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Special Issue

TRANSNATIONAL ADMINISTRATIVE LAW AND CLIMATE CHANGE IN THE AGE OF THE GREEN DEALS: CONFERENCE PROCEEDINGS

SYMPOSIUM: *THE AUSTRIAN CODIFICATION OF ADMINISTRATIVE PROCEDURE*, EDITED BY G. DELLA CANANEA, A. FERRARI ZUMBINI, O. PFERSMANN, OXFORD, OXFORD UNIVERSITY PRESS, 2023.

COMMENTS

TRANSNATIONAL ADMINISTRATIVE LAW AND CLIMATE CHANGE IN THE AGE OF THE GREEN DEALS: INTRODUCTION TO THE SPECIAL ISSUE

*Maurizia De Bellis**

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1. Climate change and public law

Climate change is the existential challenge of our age. Moreover, while in the long-term climate change raises an existential threat to humankind, in the short term its effects are increasingly perceived, through form of heat waves, droughts, wildfires and extreme precipitations[1].

The magnitude of this challenge requests efforts from a number of disciplines. In such a context, law, as the crucial instrument to regulate society, protect rights and establish obligations[2], is also called to give its contribution[3]. More than so, the peculiar features and the urgency of climate change put

* Associate Professor of Administrative Law, University of Rome "Tor Vergata". The author would like to thank Edoardo Chiti for his comments to a first version of this introduction, as well as Jean-Bernard Auby, Giacinto della Cananea, Martina Conticelli and all the participants to the workshop "Climate change and Transnational administrative law", University of Rome "Tor Vergata", 27-28 April 2023.

[1] For the most recent report Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2023 Synthesis Report Summary for Policymakers* (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf; see also, Copernicus Climate Change Service (C3S), *European State of the Climate 2023*, htttp://climate.copernicus.eu/ESOTC/2023.

[2] H.L.A. Hart, *The concept of law* (1969).

[3] F. Fracchia & M. Occhiena (eds.), *Climate Change: La Risposta del Diritto* (2010).

traditional legal paradigms under pressure, demanding innovative efforts[4].

Measures needed in order to address climate change, as science requires to do, have long been known. Efforts intended to put in place collective action towards this end have been significant; however, effective action is still insufficient.

The current international climate regime is the result of a long process that started in 1988, when the Intergovernmental Panel on Climate Change (IPCC), an expert body, was set up. In the 1992 Earth Summit in Rio de Janeiro, the United Nations Framework Convention on Climate Change (UNFCCC), the first international legal regime on climate change, was adopted. While the Kyoto Protocol, setting forth obligations for the reduction of greenhouse gas (GHG) emissions for the period 2008-2012 (but only for industrialized countries), was adopted in 1997, the agreement concerning the post-2012 period was reached in the conference of the parties (COP) 21st meeting held in Paris in 2015.

With the Paris agreement, States committed to keep the increase in the global average temperature to well below 2° and preferably 1.5° compared to pre-industrial levels; however, such commitments are based on nationally determined contributions (NCDs), to be determined on the basis of common but differentiated responsibilities. The Paris agreement is hence based on a multilevel approach, as the agreement sets objectives and procedural requirements, but the substance of the commitments is to be determined by the States[5]. The violations of the commitments, however, is not assisted by a specific mechanism of sanctions. The lack of enforcement was both the result of a compromise meant to bring on board a large number of countries and of an approach intended to reach flexibility, taking into account the failure of the Kyoto Protocol, despite its binding compliance mechanisms.

[4] J.-B. Auby & L. Fonbaustier, *Climate Change and Public Law Dossier: Introduction*, 1 French Y.B. Pub. Law 25 (2023).

[5] S. Maljean-Dubois, *Climate change in international law. The Paris agreement: a renewed form of States' commitment?*, 1 French Y.B. Pub. Law 25 (2023).

2. Remedies for ineffective climate action and the adoption of the Green deals: the risk of fragmentation

The lack of adequate action to meet the target for GHG reduction agreed upon at the international level has led to different types of responses.

On the one hand, there is a growing response from civil society and judges to make States meet their obligations. As further discussed in this special issue, while in the first decade of the 2000s it was considered that the only effective instrument to tackle climate change could come from international agreements and policies and that the role for courts would be negligible[6], due to States' lack of effective action despite international agreements there is a growing trend of climate litigation cases, in which individuals and NGOs resolve to courts to have government's climate inaction declared unlawful and asking courts to condemn States to adopt effective mitigation measures. Since the historic *Urgenda* decision of 2015, in which for the first time a court affirmed that a Government was responsible to protect its citizens from climate change, ordering it to reduce GHG emissions in line with scientific recommendations[7], several other courts have followed, notably, in 2021, the Federal Constitutional Court (FCC) of Germany, which, in the *Neubauer* case, declared some of the provisions of the German Federal Climate Change Act determining the annual emissions amount allowed until 2030 incompatible with the claimants' fundamental rights. In April 2024, the European Court of Human Rights (ECHR), in the *Klimaseniorinnen* case, has for the first time condemned a State – Switzerland – for its failure to fulfill its positive obligations to protect individuals from the adverse effects of climate change on their life and health, hence violating their right to private life protected under art. 8 ECHR[8].

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[6] J. Peel & H.M. Osofsky, *Climate Change Litigation*, 16 Ann. Rev. Soc. Sci. 21 (2020), 22.

[7] Supreme Court of the Netherlands, *Urgenda Foundation v. State of the Netherlands*, 2019, which confirmed *Urgenda Foundation v. The State of The Netherlands*, judgment of 24 June 2015, District Court of The Hague (ECLI:NL:RBDHA:2015:7196). See J. Verschuuren, *Climate Change and the Individual in the Netherlands*, in F. Sindico & M.M. Mbengue (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (2021).

[8] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others V. Switzerland*, Application no. 53600/20, 9 April 2024. For a first comment, M.A. Tigre & M. Bönnemann, *The Transformation of European Climate Change Litigation:*

On the other hand, several regional or national efforts inspired to the Green New Deal (GND) are emerging, meant to enact economic policy programs intended to pursue an ecologic transition. Using an expression that evokes the "New Deal" developed in the United States by President Franklin Delano Roosevelt in the aftermath of the 1929 crisis and inspired to Keynesian economic theory, this expression was first used in a manifesto produced in 2008 by a British group of experts[9].

In the last decade, this project – which departed quickly from the origin, still connected with the financial crisis of 2008, and is based on a novel combination of public intervention and private initiative[10] – has gained broad support, both at the international level (in particular within the *United Nations Environmental Program – UNEP)* and at the national one[11]. In the US, the Inflation Reduction Act (IRA) has been adopted in 2022, subsidizing the production of renewable energies, upon condition that the production takes place in the US[12]. With the European Green Deal (EGD), the EU has intended to position itself as a first runner[13]. With the Communication of 11 December 2019, the von der Leyen Commission launched a comprehensive and ambitious strategy aimed at enacting a deep transformation of its economy, as decoupled from resource use[14].

Introduction to the Blog Symposium, 9 April 2024, https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium. For some preliminary remarks on the three climate litigation cases decided by the ECHR 9 April 2024, see Section 4.

[9] *A Green New Deal. Joined-up policies to solve the triple crunch of the credit crisis, climate change and high oil prices*, 2018, https://base.socioeco.org/docs/a_green_new_deal_1.pdf.

[10] For its features, J. Rifkin, *The Green Deal: Why the fossil fuel civilization will collapse by 2028, and the bold economic plan to save life on Earth* (2018); N. Chomsky, R. Pollin & C.J. Polychroniou, *The Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet* (2020).

[11] J.J. Monast, *The Ends and Means Of Decarbonization: The Green New Deal In Context*, 50 *Environmental Law* 21 (2020).

[12] B. Marchetti, *Le politiche di decarbonizzazione statunitensi tra il Green New Deal e la giurisprudenza della Corte Suprema*, 1 Riv. Reg. Mercati (2023).

[13] On the novelty of the EGD, see E. Chiti, *Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process* 19 Common Mkt. L. Rev. 59 (2022).

[14] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal* (COM/2019/640 final).

The EGD entails the approval of a number of different acts, as further clarified in the "Fit for 55" strategy[15]. Regulation 2021/1119/EU (so called European Climate Law) makes the goal of climate neutrality by 2050 (i.e. net zero greenhouse gas emissions), at first set forth in the EGD 2019 Communication, legally binding, providing the same legal effect for the intermediate target of reducing emissions of at least 55% by 2030, compared to 1990[16]. In this way, the climate neutrality objective has been made for the first time legally binding, an objective affecting a number of different policies. Similarly to the Paris agreement, the EGD entails a multilevel approach: it sets objectives to be reached, but the specific content of the measures will need a fundamental role from the States[17].

These two trends – increasing role of the courts in obliging the States to take climate action and the surge of Green deal policies, intended to foster a green transition – advance significantly the path towards the target of GHG reduction. Yet, both present some limitations.

As for the trend towards climate litigation, there is a limit to what the courts can identify as a necessary action to be taken by the governments, stemming from the principle of separation of powers[18]. Such issue has been constantly addressed in the momentous judgments recalled above. As the ECHR was very careful in clarifying in the latest *Klimaseniorinnen* case, Courts can identify the violation of the obligation to protect fundamental rights affected by climate change and can condemn States to take action to address a specific target, defined on the basis of international agreements and the best available science, but they

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '*Fit for 55': Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality*, COM(2021) 550.

[16] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[17] For a comprehensive analysis, E. Chiti & D. Bevilacqua, *Green Deal. Come costruire una nuova Europa* (2024); D. Bevilacqua, *Il Green New Deal* (2024).

[18] M. Payandeh, *The role of courts in climate protection and the separation of powers*, in W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021).

cannot (and should not) identify the specific measure to be adopted[19].

As for the trend towards the adoption of the green deals, different national parallel efforts could foster convergence towards a decarbonization path, setting the scene for experimentalist governance overcoming the limits of global climate diplomacy[20]. However, while the respect of the Paris agreement would require policy coordination between the largest GHG emitters (together with the EU, the US and China)[21], these initiatives could also result in a regulatory competition (implicit in the subsidization of national green industries) and in a geopolitical clash[22].

Because of these limitations, there is a high risk of fragmentation in the efforts to address climate change.

Fragmentation is all but new to the area of international cooperation in the environmental area, due to the fact that international agreements deal separately with single issues (climate change, biodiversity, waste, chemical products)[23]. The regime complex for climate change is also highly fragmented and polycentric[24]. The two trends recalled do not address the problem of fragmentation, but are to be framed within this context and, for the reasons discussed above, risk magnifying such problem. This is why this special issue focuses on transnational mechanisms, as a means to overcome fragmentation.

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[19] ECHR, Grand Chamber, *Verein Klimaseniorinnen*, cit. at 9, paras. 412-3, 457, 543-554 and 657.

[20] C.F. Sabel & D.G. Victor, *Fixing the Climate. Strategies for an Uncertain World* (2022).

[21] M. Siddi, *The European Green Deal: Assessing its Current State and Future Implementation*, FIIA Working Paper (May 2020).

[22] E. Chiti & D. Bevilacqua, *Green Deal. Come costruire una nuova Europa*, cit. at 18, 129.

[23] H. Van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 Int'l L. Pol. 1205 (2012).

[24] K.W. Abbott, *The Transnational Regime Complex for Climate Change*, 30 Env't Plan. Gov't Pol'y 571 (2012).

3. Transnational administrative law and climate change in the EU and beyond

Transnational environmental law has long been discussed as an emerging trend in environmental regulation. In this sense, it is conceived as one of the cases of transnational regulatory regimes, involving public bodies, private actors acting under a public mandate, civil society organizations, networks of public and private actors[25]. According to this perspective, transnational environmental law is one form of global regulation[26].

Within the broad range of norms regulating cross-border relations across a variety of public and private actors considered from the transnational environmental law perspective, fall also mechanisms of cross-border administrative cooperation[27]. Moreover, transnational administrative law principles, acts and forms of cooperation can be found not only within soft law settings (which are usually examined within the transnational environmental law perspective of research), but find their basis also within binding legal frameworks[28].

For purpose of this special issue, the focus is on *transnational administrative law* principles, measures and forms of cooperation, both within EU and international settings[29]. Environment is one of the areas in which transnational administrative law has been emerging more clearly and dates back to several decades[30]. The principle not to cause transboundary environmental damage (or «no harm rule») - placing an obligation on States to prohibit activities within its territory, that may cause

[25] V. Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (2018).

[26] V. Heyvaert, *The Transnationalization of Law: Rethinking Law through Transnational Environmental Regulation*, 6 Transnat'l Env'l L. 205 (2017).

[27] O. Dilling & T. Markus, *The Transnationalisation of Environmental Law*, 30 J. Env.l L. 179 (2018), 189-191.

[28] See the examples examined in this special issue.

[29] For this approach, see J.-B. Auby, E. Chevalier, O. Dubos, & Y.Marique (eds.), *Traité de droit administratif transnational* (forthcoming). In a similar sense, see Y. Marique, *"Transnational" Climate Change Law. A case for reimagining legal reasoning?*, 1 French Y.B. Pub. Law 69 (2023).

[30] S. Jolivet, *La transnationalité administrative en matière environnementale*, in J.-B. Auby, E. Chevalier, O. Dubos, & Y.Marique (eds.), *Traité de droit administratif transnational*, cit. at 30.

damage to other States or areas beyond its national jurisdictions[31] – was set forth at the global level in Principle 21 of the Stockholm Declaration on the Human Environment in 1972[32]. The need to prevent and address the consequences of transboundary environmental harm is one of the oldest reasons for transnational administration.

An example of a transnational administrative procedure stems from Principle 19 of the 1992 Rio Declaration, according to which a State shall provide prior notification and consultation with neighbouring States when deciding on activities that may have a significant adverse transboundary environmental effect[33]. This means that the guarantee that a State other than the one that has started an administrative procedure, shall be heard when such a procedure is going to result in the adoption of an administrative act that is going to produce a transboundary harm, has long been recognized[34]. Moreover, the extension of the procedural obligations stemming from States' obligation to prevent transboundary environmental damage has been recognized several times via case law, notably by the International Court of Justice (ICJ)[35].

The United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context, usually referred to as 'the Espoo Convention', from the Finnish town where the Convention was signed in 1991, sets forth a framework of a transboundary

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[31] U. Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles and Rules*, in D. Bodansky, J. Brunnée, & E. Hey (eds.), *Oxford Handbook of International Environmental Law* (2008), 439.

[32] Stockholm Declaration of 1972 (Declaration of the United Nations Conference on the Human Environment), Report of the Conference A/CONF.48/14/Rev.1

[33] Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I). See also Principle 24 of the Stockholm Declaration of 1972.

[34] See more extensively M. De Bellis & R. Lanceiro, *Les procédures administratives transnationales: principes, taxonomie, problèmes*, in J.-B. Auby, E. Chevalier, O. Dubos, & Y. Marique (eds.), *Traité de droit administratif transnational*, cit. at 30.

[35] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica),* I.C.J. Reports (2015). For a comment, M. Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule*, PluriCourts Research Paper No. 14-17 (August 25, 2014), https://ssrn.com/abstract=2486421

Environmental Impact Assessment (EIA)[36]. The EIA procedure includes an obligation for the State of origin to notify any State which it considers may be affected by the activity as early as possible, the minimum content of such a notification, the time limit for the potentially affected state to respond whether it intends to participate in the EIA, and an obligation for the initiating state to provide sufficient information[37].

Several examples of transnational administrative law mechanisms and procedures, both emerging from international agreements and EU law, will be examined in the contributions of this special issue. However, *environmental* law does not identify with transnational *climate* law. As recently recalled by the ECHR in *Klimaseniorinnen* case, there are key differences of characteristics among the two areas: in the context of climate change, there is no single or specific source of harm, as GHG emissions arise from a multitude of sources and the harm derives from aggregate levels of such emissions, so that the chain of effects is both complex and difficult to predict[38]. Not only there are differences among the two areas, but there can also be contrast between policies adopted for environmental protection and for climate action, to the point that it has been asked whether conflict among them is inevitable[39]. One recently debated case of such clash is the one concerning the construction of renewables plants, which, on the one hand, is essential for GHG mitigation, while, on the other hand, has an impact on landscape.

Nevertheless, fundamental differences among the two areas mean that it would not be adequate to follow an approach consisting in a direct transposal of patterns and mechanisms

[36] On the history of the Espoo Convention, R.G. Connelly, *The UN Convention on EIA in a Transboundary Context: A Historical Perspective*, 19 Env.l Impact Assessment Rev. (1999) 37. For a general overview of thirteen different systems of transboundary environmental impact assessment, see K. Bastmeijer & T. Koivurova (eds.), *Theory and Practice of Transboundary Environmental Impact Assessment* (2008).

[37] Espoo Convention, articles 3-5.

[38] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz And Others V. Switzerland*, cit., paras. 415-422.

[39] O. Woolley, *Climate Law and Environmental Law: Is Conflict Between Them Inevitable?*, in B. Mayer & A. Zahar (eds.), *Debating Climate Law* (2021). For the need of a transition from environmental to ecologic law, K. Anker, P. D. Burdon, G. Garver, M. Maloney, & C. Sbert (eds.), *From Environmental to Ecological Law* (2021).

developed for the purpose of environmental protection to the context of climate change; however, inspiration can be drawn from existing principles and instruments, in building an approach better tailored to address the specific characteristics of climate change. How far can we build on existing patterns of transnational administrative mechanisms for environmental protection in order to address climate change? Or do we need new paradigms? Does transnationality in the climate area follow the same path of the environmental one?

4. The contributions in this special issue

The symposium aims at exploring transnational administrative law mechanisms both stemming from international agreements and established under EU law; moreover, the scope of the special issue extends to how these mechanisms have emerged beyond the EU and it explores whether there is scope for transnationality beyond policy, and more specifically also in climate litigation.

The first contributions in the special issue examine transnational administrative mechanisms under EU law. The article of Rui Lanceiro provides a taxonomy for the different mechanisms of transnational administrative cooperation between States in the environmental field. These mechanisms stem from the duty of inter-State cooperation in environmental matters and cover a wide range of arrangements, ranging from a simple obligation of prior information to specific transnational composite procedures. It shows that the various mechanisms examined may serve as a laboratory to experiment cooperation mechanisms to be exported to other policy areas.

The contribution of Luca De Lucia focuses specifically on transnational acts provided for in legislative measures issued in the EU's environmental policy. The author shows that, in this area, transnational acts have significantly different features from those provided in the context of policies aimed at the establishment and functioning of the internal market. Hence, the concept of transnational acts, far from being unitary, is in fact highly complex and must necessarily also be looked at in the light of the relevant provisions of the Treaty. The author further demonstrates that the importance of these types of acts is bound to grow, also in view of

the European Green Deal, as developments in the area of energy show.

The article of Dario Bevilacqua focuses on one of the main novelty of the European Green Deal: the Carbon Border Adjustment Mechanisms (CBAM), with which the EU imposes a tax on goods produced outside the EU and imported into it, with a high carbon footprint. Besides its impact on decarbonization, as a regulatory tool towards climate neutrality, CBAM can work as a transnational measure, with a potential harmonizing effect, despite its unilateral origin. In this case, trans-nationalization is not the product of cooperation mechanisms or of the adoption of transnational acts, but it could be the result of the potential capacity of the Union to condition global markets with a provision applying also to foreign operators.

With the contribution from Anna Maria Chiariello, the symposium moves from focusing on transnational mechanisms in the EU legal order to the ones set forth in the international one. More specifically, the article focuses on whether and how transnational administrative law could protect biodiversity, identifying the different characteristics and sources of transnational administrative law instruments intended to safeguard biodiversity. In so doing, the article analyzes the interactions between the instruments intended to protect biodiversity and those designed to fight climate change.

The contribution of Jacques Papy offers an examination of transnational administrative law patterns in a regional area different from the one of the EU. It focuses on Ontario's brief participation and sudden departure from the Western Climate Initiative (WCI) common carbon market in 2018, reviewing the mechanisms of cooperation within the WCI framework and the legal repercussions of Ontario's withdrawal. Finally, it draws insights into the dynamics of the WCI cooperative model, highlighting its resilience but also its vulnerability to regulatory risks, which can undermine the stability of the common carbon market.

In the last contribution, I explore the growing body of climate litigation cases that are *strictu sensu* transnational, directed against foreign corporations or foreign governments. In some cases, courts adopted an approach open to reconsider well established principles: in the *Neaubauer* case, the German constitutional court did not rule out the responsibility of Germany

in fulfilling its positive obligations to protect fundamental rights of foreign citizens, while the Inter-American Court on Human Rights and the UN Committee on the Rights of the Child opened to the possibility of diagonal human rights protection in climate litigation. In the recent *Duarte* case, on the contrary, the ECHR declared inadmissible the complaint directed by some Portuguese youths against States other from Portugal, limiting the recognition of the extraterritorial protection of fundamental rights.

MECHANISMS OF TRANSNATIONAL ADMINISTRATIVE COOPERATION UNDER EU ENVIRONMENTAL LAW

*Rui Lanceiro**

Abstract

Environmental problems ignore political boundaries, which means that they can only be adequately addressed through cooperation between States. The several cooperation duties that emerge from international law in this field are implemented, in the majority of cases, through EU Law, which is the main focus of this article. A tentative taxonomy of mechanisms of transnational administrative cooperation in EU environmental law is provided. The first is the establishment of a consultation stage of Member States and/or EU, in the framework of a national decision-making procedure. There are cases where the decision-making procedure not only involves a consultation stage, but also prior consent by another Member State or the Commission. Other mechanisms demand coordination of Member States action, namely in the management of shared resources. Composite decision-making procedures – i.e., procedures that have stages at both the national and the Union level, requiring the active participation of both levels – can also be seen as mechanisms of cooperation. Finally, duties of exchange of information and of notification are also presented as cooperation mechanisms.

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1. Introduction

As environmental problems ignore political boundaries, it is generally agreed that they can only be adequately addressed through cooperation between States. That is why international cooperation is central to the field of environmental law.

In this context, the duty of inter-State cooperation in environmental matters is especially developed in the context of European integration and EU law.

Cooperation in this field has its origins in the principle of territorial jurisdiction, which entails that the State that intents to conduct or authorize an activity in its territory which have transnational effects, should hear the States whose territories are potentially affected by those activities. Under the principle of sovereignty over natural resources[1], also the management of shared resources is dependant of cooperation between the States involved.

In both these cases, the duty to cooperate entails a proceduralization of the decision-making of the States, in the sense that cooperation may take place either in the form of a specific stage in national procedures or the establishment of a composite transnational procedure, in order to allow the dialogue between the several States involved. This, in turn, allow the decision to be perceived as legitimate, because it is taken following a cooperative procedure and the participation of the affected States.

Seen from this perspective, the adoption of cooperation mechanisms also allows for the avoidance of international conflicts, because the different parties should be able to resolve their differences through the legal decision-making procedures established. This also provides a legal framework to answer potential conflicts between the States involved – avoiding potential diplomatic escalation – and allowing the recourse to judicial review of municipal or international courts.

EU law absorbs this international law framework for cooperation and converts it into EU legal duties of cooperation between the Member States. In this sense, the Court of Justice of the EU plays a major role as the forum to adjudicate conflicts between Member States in this matter. The recourse to cooperation duties, in the framework of the more general principle of sincere cooperation, also represents a consequence of the principle of subsidiarity – in

* Assistant Professor of Administrative and Environmental Law, University of Lisbon.

[1] General Assembly resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.

the sense that the EU is using decentralized tools of implementation of EU law, instead of centralizing it at the European level.

The use of transnational cooperation mechanisms is also present in the more recent package of legislation in climate law, namely in the Fit for 55 package (which is one of the initiatives included in the European Green Deal[2]) - as some of the examples given will show. For instance, cooperation is at the center of the EU efforts in climate law (Article 2(2) of the European Climate Law[3]). In that sense, transnational cooperation is still used by the EU as one of the key tools to ensure a smooth implementation by Member States, despite some centralization trends, that can be found, for instance in the amendments to the Emission Trading Directive[4] concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system.

In this article, a presentation of the legal framework of environmental transnational administrative cooperation is given. Following that, a tentative taxonomy of mechanisms of transnational administrative cooperation in EU environmental law is provided. The first is the establishment of a consultation stage of Member States and/or EU, in the framework of a national decision-making procedure. There are cases where the decision-making procedure not only involves a consultation stage, but also prior consent by another Member State or the Commission. Other mechanisms demand coordination of Member States action, namely in the management of shared resources. Composite decision-making procedures – i.e., procedures that have stages at both the national and the Union level, requiring the active participation of both levels – can also be seen as mechanisms of

[2] The Fit for 55 package is a set of proposals to revise and update EU with the aim of ensuring that EU policies are into line with the EU climate goals. See https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55/.

[3] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), ELI: http://data.europa.eu/eli/reg/2021/1119/oj.

[4] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, ELI: http://data.europa.eu/eli/dir/2003/87/2024-03-01, as amended by Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, ELI: http://data.europa.eu/eli/dir/2023/959/oj.

cooperation. Finally, duties of exchange of information and of notification are also presented as cooperation mechanisms. In the final part of the article, some conclusions are drawn.

2. Legal framework of environmental transnational administrative cooperation

The legal framework of transnational administrative cooperation in the field of environmental policy is multi-layered, including sources from general international law, regional European international law, and EU law.

The obligation on States to cooperate in addressing international issues is recognized as a fundamental rule of general international law, as exemplified in Articles 55 and 56 of the Charter of the United Nations, emanating from the principle of 'good neighbourliness' enunciated in Article 74 of the Charter, and applies on the global, regional, and bilateral levels. In the specific area of international environmental law, the duty to cooperate between States must be considered a general principle.[5] This principle is laid down in 'soft law' instruments such as in Principle 24 of the Stockholm Declaration and in Principles 7 of the Rio Declaration[6], which codify the obligation on States to cooperate 'in good faith and in a spirit of partnership' in all matters concerning protection of the environment. While the precise nature and extent of this obligation remains a matter of debate,[7] its customary status, at least, is not contested.[8] It should be noted, however, that the obligation to cooperate does not mandate a specific outcome or the prior consent of potentially affected States.[9] The proper adherence to the principle of cooperation in International Law (only) requires

[5] M. Valverde Soto, General Principles of International Environmental Law, 3 ILSA J. Int.'l & Compar. L. 193 (1996), 197-199; J.A.R. Nafziger, Basic Functions and Principles of International Environmental Law in the Context of Managing Water Resources, 39 Denv. J. Int'l L. & Pol'y 381 (2011); M. Moïse Mbengue & B. Mcgarry, General Principles of International Environmental Law in the Case Law of International Courts and Tribunals, in M. Andenas et al. (ed.). General Principles and the Coherence of International Law (2019); P. Sands et al., General principles and rules, in Principles of International Environmental Law (2018), 213-217.

[6] See also Principles 9, 14, 19, and 27 of the Rio Declaration.

[7] See, e.g., Pulp Mills on the River Uruguay (Argentina v. Uruguay).

[8] See, e.g., *Gabčikovo-Nagymaros*, paras 141–142; *Mox Plant (Ireland v. UK)* (Provisional Measures) ITLOS, Order of 3 December 1981, para. 83.

[9] See, e.g., *Lac Lanoux Arbitration (France v. Spain)* (1957) 12 RIAA 281; 24 ILR 101 and Pulp Mills.

fulfilment of certain procedural obligations such as those relating to environmental assessment, exchange of information, notification, consultation and negotiation.[10] There are also examples of cooperation duties in specific areas established in international conventions[11], notably duties to cooperate in the production and exchange of information.[12]

The principle of international cooperation places an obligation for States to ensure that activities undertaken on their territories do not cause damage to the environment of other States or which could harm the health of their inhabitants (the 'no harm rule').[13] It was established since the first international judicial decisions with an environmental dimension, *i.e.* the Trail Smelter case[14], and is referred to by the ICJ in the Corfu Channel case.[15] It both builds on and expands the principle of 'good neighbourliness'.[16] From the principle of international cooperation in Environmental Law stem: *i)* a duty of due diligence to prevent or reduce transboundary harm by controlling the activities on its territory; *ii)* a duty to notify, exchange relevant information, and consult with other States on possible transboundary harm,

[10] As an example, Principle 19 of the Rio Declaration merely requires States to 'provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant transboundary environmental effect and to consult with those states at an early stage and in good faith'. Another example can also be found in Principle 14 of the Rio Declaration, which requires States to cooperate 'effectively' to 'discourage or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health'.

[11] For example, in Article 197 of the 1982 UN Convention on Law of the Sea (UNCLOS).

[12] Law of the Sea, supra note 11, at art. 200; U.N. Convention on Biological Diversity, supra note 6, at art. 17; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, art. 8, 31 I.L.M. 1312; Convention for the Protection of the Ozone Layer, Mar. 22, 1985, art. 4, 26 I.L.M 1517 [hereinafter Ozone Protection Convention].

[13] As recognized by the International Court of Justice in Corfu Channel (U.K. v. Albania), 1949 I.C.J. (April 22). See also Lac Lanoux Arbitration (France v Spain), 12 R.I.A.A. 285 (Arbitral Tribunal affirmed 'France is entitled to exercise her rights; she cannot ignore the Spanish interests.'). Island of Palmas (U.S. v. Netherland), 11 R.I.A.A. 829. H. Kelsen, *Principles of International Law* (1966), 205-206.

[14] Arbitral Awards, April 16, 1938 and March 11, 1941, *Trail Smelter (United States v. Canada)*, R.S.A., Vol III, p. 1965.

[15] ICJ, Judgment of 9 April 1949, *Corfu Channel Case*, Rec. 1949, p. 4

[16] The maxim was invoked as a rule by Hungary in the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1992 I.C.J. 32. Hungary supported its submission in Corfu Channel, the Stockholm Declaration, the Rio Declaration, and the International Law Commission Draft Articles On State Responsibility (1990).

hazardous activities and risks, and emergencies[17]; and *iii)* the duty to carry out cross border environmental impact assessments if risk of significant cross border effects.

At a regional level, in Europe, these duties of cooperation have been codified in several international conventions. Under the auspices of the United Nations Economic Commission for Europe (UNECE) one can find the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).[18] This Convention establishes the main international framework for transnational consultations during an environmental impact assessment of projects. The Kiev Protocol to the Espoo Convention[19] set forth the procedure for transnational consultation in the case of strategic environmental assessment, conducted at the level of plans and programmes. Other examples are the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention),[20] which aims to ensure the sustainable use of transboundary water resources by facilitating cooperation, the Convention on the Transboundary Effects of Industrial Accidents (TEIA Convention),[21] which helps Parties to prevent industrial accidents that can have transboundary effects and to prepare for, and respond to, accidents if they occur, and the Convention on Long-range Transboundary Air Pollution (LRTAP Convention),[22] laying down the general principles of international cooperation for air pollution abatement. Finally, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention.[23] This Convention establishes the right of the

[17] 1986 Vienna convention on Early Notification of a Nuclear Accident (the "Chernobyl convention").

[18] Usually referred to as the Espoo Convention, because it was signed in that Finnish city in 1991. The Convention was adopted in 1991 and entered into force in 1997. On the Espoo Convention, see A. Boyle, *Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention*, 20 Rev. Eur. Cmty. Int'l Env'l L. 227 (2011).

[19] Signed in 2003 and entered into force in 2010.

[20] Adopted in Helsinki, on 17 March 1992, and entered into force on 6 October 1996.

[21] The Convention was signed on 17 March 1992 in Helsinki and entered into force on 19 April 2000.

[22] Adopted in Geneva, on 13 November 1979, and entered into force on 16 March 1983.

[23] The Aarhus Convention was adopted on 25 June 1998 in the Danish city of Aarhus and entered into force on 30 October 2001, after obtaining ratifications by sixteen of the signatory parties. E. Pozo Vera, *The Aarhus Convention: a tool for environmental democracy and defending consumers rights on the environment*, 21 Eur. J. Consumer L. 53 (2011), pp. 53-83; M.

public to have access to information, to have the possibility to participate in decision-making, and to have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile, also in the transboundary context.

EU law takes a special interest in environmental policy. The EU Treaties establish that the EU shall pursue a policy in the field of environment with objectives to ensure a high level of protection and improvement of the quality of the environment, protect human health, and promote prudent and rational utilisation of natural resources (Article 3(3) TEU and Article 191(1) TFEU). EU environmental policy builds on the principles of preventive action, rectification of pollution at source, precaution and polluter pays (Article 191(2) TFEU).

In order to achieve these aims, the EU depends on a framework of cooperation both between institutions, bodies, and agencies, between the EU and its Member States, and also amongst the Member States themselves. In this context, environmental policy is an area of shared competence between the EU and the Member States (Article 4(2)(e) TFEU).[24] While, for some environmental problems, a response at national level is adequate, other cases of environmental degradation can only be adequately addressed at EU level, in line with the principle of subsidiarity.

This framework relies on the principle of sincere cooperation, which is one of the pillars of European integration, has a general legal basis in Article 4(3) TFEU. In this context, the principle of sincere cooperation guarantees the existence of general mutual duties of respect, assistance, articulation, and non-contradiction – of coherence of action – between all the public entities covered by the EU legal order, through actions or omissions. The principle of sincere cooperation, with its multiple characteristics, has a particular importance in environmental policy field. The integration of environmental protection across EU policies and activities is also mandated by Article 11 TFEU and requires cooperation between Member States and the EU, and between EU institutions, bodies, and organisms.[25]

Prieur, *La Convention d'Aarhus, instrument universel de la démocratie environnementale*, Revue Juridique de l'Environnement 9 (1999).

[24] See H. Tegner Anker, Competences for EU environmental legislation: about blurry boundaries and potential opportunities, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law (2020).

[25] According to Article 11 TFEU, EU institutions, bodies, and organisms must integrate environmental protection 'into the definition and implementation of the Union's policies

The complex environmental international law framework of mutual duties of sharing information, giving notice to or consulting with neighbouring states, or assessing transboundary impacts have mostly been transposed into the EU legal order through several legal acts, being transformed into EU legal duties binding the Member States in their mutual relations, as well as the EU institutions, bodies, and agencies. For instance, the duty to carry out cross border environmental impact assessments and consultations if there are risks of significant cross border effects, codified in the Espoo Convention and in the Kiev Protocol, were implemented by Article 7 of the EIA Directive[26] and Article 7 of the SEA Directive[27], respectively.

3. Mechanisms of transnational administrative cooperation

It is extremely hard to draw a taxonomy of mechanisms of administrative cooperation in the field of EU environmental law. The multi-layered character of the sources of cooperation duties, its quantity and complex nature is partly responsible for this difficulty. In fact, one can find several duties to cooperate in this area, in a horizontal (between Member States, or between EU institutions, bodies or organisms) or a vertical axis (between Member States and the EU level).

Cooperation duties are present in different types of administrative decision-making procedures.[28] There are cases of national administrative procedures where other States may

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and activities, in particular with a view to promoting sustainable development'. Article 37 of the Charter of Fundamental Rights of the EU also establishes that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. However, the way in which this objective is to be implemented is not entirely clear. A. Volpato & E. Vos, *The institutional architecture of EU environmental governance: the role of EU agencies*, in M. Peeters & M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. at 24, 54, note 7.

[26] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification), ELI: http://data.europa.eu/eli/dir/2011/92/2014-05-15.

[27] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, ELI: http://data.europa.eu/eli/dir/2001/42/oj.

[28] L. De Lucia, Strumenti di cooperazione per l'esecuzione del diritto europeo, in L. De Lucia & B. Marchetti (eds.), L'amministrazione europea e le sue regole, (2015); E. Schmidt-Aβman, Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft, 31 EuR 270 (1996).

participate or give input in a specific stage. In some other cases, it is the EU decision-making procedures that rely on data provided by the Member States or depend on national enforcement proceedings. Finally, composite decision-making procedures – *i.e.*, procedures that have stages at both the national and the Union level, requiring the active participation of both levels – can also be seen as mechanisms of cooperation.[29]

In the next points several mechanisms of cooperation are presented. The first is the establishment of a consultation stage of Member States and/or EU institutions, bodies, or agencies, in the framework of a national decision-making procedure. There are cases where the decision-making procedure not only involves a consultation stage, but also prior consent by another Member State or the Commission. Other mechanisms demand coordination of Member States action, namely in the management of shared resources. Composite decision-making procedures, as well as the exchange of information and of notification can also be seen as cooperation mechanisms.

3.1. Consultation in national decision-making procedures

One of the mechanisms of administrative transboundary cooperation in the field of environmental law is the establishment, in national decision-making procedures, of a consultation stage of other Member States. This mechanism derives from international law, especially the already mentioned no-harm rule and the duty to prevent or mitigate cross-border environmental damages that would result from the activities or projects in question.

The potentially affected Member States should have access to information on the activity, project, or plan in question, in order to ensure that they are able i) to decide whether to participate or not in the procedure; and ii) to adopt a position regarding the proposal

[29] See Article I-4 (Definitions) of the 2014 ReNEUAL Model Rules on EU Administrative Procedure, which reads as follows: "'Composite procedure" means an administrative procedure where EU authorities and the authorities of a Member State or of different Member States have distinct functions which are inter-dependent. A composite procedure may also mean the combination of two administrative procedures that are directly linked.' On the concept of composite procedure its different classifications, see S. Cassese, *European Administrative Proceedings*, 68 Law & Contemp. Probs. 21 (2004); M. Chiti, *Forms of European Administrative Action*, 68 Law & Contemp. Probs. 37 (2004); and G. della Cananea, *The European Union's mixed administrative proceedings*, 68 Law & Contemp. Probs. 197 (2004); M. Eliantonio, *Judicial Review in an Integrated Administration: the Case of Composite Procedures*, 7 Rev. Eur. Admin. L. 65, 66 (2014).

in question. Although the Member State conducting the decision-making procedure is not bound by the opinions of the consulted States, it should take them into account.

The main example of this cooperation mechanism is the consultation stage of the environmental impact assessment (EIA) procedure in a transboundary context.

The EIA procedure, in the EU, is regulated by the EIA Directive as a national procedure, under the responsibility of the Member State in whose territory the project in question is intended to be carried out.[30] The international obligations to cooperate, namely under the Espoo Convention, were implemented at EU level by Article 7 of the EIA Directive. The cooperation mechanism has three stages. In the first stage, there must be an exchange of information. If a Member State finds that a project is likely to have significant effects on the environment in another Member State, the latter must be given information on the project and on the procedure. This can also happen at the request of the Member State likely to be significantly affected. In both cases, the national procedure must establish a legal duty to transmit the information.[31]

The need for a transboundary environmental impact assessment in these cases cannot be avoided not even under Article 2(4) which allows Member States, in exceptional cases, to exempt a specific project in whole or in part from the provisions of the EIA Directive.[32]

It is not necessary for a project to be transboundary in nature to be considered to have significant effects on the environment in another Member State. The EIA Directive adopted an overall assessment of the effects of projects on the environment, which may extend to the territory of a number of Member States.[33] If a project is located close to a border, the CJEU has already considered that it was 'indisputable that the project could also have significant effects on the environment in the [other] Member State, within the

[30] J.H. Jans & H.H.B. Vedder, European Environmental Law: After Lisbon (2012), 311-319; A. García-Ureta, Environmental Impact Assessment in the EU, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law, cit. at 24.

[31] Case *Commission v Ireland*, C-392/96, ECLI:EU:C:1999:431, para. 92.

[32] Opinion of Advocate General Kokott delivered on 29 November 2018, Case Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen, C-411/17, ECLI:EU:C:2018:972, para. 163, and Case Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen, C-411/17, ECLI:EU:C:2019:622, para. 72.

[33] Case *Umweltanwalt von Kärnten*, C-205/08, ECLI:EU:C:2009:767, paragraph 51

meaning of Article 7(1)' of the EIA Directive.[34] This also means that projects listed in Annex I to the EIA Directive which extend to the territory of several Member States cannot be exempted from the application of the Directive. The CJEU considered that such an exemption would seriously interfere with the objective of the EIA Directive and seriously compromise its effectiveness. [35]

If the Member State which receives the information indicates that it intends to participate in the environmental decision-making procedure, a consultation stage ensues (Article 7(4) of the Directive).

In this case, the other Member State and its citizens have the possibility to participate in the environmental decision-making procedures of the Member State conducting the EIA, which must take into consideration the transboundary effects on the environment of the project in the national administrative decision-making procedure. Interestingly, the Espoo Convention and the EIA Directive go beyond intergovernmental cooperation and ensure the participation of local authorities and the public. The EIA Directive requires that the public in the affected Party be informed of the proposed activity and be given the opportunity to comment on or object to it – which is a reflection of the obligations stemming from the Espoo Convention and the Aarhus Convention. The EIA Directive goes further, ensuring that also the public authorities of the affected Member State likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences, can effectively participate in EIA procedures in a transboundary context (Article 7(3) and (5) of the EIA Directive). [36] The information provided by the Member State conducting the EIA to the potentially affected Member State must be communicated to the public and to the authorities within a reasonable period of time and they must be given an opportunity, before development consent for the project is granted, to forward

[34] Case Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen, C-411/17, ECLI:EU:C:2019:622, para. 76-81.

[35] Case *Umweltanwalt von Kärnten*, C-205/08, ECLI:EU:C:2009:767, para. 54-55.

[36] The EIA Directive was amended in an extensive way in 2003, following the signing of the Aarhus Convention by the EU, through the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, ELI: http://data.europa.eu/eli/dir/2003/35/2016-12-31.

their opinion within a reasonable time on the information supplied to the Member State responsible for the assessment.

In the final stage, the results of consultations and the information gathered must be duly considered in the development consent procedure by the Member State responsible for the assessment. After the national decision is taken, it must be notified to the affected Member State, including a summary of how the comments received from it have been incorporated or otherwise addressed in the decision (Articles 8 and 9(1)(b) and (2) of the Directive). The final decision must be also made available to the public and to the local authorities of the affected Member State at its request.

When cooperation fails, the affected Member State may resort to the infringement procedure established in Article 259 TFEU. An example of this is the case between the Czech Republic and Poland over lignite mining activities at the Turów mine (Case C-121/21). In this case, Poland granted development consent for the extraction of lignite in an open-cast mining project without any environmental-impact assessment or prior verification of the need for such an assessment. The Czech Republic lodged also an application for interim measures, which was granted by the Court.[37] The case was resolved without the need of a judgement, through an agreement between the parties in the dispute.[38]

Similar procedures of notice and consultation are established in Article 7 of the SEA Directive, when the implementation of a plan or programme being prepared is likely to have significant effects on the environment in another Member State, Article 14(3) of the Seveso Directive[39], and in Article 26 of the Industrial Emissions Directive[40], for the activities set out in its Annex I.

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[37] Order of the Vice-President of the Court of 21 May 2021, Case *Czech Republic v Poland*, C-121/21 R, ECLI:EU:C:2021:420. Poland was later ordered to pay the European Commission a penalty payment for not complying with that Order (Order of the Vice-President of the Court of 20 September 2021, Case *Czech Republic v Poland*, C-121/21 R, ECLI:EU:C:2021:752).

[38] Order of the President of the Court of 4 February 2022, Case *Czech Republic v Poland*, C-121/21, ECLI:EU:C:2022:82.

[39] Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, ELI: http://data.europa.eu/eli/dir/2012/18/oj.

[40] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), ELI: http://data.europa.eu/eli/dir/2010/75/2011-01-06.

In all these procedures, the EU law establishes the need for a national decision-making procedure, that may include a horizontal consultation stage of potentially affected Member States. They (and their citizens) should be informed and have the power to issue opinions that must be taken into consideration by the Member State conducting the procedure. Thus, the national final decision must be reasoned in the light of the results of the cross-border consultation.

3.2. Prior informed consent or agreement

Another cooperation mechanism is the requirement of prior informed consent by the affected State. This is the case when the national administrative authority's decision produces effects in the territory of another State.

A possible example of this situation can be found in the area of transboundary movement of toxic or hazardous wastes. The need to ensure prior informed consent of the affected parties can be found in International Law, more specifically in the Basel Convention[41] as well as the Rotterdam, Stockholm, Bamako, and Waigani Conventions.[42]

The regimes applicable to the prior notification and consent in these cases in the EU, which is a Party to the Basel, Rotterdam, and Stockholm Conventions[43], was implemented through

[41] Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Basel, 1989, 28 I.L.M. 649. See K. Kummer, *The Basel Convention: Ten Years On*, 7 Rev. Eur. Cmty. & Int'l Env'l L. 227 (1998); F. Bitar, *Les Mouvements Transfrontières de Déchets Dangereux Selon la Convention de Bâle* (1997); M.E. Allen, *Slowing Europe's hazardous waste trade: implementing the Basel Convention into European Union law*, 6 Colorado J. Int'l L. Pol'y 163 (1995); C. de Villeneuve, *Les mouvements transfrontières des déchets dangereux: Convention de Bâle et droit communautaire*, 340 *Revue du Marché Commun* 568 (1990).

[42] Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted on 10 September 1998, entered into force on 24 February 2004) (1999) 38 ILM 1; Stockholm Convention on persistent organic pollutants (POPs), entered into force on 17 May 2004; Organization of African Unity: Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, art. 6, 30 I.L.M. 773, 785; Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), 2001. P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment* (2009), 476–7 and 486.

[43] In relation to the Basel Convention, through the Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention), ELI: http://data.europa.eu/eli/dec/1993/98/oj. In relation to the Rotterdam

regulations.[44] For instance, in the case of the enforcement of the Basel Convention, the shipment of certain types of waste within the EU must be notified to the competent authority of dispatch, which transmits the notification to the competent authority of destination with copies to any competent authorities of transit (Articles 3 and 7 of Regulation (EC) No 1013/2006). Only if all these authorities give their express or tacit consent is the shipment legal (Article 2(35) of the Regulation).

There are also cases where prior positive opinion of the Commission is required before the national administration can adopt an act. One example is established in the Habitats Directive.[45] Article 6(3) of this Directive requires that any plan or project likely to have a significant effect on a Natura 2000 site, must be subject to appropriate assessment of its implications in view of the sites' conservation objectives.[46] Only if the competent national authorities conclude that the plan or project will not adversely affect the integrity of the site concerned can they approve it. However, a plan or project which has had a negative appropriate assessment of its implications for a site may still be greenlighted, in the absence of alternative solutions, if the Member State invokes imperative reasons of overriding public interest, including those of a social or economic nature, if all compensatory measures necessary are taken (Article 6(4) of the Habitats Directive). If the site in question hosts a priority natural habitat type and/or a priority species, the plan or

Convention, by Council Decision 2003/106/EC of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, ELI: http://data.europa.eu/eli/dec/2003/106(1)/oj. In relation to the Stockholm Convention on POPs, by the Council Decision 2006/507/EC of 14 October 2004 concerning the conclusion, on behalf of the European Community, of the Stockholm Convention on Persistent Organic Pollutants, ELI: http://data.europa.eu/eli/dec/2006/507/oj.

[44] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, ELI: http://data.europa.eu/eli/reg/2006/1013/2021-01-11, Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals, ELI: http://data.europa.eu/eli/reg/2012/649/2020-09-01; and Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants, ELI: http://data.europa.eu/eli/reg/2019/1021/2021-03-15. See J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 30, 438-445.

[45] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, ELI: http://data.europa.eu/eli/dir/1992/43/2013-07-01.

[46] A. Cliquet, EU nature conservation law: fit for purpose, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law, cit. at 24, 273-275.

project can only be carried out if the Member State invokes reasons related to human health or public safety or beneficial consequences of primary importance for the environment or, after receiving the Commission's opinion, other imperative reasons of overriding public interest.[47] This opinion is, in substance, an authorisation by the Commission – without it the Member State cannot carry out the action in question.

In these cases, national decision-making procedures not only have a stage where other Member States or the Commission participate, but also are bound by the need of a prior positive decision by the other party before reaching the final decision. These cases are not the most common but may arise when the procedure impacts the sovereignty of another State or deals with shared resources.

3.3. Coordination of Member State action

A different type of cooperation mechanism is the establishment of duties of coordination of Member State action. In this case, national decision-making procedures must take into consideration the acts and positions of the other Member States involved. When several Member States are implementing the same set of EU law obligations, this may lead to joint action. The objective of this coordination is to ensure coherence of action and effective implementation of EU law.

This is especially relevant in cases of management of shared resources. A good example of this is provided by the regime established in the Water Framework Directive (WFD)[48] to shared bodies of water.[49] The basic operational entity of water management is the river basin, which are natural entities independent of administrative and political borders. A river basin extending over the territory of more than one Member State should be integrated into an international river basin district (Article 3(3)

[47] See Article 6(4) of the Habitats Directive. This provision must be interpreted restrictively and does not exempt an environmental assessment from being carried out (see ECJ judgment in Case C-304/05 *Commission v Italy* of 20 September 2007, paras. 81-83).

[48] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, ELI: http://data.europa.eu/eli/dir/2000/60/2014-11-20.

[49] J.H. Jans & H.H.B. Vedder, European Environmental Law, cit. at 30, 346-367; N. Hervé-Fournereau, Beyond the 2019 Fitness Check of the Water Framework Directive: designing the future of European Water Law, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law, cit. at 24.

of the WFD) and there is a duty of transboundary cooperation for their management. A general obligation to coordinate all programmes of measures for the whole of the river basin district, namely through existing structures stemming from international agreements (Article 3(4)-(5) of the WFD), can be distinguished from a more specific obligation regarding management plans. In international river basin district, Member States must ensure coordination with the aim of producing a single international river basin management plan (Article 13(2)-(3) of the WFD).[50] For river basins extending beyond the boundaries of the Union, Member States should equally ensure the appropriate coordination with the relevant non-member States.

Similar coordination duties can be found, for instance, in Article 3(4) of the Groundwater Directive[51], in case of shared bodies of groundwater, or in Articles 5(2) and 8(2) and (3) of the Floods Directive[52], for the identification of identify of potential significant flood risks and the production of flood risk management plans in at the level of the international river basin district.

The need to decarbonize the economy can also lead to the establishment of joint projects between Member States with regard to the production of electricity, heating or cooling from renewable sources (Article 9(1) of the Renewable Energy Directive[53]), through cooperation agreements that must be notified to the Commission. A recent amendment of the Directive, in the context of the Fit for 55 package, introduced the duty that 'by 31 December 2030, Member States [should] endeavour to agree on establishing at least two joint projects' (Article 9(1a) of the Renewable Energy Directive[54]).

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[50] If that is not possible, they are under the obligation to produce river basin management plans covering at least those parts of the international river basin district falling within their territory to achieve the objectives of this Directive.

[51] Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration, ELI: http://data.europa.eu/eli/dir/2006/118/oj

[52] Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, ELI: http://data.europa.eu/eli/dir/2007/60/oj.

[53] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), ELI: http://data.europa.eu/eli/dir/2018/2001/2023-11-20

[54] Introduced by Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, ELI: http://data.europa.eu/eli/dir/2023/2413/oj.

The need for coordination may also lead to duties to respect decisions taken by other Member States. An example of this can be found in the EU implementation regime of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[55], which include the so-called Basic Regulation[56], as well as several implementing regulations. Under this regime permits and certificates issued by the competent authorities of the Member States in accordance with the CITES Basic Regulation are valid throughout the EU (Article 11(1) of the CITES Basic Regulation) – meaning that they have transnational effect.[57] This regime establishes a mechanism of coordination to ensure consistency of application: the duty of Member States to recognize the rejection of applications by the competent authorities of the other Member States, where such rejection is based on the provisions of the CITES Basic Regulation, according to its Article 6(4). To ensure the effectiveness of this regime, when a Member State rejects an application for a permit or certificate 'in a case of significance in respect of the objectives' of the Regulation, it must immediately inform the Commission which is responsible for informing the other Member States (Article 6(1) and (2) of the CITES Basic Regulation). Only if the circumstances have significantly changed or where new evidence to support an application has become available may the Member States fail to respect the previous rejection. In this case, if the management authority issues a permit or certificate, it must inform the Commission and state the reasons for issuance (Article 6(4) of the CITES Basic Regulation). This means that, in this case, the national decisions rejecting a request also have transnational value.

There are also cases where the Commission is empowered to issue generic guidelines to ensure the coordination of Member States' administrations. An example of this can be found in the

[55] CITES has created a system of permits and certificates for the import and export of specimens of endangered species, with different types of protection. All EU Member States are party to CITES, although the EU as an organisation is not.

[56] Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, ELI: http://data.europa.eu/eli/reg/1997/338/2020-01-01.

[57] See A. M. Keessen, European administrative decisions how the EU regulates products on the internal market (2009), 58; L. De Lucia & M.C. Romano, Transnational administrative acts in EU environmental law, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law, cit. at 24, 105-106; J.H. Jans & H.H.B. Vedder, European Environmental Law, cit. at 30, 463-64.

Industrial Emissions Directive (IDE), concerning the adoption of best available techniques (BAT).[58] Firstly, the Commission is responsible for drawing up BAT reference documents (BREFs) - which are documents describing, inter alia, the techniques used to determine best available techniques and BAT conclusions (Article 3(11) and (12) of the IED) - involving the participation of Member States, industry, non-governmental organisations, and the public (Article 13 of the IED). The part of the BREFs laying down the so-called 'BAT conclusions' are the reference for setting the permit conditions by the national permitting authorities (Article 14(3) of the IED). [59] BAT conclusions are the reference to the competent authority of Member States to set emission limit values that ensure that, under normal operating conditions, emissions do not exceed the emission levels associated with the BAT established therein (Article 15(3) of the IED). Derogations from these BAT associated emission levels, as resulting from the BAT conclusions, are foreseen if they would lead to disproportionately high costs compared to the environmental benefits obtained. However, also in this case, the Commission may, if necessary, issue further guidance, establishing the criteria to be considered, based on information provided by Member States (Article 15(4) of the IED).

Duties of coordination can also be found in the area of enforcement of EU law. Recommendation (2001/331/EC) providing for minimum criteria for environmental inspections in the Member States (RMCEI)[60] contains non-binding criteria for the planning, carrying out, following up and reporting on environmental inspections.[61] It recommends the coordination between Member States of inspections with regard to installations and activities which might have significant transboundary impact (Recommendation III(3) of RMCEI).

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[58] J.H. Jans & H.H.B. Vedder, European Environmental Law, cit. at 30, 324-327; L.S. Braaksma & H. Tolsma, Integrated Pollution and Prevention: A critical legal perspective on all-inclusive integration, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law, cit. at 24, 318-319.

[59] They are adopted by the Commission as implementing decisions in accordance with the examination procedure.

[60] Recommendation (2001/331/EC) of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States, ELI: http://data.europa.eu/eli/reco/2001/331/oj

[61] M. Hedemann-Robinson, Environmental Inspection by public authorities, in M. Peeters & M. Eliantonio (eds.), Research Handbook on EU Environmental Law, cit. at 24, 202-205.

3.4. Composite decision-making procedures

Another possible mechanism of cooperation is the establishment of a decision-making procedure with stages at both the national and the Union level, requiring the active participation of both levels, where the final decision may be taken by either one of these administrations (or by both together) – a composite decision-making procedure.[62] It may involve the establishment of procedural links between the national administrations and the EU (vertical cooperation), between Member State administrations (horizontal cooperation), or both.

The creation of composite procedures is based on a logic of administrative cooperation between Member States and the EU or between the Member States.[63] It implies a joint enforcement of EU law through concerted action between the various administrations. In the case of vertical cooperation, the composite decision-making procedure is able to reconcile the guarantee of coherent application of EU law, which is better achieved through the EU level insofar as the same bodies enforce the rule in question throughout the EU, with the greater effectiveness afforded by the Member State level, which is closer to the citizens (which serves the principle of subsidiarity) and has more means of enforcement. Moreover, the existence of a national stage also enables national administrations to represent the national interests of the Member States in the procedure concerned.

An example of a composite procedure is the designation of Special Areas of Conservation, under the Habitats Directive, to be

[62] See T. von Danwitz, Europäisches Verwaltungsrecht (2008), 609; S. Cassese, European Administrative Proceedings, cit. at 29, 21-36; G. della Cananea, The European Union's mixed administrative proceedings, cit. at 29, 198; M. P. Chiti, Diritto amministrativo europeo (2018), 469 ss.; C. Franchini, European Principles Governing National Administrative Proceedings, 68 Law & Contemp. Probs. 191 (2004); E. Schmidt-Aßmann, Introduction: European Composite Administration and the Role of European Administrative Law, in O. Jansen & B. Schöndorf-Haubold (eds.), The European Composite Administration (2011); H. Hofmann, Composite Decision Making Procedures in EU Administrative Law, in H. Hofmann & A. Türk (eds.), Legal Challenges in EU Administrative Law: Towards an Integrated Administration (2009); M. Eliantonio, Judicial Review in an Integrated Administration, cit. at 29.

[63] L. de Lucia, Conflict and Cooperation within European Composite Administration (between Philia and Eris), 9 Rev. Eur. Admin. L. 43 (2014).

part of the Natura 2000 network of sites. [64] This composite procedure has three stages.[65]

In the first stage, each Member State must compose a national list of sites on the basis of the criteria set out in the annexes to the Habitats Directive. The list is to be transmitted to the Commission, together with information on each site.[66] As a second step, based on the national lists and in coordination with the Member States, the Commission adopts, through an implementing decision, lists of sites of Community importance under the comitology procedure.[67] If the Commission establishes a national list fails to contain a site which should be there, it initiates a bilateral dialogue with the Member State. In the absence of agreement, the inclusion of the site on the Community list of sites may be decided on by the Council by unanimity (Article 5 of the Habitats Directive).

Sites considered to be of Community importance are immediately covered by the protection regime of the Habitats Directive.[68]

Finally, in a third stage, the Member States must designate the sites of Community importance as special areas of conservation

[64] Natura 2000 is an ecological network of protected areas established by the EU to ensure biodiversity by conserving natural habitats and wild fauna and flora of Community interest throughout the territory of the Member States by providing a common framework applicable to them is a network of ecological protection areas in the territory of the EU. See J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 30, 451-463; A. Cliquet, *EU nature conservation law: fit for purpose*, cit. at 46, 265-279.

[65] A. Cliquet, EU nature conservation law: fit for purpose, cit. at 46, 269-272; H. Schoukens & H. E. Woldendorp, Site selection and designation under the habitats and birds directives: a Sisyphean task?, in C.-H. Born, A. Cliquet, H. Schoukens, D. Misonne, and G. Van Hoorick (eds.), The habitats directive in its EU environmental law context : European nature's best hope? (2015), 31–55.

[66] According to the ECJ, Article 4(1) of the Habitats Directive must be interpreted as meaning that a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as referred to in Article 2(3) of that directive, when selecting and delimiting sites to be proposed to the Commission for identification as sites of Community importance. See the judgment of the Court of Justice in Case C-371/98, *First Corporate Shipping*, of 7 November 2000.

[67] See Article 4(2) para 3 and Article 21 of the Habitats Directive. To the extent that Article 21 of the Directive refers to Article 5 of the repealed Comitology II Decision, the examination procedure (Article 5 of the Comitology Regulation) should be understood to apply and the basic act provides that in the absence of an opinion the Commission may not adopt the draft implementing act (Article 5(4)(b), *ex vi* Article 13(1)(c) of the Comitology Regulation).

[68] See the Judgement of the Court of Justice in Case C-117/03, *Società Italiana Dragaggi*, of 13 January 2005, ECLI:EU:C:2005:16.

within a maximum period of six years (Article 4(4) of the Habitats Directive).

This composite procedure is rather complex because it involves a national first stage, a second supranational stage and a third, again national, stage. The Commission has a significant role to play and may exclude sites list of sites of Community importance which were on the national list or suggest the addition of sites not included. The last stage, at national level, is a purely implementing stage since there does not seem to be any scope for Member States to refuse to designate sites as special areas of conservation.[69] The various stages, both national and supranational, serve specific objectives and allow for the representation of national interests of Member States and the EU (through the Commission).

3.5. Exchange of information and duties of notification

Finally, the exchange of information between public administrations at the national and EU levels can also be considered a mechanism of cooperation.

The exchange of information between Member States or between Member States and EU institutions, bodies, and organisms may take the form of a particular step in the decision-making process, an independent duty to inform, or may be institutionalized as a network for information exchange, allowing for a more dynamic exchange.

One example can be found in Article 27 of the Ambient Air Quality Directive[70], which establishes that Member States must provide information on ambient air quality to the Commission. Another example can be found in Article 18(1-2) of the Drinking Water Directive[71], that establishes that each Member State must create and update several data sets containing relevant information on the implementation of the Directive, ensuring access to these

[69] See the judgment of the Court of Justice in Case C-441/17, *Commission v. Poland [Białowieska Florest]*, of 17 April 2018, ECLI:EU:C:2019:669, para. 207.

[70] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, ELI: http://data.europa.eu/eli/dir/2008/50/2015-09-18. See J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 30, 374-376; K. Pedrosa & B. Vanheusden, *EU Air Pollution Law: Comprehensive But Insufficient*, in M. Peeters & M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. at 24.

[71] Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast), ELI: http://data.europa.eu/eli/dir/2020/2184/oj. See J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 30, 366-367.

data sets by the Commission, the EEA and the European Centre for Disease Prevention and Control. send to the Commission a report every three years on the quality of water intended for human consumption. To ensure that the effective collection, exchange and use of environmental data and information across Europe, the 'Shared Environmental Information System' (SEIS) was established. It is a collaborative initiative of the European Commission[72] together with the EEA and the 39 countries of the Eionet.

In climate law, Article 10(6) of the Emissions Trading Directive establishes the duty of all the relevant competent authorities of the Member States and ESMA to cooperate and exchange detailed information on all types of transactions on the market for emission allowances and derivatives thereof.[73]

The exchange of information duties may lead to the creation of databases. One example of this is the database established in Article 21(3-4) of the Seveso Directive that contains the reports of Member States of major accidents meeting which have occurred within their territory. It is the Major Accident Reporting System (eMARS) the purpose of which is to facilitate exchange of lessons learned from accidents and near misses involving dangerous substances in order to improve chemical accident prevention and mitigation of potential consequences. The eMARS contains the reports provided to the Major Accident Hazards Bureau (MAHB) of the Commission's Joint Research Centre (JRC) from EU, EEA, OECD, and UNECE countries (under the TEIA Convention).[74]

The exchange of best practices between the competent national or regional authorities or bodies can be facilitated by the Commission in several ways, including through annual meetings of the regulatory bodies, public databases with information on the implementation of measures by Member States, and cross-country

[72] SEIS was proposed, in February 2008, by the European Commission (EC) Communication 'Towards a Shared Environmental Information System (SEIS)' [COM(2008) 46 final] as a solution to Europe's environmental information challenge.

[73] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, ELI: http://data.europa.eu/eli/dir/2003/87/2024-03-01.

[74] For non-EU OECD and UNECE countries, reporting accidents to the eMARS database is voluntary.

comparisons. One example of this can be found in Article 30(6) of the Energy Efficiency Directive.[75]

Sometimes the duty to provide information takes the form of duties of notification, in cases where Member States must inform EU institutions and bodies or other Member States of decisions or actions they have taken. Sometimes, this duty of notification is connected to areas where EU legislation recognizes a margin of free appreciation to the Member States, allowing them to depart from the intended general rule. An example can be found in Article 2(4) of the EIA Directive, which establishes the possibility of Member States, in exceptional cases, exempt a specific project from going through an EIA, where the application of those provisions would result in adversely affecting the purpose of the project, provided the objectives of this Directive are met.[76] In such a case, the Member State must inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals. The Commission immediately forwards the documents received to the other Member States and reports annually to the European Parliament and to the Council on the application of this exemption. The mere fact that a Member State must notify the Commission – and that notification is made public – is a deterrent to the abuse of the powers attributed to the Member States, for instance, to exempt EU legal obligations. The Commission can also check, more easily, if the exemption was lawful.

There are also duties of notification of neighbouring Member States and/or the Commission in case of any natural disasters, industrial accidents, or other emergencies that are likely to produce transboundary effects.[77]

For example, the Air Quality Directive establishes the duty to inform the competent authorities in the neighbouring Member States concerned in case of the information threshold or alert thresholds being exceeded in zones or agglomerations close to national borders (Art. 25(3) of the Air quality Directive).

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[75] Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast), ELI: http://data.europa.eu/eli/dir/2023/1791/oj.

[76] See the judgment of the Court of Justice in Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers*, of 29 July 2019, ECLI:EU:C:2019:622, para. 95-102.

[77] Rio Declaration, supra note 7, at principle 18.

4. Conclusions

It is no surprise that, given the transnational scope of the environmental problems, cooperation plays a central role in EU environmental law. In this sense, the EU legal order, which is deeply dependent on the principle of sincere cooperation, in environmental policy, implements and complements the international environmental law obligations.

Several cooperation mechanisms emerge from EU environmental law. In some cases, these are general duties of cooperation, present in other areas of EU law, such as the exchanging of information. However, one can find some specificalities in environmental policy. These are related, on the one hand to the potential transboundary nature of potential environmental damages – in a logic of prevention, mitigation, and remediation of their effects. The principle of good neighbourliness impose that that Member States and their citizens can have access to important information and may be consulted in the national decision-making procedure relative to projects or plans of other Member States that may have nefarious effects on their environment. In this case, we have a participatory right in the national procedure of a different Member State, such as an affected citizen of that state would have a right to be heard if potentially affected. In cases where a national decision involving potential threats to the environment has a direct impact over the territory of another state, such as in the case of trade in waste, the law may establish the need to obtain prior informed consent of the other State, equivalent to a veto power, because of the principle of sovereignty. The response to transboundary environmental damages is also justification for some of the alert mechanisms found.

On the other hand, as nature knows no borders, EU environmental law needs to deal with questions of management of shared resources – a watercourse, a biodiversity relevant site, or the atmosphere, for instance. Specifically, it is the justification for the composite decision-making procedure for the designation of Natura 2000 sites or the establishment, by the Commission, in cooperation with the Member States, of the parameters for industrial emissions.

This leads to the conclusion that environmental policy is an area of deep cooperation – both vertical and horizontal – that may serve as a laboratory to experiment cooperation mechanisms to be exported to other policy areas.

TRANSNATIONAL ACTS BETWEEN ENVIRONMENTAL PROTECTION AND THE FUNCTIONING OF THE SINGLE MARKET. THE TREATY MATTERS

*Luca De Lucia**

Abstract

This article aims to highlight how transnational acts provided for in legislative measures issued in the context of the European Union's environmental policy have significantly different features from those provided for in legislative measures enacted in the context of policies aimed at the establishment and functioning of the internal market. To illustrate this, reference is made primarily to a number of EU provisions on the circulation of goods, taking into consideration the following types of acts: a) administrative authorisations that allow the movement of goods in the territory of several Member States or in the entire territory of the European Union; b) certifications issued by national authorities and private bodies attesting that a good meets specific requirements. This analysis brings to the fore an additional finding that is noteworthy: the concept of transnational acts, far from being unitary is in fact highly complex and must necessarily also be looked at in the light of the relevant provisions of the Treaty. This is even more important when dealing with new EU legislative competences, such as energy. This circumstance consequently raises the question of the constitutionalisation of EU transnational administrative acts and the role of legal scholarship in this field.

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1. Introduction

This article aims to highlight how transnational acts provided for in legislative measures issued in the context of the European Union's environmental policy (Articles 191, 192 and 193 of Treaty the on the Functioning of the European Union: TFEU) have significantly different features from those provided for in legislative measures enacted in the context of policies aimed at the establishment and functioning of the internal market (Article 114 TFEU). To illustrate this, reference is made primarily to a number of EU provision on the circulation of goods, taking into consideration the following types of acts: a) administrative authorisations that allow the movement of goods in the territory of several Member States or in the entire territory of the European Union; b) conformity assessments (and the connected certifications, labels and markings) carried out by national authorities and private bodies attesting that a good meets specific requirements. This analysis also brings to the fore an additional finding that is noteworthy: the concept of transnational acts is far from being unitary but is in fact highly complex and must necessarily be looked at also in the light of the relevant provisions of the Treaty. In turn, this circumstance raises the question of the constitutionalisation of EU transnational administrative acts and the role of legal scholarship in this field.

The starting point of the reasoning is that although transnational acts under the legislation on the functioning of the single market and those under environmental protection legislation may have two elements in common (i.e., environmental protection, on the one hand, and the movement of goods, on the other), they perform different functions depending on whether the legal basis for the relevant legislative act is that of Article 114 TFEU or Article 192 TFEU. As a consequence, two alternative models of transnational acts can be identified: the first is aimed at facilitating the functioning of the single market and the second is primarily aimed at protecting the environment. However, examples of transnational acts in which these two models partially merge can

be found in the secondary legislation based on the EU legislative competence on energy (Article 194 TFEU). These types of acts have not yet received sufficient attention from legal scholars, but their importance is bound to grow, also in view of the European Green Deal and the role that the energy policy plays in this context.

In the following discussion, the issue of the legal basis for EU legislative acts is first touched upon by recalling some statements of the Court of Justice (Section 2). Next, the main characteristics of transnational acts (authorisations, certifications, labels and markings) issued within the framework of approximation of laws (Section 3) and environmental policies (Section 4), respectively, are outlined and compared. Finally, some remarks are made on the complexity of the concept of transnational acts and the need to give appropriate weight to the Treaty in the study of the subject matter; this is even more important when dealing with new EU legislative competences, such as energy (Section 5).

2. On the legal basis for legislative acts

The European Union has several competences regarding environmental matters.[1] On the one hand, Articles 191-193 TFEU are dedicated to environmental policies; on the other hand, according to Article 11 TFEU, "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".[2] This principle – known as the Integration Principle –[3] obviously also applies to legislative measures intended for the establishment and

* Full Professor of Italian and European Administrative Law, University of Salerno. The author would like to thank Bettina Schöndorf-Haubold for her comments on an earlier version of this paper. The usual disclaimers apply.

[1] In general, on environmental protection in the Treaty, see, e.g., J.H. Jans & H.H.B. Vedder, *European Environmental Law* (3rd edn, 2008); G. Van Castler & L. Reins, *EU Environmental Law* (2017); H. Tegner Anker, *Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities*, in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law* (2020), 7-21.

[2] See also Article 37 of the Charter of Fundamental Rights of the European Union.

[3] On this principle, see, e.g., N.M.L. Dhondt, *Integration of Environmental Protection into other EC Policies - Legal Theory and Practice* (2003); J.H. Jans, *Stop the Integration Principle?*, 33 Fordham Int'l L. J. 1533 (2011).

the functioning of the internal market.[4] The importance of this can be seen in the fact that under Article 114(3) TFEU, the Commission in its legislative proposals concerning, inter alia, environmental protection "will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective" (see, e.g., the legislation on the deliberate release into the environment of genetically modified organisms).[5] Similarly, according to Article 194(1) TFEU, the Union's energy policy must take due account of "the need to preserve and improve the environment".[6]

However, this by no means implies that the legal basis[7] for a legislative measure is insignificant. In this respect, the Court of Justice has repeatedly clarified that "the choice of the appropriate legal basis has constitutional significance",[8] and that this choice "may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review, such as the aim and the content of the measure. If an examination of an EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component".[9] In essence, in case of doubt, the Court of Justice, in order to verify the correctness of

[4] See, e.g., Court of Justice, C-336/00, *Huber*, EU:C:2002:509, para. 33.

[5] See, e.g., Consolidated Version of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106/1.

[6] See Section 5 below.

[7] On the choice of the legal basis of EU legislative acts, see recently A. Engel, *The Choice of Legal Basis for Acts of the European Union* (2018), chap. I and previously, e.g., H. Cullen & A. Charlesworth, *Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States* 36 Common Mkt. L. Rev. 1243 (1999). With specific reference to environmental law, see, e.g., J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 1, chap. 2 and N. de Sadeleer, *Environmental Governance and the Legal Bases Conundrum*, 31 Y.B. Eur. L. 373 (2012).

[8] Opinion of the Court of Justice of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664, para 5.

[9] See, e.g., Court of Justice, C-348/22, *Autorità Garante della Concorrenza e del Mercato (Comune di Ginosa)*, EU:C:2023:301, para 52.

the legal basis for a legislative act, needs to look at its "centre of gravity".[10] However, exceptionally, "if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases".[11]

On several occasions, the Court of Justice has had to decide on the correct legal basis of legislative measures aimed at both protecting the environment and ensuring the functioning of the internal market. Although the subject is highly complex (since the delimitation of the two EU policies is sometimes blurred) and the case law is not always consistent in this respect,[12] in brief, for the Court, the European legislator may resort to Article 114 TFEU to enact measures for the approximation of national legislation concerning, for example, environmental product standards or environmental protection rules on the production of certain goods. In other words, the European legislator can turn to Article 114 TFEU when the aim of ensuring the free movement of goods and eliminating regulatory differences (which "give rise to obstacles in trade or appreciable distortions in competition")[13] is predominant. On the contrary, when the overriding objective of the legislative act is the protection of the environment, it must be based on Article 192 TFEU, despite the fact that it may have an accessory harmonising effect.[14]

More specifically, with reference to the movements of environmentally harmful goods (i.e., waste),[15] the Court of Justice has clarified that while measures based on Article 100 A EEC Treaty (now Article 114 TFEU) must pursue the aim of defining those

[10] On the "centre of gravity" test in the case law of the Court of Justice, see, e.g., H. Cullen & A. Charlesworth, *Diplomacy by Other Means*, cit. at 7; A. Engel, *The Choice of Legal Basis*, cit. at 7, 13-16.

[11] Court of Justice, C-348/22, cit. at 9, para 52, where other references to case-law.

[12] See, e.g., A. Engel, *The Choice of Legal Basis*, cit. at 7, ch. 2.

[13] R. Schütze, *An Introduction to European Law* (2012), 67.

[14] See in general J.H. Jans & H.H.B. Vedder, *European Environmental Law*, cit. at 1, chap. 2; also H. Somsen, *Discretion in European Community environmental law: An analysis of ECJ case law*, 40 Common Mkt. L. Rev. 1413 (2003), 1415-1418; N. de Sadeleer, *Environmental Governance*, cit. at 7, 381-385.

[15] Court of Justice, C-155/91, *Commission v Council*, EU:C:1993:98; A. Wachsmann, 30(5) CML Rev. (1993), 1051–1065 and D. Geradin, *The Legal Basis of the Waste Directive*, 18 Eur.L.Rev. 418 (1993); Court of Justice, C-187/93, *Parliament v Council*, EU:C:1994:265. On this, see H. Cullen & A. Charlesworth, *Diplomacy by Other Means*, cit. at 7, 1247.

characteristics (including environmental compatibility) of a good "which will enable it to circulate freely within the internal market", those based on Article 130 S of the EEC Treaty (corresponding to Article 192 TFEU) are aimed instead at providing "a harmonized set of procedures whereby movements of waste can be limited in order to secure protection of the environment".[16] Consistent with this approach, for instance, Directive 2019/904,[17] while having effects on the internal market, essentially aims at the reduction of the impact of certain plastic products on the environment and is therefore based on Article 192(1) TFEU.[18]

The choice of legal basis is important for numerous reasons, one of which is central to this paper: that the approach of the Court of Justice outlined above has important implications from the point of view of the regulation of transnational acts.

3. Transnational acts and the establishment and functioning of the single market

The issue of transnational administrative acts has been studied mainly with reference to the approximation of laws for the establishment and functioning of the single market[19] and, more specifically, in connection with the principle of mutual recognition.[20] Indeed, the creation of the single market (and thus the effectiveness of the free movement of goods) is based, to a large

[16] C-187/93, cit. at 15, para 26; see also Court of Justice, C-187/93, *Parliament v Council*, EU:C:1994:203, Opinion of Advocate General Jacobs, paras 44 and 45; C-411/06, *Commission v Parliament and Council*, EU:C:2009:518, para 72; more recently, C-292/12, *Ragn-Sells*, EU:C:2013:820, para 49 and C-315/20, *Regione Veneto (Transfert de déchets municipaux en mélange)*, EU:C:2021:499, Opinion of Advocate General Rantos, para 55.

[17] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155/1.

[18] On this Directive, see also H. Tegner Anker, *Competences for EU Environmental Legislation*, cit. at 1, 13.

[19] There are obviously some exceptions which include, for example, EU immigration law: on this issue, see. e.g., J. Bast, *Transnationale Verwaltung des europäischen Migrationsraums: Zur horizontalen Öffnung der EU-Mitgliedstaaten*, 46 Der Staat 1-32 (2007).

[20] See, in general, K.A. Armstrong, *Mutual Recognition*, in C. Barnard & J. Scott (eds.), *The Law of the Single European Market* (2002), 225-267; F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (2005).

extent, on regulatory harmonisation and pursues the objective of eliminating the duplication of administrative controls at state level. This is pursued, inter alia, through the provision of transnational authorisations and conformity assessments.[21] The subject is well known, and it is therefore unnecessary to address the matter in-depth here.[22] Some brief references are therefore sufficient.

3.1. Transnational authorisations

The legislation on the movement of goods provides for various models of transnational authorisations,[23] all of which are based on administrative cooperation, i.e., a complex set of tools aimed at governing administrative pluralism. The concept of

[21] On the different tools used by the European legislator to implement the principle of mutual recognition, see, e.g., L. De Lucia, *One and Triune – Mutual Recognition and the Circulation of Goods in the EU*, 13 Rev. Eur. Admin. L. 7 (/2020).
[22] On the transnational administrative acts see, e.g., E. Schmidt-Aßmann, *Deutsches und Europäisches Verwaltungsrecht*, Deutsches Verwaltungsblatt, 924 (12/1993), 936; S. Galera Rodrigo, *La aplicación administrativa del derecho comunitario* (1998), 108 ff.; J. Becker, *Der transnationale Verwaltungsakt*, Deutsches Verwaltungsblatt, 855-866 (11/2001); M. Ruffert, *Der transnationale Verwaltungsakt*, Die Verwaltung 453-485 (4/2001); G. Sydow *Verwaltungskooperation in der Europäischen Union* (2004), part II; L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (2009); A.M. Keessen, *European Administrative Decisions. How the EU regulates Products on the Internal Market* (2009); H.C.H. Hofmann, G.C. Rowe & A.H. Tϋrk, *Administrative Law and Policy of the European Union* (2011), 645-648; C. Ohler, *Europäisches und nationales Verwaltungsrecht*, in J.P. Terhechte (ed.), *Verwaltungsrecht der Europäischen Union* (2011), 331, 345 ff.; M. Gautier, *Acte administratif transnational et droit communautaire*, in J-B Auby & J. Dutheil de la Rochère (eds.), *Traité de droit administratif européen* (2nd edn, 2014), 1303-1316; L. De Lucia, *From Mutual Recognition to EU Authorization: A Decline of Transnational Administrative Act*s, 8 IJPL 90 (2016); J.J. Pernas García, *The EU's Role in the Progress Towards the Recognition and Execution of Foreign Administrative Acts: The Principle of Mutual Recognition and the Transnational Nature of Certain Administrative Acts*, in J. Rodrigo-Arana Muñoz (ed.), *Recognition of Foreign Administrative Acts* (2016); J. Ortega Bernardo, *El acto administrativo transnacional en el derecho europeo del Mercado interior*, in L. Arroyo Jiménez, A. Nieto Martìn (eds.), *El reconocimiento mutuo en el Derecho español y europeo* (2018).
[23] On the different models of transnational administrative acts, see, e.g., S. Galera Rodrigo, *La aplicacìon administrativa del derecho comunitario*, cit. at 22, 108 ff.; G. Sydow, *Verwaltungskooperation*, cit. at 22, 126 ff.; H.C. Röhl, *Procedures in the European Composite Administration*, in J. Barnes (ed.), *Transforming Administrative Procedure* (2008).

cooperation has several implications,[24] two of which should be mentioned here.

First, cooperation takes shape through forms of division of administrative tasks.[25] In short, the EU legislator in these cases stipulates that a national administration may carry out certain activities (e.g., environmental control, authorisation) in place of the administrations of other Member States. In order to ensure the effectiveness of the division of administrative work, the issuance of transnational authorisations usually entails limitations in the activities of the administrations of destination. This is the so-called inter-administrative tie that is part of the transnational effect and operates differently in the various models of transnational acts.[26] For example, in certain cases (e.g., the authorisation for marketing of mineral waters),[27] all controls are carried out by the administration of origin, which is also tasked with issuing an authorisation that has automatic transnational effects (i.e., allowing the circulation of a good in all Member States); in turn, other administrations must allow this authorisation to be executed (by its recipient) in the respective legal orders and cannot contest or subject the authorisation to legality checks. In other cases (e.g., the recognition of a marketing authorisation for a biocidal product),[28] all scientific/technical analysis and tests are carried out by the administration of origin when it issues the first marketing authorisation for a good (which is only valid for the territory of the state of origin). The administration of destination must accept (and evaluate) the results of these analyses and tests (without being able to question them autonomously) when it issues the authorisation for its own jurisdiction.[29] The inter-administrative tie works here

[24] See E. Schmidt-Aßmann, *Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft*, 31 Europarecht 270 (1996).

[25] See, e.g., G. Sydow *Verwaltungskooperation in der Europäischen Union*, cit. at 22, 7 f.

[26] On this see L. De Lucia, *Amministrazione transnazionale e ordinamento europeo*, cit. at 22, ch. 6 and L. De Lucia, *Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts*, 5 Rev. Eur. Admin. L. 17 (2012), 32-35.

[27] Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters [2009] OJ L164/45.

[28] Chapter VII of the Consolidated Version of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products [2008] OJ L 167/1.

[29] See, e.g., L. De Lucia, *Administrative Pluralism*, cit. at 26.

within the administrative proceedings carried out by the destination authority.

Second, cooperation is based on mechanisms of information and dialectical confrontation between the national authorities involved: the greater the impact the product has on the environment (or other public interests), the more complex the decision-making process will be, sometimes resulting in truly intertwined decision-making. This explains the provision of procedures for resolving conflicts between the different administrations involved.[30] It should be noted that, in many cases, administrative conflict resolution mechanisms can be traced back to the safeguard measures provided for in Article 114(10) TFEU for the protection of non-economic values.

These brief remarks show that transnational authorisations in these cases pursue the aim of facilitating the movement of goods (i.e., a fundamental freedom guaranteed by the Treaty) through the coordination of the administrative pluralism that characterises the European Union, while at the same time ensuring the protection of certain values (e.g., environment, health).

3.2. Conformity assessments and CE marking

As is well known, the EU legislator has also turned to techniques other than transnational authorisations to ensure the functioning of the single market, namely those of the "New Approach" to harmonisation.[31] These include, inter alia, the conformity assessments and examination certificates issued by private entities - the so-called notified bodies - which attest the conformity of a product (or a product type) with the safety requirements set out in the relevant legislative acts, as well as with harmonised standards, if approved.[32] In this context, when

[30] On this, see, e.g., L. De Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, 5 Rev. Eur. Admin. L. 43 (2012).

[31] Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136/1.

[32] On this issue, see J. McMillan, *La «certification», la reconnaissance mutuelle et le marché unique*, 1 *Revue du marché unique européen* 181 (1981); H.C. Röhl, *Akkreditierung und Zertifizierung im Produktsicherheitsrecht* (2000); H.C. Röhl, *Conformity Assessment in European Product Safety Law*, in O. Jansen, B. Schöndorf-Haubold (eds.), *The European composite administration* (2011); J.-P. Galland, *The difficulties of Regulating Markets and Risks in Europe through Notified Bodies*, 4 Eur. J. Risk Regul. 365 (2013); Commission Notice, "The 'Blue Guide' on the implementation of EU products rules 2016" [2016] OJ C272/1.

products have been placed on the market of a Member State in accordance with the essential safety requirements (and bear the CE marking), the other Member States can no longer restrict their circulation in their territory.[33] Since conformity assessments are the result of a fully harmonised verification procedure and produce (relative) certainty as to the safety of a certain product, they must then be accepted by all Member States. In this respect, the Court of Justice has repeatedly stated that products which have been certified as conforming with the essential requirements of the relevant Directive and "which bear a CE marking […] must be allowed to move freely throughout the European Union, and no Member State can impose a requirement that such a product should undergo a further conformity assessment procedure".[34] This is of course without prejudice to the powers that national market surveillance authorities may exercise with respect to products that do not comply with harmonised standards or that present a risk to the safety or health of users.[35]

There are many differences between transnational authorisations and conformity assessments.[36] One of these should be mentioned here. While transnational authorisations remove a legal obstacle to free movement posed by EU legislation in order to protect overriding public interests (e.g., the environment), on the contrary, the conformity assessments are aimed at providing evidence that a given product meet the conditions for free movement – i.e., they concern the legal status of the goods. However, as in the case of transnational authorisations, the

[33] See, e.g., Court of Justice, C-220/15, *Commission v Germany*, EU:C:2016:815, paras 36 ff.

[34] Court of Justice, C-277/17, *Servoprax*, EU:C:2016:770, para. 37 and, previously, C-6/05, *Medipac-Kazantzidis*, EU:C:2007:337, para. 42.

[35] Chapter V of Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L 169/1.

[36] Obviously, intermediate forms can be found between the model of the transnational act and that of certification; this occurs, for instance, when certificates of conformity can only be issued by public administrations: see, e.g., Consolidated Version of Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1.

conformity assessments for goods also limit the control powers of the destination administrations (other than those entrusted with market surveillance);[37] therefore, also these forms of acts can be described as acts with transnational effects.[38]

4. Transnational acts in EU environmental protection legislation

Transnational acts and certificates are also provided for by secondary legislation that has Article 192 TFEU as its legal basis. However, these types of acts are far fewer in number than those based on Article 114 TFEU and are quite different from the latter. A look at some pieces of legislation may clarify this diversity.[39]

4.1. Transnational administrative authorisations

With regard to transnational acts, the explanation needs to be slightly more detailed. First, authorisations issued by national authorities of origin, transit and destination and relating to the transboundary shipment of waste should be mentioned. According to Regulation 1013/2006,[40] whoever intends to ship waste must submit a notification to the competent authority in the State from which the waste will be despatched, complying with the requirements laid down in the Regulation. This authority must then transmit the notification to the competent authority of destination and to any competent authority (or authorities) of transit. At this point the dispatch and destination authorities can take one of the following decisions: (1) consent without conditions; (2) consent with conditions (Article 10); (3) raise objections (Article 11 and 12).

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[37] See in general De Lucia, *One and Trune*, cit. at 21, 21 ff.

[38] At most, one could perhaps also speak of a de-nationalised legal effect, since with these regulations the European legislator has set up private (i.e., de-nationalised and de-politicised) systems for product conformity verification: see, e.g., H.C. Röhl, *Conformity Assessment*, cit. at 32, 218 ff. and J.-P. Galland, *The difficulties of Regulating Markets*, cit. at 32, 368.

[39] On the following, see L. De Lucia & M. C. Romano, *Transnational Administrative Acts in EU Environmental Law*, in M. Peeters & M. Eliantonio (eds.), *Research Handbook on EU Environmental Law* (2020). In general, on waste EU legislation see, e.g., G. Van Castler & L. Reins, *EU Environmental Law*, cit. at 1, ch. 15.

[40] Consolidated Version of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L 190/1. On the legal basis of Regulation 1013/2006, see Court of Justice C-411/06, *Commission v Parliament and Council*, EU:C:2009:518.

In the first case, the consent given by all the administrations involved represents an example of an authorisation with transnational effects. From a structural point of view, the decision consists here of many simultaneous national authorisations, which concurrently condition the undertaking of the cross-border shipment of waste. However, each national authority can individually withdraw its consent in the presence of any potentially harmful effects for the environment (Article 9(8)). In the third case, if the notification concerns a shipment of waste destined for disposal and recovery, the competent authorities of destination and dispatch may raise reasoned objections based on one or more of the grounds provided for in the Regulation (Articles 11 and 12, respectively). If the problems giving rise to the objections have not been resolved within the 30-day time limit, the notification ceases to be valid (Articles 11(5) and 12(4)). On the other hand, in the case of shipments for the disposal of hazardous waste in small quantities, if the competent national administrations cannot find a satisfactory solution, either Member State may refer the matter to the Commission for decision in accordance with the examination procedure (Articles 11(3)(2) and 59a(2)). If none of the states have asked for the intervention of the Commission and the problem remains, the notification ceases to be valid.

Mention must also be made of licences and certificates for the import and export of species of wild flora and fauna regulated by Regulation 338/97.[41] This Regulation aims to protect endangered species of fauna and flora, applying the principles of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[42] and regulates separately the introduction of a protected species into the EU, and the export or re-export of a species from the EU. The introduction of a specific species[43] into the EU is subject to the prior presentation, at the border customs office, of an import permit issued by a management authority of the Member State of destination on the basis of a complex series of conditions (Article 4). In turn, the Regulation lays

[41] Consolidated Version of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L 298/70. On this issue, see, e.g., J.H. Jans, H.H.B. Vedder, *European Environmental Law*, cit. at 1, 463 ff.

[42] Convention on International Trade in Endangered Species of Wild Fauna and Flora Signed at Washington, D.C., on 3 March 1973.

[43] See Annexes A, B, C, D of the Regulation 338/97.

down the conditions necessary for the Member States in which the specimens are located to issue an export licence or re-export certificate (Article 5). These conditions partly overlap with those for the granting of the import licence. The variation of the prerequisites and the type of act required (permit, certification, notification) responds to the need to graduate the level of protection of the flora and fauna through the varying levels of control on the import and export of the various protected species, to and from third-party countries. Moreover, in line with Article 193 TFEU, the Regulation also allows Member States to take stricter measures (Article 11(1)).

The permits and the certificates issued by one Member State have transnational effects as they are valid within the whole territory of the EU (Article 11(1)). However, a permit or a certificate is deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met; in the same way these acts are not considered valid when specimens situated in the territory of a Member State and covered by such documents are seized or confiscated by the competent authorities of that Member State (Article 11(2)).[44] Also the rejection of an application produces transnational effects, since this must be recognised by the other Member States (Article 6(4)(a)), except when the circumstances have significantly changed or where new evidence to support an application has become available (Article 6(4)(b)).

At this point, it is possible to dwell briefly on the features that differentiate these transnational authorisations from those based on Article 114 TFEU. Evidently, these two Regulations establish prior authorisation and notification systems that are a "typical instrument of environmental policy",[45] the aim of which is to restrict the circulation of the goods in question.[46]

This is reflected in the legal framework of the transnational acts provided for in these Regulations. If their predominant objective is to limit the movement of certain goods, this means allowing (if not encouraging) the multiplication of administrative controls at national level. It is no coincidence that in both cases, a

[44] Court of Justice, C- 532/13, *Sofia Zoo*, EU:C:2014:2140, para. 38.
[45] Opinion of the Court of Justice, 2/00, cit. at 8, para 33; see also Court of Justice, C-94/03, *Commission v Council*, EU:C:2006:2, para 44.
[46] For protected species, this is implicit in Regulation 338/97; for waste, see the judgments of the mentioned at 16 above.

marked autonomy of individual national administrations is ensured, as they are hardly ever completely bound by decisions or procedural acts taken by other national administrations. In fact, the transnational effect (i.e., the inter-administrative tie) operates in these cases only as an orientation and can be questioned (or blocked) by the administrations of destination. In addition, each state authority can intervene unilaterally in its own territory without, as a rule, having to initiate conflict resolution procedures with other national administration: The absence of conflict mechanisms clearly leads to a more incisive protection of the environment, as this key interest cannot, in fact, be subject to the negotiation and the balancing of interests that normally characterises conflict resolution procedures. In reality, these regulations, rather than forms of division of administrative work, essentially provide for forms of administrative coordination, in the sense that they regulate a set of techniques aimed at giving a certain order to the activities of public actors from different jurisdictions.[47]

To sum up, in the legal provisions analysed here, the overriding priority of protecting the environment coincides with the weakening of procedural forms of administrative cooperation and with the strengthening of the decisional autonomy of all national administrations. This essentially means that in this field, the EU legislator believes that each individual state administration can protect the environment in a more appropriate way than through a deliberative decision-making process.

4.2. Environmental labels and certifications

European legislation contains numerous provisions on environmental certification.[48] Of these, few have Article 192 TFEU (or its predecessors) as their legal basis and even fewer regulate

[47] G. Sydow, *Verwaltungskooperation in der Europäischen Union*, cit. at 22, 8.
[48] See, e.g., the list contained in Article 1 of the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023) 166 final.

certifications that can produce transnational effects.[49] Transnational effects occur instead in the EU Ecolabel Regulation.[50]

According to Regulation 66/2010, the use of this label is awarded by the competent national authority, following the assessment and verification that a product complies with the production requirements set out in the relevant European provisions.[51] The awarding of the label provides evidence of the low environmental impact of a certain good. This certainty is transnational in nature since it is valid throughout the entire territory of the EU; moreover, the validity of the EU Ecolabel cannot be contested by the administrations of other Member States, but at most can be reported by the competent national administration to that which issued it in order to carry out the relevant checks and to order the possible prohibition of use (Article 10(5)). As a consequence, for example, in the context of tenders for the purchase of goods, the EU Ecolabel (even if awarded in another Member State) must be duly taken into account.[52]

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[49] Among the legislative measures based on Article 192 TFEU that provide for environmental certification but do not have transnational effect, see, e.g., the Consolidated Version of Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars [2000] OJ 12/16.

[50] Consolidated Version of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L 27/1. On the EU Ecolabel, see, e.g., A. Barone, *L'Ecolabel*, in F. Fracchia & M. Occhiena (eds.), *I sistemi di certificazione tra qualità e certezza* (2006); A. Redi, *L'Ecolabel al crocevia tra ambiente e sviluppo*, in 3 Rivista quadrimestrale di diritto dell'ambiente 135 (2020).

[51] See, e.g., Commission Decision (EU) 2016/1349 of 5 August 2016 establishing the ecological criteria for the award of the EU Ecolabel for footwear [2016] OJ L214/16.

[52] See, e.g. Recital 74 and Article 43, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65. On this issue, see Court of Justice, C-368/10, *Commission v Netherlands*, EU:C:2012:284; and C-368/10, *Commission v Netherlands*, EU:C:2011:840, Opinion of Advocate General Kokott; see also V. Ihamäki, E. van Ooij & S. van der Panne, *Green Public Procurement in the European Union and the Use of Eco-Labels*, Maastricht University, State aid & Public procurement in the European Union IER 4014 (maastrichtuniversity.nl/sites/default/files/2023-03/green_public_procurement_in_the_european_union_and_the_use_of_eco-labels.pdf).

The main features of this legislation are clearly conditioned by Articles 191 and 192 TFEU.[53] The EU Ecolabel scheme is voluntary and aims to "promote products with a reduced environmental impact throughout their life cycle and to provide consumers with accurate, non-deceptive and science-based information on the environmental impact of products" (recital 1).[54] As with many other environmental protection regulations, it therefore focuses on consumer awareness[55] and "is intended to direct consumers' attention to those products".[56]

In short, compliance with the environmental production criteria set out by European legislation is not a condition to market a product, but the result of a business choice of the producer. On the other hand, if in order to place a product on the market, manufacturers had to demonstrate (through harmonised techniques) that it has little or no impact on the environment or that it complies with certain environmental standards, the primary objective of the legislative measure would be to ensure the circulation of the good in question in an environmentally compatible manner - that is, there would be a mechanism that

[53] A similar reasoning can be followed for the EU Eco-Management and Audit Scheme (EMAS): Consolidated Version of Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L352/1. Public or private organisations can participate in this scheme on a voluntary basis and its purpose is to promote the improvement of the environmental performance of organisations through the establishment and implementation of environmental management systems, the evaluation of the performance of such systems, and the provision of information on environmental performance. The transnational effect in these cases may come into play, for instance, in the context of tenders for the purchase of services.

[54] On this, see also General Court, T-573/14, *Polyelectrolyte Producers Group and SNF v Commission*, EU:T:2015:365, para 4.

[55] The centrality of consumer awareness in these regulations also explains the need to counter the phenomenon of so-called Greenwashing, on which see, in addition to the Green Claims Directive Proposal, cit. at 48, S. Szabo & J, Webster, *Perceived Greenwashing: The Effects of Green Marketing on Environmental and Product Perceptions*, 171 J. Bus. Ethics 719 (2021).

[56] Court of Justice, C-281/01, Commission v Council, EU:C:2002:486, Opinion of Advocate General Alber, para 61.

affects the functioning of the single market not very differently from that envisaged by the Directives of the New Approach.[57]

5. Final remarks

These brief considerations should have shown that transnational act is not a unitary concept. In fact, if the transnational act is understood as one that produces legal effects in countries other than that to which the issuing body belongs, it is clear that the transnational effect may be connected to an authorisation, an act of procedure (as scientific analysis and tests in the case of authorisations subject to recognition), or information on a good (e.g., its safety or its environmental quality). In addition, the transnational effect may derive from an act of a public administration or a private entity (e.g., examination certificates issued by notified bodies). Finally, the transnational effect may be more or less robust in the different fields.

All this calls for reflection on the relationship between the Treaty and the regulation of transnational acts in general and more specifically with reference to the new legislative competences of the EU.

5.1. The constitutionalisation of EU transnational administrative acts

In the cases examined above, the type of transnational effect and its strength are directly linked to the legal basis chosen by the EU legislator. As the case law shows, the decision to prioritise the protection of the environment or the circulation of a good in a given sector, is the result of a political choice, which is reflected in the administrative tools used to govern that sector. The fact that the Court of Justice demands consistency between the legal basis of a legislative act, its content and objectives, means that the judiciary is implicitly imposing, among other things, the constitutionalisation

[57] More complex is the reasoning for those legislative acts that, while establishing the obligation of certification or labelling with regard to the environmental impact of a product, do not affect the related production techniques. In these cases, both the protection of the environment (by raising consumer awareness) and the circulation of the good (given the mandatory nature of the label or certificate) come into play. Hence, according to the case law of the Court of Justice, the legal basis of these legislative measures must probably be chosen in consideration of their main or predominant purpose or component: see Section 2 above, and footnote 75 below.

of transnational administrative law, i.e., the "adaptation, alignment and reshaping of the ordinary legislation to the guidelines of the constitution, which are not exhausted in strict and simple commands and prohibitions".[58] With all its variants, the transnational act thus represents an instrument of public authority action that must be placed harmoniously within the EU constitutional framework.

On this point, however, there is one important issue to consider. The differences between transnational acts enacted in the context of environmental policy and in the context of the approximation of laws have emerged for a specific reason: they stem from the difference, envisaged in the past, between the legislative procedures in the two areas (or more specifically from the different roles of Parliament). In other words, litigation between the Parliament, the Commission and the Council on the legal basis of legislative acts (and thus on the legislative procedure to be followed) led the Court of Justice to identify the interpretative criteria mentioned above.[59] However, since these legislative procedures are now regulated in an essentially uniform manner, disputes between the institutions on the legal basis of legislative

[58] G. Schuppert & C. Bumke, *Die Konstitutsionalisierung der Rechtsordnung* (2000), 57. On the constitutionalisation of administrative law in general, see L. Heuschling, *The Complex Relationship between Administrative Law and Constitutional Law. A Comparative and Historical Analysis*, in A. von Bogdandy, P.M. Huber & S. Cassese (eds.), *The Max Planck Handbook in European Law. The Administrative State*, vol. I (2017). For the German legal order, see e.g., F. Wollenschläger, *Constitutionalisation and Deconstitutionalisation of Administrative Law in View of Europeanisation and Emancipation* 10 Rev. Eur. Admin. L. 7 (2017); for the French legal order, see e.g., P. Delvolvé, *L'actualité de la théorie des bases constitutionnelles du droit administrative*, Ius Publicum Annual Report 2015 (June 2015) <www.ius publicum.com/repository/uploads/14_07_2015_14_54-Delvolve.pdf> accessed 3 June 2023; for the Italian legal order, see e.g. S. Cassese, *La costituzionalizzazione del diritto amministrativo*, in A. Ruggeri (ed.), *Scritti in onore di Gaetano Silvestri* (2016). On the constitutionalisation of European administrative law, see e.g., M. Ruffert, *The Constitutional Basis of EU Administrative Law*, in S. Rose-Ackerman, P.L. Lindseth, B. Emerson (eds.), *Comparative Administrative Law* (2nd edn, 2017); E. Schmidt-Aßmann & B. Schöndorf-Haubold, *Verfassungsprinzipien für den Europäischen Verwaltungsverbund*, in A. Voßkuhle, M. Eifert & C. Möllers (eds.), *Grundlagen des Verwaltungsrechts*. I, (2nd edn, 2022); previously P. Craig, *The Constitutionalization of Community Administration*, Jean Monnet Working Paper No 3/03; with reference to the Constitutional Treaty, see E. Nieto-Garrido & I. Martín Delgado, *European Administrative Law in the Constitutional Treaty* (2007).

[59] See A. Engel, *The Choice of Legal Basis*, cit. at 7, ch. 4.

acts have diminished considerably and the Court of Justice now has fewer opportunities to exercise its checks on this matter.[60]

The legal basis of legislative acts is of course still important today; for instance, since the case-law of the Court of Justice on this issue continues to apply, Article 192 TFEU can justify minimum and not full harmonisation of product-related measures, and Article 193 TFEU allows individual Member States to maintain and introduce stricter protective measures.[61] However, it is undeniable that the alignment of legislative procedures has induced the three institutions to pay less attention to this issue. An example may clarify the point. Regulation 842/2006 on certain fluorinated greenhouse gases[62] had a dual legal basis: Article 175(1) TEC (now 192(1) TFEU) and Article 95 TEC (now 114 TFEU) for *product-related* provisions, i.e., those rules regarding the labelling, the control of use and the placing on the market of certain products. This solution - which was in line with the criteria identified by the Court of Justice -[63] was then abandoned by Regulation 517/2014,[64] which, while also providing for legal norms on the labelling, the control of use, the placing on the market and the mandatory declaration of conformity (issued by independent auditors) of certain products,[65] has only Article 192(1) TFEU as its legal basis.

[60] Of course, the correctness of the legal basis chosen by the legislator can always be questioned, for instance, by a national court through a request for a preliminary ruling on the validity of a legislative act of the Union: see, e.g., C-348/22, cit. at 9, paras 50-59.

[61] See, e.g., H. Tegner Anker, *Competences for EU Environmental Legislation*, cit. at 1, 11-13, where further references and L. Reins, *Where Eagles Dare: How Much Further May EU Member States Go under Article 193 TFEU?*, in M. Peeters & M. Eliantonio (eds.), *Research Handbook on EU Environmental Law* (2020), 22-35; in a different perspective, see N. de Sadeleer, *Environmental Governance*, cit. at 7.

[62] Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases [2006] OJ L 161/1.

[63] See Section 2 above.

[64] Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 [2014] OJ L150/195.

[65] Article 14 of Regulation 517/2014 and Commission Implementing Regulation (EU) 2016/879 of 2 June 2016 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, detailed arrangements relating to the declaration of conformity when placing refrigeration, air conditioning and heat pump equipment charged with hydrofluorocarbons on the market and its verification by an independent auditor [2016] OJ L146/1.

5.2. Transnational acts in the context of the European Green Deal: the case of renewables

In the face of these developments, an even more important (and partially compensative) role can then be played by legal doctrine, which, precisely based on the interpretation of the Treaty provisions that envisage legislative competences of the Union, can contribute inter alia to a better understanding of the various regulations of transnational act and therefore to their constitutionalisation.[66] This could be particularly useful with regard to new EU legislative competences, notably those on energy policy (Article 194 TFEU).[67] The Lisbon Treaty has made important innovations in this area, which is also characterised by significant transnational elements: in this respect it was stated that "settled case law on the choice of a legal basis seems to preclude using Article 192 TFEU as a legal basis for direct action in the energy sector after the adoption of Article 194 TFEU",[68] and that "with Article 194 TFEU, measures aiming at ensuring the functioning of the energy market can now be based on the energy competence provided in that Article".[69]

It is probably for this reason that typologies of transnational acts can be found in current EU energy legislation that are partially different from those mentioned above. The issue is very complex and cannot be explored in depth here. An example of regulations based on Article 194(1) TFEU may however help to clarify this point.

For several years now, the European legislator has established guarantees of origin from renewable sources, that is, an "electronic document" issued by public or private entities "which

[66] See, e.g., E. Schmidt-Aßmann, B. Schöndorf-Haubold, *Verfassungsprinzipien*, cit. at 58, 248 ff.

[67] On Article 194 TFUE, see, e.g., A. Johnston & E. van der Marel, Ad Lucem? *Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU*, 22 Eur. Energy Env'l L. Rev. 181 (2013); K. Talus, *EU Energy Law and Policy: A Critical Account* (2013); R. Leal-Arcas & J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (2017); K. Huhta, *The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of EU Competences in the Energy Sector*, 70 Int'l & Compar. L. Q. 991 (2021).

[68] K. Huhta, *The Scope of State Sovereignty*, cit. at 67, 999.

[69] K. Talus, P. Aalto, *Competences in EU energy policy*, in R. Leal-Arcas & J. Wouters (eds.), *Research Handbook on EU Energy Law and Policy* (2017), 20. See also Court of Justice, C-490/10, *Parliament v Council*, EU:C:2012:525. On this issue, see, e.g., A. Johnston & E. van der Marel, Ad Lucem?, cit. at 67.

has the … function of providing evidence to a final customer that a given share or quantity of energy was produced from renewable sources" (Article 2(2)(12) Directive 2018/2001).[70] Guarantees of origin have many elements in common with environmental certifications,[71] since their primary purpose is to provide information to final customers, guiding them in their choices (Recitals 55-59). They also have transnational effects, as all Member States must recognise them (Article 19(9)). In this regard, Directive 2018/2001 establishes a procedure - which is similar to that provided for the circulation of goods -[72] for resolving conflicts between national administrations: in the event of non-recognition by a Member State, the Commission may, if it considers the national decision to be unfounded, require the Member State in question to recognise the guarantee (Article 19(9) and (10)).

In the past, guarantees of origin were regulated by legislative acts whose legal base was Article 175(1) TCE.[73] Nevertheless, this legislation clearly went far beyond environmental protection and directly interfered with the functioning of the single market: as noted by Advocate General Bot, "far from merely introducing minimum standards, the Union legislature made several aspects of this area subject to harmonisation, hand in hand with the principle of mutual recognition. In particular, it established a uniform definition throughout the Union, of the guarantee of origin, … also conferring on it scope … uniform at EU level".[74] Moreover, the legality of certain national laws transposing Directive 2001/77, as regards guarantees of origin, were scrutinised by the Court of Justice in light of Article 28 TEC;[75] and the question arose as to

[70] Consolidated Version of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82.
[71] See Section 4.2. above.
[72] See Section 3.1. above.
[73] Article 5 of Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L 283/33 and Article 15 of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16.
[74] Court of Justice, C-66/13, *Green Network*, EU:C:2014:156, Opinion of Advocate General Bot, para 56; see also Court of Justice, C-66/13, *Green Network*, EU:C:2014:2399.
[75] See, e.g., Court of Justice, C-204/12, *Essent Belgium*, EU:C:2014:2192.

whether these guarantees were to be considered as "goods" within the meaning of Article 28 TEC.[76] This shows that Article 175(1) TEC was a rather fragile (and perhaps insufficient) legal basis for the regulation of guarantees of origin.

In summary, on the basis of Article 194(1) TFEU, Directive 2018/2001 now provides for a transnational act in which instruments inspired by both single market and environmental legislation converge. This is clearly different from those examined in the previous Sections. And it is likely that European energy legislation contains other examples of transnational acts with peculiar features,[77] which, especially in the light of the European Green Deal, would deserve to be duly investigated. This could in fact offer new insights into EU transnational administrative law.

To conclude, the field of administrative transnationality is extremely broad and varied and it is an area that still poses many complex challenges to legal scholars.

[76] For an answer in the affirmative, see Court of Justice, C-204/12, *Essent Belgium*, EU:C:2013:294, Opinion of Advocate General Bot, para 76; on the other hand, Court of Justice, C-204/12 cit., para 81, did not consider it necessary to rule definitively on the question.

[77] Consider, for instance, the Consolidated Version of Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU [2017] OJ L198/1. Regulation 2017/1369, whose legal basis is again Article 194 TFEU, provides for the labelling of energy-related products and the provision of information regarding energy efficiency, the consumption of energy and of other resources by products during use, "thereby enabling customers to choose more efficient products in order to reduce their energy consumption" (Article 1(1)). It does not establish the characteristics that energy-related products must have, but merely states that labelling containing information on energy efficiency is a condition for their circulation in the single market (Article 7(1)). Furthermore, it recognises that Member States may provide incentives for the use of the most energy-efficient products (Recital 34 and Article 7(2)). But above all, it envisages harmonised labelling rules (Article 13(1)) that are, however, destined to be incorporated into the conformity assessment of these products (Article 13(2)). Here again, environmental protection rules overlap with those on the functioning of the energy market, resulting consequently in the convergence of administrative instruments typical of the New Approach with those typical of environmental certification.

THE GREEN DEAL THROUGH TRANSNATIONAL GOVERNANCE: THE CASE OF CBAM

Dario Bevilacqua *

Abstract

Through the application of the Carbon Border Adjustment Mechanisms – CBAM, adopted in 2023, the EU contributes to the Green Deal implementation, using a regional domestic regulatory measure with a transnational impact. This provides that producers importing goods into Europe will pay the same price for their carbon footprint as operators on the continent, with the elimination of the free allocation of permits within the emissions trading system. Besides its impact on decarbonization, as a tool towards climate neutrality, CBAM applies as a transnational trade regulatory measure, with a potential harmonizing effect, despite its unilateral origin inside the Global Arena. Trans-nationalization does not come out of cooperation or of the adoption of common rules (except for Member States inside the European area), but it should be the result of the potential capacity of the Union to condition global markets with a provision applying also to foreign operators. The article analyses CBAM, its rationale and functioning, and its transnational impact.

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1. Introduction

The Green Deal is not only a policy – or a strategy to translate into policies and measures for its actuation[1] – coming from the European Commission[2] and to be applied in the territories of the Member States. Indeed, in its several ways of development, it also has a reflection, and effects, in the Global Arena, through the application of measures with a transnational impact. This is the case of the Carbon Border Adjustment Mechanisms – CBAM, adopted by the EU in 2023[3].

The proposal was born with the Commission's Communication "Fit for 55%"[4], as a new regulatory tool for the implementation of the Green Deal. Then it became a binding norm, precisely Regulation (EU) 2023/956[5]. Art 1, par. 1 describes it as a mechanism "to address greenhouse gas emissions embedded in the goods listed in Annex I on their importation into the customs territory of the Union in order to prevent the risk of carbon leakage, thereby reducing global carbon emissions and supporting the goals of the Paris Agreement, also by creating incentives for the reduction of emissions by operators in third countries". In addition, it "complements the system for greenhouse gas emission allowance trading within the Union established under Directive 2003/87/EC (the 'EU ETS') by applying an equivalent set of rules to imports into the customs

* Assistant Professor of Administrative Law, University of Modena and Reggio Emilia.

[1] See D. Bevilacqua & E. Chiti, *Green Deal. Come costruire una nuova Europa* (2024); D. Bevilacqua, *Il Green New Deal* (2024); E. Chevalier, *European Union law in times of climate crisis: change through continuity*, 1 French Y.B. Pub. Law 51 (2023); A. Bongardt & F. Torres, *The European Green Deal: More Than an Exit Strategy to the Pandemic Crisis, a Building Block of a Sustainable European Economic Model*, 60 JCMS 170 (2022).

[2] EU Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of The Regions. The European Green Deal*, Bruxelles, 11 December 2019 COM(2019) 640 final.

[3] G. Dominioni & D.C. Esty, *Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes*, 65 Arizona L. R. 1 (2023).

[4] European Commission, Brussels, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 'Fit for 55': delivering the EU's 2030 climate target on the way to climate neutrality*, 14 July 2021 COM(2021) 550 final.

[5] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023, *Establishing a Carbon Border Adjustment Mechanism*, L 130.

territory of the Union of the goods referred to in Article 2 of this Regulation" (par. 2). The measure, which will be introduced gradually[6] and initially only for goods related to certain sectors, provides that producers importing goods into Europe will pay the same price for their carbon footprint as operators on the continent, with the elimination of the free allocation of permits within the emissions trading system[7].

Through the described proposal, the EU actually imposes a tax on goods produced with a high carbon footprint, preparing for the gradual elimination of free quotas, in order to induce European and foreign industries to use production systems that, through innovation or other means, eliminate or reduce greenhouse gas emissions. Hence, particularly in the first phase of application of the new system and regardless of the place of origin, companies with lower emissions will reap greater competitive benefits, since they will not have to bear the increased costs, which will instead be borne by the producers who pollute more.

The measure is non-discriminatory and, *rebus sic stantibus*, compatible with the rules of the World Trade Organization (WTO). In addition, despite being compulsory for operators trading in European market, it merely applies as a cost to pay[8]:

[6] The European Commission and the Council considered that technical and economic feasibility, including administrative constraints and the legitimate expectations of all economic operators, should be taken into account when moving from a carbon leakage scheme with free allowances to a carbon leakage scheme where this practice is addressed through a carbon border adjustment mechanism. So that operators can adapt to the new system and authorities can gain experience with regard to its operation.

[7] "The EU emissions trading system (ETS), established in 2005, puts a cap on greenhouse gas (GHG) emissions, and divides these into emission allowances that permit the emission of one tonne of carbon dioxide (CO2) or CO2-equivalent (CO2e) […]. Through market-based determination of prices, the system encourages emissions reductions. The European Commission gives the rest of the allowances for free to sectors at risk of 'carbon leakage', whereby companies offshore production to jurisdictions with laxer environmental regulations. […] The aim of the CBAM is to equalise the carbon price between domestic and foreign products, thereby limiting carbon leakage; the measure could also encourage partner countries to adopt carbon pricing that tests the prediction of a Brussels effect", European Parliament, *Briefing. EU carbon border adjustment mechanism. Implications for climate and competitiveness*, PE 698.889, June 2023.

[8] Arts. 4-10 describe an authorization procedure that includes a mandatory declaration by the authorized entity (Art 6) and a system for calculating and

companies are free to continue with their methods of production, but they face an economic disincentive to pollute; in addition, by paying for their carbon footprint they provide extra funding to be used by the public powers dealing with environmental objectives.

Besides its impact on decarbonization, as a regulatory tool towards climate neutrality, CBAM applies as a transnational measure, with a potential harmonizing effect, despite its unilateral origin inside the Global Arena. In this respect, trans-nationalization does not come out of cooperation or of the adoption of common rules (except for Member States inside the European area), but it should be the result of the potential capacity of the Union to condition global markets with a provision applying also to foreign operators.

2. The Green Deal and global markets: bending free-trade to ecologic transition

The Carbon border adjustment mechanism reinforces the regulatory paradigm of public powers limiting and disciplining global markets to protect general goods. Such approach differentiates from the previous one, consequent to the orientation established by the WTO and based on a deferential and recessionary trade governance. The features stressing the differences of the measure at stake with the regulatory approach used in recent decades, particularly on a global scale, are at least four, as follows.

First, CBAM alters free trade, influencing the production choices – and the related costs – of operators, in contrast to the idea of facilitating low-cost production.

Secondly, it provides for a tariff, which, thanks to a mirror tax aimed at domestic producers, does not violate the WTO's rules of formal equality (Articles I and III, GATT 1947), but increases transaction costs, with potentially negative effects on "comparative advantages"[9].

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verifying the emissions produced by the same (Arts 7 and 8). It allows the import of the products and calculate the tariff applied, which may be reduced by taking into account the carbon price paid in the country of origin for the declared embedded emissions (Art 9).

[9] The theory of comparative advantages, developed by D. Ricardo (*On the Principles of Political Economy and Taxation* (1 ed., 1817)) and other economic scholars, is the foundation of the international free market, and therefore also of

The third character concerns the ability of CBAM to affect production methods and not final products; so that goods that are theoretically equivalent ("like products")[10] receive different treatment based on their carbon footprint.

Finally, it works as a taxation system extended to the entire European area, which, as far as operators pay for their carbon footprint, gives the Union significant revenues for environmental policies.

Nonetheless, CBAM does not deny or contradict the spirit of global free trade as the border imposition explicitly rely on the convenience to exploit the European market, although respecting certain public-related conditions – identical for all the operators – in order to protect the environment. The perspective we use changes the judgment of such provision: not a new burden for foreign companies, but an equal cost every party must share.

In order to understand the *rationale* of the measure at stake, it is useful to compare it with a draft reform of the WTO's Agreement on Subsidies and Countervailing Measures (ASCM)[11], put forward by the United States in 2020[12]. This presents analogy and coherence with the Carbon Border Adjustment Mechanism, since it proposes to consider the application of excessively lax environmental and ecological standards as "actionable subsidies". Meaning indirect – unlawful – aid to domestic producers, in violation of WTO law[13]. Therefore, if a member is actually

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the World Trade Organization and the European Union, with a decisive role in the emergence and development of transnational regulation. It is based on the idea that as long as one country has certain advantages in the production of a good and another has none, it will always be more convenient for the latter to buy from the former than to produce in autarky; and for both to exchange goods respectively produced with greater efficiency. See A. SMITH, *An inquiry into the nature and causes of the wealth of nations* (1776), par. 15.

[10] Art II, par. 2, lett. a) *General Agreement on Tariffs and Trade* 1947, now in WTO law: «Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product: (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part».

[11] See http://wto.org/english/docs_e/legal_e/24-scm.pdf.

[12] Draft Ministerial Decision, *Advancing Sustainability Goals through Trade Rules to Level the Playing Field*, WT/GC/W/814, 17 December 2020.

[13] "The underlying idea of the US proposal is that industries located in certain countries benefit from weak or unenforced environmental laws and regulations by not being required to incur, and properly internalize, the costs of preventing

benefiting from the lowering of environmental standards, the latter can be challenged before the organization's dispute adjudication body, for its undue alteration of the free market.

This approach, similar to CBAM, overturns the perspective according to which the environment is seen as an exception to free trade, to be kept under control because of its protectionist effects. On the contrary, both proposals do not focus on the risk that excessively high forms of environmental protection could become barriers to trade, but on the fact that maintaining too low standards in this area alters the balance of world trade itself, to the detriment of "leveling the playing field". In this way, the most effective rules of the WTO are used to punish states that do not sufficiently protect the environment, which is no longer a resource that must be functionalized and adapted to trade and economic interests, since these, on the contrary, are now tools for pursuing ecological goals[14].

Without considering the objective difficulties of its application in practice – due to the current inability of the international community to harmonize the criteria for defining, in a reliable and shared way, when certain standards comply or not with the required levels of environmental protection –, the aforementioned proposal, if compared to CBAM, confirms the innovative approach inherent in both visions. Such approach uses world trade rules – such as formal equality between operators in the various states – to make environmental protection effective and widespread on a global scale. Both, in addition, are transnational in nature: the Reform of ASCM, as a top-down decision based on rules harmonization; the Carbon Border

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or remediating environmental damage resulting from their production processes and thus gain an unfair competitive advantage, comparable to that obtained by subsidized industries", E. Cima & M.M. Mbengue, *'Kind of Green'. The U.S. Proposal to Advance Sustainability through Trade Rules and the Future of the WTO*, 10 ESIL 1 (2021), 2-3.

[14] Coherently, E. Cima, *From Exception to Promotion. Re-Thinking the Relationship between International Trade and Environmental Law* (2021), 233: «the focus of the proposal is instead on the role that can be played by trade remedies to advance sustainability goals through trade rules: rather than helping countries' 'green' measures by providing for a way to escape ASCM rules, what the US is suggesting is to 'punish' those countries that do not uphold certain fundamental levels of environmental protection, adding their practices to the list of actionable subsidies, under Article 5 of the Agreement».

Adjustment Mechanism, instead, as unilateral measure, with an extra-border effect.

CBAM is not only consistent with the open market system introduced both within the EU and with the Marrakesh Agreements of the WTO, but is also based on dynamics of a commercial nature, as it exploits the strength that the EU itself has on international markets. According to the vision of EU legislator, the risk of losing the access to European market is capable of discouraging carbon leaks[15] and pushing partner countries to define, in turn, carbon-pricing policies to combat climate change.

2.1. The Carbon Border Adjustment Mechanism and transnational governance

One of the principles that constitutes the logical-legal basis of the described carbon tariff is that of formal equality, central to the law of the World Trade Organization, which imposes the same treatment on market operators, regardless of their geographical affiliation. In order to guarantee an equal treatment for all the States, the obligations under the Paris Agreement are to be kept in mind. Notably, recitals 1, 2 and 3 of Reg. 956 recall such Agreement, which demand a National Determined Contribution to nation States. All of them are required to plan a strategy to deal with global warming, although free to decide its content and the measures composing it[16].

[15] Carbon leakage or carbon leaks consists of the possibility that companies decide to produce certain goods or services abroad, avoiding the cost of the carbon footprint, but at the same time losing the European market field for the sale of their products. See, e.g., B. Bednar-Friedl, T. Schinko, & K.W. Steininger, *The Relevance of Process Emissions for Carbon Leakage: A Comparison of Unilateral Climate Policy Options with and without Border Carbon Adjustment*, 34 Energy Econ. 168 (2012), 168-180 and K. Kama, *On the Borders of the Market: EU Emissions Trading, Energy Security, and the Technopolitics of 'Carbon Leakage'*, 51 Geoforum 202 (2014).

[16] Paris Agreement, Arts 3, 4 and 6. As known, the main *rationale* of the Agreement is not to standardize and harmonize measures to tackle climate change, but to admit differentiated responsibilities and to recognize different capacities and different national circumstances for the implementation of policies to combat the phenomenon. This view is confirmed by the National Climate Action Plan (*Intended Nationally Determined Contribution* – INDC). In their INDCs, countries disclose the actions they will take to reduce their greenhouse gas emissions in order to achieve the objectives of the Treaty: the INDCs are mandatory, but their content is not constrained, being left to the discretion of nation states.

Hence, given that the EU and its Member States are implementing a series of measures that are particularly attentive to reducing the carbon footprint of industrial and economic activities in general, it would constitute a serious imbalance – from the point of view of competition – if operators from other countries did not commit to similar costs. In this sense, the divergence between the level of action of the EU and third countries would lead to an indirect subsidy effect similar to that which the US would like to discourage with the proposed amendment of Art 5 of the ASCM, referred to in the previous paragraph. In front of this, as international law proved its incapacity to agree a common and cooperative solution, the EU tries to spread its approach by a transnational measure for all the operators.

Although it is undeniable that "climate change is by its very nature transnational in its causes and effects"[17], it is also true that national States are so far resisting this force, unwilling to leave, while determined to maintain, their discretion in climate and environment decision-making. With CBAM, the EU goes beyond this fragmentation, adopting a *de facto* transnational regulatory measure, attempting to enhance a higher level of environmental protection not only in Europe but also outside its borders.

3. Creating environmental markets, setting environmental limits to markets and using markets for the environment

The Carbon Border Adjustment Mechanism, as seen, does not limit itself to regulating the market, but is also based on a

[17] «This is only reinforced by globalization. Decisions and choices regarding how to produce goods are taken in one country and are implemented in another country, possibly on a different continent. Due to these global supply chains, goods are transported all the way to a different country, where they are consumed. Notably waste is also processed in yet a different country with a risk of pollution for air, ground, or water due both to the waste being dispatched abroad and the waste processing itself in countries where health and environment regulations may be patchy or poorly enforced. People located in different legal orders are affected by this process directly (for instance when they come in contact with polluted components) and indirectly (for instance when their land and crops are affected by this pollution sometimes years later after the cause of pollution arose)», Y. Marique, *"Transnational" Climate Change Law. A case for reimagining legal reasoning?*, 1 French Y.B. Pub. Law 70 (2023).

market system, which, despite extra costs to pay, leaves operators free to act in the economic context. With respect to other similar instruments and with reference to the relationship between the State and free trade, four aspects are to be stressed.

In the first place, the measure consists of a transnational public intervention to face transnational environmental problems. It affects private operators' freedom, restricting it, but to push them towards less polluting production methods. Public authorities – in this case supranational and only secondarily national – do not act by prohibiting, coercing, punishing or imposing a certain behavior, but by making one cheaper than another. To do so, they also use coercive and restrictive instruments, as well as an authorization system attributed to national authorities, but then they rely on the reaction of economic actors operating on the market, which are still free to pollute, although paying a cost for it.

Secondly, CBAM is in line with the market-regulation process, but at the same time it makes it evolve because, while implementing an egalitarian policy – extended to domestic and foreign producers – it introduces trade barriers, which first the GATT and then the WTO had the task of eliminating. It forces producers – whether importers or domestic companies – to increase production costs, with higher prices for consumers, in contrast to the theory of "comparative advantages", as well as to the main objectives of free-trade legislation. Nevertheless, this derogation from the principles of free trade is justified by an overriding interest – tackling climate change –, which must weigh across all operators and be suffered in an equal fashion.

Thirdly, the EU uses both a market instrument and the strength of its market to impose a regulatory measure that restricts the freedom of action of traders. The European institutions bend and direct private subjects' choices imposing what in fact operates as a carbon tax, with the dual purpose of both influencing the decisions of operators and obtaining revenue to be used in the ecological transition. However, the application of this measure is not undisputed, since it risks encouraging, rather than preventing the carbon leaks. It is precisely this last aspect to inform the strategic attempt of the EU, because the importance of accessing the European market is, for many operators, greater than the convenience of producing with lower environmental costs.

Moreover, by acting as a virtuous example, the EU promotes the sharing and trans-nationalization of good practices.

With reference to this last point, one of the most interesting and original aspects of the measure in question is that it is based on the existence of an extra-national market – the European one – which breaks down trade barriers within it, between States, becoming particularly attracting for operators. It is precisely because of the comparative advantages that are thus constituted in the common European market that its commercial strength can be used to adopt restrictions and impose barriers that would otherwise be unworkable or at least inconvenient. It is because of the European common market that the Union itself can impose the CBAM at its borders, without fear of being subjected to any significant free-rider behavior or relocation of production by operators: through the centrality and commercial strength of the European market in the world trade scenario and thanks to the compactness of internal governance, the Union can apply restrictions on the same continental market. EU's transnational regulatory measure is based on internal cooperation, among Member States, and on competitive markets outside its borders, affecting the economic expectations of all those producers who are now forced to bear higher costs to sell their goods in certain territories.

Finally, the mechanism has a further final effect, still linked to the economic strength and commercial outlet of Europe, but related to a transnational conditioning of public choices of regulation and intervention[18]. Even non-European nation States, aware of the drop in exports (or its higher cost) due to the barriers placed at the borders by the EU, will be more inclined to intervene at the domestic level with measures and tools designed to discourage production of polluting goods, in favor of methods with low (or no) carbon emission. Therefore, the transnational effect of CBAM not only concerns the choices of private operators, but also the economic policies of States and other public actors.

[18] See A. Bradford, *The Brussels Effect. How the European Union Rules the World* (2020).

4. Conclusive remarks

The Carbon Border Adjustment Mechanisms is an EU measure with a transnational effect, to provide a global reaction to climate change. It is important for at least four reasons.

Firstly, from a political, strategic and programmatic point of view: the European Union – aware of the fact that the path towards climate neutrality is on the one hand necessarily global and to be shared with non-EU countries, and on the other hand devoid of effective coercive tools on such a vast and heterogeneous scale – aims to show the world the way forward for the ecological transition. It does not do this through cooperation, but by exploiting its commercial strength (access to the EU market for goods and services from abroad), and conditioning the production methods of the economic operators. *A fortiori*, the mechanism is an economic policy instrument working not only as a limit to free trade and freedom in production processes, but also to avert a risk of "carbon leaks", which could lead to an increase in total emissions worldwide and thus undermine the EU's efforts towards climate neutrality.

Secondly, the Carbon Border Adjustment Mechanism marks an important turning point towards market-regulation policies, traditionally aimed at breaking down, reducing or eliminating trade barriers, so decreasing transaction costs to facilitate the exchange of goods. With the new measure, a burden is placed on producers – both importers and domestic – that increases, at least in the short-term, production expenses and therefore the final prices for consumers. Nevertheless, this type of intervention serves precisely to conform the choices of operators, pushing the latter to carry out activities to low (or zero) polluting impact because it is more convenient. This is an approach that marks a distinction from the policies of the past, but which does not deny the logic and rules of free trade and competition, because it provides for a justified, non-discriminatory and normatively predefined derogation. Nevertheless, it leaves open the question of the effects of such a policy on production.

Thirdly, linked to this last point, the EU decision also marks a reversal of the trend in the relationship between public authorities and private initiative. The latter, in the name of environmental protection, is directed – through an economic burden – to a less polluting, but potentially (at least in the short term) more expensive economic production. Nonetheless,

precisely with the gains of this taxation, the public authorities can provide incentives, facilitations and mechanisms for protection, assistance and support for the various non-polluting activities, thus creating a virtuous circle that in the medium term could also make this type of mechanism unnecessary. CBAM is thus economically advantageous for the public purse and allows for compensatory and adjustment interventions, which can facilitate the transition to less polluting production models. This means relying on public authorities' activity: they must be able to offer the necessary guarantees of impartiality, efficiency and effectiveness, in particular with regard to measures to prevent carbon leakage, which cannot follow an arbitrary and discriminatory course. In addition, they are called upon to contribute to offering an alternative path to private entities, not only by discouraging unsustainable economic activities, but also by eliminating or simplifying bureaucratic barriers to undertaking sustainable ones, so as to make the latter effectively convenient.

Finally, the impact of CBAM is surely transnational, meaning it affects rules concerning national States relationships in two much globalized issues as trade and climate. It consists of a restrictive approach, as it alters choices of private subjects operating in the global market. In this sense, it may diminish the comparative advantages of free trade and encourage flight to cheaper and more polluting production models, even if this is offset by the strength of the European market and the opportunities it offers to operators. In addition, it is transnational as it does not involve only European companies, consumers and public authorities, while influencing as well foreign actors, conditioned – by a non-formally binding disposition – in their economic decisions. Finally, it is not based on authorities' transnational cooperation, but on authorities' transnational competition: even if there is not a supranational regulation applying the same provisions to all the operators, CBAM may produce a global effect, grounded on economic convenience and working for the rest of the world as a transnational *quasi*-binding measure affecting companies and traders.

PROTECTION OF BIODIVERSITY THROUGH TRANSNATIONAL ADMINISTRATIVE LAW AND ITS RELATIONSHIP WITH CLIMATE CHANGE

*Anna Maria Chiariello**

Abstract

First aim of the present study is to evaluate whether and how transnational administrative law would protect biodiversity. The study specifically focuses on identifing examples of transnational administrative law instruments intended to safeguard biodiversity, studying their characteristics and sources and attempting their classification. The second goal is to evaluate, by analyzing their interactions, if a connection exists between the abovementioned instruments and those designed to fight climate change.

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1. Protection of biodiversity and its relationship with climate change

In the present time climate change and loss of biodiversity are major challenges. Effects of climate change (*i.e.*, global warming—the ongoing increase in global average temperature) are unprecedented in magnitude, shifting from weather patterns endangering food production to sea level rise favoring catastrophic flooding. Simultaneously biodiversity is decreasing at an alarming exponential rate, as compared to the weighted average of the last ten million years, leading to an unprecedent scenario: according to scientists, one million species of plants, insects, birds and mammals

are at risk of extinction and every day up to two hundred species go disappear[1]. Based on present rates of biodiversity loss and on forecast for the future, the sixth mass extinction in the earth history is believed to be underway, the first caused by the impact of human activities on the planet life[2]. While environment is exposed to a constant and natural change from a hydrological, biological and even climatic point of view – over time waters recede and expand, species become extinct, climate changes –, unlike in the past, today's change is no longer due to the wise and providential action of nature alone. Especially in recent decades it is instead significantly or predominantly the result of human activities and the related economic, political, social and cultural processes[3].

This is especially worrying as biological diversity represents the backbone of life and plays a fundamental role in protecting the environment and safeguarding human health. Taking a step back, biodiversity, i.e. biological diversity, is a relatively poorly known, recent notion (the term "biodiversity" appeared for the first time in 1988 in a scientific publication[4]), of complex and not always

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* Ph.D. in Administrative Law, University of Rome Tor Vergata.

[1] IPBES, *Summary for policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019). On the rate of biodiversity loss, well in advance: E.O. Wilson, *Biophilia* (1984). Recently, WWF, *Living Planet Report 2020 - Bending the curve of biodiversity loss* (2020).

[2] See J. Rockström et al., *Planetary Boundaries: exploring the safe operating space for humanity*, 461 Ecology Soc'y 472 (2009).

[3] On the impact of human action on nature: C.Y. Aoki Inoue, *La Convenzione sulla diversità biologica e la biodiversità come questione globale e locale*, in A. Del Vecchio & A. Dal Ri Junior (eds.), *Il diritto internazionale dell'ambiente dopo il vertice di Johannesburg* (2005); P.C. Stern, O. Young & D. Druckman (eds.), *Global Environmental Change. Understanding the Human Dimensions* (1992); P.J. Crutzen, *Geology of Mankind*, 23 Nature 415 (2000); P.J. Crutzen & E.F. Stoermer, *The "Anthropocene"*, 41 IGBP Newsletter (May 2000). See also UN Environment, *Global Environment Outlook – GEO-6: Summary for Policymakers* (2019).

[4] E.O. Wilson, *Biodiversity* (1988), in which the ecologist Wilson collected the works of the National Academy of Sciences Symposium in Washington in 1986 "National Forum on BioDiversity". The first to have used the extended expression "biological diversity" was instead a few years earlier the American biologist Lovejoy. See T.E. Lovejoy, *Changes in biological diversity*, in G.O. Barney (ed.), *The Global 2000 Report to the President. The Technical Report* (1980), while the contracted formula "biodiversity" was coined by the biologist and member of the National Academy of Sciences secretariat W.G. Rosen on the occasion of the aforementioned Symposium. See L. Marfoli, *Biodiversità: un percorso internazionale ventennale*, 155 Rivista Quadrimestrale di Diritto dell'Ambiente 3 (2012).

unambiguous meaning[5]. In general, it can be defined as the multiplicity and coexistence of natural resources and of the different organisms, or as the diversity and variability of living organisms in all their forms and interactions, or even as the diversity of genes, species and ecosystems. The definition of biodiversity universally accepted and mostly used by the legal community is in the Convention on Biological Diversity (CBD), the main international treaty in defense of biodiversity, signed in Rio de Janeiro in 1992. Art. 2 of the Convention, attributing autonomous legal relevance to biodiversity, defines it as "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems".

Biodiversity and climate change are closely connected and influence each other, as confirmed in the EU Biodiversity Strategy for 2030[6]. On the one handamong the factors implemented by humans directly affecting biodiversity – such as soil consumption, pollution, excessive exploitation of wild flora and fauna species and introduction of non-native species – there is also climate change[7]. There is a scientific consensus that the rise in average global temperature due to increased greenhouse gas concentrations not only favors extreme weather events (for instance typhoons or heat

[5] On the definition of "biodiversity", *ex multis*: R.F. Noss, *Indicators for monitoring biodiversity: a hierarchical approach*, 355 Conservation Biology 4 (1990), which highlights the multiplicity of meanings of the term biodiversity ("biological diversity means different thing to different people"); L. Contoli, *Sulla diversità biotica come manifestazione ecologica dell'entropia*, 23 Atti e Memorie dell'Ente Fauna Siciliana 2 (1994), in which biodiversity is understood as a "cluster of concepts" elaborated in the different fields of knowledge that have studied the value of diversity from an ecological, social, cultural and philosophical point of view; D.C. Delong, *Defining biodiversity*, 738 Wildlife Soc'y Bull. 24 (1996), which has identified at least eighty-five definitions of biodiversity; H.M. Pereira & D. Cooper, *Towards the global monitoring of biodiversity change*, 123 Trends in Ecology & Evolution 3 (2006); C.Y. Aoki Inoue, *La Convenzione sulla diversità*, cit. at 3, 235; M. Buiatti, *La biodiversità* (2007).

[6] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Eu Biodiversity Strategy for 2030 Bringing nature back into our lives, COM/2020/380, para. 1, «The biodiversity crisis and the climate crisis are intrinsically linked».

[7] These factors are identified by conservation biology, a discipline that identifies the primary causes of biodiversity loss.

waves that cause wildfires), but also generates slow-onset events, such as biodiversity loss[8]. Climate change negatively affects marine, terrestrial, and freshwater ecosystems across the world. It causes the loss of local species, increases diseases and drives widespread mortality of plants and animals, resulting in the first climate-driven extinctions. On the other hand, biodiversity plays a key role in fighting against climate change. In fact, while about half of the greenhouse gas emissions caused by human activity remains in the atmosphere, the other half is absorbed by the land and ocean. These ecosystems, together with the biodiversity they contain, act as natural carbon sinks and offer what are known as "nature-based" solutions to climate change[9].

As a consequence of the close connection between biodiversity and climate, the challenges to which they give rise and the relative solutions are intimately interdependent, as first witnessed by the United Nations. For example, the Paris Agreement (2015) (an international treaty released at the United Nations Framework Convention on Climate Change) underlines how reducing emissions and abandoning fossil fuels use – fundamental steps to limit the increase of the global average temperature – must be accompanied by an urgent and deep transformation of the relationship with nature.

More recently and more explicitly, at the COP-27 of the United Nations Framework Convention on Climate Change (Sharm el-Sheikh, 2022) biodiversity was the key theme of an entire day, and the close connection between biodiversity and climate was stated. Furthermore, among the 23 targets envisaged by the Kunming-Montreal Global Biodiversity Framework adopted by the COP-15 of the CBD (2022), target 8 sets the objective of "minimize the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation, and disaster risk reduction actions, including through nature-based solution and/or ecosystem-based approaches, while minimizing

[8] Human activity seems to have caused an increase in average temperatures over the last thirty years of about 0.2 °C per decade, increasing the frequency and intensity of extreme weather events (such as droughts and floods), having a strong impact on many aspects of biodiversity, such as the distribution of species. Although global warming is not the main cause of biodiversity loss to date, it is expected that in the future it will have an equal or greater impact than other factors.

[9] See www.un.org/en/climatechange/science/climate-issues/biodiversity.

negative and fostering positive impacts of climate action on biodiversity".

In light of the foregoing, the relationship between climate and biodiversity is not only deep but also doubly linked: on the one hand, climate change affects nature and ecosystems, contributing to a loss of species of unprecedented gravity at least since dinosaurs' extinction; on the other hand, protecting nature and biodiversity is essential to limit the climate crisis.

2. Multilevel legal orders protecting biodiversity

Full protection of biodiversity is an absolute necessity, given the relevance of biodiversity, the grave issues caused by its loss, and its strong connection to climate change and the associated challenges.

On a legal level, the international community, the European Union and individual States have gradually adopted disciplines aiming at protecting biodiversity and preventing and correcting its worrisome progressive impoverishment.

Biodiversity takes on legal significance first at an international level[10]. This is not surprising: considering that protecting biodiversity is a problem of global dimensions, it must first be tackled with unitary rules dictated by the international community. Various legal instruments have therefore been internationally adopted. These are generally acts with an universal vocation, which constitute a significant output of the multilateral cooperation between States and are the legal basis of the global governance of biodiversity[11]. Among these acts, the CBD, legal framework for the protection of biodiversity at international level, is of special relevance[12].

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[10] M. Montini, *La disciplina settoriale sulla protezione dell'ambiente*, in P. Dell'anno & E. Picozza (eds.), *Trattato di diritto dell'ambiente* (2012), 62. On biodiversity in international law: M. Bowman & C. Redgwell (eds.), *International Law and the Conservation of Biological Diversity* (1996); R. Pavoni, *Biodiversità e biotecnologie nel diritto internazionale e comunitario* (2004).

[11] On the international biodiversity regulatory framework: L. Marfoli, *Biodiversità*, cit. at 4, 155; A. Porporato, *La tutela della fauna, della flora e della biodiversità*, in R. Ferrara & M.A. Sandulli (eds.), *Trattato di diritto dell'ambiente* (2014).

[12] The European Union and 195 countries are part of the CBD, constituting one of the most widely ratified international instruments. About CBD *ex multis*: A. Porporato, *La tutela della fauna*, cit. at 10, 745; L. Marfoli, *Biodiversità*, cit. at 4, 185; C.Y. Aoki Inoue, *La Convenzione sulla diversità biologica*, cit. at 3, 235, in which the

Legally introduced by the CBD, the notion of biodiversity is adopted and regulated also by the European Union. The latter plays a major role in the protection of biodiversity. Not only it 402nvironment402 to a number of international agreements on the issue and weighs heavily in their definition, but its sources also serve as a natural bridge between external and Internal norms, providing the former with the effectiveness they frequently lack. The majority of domestic legislation concerning biodiversity is actually a transposition of the European legislation, following the same trend seen in environmental legislation[13].

Finally, individual States have implemented (and are implementing) regulatory disciplines aiming at protecting biodiversity, although often they are still incomplete, as in the case of the Italian legal system[14].

This study intends to verify if and how biodiversity is protected through transnational administrative law, at the same time looking for connections with instruments aiming at tackling climate change. In particular, the focus will be on identifying, within the main acts aiming to biodiversity protection, some examples of principles, instruments and procedures of transnational administrative law prepared for the same purpose. Their source wiil be 402nvironm, attempting to offer, when possible, a classification in light of the categories that so far have

CBD is considered "pillar of the international biodiversity regime, understood as the set of principles, norms, rules and decision-making procedures, formal and informal, around which, in the area of biodiversity, the expectations of international actors converge"; A. Boyle, *The Rio Convention on Biological Diversity*, in M. Bowman & C. RedGwell, *International Law and the Conservation of Biological Diversity* (1996); Id., *The Convention on Biological Diversity*, in L. Campiglio, L. Pineschi, F. Siniscalco & T. Treves (eds.), *The Environment after Rio: International Law and Economics* (1994).

[13] On European legislation on protection of biodiversity, see in general: R. Savoia, *Profilo storico della tutela della biodiversità nel diritto comunitario dell'ambiente*, 233 Rivista Giuridica dell'Ambiente (1997); N. De Sadeleer & C.H. Born, *Droit international et communautaire de la biodiversité* (2004); A. Garcia Ureta, *Derecho europeo de la biodiversidad* (2010).

[14] In the Italian legal system, biodiversity is protected with a series of sector disciplines. On the other hand, there is still no national framework law on the conservation and enhancement of biodiversity that establishes the general principles and guidelines for regional legislation in the areas of biodiversity. The fragmentation, the lack of a rational overall design and the absence of organicity leave room for regulatory gaps, sometimes giving the impression of an incomplete legislative mosaic.

been outlined in transnational administrative law and highlighting possible limits, gaps or strengths.

3. Transnational administrative principles protecting biodiversity: the STH rule

Bilateral agreements, European Union legislation, multilateral international treaties are some of the sources of transnational administrative law. As the CBD is the primary international act protecting biodiversity, it seems appropriate to start the present research from this treaty. In CBD rules, instruments and principles of transnational administrative law for protection of biodiversity are identified.

Not differently from what happens for environment and climate, events occurring within the territory of a single State may have a negative impact on biodiversity also beyond its borders. On this basis, the CBD regulates cases in which activities that take place under the jurisdiction or control of a State party to the Convention are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction. On the basis of reciprocity, the CBD promotes as well notification, exchange of information and consultation, by encouraging the conclusion of bilateral, regional or multilateral agreements (significant transboundary harm rule, STH rule, art. 14).

This rule is relevant from the point of view of transnational administrative law. Indeed, it heralds a type of cooperation aiming at addressing administrative transnational situations in which administrative authorities of two or more national legal systems are involved, having different but related functions. These are eminently cross-border situations. In particular, in the case at stake the activity carried out within a State is considered capable of producing significant damage beyond national borders or in any case in areas located outside the limits of national jurisdiction. It also involves including the administrative authorities of the concerned States in the notification, information-sharing, and consultation processes.

The STH rule, which can therefore be considered a rule of transnational administrative law, develops the broader principle (and related obligation) stated in art. 3 CBD, according to which "States have, in accordance with the Charter of the United Nations and the principles of international law, (…) 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". This is the most general "no-harm rule", which is a widely recognized principle of customary international law whereby a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States[15]. This statement must be understood beyond its words: in fact the no-harm rule meets the two criteria of being both transboundary and significant[16], evidently in accordance with the STH rule.

Moreover, the no-harm rule is not only an instrument of biodiversity protection, but also of environment and climate protection. In environmental matters it was first adopted in the 1941 Trail Smelter arbitration,[17] while in climate matters, it is the foundation of international Climate Law[18].

The STH rule is also applicable to the global response to climate change[19]. It can be applied to those activities that although taking place under the jurisdiction or control of a State are likely to significantly affect climate and climate change of other States or areas located beyond the limits of the original State jurisdiction. Evidently there is a convergence between tools used to respond to climate challenges and tools used for biodiversity loss emergency.

However, obligations to conduct an EIA, to notify, consult, and cooperate with other States for designing and updating climate policies are most of times impracticable. This is because for a State it is very difficult to know if activities carried out within its territory create a risk of a transboundary harm from climate change. By

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[15] Concerning the principle at stake: M. Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule*, PluriCourts Research Paper No. 14-17 (2014); A. Akhtar-Khavari, *Restoring the transboundary harm principle in international environmental law: Rewriting the judgment in the San Juan River case*, in N. Rogers & M. Maloney (eds.), *Law as if earth really mattered: The wild law judgement project (Law, Justice and Ecology)* (2017); C. Campbell-Duruflé, *The Significant Transboundary Harm Prevention Rule and Climate Change: One-Size-Fits-All or One-Size-Fits-None?*, in B. Mayer & A. Zahar (eds.), *Debating Climate Law* (2021).

[16] C. Campbell-Duruflé, *The Significant Transboundary Harm Prevention Rule*, cit. at 14, 30, and ICJ, *Pulp Mills on the River Uruguay*, *Argentina* v. *Uruguay*, 2010.

[17] *Trail Smelter case*, United States, Canada, 16 April 1938 and 11 March 1941.

[18] S. Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, in B. Mayer & A. Zahar (ed.), *Debating Climate Law* (2021).

[19] S. Maljean-Dubois, *The No-Harm Principle as the Foundation of International Climate Law*, cit. at 17.

implication, for a State it is also conceptually very difficult (or even impossible) to determine if its procedural obligations are triggered in accordance with the due-diligence standard applicable under the STH rule[20].

These considerations may be appropriate also in regard of biodiversity protection. For a State it is not always possible, or at least easy, to define when the activities carried out in its territory involve the risk of damaging biodiversity across borders. In such a case, as for the climate, for a State it could be impossible or at least difficult to determine whether its procedural obligations are triggered in accordance with the due-diligence standard applicable under the STH rule.

The foundations of the STH rule can also be found in Principle 19 of the Rio Declaration on Environment and Development (1992), according to which "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith". This rule is expression of the principle of prevention. Indeed, the International Court of Justice stated that the obligation to notify and consult in good faith the State potentially adversely affected by the activity that another State is planning to undertake (as well as the obligation to conduct an environmental impact assessment in the case of significant transboundary harm) stems from the substantial principle of prevention[21], of which the STH rule is an expression[22].

The principle of prevention, in turn, "as a customary rule, has its origins in the due diligence that is required of a State in its territory"[23]. More specifically, the obligation not to cause damage as duty of due diligence implies that States must use all available

[20] C. Campbell-Duruflé, *The Significant Transboundary Harm Prevention Rule*, cit. at 14.

[21] On the principle of prevention, *ex multis*, M. Nunziata, *Una particolare lettura dei principi europei chi inquina paga, di precauzione e di prevenzione*, 656 Giornale di diritto amministrativo 6 (2014).

[22] M. De Bellis & R. Lanceiro, *Transnational administrative procedures: a first survey*, J.-B. Auby, E. Chevalier, O. Dubos, & Y.Marique (eds.), *Traité de droit administratif transnational* (forthcoming).

[23] ICJ, joined cases *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* 2015. See M. De Bellis & R. Lanceiro, *Transnational administrative procedures: a first survey*, cit. at 21.

means in order to ensure to the highest possible extent that activities carried out on their territory or within their jurisdiction do not cause harmful consequences to other States or to areas beyond their national jurisdiction. From the due diligence obligation derive as corollaries a number of procedural obligations, which imply the application of transnational administrative law: information, notification, cooperation, impact assessment and continuous monitoring. These are exactly those obligations which, as seen, the CBD provides for biodiversity protection, thus closing the circle between the STH rule and its underlying principles.

4. Transnational administrative acts protecting biodiversity: the joint decision model

In addition to principles, transnational administrative law for protection of biodiversity includes also procedures and acts[24]. The CBD is once more the starting point.

Beside other topics, CBD regulates the handling of biotechnology and the distribution of its benefits. In this regard, it invites the Parties to provide, if needed, a protocol of appropriate procedures, including advance informed agreement, for the safe transfer, handling and use of any living organism modified from biotechnology, that may have adverse effect on biological diversity (art. 19, para. 3).

The Cartagena Protocol on biosafety implemented the CBD guidelines[25]. In accordance with the precautionary approach reaffirmed by Principle no. 15 of the Rio Declaration on Environment and Development[26], the Cartagena Protocol intends

[24] On the transnational administrative act, see for example M. Ruffert, *The transnational Administrative Act*, in O.J. Jansen & B. Schondorf-Haubold (eds.), *The European Composite Administration* (2011); L. De Lucia, *Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts*, 17 Rev.Eur. Admin. L. 2 (2012).

[25] On the Cartagena Protocol (also known as the Biosafety Protocol), later integrated by the Nagoya - Kuala Lumpur Supplementary Protocol of 2010 on Liability and Redress, see: B. Eggers & R. Mackenzie, *The Cartagena Protocol on biosafety*, 525 J. Int'l Econ. L. 3 (2000); V. Della Fina, *Il Protocollo di Cartagena sulla biosicurezza*, in G. Tamburelli (ed.), *Discipline giuridiche dell'ingegneria genetica* (2008).

[26] On the precautionary principle, *ex multis*: S. Grassi, *Prime osservazioni sul principio di precauzione nel diritto positivo*, 45 Diritto e gestione dell'ambiente (2001); D. Amirante, *Il principio precauzionale tra scienza e diritto. Profili introduttivi*,

to provide an adequate level of protection for the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements (art. 1).

In compliance with the aforementioned Protocol, the EU directive 2001/18/EC regulates the deliberate release into the environment of genetically modified organisms (GMOs), based of the consideration that living organisms, whether released into the environment in large or small amounts, either for experimental purposes or as commercial products, may reproduce in the environment and may cross national frontiers, thereby affecting other Member States and producing possibly irreversible effects[27].

Following the principle of prevention – in fact EU action for environmental protection is based on the principle of preventive

16 Diritto e gestione dell'ambiente (2001); A. Gragnani, *Il principio di precauzione come modello di tutela dell'ambiente, dell'uomo, delle generazioni future*, 9 Rivista di diritto civile (2003); G. Manfredi, *Note sull'attuazione del principio di precauzione nel diritto pubblico*, 1075 Diritto pubblico 3 (2004); F. Trimarchi, *Principio di precauzione e "qualità" dell'azione amministrativa*, 1673 Rivista italiana di diritto pubblico comunitario (2005); F. De Leonardis, *Il principio di precauzione nell'amministrazione di rischio* (2005); Id., *Il principio di precauzione*, in M. Renna & F. Saitta (ed.), *Studi sui principi del diritto amministrativo* (2012); S. Di Benedetto, *Il principio di precauzione nel diritto internazionale*, (2006); A. Milone, *Principio di precauzione: criterio di larga massima o principio ispiratore del procedimento di Via?*, 1740 Foro amministrativo TAR 5 (2006); M. Cecchetti, *Principio di precauzione e produzione pubblica del diritto. La funzione normativa di fronte alle sfide del "governo" dell'incertezza scientifica*, in G. Guerra, A. Muratorio, E. Pariotti, M. Piccinni & D. Ruggiu (eds.), *Forme di responsabilità, regolazione e nanotecnologie* (2011); S. Cognetti, Po*tere amministrativo e principio di precauzione fra discrezionalità tecnica e discrezionalità pura*, in S. Cognetti, A. Contieri, S. Licciardello, F. Manganaro, S. Perongini & F. Saitta (eds.), *Percorsi di diritto amministrativo* (2014); Id., *Precauzione nell'applicazione del principio di precauzione*, in *Scritti in memoria di Giuseppe Abbamonte* (2019); F. Follieri, *Decisioni precauzionali e stato di diritto. La prospettiva della sicurezza alimentare*, 1495 Rivista italiana di diritto pubblico comunitario 6 (2016); M. Allena, *Il principio di precauzione: tutela anticipata v. legalitàprevedibilità dell'azione amministrativa*, 411 Diritto dell'economia (2016); N. Olivetti Rason, *Il principio di precauzione tra sicurezza e libertà*, in *Liber amicorum per Vittorio Domenichelli* (2018); R. Titomanlio, *Il principio di precauzione fra ordinamento europeo e ordinamento italiano* (2018); A. Barone, *Principio di precauzione e governo del rischio*, in F. Ricci (ed.), *Principi, clausole generali, argomentazione e fonti del diritto* (2019).

[27] On Dir. 2001/18/EC see for example E. Caliceti, *Le nozioni di emissione deliberata, immissione in commercio e coltivazione di ogm: commento critico alla direttiva 2001/18/CE alla luce della direttiva 2015/412/UE*, 273 BioLaw 4 (2017).

action[28] – the aforementioned Directive asks the Member States to implement all appropriate measures and avoid negative effects on human health and on 408nvironment deriving from the use and/or circulation of GMOs in the European territory. To this end, according to the EU directive the deliberate release into the environment and the placing on the market of a GMO should be subject to a specific authorisation.

In particular, for placing GMO(s) on the market, the authorization procedure starts with a specific prior notification to the competent authority of the Member State in which the product is expected to be first placed on the market. If the notification complies with the legal requirements, and at the latest when the competent authority transmits its assessment report, the competent authority sends a copy to the Commission which transmits it to the competent authorities of the other Member States. This report indicates that the GMO(s) in question: (*i*) should be placed on the market, specifying under which conditions it could be done; (*ii*) should not be placed on the market. The assessment report, together with the information on which it is based, is sent by the competent authority to the Commission and by this it is forwarded to the competent authorities of the other Member States. Any competent authority or the Commission may ask for further information, make comments or present motivated objections. Comments, reasoned objections and replies are forwarded to the Commission, which immediately will forward them to all competent authorities and possibly discuss all issues in order to reach an agreement.

If the authority issueing the report states that the product may be placed on the market, in absence of any reasoned objection from a Member State or from the Commission or if controversies have been solved within the deadline set, the competent authority issueing the report shall give written consent for placing the product on the market, shall transmit it to the notifier and shall inform the other Member States and the Commission (arts. 13 ff.)[29].

[28] Art. 191, para. 2, TFUE.

[29] In relation to the placing on the market of products containing GMOs, Dir. 2001/18/EC, in its updated version (art. 26-ter), seems to weaken the transnational effect by providing that the States, in addition to being able to raise an objection to the placing on the market of a GMO, can ensure that their territory, or part of it, is excluded from the cultivation of the candidate product for reasons, among other things, of environmental policy, urban and territorial

The mentioned procedure includes the participation of administrative entities of multiple national legal systems (the competent authorities of the Member States), exercising different but related functions. In Italy, for example, the competent authority for Dir. 2001/18/EC, implemented with Legislative Decree no. 224/2003, is the Ministry of the Environment in concert, according to their respective competences, with the Ministry of Health and the Ministry of Agriculture. More specifically, the administrative authority of one or more Member States (and the Commission) participates in the administrative procedure of another Member State. After the initial phase, "strictly" at a national level, when the applicant presents his request complete with the appropriate documents, according to cooperation mechanisms the authorities of other Member States and the Commission are involved in a multilateral phase, and the final positive authorization is obtained only in case of non-opposition from the administrations involved. Differently, in case of objection from one of the Member States or from the Commission, the issue reverts to the Commission which initiates a comitology procedure.

The agreement of the national administrations involved or absence of any dissent is followed by an authorization of transnational administrative nature. Its effects are transnational, giving the act itself direct relevance and a binding power towards the involved authorities. However, these authorities may submit the authorization to a review procedure, to be carried out jointly with the authorities of the Member States and the Commission and not unilaterally by the single State which adopted the authorization decision.

This procedure is, as mentioned, an expression of the authorizing power. Transnational authorizations are classified in three categories[30]: (*i*) Authorisation with Automatic Transnational Effects, whose effects are produced without need for consent of the

planning, socio-economic impact, essentially allowing each State to escape the transnational effect, without this giving rise to an administrative conflict and therefore the Commission being able to issue a binding decision on the matter. See: M. Porpora, *Gli OGM e la frammentazione della* governance *nel settore alimentare*, 1678 Rivista italiana di diritto pubblico comunitario (2016); L. De Lucia, *From mutual recognition to EU authorization: decline of transnational administrative acts*, 90 IJPL 1 (2023); F. Cittadino, *Libera circolazione degli OGM: più spazio per la tutela dell'ambiente alla luce della direttiva (UE) 2015/412?*, 209 Rivista Giuridica dell'Ambiente 1 (2016).

[30] L. De Lucia, *From mutual recognition*, cit. at 23, 95.

recipient State, which is obliged to respect the measure taken; (*ii*) Joint Decision, when all administrations involved – and sometimes even the Commission – have a co-decision role; and (*iii*) Authorisation Subject to Recognition, where there are several interconnected authorizations adopted in different State systems and, while one produces effects only in the State of origin, the other (or others) may produce effects in the State of destination.

The mentioned procedure appears to fall into the category of Joint Decisions. Indeed, the authorization act is the result of a composite procedure with the national administrations involved and the Commission playing a co-decision-making role by presenting (or not presenting) reasoned objections to the release for trade of GMOs.

The Joint Decisions model, typically aimed at balancing the principles of subsidiarity and unity and in which administrative polycentrism is counterbalanced by the uniqueness of the decision[31], is an expression of the relevance of the public interest at stake, which, because of such relevance, requires the prior involvement of the public authorities affected by the decision. As important interests such as environment, biodiversity and health are at stake, it seemed opportune and necessary to involve the competent public authorities of the Member States as well as the Commission.

It is no coincidence that among the different forms of transnational authorization, a Joint Decision was preferred for protection of biodiversity through transnational administrative law. As described, this form of authorization requires intense procedural collaboration possibly involving all States in the decision-making process, thus influencing the content of the final act, even if eventually it's adopted by a single administrative authority. So the Joint Decision appears the most suitable procedural form to be adopted in delicate sectors in order to protect public interests, such as biodiversity. As the latter characteristically involves other delicate interests with which it must balance, it appears necessary to pursue the mostly shared decisions. Accordingly the procedure of Dir. 2001/18/EC also includes a phase of public information and participation through the presentation of observations. Namely, after having received the

[31] S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, 648 Rivista trimestrale di diritto pubblico (2001).

notification, the Commission summarizes the dossier and the assessment reports available to the public, a deadline for submitting observations to the Commission is given, the Commission will forward them to the competent authorities (art. 24).

Lastly, with regard to the procedure referred to in Dir. 2001/18/EC, starting from the CBD a transnational administrative act has been developed, passing through European Union law. In fact, the latter is – also in the field of biodiversity protection – an important source of transnational administrative law[32]. This law, finding its source in the international law, implements it with acts of a Member State which, according to secondary EU law, produces legal effects in one or more other Member States, i.e. with acts that are transnational administrative measures in the legal order of the European Union.

5. Transnational cooperation protecting biodiversity

Transnational administrative law for the protection of biodiversity takes also the form of transnational cooperation. There are multiple transnational cooperation mechanisms, such as the informative procedure (i.e. information exchange among national administrative authorities), the "simple" procedure (a national administrative authority provides various types of input in a procedure carried out by another administrative authority, national or not), the "shared" procedure (several public administrations participating in an administrative procedure composed of multiple stages, each national administration being responsible for one or more phases, with at least one phase being assigned to a public administration of a different State), the institutional procedure (cooperation achieved through collegial boards made up of representatives of the authorities of the States involved in the relevant sector)[33].

These different mechanisms integrate according to the sectors in which they are used, are declined in multiple ways and perform a plurality of functions. They are intended to provide

[32] On the relationship between transnational administrative law and EU legal order see L. De Lucia, *Amministrazione transnazionale e ordinamento europeo* (2009); M. Gautier, *Acte administratif transnational et droit communautaire*, in J.B. Auby-J. Dutheil De La Rochere (eds.), *Droit administratif européen* (2007).

[33] On the different types of transnational cooperation: L. De Lucia, *Administrative Pluralism*, cit. at 18, 22.

coordinated, efficient and homogeneous actions, mutual control, and relationship of mutual trust between the public subjects involved[34].

In relation to the transnational provision, cooperation has also the important function of providing an alternative in the decision-making process in case of absent action of the

administration of destination[35]. This explains why the authority intervenes at various moments in the transnational act's life to protect relevant public interests (for example through safeguard measures) and why procedural mechanisms are anticipated for settling problems in a deliberative way.

There are many examples of transnational cooperation finalized to biodiversity protection. The extensive use of transnational cooperation measures is justified by the relevance of the object to be protected. In fact, transnational cooperation is particularly suitable for those sectors, such as protection of biodiversity – but also climate change and environment –, in which the widest possible sharing of efforts is necessary in order to reach equally shared decisions.

Returning to the CBD, it contains a general obligation to cooperation for biodiversity protection. For the conservation and sustainable use of biological diversity, if possible and appropriate, each Party shall cooperate with other Parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest (art. 5). There are many acts, and mostly treaties, protecting biodiversity (directly or indirectly) that require this type of general cooperation, among them the Convention for the Conservation of European Wildlife and Natural Habitats, also known as Bern Convention, 1979 (art. 1).

Transnational cooperation in the forms indicated is frequent. Limiting the analysis to a few examples, transnational information cooperation mechanisms can be found in Dir. 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. Indirectly it protects biodiversity as it is aimed at intervening on site contaminations that involve not only significant health risks, but also a significant loss of biodiversity (recital 1). Hence, this Directive establishes that

[34] W. Kahl, *Der Europäische Verwaltungsverbund: Strukturen – Typen – Phänomene*, 353 *Der Staat* 50 (2011).
[35] G. Sydow, *Verwaltungskooperation in der Europäischen Union* (2004).

when environmental damage affects or is likely to affect several Member States, these shall cooperate, including through the appropriate exchange of information, to ensure that preventive and, if needed, remedial action may be taken. The directive states also that, when environmental damage occurred, the Member State in which the damage originated shall provide sufficient information to the potentially affected Member States (art. 15).

Furthermore, there are many cases of transnational cooperation of a "simple" procedural type that protect biodiversity in the form of consultation, notification, opposition, advanced informed agreement or prior informed consent. For example, in the aforementioned Dir. 2001/18/EC, in relation to the placing on the market of GMOs, transnational cooperation takes the form of notification, advanced informed agreement and objection by a national administrative authority of a Member State in the procedure of another Member State.

In the EIA Directive 2011/92/EU (art. 7) and in the SEA Directive 2001/42/EC (art. 7) – both aiming to biodiversity protection[36] – transnational cooperation takes the form of consultation, as a possible sub-procedure. This has to be adopted if a Member State believes that the implementation of a plan, program or project being prepared on its territory is likely to have significant effects on the environment of another Member State, or if a Member State which could be significantly affected requests it.

In such cases the Member State in whose territory the implementation of the plan, program or project is envisaged forwards the relevant information to the Member State involved, and this within a reasonable period of time must communicate if it intends to participate in the decision-making procedures and carry out consultations.

If such communication is made, according to the EIA Directive the Member States involved carry out consultations on the possible transboundary environmental effects deriving from the

[36] The EIA and SEA Directives implement the CBD requiring the Parties to integrate the conservation and sustainable use of biodiversity in relevant sectoral and cross-sectoral plans and programs. Moreover, environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programs which may have significant effects on the environment in the Member States, where such possible effects include aspects such as biodiversity, and environmental assessment is aimed at ensuring that human activity takes place in compliance, inter alia, with the protection of biodiversity.

implementation of the plan or program as well as on the measures envisaged to reduce or eliminate these effects. In the case of the SEA Directive the Member States involved agree on specific procedures so that the environmental authorities, those asked to express their opinion and the public are adequately informed and have the opportunity to express their opinion within a reasonable time. In addition, the Member States involved shall enter into consultations concerning, *inter alia*, the possible transboundary impact of the project and the measures envisaged to reduce or eliminate this impact. A reasonable time limit for the consultation should be set. The detailed arrangements regarding the cross-border consultation procedure relating to the EIA may be defined by the Member States interested. It must allow the interested public in the territory of the Member State involved to effectively participate in the environmental decision-making process. Finally, results of the consultations must be considered by the Member State involved when adopting the act in question, the competent authorities must inform the environmental authorities, the public and all the consulted States of the final decision (articles 8 and 9 EIA and SEA Directives).

In the CBD and in the Nagoya Protocol[37], transnational cooperation takes the form of prior informed consent. In particular, art. 15 CBD, after stating that the authority to determine access to genetic resources belongs to the national governments (as States have the sovereign rights over their natural resources) states also that such access must be granted. Although granted, access to genetic resources shall be subject to prior informed consent of the Party providing such resources, unless otherwise determined by that Party.

Art. 15 CBD finds more extensive declination in the Nagoya Protocol. Pursuant to art. 6 of this Protocol, access to genetic

[37] The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, also known as ABS Protocol, *Protocol on Access and Benefit-Sharing*, 2010) implements the third objective of CBD, namely the fair and equitable sharing of benefits deriving from the utilisation of genetic resources. ABS refers to the set of ways in which resources can be accessed and the modus operandi by which the benefits deriving from their use are distributed among the individuals or countries that use these resources (users) and the persons or States that provide them (suppliers). This Protocol was adopted at the end of COP-10, which acknowledged the failure of the international community to achieve the objectives set for 2010: O. Montanaro, *La COP 10 della CBD: le aspettative, i risultati*, 15 Protecta (2010).

resources for their utilization shall be subject to prior informed consent of the Party providing such resources that is the country of origin of such resources or the Party that acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party. Furthermore, as appropriate, all Parties shall take measures in order to ensure that prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources is obtained, when they have the established right to grant access to such resources.

In consideration of the foregoing, transnational cooperation not only realizes through several different transnational administrative procedures, but appears to provide protection of biodiversity in many ways, thus representing a versatile tool to be frequently used when cooperation among States is required. It intertwines the different interests of different subjects in mechanisms capable of assembling and composing them in order to achieve the best protection of biodiversity.

6. Final remarks

Some preliminary conclusions on protection of biodiversity through transnational administrative law and on its connection with climate can be made.

First, between biodiversity and climate there is such a connection that the challenges they face and solutions adopted to solve problems are similar and intimately interdependent, also in relation to transnational administrative law. Similarly to what occurs for climate change, transnational administrative law contributes to the protection of biodiversity. In fact, this law is particularly suitable in a delicate and broad field such as biodiversity, where the protected interest, the associated loss factors and the connected effects transcend national boundaries, making it necessary for the participation of several national administrations.

Between the cross-border nature of transnational administrative situations and the nature of biodiversity there is a great compatibility that makes transnational administrative law particularly suitable to regulate biodiversity protection instruments. Biodiversity doesn't tolerate national boundaries, therefore it's particularly difficult to contain the relative law in the juridical space of the single States.

It is not surprising that international law – specifically international treaties, first of all the CBD – and secondary EU law serve as primary sources of transnational administrative law protecting biodiversity. While international treaties usually set out "wider mesh" principles and measures of transnational administrative law, EU law, which often refers to the international treaties, presents more detailed and articulated transnational mechanisms. These are complementary sources, to which also sources of customary law are added, all necessary, not unlike what happens in relation to climate challenge and the related sources of regulation, to respond to the challenge of biodiversity conservation.

EXAMINING ONTARIO'S DEPARTURE FROM THE WESTERN CLIMATE INITIATIVE: IMPLICATIONS FOR INFRANATIONAL ADMINISTRATIVE COOPERATION IN THE NORTH AMERICAN REGIONAL CARBON MARKET

*Jacques Papy**

Abstract

This article offers a critical examination of Ontario's brief participation and sudden departure from the Western Climate Initiative (WCI) common carbon market in 2018. It reviews the mechanisms of cooperation within the WCI framework and the legal repercussions of Ontario's withdrawal. Finally, it draws insights into the dynamics of the WCI cooperative model, highlighting its resilience but also its vulnerability to regulatory risks, which can undermine the stability of the common carbon market. The study concludes that clear procedural rules and compensatory mechanisms would help mitigate regulatory unpredictability.

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1. Introduction

The Western Climate Initiative (WCI), particularly the California-Québec common carbon market, stands as a pioneering cooperative effort among North American subnational jurisdictions aiming at tackling climate change via cap-and-trade programs.

It was established in February 2007, via an accord signed by the Governors of Arizona, California, New Mexico, Oregon, and Washington. By 2008, British Columbia, Manitoba, Ontario, and Québec had joined the initiative with the shared goal of inaugurating a harmonized transnational emission allowance market by January 1, 2012. However, by that date, several US states and Canadian provinces had withdrawn from the WCI. California initiated its cap-and-trade program in 2012, followed by Québec in 2013; the two programs were subsequently linked in 2014.

After comprehensive harmonization work conducted in collaboration with Québec and California, Ontario launched its cap-and-trade program in 2017. The program maintained a brief linkage with those of Québec and California from January to June 2018[1].

Other subnational jurisdictions have used the Western Climate Initiative framework to establish their own cap-and-trade programs but without joining the common carbon market. Nova Scotia initiated its program in 2019 and will terminate it in December 2023, while the State of Washington implemented its cap-and-invest program in January 2023[2].

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* Professor of Business Law, University of Québec at Montréal

[1] For a detailed history of the WCI see H. Trudeau, *The Cap-and-Trade System for Greenhouse Gas Emission Allowances: The Quebec Experience*, in A.R. Lucas & A.E. Ingelson (eds.), *Environment in the courtroom*, (2022), 369; F. Roch & J. Papy, *L'Entente de liaison des marchés du carbone de la Western Climate Initiative : enjeux institutionnels et juridiques pour le Québec*, 49 RGD 67, 75 (2019); D.V. Wright, *Cross-Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage*, 46 Envtl. L. Rep. News & Analysis 10478 (2016).

[2] International Carbon Action Partnership, *Nova Scotia Transitions to New Carbon Pricing System*, (2023), https://icapcarbonaction.com/en/news/nova-scotia-

While the initiative has been hailed for its achievements, its framework presents significative legal vulnerabilities. The examination of these vulnerabilities is not novel. Notable scholars in the US and Canada, such as Michael Mehling, David Wright, and Géraud de Lassus, have already provided valuable insights, with respect to the early phases of operation the WCI and the linking process between the California and Québec cap-and-trade programs.

This case study seeks to contribute to the conversation surrounding the WCI framework by focusing on the linkage and subsequent delinkage of the Ontario cap-and-trade program and by gleaning insights into the WCI's scalability and long-term viability. It reviews the mechanisms of interjurisdictional cooperation within the WCI framework (Section 1), explores Ontario's departure from the common carbon market (Section 2), and lastly, offers insights derived from the WCI cooperative model's dynamics (Section 3).

2. How do WCI partners cooperate?

The WCI cooperative model attempts to navigate the dual challenges of harmonization and decentralized governance. It is characterized by an iterative process built around common objectives and guidelines (2.1), marked by US Law dominance (2.2), and a highly decentralized linkage architecture (2.3).

2.1. Iterative cooperative process built around common objectives and guidelines

This section describes the main objectives of the WCI's linkage arrangements, the underlying mechanisms employed to achieve these goals, and explores the decentralized rulemaking process that characterizes the initiative.

The main objectives of the Western Climate Initiative cooperation center around two primary goals. First, the aim is to enhance the efficiency of the partners' respective Cap-and-trade programs by strategically reducing compliance costs for covered entities and minimizing administrative costs for regulators. Second, the WCI seeks to augment the Greenhouse Gas (GES) mitigation

transitions-new-carbon-pricing-system (last visited Aug 21, 2023); International Carbon Action Partnership, *Presentation of the Washington State (USA) Cap-and-Invest Program*, (2023), https://icapcarbonaction.com/en/ets/usa-washington (last visited Aug 21, 2023).

objectives for partnered jurisdictions, aligning these efforts with broader regional environmental goals. It is designed not only to elevate mitigation efforts but also to preserve and reinforce the environmental integrity of the system across the entire region.

These goals are primarily achieved through the following three mechanisms. First, the mutual recognition of emission rights fosters interoperability and enables partners to sustain a common carbon market. Secondly, the utilization of common auctions supports a unified and transparent primary market structure for the introduction of emissions allowances at the regional level. Thirdly, a shared technological platform centralizes administrative and technological services that are essential to the effective functioning of the linked Cap-and-trade systems. This facet of the WCI institutional arrangements is further elaborated in the next section.

The Western Climate Initiative (WCI) differs from other carbon market frameworks like the EU Emissions Trading System and the Regional Greenhouse Gas Initiative (RGGI) in that it does not rely on a shared regulatory foundation or model rule. Instead, each partner has developed its own regulatory architecture, based on general guidelines. These guidelines were developed between 2007 and 2010, following extensive consultations with stakeholders. They are described in the *Design Recommendations for the WCI Regional cap-and-trade Program* (2008) and the *Design for the WCI Regional Program* (2010)[3].

In effect, rulemaking within the Western Climate Initiative (WCI) is characterized by a fully decentralized process, reflecting the diverse regulatory landscapes of its partners.

WCI cap-and-trade programs are tailored to reflect the unique circumstances of each member jurisdiction. Consequently, there are noticeable disparities among them, including greenhouse gas reduction targets, free allowances distribution methodologies, and specific rules and protocols for offsets. This explains why, even

[3] Western Climate Initiative, *Design Recommendations for the WCI Regional Cap-and-Trade Program*, (2008), https://wcitestbucket.s3.us-east-2.amazonaws.com/amazon-s3-bucket/documents/en/wci-program-design-archive/WCI-DesignRecommendations-20090313-EN.pdf; Western Climate Initiative, *Design for the WCI Regional Program*, (2010), https://wcitestbucket.s3.us-east-2.amazonaws.com/amazon-s3-bucket/documents/en/wci-program-design-archive/WCI-ProgramDesign-20100727-EN.pdf.

after linking, Québec and California respective programs have developed in differentiated ways.

The essence of this kind of cooperation lies in the continuous consultation between the partners, making the process highly dynamic and contingent on trust and a consistent exchange of information. This approach has led to successive waves of harmonization between the California and Québec programs, with a fifth wave currently in progress[4].

The overall cooperative process underpinning the harmonization and integration of cap-and-trade programs within the Western Climate Initiative (WCI) is captured through two formal agreements. In 2013, California and Québec entered into an *Agreement between the California Air Resources Board and The Gouvernement du Québec concerning the Harmonization and Integration of cap-and-trade Programs for Reducing Greenhouse Gas Emissions*, preceding the 2014 linkage[5]. Subsequently, in 2017, California, Québec, and Ontario signed an *Agreement on the Harmonization and Integration of cap-and-trade Programs for Reducing Greenhouse Gas Emissions*, ahead of the 2018 linkage[6]. The 2017 Agreement, however, largely retains the structure and content of the previous agreement and will be further described in section 1.3.

2.2. Institutional arrangements characterized by outsourcing and US Law dominance

WCI's institutional arrangements are characterized by outsourcing practices and U.S. legal dominance, revealing a multifaceted interplay of administrative and legal dynamics.

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[4] For a description of the mechanics of the first two waves of harmonization see G. De Lassus Saint-Geniès, *Quel droit pour l'interconnexion des marchés du carbone ? Un regard sur l'expérience Québec-Californie*, 42 RJENV 157 (2017).

[5] California & Québec, *Agreement between the California Air Resources Board and The Gouvernement Du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions*, (2013), https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/ca_quebec_linking_agreement_english.pdf (last visited Aug 14, 2023) [2013 Harmonization Agreement].

[6] California, Ontario, & Québec, *Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions*, (2017), https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/linkage/2017_linkage_agreement_ca-qc-on.pdf [2017 Harmonization Agreement].

WCI partners have delegated several core administrative and technological functions of their cap-and-trade programs to WCI Inc., a non-profit corporation organized under the laws of Delaware. WCI Inc.'s role includes the maintenance of a central registry (known as the Compliance Instrument Tracking System Service or CITSS), to track emission allowances and offset credits. WCI Inc. has also been mandated to conduct common auctions and to monitor all emissions rights transactions on both primary and secondary markets[7]. Following public tenders, WCI Inc. has in turn subcontracted the performance of these tasks to various private entities[8]. Financing of WCI Inc. is allocated by the WCI partners based on the relative size of their programs. For the fiscal year 2023, WCI Inc. has a budget of approximately 12.4 million USD[9].

American law is applicable to all aspects of the performance of WCI inc.'s core duties including with respect to tenders, centralized registry, common auctions and transaction monitoring tasks. This dominance and the limited scope of Québec's law raises several questions about the interplay between legal frameworks in WCI cross-border governance. Notably, it creates a significant issue concerning public finances for Québec, as the province's Auditor General does not possess the authority to audit outside its territory. Presently, audits are carried out by Clifton Larsen LLP, an accounting firm mandated by WCI Inc. This situation highlights a vulnerability in Québec's financial oversight capabilities, raising concerns about the efficacy and transparency of the auditing process within the WCI framework[10].

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[7] For a complete description of WCI inc. tasks delegation, see WCI Inc., Greenhouse gas emissions trading: a cost-effective solution to climate change, WCI, Inc. (2023), https://wci-inc.org (last visited Aug 15, 2023).

[8] As of April 2023, General Dynamics Information Technology maintains the common tracking registry, Deutsche Bank National trust Company provides services related to allowances auctions and Monitoring Analytics, LLC provides market monitoring, see *Id.*

[9] For detailed financial informations about WCI Partners respective contribution see WCI, Inc., Budget Documents, https://wci-inc.org/documents/budget-documents (last visited Aug 15, 2023).

[10] Auditor General of Québec, *Report of the Sustainable Development Commissioner "Chapter 4 : Carbon Market Description and Issues,"* 34 (2016), https://www.vgq.qc.ca/Fichiers/Publications/rapport-cdd/2016-2017-CDD/en_Rapport2016-2017-CDDE.pdf (last visited Aug 15, 2023).

2.3. Decentralised linkage architecture

The linkage architecture in the Western Climate Initiative (WCI) is multi-layered and reflects a complex integration system. It can be visualized as a three-tiered structure, comprising partners' administrative laws and regulations, the aforementioned delegation of administrative and technological services to WCI inc., and formal agreements describing the continuing harmonization process between the cap-and-trade programs.

Contrary to a common misconception, the core legal foundation for linkage is not rooted in the 2013 or 2017 Agreements but anchored in domestic administrative rules and regulation. These provide for key linkage elements such as joint auctions, mutual recognition of emission rights or mutual recognition of administrative decisions (for example in the case of offsets invalidation).

This explains why the process for linkage within the Western Climate Initiative (WCI) may vary from one partner jurisdiction to another. For example, in California, Senate Bill 1018 requires that the Governor makes four distinct equivalency findings related to the environmental stringency of the program, respectively the unimpeded ability of California to enforce its laws, the assurance that enforcement in case of non-compliance in the other jurisdiction is as stringent as in California, and the guarantee that linkage does not impose significant liability on the state[11]. Conversely, Québec's legal approach to linkage is more straightforward and effectuated by a simple governmental decree[12].

From a functional standpoint, the 2017 Agreement aims to promote the protection of the environmental integrity of regional greenhouse gas emission reduction targets[13], mutual recognition of

[11] For more details about the equivalency findings process, see Governor E.G. Brown Jr., *SB 1018 Request for Cap-and-Trade Program Equivalency Findings*, https://www.ca.gov/archive/gov39/2013/02/26/news17933/index.html (last visited Aug 15, 2023).

[12] Gazette officielle du Québec, *Décret 1184-2012 Modifiant Le Système de Plafonnement et d'échange de Droits d'émission de Gaz à Effet de Serre*, (2012), https://www.publicationsduquebec.gouv.qc.ca/gazette-officielle/la-gazette-officielle-du-quebec/.

[13] Article 8 seeks to ensure transparent accounting and regional allocation of greenhouse gas (GES) emission reductions to prevent double counting, see California, Ontario, & Québec, cit. at 6.

emission rights[14], common auctions[15], carbon market oversight[16] and the deployment of a common technological infrastructure through WCI inc.[17] It also outlines the cooperation modalities between the parties to ensure the harmonization and integration of their respective programs. For example, continuing work related to the above-mentioned topics is conducted through dedicated workgroups under the supervision of a consultation committee composed of official representatives of each Party[18].

More relevant to the subject of this paper, it specifies the procedures to be followed for the accession of a new jurisdiction as well as the withdrawal of a Party[19]. Interestingly, these provisions signal a forward-looking perspective, contemplating potential expansions or retractions within the WCI common carbon market and are completed by dispute resolutions dispositions[20].

The fact that the legal basis for linkage does not stem from the 2013 and 2017 Agreements, but rather originates from domestic administrative regulation, raises interesting questions, particularly concerning the model's resistance to political risk and its capacity to sustain long-term market engagement with other jurisdictions. These issues were tested in 2018 when Ontario abruptly retracted its participation.

3. The case of Ontario's withdrawal from the WCI common carbon market

Ontario's withdrawal in 2018 was the first resilience test of the WCI linkage arrangements (3.1) and had wide legal repercussions (3.2).

3.1. Ontario's Withdrawal in Light of WCI Cooperative Arrangements

Ontario's cap and trade program was initiated on January 1st, 2017. Prior to linking with California and Québec, the province

[14] Art. 6 of *Id.*
[15] Art. 9 of *Id.*
[16] Art. 11 of *Id.*
[17] Art. 12 of *Id.* For a detailed analysis of the 2017 Agreement, see F. Roch & J. Papy, cit. at 1.
[18] Art. 3 and 13 of California, Ontario, & Québec, cit. at. 6.
[19] Art. 19 and 17 of *Id.*
[20] Art. 20 of *Id.*

conducted four separate auctions, for which WCI Inc. provided administrative, financial, and technical services. On January 1st, 2018, Ontario's linkage with both California and Québec formally took effect. Two common auctions were then coordinated among the WCI partners, specifically on February 21st, 2018, and May 15th, 2018[21]. A third common auction was due to take place on August 14th, 2018. The 2018 Ontario provincial elections proved to be a pivotal moment for the province's climate change policy.

The Ontario conservative party led by Doug Ford won the provincial elections on June 7th, 2018. The centerpiece of its campaign was a promise to eradicate all forms of carbon pricing, dismantle the cap-and-trade program, and challenge the constitutionality of the Canadian federal carbon tax. Following its victory, the new conservative government was set to be instated on June 29th, 2018.

On the morning of June 15th, 2018, Doug Ford, as Premier-Designate, held a press conference in which he detailed the immediate plans following his government's inauguration, including, as promised, the termination of the cap-and-trade program and the challenge to the federal carbon tax. He then announced that Ontario would be serving notice of its withdrawal from the WCI and that he had directed officials to cease participation in future common auctions. Ford further promised the government would provide clear rules for the orderly wind down of the program[22]. The choice of June 15th for the press conference is believed to have been strategic, as it was the last day for Ontario to communicate its decision regarding participation in the August 14th common auction. Questions were immediately raised about these announcements, particularly in relation to the obligations contained in art. 16 and art. 17 of the 2017 Agreement.

Art. 16 provides for public announcement, and states that "*The Parties shall keep each other informed in advance of any public announcement related to their respective programs*" and furthermore

[21] See Ontario Cap-an-Trade Past auction information and results, http://www.ontario.ca/page/past-auction-information-and-results (last visited Aug 16, 2023).

[22] News release *Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax*, news.ontario.ca (2018), https://news.ontario.ca/en/release/49621/premier-designate-doug-ford-announces-an-end-to-ontarios-cap-and-trade-carbon-tax (last visited Aug 16, 2023).

that "*Any announcement concerning the harmonization or integration of the Parties' programs shall be prepared and, if possible, made public jointly*". Despite the strong wording of this provision, the Premier-Designate's announcement was not made jointly with Québec and California. It also appears that they were not given advance notice[23].

This prompted the Québec government, a few hours after the Premier-Designate's declaration, to publish a press release reassuring Québec market participants of the province's commitment to cap-and-trade and the WCI common market, and to announce collaboration between Québec and California to protect the carbon market integrity[24]. Later that day the California Air Resources Board announced, in the joint name of Québec and California, the suspension of all transactions with Ontario accounts in order to safeguard the integrity of the carbon market[25].

In effect, at the close of June 15th, transfers could not be made between Ontario accounts and Québec or California accounts, effectively de facto suspending market linkage with Ontario. Ontario participants could however continue trading among themselves.

Article 17 of the 2017 Agreement sets out the withdrawal procedure from the common carbon market. It provides that «A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavour to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to match the effective date of withdrawal with the end of a compliance

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[23] See, Declaration of Rajinder Sahota (CARB) Cross-Motion for Summary Judgement and Opposition, United States of America v. State of California, et Al., 68, par. 76, https://www.caed.uscourts.gov/caednew/assets/File/19cv2142%20Doc%2050.pdf (last visited Aug 21, 2023).

[24] Cabinet de la ministre du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques, *Le marché du carbone : un outil reconnu qui couvre maintenant plus de 50 % du PIB mondial*, https://www.newswire.ca/content/newswire-ca/ca/fr/news-releases.detail.html/null.htm (last visited Aug 16, 2023).

[25] Newsrelease : California Air Resources Board, *Market Notice : New Functionnality in CITSS*, https://ww2.arb.ca.gov/sites/default/files/cap-and-trade/auction/marketnoticejune2018.pdf (last visited Aug 16, 2023).

period». In this instance, the end of the compliance period was December 31st, 2020.

The use of the term "shall endeavour" does not render these timelines obligatory and grants a large degree of flexibility to a Party wishing to withdraw. The following events show that this interpretation had clearly been adopted by the Premier-Designate.

Doug Ford took office as prime minister on June 29th, 2018, and despite the provisions of Article 17 of the 2017 Agreement, moved to immediately dismantle the cap-and-trade program. On July 3rd, 2018, his government repealed the program with immediate effect and prohibited transactions of emission rights between Ontario participants[26]. This decision formally terminated linkage with California and Québec, thereby establishing July 3rd, 2018, as the official date for the delinking of Ontario from the common market.

The government subsequently introduced Bill 4 on July 25, 2018, to wind down Ontario's cap-and-trade program. The Bill modified the existing compliance period, mandating capped participants to report their GHG emissions until July 3rd, 2018, and retire emission allowances corresponding to those emissions. Additionally, the Bill outlined a compensation process for capped participants with excess purchased allowances. However, the Bill explicitly denied compensation for uncapped market participants who had bought allowances during the common auctions or on the secondary market[27]. During the legislative debates, when asked to justify this exclusion, Rod Philipps, then Minister of the Environment, Conservation and Parks explained that this category of "(…) participants without a compliance obligation chose to take risks as market traders and speculators", equating market risks and regulatory risks[28].

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[26] Ontario, *O. Reg. 386/18: Prohibition Against the Purchase and Other Dealings with Emission Allowances and Credits*, (2018), https://www.ontario.ca/laws/view (last visited Aug 16, 2023).

[27] Art. 8 (5), Ontario, *An Act Respecting the Preparation of a Climate Change Plan, Providing for the Wind down of the Cap and Trade Program and Repealing the Climate Change Mitigation and Low-Carbon Economy Act, 2016*, (2018), https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-4.

[28] See p. 486 of Legislative Assembly of Ontario, *Hansard, 31 July 2018 N°12*, (2018), https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2018-07-31/hansard (last visited Aug 16, 2023).

Significantly, Bill 4 incorporated a Crown Immunity Protection clause, shielding governmental actions from legal repercussions[29]. In explicit terms, Section 10(1) ensured that no cause of action could arise against the crown because of actions pertaining to the cancellation Act, the retirement, or annulment of any cap-and-trade instruments. This immunity extended comprehensively, proscribing any legal proceedings against the crown, including claims rooted in contract, tort, misfeasance, bad faith, trust, or fiduciary obligations.

To summarize, the withdrawal of Ontario from the WCI carbon market occurred within an 18-day timeframe, in stark contrast to the significantly longer timelines envisioned by article 17 of the 2017 linkage agreement. The swift and unilateral withdrawal by Ontario, albeit technically within the scope of the agreement's language, might not have been conforming to the original spirit and intent of the Parties.

3.2 Ensuing domestic and international litigation

Legal proceedings against the decisions of the Ontario government were promptly initiated, addressing both the government's obligations regarding public consultation and Bill 4's annulment of allowances without compensation.

On July 18th, 2018, the *Canadian Environmental Law Association* filed a petition for review against Regulation 386/18, citing failure to observe public consultation requirements as stipulated under the Environmental Bill of Rights[30]. Ecojustice, on behalf of Greenpeace Canada filed a similar challenge on September 11, 2018, targeting both Regulation 386/18 and Bill 4, over the absence of meaningful public consultations, in accordance with the Environmental Bill of Rights[31]. In reaction, a few hours

[29] Art. 9 and 10 of Ontario, cit. at 27.

[30] Canadian Environmental Law Association, *Application for Review to the Ministry of the Environment Conservation and Parks, Filed Pursuant to Section 61 of the Environmental Bill of Rights, Re: Ontario Regulation 386/18 Prohibition on the Purchase, Sale and Other Dealings with Emission Allowances and Credits*, (2018), https://cela.ca/wp-content/uploads/2019/07/EBR-Application-for-Review_cap-and-trade.pdf (last visited Aug 17, 2023) This petition was subsequently denied on September 21, 2018.

[31] Press release: *Environmental groups take Ontario to court for unlawfully cancelling cap and trade program*, Ecojustice (2018), https://ecojustice.ca/news/environmental-groups-take-ontario-to-court-for-unlawfully-cancelling-cap-and-trade-program/ (last visited Aug 17, 2023).

later, the Ontario government launched a 30 days public comment period over Bill 4[32]. On October 11th, 2018, while the majority of the court found that the cancellation of the cap-and-trade program without public consultation was unlawful, the case was dismissed on the grounds that a public consultation had in effect been conducted and that the law had been enacted[33].

While these legal actions delayed the adoption and implementation of Bill 4, they were unable to change the outcome especially for uncapped participants. As a result, two legal actions over Bill 4 cancellation of allowances without compensation were also initiated**.**

The first action was launched on December 7th, 2020, by Koch industries Inc. ("Koch"), a US based company. Its Canadian subsidiary Koch Supply & Trading LP ("KST") was a market participant under the Ontario cap-and-trade program and had purchased a large quantity of allowances on the primary and secondary markets. KST was not entitled to compensation under Bill 4, because it was a market participant. After several unsuccessful attempts to negotiate some form of compensation with the Ontario government, and because of the Crown immunity clause in the cancellation Act, Koch filed a request for arbitration against Canada pursuant to Chapter 11 of the North American Free Trade Agreement (NAFTA), seeking damages of approximately 30.000.000 USD[34].

The case raises several procedural questions related to chapter 11 of NAFTA and eligibility under the legacy clause. Of interest to our discussion are claims 1) that the 2017 Agreement created legitimate expectations for market participants in case of Ontario's delinking with WCI partners, and that 2) in cancelling

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[32] Environmental Registry of Ontario, *Comment Period on Bill 4, Cap and Trade Cancellation Act, 2018*, (2018), https://ero.ontario.ca/notice/013-3738 (last visited Aug 17, 2023); We're taking Premier Ford to court, ECOJUSTICE (2018), https://ecojustice.ca/news/taking-premier-ford-to-court/ (last visited Aug 17, 2023).

[33] Ontario Superior Court of Justice, Divisional Court, Greenpeace Canada v. Minister of the Environment, Conservation and Parks (Ontario), 2019 ONSC 5629, https://ecojustice.ca/wp-content/uploads/2019/10/Greenpeace-v-Min.-Environment-20191011.pdf.

[34] ICSID, *Koch Industries Inc. & Koch Supply & Trading, LP v. Canada, Request for Arbitration*,
http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9375/DS17196_En.pdf (last visited Aug 17, 2023).

allowances without compensation, the government of Ontario unlawfully expropriated Koch's property rights[35]. At of the time of writing, the hearings have taken place, but the decision is still pending.

A second action was launched by SVM Energy Solutions ("SVM"), another market participant in the Ontario Cap and Trade program, which found itself ineligible for compensation under Bill 4. On February 19th, 2021, SVM sought leave to initiate a class action against the Government of Ontario, pursuing both general and punitive damages, as well as a formal declaration that the July 3rd regulation and Bill 4 were in violation of the 2017 Agreement[36].

The case raises several procedural questions related to class action proceedings and the constitutionality of the Crown immunity clause. Central to our discussion is the question of whether the way California, Québec, and Ontario framed the 2017 Agreement created legitimate expectations among market participants. Specifically, whether it led them to anticipate that the termination of the Ontario cap-and-trade program would be executed in a in a manner to minimize avoidable, harmful economic impacts to them. As of the time of writing, the proceedings are still ongoing[37].

These proceedings illustrate the limitations of the cooperation model deployed within the WCI framework and allow for certain lessons to be drawn.

4. Lessons learned from Ontario's withdrawal

The Western Climate Initiative (WCI) represents an ambitious experiment in transantional collaboration despite serious political and regulatory challenges. Yet, its structure faces legal ambiguities and governance concerns that pose potential risks to the common carbon market. This section explores these complexities, highlighting the resilience (4.1) and vulnerabilities of the WCI's cooperative effort (4.2).

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[35] *Id.* at 6 par. 36.

[36] Ontario Superior Court of Justice, *SMV Energy Solutions v. Minister of the Environment, Conservation and Parks (Ontario), Statement of Claim*, (2021), https://cbaapps.org/ClassAction/PDF.aspx?id=18937 (last visited Aug 17, 2023).

[37] *Id.* at 31.

4.1. WCI as a resilient and flexible cooperative model

The Western Climate Initiative (WCI) offers a flexible cooperative model that allowed Québec and California to develop a transborder carbon market, even when faced with federal hostility[38]. The model's adaptability to geopolitical complexities underscores the feasibility of transnational collaboration of subnational governments, and is exemplified by the stability of the market, even amid the sudden withdrawal of Ontario.

The model is specifically tailored to its partners' unique needs and constitutional limitations, and facilitates transnational cooperation through WCI Inc. This includes instances where carbon markets were not linked, such as California, Québec and Ontario before linkage, and at the time of writing Nova Scotia, and Washington State[39]. However, the reliance on American private entities to perform certain administrative, technological, and financial functions has its drawbacks, as it muddles the governance structure of the carbon market and raises questions related to transparency, compliance, and accountability.

Since its inception, WCI seemed to be particularly well adapted to foreseeable and ongoing regulatory transformations. As stated earlier, these transformations have been structured around waves. To that effect, the 2013 and 2017 Agreements contain dispositions providing for prior consultations between partners before regulatory transformation[40]. However, this aspiration has faltered in practice, and California tends to modify its cap-and-program without prior consultation with Québec[41]. Consequently,

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[38] For a description of the federal context in the USA and Canada see A. Chaloux (ed.), *L'action Environnementale Au Québec: Entre Local et Mondial* (2017), http://ebookcentral.proquest.com/lib/uqam/detail.action?docID=4891437 (last visited Aug 15, 2023).

[39] Following its victory in the 2021 provincial elections, the Progressive conservative party announced an orderly wound-up of the cap-and-trade program. The program will end in december 2023, see International Carbon Action Partnership, cit. at 2; The Washington's cap-and-invest program began operating in January 2023, see International Carbon Action Partnership, cit. at 2.

[40] For exemple art. 4 provides that a «(...) Party may consider making changes to its respective programs (...) [and that] any changes or additions (...) shall be discussed between the Parties." Moreover, the "(...) Parties shall consult regarding changes (...) that my have impacts on any parties», California, Ontario, & Québec, cit. at 6.

[41] California has modified its cap-and-trade regulations more that five times since linkage with Québec and has done so without consulting the province see p. 68,

Québec finds itself in a position of ensuring its program's continuing alignment with California's changes, indicating a more unilateral, rather than collaborative, approach.

The size discrepancy between California's and Québec's programs may explain this imbalance, but it also brings forth concerns about Québec's constrained choices in maintaining its cap-and-program. This asymmetry raises critical questions about the scalability of the WCI model, including its capacity to accommodate additional partners and to manage disagreements between them regarding regulatory transformations. The existing framework, as it stands, seems ill-equipped to handle such complexities and tensions, thus potentially undermining the stability and future expansion of the WCI.

This is why, despite its apparent resilience, the model structural robustness might be called into question in the face of regulatory risks.

4.2. WCI as a model which amplifies regulatory risk

It might be argued that the WCI cooperative model has a reduced ability to handle unforeseen transformation of domestic law and amplifies the effects of regulatory risks on common carbon market participants. These drawbacks arise partly from the ambiguous nature and effectivity of the 2013 and 2017 agreements.

Ontario's conduct in 2018 during its withdrawal from the WCI deemed the 2017 Agreement as non-binding and defeated the indications given about how WCI Partners would interact with each other with respect to regulatory change. The ambiguity surrounding the agreement was further underscored when, in October 2019, the Trump Administration questioned its constitutionality in front of the United States District Court of the Eastern District of California[42].

In this case, the Trump Administration contested the validity of the linking arrangements between California and Québec's cap-

par-78-83, Declaration of Rajinder Sahota Cross-Motion for Summary Judgement and Opposition, cit. at 23.

[42] Documents of that case may be consulted at United States District Court, Eastern District of California, *Cases of Interest: USA v. State of California, et al. (Climate Initiative)*, https://www.caed.uscourts.gov/caednew/index.cfm/clerks-office/cases-of-interest/219-cv-2142-usa-v-state-of-california-et-al-climate-initiative/ (last visited Aug 22, 2023).

and-trade programs, specifically the 2017 Agreement, alleging that it violated the U.S. Constitution's treaty clause, compact clause, and Foreign Affair doctrine. Several issues were up for debate, but at the heart of the discussion was the nature of the 2017 Agreement. If it was deemed a treaty under U.S. constitutional law and its provisions were binding, then California would have infringed on powers belonging to the federal government.

California pleaded Ontario's disregard of the 2017 Agreement as evidence that it was non-binding, and as mentioned earlier, asserted that despite the language of the Agreement, it had never consulted Québec prior to altering its cap-and-trade program. The court sided with California and ruled that, although in «(…) its current form, California's cap-and-trade program has extended beyond an area of traditional state competence by creating an international carbon market», the 2017 Agreement does not constitute a treaty as defined by the U.S. Constitution and its provisions are not binding[43].

Interestingly, California's arguments are now invoked by Canada in the Koch case as proof that Ontario had made no commitments under the 2017 Agreement[44]. However, these positions should be interpreted considering their contexts. Canada likely asserts the non-binding nature of the Agreement to dodge responsibilities under NAFTA, while California may have argued similarly to shield the Québec linkage from the Trump administration's attack.

However, Québec position might differ. While this article steers clear of Québec-Canada constitutional disputes, it is important to mention that Québec's approach to international agreements, particularly in the field of environmental and natural resources, is anchored in the Gerin-Lajoie doctrine. This doctrine

[43] W.B. Shubb, United States v. California, et Al. 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (2020) The judgment was appealed by the Trump administration on September 15, 2020. However, the appeal was subsequently abandoned by the Biden administration on March 22, 2021, and the case did not progress to the Court of Appeal.

[44] ICSID, *Koch Industries Inc. & Koch Supply & Trading, LP v. Canada, Counter-Memorial on Jurisdiction and the Merits*, 97, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9375/DS17715_En.pdf (last visited Aug 23, 2023).

asserts Québec's ability to negotiate and sign international accords within its constitutional jurisdiction[45].

This explains why the Québec ministry of international relations differentiates the 2013 and 2017 Agreements from ordinary memorandums or political statements, categorizing them as "International Agreements", thereby considering them legally binding[46]. This stance is exemplified by the 2013 Agreement, which secured the unanimous approval of the Québec National Assembly.

However, the legitimacy of the Gérin-Lajoie doctrine remains disputed within Canadian constitutional Law and its practical impact is limited[47]. For example, Québec did not formally object to Ontario's disrespect of the provisions of the 2017 agreement and Québec classification of the 2013 and 2017 agreements has not been argued by the parties in the USA v. California and the Koch v. Canada cases.

The uncertainty surrounding the 2017 Agreement's effectivity has also negative consequences on the legitimate anticipations formed by market participants. The Koch and SVM cases reveal that market actors shared understanding was that the Ontario cap-and-trade program termination was a possibility. They nevertheless expected the province adherence to the withdrawal procedure set out in art. 17 of the 2017 Agreement. To that effect, there was a widespread assumption that Ontario would participate in the August 2018 common auction, and that any termination would align with the end of the compliance period in December 2020, or at the very least, that Ontario would give a 12-month notice before withdrawing from the WCI. In addition, stakeholders anticipated that Ontario would actively collaborate with Québec and California to clarify the status of Ontario's emission rights

[45] D. Turp, *L'approbation des engagements internationaux importants du Québec : la nouvelle dimension parlementaire à la doctrine Gérin-Lajoie*, RQDI 9 (2020).

[46] For a description of Québec's official position on international agreements see Agreements and commitments, Gouvernement du Québec, https://www.quebec.ca/en/government/agreements-and-commitments (last visited Aug 22, 2023).

[47] For further discussion of this issue in the context of the WCI, see D.V. Wright, cit. at 1; A. Messing, *Nonbinding Subnational International Agreements: A Landscape Defined Notes*, 30 Geo. Envtl. L. Rev. 173 (2017); F. Roch & J. Papy, cit. at 1.

within the common market and the particulars of holdings in participant accounts[48].

These beliefs illustrate a pervasive misunderstanding of the legal framework governing WCI linkage, particularly the 2017 Agreement's role and essence. For example, SVM, Koch as well as the US government have argued that the agreement had an actual legal effect on the linking process and common carbon market framework[49]. This misapprehension led market participants to a flawed perception of diminished regulatory uncertainty around which they build erroneous expectations.

These beliefs also show that the structure of linkage arrangements allows the regulatory risks of each WCI partner to be transferred to the common carbon market. This leads to greater uncertainty and higher transaction costs for market participants who have to monitor political and legal developments in each partner's jurisdiction. For example, had the court sided with the U.S. government in the U.S. v California case, the linkage with Québec could have been disrupted, leading to negative consequences for Québec participants, such as an increase in allowance prices. Furthermore, Québec cap-and-trade program is subject to an annual equivalency review by the Canadian federal government in relation to the federal carbon tax. Should the equivalency be lost, the viability of Québec cap-and-trade program might be called into question[50].

Risks to the common market may also arise from unresolved legal questions within partners' regulations, such as the legal nature of emission rights. The Ontario government refusal to indemnify market participants highlights this question. For example, Koch argues that the Ontario government decision amounted to an

[48] ICSID, *Koch Industries Inc. & Koch Supply & Trading, LP v. Canada, Memorial on Jurisdiction and the Merits*, 53, 106, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9375/DS17197_En.pdf (last visited Aug 23, 2023); Ontario Superior Court of Justice, cit. at 36, 31.

[49] Ontario Superior Court of Justice, cit. at 36, 23; ICSID, cit. at 48, 116; United States District Court, Eastern District of California, United States of America v. State of California, et al., Complaint 8, https://www.caed.uscourts.gov/caednew/assets/File/19cv2142%20Doc%201.pdf (last visited Aug 23, 2023).

[50] Mémoire de l'intervenante la Procureure Générale du Québec, Supreme Court of Canada, References re Greenhouse Gas Pollution Pricing Act, 75.

unlawful taking of property[51]. On the other hand, in the Koch case, Canada quotes California and Ontario regulations to argue that emission rights are mere revocable administrative authorization to emit and that their revocation cannot trigger indemnification[52].

This is another example where the situation in Québec might differ. Québec has no such qualification in its cap-and-trade regulation. Because its legal system is based on both common and civil law, the qualification of emission rights under Québec law might be closer to what is found in many continental European countries with respect to EU-ETS allowances and be considered property. This potential fragmentation in the classification of emission rights may lead to legal uncertainties reminiscent of those encountered within the European Emissions Trading System.[53] In this context, the forthcoming arbitration decision in the Koch v. Canada case could have far reaching consequences.

5. Conclusion

The withdrawal of Ontario was the strongest resiliency test of the WCI linkage model and offers critical insight into the WCI transnational cooperative model.

The 2017 Agreement could have diminished regulatory ambiguity for stakeholders and clarified the rules of conduct for WCI partners, especially regarding linkage. However, Ontario's withdrawal underscores its failure to meet these objectives, undermining the model's credibility. Furthermore, the Agreement's drafting gave a false sense of security to market participants and might have contributed to the losses which they incurred.

Conversely, Ontario's departure underscored the model's resilience. California and Québec quick response to Ontario's actions effectively mitigated market disruptions and preserved the integrity of their individual programs. Nevertheless, the model's scalability and aptitude for broader multi-jurisdictional engagement remains in question.

Finally, Ontario's exit underscores the importance of negotiating from the outset, clear and enforceable market linkage

[51] ICSID, cit. at 48, 94, 117.

[52] ICSID, cit. at 44, 6, 49.

[53] See observations 25 to 28 expressing concerns related to the definition of allowances of European Court of Auditors, *Special Report No 6/2015: The Integrity and Implementation of the EU ETS*.

termination provisions and timelines. These procedural elements could be both coordinated and integrated within the regulations of the various cap-and-trade programs. Furthermore, the formulation of compensatory mechanisms for market participants is essential, especially for mitigating unpredictable regulatory risks. Regulatory frameworks could stipulate conditions under which indemnification is triggered, for example when established procedural obligations are breached. In this context, Contracts for Differences could be useful instruments and might merit further exploration.

TRANSNATIONAL CLIMATE LITIGATION: EMERGENCE AND LIMITS OF A DIAGONAL PROTECTION OF FUNDAMENTAL RIGHTS

*Maurizia De Bellis**

Abstract

There is a growing body of climate litigation cases that are *strictu sensu* transnational, directed against foreign corporations or foreign governments. In some cases, courts adopted an approach open to reconsider well established principles: in the *Neaubauer* case, the German constitutional court did not rule out the responsibility of Germany in fulfilling its positive obligations to protect fundamental rights of foreign citizens, while the Inter-American Court on Human Rights and the UN Committee on the Rights of the Child opened to the possibility of diagonal human rights protection in climate litigation. In the recent *Duarte* case, the ECHR declared inadmissible the complaint directed by some Portuguese youths against States other from Portugal, limiting the recognition of the extraterritorial protection of fundamental rights. Climate transnational litigation shows how climate change continuously challenges old legal paradigms, fostering the need for adapting existing instruments and building new ones.

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1. Transnational climate litigation: the perspective of research

In the last decade, climate litigation has been growing steadily in number, scope, and impact[1]. As of 2023, more than 2300 cases of climate litigation have been reported, of which around two thirds have been filed since 2015[2]. The scope of climate litigation has also widened, encompassing not only cases intended to challenge the lack or adequacy of governments' action to address climate change, or the responsibility for damages caused by corporate actors, but also a variety of complex legal claims, such as those concerning just transition cases and climate washing ones[3]. Such trend is expected to increase in the next years and to gain momentum, in the aftermath of the *Klimaseniorinnen* case, ie. the first case in which the European Court of Human Rights (ECHR) condemned a State – Switzerland – for its failure to fulfill its positive obligations to protect individuals within its jurisdiction from the adverse effects of climate change on their life and health, hence violating their right to private life protected under art. 8 ECHR[4].

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* Associate Professor of Administrative Law, University of Rome "Tor Vergata".

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[1] J. Peel & H.M. Osofsky, *Climate Change Litigation*, 16 Ann. Rev. Soc. Sci. 21 (2020); W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021).

[2] J. Setzer & C. Higham, *Global trends in climate change litigation: 2023 Snapshot*, 2023, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf. Statistics are regularly updated in the climate litigation databases of the Grantham Research Institute at LSE and Sabin Centre at Columbia.

[3] See I. Alogna, *Increasing Climate Litigation: A Global Inventory*, 1 French Y.B. Pub. L. 101 (2023).

[4] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others V. Switzerland*, Application no. 53600/20, 9 April 2024. For a first comment, see M.A. Tigre & M. Bönnemann, *The Transformation of European Climate Change Litigation:*

Climate litigation is having a tremendous impact in advancing the objective of mitigation, as it responds to States' failures to protect their citizens from the threat of climate change[5] and to their lack of compliance with international commitments[6]. Moreover, climate litigation cases foster the public's awareness on the climate emergency[7].

Besides its practical impact, climate litigation raises a number of theoretical legal challenges[8]. For example, even if at the origin of this phenomenon lies the governments' lack of effective action and delay in the implementation of international commitments, a highly contested conundrum is the one of the scope and limits of the courts' review on such action or inaction[9]. In other words, the intervention of the courts in this area challenges one of the founding principles of modern constitutionalism, *i.e.* the separation of powers[10].

Introduction to the Blog Symposium, 9 April 2024, https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium/. For some preliminary remarks on the three climate litigation cases decided by the ECHR 9 April 2024, see Section 4.

[5] H.M. Osofsky, *The continuing importance of climate change litigation*, 1 Climate L. 3 (2010), and C.P. Carlarne, *The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis*, in B. Mayer & A. Zahar (eds.), *Debating Climate Law* (2021), 113. For a more critical viewpoint, see G. Dwyer, *Climate Litigation: A Red Herring among Climate Mitigation Tools*, in *op.ult.cit*.

[6] S. Maljean-Dubois, *Climate Change Litigation*, Max Planck Encyclopedias of International Law (2018).

[7] J. Peel & H.M. Osofsky, *Climate Change Litigation. Regulatory Pathways to Cleaner Energy* (2015), 10 and 233.

[8] S. Simou, *The emergence and potential of climate change litigation: methodological and theoretical legal challenges*, 35 Eur. Rev. Pub. L. 145 (2023).

[9] M. Payandeh, *The role of courts in climate protection and the separation of powers*, in W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021); see also C. Voigt, *Introduction Climate Change As A Challenge For Global Governance, Courts And Human Rights*, in *op. ult. cit.*, at 15. I have discussed elsewhere what standard of review would be more appropriate for the courts to follow, in order to square the circle with the separation of powers principle: see M. De Bellis, *Adjudicating Climate Change (In)action from Urgenda to Neubauer: Minimum Reasonableness and Forward-Oriented Proportionality*, 35 Eur. Rev. Pub. L. 213 (2023).

[10] On the separation of powers in general, see C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (2013); E. Carolan, *The New Separation of Powers: A Theory for the Modern State* (2009); J. Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. Rev. 433 (2013).

The magnitude of the challenges that climate litigation raises is not isolated. Climate change, in itself, raises a number of theoretical and normative challenges for law in general, and public law more specifically[11].

This article will focus on one type of climate litigation, ie. transnational climate litigation. In a broad sense, all climate litigation is transnational, as it plays a diagonal regulatory role, involving vertical and horizontal governance simultaneously[12]. From this perspective, climate litigation can be understood as a transnational legal process as it breaks the dichotomy between the domestic and the international, the public and the private, being, on the contrary, multiscalar and multiactor[13]. Additionally, climate litigation is explicitly transnational in its impact, as the agenda of the plaintiffs – even when the case is before a domestic court and involves exclusively domestic litigants – is usually the one of producing spillover effects, in terms of cross fertilization and imitation, well beyond the jurisdiction where one specific case takes place[14]. Under a *strictu sensu* understanding, however, transnational litigation involves a foreign plaintiff, or a defendant located outside the jurisdictions of the court[15]. While in the past climate claims *strictu sense* transnational were limited[16], recently there has been a growing trend of such cases[17].

The reasons behind the trend toward the growth of climate litigation *strictu sensu* transnational can be easily understood. First of all, climate change is, for its very nature, a transboundary phenomenon. Second, the increasing number of climate litigation cases show that some jurisdictions can present a more favorable law for the applicants than others. Such mismatch between venues and instruments for protection can fuel attempts from individuals or

[11] J.-B. Auby & L. Fonbaustier, *Climate Change and Public Law Dossier: Introduction*, 1 French Y.B. Pub. L. 25 (2023).
[12] H.M. Osofsky, *Is Climate Change International - Litigation's Diagonal Regulatory Role*, 49 Va. J. Int'l L. 585 (2009), 631.
[13] Ivi, 634-6.
[14] J. Peel & J. Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 Am. J. Int'l L. 679 (2019), 696.
[15] In a similar sense, see Y. Marique, *"Transnational" Climate Change Law. A case for reimagining legal reasoning?*, 1 French Y.B. Pub. L. 69 (2023).
[16] J. Peel & J. Lin, *Transnational Climate Litigation*, cit. at 1, 696 and M.L. Banda & S. Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 Envtl. L. Rep. 101 (2017).
[17] I. Alogna, *Increasing Climate Litigation: A Global Inventory*, cit. at 3, 119.

organization in one jurisdiction to seek a favorable judgment before the Courts of a different jurisdiction. For instance, nationals of highly affected territories – for example, islands - could have an interest in filing a case before Courts of the global North.

What type of transnational climate cases are emerging in the practice? Against corporation or against States? Within which type of procedures? What are the legal obstacles and what are the perspectives?

After mapping the field of transnational climate actions within the more general landscape of climate litigation (Section 2), the article analyses the openings that can be traced within recent case law in favor of the recognition of the duty of a State to protect the fundamental rights of a foreign individual, in the context of a climate litigation case (Section 3). These openings can be traced both in a judgment of national constitutional Court (ie. the German Federal Constitutional Court (FCC) in the *Neubauer et al. v. Germany* case: Section 3.1), in the opinion given by an International Court (ie. the opinion of the Inter-American Court on Human Rights (IACtHR): Section 3.2) and in the decision of the United Nations Committee on the Rights of the Child (CRC) in the *Sacchi and Others* case (Section 3.3). On the other hand, though, the ECHR has recently declared inadmissible a case in which six Portuguese youths had challenged thirty-two States, in addition to Portugal, limiting the recognition of the extraterritorial protection of fundamental rights (Section 4). The reasonings followed in these cases present some common starting points, but also diverging outcomes; possible reconciliations and future perspectives, however, can be suggested (Section 5).

2. A typology of transnational climate actions

Within the academic legal literature, the very definition of climate litigation is discussed. Some authors limit their analysis to "any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts"[18]. This definition, however, appears too narrow, as it would exclude cases that, albeit

[18] D. Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 Env'y L. Rep. 10644 (2010), 10647.

being motivated by concerns on climate change, base their claims on different grounds, such as, for instance, energy plants' contribution to air pollution[19]. For purposes of this article, the definition of climate litigation as including "cases before judicial and non-judicial bodies that involve material issues of climate change science, policy or law" will be used, as encompassing a broader variety of cases[20] .

As recalled at the outset, the types of climate litigation cases have been evolving over time. The main distinction is the one between cases in which litigants intend to promote climate change regulation (so-called pro-regulatory litigation) and cases in which claimants seek to oppose existing regulation or regulatory efforts (so-called anti-regulatory cases)[21]. Recently, however, it has been suggested to replace such distinction with the one between Climate-aligned and Non-climate aligned cases[22], with the purpose of including in the first category not only anti-regulatory cases, but also just transition ones, ie. cases that do not oppose climate regulation in itself, but some specific consequences that such regulation can produce (for example, the impact on occupation[23]).

Other differences concern the type of claimants and defendants: while pro-regulatory cases are usually brought by individuals, NGOs, or both acting together, defendants can be corporations or governments (the first case being more common in the United States, and the second one outside)[24]. Correspondingly, also the type of strategy varies, as claims against governments can be directed to challenging the governments' climate targets and to increasing the ambition of such action, seeking higher greenhouse gases (GHG) reductions, while cases against corporations can be directed to disincentivizing high-emitting activities and seeking compensation.

Several transnational climate change actions have been brought by foreign plaintiffs against corporations. In the case *Lilyua*

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[19] J. Peel & H. M. Osofsky, *Climate Change Litigation*, cit. at 1, 6.
[20] J. Setzer & C. Higham, *Global trends in climate change litigation*, cit. at 2, 6.
[21] C. Hilson, *Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)*, in F. Fracchia & M. Occhiena (eds.), *Climate Change: La Risposta del Diritto* (2010).
[22] J. Setzer & C. Higham, *Global trends in climate change litigation*, cit. at 2, 7.
[23] A. Savaresi & J. Setzer, *Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers*, 13 J. Hum. Rts. Env't 7 (2022).
[24] J. Setzer & C. Higham, *Global trends in climate change litigation*, cit. at 2, 11-2.

vs. RWE[25], a farmer from Peru sued RWE, the largest electricity producer of Germany, before the District Court of Essen, Germany. The claimant argued that RWE had contributed, due to its high emission of GHG, to the melting of the glacier Palcacocha, located close to the town where he lived, and asked the court to order the company to bear a share of his adaptation costs (specifically, the costs incurred for setting up flood protection), or, alternatively, asked compensation for the damages. The share of the costs to be reimbursed was identified in the percentage of 0.47%, equal to RWE estimated contribution to global industrial GHG emissions. While the District Court dismissed the case in 2016, the appeal court – the Higher Regional Court of Hamm – declared the case to be admissible and released an order to the parties to submit evidence. The case is currently pending.

A similar case is the *Asmania vs. Holcim* one, filed in 2022 and also pending, in which four inhabitants of the Indonesian island of Pari, supported by three NGOs, sued the Swiss-based cement producer Holcim, before a Swiss Court, under Swiss civil law[26]. As in the RWE case, the claimants seek compensation for damages and financial contribution for adaptation measures; in addition, they are asking for a reduction of CO2 emissions[27].

In *Union Hidalgo vs. EDF France*, a Mexican indigenous community (Union Hidalgo) challenged the project of the French electricity company Electricité de France (EDF) to construct a wind farm – named Gunaa Sicarù – on a land possessed by such indigenous community in the state of Oaxaca, in Mexico[28]. The claim concerned a lack of consultation of the indigenous community in the authorization procedure (more specifically, their

[25] District Court Essen, *Luciano Lliuya vs. RWE AG*, 15 December, 2016, and Higher Regional Court of Hamm, *Luciano Lliuya vs. RWE AG*, Indicative Court Order and Order for the Hearing of Evidence, 30 November 2017, and Order of 7 January 2021, unofficial translations in English available at: https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/. For a comment, see P. Semmelmayer, *Climate Change and the German Law of Torts*, 22 German L.J. 1569 (2021).

[26] See https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/.

[27] By 43% by 2030, and and by 69% by 2040, compared to 2019.

[28] Z. Brémond, *Corporate Duty of Vigilance and Environment: Some Lessons Drawn from the EDF and the TotalEnergies Cases*, VerfBlog (6 April 2023), https://verfassungsblog.de/corporate-duty-of-vigilance-and-environment/.

right to free, prior and informed consent (FPIC))[29], hence falling within the typology of "just transition" cases, not intended to oppose regulatory action, but contesting its impact on other rights, such as, in this case, the right of indigenous communities. After a failure to find a settlement before the French National contact point, Union Hidalgo and two NGOs started a lawsuit before a civil court in Paris. In the meantime, the energy Ministry of Mexico cancelled the contract with EDF[30]; however, the action, intended to ascertain whether a violation of the French law on the duty of vigilance was involved, is pending[31].

The transnational litigation cases listed above include actions taken by foreign plaintiffs against corporations, before tribunals of the jurisdiction of the latter. A different pattern emerges in the *Envol Vert vs. Casino*, in which a number of NGOs based in France or elsewhere sued the French supermarket chain Casino before a French Court, challenging its responsibility for the violation of its duty of vigilance on the activity undertaken by its subsidiaries in Brasil and Colombia, which caused environmental damages in those countries[32].

While all these cases involve corporations, hence being relevant for public law only as a source of possible spillover in the elaboration of principles on causality and responsibility (particularly relevant in cases such as the one involving EDF, a publicly-owned company), in other transnational cases the plaintiffs addressed the responsibility for the breach of their fundamental rights by foreign governments. The cases that will now be examined include *Neubauer et al. v. Germany*, in which the Federal Constitutional Court of Germany examined, *inter alia*, the admissibility of foreign nationals' complaints within constitutional proceedings; the opinion of the Inter-American Court on Human Rights (IACtHR), in which the international court expressed an opening to 'diagonal' human rights obligations; the decision of the United Nations Committee on the Rights of the Child (CRC), in the

[29] https://www.oecdwatch.org/complaint/union-hidalgo-vs-edf-group/.
[30] Such cancellation was followed by a declaration of nullity of the contracts by the Tribunal Agrario de Oaxaca: https://www.business-humanrights.org/en/latest-news/mexico-agrarian-tribunal-declares-nullity-of-lease-contracts-of-11-community-members-of-uni%C3%B3n-hidalgo-regarding-wind-farm-owned-by-renovalia-energy/
[31] *A la cour d'appel de Paris, une nouvelle chambre pour mieux traiter les contentieux environnementaux liés aux grandes entreprises*, in *Le Monde*, 5 March 2024.
[32] See https://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/.

Sacchi and Others case, following the notion of extraterritorial jurisdiction elaborated by the IACtHR; lastly, the decision *Duarte & others*, with which the ECHR declared the claim of six Portuguese youth against States different from Portugal to be inadmissible.

3. The emergence of the protection of 'diagonal' fundamental rights

3.1. The admissibility of foreign national complaints within Constitutional proceedings: *Neubauer, et al. v. Germany*

The judgment of the Federal Constitutional Court (FCC) of Germany originated from four different complaints, the first of which was lodged in 2018, when a number of German young individuals and two German NGOs alleged a failure to take action to counter climate change from the German legislature, hence infringing the State's duties to protect the rights to dignity, to life and to physical integrity of its citizens[33]. As, in December 2019, the Federal Climate Protection Act was adopted, the first constitutional complaint was changed. The complainants alleged that such act did not alter fundamentally their complaint, as the national climate targets and the annual emission amounts allowed under such act were insufficient in order for Germany to do 'its part' in meeting the legal obligation under the Paris agreement to limit the increase in the global average temperature well below 2° C and preferably to 1.5° C, and that it did not contain a reduction path after 2030[34].

At the same time, three other groups of claimants lodged a complaint against the Federal Climate Protection Act: two environmental associations, other individuals from Germany and – what matters the most for purposes of this article – individuals from Bangladesh and Nepal.

The parameters invoked by the claimants were generally the constitutional provisions protecting the fundamental rights to

[33] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], *Neubauer et. al. vs. Germany*, Mar. 24, 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, available at http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/, para. 39.

[34] Complaint, 2 June 2020, 7 and 10, available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200206_11817_complaint-1.pdf.

dignity, to life and to physical integrity (articles 1 and 2 of the German constitution (*GrundGesetzt* (GG)), read in conjunction with art. 20a, according to which the state shall protect the natural foundations of life and animals by legislation, taking into account also its responsibility towards future generations. Some also claimed a violation of the fundamental right to property (art. 14). The FCC decided to rule jointly on these complaints.

The outcome of the decision has been momentous[35]. The FCC rendered its judgment on the basis of the State's both negative and positive obligations to protect the fundamental rights of its citizens.

On the one hand, there is a positive obligation for the Government, stemming from its general duty to protect the fundamental rights to life and physical integrity, «to maintain minimum ecological standards that are essential for fundamental rights, thereby making it obligatory to afford protection against environmental degradation "of catastrophic or even apocalyptic proportions"»[36]. However, in the Neubauer case no infringement of this positive obligation was assessed[37], as the Federal Constitutional Climate Act was not considered «manifestly unsuitable» for the protection goals, as the goal of climate neutrality by 2050 and the interim goal of 55% reduction by 2030 that the German law identifies are consistent with the goal of limiting the increase of the temperature to well below under 2° and preferably 1.5° compared to pre-industrial levels set in the Paris agreement[38].

On the other hand, though, it is from the point of view of the negative obligations not to restrict freedom that the FCC found the Climate law to be unlawful. As the Federal Constitutional Climate Law postpones significant GHG reduction burdens to the post-2030 period, it produces an «advance interference effect» on future freedom, ie. the restrictions to freedom that will be necessary in the

[35] See the Special Issue edited by V. Casado Pérez & E. Orlando, 22 German L.J. 1387 (2021), and in particular A. Buser, *Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity–The German Constitutional Court's Climate Decision*, 22 German L.J. 1409 (2021), at 1414-7; J. Peel & R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, 22 German L.J. 1484 (2021); L. J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, 22 German L.J. 1423 (2021). See also T. Gross, *Climate change and duties to protect with regard to fundamental rights*, 35 Eur. Rev. Pub. L. 81 (2023).

[36] FCC, *Neubauer*, cit. at 33, para. 114.

[37] FCC, *Neubauer*, cit. at 33, paras. 115 and 149-172.

[38] FCC, *Neubauer*, cit. at 33, paras. 155-164.

future are «already built into the generosity of current climate legislation»[39]. Post 2030, mitigation efforts will then be necessary, and the actions that will have to be taken will place complainants under enormous strain, jeopardizing their freedom protected by fundamental rights. As a result, the Federal Constitutional Climate Law produces an «advance interference effect» on future freedom, hence violating the fundamental rights of the claimants, and in particular the State's negative obligation not to restrict freedom in a disproportionate way[40].

The central doctrinal legal novelty has rightly been considered to be the construction of the obligation to protect the freedom of the future[41], or the «intertemporal guarantee of freedom»[42]. Additionally, the use made by the German FCC of the proportionality principle is innovative, as, in the balancing and accommodating conflicting interests that constitutes its founding, it is here shaped as a «forward looking exercises», which needs to take into account the duty to protect future generation, and as it tends to affirm the growing weight that will be given to climate action in any balancing exercise entailed in the proportionality principle[43].

For purposes of this article, however, what matters the most is the way the FCC has treated the complaints from the individuals living in Bangladesh and Nepal. Such complaints were considered admissible and the claimants were recognized standing, as the Court argued that it could not be «ruled out from the outset» that the State would have a duty to protect their fundamental rights to life and physical integrity against the impact of climate change[44]. On the contrary, according to the FCC, «While Art. 1(3) GG makes fundamental rights binding on the German state, *it does not explicitly restrict this binding effect to German territory*. Rather, the binding

[39] FCC, *Neubauer*, cit. at 33, paras. 120.
[40] FCC, *Neubauer*, cit. at 33, paras. 116 and 182.
[41] A. Buser, *Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity*, cit. at 35, 1417. Considering it as an innovative legal argument, see also J. Peel & R. Markey-Towler, *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, cit. at 35, 1484.
[42] V. Casado Pérez & E. Orlando, *Introduction*, cit. at 35, 1389.
[43] M. De Bellis, *Adjudicating Climate Change (In)action from Urgenda to Neubauer: Minimum Reasonableness and Forward-Oriented Proportionality*, cit. at 9, 237.
[44] FCC, *Neubauer*, cit. at 33, paras. 90 and 101.

effect of the Basic Law's fundamental rights on German state authority is *comprehensive*» (italics added) [45].

In examining the merit of the case, the FCC clarifies that the specific protections afforded by fundamental rights and their scope abroad may vary, depending on specific circumstances, and that «The circumstances under which fundamental rights may be invoked as the basis for establishing duties of protection vis-à-vis people living abroad have yet to be fully clarified»[46]. Hence, there is an opening to a State's duty of protection towards individuals living in a different State – even if not equal to the one concerning individuals living in Germany –; an opening which, as has been stated, «could be of immense significance in future cases where the only way to overcome global problems is international cooperation[47].

The FCC has further specified that the duty of fundamental rights protection that the German State has vis-à-vis individuals living in a country other than Germany «could not have the same content» as the duty toward individuals living in Germany[48].

More specifically, such different content is clarified by the FCC, taking into account the two different sets of measures that a State can adopt in order to fulfil the duty to protect rights from the consequences of climate change, ie. mitigation and adaptation measures. Limitations are identified, in particular, as for the second set of measures, given the lack of power of the German State to adopt adaptation measures outside the German border[49].

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[45] FCC, *Neubauer*, cit. at 33, para. 175.

[46] FCC, *Neubauer*, cit. at 33, para. 175.

[47] M. Goldmann, *Judges for Future: The Climate Action Judgment as a Postcolonial Turn in Constitutional Law?*, VerfBlog (30 April 2021).

[48] FCC, *Neubauer*, cit. at 33, para. 178.

[49] FCC, *Neubauer*, cit. at 33, para. 178: «However, with regard to people living abroad, the German state would not have the same options at its disposal for taking any additional protective action. Given the limits of German sovereignty under international law, it is practically impossible for the German state to afford protection to people living abroad by implementing adaptation measures there ([...]). Rather, it is the task of the states concerned to select and implement the necessary measures. Whereas steps such as minimising the further development of open spaces, restoring, unsealing, renaturing and reforesting suitable areas, and introducing resilient plant varieties are generally feasible at the domestic level, the German state clearly cannot implement such measures abroad. This is illustrated by examining some of the adaptation measures considered by the IPCC to be viable and necessary worldwide […]. These particularly include the modification of existing infrastructure in order to provide better protection

Even if in this specific case the claims of the foreign individual were dismissed, as no infringement of the German State of its positive duty to product fundamental rights was found[50], the State's positive obligation to protect the fundamental rights of foreign individuals was not excluded; additionally, it was affirmed that the content of such obligation would be different from the one vis-à-vis the citizens of a State and that such specific content would still need further specifications.

3.2. 'Diagonal' human rights obligations: the opinion of the Inter-American Court on Human Rights (IACtHR)

A second interesting opening to extraterritorial or 'diagonal' protection of fundamental rights, entailing «obligations capable of being invoked by individuals or groups against States other than their own»[51] does not originate from a judgment, but from an advisor opinion given by the Inter-American Court on Human Rights (IACtHR)[52].

In March 2016, Colombia requested the IACtHR to issue an opinion on three distinct questions, related to the interpretation of the American Convention on Human Rights (ACHR).

At the background of the opinion was the construction of major new infrastructure projects in the Wider Caribbean Region (such as the then Chinese funded trans-isthmus canal[53]) that, due to

against heat, wind and flooding. For areas prone to tropical cyclones and flooding, the IPCC mentions houses with low and aerodynamic de- sign, sewage systems, dykes, flood levees, beach nourishment and the retrofitting of buildings; for cities it names sustainable infrastructure such as green roofs, urban parks and porous pavements; and for agriculture it mentions efficient irrigation systems and the introduction of plants with high drought tolerance as well as resettlement […]. None of this could be carried out by the German state in the countries where the complainants live. For this reason alone, a duty of protection could not have the same content as it has vis-à-vis people living in Germany».

[50] FCC, *Neubauer*, cit. at 33, paras. 173 and 180-1.

[51] M. Feria-Tinta & S. Milnes, *The Rise of Environmental Law in International Dispute Resolution: the Inter-American Court of Human Rights issues a Landmark Advisory Opinion on the Environment and Human Rights*, 27 Y.B. Int'l Env't L. 64 (2016), 65.

[52] IACtHR, Advisory Opinion no. OC-23/17, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)* (15 November 2017).

[53] See Council on Foreign Relations, *Nicaragua's Grand Canal* (2015), https://www.cfr.org/backgrounder/nicaraguas-grand-canal. The project was abandoned due to a collapse of the Chines company involved in it: see *The rival*

their dimensions, may cause significant harm to the marine environment and, consequently, to the inhabitants of the coastal areas and islands located in the region[54]. However, such practical aspect was not considered by the IACtHR, which, instead, focused on the theoretical issues[55].

In particular, the request revolved around the interpretation of the notion of "jurisdiction" under the ACHR: more specifically, it was requested whether the obligations for the signatories States to respect the rights and freedoms recognized by the ACHR shall be interpreted to apply in the case of a damage to the right of a person that is outside the territory of such State.

According to the IACtHR, «the fact that a person in subject to the jurisdiction of a State does not mean that he or she is in its territory»; on the contrary, «the meaning of the word "jurisdiction",[…] signifies that it is not limited to the concept of national territory, but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the State in question»[56].

The specific case taken into account by the IACtHR is the one of transboundary damage. In such a case, it is the State «in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them»; as a result, such State is in the position to prevent those activities from causing transboundary harm that can impact the human rights of persons outside its territory. This leads the court to rule that «for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage»[57] the potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin.

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to the Panama Canal that was never built (26 August 2023), https://www.bbc.com/future/article/20230825-the-rival-to-the-panama-canal-that-was-never-built.

[54] IACtHR, Advisory Opinion no. OC-23/17, cit. at 52, paras. 2 and 25.

[55] M. Feria-Tinta & S. Milnes, *The Rise of Environmental Law in International Dispute Resolution*, cit. at 51, 57.

[56] IACtHR, Advisory Opinion no. OC-23/17, cit. at 52, para. 130. About extraterritorial protection of fundamental rights, S. Skogly & M. Gibney (eds.), *Universal Human Rights and Extraterritorial Obligations* (2010); M. Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013); M. Gibney et al., *The Routledge Handbook on Extraterritorial Human Rights Obligations* (2022).

[57] IACtHR, Advisory Opinion no. OC-23/17, cit. at 52, para. 102.

Some legal scholars have argued for the extension to the opening to extraterritorial protection of human rights and the rising of diagonal obligations, stated by the IACtHR for the cases of transboundary damage, also to litigations revolving on climate litigation and adaptation[58]. As it will now be seen, such perspective has been shared by of the Committee on the Rights of the Child (CRC), while the ECHR has recently taken a different stance, differentiating the two cases.

3.3. Climate litigation and extraterritorial jurisdiction: the *Sacchi and Others* case

In September 2019, 16 individuals - who were all, at the time of submission, under the age of 18 - filed five complaints with the Committee on the Rights of the Child (CRC) against Argentina, Brazil, France, Germany, and Turkey. The complainants argued that the respondent states, by causing and perpetuating climate change, had violated their rights to life, health, and culture, under the United Nations Convention on the Right of the Child (UNCRC)[59]. The complaints were filed under the Convention's 2011 Optional Protocol, which gives individuals a right to petition to the CRC.

In October 2021, the CRC adopted five decisions, one for each respondent, which are nearly identical, and it found that the communications were inadmissible for failure to exhaust domestic remedies. Notwithstanding this unfavorable outcome, the CRC adopted a notion of jurisdiction that follows the IACtHR opinion discussed in the preceding section[60], hence opening the door to future child-centric climate related cases[61].

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[58] M. Feria-Tinta & S. Milnes, *The Rise of Environmental Law in International Dispute Resolution*, cit. at 51, 78-9, and C. Voigt, *Introduction Climate Change As A Challenge For Global Governance, Courts And Human Rights*, in W. Kahl & M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021), 11.

[59] As discussed in the text, the five decisions adopted by the CRC as a result of the petitions are nearly identical. Reference will here be made to Committee on the Rights of the Child (CRC), *Decision adopted under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019 (Sacchi et al. v. Argentina)*, CRC/C/88/D/104/2019, 8 October 2021.

[60] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.5.

[61] M.A. Tigre & V. Lichet, *The CRC Decision in Sacchi v. Argentina*, 25 ASIL Insights (2021),
https://www.asil.org/sites/default/files/ASIL_Insights_2021_V25_I26.pdf,
and I. Gubbay & C. Wenzler, *Intergenerational Climate Change Litigation: The First*

The CRC recalled that, according to the notion of jurisdiction developed by the IACtHR, the appropriate test to be met is the one of the 'effective control' of the State of origin on the activities that caused the transboundary damage and the consequent human rights violations[62]. According to the CRC, a second element that needs to be considered in order to establish the existence of jurisdiction is the one of the 'reasonable foreseeability' of the harm[63]. The CRC concluded positively on both elements, considering both that the State of origin had 'effective control' over the sources of emissions causing harm to children outside its territory[64] and that, due to the existing scientific evidence showing the cumulative impact of carbon emission, the potential harm of the State's acts or omissions concerning GHG emissions originating in its territory were also reasonably foreseeable[65].

As for the causal link between the alleged harm and the State's acts or omissions, the Committee concluded that the applicants had *prima facie* established the existence of a real and significant harm[66] sufficiently for the purpose of establishing jurisdiction, while the assessment of the elements required to establish responsibility would be a matter for the merit[67] (to which the CRC did not go, given the inadmissibility for failure to exhaust domestic remedies).

4. The ECHR and the limits to an extraterritorial notion of jurisdiction: *Duarte Agostinho & Others*

As anticipated above, on April 9th 2024, with the *Klimaseniorinnen* case, the ECHR condemned for the first time a State in a climate litigation case, identifying an infringement of art. 8 ECHR in its failure to fulfill its positive obligations to protect individuals within its jurisdiction from the adverse effects of climate change on their right to private life[68]. The impact of the case

Climate Communication to the UN Committee on the Rights of the Child, in I. Alogna et al. (eds.), *Climate Change Litigation: Global Perspectives* (2021).

[62] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.5.

[63] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.7.

[64] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.12.

[65] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.11.

[66] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.14.

[67] CRC, *Sacchi et al. v. Argentina*, cit. at 59, para. 10.7.

[68] ECHR, Grand Chamber, *Verein Klimaseniorinnen Schweiz and Others V. Switzerland*, cit. at 4. For a first comment, see M.A. Tigre & M. Bönnemann, *The*

on climate litigation is expected to be tremendous. The discussion of the reasoning of the Court in this case - just published at the moment of writing this article - will occupy legal scholars for years to come. However, as the *Klimaseniorinnen* case dealt exclusively with the responsibility of the condemned State vis-à-vis individuals within its territorial jurisdiction, its implications appear to be only tangentially related with the focus of this contribution.

On the contrary, for the purposes of this article, some preliminary remarks need to be sketched about one of the two other cases[69] decided on the same date by the ECHR, ie. *Duarte Agostinho & Others vs. Portugal & Others*[70], in which the Court of Strasbourg found inadmissible the claim filed by six Portuguese youth against 32 countries, in addition to Portugal[71].

The claimants (all Portuguese nationals living in Portugal, born between 1999 and 2008) alleged that the respondents had violated their human rights obligations under articles 2 (life), 3 (prohibition of torture), 8 (private and family life), and 14 (prohibition of discrimination) of the Convention. According to the claimants, all respondents States bore responsibility for the harm caused by climate change on human health, in particular in relation to heatwaves and wildfires, due to the release of emissions within their territory and offshore areas "over which they had jurisdiction", and because of the export of fossils fuels extracted in

Transformation of European Climate Change Litigation: Introduction to the Blog Symposium (9 April 2024), https://blogs.law.columbia.edu/climatechange/2024/04/09/the-transformation-of-european-climate-change-litigation-introduction-to-the-blog-symposium/. For some preliminary remarks on the three climate litigation cases decided by the ECHR 9 April 2024, see Section 4.

[69] ECHR, Grand Chamber, *Carême v. France*, Application no. 7189/21, 9 April 2024, which was also declared inadmissible, on different grounds (lack of status of victim of the applicant). For a first overview of the case, before the decision, M. Torre-Schaub, *The Future of European Climate Change Litigation: The Carême case before the European Court of Human Rights,* VerfBlog (10 August 2022), https://verfassungsblog.de/the-future-of-european-climate-change-litigation/.

[70] ECHR, Grand Chamber, *Duarte Agostinho & Others vs. Portugal & 32 Others*, Application no. 39371/20, 9 April 2024.

[71] The action was filed against against the Member States of the EU (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Greece, Denmark, Estonia, Finland, France, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden) as well as Norway, Russia, Switzerland, Turkey, Ukraine and the United Kingdom.

their territory, the import of goods (for the emissions involved in their production) and the extraction of fossil fuels overseas from entities within their jurisdiction or financing such extraction[72].

The Court declared the claims directed against States different from Portugal to be inadmissible, as it considered that no jurisdiction could be established for such States[73]. In the end, also the claim against Portugal was declared inadmissible, due to the lack of exhaustion of domestic remedies[74].

The crucial point in assessing the admissibility of transnational claims is the concept of jurisdiction. The Court of Strasbourg did accept some of the arguments put forward by the applicants, and in particular that 1) there is «a certain causal relationship» between activities based on a State's territories that produce GHG emissions and «the adverse impact on the rights and well- being of people residing outside its borders and thus outside the remit of that State's democratic process» and 2) «the problem of climate change is of a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations»[75]. However, according to the Court, these arguments cannot serve as a basis for «creating by way of judicial interpretation a novel ground for extraterritorial jurisdiction», nor can justify an expansion of the existing ones[76].

The main arguments used by the Court to exclude an expansion of the notion of jurisdiction are three.

First, the Court underlines that in the case *Duarte* there was no specific link between the applicants and any of the other respondent States (other than Portugal), so that jurisdiction would end up having to be established exclusively on the argument that a State is capable of adopting a decision or action impacting the applicant's situation abroad[77].

Second, the Court of Strasbourg stresses that the Convention is not a legal instrument designed to provide general protection of the environment, and that accepting the applicant's line of argument would result in «a radical departure from the rationale of the Convention protection system, which is primarily and

[72] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, paras. 12-14.
[73] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 214.
[74] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 227.
[75] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, paras. 193-4.
[76] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 195.
[77] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 199.

fundamentally based on the principles of territorial jurisdiction and subsidiarity»[78].

Third, the Court maintains that, contrary to the cases of specific activities that can be labelled as dangerous, whose impact can be localized and limited to specific installations from which a harmful conduct emanates, the harmful consequences produced by GHG emissions are the result of a complex chain of effects and are diffuse[79]. Accepting a criterion of reliance on control over the person's interest for establishing the State's extraterritorial jurisdiction would hence lead to «a critical lack of foreseeability of the Conventions' reach»[80], as the scope of the extraterritorial jurisdiction would be «without any identifiable limits»[81].

A common trait of the line of arguments used by the Court of Strasbourg appears to be the one of avoiding a limitless load of cases, together with the transformation of the Convention in a «global climate-change treaty»[82].

The Court, however, uses two relevant caveas. First, it affirms that it is conscious of the diverging approaches used by other international Courts (notably, both the Advisory Opinion of IACtHR and the *Sacchi and Others* case of the CRC, discussed above, are specifically recalled); however, it observes that both use «a different notion of jurisdiction»[83]. Second, it did not bound itself to the position taken, as it comes to the conclusion of inadmissibility «while also mindful of the constant legal developments at national and international level and global responses to climate change, together with the ever-increasing scientific knowledge about climate change and its effects on individuals»[84].

While this latter caveat seems to show that the Court leaves its hands free to adapt to such developments and increasing knowledge and effects on individuals in the future[85], the distancing

[78] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 202.
[79] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 207.
[80] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 206.
[81] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 207.
[82] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 208.
[83] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 212.
[84] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 213.
[85] Yet, in the closest future the Court will most likely follow its own precedent in *Duarte*, leading to an analogous declaration of inadmissibility for cases such as *De Conto v. Italy and 32 other States*, Complaint no. 14620/21, https://climatecasechart.com/non-us-case/de-conto-v-italy-and-32-other-states/ and *Uricchio v. Italy and 32 other States*, Complaint no. 14615/21,

from other precedents is not entirely convincing[86]. The Advisory Opinion of IACtHR, discussed above, was focused on transboundary harm: hence, the distinction based on the reasoning of the Strasbourg Court, recalled above, contrasting such type of harm, which can be specifically identified, from harms connected in general with GHG emission, which are diffuse and potentially without limits, could soundly justify diverging approaches. Yet, the Strasbourg Court appears to have magnified its differences from the other two cases specifically recalled: for instance, it distances its own system, as involving individual claims, from the other relevant legal frameworks, as inter-States ones, while in the case of the CRC the petition was coming from individuals, not from a State[87].

Most notably, while the Strasbourg Court gives account of the existence of the *Neaubauer* case of the German Constitutional Court in the introductory part of its judgment, where the relevant legal framework and an overview of domestic case law is provided, such case is entirely ignored in the part of the decision on the merits, where the Strasbourg Court gives consideration of the alternative approaches of the IACtHR and of the CRC. In this sense, the Strasbourg Court avoided to engage with the differentiated type of approach suggested by the German constitutional Court, and intended to consider the responsibility of a state vis à vis individuals based in foreign states for the consequences of climate inaction, while also differentiating it from the type of responsibility the State has vis-à-vis its own citizens.

5. Concluding remarks

The analysis has shown that there is a growing body of climate litigation cases that are *strictu sensu* transnational. Transnational actions are directed against foreign corporations, such as in the *RWE* or in the *EDF* cases, or against foreign governments, like in the *Neubauer* and *Duarte* cases. These latter can be strategic climate cases, aimed specifically at challenging the lack

https://climatecasechart.com/non-us-case/uricchio-v-italy-and-32-other-states/.

[86] For a critical standpoint on the mismatch between the ECHR case law and the IACtHR's and CRC's one, A. Rocha, *States' Extraterritorial Jurisdiction for Climate-Related Impacts, VerfBlog,* 12 April 2024, https://verfassungsblog.de/states-extraterritorial-jurisdiction-for-climate-related-impacts/.

[87] ECHR, Grand Chamber, *Duarte Agostinho & Others*, cit. at 70, para. 213.

of climate action or inaction, or transnational environmental cases that can also involve climate effects (cases involving transboundary projects which can cause environmental harm, such as the IACtHR opinion).

Transnational climate litigation cases raise substantial challenges to legal concepts and requirements such as standing, jurisdiction, and causality. While the majority of these cases are still pending, others have led to remarkable decisions.

In some cases, courts adopted an approach open to an evolutive interpretation of well-established principles. For example, the German constitutional court in the *Neaubauer* case did not rule out the responsibility of Germany in fulfilling its positive obligations to protect fundamental rights also of foreign citizens; however, it specified that such obligations would have a different content than the one that the State has vis-à-vis its own citizens, also due to practical considerations (such as the lack of power of a State to adopt adaptation measures in the territory of a different State).

The Inter-American Court on Human Rights and the UN Committee on the Rights of the Child developed a notion of extraterritorial jurisdiction based on the appropriate test of the 'effective control' of the State of origin on the activities that caused the transboundary damage and the consequent human rights violations, opening the path for actions against a State's acts or omissions concerning GHG emissions originating in its territory and causing harm to fundamental rights outside its territory.

A stop to these openings emerged in one of the three cases that the ECHR decided on April 9th 2024. In the *Duarte* case, the Court, adopting a more restrictive notion of jurisdiction than the one put forward by the IACtHR and by the CRC, found the claims directed by some Portuguese youth against thirty-two States other than Portugal to be inadmissible. The Court of Strasbourg stressed that no specific link between the applicants and such States could be established and that, contrary to the cases of specific dangerous activities, whose impact can be localized, the harmful consequences produced by GHG emissions are diffuse. According to the Court, using a criterion of reliance on control over the person's interest for establishing the State's extraterritorial jurisdiction would lead to a lack of foreseeability of the Conventions' reach. Paradoxically, the ECHR's decision could end up fostering the use of environmental transnational litigation in the traditional sense, as cases could be strategically constructed in order to identify specific links between

the applicant and the respondent in terms of transboundary harm, hence overcoming the objections of the ECHR.

Climate transnational litigation shows how climate change continuously challenges old legal paradigms, fostering the need for adapting existing instruments and building new ones. However, the urge to take action could in turn promote the use of instruments which would encounter less limitations, like the successful outcome of the other case decided by the ECHR on the same day, the *Klimaseniorinnen* case – in which a State was condemned for its failure to fulfill its positive obligations to protect individuals within its own jurisdiction, hence not involving transnational *strictu sensu* aspects – shows.

SYMPOSIUM

THE AUSTRIAN CODIFICATION OF ADMINISTRATIVE PROCEDURE

DIFFUSION AND OBLIVION (1920 – 1970)

G. DELLA CANANEA, A. FERRARI ZUMBINI, O. PFERSMANN (EDS)

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SYMPOSIUM

THE AUSTRIAN CODIFICATION OF ADMINISTRATIVE PROCEDURE: DIFFUSION AND OBLIVION

INTRODUCTION

1. At the crossroads of European civilization: Florence and Vienna

Florence, the city that is universally known for its culture, before and during the Renaissance, the period of the rebirth of the culture of ancient Greek and Rome, was the setting for an event which preceded the celebrations that will take place as of 2025, in Vienna and elsewhere, for the one-hundred anniversary of the codification of administrative procedure in Austria. The event was a book launch. It concerned the book edited by Giacinto della Cananea, Angela Ferrari Zumbini and Otto Pfersmann on that codification that was, if not the first in absolute terms, the most significant of the twentieth century for its reach. The aim was precisely to generate interest not only on the codification itself, but also on the more general issue of the interaction between commonality and diversity in public law.

Both public lawyers and historians of law, as well as many students of the Florence law school assembled for these purposes. Discussions were based on critical issues, including the nature and purposes of judicial review of administration in various institutional settings and the emergence of the movement for administrative procedure legislation, again, in more than one type of constitutional context, including democracies and more or less authoritarian regimes. Why was such a symposium organized with participants of such diverse background and viewpoints? It is axiomatic that administrative law transformed throughout the last century and that its transformation was related to various challenges. The relative importance of such challenges is, however, questionable. What were the characteristics of the Austrian codification of administrative procedure? What were the values underlying the codification, the rule of law or administrative

efficiency? Was the reform only based on national necessities or was it influenced by external factors? To what extent were the potentials of the reform attained? And, last but not least, why did other nations, sooner or later, follow Austria on that path of reform?

The Symposium sought to reappraise and evaluate some basic assumption about administrative and public law, with a view to developing greater concern and awareness of the problems and potentials of this increasingly important field of law.

2. Structure of the Symposium

The following pages report in greater detail some of the concepts, ideas, and conflicting views that were formulated during the Symposium. There will be no attempt to synthetize them here. It will suffice to say that the discussion was opened by Bernardo Sordi, professor of history of law and continued with the views expressed by Leonardo Ferrara, professor of administrative law. Next, two of the editors, Giacinto della Cananea and Angela Ferrari Zumbini (professors of administrative law in Milan and Naples, respectively, and members of the IJPL) responded to the comments previously made. Stefano Mannoni, professor of history of law, too, expressed his views. Neither his views, nor those of other participants, unfortunately, could be translated in time for the publishing of this special issue. But their contribution to the debate is gratefully acknowledged.

3. Acknowledgments

Gratitude is due to the Florence Law School that made the Symposium possible, coherently with its long experience of debate about law and its relationships with other social sciences and with its distinctive tradition of "critical" spirit. The full meaning and significance of the comparative research discussed during the Symposium remains to be seen. The inquiry is open-ended and ongoing. The next steps have been identified. Recommendations for shedding light on new aspects have been formulated.

TOWARDS AN IMPORTANT CENTENARY. THE AUSTRIAN LAW ON ADMINISTRATIVE ACTION UNDER SCRUTINY IN RESEARCH ON THE COMMON CORE OF EUROPEAN ADMINISTRATIVE LAWS[1]

*Bernardo Sordi**

1.

The book we are presenting today is the result of a major project that has brought together wide-ranging research by a variety of scholars on the European origins of administrative procedures. A volume on an Austrian law that is nearly a century old, written in English, looking towards Europe's eastern borders and rarely the focus of comparative study, may initially seem a topic reserved for initiates and specialists.

So why are we including it in a series of lectures as a valuable addition to the education of administrative law students, albeit advanced ones? I would say there are essentially three reasons.

The first concerns the objective importance of the historic event itself. The Austrian Republic of the 1920s, situated in the reduced territorial confines of Upper and Lower Austria, was certainly far removed from the Habsburg myth and the great power which, in 1815, had orchestrated peaceful relations within the European state system in Vienna that would last for almost a century. Nevertheless, it remains a political laboratory of exceptional interest within the framework of the fragile democracies that sprang from the collapse of the Central Empires following the First World War. It embarked on a challenging constitutional journey covering everything from the form of government to federal structure, to a system of rights and protections and effective governance in line with democratic

* Full Professor of History of Medieval and Modern Law, University of Florence

[1] The speech given at the presentation of the volume on 19 March 2024 in Florence is published here, retaining its oral form: G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920-1970)*, Oxford, Oxford University Press, 2023.

principles. It boasted one of the most innovative schools of law of the twentieth century and, in the context of our discussion today, emerges as the true forerunner of an institution – administrative procedure – that has increasingly become the cornerstone of the entire administrative system. Suffice it to recall Law No 241 1990 in Italy and its amendment in 2005

Secondly, we have the opportunity to participate in an important research project, as mentioned in the title, which has already proven effective and aims to identify a European Common Core beyond the usual boundaries of private and commercial law or common constitutional traditions. The project focuses on administrative law, which is uncodified and varies greatly between nations in terms of chronology, organisation, models of action, and judicial protection. It is characterised by the marked historical and institutional differences between nations, a feature that has long made comparison difficult. Today, however, having become unshackled from merely contrasting different legal traditions, it can provide substantial commonalities and unexpected convergences against a backdrop of lasting dissonances.

Thirdly, we wish to honour a Florentine tradition that has long focused on administrative procedures, dating back to figures such as Federico Cammeo and Giovanni Miele. We, students at the time, became involved in an important reform project inspired by the Austrian model led by Mario Nigro and Giorgio Berti, and continued by Umberto Allegretti. These two masters were called upon to bring to Tuscany the themes and interests of research and legislative innovation so dear to the school of Feliciano Benvenuti, and, for this reason especially, they constantly referred to the Austrian law of 1925 in their lectures.

2.

Why did Austria, in particular, assume this pioneering role? It did so long before Germany (1976) and Italy (1990); before the United States (1946); before England, which cannot be said to have had a legal system sensitive to procedural matters. And even before France, unquestionably the homeland of *droit administratif* and the Conseil d'État model, but precisely because it had founded its institutional model, since the Revolution, on a clear distinction between justice and administration, one that was strongly resistant

– until very recent measures – to accommodating non-contentious administrative procedures.

Why then did Austria become the chosen land for administrative procedures, offering, from a territory that the outcome of the First World War had suddenly rendered peripheral, such a significant contribution to a European Common Core, as we have just seen, albeit with some "negative results", as the volume honestly acknowledges?

Some answers were already known. Let me outline them quickly.

The first is the opportunity presented by certain nineteenth-century decisions when the Austrian system of administrative justice was established. The law founding the *Verwaltungsgerichtshof* (Administrative Court) in 1875 – a well-known law at the time, in Italy too, thanks to a celebrated and timely reading by Marco Minghetti – refers to a defect absent in the French tradition and in the triad which, with the Crispi Law of 1889, would soon characterise the power of review of the Fourth Section of the Council of State. In the event of failure to adhere to essential procedural requirements in administrative proceedings (*wegen mangelhaften Verfahrens*), the *VGH*, acting as a single central court, annuls and sends decisions back to the administrative authority for reasons of procedural defect.

However, these requirements were far from being established by legislation. The general principles of administrative action across Europe had not been set by lawmakers. Rather, a complex dialogue between case law and doctrine, with balances varying from country to country, was shaping them during the turning point of the late nineteenth century, when the first signs of some shared pathways among the experiences of administration in different European States began to emerge.

Austria, influenced by the *Rechtsstaat* endeavour, which here interprets administrative justice in distinctly jurisdictional terms as part of a *Justizreform*, also generated the first case law, described in our volume. And it is precisely here that concepts such as impartiality, information, the right to be heard, oral hearings, access, proceedings, reasoning, and legal certainty began to take shape. These aspects were later codified by parliament in 1925, resulting in a well-structured consolidated law, which is presented in this volume, together with the English version of the text.

And there was also a degree of attention in legal scholarship unmatched in other continental contexts, where the term itself was used sparingly, with the sole exception of the Spanish scenario – thoroughly analysed by Javier Barnes in the volume – albeit less easily generalised. Even where legislative solutions existed, hidden away in the darkest corners of the legal system, such as in Article 3 of the Italian law abolishing administrative litigation in 1865, or in laws on expropriation for public utility, they were not sufficiently used to build a "procedural" institution capable of guiding administrative decision making. The traditional image of a pure administration still shrouded in the mysteries of sovereignty, or the private-law model of the sovereignty of the will, proved too ingrained for the legal importance of administrative decision-making to be acknowledged.

This scholarly attention soon culminated in a celebrated work: Friedrich Tezner's manual of administrative procedure of 1896. A future member of the *Verwaltungsgerichtshof,* he primarily focused at this time on one of the great themes of the nineteenth century: administrative discretionality, which directly impinged on the functioning of administrative justice systems and the extent of judicial review. Tezner's volume, offering the first significant systematic analysis of the various stages of procedure, was unparalleled on the continent at that time. However, it was perhaps due to this uniqueness that it received negative reviews in German legal journals, starting with that of Georg Meyer.

Alongside this internal development within the Austrian model of administrative justice, there emerged a general theoretical strand, notably represented in 1911 by Hans Kelsen's *Hauptprobleme*. Kelsen began to challenge the contrast between *Justiz* and *Verwaltung*, although his volume, in my opinion, rather overemphasises the relative incompatibility between Tezner and Kelsen. Meanwhile, even before 1914, there was, in Austria, growing institutional attention to the need for legislative regulation of administrative procedure.

This tradition remained intact until after the First World War, with some additional elements supporting the centrality of the new procedural institution (which still could not really be considered a substantive legal principle).

The establishment of the Austrian Republic, to which Hans Kelsen primarily contributed at the behest of Social Democratic Chancellor Karl Renner (promulgated on 1 October 1920), provided

further impetus. It incorporated a particularly broad version of the principle of administrative legality (the famous Article 18 in the volume appositely recalled by Dian Schefold; p. 235). It reserved the subject of administrative procedure to federal legislation and fostered important debate on the topic of administrative democracy.

Leading the way in Europe, it introduced a form of constitutional review of legislation, namely Kelsen's negative legislator, elevated to become the guardian of the constitution in particularly conflict-ridden democracies, such as those of the post-World War I era, and arbiter of its delicate federal balances. The theoretical resolution of the conflict between *Justiz* and *Verwaltung* translated into the choice of jurisdiction as the bulwark of the "regularity of execution" and the legislative will itself, also becoming the primary guarantee of constitutional normative adherence.

The Kelsenian hierarchical structure (already fully developed in the *Allgemeine Staatslehre* of 1925) would be its most famous theoretical representation, while Adolf Merkl's administrative law manual, published in 1927, would be its main administrative systemisation. Meanwhile, Carl Schmitt, relying – as is well known – on another "defender of the constitution", would brand the Viennese group with the derogatory term "jurists of jurisdiction".

3.

However, it seems to me that the book we are presenting offers another significant contribution to scholarship (especially evident in the excellent essays by Angela Ferrari Zumbini and Otto Pfersmann, which provide assessments rich in interpretative nuances). It is not simply a matter of *Auseinandersetzung*, a political-conceptual contrast. This law enacting administrative procedure was one of administrative simplification, as well as the result of a conditional loan granted to Austria by the League of Nations at a time when the Republic was reaffirming its prohibition of annexation to Germany, changing its currency by abandoning the crown for the schilling..., within the framework of the so-called *Genfer Reformbeschlüsse* (Geneva Reform Decisions) of October 1922; followed by the Locarno Pact in 1925, while the *Anschluss* would

come later, definitively dismantling the precarious order of Versailles, on the eve of the Second World War, in March 1938.

The concerns of the international creditor centred on public spending, reductions in public employment, and streamlining administration. There was no specific international commitment regarding administrative procedure. Yet, as Stefano Mannoni aptly observes, if a law on procedure was ultimately created, it was certainly due to the many internal pressures we have examined but also to the international oversight and cooperation that this first, significant, and often undervalued experiment in international organisation brought with it.

In this interplay between international pressure and domestic tradition, as Otto Pfersmann writes so eloquently, a central fact emerges: it was the young Austrian Republic itself which considered the procedural aspect an essential part of the reform, in order to streamline its administrative machinery according to international requirements (p.220).

We return, then, to the *Mitteleuropean* melting pot, at the very time when *die Welt von Gestern*, *The World of Yesterday*, had suddenly and definitively dissolved (a world to which Stefan Zweig, aptly cited in the final pages of our volume, added a subtitle that is particularly fitting in terms of the perspective of this book: *Memoirs of a European*). Yet, it was precisely this melting pot which produced the "Diffusion and Oblivion" of this great administrative reform, most commendably investigated and meticulously reconstructed in this work.

Rereading Adolf Merkl's *Allgemeines Verwaltungsrecht* written two years later, it is clear that the goal had been achieved and a new and significant journey had begun. "*Im Grund ist alle Verwaltung Verwaltungsverfahren*" – "fundamentally, all administration is always administrative procedure, just as administrative acts are simply the result of administrative procedure". Indeed, it is this procedure which also provides the same guarantees in relation to administrative relationships that the judicial process offers to the parties, prioritising legality and opening the door for citizen participation in administration.

SOME LITTLE NOTES ON ADMINISTRATIVE JUSTICE

PROMPTED BY THE READING OF
THE AUSTRIAN CODIFICATION OF ADMINISTRATIVE PROCEDURE
G. DELLA CANANEA - A. FERRARI ZUMBINI - O. PFERSMANN (EDS)

*Leonardo Ferrara**

1.

There are numerous reasons to feel enthusiastic after reading the volume edited by G. della Cananea, A. Ferrari Zumbini, and O. Pfersmann. One of the most interesting findings in this collaborative study is certainly the scaling down of the widespread belief that public law is inextricably linked to the social, political, and historical context of individual countries. This is a result that fits perfectly within the framework of an even broader comparative research project funded by the European Research Council, which focuses on the 'common core' of European administrative law.

Equally important is the emphasis on the mitigating effect that the Austrian law on administrative procedure ultimately had on authoritarianism and arbitrariness, influencing the regulation of some Eastern European countries, such as Poland and Czechoslovakia, after their experience of Soviet government.

Perhaps it is even more noteworthy that this volume has brought lesser-known legal systems into the spotlight, overturning the traditional comparative approach that usually focuses only on the legal systems of Germany, France, Spain, and the United Kingdom (to remain within the European context, of course).

* Full Professor of Administrative Law, University of Florence

2.

I could go on. However, I would be dishonest if I did not reveal at this point that my enthusiasm for the volume is not matched by my enthusiasm for comparative studies in general. The explanation is very simple. I do not specialize in comparative law, but at the same time, I have developed a certain scepticism towards the instrumental use that is often made of the comparative method. In fact, I have heard and seen similarities or dissimilarities being casually manipulated to support a thesis, if not an ideology.

This is particularly the case when the German or Spanish administrative courts are portrayed as special courts similar to the Italian one.

The truth is that in Germany, the Basic Law (*Grundgesetz*-GG) of 1949 places administrative courts under a single jurisdiction (Article 92) and in a single judicial order[1]. Within one jurisdiction we find five principle and co-equal branches (see also Article 95 GG), namely ordinary (civil and criminal), administrative, financial, labour, and social. The Administrative Court Act (*Verwaltungsgerichtsordnung* – VwGO), moreover, applying Articles 97 of the GG, establishes that "administrative jurisdiction is exercised by independent administrative courts, separately from the administrative authorities" (para. 1).

A Spanish Law of December 27, 1956 introduced genuine jurisdictional oversight, entrusted solely to ordinary courts, albeit with specialized competence in handling disputes concerning public administration[2]. Thus, specialized[3] sections are established within the general courts of first and second instance. The Spanish Constitution of 1978, furthermore, assigns an exclusively advisory function to the *Consejo de Estado* (defined as the "supreme advisory

[1] As precisely recalled in M. Carrà, *Sindacato giurisdizionale sulla discrezionalità e principi dello Stato di diritto in Germania*, in S. Torricelli (ed.), *Eccesso di potere e altre tecniche di sindacato sulla discrezionalità* (2018); Id., *Atipicità del diritto di azione ed effettività della tutela nel processo amministrativo tedesco*, in D. Sorace (ed.), *Discipline processuali differenziate nei diritti amministrativi europei* (2009); R. Bifulco, *La giustizia amministrativa nella Repubblica Federale di Germania*, in G. Recchia (ed.), *Ordinamenti europei di giustizia amministrativa* (1996); G. Napolitano, *Introduzione al diritto amministrativo comparato* (2020).

[2] E. García de Enterría, *Le trasformazioni della giustizia amministrativa* (2007); F. Lopéz Ramón, *L'evoluzione dell'organizzazione della giustizia amministrativa in Spagna*, in S. Raimondi-R. Ursi (ed.), *La riforma della giustizia amministrativa in Italia ed in Spagna* (2002).

[3] G. Napolitano, *Introduzione*, cit. at 1.

body of the Government": Article 107) but firmly establishes the principle of jurisdictional unity and the separation of judicial power from that of the executive (Article 117, para. 1: "Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates of the Judiciary who shall be independent, irremovable and liable and subject only to the rule of law." Article 117, para. 5: "The principle of jurisdictional unity is the basis of the organisation and operation of the Courts [...]"). In 1998, lastly, the *Ley de la Jurisdicción Contencioso-Administrativa* implemented the *Ley Organica del Poder Judicial* of 1985[4].

Regarding the United Kingdom too, some similarities with Italian administrative justice sometimes appear artificially exaggerated: yet "the English model [...] remains firm on the point of jurisdictional unity"[5]. However, it must be considered, on the one hand, that in the UK the rule of law assigns a central role to Parliament, which is politically responsible also for implementing its will, expressed precisely through the law[6], but, on the other hand, in disputes against the public administration before the ordinary courts, there has gradually emerged a need for an at least partially differentiated procedural framework (the judicial review of administrative action according to the reform of 1977). Furthermore, a specialized section (the Administrative Court) within the High Court was established in 1999. Lastly, "the private individual can rely on very refined non-judicial remedies"[7], such as those entrusted to Administrative Tribunals. These were administrative bodies with sectoral jurisdiction, which, after the 2007 reform, not only saw a reduction in number and organized into a dual-tier system of judgment with general competence but

[4] E. García de Enterría, *Le trasformazioni*, cit. at 2; R. Briani, *Effettività della tutela tra rito ordinario e riti differenziati nella giustizia amministrativa spagnola*, in D. Sorace (ed.), *Discipline processuali*, cit. at 1.

[5] E. Balboni, *Qualche idea, antica e nuova, a favore dell'unicità della giurisdizione*, Quad. cost. 2011; E. Marotta, *La giustizia amministrativa in Inghilterra*, in G. Recchia (ed.), *Ordinamenti europei*, cit. at 1; G. Napolitano, *Introduzione*, cit. at 1.

[6] Until 2005, the *House of Lords* was the final court of appeal: see D. De Grazia, *Il sistema di giustizia amministrativa del Regno Unito: verso l'integrazione delle tutele*, in D. Sorace (ed.), *Discipline processuali*, cit. at 1.

[7] M. Macchia, *La riforma degli* Administrative Tribunals *nel Regno Unito*, Riv. Trim. Dir. Pubbl. 2009.

were endowed with guarantees of judicial[8] independence, leading to claims regarding their substantial judicialization[9] although these were not without controversy. Appeal against their decisions to the ordinary courts is permitted, however.

3.

However, a special court is indeed found in Austria. This is evident in the experience of the independent administrative panels introduced by a constitutional amendment in 1988. These served as the first stage of administrative justice[10]. Nevertheless, even after the 2012 reform of administrative jurisdiction, at least government nomination of judges[11] is not something that can be disregarded.

It is true, however, as Chiti writes in the volume[12], that this court, much like the Austrian legal system in general, is poorly studied or only examined within the broader context of Germanic legal culture. It might come as a surprise to discover that the requirement to conclude the procedure with an express decision, as stipulated in Article 2 of Law No. 241 of 1990, already existed in the Austrian law on administrative procedure of 1925[13]. Or perhaps it will be even more surprising to learn that the forerunner of the action against silence regulated by Article 31, paragraphs 1-3, of the

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[8] Even though not directly related, see R. Caranta, Administrative Tribunals *e* Courts *in Inghilterra (e Galles)*, in G. Falcon-B. Marchetti (ed.), *Verso nuovi rimedi amministrativi? Modelli giustiziali a confronto* (2015).

[9] M.P. Chiti, *La giustizia nell'amministrazione. Il curioso caso degli* Administrative Tribunals *britannici*, in G. Falcon-B. Marchetti (ed.), *Verso nuovi rimedi amministrativi?*, cit. at 8; M. D'Alberti, *Diritto amministrativo comparato* (2019); M.C. Pangallozzi, *Le trasformazioni del diritto amministrativo inglese: i "nuovi"* Administrative Tribunals, Riv. Trim. Dir. Pubbl. 2016; G. Ligugnana, *Le trasformazioni della giustizia amministrativa inglese: la riforma dei Tribunals*, Dir. Proc. Amm. 2009.

[10] Previously, the VwGH rendered decisions at a single instance.

[11] See giustiziainsieme.it/it/news/74-main/138-diritti-stranieri/3058-una-panoramica-sulla-corte-suprema-daustria.

[12] M.P. Chiti, *The Austrian 1925 General Administrative Procedure Act: A View from Italy*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) p. 181.

[13] S. Storr, *The Structure and Main Features of the Austrian General Administrative Procedure Act*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) p. 53.

Italian Code of Administrative Procedure, and thus, the action through which the aforementioned obligation is condemned in Italy in cases of non-compliance, does not stem from the German *Verpflichtungsklage* but the Austrian *Säumnisbeschwerde*. The issue is less about timing and more about rules and procedures. Whereas the German system, in the event of a judgment not being enforced by the public administration, resorts to indirect coercive measures (in the form of fines), the Austrian system, on the other hand, relies on proceedings extending to the merits, of a substitutive and executive nature, thus bearing many similarities to our compliance proceedings[14].

4.

From the perspective of a scholar of administrative justice, I can now refer to a couple of questions prompted by my reading of the volume.

On more than one occasion, the Spanish law of 1889[15] has been cited as a precedent for the Austrian Code of Administrative Procedure. At the same time, the result of the work by the Forti Commission, established in 1944 by the Bonomi Government to address the general reform of public administration, is recognized as the first official Italian document to discuss the need to regulate administrative procedure[16].

The question then arises as to whether Article 3 of Annex E of Law No. 2248 of 1865 (the law abolishing administrative litigation) might warrant a mention.

It is true that this provision was never implemented and, at most, assumed a prospective or policy-oriented function to be realized through individual sector-specific laws (as happened in the case of Expropriation Law No. 2359, also from 1865, which even anticipated the current notice of rejection under Article 10-*bis* of Law No. 241 of 1990, at Article 5). However, provision was made

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[14] May I refer in this regard to L. Ferrara, *Prime riflessioni sulla disciplina del silenzio-inadempimento con attenzione alla Säuminsbeschwerde austriaca*, in G. Falcon (ed.), *La tutela dell'interesse al provvedimento* (2001) pp. 72 ff.

[15] See, for example, G. della Cananea, *Introduction*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) pp. 1 and 3.

[16] M.P. Chiti, *The Austrian 1925 General Administrative Procedure Act*, cit. at 12, pp. 179 and 182.

for the possibility for interested parties to submit written submissions and observations, which seems to presuppose not only the possibility of participating in the proceedings but also of doing so in an informed manner (as making submissions requires knowledge of the administrator's intentions). Also envisaged was the prior issuance of an opinion, i.e., the essential involvement of an advisory body capable of mitigating the political arbitrariness of both the initiating and adjudicating administration through technical assessments together with the requirement to justify the administrative measure, with the justification being expected to take into account the submissions and observations put forward by the private party. There existed, then, a genuine procedural framework or principle of profound innovative significance.

Moreover, Annex E as a whole is the result of a compromise between the protective and the efficient-authoritarian core of the liberal ideology of the nascent Italian[17] State, a compromise exactly mirrored in the representation of the intentions of the Austrian legislator of 1925, torn between the demands for uniformity[18] and the protection of rights[19].

I turn now to the second question.

There is an introductory chapter by Clemens Jabloner (President of the VwGH from 1993 to 2013), dedicated to the judicial oversight of government activities seen from the standpoint of the separation of powers[20].

One may wonder then whether there is a risk of undervaluing the opposing perspective of safeguarding subjective legality. Yet, studies generally depict the Austrian administrative justice system as being focused on safeguarding subjective (albeit public) rights from the outset, with the protection of objective law merely reflecting the defence of the rights and interests of the

[17] For those interested in further details, L. Ferrara, *Lezioni di giustizia amministrativa* (2024).
[18] G. della Cananea, *Introduction*, cit. at 15, p. 7 and S. Storr, *The Structure and Main Features*, cit. at 13, p. 39.
[19] G. della Cananea, *Introduction*, cit. at 15, p. 7 and S. Storr, *The Structure and Main Features*, cit. at 13, p. 41.
[20] C. Jabloner, *Administrative Procedure and Judicial Control*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) pp. 21 ff.

citizen (rather than vice versa, as was the case with our original concept of legitimate interest)[21].

Moreover, the volume makes various allusions to the opposite perspective of the "rights of the individual"[22]. But already some years ago, Angela Ferrari Zumbini noted in an invaluable essay anticipating this research that the previous jurisprudence of the *Verwaltungsgerichthof* aimed to provide "subjective protection against public power"[23].

On the other hand, Jabloner's observation is of particular interest: "The separation of the judiciary and the administration has a deep historical, and somewhat contradictory, dimension. It is always surprising for students to learn that the principle of separation of judiciary and administration did not initially serve exclusively, nor even primarily, to protect the judiciary but to safeguard the administration"[24].

This is precisely the conception of separation of powers as mechanical, rigid, fundamentalist, and subjective rather than functional that still persists in the system despite the current reversal to protect the independence of the judiciary, such as when cases of the substantive jurisdiction of an administrative court are classed as exceptional scenarios where the court, standing in for the public administration, merely applies the law[25].

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[21] V. K. Ringhofer, *Der Verwaltungsgerichtshof* (1955) pp. 80 ff.; F. Koja, *Allgemeines Verwaltungsrecht* (1996) pp. 833-834.

[22] See, for example, G. della Cananea, *Introduction*, cit. at 15, p. 7.

[23] A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo: il modello austriaco* (2020).

[24] C. Jabloner, *Administrative Procedure and Judicial Control*, cit. at 20, p. 21.

[25] This is what happens when the court determines the boundaries of territorial entities, sets appropriate penalties, and even goes so far as to "correct the outcome of elections and replace candidates who have the right to be declare but were declared illegitimately" (Article 130, paragraph 9, Code of Administrative Procedure).

THE OWL OF ATHENA: THE DIFFUSION OF ADMINISTRATIVE PROCEDURE LEGISLATION IN *MITTELEUROPA*

*Giacinto della Cananea**

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* Full Professor of Administrative Law, Bocconi University, Milan

1. Prologue

I am very grateful to all the commentators for the trouble they have taken in the realization of our book. Responding to them will, I hope, help me clarify various aspects of what we were trying to achieve and do justice to the intellectual exchanges we had not only with all the contributors but also with other scholars – including Mauro Bussani, Roberto Caranta, Sabino Cassese, Martina Conticelli, Paul Craig, Marco Mazzamuto and Jacques Ziller – who participated as discussants in the two workshops that were held before the book was published (it is the fifth in the series that Oxford University Press has devoted to research on the common core of administrative laws in Europe)[1]. It will also help me to better explain how our focus on the Austrian codification of administrative procedure allowed me to walk a new path in the discussion on commonality and diversity in public law.

2. Reply to commentators

2.1. A fertile diversity of views

It has never been easy to describe the transformation of administrative law. All those involved in the field of public law, I think, would agree with the modest assertion that administrative law is a distinct legal field, one that has emerged relatively recently, several centuries after private law and criminal law. However, there is disagreement as to whether, historically speaking, administrative law was a product of the *ancien régime*, as Tocqueville called it, or the fruit of democratization, which spread

[1] The first attempt to carry out what we called a synchronic comparison concerned one of the areas in which, according to Albert V. Dicey, diversity among national laws was most striking; that is, what many Continental lawyers still call the "non-contractual liability" of public authorities: see G. della Cananea & R. Caranta (eds), *Tort Liability of Public Authorities in European Laws* (2020). This was followed by a comparative study concerning the other area that Dicey regarded as a manifestation of profound diversity, namely judicial review of administration: see G. della Cananea & M. Andenas (eds), *Judicial Review of Administration in Europe. Procedural Fairness and Propriety* (2021). Meanwhile, the other line of research, concerning diachronic comparison, began with an inquiry into the emergence of general principles of administrative law: see G. della Cananea & S. Mannoni (eds), *Administrative Justice Fin de siècle. Early Judicial Standards of Administrative Conduct in Europe (1890-1910)* (2021). Another line of research developing synchronic comparison concerned the classic subject of expropriation: M. Conticelli & T. Perroud (eds), *Administrative Limitations of Property Rights* (2022).

throughout almost all corners of Europe after the French Revolution[2]. There is also no shortage of disaccord surrounding the nature and purpose of administrative law and its relationship with private law.

With regard to the last issue, both Bernardo Sordi and Leonardo Ferrara conceive the distinction between private law and public law in ways that differ from mine[3]. I am, therefore, particularly grateful to both for inviting us to discuss our book on the Austrian codification. This is but a further demonstration that diversity of thought in no way constitutes an obstacle to debate. Quite the contrary, diverse ways of thinking encourage discussion and debate, which stimulates the mind and helps to envisage new solutions to problems or identify new difficulties.

Before responding to Sordi and Ferrara's thought-provoking comments, we explore the idea that comparative research on the common core of European administrative laws sprang from dissatisfaction with a number of *idées reçues*, but it greatly benefited from fresh connections between ideas and methodologies outside the field of administrative law. This exploration will be followed by an analysis of the comments we received on the book on Austrian law. The subsequent section will address the various ways in which commonality and diversity interact.

2.2. Shifting the focus and methodology of comparative inquiries

As is often the case, the new research grew from discontent. There was dissatisfaction with the (perhaps now less prevalent) opinion that administrative law is, even more than other fields of law, inextricably linked to the State, with each State being a product of a *Volksgeist* (the spirit of the people). There was some frustration with the persistent focus on judicial review of administration, and, more importantly, there was discontent with the traditional approach to what is termed "comparative administrative law". The first two aspects will be illustrated more thoroughly in the next sections.

Meanwhile, it may be helpful to explain in what sense our comparative enquiry is an original combination of ideas. Generally speaking, when people hear about something being a new idea,

[2] A. de Tocqueville, *L'Ancien régime et la Révolution* (1856; 1967).

[3] See B. Sordi, *Diritto pubblico e diritto privato. Una genealogia storica* (2020); L. Ferrara, *Lezioni di giustizia amministrativa* (2024).

such as an original analysis of a legal principle or an unconventional state-of-the-art concept, many tend to assume that it is entirely novel, never before conceived or thought about. This is seldom the case, however. Few thinkers propose entirely new ideas, though Santi Romano was perhaps an exception when he developed his conception of the legal order in terms similar to, but distinct from, Maurice Hauriou's institutional theory. But there is another method of generating new ideas. It involves forming new and unexpected connections between existing ideas. Although this may go unnoticed, most of our ideas are inspired by concepts from the past. In other words, new ideas are the result of innovative combinations of what has come before, allowing us to develop a new idea.

More specifically, there was no 'starting from scratch' in our case. Rather than using the conventional approaches to administrative and public law, we attempted to pick up threads from the past and use them as hypotheses to be tested. There were, essentially, three basic lines of thought: a) The realization that it was high time we questioned the prevailing focus on the judicial review of administration as distinct from administrative action in itself, b) That in this respect, the role of general principles might be even more important than it is in private law due to the lack of codification, and c) That greater attention to administrative procedure legislation was required, as a small number of comparative scholars had suggested in the past[4].

How to go about testing these hypotheses was quite another matter. Rudolf Schlesinger observed six decades ago that all too often in the field of private law, scholars merely juxtaposed national reports without progressing to the subsequent and crucial stage of genuine comparison[5]. The same observation could be applied to administrative law. It was both interesting and important, therefore, to look for inspiration elsewhere, and it came from the methodology adopted by Schlesinger and his colleagues during the Cornell law seminars of the 1960s, subsequently refined by Mauro Bussani, Ugo Mattei, and other scholars[6]. Essentially, this

[4] G Pastori (ed.), *La procedura amministrativa* (1965); G. Isaac, *La procedure administrative non contentieuse* (1968), 109.
[5] R.B. Schlesinger, *Introduction*, in R.B. Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (1968), 5.
[6] M. Bussani and U. Mattei, *The Common Core Approach to the European Private Law,* 3 Columbia J. Eur. Law (1997), 339.

methodology unfolds in three steps. The first step is to prepare hypothetical cases to be submitted to a group of national experts in order to determine whether they are suitable for all the legal systems selected for comparison. Ours is therefore a factual analysis. Once the suitability of those hypotheticals has been confirmed, the experts are asked to provide solutions according to the operational rules of their legal systems, as well as background theories. Lastly, the solutions are compared. One more fundamental source of inspiration remains to be mentioned: Gino Gorla's idea that history and legal comparison are closely intertwined[7].

All in all, our rethinking of administrative law has been inspired by various ideas from the past. Through the innovative combination of pre-existing elements, we have sought to shed light on how the same issues are addressed and resolved across diverse legal systems. This approach has allowed us to discuss not so much whether a common core exists despite the many differences among these legal systems, but also to discern the nature of this common core[8].

2.3. The owl of Athena: the spread of Austrian ideas

The Austrian codification of administrative procedure, as depicted in some old treatises and commentaries, has raised some interesting inquiries. Why was a codification– in itself a complex cultural and political change – adopted following the collapse of the Habsburg Empire in 1919? And why did the newly formed nations embark on a similar, if not identical trajectory? Why was there no such reform initiative in France, which had pioneered the *Conseil d'Etat*, the prototype of the institution entrusted with both judicial and advisory roles?

Concerning the first question, it would seem straightforward to reply that Vienna had been at the crossroads of European cultures, trading routes (suffice it to mention the Danube), and

[7] See G. Gorla, *Diritto comparato e diritto comune europeo* (1981) and R.B. Schlesinger *The Common Core of Legal Systems: an Emerging Subject of Comparative Study*, in K. Nadelmann, A.T. von Mehren, J.N. Hazard (eds.), *Twentieth Century Comparative and Conflicts. Law, Legal Essays in Honor of Hessel E. Yntema* (1961), 65 (observing that the concept of common core derived plausibility from historical studies, concerning the common roots of legal institutions).

[8] G. della Cananea & M. Bussani, *The Common Core of European Administrative Laws: A Framework for Analysis*, 26 Maastricht J. Eur. & Comp. L. 217 (2019).

power relationships for centuries[9]. The cultural dimension, too, should not be overlooked. Between 1890 and 1915, Vienna had witnessed cultural advancements in the spheres of philosophy, literature, art, and architecture, spearheaded by – among others – Ludwig Wittgenstein, Sigmund Freud, Joseph Kafka, Stefan Zweig, Gustav Klimt, Alfred Loos, and Walter Gropius. One possible answer to the first two questions could thus be that once a certain level of civilization had been reached, some kind of codification became necessary, especially within a multinational polity, although it would not be adopted until after the dissolution of the centuries-old Empire.

This explanation owes much to the idea that culture comes to understand a particular way of life just as it fades away. This concept was eloquently articulated by Hegel in his *Philosophy of Right* as follows:

"Philosophy, as the thought of the world, does not appear until reality has completed its formative process, and made itself ready. History thus corroborates the teaching of the conception that only in the maturity of reality does the ideal appear as counterpart to the real, apprehends the real world in its substance, and shapes it into an intellectual kingdom. When philosophy paints its grey in grey, one form of life has become old, and by means of grey it cannot be rejuvenated, but only known. The owl of Minerva takes its flight only when the shades of night are gathering."[10]

The underlying assumption is that philosophy appears only with the "maturity of reality". As a variation on this theme, it might be said that the codification of administrative procedure was preceded by significant cultural advancements. One was internal to administrative law, exemplified by Friedrich Tezner's work on developing standards of administrative conduct. Another area of progress concerned public law in more general terms. Hans Kelsen and his colleagues and followers, in particular Adolf Merkl, did not only define an innovative and systematic legal theory, known as the "gradual construction of law" (*Stufenbau*); they also contributed to shaping the new Austrian institutions. Kelsen was the architect of

[9] On the institutional history of the Empire, see J. Bryce, *The Holy Roman Empire* (1871, 3rd ed.).

[10] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts. Naturrecht und Staatswissenschaft im Grundrisse Erstdruck* (1820), Engl. transl. by S.W. Dide, *Philosophy of Right* (1896).

the Austrian Constitutional Court, the first in Europe, and he himself served as one of its first judges.

Bernardo Sordi agreed with our assessment of the importance of the intellectual foundations of the codification of administrative procedure. He also credited us with presenting a complementary explanation, an argument rooted in the more concrete international pressure exerted on Austria after WWI[11]. This is, in itself, a point of general interest, since it shows that the institutional design of democracies is not immune from external influences, a point to which I will return later.

2.4. Procedural administrative justice: Austria, France, and Italy

Culture and history also provide some answers to the other two questions raised at the start of the previous section. There are various reasons why Czechoslovakia, Yugoslavia, and Poland adopted administrative procedure legislation in the years following 1925. They can be summarized as follows. First of all, they shared the same problem of how to regulate administrative behaviour in a new social and legal environment. Secondly, there was a common legal culture, as most administrative officials and judges in the new nations had previously served in Austrian institutions. There may also have been a shared belief that the standards of administrative conduct defined and refined by the Administrative Court subsequently adapted by lawmakers, were in the "nature of things", so to speak. I will return to this explanation later too.

At the same time, it might be said that the reasons why neither France nor Italy adopted a codification of administrative procedure are, to some degree, similar, although they differ in other respects. They are similar as far as the role of the administrative court is concerned, one that not only adjudicates disputes between citizens and public authorities, but is also the latter's general advisor. They are similar also with regard to a more general reluctance to consider Austrian and German institutions after WWI. The legacy of that long and bloody conflict marked, therefore, a profound cultural separation. That gap between legal cultures was filled only some decades later, after another conflict. This, therefore, is partly a historical question. However, it may be

[11] B. Sordi, *Towards an Important Centenary. The Austrian Law on Administrative Action under Scrutiny in Research on the Common Core of European Administrative Laws*, in this Issue.

so only in part, in the sense that there might be an underlying theoretical question. Throughout our comparative investigation, Otto Pfersmann repeatedly called for greater attention to the differing conceptions of the *Rechtsstaat Prinzip* in Austria and Germany. Austria's emphasis on procedural justice and Germany's reluctance to embrace it might explain why Austria adopted general legislation on administrative procedure as early as 1925, while Germany did so five decades later, in 1976[12].

The historical and philosophical dimensions of procedural justice can also help provide an answer to the comments by Sordi and Ferrara. Sordi expressed his comment positively. He agreed with our decision to shed new light on the Austrian codification of administrative procedure, not least because it had been the subject of much intellectual interest among Italian public lawyers – such as Feliciano Benvenuti and Giorgio Pastori - in the 1960s. Ferrara, too, agreed with this choice. However, he added a critical remark. He noted that we had neglected to vindicate the importance of an old legislative provision of 1865, established soon after the political unification of Italy[13]. He observed, however, that this legislation had never been enforced and, significantly, Sordi expressed the same view[14]. In some sense, he did my job for me by offering both a description of the provision and an analysis of its potential.

This is precisely the point. What distinguishes the two different legal realities we are concerned with, Italy and Austria, is the disparity between two levels in the evolution of political and administrative institutions: the level of potential development and the level of actual development. There is clearly a gulf between them. It is not fortuitous, once again, that Mario Chiti, the author of the chapter in our book concerning the Italian legal order, is one of the few scholars to have studied the less recent legislative provisions concerning citizen participation in administrative procedure. In a previous and insightful work, he reached the conclusion that those provisions could be interpreted as establishing the legal foundations for a robust conception of participation but were not interpreted in this way[15]. This is the decisive point.

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[12] B. Sordi, *Towards an Important Centenary,* cit. at 11.
[13] L. Ferrara, *Some Little Notes on Administrative Justice*, in this Issue.
[14] B. Sordi, Ibid.
[15] M.P. Chiti, *Partecipazione popolare e pubblica amministrazione* (1977).

2.5. A gloss on administrative jurisdictions

Ferrara made another remark to which some serious thought must be given. When he laid the groundwork for his comments concerning the adoption of general legislation on administrative procedure, he did not simply reiterate from another perspective the critical remarks he had made in previous works about the evolution of administrative jurisdictions in Italy – or its involution. He put those remarks into a broader perspective, observing that, unlike Italy, other countries from the same legal tradition – Spain in particular – have not strayed from the conception of unitary jurisdiction, albeit enriching it with judicial specialization[16]. He also made a reference to the German legal system, where administrative jurisdiction is integrated into the same system as civil or ordinary courts. These remarks cannot be left unanswered, for they can help us to better understand commonality and diversity in public law.

Two remarks are called for at this juncture. The first is a variant of the one we made in the previous paragraph. Ferrara and I are in full agreement that one of the most serious constitutional issues concerning the Italian Council of State is the persistence of the executive branch's power to appoint a certain number of judges, not unlike what in France is known as the '*tour extérieur*'. We do not agree, though, on the importance of legal experience. Ferrara maintains that the fundamental reform of administrative justice was established in 1865 and that the subsequent changes distorted or even "perverted" it. I would not subscribe to a blind empiricist vision – *à la* Burke – of our administrative jurisdiction. However, once liberated from a certain discardable conception of what is "natural", empiricism can provide us with a non-negligible understanding of what is legally relevant and significant. Moreover, I think that it is incumbent on anyone who reflects on our institutions, for whatever purpose, to have a theory to incorporate their constitutional foundations. And the Constitution did not subscribe to the view that the civil jurisdiction – headed by the Court of Cassation – was at the same time the 'ordinary' jurisdiction for disputes between citizens and public authorities. Quite the contrary, it retained both the Council of State and the Court of Auditors as judges. This seems to me to raise no issue regarding the existence of an adequate constitutional foundation

[16] L. Ferrara, *Some Little Notes on Administrative Justice*, cit. at 13.

for these institutions, though their behaviour is open to criticism in more than one respect, as Ferrara has often observed.

A word or two is in order concerning judicial specialization. Ferrara is too good a *connoisseur* of administrative justice not to be aware that, for all the importance of the competence of the special panels established in both Spain and the UK, it is equally relevant whether the judges that sit in those panels are called to adjudicate only disputes between citizens and public authorities or other disputes too, such as between citizens or businesses. Interestingly, the third panel of the Spanish Supreme Court adjudicates both administrative and tax law disputes. In the UK, where the Administrative Court was established within the High Court of Justice precisely to solve disputes between individuals and public authorities, its judges no longer rotate with those of the Commercial Court. The trend is, therefore, towards both an organizational and functional distinction, though this is unlikely to give rise to separation, as we see in France. Interestingly, the same trend is discernible in another common law system, perhaps the one most similar to that of England and Wales: New Zealand[17]. A final remark concerns Germany, where the Basic Law deviated from the national tradition in that it established several jurisdictions, each with its own system. It might be said, therefore, that the German judicial system is characterized by institutional pluralism. This is confirmed by a circumstance that should not be ignored. At the top of the system is a single body responsible for resolving disputes between the various jurisdictions; it is formed by judges from each of those jurisdictions. Quite the contrary, in Italy it is the Court of Cassation that resolves this type of conflict. This solution differs not only from that adopted in Germany but also from the French one, where the *Tribunal des Conflits* includes judges from both the *Conseil d'Etat* and the *Cour de Cassation* on an equal basis. This confirms that there is no 'natural' solution to the problems concerning administrative justice and suggests some further reflections from the comparative standpoint.

[17] See S.H. Legomsky, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-National Theory of Specialization* (1990), 43-83.

3. Understanding the diffusion of administrative procedure legislation

Our analysis of the spread of Austrian ideas and institutions has shown the emergence of a new trend, namely a movement for administrative procedure legislation. In recent decades, especially after 1989, the spread of procedural legislation has reconfigured how administrative law is seen and practised in various nations around the world. It would be an exaggeration to assert that procedural legislation has led administrative law to lose one of its distinctive features, namely that it is a non-codified law. It would be equally an exaggeration to say that "*plus ça change, plus c'est la même chose*" (that is, the more it changes, the more it stays the same). Procedural legislation has shown considerable variety across a broad range of issues, including not only procedural rules for the exercise of administrative powers and access to documents but also general principles of public law. For some, at the turn of the 21st century, adopting general legislation was the "form par excellence of administrative procedure"[18]. In a similar vein, others argue that a sort of *ius commune* of administrative procedure has emerged on both sides of the Atlantic[19].

We will examine this phenomenon from a specific angle. What concerns us is the transnational diffusion of administrative law. Through our comparative enquiry into administrative procedure legislation in Europe and our subsequent studies on Latin America, we are trying to open up an avenue of research in an area of legal significance that has been largely overlooked. In so doing, we will consider a variety of relationships between legal systems – some symmetric, others asymmetric. This comes as no surprise to comparative lawyers because the transnational diffusion of law often reveals asymmetries of power and expertise. But, as our focus on Austria has shown, the channels of diffusion amply differ from those of private law. Moreover, some relationships are bilateral, while others involve a plurality of legal systems. Again, this is not surprising. Nonetheless, it is both

[18] G.A. Bermann, *Foreward*, in J.B. Auby (ed.), *Codification of Administrative Procedure* (2014), See also J. Barnès, *Towards a third generation of administrative procedure*, in S. Rose-Ackermann & P. Lindseth (eds), *Comparative Administrative Law* (2010), 337.

[19] E. Garcia de Enterria, *Prologo*, in A. Brewer-Carias, *Principios del procedimiento administrativo. Estudio de derecho administrative comparado* (1990).

interesting and important to take stock of the processes that lead to the creation of shared values and institutions.

3.1. Administrative law: not a national *enclave*

The starting point can be stated very simply. For almost a century, public law was dominated by two received ideas. The first was the idea that law, in particular public law, was inextricably tied in with the history and culture of each people, with its own *Volksgeist*, or 'spirit of the people'[20]. The second, which was partly a consequence of the former, was the Diceyan idea that administrative law was not a product of the State, but of some States, that is, only those in continental Europe, while it did not, and could not, exist in England or other common law systems adhering to the postulates of the rule of law[21]. The difference between civil law and common law systems was not, therefore, limited to the field of private law. It is fair to say that Dicey was not isolated in this belief. For example, one of the most distinguished comparative lawyers of the last century, René David, emphasized the absence of administrative law in England in the distinction between the two Western legal families[22] and even one of the most influential public lawyers in continental Europe, Massimo Severo Giannini, echoed Dicey's views[23].

Our comparative enquiry shows that soon after some nations regained independence and made different choices concerning, for example, form of government, they opted for a very similar type of administrative procedure legislation, which was actually the same in some respects, including the choice of general legislation and some general principles, such as the individual's right to be heard and the duty to give reasons. A focus on administrative procedure legislation also shows that, well before the last edition of Dicey's successful treatise on constitutional law (1954), the US adopted the federal Administrative Procedure Act (1946), which became one of the most important statutes. There was, therefore, no divide

[20] F.K. Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1815).
[21] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1894; 1954, 10th ed.) 330.
[22] R. David, *Le droit anglais* (1965), 92 («*la notion d'un droit administratif…est inconnue en Angleterre*»).
[23] M.S. Giannini, *Istituzioni di diritto amministrativo* (1981) 8-9.

between common law and civil law systems. What emerged was, rather, a difference that cut across these 'legal families'.

3.2. Coercion: colonial administrative law and post-war constitutions

Although we may not like to think of the law in this manner, the transnational diffusion of law, including administrative law, is not devoid of coercion[24]. This can be demonstrated very simply by referring to colonial administrative law and post-WWII constitutions. Colonial administration involved a large part of the world in the eighteenth, nineteenth, and early twentieth centuries. The significant difference between the British and French empires is well known. The British tended to export domestic institutions, while the latter was based on indirect rule[25]. What is less known is that there were instances of borrowing and transplant also among colonial powers. For example, at the end of the nineteenth century, the German officers who had to devise the institutions for the new colonies largely drew on the British experience[26]. There was also debate surrounding the existence and extent of international standards of colonial administration[27].

While this cultural environment disappeared with decolonization, the consequences of post-war constitution-making linger on. Scholars have debated, in particular, whether the 1948 Japanese Constitution was essentially a transplant of Western values and principles[28]. Interestingly, a Japanese scholar observed that there was a rapid change in what Dicey called legislative public opinion, in the sense that the new constitutional framework was

[24] See A. Kocourek, *Factors in the Reception of Law*, 10 Tulane L. Rev. 209 (1935) (distinguishing accord from conflict and assimilation from imposition).
[25] P.G. Magri, *Colonialismo e istituzioni consuetudinarie nell'Africa sub-sahariana* (1984). On the British indirect rule, see Lord Lugard, *Colonial Administration*, Economica, n. 41, 1933, 12 (who, however, disliked the concept).
[26] J. Zollmann, *German Colonial Law and Comparative Law, 1884–1919*, in T. Duve (ed.), *Entanglements in Legal History. Conceptual Approaches* (2016), 253.
[27] F. M. van Asbeck, *International Law and Colonial Administration*, 39 Transactions of the Grotius Society 5 (1953). On the relationship between colonialism and international law, see M. Craven, *The Decolonization of International Law* (2009).
[28] See R.E. Ward, *The Origins of the Present Japanese Constitution*, 50 American Political Science Review 980 (1956) (for the thesis that the US exerted a decisive influence).

viewed as a break with the authoritarian tradition, and that most legal scholars accepted it[29].

One of the most innovative parts of the new Japanese Constitution was the recognition and protection of a number of fundamental rights. These rights were protected, among other things, by Article 31, establishing that "no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law". It would be interesting to consider how this provision has been enforced in the field of administrative law by the Administrative Procedure Act of 1993. Certainly, the influence exerted by Austrian institutions differs from that exerted by the US on the adoption of Article 31, since there was no coercion involved but rather a voluntary choice. The question that thus arises is what led to a similar choice in differing contexts.

3.3. Parallel developments and the 'nature of things'

A possible explanation for the adoption of administrative procedure legislation by Czechoslovakia, Yugoslavia, and Poland between 1925 and 1930 can be based on what one of the most distinguished public lawyers of the last century, Jean Rivero, called "*parallélisme des solutions*"[30].Underlying this explanation is the view that when legal systems are faced with the same problems, they tend to adopt similar, if not the same, solutions.

This way of looking at administrative law is clearly opposed to the approach that emphasizes the uniqueness of law as a product of each social group or nation. It rests on a concept whose fortune preceded the emergence of the latter approach, namely, the "nature of things". This concept does not refer simply to the usual and expected characteristics of things. It represents something broader and more profound than such a merely empiricist remark. It has a deep normative dimension in a twofold sense. There is, first, a rejection of the excess of emphasis (allegedly) placed on the observation of the innumerable differences that can easily be found on the surface of various legal systems. Following this line of

[29] This is the conclusion reached by T. Hideo, *The Conflict between Two Legal Traditions in Making the Constitution of Japan*, in R.E. Ward & Y. Sakamoto (eds), *Democratizing Japan. The Allied Occupation* (1987) 133-134. See also Y. Okudaira, *Forty Years of the Constitution and its Various Influences: Japanese, European, and American*, 53 Law and Contemporary Problems 48-50 (1990).

[30] J Rivero, *Cours de droit administratif comparé* (1956-57) 27.

reasoning, what really matters is to consider 'things in themselves', as opposed to how things are presented within certain 'perspectives' or 'frames of reference'. There is, perhaps, more than an echo of American realism in this.

There is, secondly, a belief, expressed by Montesquieu in the opening statement of the *Esprit des Lois*, that laws do not simply reflect geography and climate. For him, "*les lois sont les rapports nécessaires qui dérivent de la nature des choses*" ("laws are the necessary relations resulting from the nature of things")[31]. This may be interpreted as implying that justice exists as an objective rule. However, Montesquieu himself observed that "society is far from being so well governed as the physical". It follows from this that there is no single way to fully realize objective justice. In reality, there are various ways, some of which are factually better than others. Thus, for example, a democracy should be based on respect for laws and acting in accordance with them[32]. It is not surprising, therefore, that a new democracy such as Austria adopted general legislation on administrative procedure and was followed in this by other nations.

In our case, however, there are some difficulties with respect to this view. When Yugoslavia adopted its first APA, in 1930, it was under an authoritarian government, a sort of royal dictatorship[33]. Additionally, the general legislation on administrative procedure adopted there, like in Czechoslovakia and Poland, continued to be used in some way after all these countries came under Soviet rule after 1945. There is still another development to consider, namely the adoption of this type of legislation by Hungary after the repression of the 1956 revolt against foreign oppression. Few years later, general legislation on administrative procedure was adopted in Spain under Franco's authoritarian regime. Which appears to suggest that this type of legislation is not – to borrow again from Montesquieu's world – necessarily associated with democratic government but, rather, with a certain degree of development in administration in the functional sense, and with the reluctance of rulers to rely only on executive rulemaking, unlike – for instance –

[31] Montesquieu, *L'esprit des lois* (1756), book I, chapter 1, Engl. transl. by T. Nugent, *The Spirit of the Laws* (1949).
[32] Id., III, 3; IV, 5; V, 2.
[33] M.J. Calic, *History of Yugoslavia* (2019) 105.

in the USSR and the Russian Federation. This relationship, therefore, requires further verification[34].

3.4. Diffusion: *Mitteleuropa* and Latin America

The spread of administrative procedure legislation in the territory of the former Habsburg Empire provides fertile ground for discussing another explanation. It was, in fact, a matter of diffusion. In this respect, three remarks need to be made. The first is of a theoretical nature. The concept of 'influence' is often employed in comparative studies[35]. However, this concept does not tell us much about two fundamental features of the spread of ideas and institutions: whether the reception of legal ideas and institutions is voluntary or coerced and whether 'imported' ideas and institutions supplement domestic law by filling *lacunae* or give rise to profound changes in the importing system[36]. For this reason, some scholars observe that simple concepts such as influence are meaningless and prefer others, such as 'reception'. However, this concept, too, is used in more than one way, including the dissemination of Roman law in Germany and other parts of Europe at the time of *jus commune*[37]. The concept of diffusion appears preferable because it conveys the sense of the spread of something across space[38]. It may thus be used as a working hypothesis.

In our case, the hypothesis was tested successfully, because there were both positive outcomes (Czechoslovakia, Yugoslavia and Poland, plus Liechtenstein) and negative outcomes (Hungary until 1956, as well as the German and Italian territories that had formerly been under authority of the Habsburg Empire). Moreover, we were able to test the significance of Austrian ideas not only at

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[34] See G. della Cananea, *The Common Core of European Administrative Laws. Retrospective and Prospective* (2023).

[35] See, for example, J.M. Galabert, *The Influence of the French Conseil d'Etat outside France*, 49 Int. 6 Comp. L. Q. 700 (2000).

[36] See W. Twining, *Social Science and the Diffusion of Law*, 32 J. of Law & Soc. 203, at 205 (2005) (distinguishing the attempts to modernize domestic law as distinct from those to fill gaps).

[37] F Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 Boston College Int. & Comp. L Rev. 257 at 270 (1981). On administrative law, R.B. Seidman, *Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law*, 5 Law & Society Review 161 (1970).

[38] See S. Farran, J. Gallen, J. Hendry, C. Rautenbach (eds), *The Diffusion of Law. The Movement on Laws and Norms Around the World* (2016).

the level of administrative procedure legislation, but also at the level of judicial doctrines, which were used for enforcement. It will be interesting to compare these outcomes with those of the new line of comparative research, which concerns the diffusion of Spanish administrative procedure legislation in Latin America after 1958.

4. Epilogue

As observed at the outset, the approach we have chosen is both historical and comparative. It is historical insofar as it examines how administrative institutions have evolved over time. It is comparative in the sense that we examine the solutions that various legal systems have developed for similar problems. The underlying idea is that both commonality and diversity are important and thus deserve adequate attention. More attention is also required, from the public law perspective, to legal systems that differ – such as those of Austria and Spain – from those that are usually the object of comparison, such as Britain, France and Germany. Conventional views concerning the relationships between administrative laws must, therefore, be reconsidered.

THE NEGLECTED IMPORTANCE OF THE AUSTRIAN *ALLGEMEINE VERWALTUNGSVERFAHRENSGESETZ*

*Angela Ferrari Zumbini**

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1. Introduction

I will try to respond to the many insights shared here by structuring my discourse around four main elements. Firstly, it is necessary to step back before the year 1925 to see how the adoption of the Administrative Procedure Act came about. Secondly, I would like to outline the main elements and features of what is known as the Austrian procedural model. I will then focus on the spread of the model into central Europe. Fourthly, I would like to highlight the current lack of interest in comparative studies in Austria. Lastly, I will try to put together some concluding remarks at the institutional level.

2. Dogmatic and historical background

Let us begin by stepping back in time to identify the dogmatic antecedents of the law and the factors that led to its adoption.

* Associate Professor of Administrative Law, University of Naples Federico II

2.1. The jurisprudence of the *Verwaltungsgerichtshof*

The first factor is the jurisprudence of the Administrative Court of the Austro-Hungarian Empire (called *Verwaltungsgerichtshof* – VwGH).

The law establishing the *Verwaltungsgerichtshof*, passed in 1875 contained no general provisions on administrative action. The legislature granted the court the power to annul administrative acts for "lacks regarding the essential forms of the procedure" but did not define or list them, leaving this task to the VwGH.

The court thus had to identify the general standards of administrative action, and as early as 1884, it recognized the right to be heard as inherent in the nature of things and thus to be protected even in the absence of explicit statutory provision[1].

The Austrian Administrative Procedure Act of 1925 (*Allgemeine Verwaltungsverfahrensgesetz* – AVG) would not have been possible without the jurisprudence of the VwGH, which formed the core for the emergence and development of administrative procedure and procedural safeguards as concepts. The AVG, in many respects, codified the principles developed in over fifty years of *Verwaltungsgerichtshof* case law.

2.2. The Treaty of Geneva

At this point, in addition to the jurisprudence of the VwGH there was also an external factor to consider, namely the Peace Treaties that followed in the aftermath of the First World War.

After the war, the newly formed Austrian republic had to face devastating inflation, which meant that wages were paid every 3-4 days, as their purchasing power had already halved in that time.

Finding itself in this situation, Austria sought a loan from the League of Nations, which demanded that other, more financially stable States provide guarantees before they would provide credit.

All of these factors led to the signing of the international treaty known as the *Reformbeschlüsse* in Geneva on October 4, 1922. It was agreed that the victors, i.e., England, Italy, France, and Czechoslovakia would act as guarantors for Austria so that it could

[1] On the principles developed by the VwGH see A. Ferrari Zumbini, *Standards of Judicial Review of Administrative Action (1890 – 1910) in the Austro-Hungarian Empire*, in G. della Cananea, S. Mannoni (eds), *Administrative Justice Fin de Siècle. Early Judicial Standards of Administrative Conduct in Europe (1890 – 1910*) (2021), pp. 41-72.

obtain a loan from the League of Nations, for which Austria assumed a number of obligations.

A comprehensive reform was imposed at the economic and budgetary level, with drastic cost-cutting. In the end, to achieve this goal, Austria committed to reforming its administration, simplifying and streamlining both the administration itself and its procedures.

To do so, Austria submitted a package of laws for administrative simplification to parliament in 1924 (including the General Administrative Procedure Act), which was then passed in 1925.

3. The Austrian procedural model

The regulation of administrative procedure codified in Austria in 1925 is usually described as a "court-type model" that guarantees adversarial proceedings in order to ensure the *legality* of administrative action.

It would perhaps be appropriate to re-evaluate this definition. In fact, an analysis of this law reveals a model that is certainly judicial insofar as its structure somewhat reflects that of a trial, but two fundamental purposes – efficiency and the protection of the parties' rights – stand out. On the one hand, the Geneva Treaty was a driving force for simplification, but, on the other hand, there was also codification of the principles developed by the VwGH, which hinge on the *Parteiengehör*.

One of the main purposes of the law was to establish a uniform and standardized model of administrative procedure with which all public administrations would have to comply.

In order to prevent a one-size-fits-all model by excessively restricting administrative activities, the law did not provide particularly detailed regulations, merely setting out essential rules.

The Austrian model is minimal in the sense that the "skeleton" of the procedure is clearly codified and can therefore be adopted in – and adapted to – any type of procedure.

These features make the AVG very chameleon-like, allowing for a very broad scope of application.

After recalling the genesis and the essential features of the Austrian procedural model, we move on to briefly examine how it spread, especially across *Mitteleuropa*.

4. The spread of the Austrian Administrative Procedure Act into Central Europe

The legal orders most profoundly inspired by the Austrian codification were those that had been part of the Austro-Hungarian Empire in some way. Although one might have expected the newly formed nation States that arose from the ashes of the Empire in 1918 to ignore Austrian regulations and reassert their independence, this was not the case.

Furthermore, the model was not limited to the former imperial territories.

The Austrian law of 1925 exerted a profound influence on the Central European countries[2], even before its formal adoption. In fact, the draft of the AVG was the model for the law on administrative procedure adopted in Liechtenstein as early as 1922 (*Landesverwaltungspflegegesetz*[3]). This law, albeit with some amendments, is still in force in Liechtenstein.

A clear and precise transposition of the Austrian model can be found in Poland[4], which had previously been subdivided and controlled by three different governments: the Austro-Hungarian Empire, the Russian Empire, and Prussia, making it necessary to unify its legislation after the creation of the new State. It was decided to adopt the Austrian model in order to unify and make the discipline of the newly formed nation autonomous. Moreover, the Polish case also underscores the importance of the personal factor, the movement of people.

In 1922, a Supreme Administrative Court was established. It was modelled on the *Verwaltungsgerichtshof,* and its first president, Jan Sawicki, was a former judge at the Administrative Court in Vienna. The Polish Code of Administrative Procedure was enacted on 22 March 1928.

After the Second World War, a new code was adopted in 1961, which, despite changes made to adapt the procedural model to the new Communist regime, kept the fundamental Austrian

[2] For a detailed analysis, please refer to G. della Cananea, A. Ferrari Zumbini, O. Pfersmann, (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion 1920-1970* (2023). The following citations of chapters refer to the chapters in this book.

[3] See the chapter by E. Schädler, *The Austrian Model and the Codification of Administrative Procedure in Liechtenstein*, pp. 57 ff.

[4] See the chapter by W. Piątek, *The Polish Legislation on Administrative Procedure*, pp. 10 ff.

structure intact. The correspondence was, of course, exclusively formal, but it would seem important to note that the model persisted even under a non-democratic regime. Just to cite one example, citizens had rights in relation to the authorities, and the Soviet Constitution of 1952 recognized that these rights could be enforced in court. However, administrative jurisdiction was abolished (only to be re-established much later, in 1980) and the justiciability of rights granted to citizens was thus envisaged. But there was no court to exercise judicial review.

The sequence of events in Czechoslovakia[5] was very similar to that in Poland. As early as 1918, a Supreme Administrative Court was established, but it did not merely follow the model of the *Verwaltungsgerichtshof*. Indeed, among the first members of this court were two judges who, until 1918, had been judges of the *Verwaltungsgerichtshof* in Vienna. They became the first and second Presidents of the Czechoslovak Administrative Court, respectively: František Pantůček and Emil Hácha, who brought their cultural background with them. The Code of Administrative Procedure was adopted in 1928, substantially transposing the Austrian law, although the AVG's influence was disguised at the time because the new State wanted to assert its autonomy and independence from the former empire.

The Kingdom of Yugoslavia[6] also adopted a general law on administrative procedure two years later. It is unanimously recognized by scholars as having been influenced by the Austrian model. After the law was repealed in 1945 (along with all laws contrary to the new political regime), in 1956 the new People's Republic of Yugoslavia adopted a general law on administrative procedure. Despite the changes necessary to adapt the discipline to the new non-democratic regime, this law also echoes the Austrian model while tempering the guarantee of citizens' rights (provided for in theory) with preponderant public interest.

A special case in point is Hungary, which was, for obvious reasons, inseparably linked to the culture and traditions of the Habsburg Empire, at the same time claiming its own autonomy. This circumstance resulted in a substantial (albeit partial) but veiled transposition of Austrian law to Hungary. Indeed, a (non-general)

[5] See the chapter by L. Potěšil, F. Křepelka, *Administrative Procedure Legislation in Czechoslovakia*, pp. 86 ff.

[6] See the chapter by S. Lilić, M. Milenković, *Administrative Procedure in Former Yugoslavia and the Austrian Administrative Procedure Act*, pp. 119 ff.

regulation on various aspects of public administration, including procedural profiles, was adopted in 1929. It was clearly inspired by the Austrian laws of 1925 but did not mention them in any way. At the end of World War II, the administrative apparatus underwent profound changes, including the introduction of strict hierarchical control and an organization modelled on the Soviets in an institutional framework deemed incompatible with even theoretical provision for procedural rights.

After the bloody repression of 1956, the Communist regime felt confident enough in its power to reintroduce regulated administrative procedure in order to make the administration more efficient (including in terms of political control).

One final example of the diffusion of Austrian law emerged from the research. It is of great interest, but, despite its importance, has been little studied. It concerns the attempt to have an AVG-inspired administrative procedure law adopted in National Socialist Germany.

After the annexation of Austria, many legal experts suggested that Germany should adopt the AVG to standardize administrative procedures. Among the leading proponents of this hypothesis was Hans Spanner, who needed to find a way to justify the adoption of a law that contained rights for individuals in a regime where only the collective was contemplated. Procedural rights were thus interpreted and reworked from a collectivist perspective. Despite the interest this project aroused, it was not approved.

Therefore, we can conclude that the Administrative Procedure Act of 1925 dominated the administrative law scene and its dogmatics for at least fifty years in Central Europe. This brings us to my fourth point, which is the incredible Austrian lack of interest in comparative studies.

5. The scarce interest in the Austrian scenario in comparative scholarships

Although Austria was the first country to codify a general regulation of administrative procedure and despite the centrality of Austrian law, as summarised in the previous paragraph, recent research often underestimates the importance of Austrian law in terms of its influence and the development of a model. Until the

1960s, at least in continental Europe[7], the importance of the Austrian contribution was clearly recognized and highlighted, but over time its significance gradually diminished for reasons that must also be examined in depth from the point of view of the history of ideas.

Austria is often overlooked in more recent works on comparative administrative law, even in the most important and impressive studies dedicated to the codification of administrative procedures.

In comparative studies, the German-speaking country of choice is often Germany, not only because of its undisputedly great public law tradition. However, Germany has always been bound to the legacy of Otto Mayer, who systematised administrative law based on the concept of the administrative act, since this is the basis for judicial protection.[8] Citizens' rights had long been assured by a system based on case law, so much so that Mayer considered it unnecessary to enact a procedural law. And even when the law was enacted in 1976, it was decided that procedural defects do not lead to the annulment of the act if the substantive content could not have been different, thus demonstrating that the substantive correctness of the act prevails over the formal shortcomings of the procedure.

Generally, at least until the first half of the 20th century, administrative procedure was traditionally analyzed in terms of its outcome: the administrative act. Even when the dynamic aspect of the procedure was emphasized, it was always inherently linked to its product, the decision.

Running contrary to the dominant approach, already in the late 19th and early 20th centuries, leading Austrian scholars (on the basis of the jurisprudence of the *Verwaltungsgerichtshof*) highlighted the autonomous value of the procedural dimension in comparison with the administrative act. It should be emphasised that the importance of procedure in itself, highlighted by Austrian jurists as early as the close of the 19th century, was recognized and built upon regardless of the underlying theoretical and philosophical convictions of scholars. Indeed, the emergence and conceptualization of an autonomous fundamental concept of

[7] A.M. Sandulli, *Il procedimento amministrativo* (1940); G. Pastori, *La procedura amministrativa* (1964). In Germany, see C.H. Ule, F. Becker, K. König (eds), *Verwaltungsverfahrensgesetze des Auslandes* (1967) vol I, esp 41 ff.

[8] O Mayer, *Deutsches Verwaltungsrecht* (3° ed., 1924).

procedure can be found in two Austrian authors from divergent, if not opposing, schools of thought.

Friedrich Tezner, an advocate of natural law and justice, dedicated a monograph to the concept of *Administrativverfahren* as early as 1896[9], stressing the fundamental importance of the path that the administrative decision follows as it takes shape. He introduced a clear distinction between production (meaning the production process) and product (*Erzeugungsvorgang und Erzeugnis*)[10], laying more emphasis on the former than the latter since it is *in* the process that individuals can exercise their rights before the decision is made. Similarly, the normativist Merkl, a follower of the Vienna School and pupil of Kelsen, used the allegory of the path and the target (*Weg und Ziel*)[11].

6. Concluding remarks at the institutional level

First of all, we have seen that the adoption of a law on administrative procedure does not necessarily coincide with democratic needs and purposes. Undeniably, the proceduralization of administrative activity within a democratic system brings numerous benefits and guarantees for citizens. However, we have also seen that even non-democratic regimes have adopted laws on administrative procedure (or at any rate discussed them); certainly not as a means of guaranteeing greater rights for citizens but rather for the sake of efficiency and political control over both administrative personnel and citizens in general.

From this, it can be inferred that a well-structured regulation of administrative procedure is in synergy with a well-functioning public administration, regardless of the specific purposes concretely pursued (i.e., the protection, welfare, and guarantees of citizens or their oppression).

The notion of administrative procedure emerged in Austria through the work of the Administrative Court.

This development is the exact antithesis of what occurred in France, where, as is well known, administrative law is largely jurisprudential in nature, especially in terms of general principles.

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[9] Tezner, F., *Das Handbuch des österreichischen Administrativverfahrens* (1896).

[10] F. Tezner, *Das österreichische Administrativverfahren, dargestellt auf Grund der verwaltungsrechtlichen Praxis. Mit einer Einleitung über seine Beziehung zum Rechtsproblem* (1922) p. 145.

[11] A. Merkl, *Allgemeines Verwaltungsrecht* (1927) p. 213.

However, the Conseil d'Etat has always focused on judicial review and its procedural profiles, leaving truly procedural aspects in the background.

Consequently, in France, an identical jurisprudential matrix of administrative law, which developed in the absence of precise legislation, has led to the marginalization of procedure in the face of the overwhelming centrality of judicial review. In Austria, the opposite has happened, leading to the pre-eminence of procedure and the subsequent development of regulation.

The law-making power of the administrative court in France led to significant delays in codification, while in Austria it actually led to the *first* codification.

So, it is not necessarily true that a strong and powerful court imposes its principles in opposition to codification.

Based on the overall analysis, I conclude that the AVG constitutes a fundamental contribution by Austrian legal science to the formation of a common administrative law heritage in Europe. Not only should the AVG hold a central place in the study of the codification of administrative procedure – where it is often neglected – but it should also feature in the debate on the subject of comparative administrative law and its fundamental concepts.

COMMENTS

THE NON-RATIFICATION OF THE CHANGES TO THE ESM: CONTRADICTIONS, IMPLICATIONS, AND PERSPECTIVES

*Angela Ferrari Zumbini**

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1. Introduction

The issue surrounding the ratification of changes to the European Stability Mechanism (ESM) has sparked a heated political and institutional debate In Italy.

After an intense clash of opinions, with differing – if not opposing – views on the reform of European economic governance, the Chamber of Deputies, on Thursday 21 December 2023, rejected authorisation of the law ratifying and implementing the Agreement Amending the Treaty establishing the ESM, which was drawn up in Brussels on 27 January and 8 February 2021. The law was rejected with 184 votes against, 72 in favour, and 44 abstentions.

* Associate Professor of Administrative Law, University of Naples Federico II

In this brief commentary, I would like to highlight four important aspects of the rejection of ratification. Firstly, some of the Government's arguments in support of the opinion not to ratify closely echo the case law of the German Constitutional Court in its judgments on quantitative easing and the Recovery Plan protecting parliamentary sovereignty on budgetary matters. Secondly, these arguments partially contradict some of the statements reported by other Government representatives in official documents. Thirdly, these arguments appear to be more hypothetical than real. Fourthly, it cannot be ruled out (and indeed, there are some indications to support such a hypothesis) that the decision on non-ratification may be resubmitted to parliamentary vote but with a different outcome.

Before proceeding with this analysis, in order to gain a more complete understanding of these four aspects, it may be useful to briefly review the changes to the ESM that were submitted for ratification.

2. The changes to the ESM submitted for ratification

The ESM was established in 2012 to address the financial crises that were affecting countries in the eurozone. It operates under an intergovernmental agreement (governed by international law) and aims to provide financial assistance through conditional loans to member countries facing financial difficulties in an attempt to maintain the stability of the eurozone as a whole.

The central aspect of the reform, passed in 2021, involves granting the ESM a new role as a financial safety net (backstop) for the Single Resolution Fund (SRF). The SRF is financed by all the European banks in the Banking Union and is intended to manage and resolve banking crises. Consequently, the ESM, which had primarily been an instrument providing assistance to States, could now also contribute to resolving banking crises.

3. The arguments put forward by the Italian Government, and the case law of the German *Bundesverfassungsgericht*

In a session held on 21 December 2023, the Fifth Permanent Commission (Budget, Treasury, and Planning) issued an unfavourable opinion regarding ratification of the ESM. It came following a bill presented by Ylenja Lucaselli, a representative of

the parliamentary majority. Specifically, "since the draft law lacks mechanisms to ensure the involvement of Parliament in the procedure to activate the European Stability Mechanism, thereby excluding the Chambers from procedures of significant importance in terms of economic and financial policy, and since such exclusion may undermine Parliament's ability to monitor further payments of the subscribed capital [...], this Commission declares its opposition".

These reasons closely echo the established case law of the *Bundesverfassungsgericht* (BVG) on *Identitätskontrolle*. On several occasions, the BVG has asserted its authority to verify that no sovereign powers are transferred – and that European bodies introduce no measures – which would infringe upon the fundamental rights provided for in Article 79(3) of the *Grundgesetz*, particularly those ensuing from the democratic principle, the sovereignty of the people, and the sovereignty of the *Bundestag* in budgetary matters.

It is worth noting at this juncture that, after a legal proceeding that kept Europe on tenterhooks for a year and a half, the German Constitutional Court, a champion of parliamentary sovereignty in budgetary matters, finally consented to the ratification of the Recovery Plan. The court deemed that it did not substantially limit the budgetary power of the *Bundestag*, as the amount, duration, and purpose of the loans the Commission could take on were limited, as was Germany's potential liability. The possibility of further liability was considered unlikely.

4. Some contradictions

In the opinion of the Fifth Commission, lack of parliamentary involvement in the activation of the ESM could "affect Parliament's ability to adequately monitor any indirect effects of the ratification of the Treaty, considering that the mere request for additional capital contributions under Article 9 of the ESM Treaty is envisaged as binding with respect to any commitment regarding public spending, which would have intuitable effects on the public purse".

This consideration contradicts (at least partially) previous statements by two members of the Government reported in official documents.

A note from the Ministry of Economy and Finance dated 9 June 2023, addressed to the III Commission of the Chamber (Foreign Affairs and Community Affairs) in response to requests for information on the direct and indirect effects on public finances due to ratification of the ESM, clearly states that, regarding direct effects arising "from the ratification [...] there are no new or greater burdens" with respect to those already arising from the ESM Treaty of 2012. As for the indirect effects that might theoretically arise, however, "no changes are found in the agreement that would suggest increased risk".

Furthermore, during the meeting of the Fifth Commission, which subsequently issued the negative opinion, on 20 December 2023, the Undersecretary for Economy and Finance provided clarification on two aspects relating to the theoretical risks arising from ratification of the amendments to the ESM. Firstly, Undersecretary Freni excluded the possibility of a "significant increase in the likelihood that Italy would have to contribute capital" even in the remote event of triggering the backstop, as the latter would have a maximum ceiling of 68 billion euros, a figure that "fully falls within the maximum borrowing capacity of the ESM, which reaches 500 billion euros, of which 417.4 billion are currently available". Furthermore, the second innovative element introduced by the ESM amendments, namely the introduction of collective action clauses with single-majority voting for newly issued Government bonds with a maturity of more than one year, is explicitly considered "not likely to result in new or greater burdens on public finances".

The contradictions within the majority regarding the perception of the implications of the changes to the ESM were also evident in previous governments (including within the same Government, led by Giuseppe Conte, who signed the amendments), so much so that not even the Draghi Government proceeded with the ratification.

5. Practical implications

The risks to public finances mentioned in abstract terms in the opinion by the Budget Commission also appear unsupported by real elements.

Firstly, Italy holds a right of veto in decisions taken by the ESM. Indeed, Italy has subscribed €125 billion to the ESM's capital,

with over €14 billion already paid in. The voting rights of members of the Council (which usually decides unanimously) are proportional to the capital subscribed by their respective countries. Germany, France, and Italy have voting rights exceeding 15 percent and can therefore veto decisions even under emergency conditions (which still require an 85 percent qualified majority vote).

Secondly, the ESM remains in force, preserving its original wording exactly as it has been for the past decade, including Article 9 of the Treaty (under which the Board of Governors may request payment of any unpaid authorised capital at any time), referred to in the V's Commission opinion as "binding with respect to any commitment regarding public spending, which would have intuitable effects on the public purse".

6. Future perspectives

Government representatives have repeatedly emphasised that the reform of the ESM did not represent a measure of immediate interest for Italy, since it mainly regards extending its scope of application to troubled systemically important banks, in a context where "the Italian banking system is among the most solid in Europe". This emphasis on the lack of current interest, combined with other concurrent circumstances, might lead one to consider it possible (and indeed desirable) for the decision on non-ratification to be resubmitted to parliamentary vote, but with a different outcome.

Indeed, according to Article 72(2) of the Chamber's regulations, at least six months must elapse before another bill to ratify the ESM Treaty (substantially identical to the rejected one) can be resubmitted. These six months will expire shortly after the next European elections. Perhaps in a less tense atmosphere, not dominated by electoral dynamics, the decision to ratify the ESM may be reconsidered. If, upon the Government's suggestion, Parliament were to reopen discussions, it may approve – alongside ratification – a directive or provision excluding its use by Italy.