instances of application of certain types of tariff treatment, or individual instances of duty variation, are connected by a system, plan, or organized method or effort". Furthermore, the Panel interpreted the term "general" in the context of the EU's claim as "not limited to only specific parts of the CCT." The Panel considered that the evidence provided by the EU failed to show the "systematic" nature or "general" application of the measure. Rather, it only showed the repeated application of certain tariff treatment with respect to 23 tariff lines. Therefore, the Panel found that the EU had failed to prove that the relevant tariff treatment was accorded in a "systematic" fashion in such a way as to constitute a "general" practice reflected in the CCT.

10.3 Observations on Salient Aspects of the Panel Report

This Panel Report is very useful as it provides a detailed description of the legal standard under Article II:1(b), first sentence, of the GATT 1994, and explains how break-even prices are calculated for combined duty rates.

In addition, this Panel Report addresses the treatment of "as such" challenges of mandatory measures. Originally, "as such" claims were brought against measures that had not entered into force but that were nevertheless deemed to be contrary to

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the GATT, and against discretionary legislation. Several GATT panels, including the GATT panel in US – Superfund, found that only mandatory legislation, i.e. legislation that mandates a violation of GATT obligations, can be found to be "as such" inconsistent. This difference in treatment between mandatory and discretionary legislation is commonly referred to as the "mandatory/discretionary distinction". WTO jurisprudence provides no clear answer as to whether this distinction developed by GATT panels remains relevant in WTO dispute settlement. The Appellate Body has cautioned against the application of this distinction in a mechanistic fashion. This Panel Report supports the view that the "mandatory/discretionary distinction" remains relevant in WTO dispute settlement.

This Panel Report is also interesting because it provides for an interpretation of the term "systematic", which was defined as "done according to a system, plan, or organized method or effort". This term may be used in the future as an analytical tool in order to facilitate the understanding of certain types of measures, and prove their existence. However, judging by the Panel's analysis in this case, this analytical tool seems to involve a high evidentiary burden for the complainant to show that something is "done according to a system, plan, or organized method or effort".

11 Russia – Pigs: Panel Report

11.1 Facts of the Case

In this dispute, the European Union (EU) challenged certain measures imposed by Russia adopting, maintaining or applying an import ban or import restrictions based on concerns related to the African Swine Fever (ASF), which prevented the importation of live pigs and their genetic material, pork and certain other pig products from the EU into Russia. ASF is a highly contagious haemorrhagic disease of pigs, warthogs, European wild boar, and American wild pigs, equally susceptible to both genders and all age groups. It is a disease covered by Chapter 15.1 of the Terrestrial Code and must be reported to the World Organization for Animal Health (OIE). ASF was not present in the EU, except for the island of Sardinia. On 24 January 2014, this situation changed with the outbreak of ASF in Lithuania. Following the outbreak of ASF in Lithuania, ASF was reported in Estonia, Latvia and Poland. ASF was introduced in Russia in November–December 2007, and was still present in certain areas of Russia during the Panel's proceedings.

The measures at issue consisted in the "refusal by Russia to accept imports for the products at issue from the entire EU" (EU-wide ban); and individual import bans on live pigs and pig products from Estonia, Latvia, Lithuania, and Poland. The EU challenged these measures under Articles 2.2, 2.3, 3.1, 3.2, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 6.1, 6.2, 6.3, 7 (and Annex B paragraphs 1, 2, 5 and 6) and 8 (and Annex C.1(a), (b) and (c)) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). To defend its measures, Russia invoked Articles 3.1, 3.2, 5.7 and 6.3 of that Agreement.

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11.2 Salient Legal Findings

The Panel found that the EU had demonstrated the existence of the "EU-wide ban", and that there was no limitation in Russia's Protocol of Accession to the Panel's assessment of the merits of the EU's claims against this measure. In addition, the Panel found that despite not being referred to specifically in the EU's panel request, the restrictions on the imports of the products at issue from Latvia and Estonia fell within its terms of reference. The Panel further found that the EU-wide ban, as well as the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland were inconsistent with Russia's obligations under Articles 2.2, 2.3, 3.1, 3.2, 5.1, 5.2, 5.3, 5.6, 6.1, and 8, and Annexes C(1)(a) and C(1)(c) of the SPS Agreement. In essence, the Panel found that the challenged measures did not "conform to", or were "based on" the relevant international standard (Terrestrial Code); that although Russia recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of ASF under Article 6.2 of the SPS Agreement, it did not adapt its measures to the SPS characteristics related to ASF of the areas where the products subject to that measure originated nor to the SPS characteristics related to ASF in Russia; that Russia did not conduct a risk-assessment when there was sufficient scientific evidence to do so; and that the challenged measures discriminated between Members where identical or similar SPS conditions prevailed.

This Panel Report was appealed by Russia and the EU. The Appellate Body Report was circulated on 23 February 2017. In general terms, the Appellate Body agreed with most of the Panel's findings with the exception of the Panel's findings under Article 6 of the SPS Agreement. In particular, the Appellate Body reversed the Panel's finding that Russia recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence in respect of the ASF, and that, therefore, the EU-wide ban and the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, were not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement.

11.2.1 The Panel Found That the EU Had Demonstrated the Existence of the EU-Wide Ban, and That There Was No Limitation in Russia's Protocol of Accession to the Panel's Assessment of the Merits of the EU's Claims Against This Measure

The parties disagreed on the existence of the EU-wide ban measure, and the extent to which Russia's terms of accession were relevant for the Panel's assessment of the measure. In WTO law, a measure is "any act or omission attributable to a WTO Member." The EU described the EU-wide ban "as an action (an import ban or restriction) and, in the alternative, as an omission (failure to accept imports from the EU)" in its Panel Request. To import the relevant products to Russia, importers were required to submit veterinary certificates. Template veterinary certificates were

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agreed bilaterally between the EU and Russia. Accordingly, importers had to certify that the entire EU (with the exception of Sardinia) was free from ASF during the previous 3 years to importation. Following the ASF outbreaks in Lithuania on 24 January 2014, Russia stopped accepting relevant imports from all EU member States.

Russia argued that the alleged EU-wide ban was not attributable to it. It argued that imports were rejected as a consequence of the EU's veterinary officials' inability to certify compliance of the relevant imports with the conditions set out in the veterinary certificates. In turn, the EU provided evidence showing Russia's rejection of its relevant imports. This evidence included letters and other documents from Russian authorities announcing that imports from the EU Member States would be rejected, as well as instances of the refusal to accept relevant imports from the EU Member States after 25 January 2014. In light of this evidence, the Panel concluded that the EU had demonstrated the existence of the EU-wide ban "as a composite measure which reflects Russia's refusal to accept certain imports of the products at issue from the European Union." In addition, the Panel found that the measure was attributable to Russia. It stated that the evidence submitted by the EU indicated that Russia was in fact "undertaking specific actions that rendered it impossible to import products at issue from the European Union into Russia", including "informing the European Union that if veterinary doctors in the EU member States did not stop certification of the products at issue these products would not be allowed into the territory of the member States of the Customs Union and would be subject to returns". The Panel, therefore, concluded that "the actions by Russia to apply this general requirement [certification that the entire EU (with the exception of Sardinia) was free from ASF during the previous three years to importation] to the current situation in the European Union result[ed] in an EU-wide ban of the products at issue attributable to Russia".

The Panel then examined whether Russia could rely on its terms of accession to effectively shield the measure at issue from scrutiny under the DSU and the SPS Agreement. Paragraph 983 of Russia's Working Party Report on the Accession of Russia provided that "[b]ilateral veterinary export certificates [between a Eurasian Economic Union (CU) Party and another country] . . . would remain valid for exports from the relevant country into the customs territory of the CU until an export certificate was agreed with a CU Party based on the agreed positions of the other CU Parties." Russia argued that the validity of the veterinary certificates was a term of Russia's accession to the WTO; and that by adopting Russia's Accession Protocol, the EU had agreed that the form of veterinary certificates concluded between the EU and Russia shall remain valid until the new certificates between the CU and the EU were agreed. Since no new certificates were agreed, Russia was under the obligation, pursuant to the terms of its WTO accession, to require the relevant veterinary certificates. The EU argued that the reference to the veterinary certificates in Russia's accession documents should be understood in the context of Russia's continuing obligation to adapt its measures to regional SPS characteristics. In the EU's view, the terms of Russia's accession to the WTO could not be construed as

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preventing the adaptation of bilateral certificates to the ASF regionalization measures in the EU.

The Panel found that Russia's Accession Protocol did not refer in any way to Russia's substantive obligations under the SPS Agreement; and that the text and context of paragraph 893 do not provide that the direct or indirect application of the veterinary requirements was automatically consistent with Russia's rights and obligations under the SPS Agreement. Therefore, the Panel concluded that Russia could not rely on its terms of accession to effectively shield the measure at issue from the Panel's scrutiny.

11.2.2 The Panel Found That Although Russia Recognized the Concepts Under Article 6.2 of the SPS Agreement, It Did Not Adapt Its Measures to the SPS Characteristics Related to ASF in the Importing Countries nor to the SPS Characteristics Related to ASF in Russia

Article 6 of the SPS Agreement addresses the recognition of pest or disease-free areas and areas of low prevalence of pests or diseases, and different aspects of the process of adaptation of a WTO Member's measure to regional SPS characteristics. Article 6.2, first sentence, requires WTO Members to "recognize" the concepts of pest- or disease-free areas and area of low pest or disease prevalence. Article 6.3 specifies what must be objectively demonstrated by a Member requesting recognition of a specific area within its territory as a pest- or disease-free area or an area of low pest or disease prevalence. Article 6.1 requires importing Members to "adapt" their SPS measures, to the regional characteristics of the areas from which the product originated and to which the product is destined, provided that there is sufficient evidence to reach a determination as to the disease status of the relevant areas.

In these proceedings, Russia argued that the obligation to "recognize" the concepts set out in Article 6.2 relates to an "abstract idea and is not linked to specific areas of a given exporting Member". Russia provided evidence, including CU legislation, a 2006 Memorandum between Russia and the EU, and the bilaterally agreed veterinary certificates to show that it expressly recognized the concept of regionalization. The EU argued that Russia's abstract understanding of "recognition" contradicted the guidance from the Appellate Body in India – Agricultural Products. According to the EU, what matters "is not the abstract, distinct from and taken prior to, recognition of the concept of disease-free areas in the Russian legislation, but the recognition of this concept through and upon adoption of the very SPS measure that is required to be adapted to the SPS characteristics of the relevant areas." The EU also referred to the existence of the EU-wide ban as evidence that Russia had failed to distinguish between ASF-free areas and areas considered infected with ASF.

The Panel distinguished the facts in this dispute from the facts in India – Agricultural Products. According to the Panel, the Appellate Body's findings in

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India – Agricultural Products addressed a situation where an SPS measure adopted by a Member could recognize the concepts mentioned in Article 6.2 even in the absence of a pre-existing regulatory framework that did so. In contrast, in the current dispute, the Panel stated that it was faced with a different situation: "a set of measures that were adopted in the context of a regulatory framework that, in [its] view, provide[d] a general recognition of the concepts mentioned in the first sentence of Article 6.2." The Panel concluded that Article 6.2 sets out a less stringent obligation as compared to Article 6.1 of the SPS Agreement, requiring merely an abstract acknowledgement of the concept of regionalization. Based on the foregoing, the Panel found that Russia recognized the concepts mentioned in the first sentence of Article 6.2 in respect of ASF and as a consequence, the EU-wide ban as well as the EU Member States' individual bans were not inconsistent with Russia's obligations under the first sentence of Article 6.2 of the SPS Agreement. These findings were reversed by the Appellate Body.

The Panel further found that the EU had demonstrated that in the period between 7 February 2014 and 11 September 2014, the EU objectively demonstrated to Russia that there were areas within the EU, outside of Estonia, Latvia, Lithuania, and Poland, which were free of ASF and were likely to remain so; and also, that there were areas within Estonia, Lithuania, and Poland, which were free of ASF and were likely to remain so. In contrast, the Panel found that the EU had failed to demonstrate that there were areas within Latvia, which were free of ASF and were likely to remain so.

Based on the Panel's findings that the EU had demonstrated to Russia that it had ASF free areas, and the fact that the ASF was present in some areas in Russia, the Panel found that Russia had failed to adapt its measures to the SPS characteristics related to ASF in the importing countries, and to the SPS characteristics related to ASF in Russia, in violation of Article 6.1 of the SPS Agreement. The Panel noted that this breach was further corroborated by Russia's failure to conduct a risk assessment, where it could have evaluated the relevant elements to determine the SPS characteristics of the areas from which the products at issue originated.

11.3 Observations on Salient Aspects of the Panel Report

The Panel's analysis of "attribution" is illustrative. The Panel concluded that Russia's refusal of the relevant imports was attributable to it without addressing whether these actions were partially attributable to the EU's failure of submitting the relevant veterinary certificates. The Panel's focus on the content of Russia's actions, irrespective of their rationale, clarifies that the motivation of a measure is usually irrelevant for the question of attribution.

The Panel interpreted the obligation in Article 6.2 so as to merely require the abstract recognition of the principle of regionalization. The Panel's interpretation of this provision was reversed by the Appellate Body. Accordingly, Article 6.2 contains an obligation that goes beyond abstract recognition, and requires WTO Members to

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"render operational" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence by providing an "effective opportunity" for the exporting Member to make a regionalization claim.

12 Indonesia – Import Licensing Regimes (New Zealand) (United States): Panel Report

12.1 Facts of the Case

In this dispute, New Zealand and the United States (the co-complainants) brought identical claims under Article XI:1 of the General Agreement on Tariffs and Trade (GATT 1994) and Article 4.2 of the Agreement on Agriculture against 18 Indonesian measures concerning Indonesia's import licensing regimes for horticultural products, animals and animal products. Measures 1–8 consisted in individual components of Indonesia's import licensing regime for horticultural products. Measure 10–16 consisted in individual components of Indonesia's import licensing regime for animals and animal products. Measures 9 and 17 consisted in Indonesia's import licensing regimes "as a whole", defined as the individual elements of the regimes operating in conjunction. Measure 18 concerned the requirement of self-sufficiency. Accordingly, importation was only permitted when domestic supply for consumption and/or government food reserves of the relevant products were insufficient. The co-complainants challenged this measure "as such" and "as applied".

Indonesia's import licensing regimes for the relevant products shared common features. Importers were required to apply for import licenses during limited application periods, indicating, among others, the quantity, port of entry and intended use of imported goods. Once the relevant import licenses were approved, they were valid for limited validity periods, and the terms of importation could not be modified (so called, fixed license terms). Moreover, the regimes provided for 80% realization requirements and reference price requirements for certain products. Accordingly, importers were required to import at least 80% of the approved quantities; and, when the reference price of certain products fell below the pre-established price, importation was suspended until the market price reached the established reference price.

Indonesia submitted that the 18 challenged measures were not subject to Article XI:1 of the GATT 1994 because, inter alia, they were automatic import licensing procedures. Moreover, Indonesia argued that measures 4, 7, and 16 were covered under Article XI:2(c)(ii) of the GATT 1994, and that, in any event measures 1–17 were justified under Articles XX(a), (b) and (d) of the GATT 1994, as applicable.

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12.2 Salient Legal Findings

The Panel found that measures 1–17 were inconsistent with Article XI:1 of the GATT 1994, and not justified under Article XX of the GATT 1994. The Panel also found that Measure 18 was inconsistent "as such" with Article XI:1 of the GATT 1994, but declined to rule on whether this measure was inconsistent "as applied" with this provision. Moreover, the Panel found that Article XI:2(c) of the GATT 1994 had been rendered inoperative by the entry into force of the Agreement on Agriculture. The Panel exercised judicial economy with respect to the co-complaints' claims under Article 4.2 of the Agreement on Agriculture, and certain other claims under the Import Licensing Agreement and Article III:4 of the GATT 1994. The Panel Report was appealed by Indonesia. In general, the Appellate Body upheld the Panel's findings.

12.2.1 The Panel Concluded That Automatic Import Licensing Regimes Are Not Excluded from the Scope of Article XI:1 of the GATT 1994

Indonesia argued that its import licensing regimes were "automatic" regimes expressly permitted under Article 2.2(a) of the Import Licensing Agreement, and thus, excluded from the scope of Article XI:1 of the GATT 1994. The co-complainants responded that the characterization of a measure as an "automatic" or "non-automatic" licensing regime was irrelevant under Article XI:1 of the GATT 1994; that the text of Article XI:1 of the GATT 1994 is explicit in that "import or export licences" can impose restrictions on importation within the meaning of Article XI:1; and that, in any event, Indonesia's import licensing regimes were not "automatic". The Panel agreed with the co-complainants' argument that there is nothing in the text of Article XI:1 of the GATT 1994 that suggests that import licensing regimes, automatic or non-automatic, are outside the scope of this provision. On the contrary, the Panel noted that import licences are expressly included in the indicative list of measures covered by this provision. The Panel considered that the essence of an analysis under Article XI:1 of the GATT 1994 does not depend on how a measure is labelled, but rather on whether it imposes a restriction or prohibition on importation. It therefore concluded that a determination of whether Indonesia's import licensing regimes were automatic import licensing procedures was not a necessary threshold in its analysis under Article XI:1.

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12.2.2 The Panel Concluded That Article XI:2(c) of the GATT 1994 Had Been Rendered Inoperative by the Entry into Force of Article 4.2 of the Agreement on Agriculture

Article XI:2(c)(ii) provides that "[t]he provisions of paragraph 1 of this Article shall not extend to the following: [i]mport restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate: (ii) to remove a temporary surplus of the like domestic product.." (notes omitted, emphasis added). Indonesia argued that measures 4, 7, and 16 were necessary to remove a temporary surplus of horticultural products, animals and animal products in Indonesia's domestic market in accordance with this provision.

The co-complainants responded that Article XI:2(c)(ii) was no longer available with respect to agricultural products by the entry into force of Article 4.2 of the Agreement on Agriculture. Footnote 1 to this provision sets out an illustrative list of measures that have been required to be converted into ordinary customs duties, and excludes measures maintained "under other general, non-agriculture-specific provisions of the of GATT 1994" (emphasis added). The co-complaints argued that Article XI:2(c) applies explicitly to "import restrictions on any agricultural or fisheries product", and therefore, it was not a "general, non-agriculture-specific provision" of the GATT 1994. Therefore, according to the co-complainants, such measures have not been excluded from the types of measures which were required to be converted to ordinary customs duties under Article 4.2 of the Agreement on Agriculture. The co-complainants further submitted that even if Article XI:2(c)(ii) of the GATT 1994 was applicable, Indonesia failed to demonstrate its constitutive elements.

The Panel agreed with the co-complainants' argument that Article XI:2(c) had been rendered inoperative with respect to agricultural measures by the entry into force of Article 4.2 of the Agreement on Agriculture. It stated that this interpretation was confirmed by Article 21 of the Agreement on Agriculture, which provides that "[t]he provisions of GATT 1994", including Article XI:2(c)(ii) of the GATT 1994, "shall apply subject to the provisions of this Agreement". Therefore, the Panel concluded that Indonesia could not rely upon Article XI:2(c)(ii).

12.2.3 The Panel Found That Measures 1–17 Were Not Justified Under Article XX of the GATT 1994

Indonesia argued that measures 1–17 were justified under Articles XX(a), (b) and (d) of the GATT 1994. Article XX of the GATT 1994 involves a two-tiered analysis. A measure must, first, be provisionally justified under one of the subparagraphs of Article XX, and, second, comply with the requirements of the chapeau of Article XX. Indonesia provided arguments on a measure by measure basis with respect to the first tier of the analysis; for the second tier, however, it provided arguments for its import licensing regime as a whole, making no distinctions between measures.

A measure is provisionally justified under Articles XX(a), (b) or (d), if it is "designed" and "necessary" to fulfil the relevant policy objective. The Panel found

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that measures 1–7 were not provisionally justified under Articles XX(a), (b) or (d), and, therefore, it did not further analyse these measures under the chapeau. With respect to measure 8, the Panel concluded that this measure was "designed", but not "necessary" to protect human health. Even though the Panel concluded that measure 8 was not provisionally justified under Article XX(b), it decided to analyse this measure under the chapeau anyway "given that this finding may be appealed". In its examination of whether measure 8 was applied in a manner consistent with the chapeau, the Panel also examined the application of measures 1–17. The Panel stated that because Indonesia presented its arguments under the chapeau with respect to the import licensing regime as a whole, it was "driven" to follow the same approach. The Panel concluded that Indonesia's import licensing regimes for horticultural products, animals and animal products as a whole, as well as the individual measures therein, failed to comply with the requirements of the chapeau. Bearing in mind that compliance with the chapeau of Article XX is a necessary requirement in order for a measure to find justification under this provision, the Panel refrained from examining whether measures 9–17 were provisionally justified under the relevant subparagraphs of Article XX. The Panel then found that Indonesia had failed to demonstrate that measure 8 was justified under Article XX(b) of the GATT 1994, and transposed its findings under measure 8 to find that Indonesia had failed to demonstrate that measures 9–17 were justified under Article XX(a), (b) or (d) of the GATT 1994, as applicable.

12.3 Observations on Salient Aspects of the Panel Report

The Panel's conclusion that Article XI:2(c) of the GATT 1994 has been rendered inoperative by virtue of Article 4.2 of the Agreement on Agriculture may conflict with the principle of effective treaty interpretation. This principle provides that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". Notably, Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to, or diminish the rights and obligations provided in the covered agreements". Arguably, if the drafters of the Agreement on Agriculture intended to make Article XI:2(c) inoperative, they could have removed it from the GATT 1994.

The Panel's analysis under Article XX of the GATT 1994 is unusual. In US – Gasoline, the Appellate Body established the two-tier sequence under Article XX, i.e., first, provisional justification, second, analysis under the chapeau. Since then, all WTO panels, with one exception (US – Shrimp), have followed that approach. In its report, the Panel first analysed measures 9–17 under the chapeau, and then, after finding that these measures were not applied in a manner consistent with the chapeau requirements, the Panel refrained from examining the provisional justification of these measures. On appeal, the Appellate Body considered that a panel that deviates from the sequence of analysis under Article XX of the GATT 1994 might, not necessarily, for that reason alone, commit a reversible legal error provided the Panel has made findings on those elements under the applicable paragraphs that are relevant for the analysis of the requirements of the chapeau. However, following

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the normal sequence of analysis under Article XX of the GATT 1994 provides Panels with the necessary tools to assess the requirements of the chapeau.

13 Argentina – Financial Services: Appellate Body Report

13.1 Facts of the Case

This dispute brought by Panama concerns "eight financial, taxation, foreign exchange and registration measures imposed by Argentina, mostly on services and service suppliers from countries which Argentina terms 'countries not cooperating for tax transparency purposes'". Panama argued that all eight measures were inconsistent with the most-favoured nation obligation in Article II:1 of General Agreement on Trade in Services (GATS), and that measures 2, 3 and 4 were inconsistent with the national treatment obligation in Article XVII of the GATS. Panama further claimed that measure 5 was inconsistent with the market access obligation in Article XVI:1 and XVI:2(a) of the GATS and that measures 2 and 3 were inconsistent with Article I:1 of the GATT 1994 and measure 3 also inconsistent with Article III:4 of the GATT 1994.

The Panel found that measures 1 through 8 were inconsistent with Article II:1 of the GATS because they did not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries. It further found that measures 2 through 4 were not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes in which Argentina has undertaken specific commitments. Moreover, the Panel found that measures 1 through 4 as well as measures 7 and 8 were not justified under Article XIV(c) of the GATS because their application constitutes arbitrary and unjustifiable discrimination. Finally, the Panel found that measures 5 and 6 were not covered by paragraph 2 (a) of the Annex on Financial Services because they were not taken for "prudential reasons" within the meaning of that provision.

13.2 Salient Legal Findings

The Panel and Appellate Body reports in this dispute addressed issues under the GATS of systemic import, notably the interpretation of likeness and "treatment no less favourable" under Articles II:1 and XVII; and the interpretation of the general exceptions in Article XIV, in particular the issue of the "design" of a measure to achieve a listed objective. As importantly, these reports addressed for the first time

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the so-called “prudential exception” in paragraph 2(a) of Annex on Financial Services to the GATS.

13.2.1 The Interpretation of “Likeness” in Articles II:1 and XVII of the GATS

As noted above, the Panel concluded that measures 1 through 8 were inconsistent with the most-favoured nation obligation in Article II:1 of the GATS. It further found that measures 2 through 4 were not inconsistent with the national treatment obligation in Article XVII of the same agreement.

The Appellate Body reversed the findings under Articles II:1 and XVI of the GATS. Specifically, it considered that the Panel’s finding that services and service suppliers of non-cooperative countries were “like” service suppliers of so-called “cooperating countries”. For the Appellate Body, a Panel may find that a service or service supplier may be presumed to be “like” another if it finds that the measure at issue provides for a distinction based exclusively on origin. However, in this dispute, the Panel did not make such a finding and, therefore, it was required to assess “the competitive relationship of the services and service suppliers of cooperative and non-cooperative countries”. Put differently, the Panel erred in presuming “likeness” in the absence of a finding that the measures at issue provide for a distinction based exclusively on origin.

The Appellate Body noted that the reversal of the Panel’s “likeness” analysis rendered the subsequent analysis of “treatment no less favourable” moot as it was predicated on foreign and domestic services and service suppliers being “like”. However, the Appellate Body stated that Panama’s appeal against the Panel’s “treatment no less favourable” analysis was an “issue of law” within the meaning of Article 17.6 of the DSU and decided to address this other ground of appeal.

13.2.2 The Interpretation of “Treatment No Less Favourable” in Articles II:1 and XVII of the GATS

Turning to its analysis of the phrase “treatment no less favourable” in Articles II:1 and XVII of the GATS, the Appellate Body understood the Panel’s interpretation of this phrase as requiring an analysis of whether the measure at issue modifies the conditions of competition between foreign and domestic services and service suppliers. As part of this analysis, the Panel considered that it had to “take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition; in particular, whether Argentina is able to have access to tax information on foreign suppliers”.

The Appellate Body concurred with the Panel that the phrase “treatment no less favourable” requires assessing whether the measure modifies the conditions of competition to the detriment of services or service suppliers of any other Member in comparison to like services or service suppliers of, respectively, any other country

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or the Member imposing the contested measure. However, the Appellate Body faulted the Panel for considering that this analysis required assessing the "regulatory aspects" of the measure. The Appellate Body juxtaposed the relevant legal standard under Articles II:1 and XVII of the GATS with that of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 to conclude that, under the GATS provisions, the regulatory intent of the measure is irrelevant to the issue of whether a measure accords treatment less favourable to foreign services and service suppliers.

13.2.3 The Issue of Whether a Measure Is "Designed" to Achieve a Listed Objective Under Article XIV of the GATS

In addressing Panama's appeal under Article XIV(c) of the GATS, the Appellate Body recalled that, for a respondent to justify its measure under that provision, "[f]irst, the measure must be one designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the [GATS]. Second, the measure must be" necessary "to secure such compliance".

With respect to the first element ("designed to secure compliance"), the Appellate Body introduced a somewhat new standard. In particular, it noted that the assessment of whether a measure is "designed" to secure compliance with laws or regulations requires an "initial examination of the relationship between the inconsistent measure and the relevant laws or regulations". The Appellate Body considered that a measure would not be "designed" under Article XIV(c) if it "is incapable of securing compliance with specific rules, obligations, or requirements under the relevant law or regulation" identified by the respondent. A measure could still be "designed" even if there is uncertainty as to whether it actually achieves the objective.

This development of the first element of the analysis of Article XIV(c) of the GATT has been applied in subsequent disputes in the context of Article XX of the GATT 1994. It stands for the proposition that the assessment of whether a measure is "designed" to meet a listed objective does not require that this objective be achieved "with absolute certainty". Thus, in the words of the Appellate Body in a subsequent appeal, the requirement that a measure be "designed" to pursue a listed objective is not "a particularly demanding step" of the analysis. The more "in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations" is under the second element of the sub-paragraphs under Article XIV of the GATS (and Article XX of the GATT)—whether the measure is "necessary" to achieve an objective.

It appears, therefore, that the analysis of whether a measure is "designed" to achieve a listed objective in Article XIV of the GATS (and Article XX of the GATT 1994) requires inquiring into whether the measure "is not incapable" to achieve that objective. This is not to be confused with the degree of contribution to achieving the objective, which must be assessed under the second step of the analysis—i.e. the necessity test.

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13.2.4 The Interpretation of the Prudential Exception in Paragraph 2 (a) of the Annex on Financial Services

Before the Panel, Argentina argued that even if measure 5 (requirements relating to reinsurance services) and measure 6 (requirements for access to the Argentine capital market) were inconsistent with Article II:1 of the GATS, these measures were justified under the prudential exception in paragraph 2(a) of the Annex on Financial Services.

The Panel found that measures 5 and 6 were inconsistent with the most-favoured nation obligation in Article II:1 of the GATS. The Panel then assessed whether these measures were justified under paragraph 2(a) of the Annex on Financial Services. In its analysis, the Panel first assessed whether these measures were adopted for "prudential reasons"; and, second, whether Argentina had demonstrated that there is "a rational relationship of cause and effect" between the measures 5 and 6 and the prudential reason provided for adopting those measures. The Panel found that measures 5 and 6 do not have such a rational relationship with the prudential reasons identified by Argentina and, accordingly, that these measures were not taken for prudential reasons within the meaning of paragraph 2(a).

Panama appealed the specific Panel's finding that "paragraph 2(a) of the Annex on Financial Services 'covers all types of measures affecting the supply of financial services'". For Panama, the prudential exception only applies to domestic regulations within the meaning of Article VI of the GATS as opposed to market access restrictions under Article XVI of the GATS.

The Appellate Body recalled that this is the first dispute in which a Member has invoked paragraph 2(a) of the Annex on Financial Services. As an issue of first impression, the Appellate Body addressed the limited issue raised by Panama concerning the type of measures that may be justified under the prudential exception in paragraph 2(a). In its analysis, the Appellate Body noted that the reference to "measures affecting the supply of financial services" "suggests that paragraph 2 (a) does not impose specific restrictions on the types of measures falling within its scope". It therefore agreed with the Panel, and dismissed Panama's appeal, that paragraph 2(a) of the Annex on Financial Services "covers all types of measures affecting the supply of financial services".

In brief, although this is the first time that the Appellate Body analysed the "prudential exception", the scope of the appeal was limited to the determining the type of measures subject to that exception.

The Panel and Appellate Body Reports were adopted by the DSB on 9 May 2016.

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Part IV
Book Reviews

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Manjiao Chi, Integrating Sustainable Development in International Investment Law

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Jörn Griebel

The current system of international investment protection, consisting mostly of bilateral investment treaties (international investment agreements, IIAs) concluded between States for the reciprocal protection of foreign investments from specific political risks, is the target of strong criticism from many sides. One of the key objections raised is that the system focusses too much on the protection of economic interests while neglecting competing values and public interests such as human rights, environmental concerns, and in particular sustainable development. It is against this background that the author, Manjiao Chi, asks to what degree sustainable development concerns have so far found their way into the investment treaty system and what possible improvements in this respect might look like within future investment agreements.

The book is very enjoyable to read as it is well-structured and guides the reader through all its stimulating and well-reasoned parts. Alongside an introduction, the book comprises three parts as well as final remarks. Within the concise introduction, the author explains the objective of his analysis. The methods applied for this purpose are equally introduced. Beside rule analysis and comparative studies, the book approaches its topic in particular from a governance perspective. Furthermore, the introduction reveals the book's central argument, that investment treaties for various reasons only insufficiently and ineffectively address sustainable development concerns. From the many convincing reasons given for bringing investment protection and sustainable development in line, a need for reform is derived. It is against this background that the book evaluates the means for addressing the sustainable development deficit in currently negotiated and future investment treaties.

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Part 1 of the book, entitled "The sustainable development challenge for IIAs," describes, in Chapter 1, the status quo of sustainable development as an international law concept as well as the development of today's investment treaty regime. With regard to sustainable development, the author convincingly argues that it "should be perceived as a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations" (p. 10). Furthermore, the "treatification" of sustainable development resulting from an increasing number of references to the concept either within a treaty's preamble or the functional provisions of an agreement is addressed. Here it is, however, found that such "treatification" mostly takes place within international environmental law. Consequently, the concept of sustainable development cannot be characterized as an international law concept *de lege lata* yet. The concept is, however, in a process of emerging as a part of either customary international law or general principles of law. Regarding the development of contemporary international investment law, the author not only provides a short overview on the system's origins, but also presents a brief description on how sustainable development concerns have previously been reflected in IIAs as well as within the ICSID Convention. In doing so, Chi lays the foundation for the more comprehensive analysis of such provisions provided in part 2 of the book.

Chapter 2 presents selected proposals on how to reform the current system to the effect that sustainable development interests are more prominently addressed. Although the selected approaches are—as the author recognises—very different in their respective focus, it is convincingly argued that they share certain common concerns, starting from the shared view that reform is indeed required for recognizing sustainable development concerns more prominently, and that a more appropriate balance of the investors' (economic) interests and the host States' (regulatory) interests needs to be established. At the same time, it is ascertained that the concepts of sustainable development as well as the long-term objectives vary considerably between the approaches.

Part 2 is concerned with identifying those rules within IIAs which—as already indicated in Part 1—have an impact on sustainable development concerns. Here, the author distinguishes, within Chapters 3–6, between four different normative categories. Starting with substantive provisions in Chapter 3, the author examines the prohibition of unlawful expropriation as well as the fair and equitable treatment standard in several IIAs, as both standards potentially limit a State's freedom to implement measures motivated by sustainable development concerns. The author submits that both substantial standards, while serving the interests of investors, "have profound restraining effects on state regulatory power" and consequently "may impede states' efforts in pursuing legitimate sustainable development goals" (p. 60). This view is arguably convincing when considering older generations of IIAs. The author suggests (p. 58), however, that more recent IIAs are equally prone to normatively attaching little value to legitimate regulatory policies, even if they

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feature "balancing provisions" such as Annex B of the 2012 US Model BIT.[1] While the author acknowledges that such provisions should strengthen a State's regulatory leeway in theory,[2] the need for interpretation of such provisions by arbitrators causes the author to doubt their effectiveness (p. 60).

The second category consists of exceptive provisions (Chapter 4). The author comprehensively describes the various general and special exceptions to be found within IIAs, such as general exceptions modelled after the well-known Art. XX GATT, and security exceptions similar to Art. XXI GATT. Each section also features a detailed description of the arbitral application of the respective exceptive provision in the past. Regarding the rather uncommon general exceptions, the author convincingly submits that arbitrators should interpret clauses modelled after Art. XX GATT in line with WTO jurisprudence, as the clauses "share the same origin, similar contents and almost identical structure" and both concern the conflict of domestic regulatory measures with international law standards (p. 72). Turning to security exceptions, a discussion of the Argentine cases between 2001 and 2002 reveals that despite a very similar factual and legal background different tribunals "had different findings with regard to the severity of the financial crisis" (p. 80). In this context, the author correctly points out that security clauses may fall short of preserving a State's regulatory power when they are not ostensibly self-judging in nature and instead open to diverging or even contradictory interpretations by arbitrators (p. 81). One should keep in mind, however, that it is in line with the object and purpose of security exceptions to interpret their terms, in particular "essential security interests", restrictively. While both general and special exceptions share functional similarities, security exceptions—contrary to clauses modelled after Art. XX GATT—will usually have little impact on domestic regulations fostering sustainable development in times of relative peace and stability.

A third category of rules is described by the author as "public interest provisions" (Chapter 5). This notion covers a very broad variety of rules referring in different ways to interests competing with economic concerns, such as the environment, human rights, labour standards, or even CSR rules. While such rules are obviously related to the concept of sustainable development, some of them are rather uncommon within IIAs. Furthermore, regarding the existing provisions, the author concludes that they are "largely insufficient, ineffective and fragmented" (pp. 105 et seq.). As an alternative, the author submits that "[i]t would be helpful to have a general public interest provision in IIAs", similar to Art. 8.9 CETA, which he praises

[1]Annex B of the 2012 US Model BIT stipulates that "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives" do not constitute an indirect expropriation "[e]xcept in rare circumstances".

[2]Regarding Annex B of the 2012 US Model BIT, the author concludes that the provision "can be a helpful tool for states in pursuing sustainable development goals without being excessively restrained by the indirect expropriation clause" (p. 58).

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"to be quite outstanding in catering for public interest" (p. 106).[3] Admitting that general public interest provisions face difficulties "due to the lack of an international consensus on the definition and scope of public interest", he expresses hope that their incorporation may imply a trend in future IIA-making (pp. 107–108). While the author's argument for an explicit public interest provision is convincing at its core, it is not entirely clear how such broad terms as in Art. 8.9 CETA would be preferable over a clause modelled after Art. XX GATT,[4] in particular when considering the ensuing interpretative uncertainty after granting States such a wide margin of appreciation.

The provisions addressed in Chapter 6 are of a procedural character, as the author employs a broad understanding of sustainable development, which derives in part from good governance in general. Accordingly, he also examines whether the ways in/by which investment disputes are settled are in line with the concept of sustainable development, which at times appears as an overly wide understanding of said concept. The author concludes that there is in inherent conflict between the public nature of investment disputes on the one hand and the arbitration system on the other, as the latter shares many principles with commercial arbitration (p. 137). He acknowledges, however, that major changes regarding transparency, third party participation, legal review etc., are already on their way to improve the system (p. 138). Within the chapter, a special emphasis is also laid on the role of inter-State dispute resolution and clauses allowing the State parties to intervene within investor-State-proceedings or prevent them completely. However, the settlement of disputes between investors and States, while needing reform in its current state, provides us with a remarkably effective mechanism for the enforcement of international law. Such mechanisms should be extended to other fields of international law, rather than be restricted by means of inter-State cooperation.

Finally, Part 3 consists of Chapters 7 (Reconceptualizing IIAs from the governance perspective) and Chapter 8 (Filling the compatibility gap between IIAs and sustainable development). In Chapter 7, the author elaborates on the concept of global governance. He argues that global governance and contemporary IIAs are incompatible: the fragmentation of international law isolates investment considerations, while the State-centric international law insufficiently engages with non-State actors (p. 153). Furthermore, he asserts a structural imbalance of IIAs, which "fail to draw a proper balance between the rights of foreign investors and those of the host states" (p. 154). The author accordingly calls for a reconceptualization of investment protection combined with further reform.

The author's efforts culminate in the instructive Chapter 8, in which he supplements the various normative reform proposals outlined in Part 2, by drawing insights

[3] Art. 8.9 CETA stipulates that "[. . .] the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.[. . .]".

[4] Cf. Art. 28.3(1) CETA, which incorporates Art. XX GATT into CETA, but is only applicable to rules on the establishment of investment and non-discriminatory treatment of investments.

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from the governance perspective introduced in Chapter 7. He argues that three major changes are due. Firstly, the supply of sustainable development norms in investment treaties should be enhanced by a hardening of soft-law rules, as well as incorporating more balancing and good governance provisions. Secondly, it is proposed that sustainable development provisions in IIAs should be harmonized on a global level to achieve a greater normative convergence. Inasmuch as other international treaties aim to strengthen sustainable development, the author suggests their systemic integration by interpreting IIAs in light of those rules of international law (p. 164, referring to Art. 31(3)(c) VCLT). And thirdly, the influence of non-State actors in the process of treaty-making should be enhanced to remedy what the author perceives as an existing democratic deficit. While the representation of different societal groups during treaty negotiations may arguably improve the acceptance of the resulting agreement on a domestic level, the reasoning of course relies on the author's premise of States' vanishing "territory-based" authority, which in turn necessitates a concept of global governance (cf. pp. 149 et seq.). It may, however, be quite challenging to reconcile this rather progressive approach with the prevalent concepts of contemporary international law.

Within his final remarks, the author again raises the key question of whether future IIAs can be made more compatible with sustainable development concerns. Against the background of his excellent analysis in the previous Chapters, he points out that the answer can be derived from a conceptual, a normative, and a governance perspective. From the conceptual perspective, the author proposes an extensive understanding of sustainable development. Normatively speaking, sustainable development provisions within IIAs should be strengthened considerably. Finally, from a governance perspective, he argues that a greater number of stakeholders—like investors, arbitrators, and civil society in general—should act alongside States in designing a more balanced system.

In conclusion, this very remarkable book makes an important contribution to our understanding of the major shortcomings of contemporary IIAs from the perspective of sustainable development concerns. The author equally provides us with different perspectives on well explained problems and a great number of reflected and creative ways for improving the system. The book is well-worth reading and can be strongly recommended.

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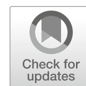
Ben Saul, The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires



Oxford University Press, 2016, ISBN 9780198758327

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In 2016, the International Covenant on Economic, Social and Cultural Rights (ICESCR) marked the 50th anniversary of its adoption and the 40th anniversary of coming into force. The ICESCR and its counterpart, the International Covenant on Civil and Political Rights (ICCPR), were meant to implement the Universal Declaration of Human Rights (UDHR) and, taken together, form the so-called International Bill of Rights.

The initial idea had been to cover the most important and basic civil, political as well as economic, social and cultural rights in one treaty, and to establish a judicial procedure to implement and monitor these core human rights. As it is common knowledge, this initial idea could not be realized. Instead of having one single covenant, the United Nations General Assembly adopted two covenants in December 1966, which entered into force 10 years later (1976). The division of the core human rights into two groups, as well as the fact that the ICCPR from the beginning included a monitoring body competent to receive individual complaints, whereas the ICESCR did not, has resulted in much discussion about the nature, implementation, binding character and justiciability of economic, social and cultural rights. Since the adoption of the Optional Protocol to the ICESCR in December 2008, which entered into force in 2013, individual complaints can be lodged with the Committee on Economic Social and Cultural Rights (Committee). It is hoped that this step will put to an end the long-lasting debate just referred to. In any event, the formidable work of the Committee in the last three decades, especially through its General Comments on the ICESCR, the increased interest of scholars, activists and state institutions in the implementation and protection of economic and social rights and the adoption of the individual complaint procedure has (enormously) changed

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the relevance and the role of economic, social and cultural rights enshrined in the ICESCR.

A further step towards the promotion of economic, social and cultural rights can be accomplished through the engagement with the Travaux Préparatoires. It can offer useful guidance on how to enforce and monitor ICESCR rights, and clarify their content, especially as the travaux, according to the Vienna Convention on the Law of Treaties, can be relied upon as supplementary means of interpretation (Art. 32). Beyond doctrinal questions, and arguably more importantly, the travaux help put some of the on-going debates about economic, social and cultural rights in perspective. From their perusal, it becomes apparent that, over the course of the Covenant's 20-year elaboration, the drafters engaged with many objections and arguments against economic, social and cultural rights and nevertheless produced a remarkable work of enormous importance for the marginalized, discriminated and excluded individuals and collectives. Against this background, the undertaking of Ben Saul to, for the first time, include and make available detailed chronological documents of the drafting procedure and history of the ICESCR deserves special attention.

In his book, Saul—who holds the Challis Chair of International Law at the University of Sydney, is one of the authors of the *Oxford Commentary on the International Covenant on Economic, Social and Cultural Rights* (2014) and a barrister and an Associate Fellow of Chatham House in London—in two volumes running to 2750 pages presents a huge corpus of important materials on the ICESCR's drafting history, dating from 1948 to 1966. The collection grew out of the work towards the above-mentioned *Oxford Commentary* and compiles documents that were previously only partly available in archives. The collection contains, among others, detailed contents—title(s) of documents, the summary of their content and the page number—which makes it easy to quickly find the documents needed. Furthermore, it includes a short list of abbreviations; an introduction by the author followed by two short Annexes and in its main part the selected documents.

In the introduction, Ben Saul provides important background information on the drafting of the Covenant. In particular, he highlights the origins of economic, social and cultural rights, offers a summary of the debate on their codification on the international level, contextualizes the drafting procedure, and draws attention to existing international documents and drafts addressing economic and social rights. By sketching out objections against the codification of economic, social and cultural rights, he enables readers to follow and understand the debates and arguments that accompanied the drafting of the ICESCR and that are reflected in the Travaux Préparatoires.

The main part of the book chronologically systematizes the Travaux Préparatoires in two volumes: from 1947 to 1952 (Vol. I) and from 1953 to 1966 (Vol. II). In this main part, Ben Saul offers a selection of key materials drawn from thousands of pages of documents stemming from the Commission on Human Rights, the Economic and Social Council and the UN General Assembly, the numerous drafts of Working Groups and States' proposals, amendments, statements and interventions, the statements and suggestions of international organizations, NGOs and experts, as

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well as the summary records of meetings (which seem countless). In doing so, he provides an insight into arguments that shaped the drafting process and gives both an overview of the general discussion and detailed information on specific questions and aspects. The book also provides information about the states' decisions regarding drafts, proposals and amendments. This huge selection of documents enables readers not only to follow the sequence and progress of the drafting of the ICESCR in general, but also to comprehend the statements and discussions on the codification and implementation of economic, social and cultural rights, the reason for the decision to draft and adopt two separate Covenants, the objections concerning the nature and content of provisions of the ICESCR and, additionally, the response to these objections etc.

While Vol. I contains documents that deal with the general aspects and questions (among them the implementation of human rights in general and economic, social and cultural rights in particular, the nature and fundamental character of these rights, and the decision to opt for two Covenants rather than a single one), Vol. II contains documents more specifically focusing on the questions concerning the ICESCR. These include the character of the provisions (individual rights vs. state obligations), the idea of the progressive realization of Covenant rights, the content of the regulations in question, monitoring system etc. Overall, the book is comprehensive and a very good collection of valuable documents with respect to the most important questions regarding the history of the Covenant. It is precious source of information not only for scholars but also for other experts working in this field.

That said, a few minor shortcomings should be mentioned. One of them concerns the omissions of the sections of the text and titles of the original documents. Some documents are presented as if they were complete, whereas in reality, they are excerpts. The omitted sections of the text have not always been marked up, for example see the 42nd Meeting of the HRC (at p. 3), summary record of the 212th Meeting of the ECOSOC (p. 326) and the excerpt of the GA Meetings (pp. 1616 et seq.). Therefore, it is not always clear that the reproduced document is only an excerpt.

Furthermore, frequently useful titles of the original documents are omitted in the reproduced version found in the book. This applies, for example, for the document of the 29th Meeting of the HRC (p. 11),[1] the summary records of the 205th Meeting of HCR (p. 290), of the 206th Meeting of HRC (p. 297) and of the 212th Meeting of the HRC (p. 326). Titles, however, can be useful since they enable faster comprehension of the context and the content of the document. Without the title, the reader has to read at least a few pages of the respective document or look into the detailed contents in order to figure out what the subject of the document is.

A further minor shortcoming is the lack of a Guide or detailed contents page containing the main relevant Travaux Préparatoires regarding the preamble and single provisions of the ICESCR. Since the book is organized chronologically, it

[1]Cf. http://hr-travaux.law.virginia.edu/document/iccpr/ecn4ac1sr29/nid-1680 (last accessed 14 May 2018).

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would have been helpful and user-friendly to have such a Guide or list containing the most relevant documents. Given that many academics, and especially practitioners, might be more interested in the drafting process with regard to the preamble and single provisions, the chronological organization does not aid the speedy location of particular documents of interest. This cannot be provided by detailed contents since it is time-consuming to search within more than 50 pages for the documents of interest. The Index cannot provide this either, firstly because it includes many more keywords than provisions of the Covenant and, secondly, because there are many page numbers for each keyword, many of which may often be of little relevance.

These, however, are only trifles, which do not significantly affect the merits of Ben Saul's valuable and laudable work. In the end, the decisive question is, especially for young scholars (e.g. PhD students): is it necessary in times of digital age when one can find many documents online—even though it may take some time—to spend a considerable amount of money (£325.00) on a collection of Travaux Préparatoires? In the reviewer's view, the answer to this is positive. Since not everything is available online and it is not always possible to consult library archives around the world, it is a worthwhile investment to acquire the current collection of Ben Saul. Whatever the position for individual readers, it is clear that for institutional purchasers (libraries, international organizations, governments), and professionals working in the area of economic, social and cultural rights, Ben Saul's collection can be highly recommended.

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Jorun Baumgartner, Treaty Shopping in International Investment Law

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Yun-I Kim

Corporate structuring and restructuring occur for multiple reasons. One of the effects of corporate structuring may be access to more favourable jurisdiction due to a change of nationality. But where to draw the line between, as the author calls it, 'legitimate nationality planning' and 'treaty abuse'?

The author's main objective consists of exploring this area of conflict by closely analysing the practice of treaty shopping in customary international law and international investment law, scrutinising developments to the present in a systematic manner.

Baumgartner sets out in a very methodical manner by defining the meaning of treaty shopping, as no universally accepted definition exists as of yet. Part I of the book is thus largely an introduction to the subject of treaty shopping and nationality planning. The author identifies areas of concern as well as corporate motives and advantages of nationality planning.

Part II contains the centrepiece of the work with a systematic examination of the practice of treaty shopping in (customary) international law and in particular investment law. The author places under close scrutiny the legal approaches taken by arbitral tribunals. Her conclusions on which issues arbitral tribunals have consolidated while others remain unsettled (leaving an overall inconsistent jurisprudence as of yet) are sound. She reaches them through a thorough discussion and analysis of the approaches tribunals have taken in order to draw the line between objectionable and unobjectionable treaty shopping. Baumgartner examines the validity of claims concerning treaty shopping by scrutinising the conclusions tribunals have reached with regard to the criteria of *ratione personae*, *ratione materiae*, and *ratione temporis* in cases where nationality planning has been subject to discussion.

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With regard to jurisdiction, a most interesting point is the discussion of its scope *ratione temporis*. During her analysis of the case law the author observes that a distinction between jurisdiction *ratione temporis* and objections due to an abuse of rights/abuse of process is made. According to her analysis, whether or not a dispute existed when the restructuring took place is a question of jurisdiction *ratione temporis*. If no dispute existed at the time of the change of nationality, the question of jurisdiction *ratione temporis* is not triggered. Rather, the matter at hand is then a question of abuse of treaty, *i.e.* when an entity changes nationality before an actual dispute arises, but where there is a future foreseeable dispute. Baumgartner carefully analyses the investment case law on how arbitral tribunals have approached this issue and finds that differing tests have been used to assess whether a (then future) dispute was foreseeable. Since different arbitral tribunals have approached the matter differently, the exact contours of the foreseeability test remain diffuse for the moment. As Baumgartner shows, two factors need to be verified when applying this test: first, the existence of a dispute, and second, the foreseeability of the dispute. The author rightly points to an inherently high 'risk of subjectivity' when attempting to make that determination; this of course is compounded by the existence of differing foreseeability tests. She herself supports a 'reasonably foreseeable' approach, pursuant to which a future dispute must be foreseeable not only from the standpoint of the investor who is a party to the dispute, but from the standpoint of a reasonable investor. This, in Baumgartner's view, introduces a more objective approach, helping shift emphasis from the subjective horizon of a particular investor. Whether this test will find larger acceptance in attempting to determine an objection due to treaty abuse remains to be seen. Baumgartner's analysis, however, is coherent and should help to better attenuate the risk of subjectivity, operating as an 'objectifying element'.

For similar reasons, the author proposes to put the 'sole purpose' doctrine to rest, which seeks to approach the question of whether a change of nationality was undertaken for the single purpose of obtaining a more opportune forum to bring a claim. Such an approach is dismissed for being too subjective and predominantly depending on conduct in the sphere of the investor, leaving no tangible criteria to permit proof of bad faith. This seems like a step in the right direction towards the introduction of a more objective approach, when exploring the motives for corporate structuring and restructuring and when examining whether treaty shopping has occurred in bad faith.

Part III then makes proposals *de lege ferenda* on how to reform international investment agreements to make them less susceptible to treaty shopping. More careful treaty drafting constitutes an effective means to that end, but will always depend to some extent on policy issues and approaches. Baumgartner first identifies policy approaches which include the negotiation of a multilateral investment framework and the 'prescription' of mailbox companies, suggesting that the use of mailbox companies should be further restricted, if not prohibited at all. Baumgartner

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readily admits, however, that both approaches are not very likely to succeed in the near future. Another of Baumgartner's proposals is to exclude investor-state dispute settlement clauses in future investment agreements which according to her could prove highly effective to prevent treaty shopping – provided that a majority of states decided to opt out. She concedes that the odds are not highly in favour of this approach either.

The author then goes on to examine approaches regarding the drafting of specific treaty clauses that could restrain treaty shopping. In general, Baumgartner advocates more restricted clauses with clear language to curtail the issue. Some examples include introducing a requirement of 'effective and dominant' nationality in cases of dual nationality where the investor is a natural person, and establishing the requirement of substantial business activities or a denial of benefits clause where legal persons occur as the investor. Further proposals are to clarify the terms 'control' and 'foreign control'. Baumgartner also suggests naming the circumstances under which corporate restructuring is permitted and acceptable under an investment agreement. She advocates clear language when setting the temporal scope of an investment agreement, be it e.g. by excluding disputes having arisen before the entry into force of the latter from its temporal scope or by explicitly regulating the situation of pre-existing disputes and foreseeable ones in a different manner in the treaty itself.

Seemingly a little out of context, the author ultimately discusses the role of the principle of good faith in treaty shopping in the last chapter of the book. At first sight, this appears slightly odd, especially considering that the author has aimed for an overall more objective approach regarding treaty shopping which e.g. the 'genuine link' test and the theory of 'piercing the corporate veil' can surely provide. Taking recourse to the principle of good faith seems to run counter to the author's objective, exposing the issue to further arbitral subjectivity. Baumgartner concedes that such a risk always exists, however, she insists that it may be confined by using the methods and principles identified in her work, *i.e.* with regard to the notion of dispute and its foreseeability, and much better so than other legal tools which according to her do not adequately capture the complex problems of treaty shopping as is discussed extensively by her.

Lastly, a quite remarkable part of the book is the annex which lists the most important arbitral decisions on the subject, sorted in clusters according to their key legal statements. Within each category, the decisions are listed in chronological order. This is a highly useful tool which can be used to quickly verify statements and positions taken by tribunals in certain cases on the issue.

Overall, the study provides the reader with a systematic analysis of the relevant jurisprudence so far, prudently distinguishing between policy and legal arguments and presenting in a comprehensive and articulate manner which issues seem to be settled already and those which remain open to further debate and exploration. Remaining inconsistencies in the jurisprudence are clearly identified;

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this sparks the reader's interest to keep following this topical debate and its future developments.

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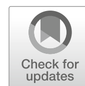
David Kennedy, A World of Struggle: How Power, Law and Expertise Shape Global Political Economy



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A World of Struggle by David Kennedy is a timely exploration on the nature of expertise and the role, influence, and, struggle of and between, experts. Though it has been so suggested elsewhere,[1] this is not a book about yesterday that may become relevant tomorrow. Rather, Kennedy writes of longstanding issues, persisting today, regarding experts which have not always been identified in mainstream international legal scholarship. The proliferation of 'people pursuing projects' (at 5)—a central theme of Kennedy's depiction of the essential nature of expertise—endures, regardless of the way in which experts are otherwise depicted by elected politicians. Instead, his central claim stands in today's current political climate; after all, the railing against 'expertise' during the US Presidential elections and the Brexit debate can actually be interpreted as 'people with projects' in the background of political discussion and public debate. This is the backdrop against which *A World of Struggle* will be read by many. Although there may indeed be a global 'backlash' against an expert elite, Kennedy effectively highlights how widespread, long-relied upon, and entrenched expertise is.

This book's relevance to current issues makes it a good addition to any holiday reading list and important for international lawyers to read, not least so as to understand and reflect better upon their role as experts. But those who would benefit the most are those not already familiar with legal realism and the sociology of law. International economic lawyers, who come to the study on the 'distributive impact of

[1]See Tom Ginsburg's review of the book in Ginsburg (2017).

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law' (217) for the first time, will certainly find it thought-provoking reading. For those readers, however, who are more well-versed in these traditions, the book will not seem methodologically or theoretically ground-breaking. However, they may still find individual chapters, such as 'the machinery of global reason' (Chapter 4) and 'expertise in action' (Chapter 5) of justifiable interest and value.

In a sense, this was my central take-away from *A World of Struggle*: as a text, this book lends itself to a variety of different uses and does not require to be read cover to cover. The book is divided into three parts, and it is possible to read each of these parts, and even many of the chapters, as stand-alone interventions. In my reading, there was little effort made to argue in what way the different individual sections came together to form part of a coherent whole.

Chapter 1 seeks to lay some ground work by setting out the case that experts tell stories and in doing so 'make the world' we live in. The central point Kennedy makes here is to emphasise this capacity of experts so as to better critically analyse the expertise given. It is an important and, in many ways, a very welcome undertaking. However Kennedy's writing style which is fairly abstract and conversational, despite being accessible and fluid, may unfortunately undermine his broader project in the eyes of some readers; it is by no means your traditional fully-referenced academic writing and sometimes the type of claims made in *A World of Struggle* demand this approach.

The broader narrative may also be undermined by whether a reader deems Kennedy trustworthy as a story-teller. I was frustrated by his obvious creation of a straw man in Chapter 1 (26–27) in order to prove a point about a tendency Kennedy has observed to 'focus on institutional design' (27) in classic discussions regarding the problem of economic globalization leaving people behind or them being 'too small to count' (26) in the face of global markets. Kennedy 'cobble[s] together from a variety of recent left liberal and progressive opinion pieces and news articles' (26) a story without references to such articles. This is important because Kennedy then asks, 'if we accept this interpretation of globalization and want to do something to change it, the story suggests we focus on institutional design' (27) which he argues, and I agree, would be a mistake. However, this interpretation was one entirely set up by Kennedy. The broader point Kennedy touches on is the well-known agency vs. structure argument. Except, we have had no real proof these opinion pieces and news articles encourage such a focus on institutions rather than people, other than our own intuition that it is plausible that Kennedy is right on this one. This unreliability is needlessly exasperating because, in my opinion, the argument is essential to make, not least because as Kennedy himself says a focus on institutions and structures 'lets many people off the hook' (27). It is a frustration I have with the book overall; Kennedy makes intuitively plausible individual points but rarely evidences them.

Herein lies the problem: all of Kennedy's points are entirely plausible. Kennedy writes on numerous occasions of the idea of the plausible: that there is a 'shared professional sense for the plausible' that allows an argument to be 'cluster[ed] within boundaries' of a hegemonic expert discourse (156); and that the agency of experts is 'deniable so long as what they add is *plausible* given the conventions of their

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expertise and the practices of their profession' (112). Kennedy criticises this, as it hides that there is always a 'range of interpretations' (112), allowing experts to escape responsibility for their expertise; if an 'answer' lies waiting to be discovered, as opposed to chosen from this range of interpretations, it removes the agency of the expert. Kennedy does this seemingly without being aware that much of what he offers is itself plausible argumentation—that he himself is an expert making an argument. He seems to only explicitly make this connection in his introduction to the very short Epilogue in the context of his job as a law professor training experts (277). This lack of self-reflexivity toward the very object of study namely that Kennedy's arguments rely on their being plausible—and ones which are more plausible to experts already well-versed in structuralism and the sociology of law—may undermine Kennedy's contribution.

Chapter 2 entitled 'Struggle: Toward a Cartography of Engagement' lays further ground work for Kennedy's argument about the role of experts in influencing decisions and why it is important that we pay attention to this role. It is here that Kennedy introduces the imagery of the backpack which every expert comes to their job carrying. These backpacks are filled with 'legal or other entitlements, powers, and vulnerabilities' (67) making experts subjective and asymmetrical in their struggle with one another, and instead maybe more or less empowered to articulate their interpretation of an issue. Accepting the premise that regime logics are social productions, Kennedy applies this idea in relation to governance experts. The point he notes is not just that systems are socially constructed but that 'they are socially constructed by a particular kind of activity: the work of expertise' (84). Presumably because it highlights that expertise is strategic for the regime in the first place.

I found two things frustrating about this chapter. The first is the attempt to use a metaphor of cartography to envisage the 'terrain' of expertise, without acknowledging that the introduction of this 'cartography' and 'terrain' is itself a classical tool of expert discourse. It is another world-making story, just like the view of the earth from space (see at 91–92) that Kennedy highlights as the image that too many naively 'latched onto...as evidence of a deep truth'. Cartography is supposed to be the 'antidote to the limits of system analytics' (75) but Kennedy does not acknowledge the highly problematic baggage that comes with cartography as a metaphor—it too promotes a certain perspective of a world, one where the viewer observes a smooth or striated surface from above and even when inside the structure, and inside the map, can still attain this imagined perspective. Kennedy also does not appear to explore, or think there might be a cause for exploring, his reasons for choosing this perspective. The second point concerns Kennedy's lack of precision and fondness for abstraction. Kennedy says he focuses on "people" rather than 'abstract and institutional actors' (56) yet rarely does he actually speak of any concrete individuals, only individuals, or 'deciders' (111), or 'economists' (84), in the abstract.

Part II is where Kennedy starts developing the themes of Part I and his analysis of expertise is more detailed and less familiar to international legal discourse. Chapters 3–5 cover what in many ways may be considered some rich ground. This includes the value of recognising insider/outsider vocabulary, thoroughly reviewed

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elsewhere.[2] The power of language to communicate, as well as to create and to perform, is well explored in the book. Although the idea is not novel, its application to the work of experts is insightful. What is a truly valuable contribution is Kennedy's treatment of it is the portrayal of expertise as a performative process: given expertise is carried out through articulation, exposing the particular vocabularies of experts, and how experts frame problems, is certainly worth highlighting and drawing attention to. Chapter 4 challenges the traditional assumption that there is a difference between the 'background' work of experts, or advisors, and the 'foreground' work of decision-makers, such as politicians (111–113) and raises the issue of responsibility in respect of this new insight, including the questions of how should or how can those who have 'fade[d] into the background' (113) be held responsible. It prompts some interesting questions such as: Who really decides? What is the role of lobbyists? How much do politicians or foreground 'deciders' rely on briefings? Kennedy rightly raises the increasingly blurred role of the positions background and foreground 'people' occupy (114).

Chapter 5 turns to a slightly, I think, unfulfilled and still abstract study of 'expertise in action' in three areas—development policy and economics, use of force, and human rights advocacy—before finally discussing the role of international law itself. Kennedy argues that 'content boundaries are less important than boundaries marked by role and style' (155), which really points to the dynamics and asymmetries of power that will ensure success or loss in the struggle to have your expertise win out. Kennedy makes an interesting observation about international law: that, because of the discipline's 'sophistication' and ability to draw on all theories, only the 'naive' could ever think there was one particular answer to a legal question (156). Kennedy, probably fairly boldly to many, claims that 'the "bindingness" of rules is. . .not that important anyway' (157).

Part III brings in the law for those who need it; however, for those who do not, this Part is only worth skimming. If you have got to this point of the book and wondered how it relates to international economic law, these chapters contain a great discussion, or rather a summary, of relevant legal theory. Kennedy articulately demonstrates that, 'because it distributes, law has value for people in struggle and is often also at stake in conflict' (177) especially in the arena of expert struggle. As international lawyers, we deal constantly with ideas about 'trade wars' in international economic law and use the language of the universal. Kennedy exposes the lack of neutrality of many of the ideas that dominate the practice of international economic law and the 'cloak covering the distributive practices [international law] authorises and accepts' (198) in Chapter 6. Chapter 7 expands this argument further, as Kennedy lays out the historical development of international law and legal theory. This chapter once again has something of value to offer to those less familiar with the

[2]Özsu U (2018) H-Diplo Roundtable XIX, 26 on A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy. XIX H-Diplo, https://networks.h-net.org/node/28443/discussions/1599029/h-diplo-roundtable-xix-26-world-struggle-how-power-law-and#_Toc509652530 (last accessed 2 April 2018).

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subject. Other readers are likely to find it unremarkable as it contributes very little to developing legal theory or in terms of interpreting an account of the history of international law. I found the Epilogue underwhelming; although a more charitable interpretation may be that perhaps Kennedy felt there was little room to sum up his book without essentially reproducing it.

The central point in *A World of Struggle*, that the stories we tell 'can let people off the hook' if we perceive the world to be at the mercy of the forces of globalisation (27), is worth retelling and restating. The value of Kennedy's book is that he offers, in a simple way, the tools to reverse, as he calls it, the naturalised outcomes of earlier debates (37), but what might otherwise be thought of as deconstructing, demystifying, and understanding the background assumptions of legal concepts or ideas such as 'market efficiency' (51) and highlighting the contingency of facts.

In short, the book does offer something to everyone who reads it. *A World of Struggle* is a current and relevant book with many plausible arguments. For those in the field of international economic law it proves an enlightening read, as it explores the role of experts and nature of the struggle of those who are typically seen in the background. I sometimes think the value in Kennedy's work overall is in his ability to spot trends in international law that few observe, and in his ability to write accessibly. It is possible to criticise Kennedy's lack of references or concreteness but, if the book is compared to other non-academic writing, perhaps even comparable to the style of 'pop' economics or legal sociology, then it works in delivering meaningful, insightful and important research and it works well.

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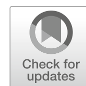
Pierre Sauvé and Martin Roy, Research Handbook on Trade in Services



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Charlotte Sieber-Gasser

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1 Introduction

Three decades into regulating services trade at the multilateral level, governments, academics and other stakeholders in the ‘diverse mosaic that services bring together’—as Sauvé and Roy so aptly put it in their Introduction to their Research Handbook on Trade in Services—continue to be confronted with substantial challenges. Most notably, the analysis of services trade and consequently also related policy making suffer from a lack of economic and legal data. Attempts to tackle this issue come in the form of more recent databases on services trade and services regulation at the WTO, the OECD, or the World Bank, among others.

In addition to the scarcity of data in relation to services trade and regulation, increasing globalisation and digitalisation of the world economy have opened up new opportunities for services trade while at the same time posing new challenges to services trade regulation. We are confronted today with new services and new forms of services trade that did not exist when, some thirty years ago, the General Agreement on Trade in Services (GATS) introduced services trade regulation at the multilateral level. Most prominently, traditional services trade regulation does not comprehensively deal with aspects of services trade related with the Internet,

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energy, automation, and more recently the emergence of the so-called sharing economy.

While services may have been considered to be less vital than goods for global trade in 1990, it becomes more and more apparent today that global production chains along with manufacturing industries heavily depend on services in their functioning and economic performance. While services contribute substantially to GDP per capita across the world, overall shares in global services trade remain unequally distributed between industrialised countries and the rest of the world. In conjunction with demographic considerations, aspects related to services trade such as the movement of natural service providers across nation borders or the role of services in fostering economic growth in developing countries increasingly gain attention.

Finally, the most recent trade negotiations both at the plurilateral level in the form of the Trade in Services Agreement (TiSA) and at the regional or bilateral level (TPP, CETA, EU-Japan, aso.) aim to tackle some of the regulatory and economic aspects of services trade highlighted above. However, efforts are not—yet—based on multilateral consensus, whereas implications of a first mover advantage for other trade negotiations and the future of services trade regulation remain unclear. The fact that the GATS was initially designed as a stepping stone for subsequent negotiations—which until today did not materialise—may furthermore raise questions regarding the role of the WTO in defining the future of services trade vis-à-vis various regional and plurilateral efforts to do so outside (or alongside) the multilateral forum.

Therefore, the comprehensive *Research Handbook on Trade in Services*, edited by *Pierre Sauvé* and *Martin Roy*, comes at a particularly interesting and challenging moment in the history of services trade regulation. It aims to take stock of the lessons learned to date and explores a range of policy questions that had so far remained unanswered. The book is divided into three parts: Empirical Perspectives (Part 1), Legal Perspectives (Part 2) and Political Economy and Development Perspectives (Part 3). The contributions to the different parts come from a multi-disciplinary group of distinguished authors, ranging from empirical economics, to law, to global political economy. Each part features seven individual Chapters, rendering the Handbook in total more than 600 pages strong. Within the array of topics considered, the Handbook lays a particular focus on issues related to global value chains, developing countries and new frontiers in services negotiations. Each of these three focus topics is considered in-depth and from different angles. The Handbook furthermore features particularly comprehensive Chapters on digital trade, labour migration, standardisation and competition. Services-related aspects of energy, investment, more recent mega-regional trade negotiations, democratic governance, and automation are touched upon in some of the Chapters, but remain outside of the main focus of the Handbook. That said, the Handbook offers a comprehensive overview of services trade today, and also contains a number of gems in the form of recent insights and innovative ideas in services trade policy and regulation.

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2 The Handbook in More Detail: Empirical Perspectives

The first Part on empirical perspectives starts off with a chapter by *Martin Roy* on charting the evolving landscape of services trade policies. The Chapter depicts changes in services policies since 2000, based on the I-TIP services database and demonstrates that policy changes worldwide clearly tend to be more liberalising, rather than trade-restrictive. The chapter discusses trends in policy changes in the different services sectors, modes of supply, as well as in geographic regions. *Roy* concludes the chapter by discussing implications for TiSA negotiations, highlighting among others, that the majority of liberalising policy changes in recent years have been undertaken by non-TiSA members. TiSA therefore was unlikely to lock in a considerable share of more recent liberalisation efforts worldwide.

In the second Chapter of the Handbook, *Andreas Maurer*, *Joscelyn Magdeleine* and *Rainer Lanz* investigate the extent to which services can be measured in a world of global value chains. The authors provide an overview over the history of services trade and most recent economic trends in services sectors worldwide. Furthermore, they discuss shortfalls and advantages of various databases aiming at depicting the role of services in today's global economy. This provides the statistical backbone of what *Sébastien Miroudot* and *Ben Sheperd* then discuss in Chapter 3 of the Handbook from a more econometric perspective: *Miroudot* and *Sheperd* use the new databases for the calculation of trade costs in services and find that, with the exception of financial services, costs of intermediate services and final trade costs of services are falling. Moreover, they demonstrate that trade costs of intermediate services react more sensitively to policy changes than final trade costs.

Chapter 4 by *Erik van Marel* investigates the interdependence between services sector regulation and comparative advantages in goods: Tailor-made regulation, which takes into account not only regulatory needs of the service sector itself, but also of respective services demanding goods industries may create a comparative advantage. *Van Marel* highlights the economic implications of services regulation for goods industries, and emphasises the need for tailor-made, national policies.

Anirudh Shingal endeavours on a challenging mission in Chapter 5 by trying to estimate the trade effects of Preferential Trade Agreements (PTAs) in services: as a consequence of the complexity of services trade regulation, existing databases on PTAs in services do not yet provide a comprehensive overview of the respective level of liberalisation before and after the implementation of a PTA. Newer databases such as DESTA do, however, cover individual commitments in services sectors as well as in modes of supply. *Shingal*'s findings show that a higher number of provisions in services trade liberalisation does not necessarily correlate with an increase in trade flows.

The two final Chapters of the 'empirical perspectives' part of the Handbook then turn to economic implications of services trade regulation and policy implementation at the national level. In Chapter 6 on nurturing the competitiveness of services exports, *Sebastián Sáez* and *Daria Taglioni* present their methodology to assess a country's performance and potential in services trade. In particular, it addresses

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avenues of increasing the integration of developing countries in the global market by adequately aligning services regulation. *Martin Molínuevo* and *Sebastián Sáez* then complement the previous Chapter by turning to the governance of regulatory reform in services sectors. Based on regulatory failures documented in case-studies and described in economic literature, they emphasise the need for careful planning and administration of reforms.

3 The Handbook in More Detail: Legal Perspectives

The first Chapter of the 'legal perspectives' part by *Eric H. Leroux* provides for a thorough and comprehensive overview over GATS case law to date. It discusses the extent to which the WTO dispute settlement contributed to developing further and clarifying the scope and functioning of GATS. *Leroux* points out in his conclusions that revising both the single undertaking approach as well as the system of dispute settlement remedies at the WTO may prove beneficial.

In his Chapter 9 of the Handbook, *Markus Krajewski* sheds light on another critical aspect of services trade liberalisation; the tension between international and national regulation. Recent attempts at negotiating deeper commitments in services trade liberalisation at the bilateral and plurilateral level are widely perceived as a challenge to democratic governance at the domestic level. Contrary to this perception, *Krajewski* shows that WTO members have—if at all—only cautiously endeavoured in novel rule-making in services in PTAs to date. In view of the emergence of novel regulatory elements in individual services sectors (e.g. e-commerce, postal and courier services), he proposes to focus future research on assessing the suitability of individual sectors for regulation at the multilateral, regional, or the domestic level.

The following two Chapters then focus on standardisation in services trade. *Bernhard M. Hoekman* and *Petros C. Mavroidis* discuss in their Chapter 10 the need for a technical barriers to trade agreement (TBT) in services. They observe that on the one hand, the current GATS regime insufficiently prevents governments from using domestic regulation to restrict trade in services. On the other hand, the embedded approaches of TBT are technically not suitable for standardisation in services trade. The authors therefore encourage strengthening the operationalization of important TBT-principles that are already incorporated in GATS, such as the requirement that domestic regulation must be least trade restrictive. In addition, *Panagiotis Delimatsis* focuses in his Chapter 11 on the role of the EU in standard-setting in services. Lessons learned in the EU internal process of creating a single services market and abandoning technical barriers to services trade within the EU may eventually spill over to the regional or multilateral level, either through PTAs of the EU or because of the first mover advantage of the largest services market today.

Sherry Stephenson and *Gary C. Hufbauer* then turn to the role of state-owned enterprises in services markets and highlight the need for adequate regulation. They point out that the regulation of state-owned enterprises has been taken up in more

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recent services trade negotiations and suggest that novel regulatory elements, like the ones featured in the Transpacific Partnership (TPP) Agreement, may find their way also into TiSA negotiations.

The final two Chapters of the 'legal perspectives' part of the Handbook focus on aspects of services trade regulation linked with technological progress. *Mira Burri* first presents an overview over the history of digital trade and of its implications for international economic law. She then assesses and carefully explains the fitness of the WTO agreements in general and of GATS-rules in particular for dealing with digital trade. *Burri* concludes the chapter by looking at the most recent regulatory proposals in regional and plurilateral negotiations and by emphasizing the need for WTO members to at least commit to the general principles of e-commerce as elaborated by the US and the EU. Thereafter, *L. Lee Tuthill* focuses on the role of trade rules in the governance of cross-border data flows. She emphasises in particular the increasing economic weight of cross-border data and information flows. In consequence, finding an adequate balance between data control and minimisation of the costs of data regulation may create substantial spill-over effects. *Tuthill* comprehensively discusses the suitability of GATS rules to deal with the governance of data flows, provides for an overview of more recent regional and bilateral initiatives and concludes by pointing out that regulation in this field will in particular benefit SMEs.

4 The Handbook in More Detail: Political Economy and Development Perspectives

In the third and final part, the Handbook then takes up a host of development policy challenges in conjunction with services trade. In their Chapter 15, *Tomer Broude* and *Shai Moses* investigate the dynamics in trade negotiations leading to positive or negative listing of commitments. They find that the binary decision-making process of either or may have led in the past to a preference for positive listing. When confronted with an increase of options, e.g. new, hybrid approaches to listing services trade commitments, negotiators are more open to embrace elements of negative listing.

In Chapter 16, *Rupa Chanda* investigates the role of temporary movement (mode 4) under the GATS in the realisation of mutual gains from labour surplus in developing countries and labour shortage in industrialised countries. *Chanda* provides for a forward looking analysis of demographics and labour markets, and discusses challenges for both sending and receiving countries combined also with case-studies from India and Bangladesh. She points out that a broad ranging, holistic approach—taking into account education, skilling, or remittances among others—is needed in order to prevent demographic dividends from becoming a liability.

Andrew Berry, *Timon Bohn* and *Nanno Mulder* build their Chapter 17 around the hypothesis that the growing participation of emerging economies in global trade of

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business services is based on their ability to increase complexity of their exports, and not on competing on low wages. They investigate various aspects and levels of upgrading in emerging economies. While China and India dominate other emerging economies, the latter have also upgraded within and among segments of business services. The Chapter highlights the key role of workers' skills in upgrading, as well as the shortage of statistical data on services segments and modes of supply in emerging economies.

In a legal case-study on Pakistan in Chapter 18, *Joseph Wilson* sheds light on the vital role of domestic competition laws and authorities in successfully opening services markets in developing countries. Similarly, *Craig VanGrasstek* and *Mina Mashayekhi* highlight in Chapter 19 that for developing countries, concluding services trade agreements promises the intended results when PTAs are conceived as complements to domestic economic reforms.

In Chapter 20, *Pierre Sauvé* and *Natasha Ward* offer an extensive and in-depth analysis of the services waiver for Least-Developed Countries (LDCs), introduced in 2011. They discuss the heterogeneity of the LDC group with a focus on their respective services sectors and analyse opportunities for LDCs along the four modes of services supply and with a focus on the most relevant services sectors. In their concluding remarks, they offer six points to be considered in the future, among them the fact that the waiver may be particularly useful in dealing with quantitative restrictions, and the reference that next to the waiver, regional or bilateral and even non-trade instruments ought to be duly recognized.

The Handbook concludes with the final Chapter by *Gabriel Gari* and the analysis of the changing nature of services negotiations. *Gari* notes that barriers to trade in services differ substantially in their nature from barriers to trade in goods. Nevertheless, services negotiators appear to rely on the practices and procedures used in goods negotiations. Given that an increasing number of WTO members appear to be willing to deepen services commitments and further develop the services trade agenda, *Gari* suggests to incorporate plurilateral negotiations within the WTO framework in the future along with alternative negotiation methods and a focus on transparency measures and regulatory cooperation.

5 Overall Assessment

The multi-disciplinary perspectives on services trade and policy combined in this Handbook offer insights into a wide array of critical aspects of services trade regulation today, both at the macro and the micro level. Across the various chapters, one common denominator is identifiable in the need for a better understanding of the role and regulation of services at the sectoral level and for more detailed data on a possibly emerging plurilateral consensus on a new minimum standard in services trade. The Handbook features new and forward-looking insights in the analysis of the role of services trade in global value chains, in the role of the GATS in governing services trade policies, and in discussing the future of services trade negotiations. It

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provides useful and timely guidance for research priorities, and for new approaches to holistic services policies and negotiations, and should therefore be read by researchers, policymakers and services negotiators alike.

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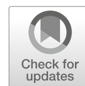
Julien Chaisse (Ed.), Charting the Water Regulatory Future: Issues, Challenges and Directions



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Fernando Dias Simões

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1 Overview

This book, examining the issues, challenges and directions in water regulation, is very timely. Indeed, works that engage with this complex and endless topic are always opportune. One need not elaborate at length on how critical water is for human existence or how dramatic water-related problems have become of late. As this review goes into print, Cape Town, struck by a historic drought, is bracing for 'Day Zero' – the day it cuts off running water for four million people. In South Africa and elsewhere, the magnitude of the problem goes well beyond the daily provision of a commodity – it includes water shortage and quality problems, growing demands from industries and urban areas amid population growth, the intricate nexuses between water, food and energy security, etc. All of these predicaments call for a re-assessment of water management models.

In this interesting book, several authors engage with the issues and challenges facing governments, private companies, international organisations, and citizens (i.e., all of us humans who cannot possibly survive without water) through an interdisciplinary prism. Countless problems are examined from a myriad of perspectives that are, in the end, deeply intertwined. While many have emphasised the need for a holistic approach to water issues, that goal is not always achieved: scholars tend to work in scientific silos and practitioners seldom convey their know-how in academic outlets. In this book, Professor Julien Chaisse gathers contributions from

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a number of leading academic experts with varied professional backgrounds (trade and investment lawyers, human rights lawyers, environmental lawyers) but also practitioners with a background in public administration, disaster governance, public finance, or international relations. Rather than looking at water-related problems merely from a legal perspective (discussing domestic and international legal frameworks and assessing arbitral awards and judicial judgements), the book analyses other dimensions such as the economic drivers of the water market, and presents several case studies that add a 'real-life' flavour to the discussion.

Three major issues (and related challenges) are discussed in the book: the challenges that water services pose to public international law frameworks; the protection and promotion of the much-discussed human right to water, and the economic determinants of global water markets.

The first two chapters examine the impact of WTO Law on the regulation of water services. International trade rules can be used to improve the management of water, but that has not happened thus far. Furthermore, low levels of transparency regarding subsidies given to the sector result in the unsustainable management of a precious resource (Ahmad). The private sector is playing an ever-central role in the supply of water and sanitation services, but the application of the General Agreement on Trade in Services to this sector remains controversial. The characterisation of these services as a human right requires special attention in their regulation (Bates).

The next three chapters focus on the interplay between international investment law and water services. Over the last decades there has been an explosion in the number of water and sanitation contracts awarded to foreign companies. Disputes between host states and foreign investors have resulted in multiple arbitration proceedings, producing a sprouting body of jurisprudence. In deciding these disputes, arbitral tribunals are shaping the contours of an international water services regime, filling the void left by the inexistence of a global organisation to supervise the sector. While this can be seen as a step towards greater regulation of water markets, it also highlights the need for a global, holistic approach to the field (Chaisse). One of the hottest topics within this emerging case load is the delimitation of host states' right to regulate water services. States are striving to limit the interpretative freedom of arbitral tribunals by invoking their right to pursue public policies. What standard should arbitral tribunals employ to strike an appropriate balance between the protection of investors and domestic public concerns (Titi)? According to Hirano and Hamamoto, arbitral awards have acknowledged the host State's regulatory power. Investment arbitral tribunals function as a watchdog for disguised 'regulatory' measures and only abusive uses of regulatory powers are considered incompatible with investment treaties.

The analysis of the public international law landscape is completed by two further contributions. Turrini discusses the role of the notion of virtual water (a concept also alluded to by Ahmad). This concept raises awareness about the scarcity of water resources and the need to exploit them rationally, for instance, as regards food security and environmental protection. Tassin adds two new perspectives: terrestrial and maritime viewpoints. In her opinion, the tendency for a sectorized and fragmented approach to terrestrial and marine uses of water affects the understanding and regulation of water issues.

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A second group of contributions addresses the much-discussed ‘human right to water’ from different perspectives. Tassin examines the notion as part of a ‘terrestrial and human’ approach to water issues. Hirano and Hamamoto focus their attention on human rights considerations by investment arbitral tribunals. Shah contributes to the discussion by offering a case study on the legal protection and judicial enforcement of water rights in Pakistan. He concludes that the country continues to fail in meeting its water-based obligations, due to governmental deficiencies and lack of resources. Another case study is offered by Emeziem, this time focusing on Nigeria. In his opinion there is a gap between the perception of water as a human right and the reality of access to clean water and sanitation. The realization of this right lies essentially at the local level, hence the need to act locally while thinking globally. The contribution of the private sector in implementing this right is discussed by Mahadevan. Transnational corporations play a major role in this regard because of their global presence. Finally, De Barcellos discusses how public law litigation has been used to advance human rights in Brazil, examining in particular lawsuits involving water and sanitation public policies.

A third group of chapters discusses the economic drivers and determinants shaping the global market for water services in the future. Water and sanitation services are operated through vast physical networks. The operation of these grids requires substantial technical expertise, maintenance, and investment. All over the world governments are faced with deteriorating water systems and the scarcity of capital to maintain and improve networks. Mukherjee and Chakraborty estimate the demand for investment in water services infrastructure to achieve the universal access to improved water supply and sanitation by 2019. Different regions are at different levels of achievement in securing universal access to safe drinking water and sanitation. McDonnell analyses residential water charges in Ireland, discussing the multiple policy objectives pursued by water funding models (environmental sustainability, financial sustainability, economic efficiency and social concerns, including affordability), concluding that there are trade-offs between each of these policy objectives. Ancev, Azad, and Hernandez-Sancho discuss the role of multinational companies in providing water services, examining their efficiency, testing the productivity and efficiency of water utilities in different countries. Finally, Lassa and Yu-Hung Lai look at microfinance in water and sanitation services and identify best practices, focusing on a community-based sanitation micro-finance initiative in Indonesia.

2 Key Lessons

The multifarious problems discussed in this book call for a global vision of water markets. All authors take on the challenge of formulating proposals and offering recommendations; their views can be distilled into three overarching propositions.

First, WTO Rules can play a greater role in promoting efficient water markets. The regulatory framework should be reformed with the goal of promoting water-use efficiency (Ahmad). Bearing in mind the essential role of water and sanitation,

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greater certainty must be provided to ensure the effective operation of trade laws, the validity of national legislation and the protection of consumers' interests. The inclusion of a new subcategory specifically related to water services could afford greater certainty in the implementation of the General Agreement on Trade in Services (Bates).

Second, looking beyond the WTO framework, it is necessary to ensure that the human right to water receives consideration in investment arbitration. Governments must design water-related policies that comply with investment treaties because their contribution is decisive to improve and expand networks (Chaisse). In some cases host states may retain the ability to regulate water services without having to compensate investors. However, they should not be able to forego their investment commitments for reasons that do not involve the public interest (Titi). Future arbitral tribunals dealing with water-related cases will have access to materials such as General Comment no. 15 on the right to water which they can invoke when assessing the conformity of State measures with investment treaties. Still, it is not likely that the deference accorded to states will increase (Hirano and Hamamoto). A further challenge for International Law is to move the concept of virtual water from a practical elaboration into a practicable policy option. It is necessary to devise meaningful ways to incorporate virtual water in existing concepts of law and policy, such as the right to water (Turrini).

Several potential avenues can be used to promote and protect the human right to water. A social justice approach can be applied as a key tool towards realizing the human right to water (Emeziem). While multi-stakeholder initiatives are important, they do not address all problems arising out the interaction between the human right to water and corporate activities. It is necessary to include state actors in these initiatives in order to ensure effective compliance standards through state mechanisms (Mahadevan). Public law litigation can also be used to foster public health policies. However, it is necessary to reach the most disenfranchised communities, as the worse-off communities remain the least represented in judicial cases (De Barcellos).

Third, looking into the future, investment is crucial to expand and maintain water networks. Encouraging private investment in this field is a key part of long-term solutions. It is necessary to improve the political-legal framework for facilitating private sector involvement (Mukherjee and Chakraborty). Different water charging models have diverse advantages and disadvantages, and water affordability is an important concern. A system that combines a volume-based pricing structure with a system of income-related water credits may be a good solution to reconcile the four main policy objectives pursued by water funding models (McDonnell). Private management of water services is not necessarily more efficient than state-run utilities. Ancev, Azad, and Hernandez-Sancho conclude that the argument for opening up a domestic sector to multinational corporations based on expected productivity and efficiency gains may not be as strong as sometimes advocated. In the community-based context, micro-finance can be useful if the conditions for sustainability are controlled by local actors (Lassa and Yu-Hung Lai).

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3 Contribution to the Literature

Innumerable books have been published over the last decades on the management of water resources, both at the national, regional, and global level. Authors have examined the economic and political reasons underpinning the liberalisation of water services in many countries. Studies have also been published on the interplay between trade rules, investment laws, and water services. Finally, a growing body of literature examines the emergence of the human right to water, and how to protect it at the national and international level, both before national courts and international arbitration panels. There is an endless 'sea' of questions flowing from different fields of knowledge. An interdisciplinary approach is necessary to understand current threats and devise sustainable solutions. This entails bringing together policymakers, managers, technicians, lawyers, economists, and other experts. Chaisse's *Charting the Water Regulatory Future* takes on that challenge, offering suggestions for action at the national and international level, both in the design of legal frameworks and in the application of legal standards, taking into account the legal framework but also the surrounding economic and social context. Such broad, complex issues could not realistically be fully examined in a single work. However, this book contributes to this gigantic endeavour by identifying some of the most pressing legal and economic issues and challenges, and pointing toward some possible future directions. It is written in a technically accurate yet accessible language and will surely prove useful to scholars, policymakers, and practitioners alike.

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New Research on the Deep Seabed and Its Resources

Christian J. Tams

The seabed has long fascinated explorers, adventurers, divers—and international lawyers. Many a gold rush for the 'unplumbed riches of the deep' (as the Economist put it in 2009) has been announced; and after a quiet period, tension seems to be building up again. According to the International Seabed Authority's (ISA) 2016 Annual Report, the "Commercialization of Marine Minerals in Deep Seabed [is now] Well Within Reach": deep seabed mining for manganese, copper, nickel and cobalt is said, once more, to be viable, and rumours of rare earths finds in the seabed heighten expectations. What is more, quite apart from minerals, the UN seems to get serious about preparing "an international legally binding instrument . . . on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction" (General Assembly Resolution 69/292 of 19 June 2015): this is meant to regulate access to, and set rules for the exploitation of, marine *genetic* resources, commercially attractive notably to pharmaceutical, cosmetic and biotech companies and referred to as 'bio-prospecting'. Unsurprisingly, as with previous gold rushes, the law is a factor in these endeavours: legal regulation seeks to ensure that exploration and exploitation occur in line with basic societal concerns, without stoking initiative through overregulation. International legal regulation, found notably in the 1982 United Nations Convention for the Law of the Sea (UNCLOS) and its 1994 Implementation Agreement, is no exception, but agreement on globally binding societal standards has not been easy to reach.

The two books under review—two German PhD theses defended in 2016, and published soon after—address aspects of the legal regime governing the 'unplumbed riches of the deep'. They complement each other well. Both look at resources beyond areas of national jurisdiction, but they do so from different angles: Mario Starre addresses the exploitation of *mineral* resources (with a focus on questions of

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liability), while Matthias J. Annweiler's focus is on marine *genetic* resources. This difference shapes their respective approaches. Starre's book is in essence a work of consolidation: he assesses the UNCLOS treaty regime that was elaborated during the 1970s–1990s and that is now being tested. Annweiler tackles more fundamental questions and has to make do without an existing masterplan: he analyses the law that applies in the absence of a tailor-made regime, and outlines principles for a future regulation.

Both books offer solid information and succeed in conveying complex scientific information to a lay audience of lawyer-readers. Starre's approach is perhaps a bit too solid; his argument takes rather long to get off the ground. More than a third of the book is spent spelling out the basics—the UNCLOS zonal regime here, Arvid Pardo there, the Area as common heritage, resistance by developed countries leading to the 1994 Implementation Agreement etc. So lengthy is the stage-setting exercise that a number of Starre's interesting observations end up buried in two largely descriptive chapters totalling 150 pages. He does make them, though, notably by providing up-to-date information about current contracts taken out by companies and consortia, and by offering detail about the significant costs of exploitation (as opposed to prospection and exploration): these mean that mining will only become economically profitable if well over 1mio tons of manganese nodules are mined over a period of 20–25 years (at 57). But it is only in the third chapter that Starre zooms in on his real topic, the legal rules governing access to deep seabed minerals, and the liability regime established under Part XI. His discussion in this third chapter is useful and detailed. Drawing on a large number of primary and secondary sources, and engaging with the 2011 advisory opinion of the ITLOS Seabed Disputes Chamber, it brings out many of the unusual features of the UNCLOS regime. The awkward role of business actors in a mostly State-centric regime is highlighted: even where private companies (and no longer State-run enterprises) today are expected to do the bulk of the actual mining, States remain relevant as sponsors; without their green light mining cannot go ahead. More unusual still, the ISA enjoys significant powers: it controls access via licensing procedures, and its mining codes define the conditions. Despite the clarification brought about by the 2011 ITLOS advisory opinion, the respective obligations and responsibilities of the different actors are not easy to disentangle. Starre's detailed discussion underlines as much. He largely follows the ITLOS chamber's approach and notably does not let sponsoring State's off the 'responsibility hook'. His discussion however suggests that responsibility may not be easy to implement. Drawing on the text of Article 139(2) UNCLOS, Starre argues that responsibility for mining activities, unlike under the general regime, depends on the finding of damage (173 et seq.). What is more (and here he is more cautious than the ITLOS chamber), Starre is not fully convinced that responsibility, once at issue, could be invoked by each and every UNCLOS treaty party through some form of public interest litigation (293 et seq.). Perhaps surprisingly (or at least prematurely), he still considers the liability regime to be effective (303): might one not wait for it to be tested in real life?

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Be that as it may, Starre's PhD certainly offers a useful stocktaking of the UNCLOS regime, as adjusted through the 1994 Implementation Agreement, and it is offered at a time when the rules formulated in these treaties begin to be tested in earnest, with contractors gradually moving towards exploration and eventually exploitation. What the book does not provide is a detailed engagement with the ISA mining code, i.e. the rules, regulations and procedures that spell out the finer details of the mining regime. This is a missed opportunity, as this code (and Starre acknowledges as much, but in fairly general terms: see 122 et seq.) concretises the often vague principles found in treaties and clarifies how the international community intends to strike a balance between enabling mining and protecting the marine environment. Given the ISA's keen desire to adopt new regulations, and the wide consultation process it has launched over the course of the last years (in which ecologists have clashed with business), Starre's decision to focus on the primary treaty text is a significant limitation; it means that his book does not speak to the current 'new frontier' of deep seabed mining. Its main value, then, is as a helpful and reliable guide to the deep seabed mining regime of UNCLOS.

Annweiler's take on deep seabed resources is different. It has to be as the object of his inquiry—access to and exploration of marine *genetic* resources—raises questions of a different nature. Unlike Starre's work focused on mineral resources, Annweiler simply cannot engage with a detailed regime; he must address a preliminary question: is there an applicable regime at all—and more particularly, do the existing rules of UNCLOS apply to bio-prospecting? The latter question needs to be addressed as Part XI UNCLOS was elaborated with mineral (not genetic) resources in mind—and Article 133, defining "resources" as "all solid, liquid or gaseous mineral resources", says so expressly.

So could the existing principles and rules developed to deal with minerals (enshrining the idea of a common heritage and implementing it through international procedures administered by the ISA) be read also to govern bio-prospecting for genetic resources? And should they? Annweiler seems torn: he thinks they should, but struggles to see how they could. To his credit, he engages in detail with the arguments set out by States and scholars—which he summarises and evaluates with a clear eye, good judgment and a capacity to divide the marine wheat from the chaff. (No lengthy summaries of the basics here, unlike in Starre's work: Annweiler's treatment is judicious, and he cuts to the chase much more quickly.) But all his nuanced and detailed inquiries yield the same result; almost mantra-like, he finds that genetic resources are special and do not fit under existing rules. To illustrate: no, Part XI cannot be dynamically read to apply to genetic resources (65 e seq.); no, the common heritage principle (in any tangible form) does not apply as customary international law (as shown in detail in chapter IV); no, Part XII of UNCLOS on marine environmental law does not apply either (94–96); but equally no, States cannot simply go ahead and exploit genetic resources on the basis of an expansive reading of the freedoms of high seas (86 et seq.). All this is plausible, and all this is set out on the basis of a detailed and mature discussion.

Two aspects remain puzzling, though. The first is that notwithstanding his firm views on what regime does *not* apply, Annweiler is silent on what does. To wit, if

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UNCLOS Part XI only applies to minerals, and no customary regime has emerged, are States free simply to explore genetic resources? Or are they under a duty to show caution, perhaps even pre-caution, before bio-prospecting away? Precisely because Annweiler considers existing regimes not to apply, the question arises acutely—but in his book, surprisingly, he avoids a firm response (see 224 et seq. for tentative thoughts).

Also surprising is Annweiler's take on the recent debates at the UN, where, as noted above, the process of drafting a treaty is gathering momentum: it has done so from 2015, and is picking up pace. Annweiler briefly mentions the more recent developments, notably GA Resolution 69/292, but only in the form of a coda to his detailed analysis (230 et seq.). Perhaps the recent trend came too late to be fully integrated—but its relegation to a coda means that some of the more significant developments are left to a side until the very end. In one important respect, these bolster Annweiler's main claim: States seem to share his view that UNCLOS as such is insufficient to address access to genetic resources; a new regime is required, and judging from recent developments, it is meant to take the form of a treaty. Whether that new regime will essentially be copied and pasted from Part XI UNCLOS remains to be seen. Annweiler outlines principles that should guide any future regulation, and these bear a uncanny resemblance to those already spelled out for mineral resources: common heritage, respect for marine biodiversity, the need to work out access and benefit sharing regimes etc. (see 256 et seq.). Perhaps the wheel does not need to be reinvented, then; but of course the on-going debates will provide States and other stakeholders with an opportunity to adjust the balance between ecological protection and exploitability, State sovereignty and common heritage. The easy solution of simply transposing the existing regime of Part XI seems no longer an option; Annweiler's competent discussion suggests that this is a pity, but demonstrates that the long road via a new treaty regime offers the legally sound approach.

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