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Impressum

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As always, we thank our anonymous peer reviewers for their considerable time and effort in reviewing the manuscripts for this issue.

We also encourage our readers to consider PJIEL as a venue for their future publications. With your contributions, PJIEL aims to remain a trusted and up-to-date forum for scholarship on international and European Union law.

Cultural Heritage Protection in the Age of Climate Change: Assessing Adequacy and Interpretative Limits of the World Heritage Convention

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Karolina Nedić[**]

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Contents

Abstract

Climate change has become a general threat to humanity, and the potentially devastating nature of its consequences is demonstrated by the fact that some States have begun to submerge as a result of rising sea levels, forcing their populations to migrate to other countries. In the face of such dramatic developments, the protection of cultural heritage has appeared not to be a priority.

In the field of international legal regulation, two distinct normative regimes have traditionally existed: on the one hand, a body of rules governing the protection of cultural heritage, foremost among them the 1972 World Heritage Convention; on the other, a regime addressing climate change, centred on the 1992 UN Framework Convention on Climate Change (UNFCCC). These two bodies of law operated separately, each within its own regulatory sphere, with little to no overlap between them.

This situation has begun to change in recent years with the adoption of various soft law instruments addressing the impact of climate change on cultural heritage and proposing measures to respond to this challenge. In addition, the question of the interdependence between cultural heritage treaties and climate change agreements has come to the fore. The rules on the interpretation of international treaties, as set out in the 1969 Vienna Convention on the Law of Treaties, point towards a contextual interpretation of the World Heritage Convention, under which other treaties, including those relating to climate change, must also be taken into account. Such an interpretative approach raises important legal questions, such as the scope of states' obligations under the World Heritage Convention and their relationship to climate change commitments.

The paper concludes that climate change informs the interpretation of the World Heritage Convention, but does not alter the scope of states' legal obligations under it. Rather, it supports the adoption of site-specific measures aimed at protecting heritage properties from climate-induced harm.

Keywords: cultural heritage, climate change, 1972 World Heritage Convention, 1992 UNFCCC, systemic integration.

I. Introduction

Climate change, manifesting as gradual shifts in temperature, precipitation, atmospheric moisture, and wind intensity, as well as sea-level rise and changes in the occurrence of extreme events,[1] such as fires, droughts, and floods, is at the

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[1] Elena Sesana and others, 'Climate Change Impacts on Cultural Heritage: A Literature Re-

forefront of international concern. Dire projections by the Intergovernmental Panel on Climate Change (IPCC) show that human-caused warming could lead to a rise in temperatures of 1.4 to 4.4 °C by the year 2100 and cause significant sea-level rise.[2] These changes obviously did not happen overnight. They unfolded gradually, and their consequences only became apparent when the situation had already begun to spiral out of control.[3] Some states have literally started to sink, forcing their populations into displacement.[4] In the face of such dramatic developments, it is not surprising that the protection of cultural heritage has often been seen as a "trivial concern"[5] and a luxury that states cannot afford.[6]

In recent years, however, the topic has gained momentum. Protection of cultural heritage, guaranteed by several important treaties,[7] most notably the 1972 World Heritage Convention (hereinafter: WH Convention),[8] began to be observed also in the context of climate change, which was rightly recognized as a "risk multiplier" to the preservation of cultural heritage and its "outstanding universal value". In addition to the usual factors affecting cultural heritage sites, such as the passage of time and typical atmospheric conditions, extreme weather events caused by climate change, as well as slow-onset events like sea-level rise, pose additional aggravating challenges.[9] Some sites are threatened by partial or total submergence, others are at risk of coastal erosion and recession.[10] Furthermore,

view, WIREs Clim. Change' <https://wires.onlinelibrary.wiley.com/doi/pdfdirect/10.1002/wcc.710> accessed 12 October 2025.

[2] IPCC, 'Sixth Assessment Report' <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_LongerReport.pdf> accessed 12 October 2025.

[3] Public perception of climate change has long been that these changes are not occurring fast and that the threat is not imminent. Michelle L. Berenfeld, 'Climate Change and Cultural Heritage: Local Evidence, Global Responses' (2008) 25 The George Wright Forum 70.

[4] Andrea Caligiuri, 'Sinking States: The Statehood Dilemma in the Face of Sea-Level Rise, The Implications of Sea-Level Rise for International Law' <http://www.qil-qdi.org/sinking-states-the-statehood-dilemma-in-the-face-of-sea-level-rise/> accessed 23 October 2025.

[5] Anna Huggins, 'Protecting World Heritage Sites from the Adverse Impacts of Climate Change: Obligations for States Parties to the World Heritage Convention' (2007) 14 Australian International Law Journal 126.

[6] Cecilia Therese Guiao, 'Recognizing the Role of Cultural Heritage in Climate Change Adaptation: Relevant Platforms and Workstreams under the United Nations Framework Convention on Climate Change' (2020) 93 Philippine Law Journal 1062.

[7] 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 215; 2001 Convention on the Protection of the Underwater Cultural Heritage, UNTS 2562; 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, 2368 UNTS 3.

[8] 1972 World Heritage Convention, 1037 UNTS 151.

[9] Ksenia Chmutina, Rohit Jigyasu and Lee Bosher, 'Understanding the Impacts of Climate Change on Cultural Heritage Buildings: A Case of York, UK' <https://core.ac.uk/reader/288372000> accessed 3 November 2025.

[10] Charlotte Beaucillon, 'Culture Overboard! The Climate Shift of International Cultural Heri-

temperature changes may significantly affect the chemical composition and physical properties of materials in cultural heritage sites.[11] Desertification and heavy rains have already proven to have a devastating effect on traditional buildings,[12] causing "the loss of irreplaceable legacies from the past".[13] Scientific research is underway to assess the impact of climate change on cultural heritage, laying the groundwork for effective adaptation and mitigation strategies. However, this research is often fragmented, focusing on specific sites or regions, as the effects of climate change on cultural heritage are not uniform across all locations.[14]

The aim of this paper, which will primarily focus on tangible cultural heritage, is to examine whether, and if so in what manner, cultural heritage is protected in the context of climate change. To address this question, the analysis first considers the rules governing the protection of cultural heritage as set out in the principal international instrument in this field, the 1972 WH Convention. It examines the obligations imposed on States in this regard, as well as the suitability of the Convention's listing mechanism for addressing climate-related threats. The article then demonstrates that recent years have witnessed a growing tendency towards the adoption of an increasing number of instruments in which the fields of cultural heritage protection and climate change intersect, offering guidance, at times of a general nature, and at others more specific, on how to approach the protection of cultural heritage in the face of climate change. In addition, the article addresses the interpretation of the WH Convention in light of the principle of systemic integration, as reflected in the Vienna Convention on the Law of Treaties (hereinafter: VCLT) and conceptualized by the International Law Commission. The conclusion argues that climate change is integrated into the cultural heritage legal regime and informs the interpretation of the WH Convention, without imposing new obligations on states parties, but rather sup-

tage Law in the Face of Rising Sea Levels' (2022) <https://www.qil-qdi.org/wp-content/uploads/2022/05/05_Sea-Level-Rise_BEAUCILLON_FIN.pdf> accessed 5 November 2025.

[11] Efstathia Tringa and others, 'Assessing the Future Risk of Damage to European Cultural Heritage Due to Climate Change' (2025) 8 Heritage 175.

[12] Alessandro Chechi, 'The Cultural Dimension of Climate Change: Some Remarks on the Interface between Cultural Heritage and Climate Change Law' in Sabine von Schorlemer and Sylvia Maus (eds.) *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity* (Peter Lang AG 2014).

[13] Bárbara Mínguez García, 'Resilient Cultural Heritage for a Future of Climate Change' (2019/2020) 3 Journal of International Affairs 101.

[14] For example, studies have been made regarding the Mediterranean, the Baltic Sea, certain Polish sites, and so on. See: John Kapsomenakis and others, 'Climate Heritage Threats to Cultural and Natural Heritage UNESCO sites in the Mediterranean' (2023) 25 Environment, Development and Sustainability 14519; Lena Reimann and others, 'Mediterranean UNESCO World Heritage at Risk from Coastal Flooding and Erosion due to Sea-Level Rise' (2018) 9 Nature Communications 4161; Mateusz Ciski and Krzysztof Rząsa, 'Threats to Cultural Heritage caused by the Global Sea Level Rise as a Result of the Global Warming' (2021) 13 Water 2577.

porting the adoption of site-specific protection measures.

II. The Unesco Framework for the Protection of Cultural Heritage

Following the adoption of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and broadening the realm of legal protection from "cultural property" to a more comprehensive "cultural heritage",[15] the UNESCO General Conference adopted the 1972 WH Convention. The Convention has by now acquired practically universal acceptance[16] and is considered to be one of the most successful instruments for protecting a common good.[17] This success is owed to the "careful balance" in the Convention between the national interests of particular states in which cultural properties are located to make their heritage visible and protected, and the general interest of the entire community of states in preserving the universal value of that heritage.[18]

The scope of protection of the WH Convention encompasses both cultural and natural heritage. However, in relation to cultural heritage, the Convention addresses exclusively the protection of tangible heritage, that is, "monuments, groups of buildings and sites",[19] while it omits regulating the immaterial forms of heritage. This omission was remedied several decades later, more precisely in 2003, when the Convention on the Safeguarding of Intangible Cultural Heritage was adopted.

Acknowledging that certain items of cultural and natural heritage are increasingly threatened with destruction not only by traditional causes of decay but also by changing social and economic conditions that aggravate the situation, the WH Convention establishes a protection framework intended to be permanent

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[15] The transition from 'cultural property' to 'cultural heritage' does not indicate a substantial broadening of the objects under protection, but instead underscores the concept's universality, recognizing heritage as a matter of interest to humanity as a whole. See: Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' in Yusuf A. Abdulqawi, *Standard-setting in UNESCO, Volume I, Normative action in education, science and culture: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (UNESCO Publishing; Martinus Nijhoff Publishers 2007).

[16] According to the available data, the Convention has 196 states parties. 'World Heritage Convention, States Parties' <https://whc.unesco.org/en/statesparties/> accessed 10 November 2025.

[17] Federico Lenzerini, 'Protecting the Tangible, Safeguarding the Intangible: A Same Conventional Model for Different Needs' in Sabine von Schorlemer and Sylvia Maus (eds.) *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity* (Peter Lang AG 2014).

[18] Franceso Francioni, 'Cultural Heritage, Max Planck Encyclopedia of Public International Law', <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1392> accessed 12 November 2025.

[19] WH Convention, art. 1.

and to rely on modern scientific methods.[20] The envisaged system of protection is predicated upon parallel responsibility of states on whose territory the site under protection is located, and, on the other hand, of the international community as a whole, which is supposed to assist states in their endeavours. Such a multilayered protection is based on a notion that protected heritage possesses an "outstanding universal value",[21] that is, a "significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity".[22]

The Convention places primary responsibility for the protection of cultural heritage on the state party whose territory the site is situated on. That state has to identify, protect, conserve, present, and transmit to future generations the heritage situated on its territory, and to undertake all appropriate measures, either on its own or by resorting to international assistance, to ensure fulfilling this goal.[23] In that regard, states should adopt policies aimed at integrating the protection of heritage into their planning programs; set up services for the heritage protection, develop studies and research to detect dangers threatening their heritage; take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and to foster the establishment or development of national and regional centres for training in the protection, conservation and presentation of the heritage, as well as to encourage scientific research in this field.[24]

All these measures should be communicated to UNESCO through the states parties' periodic reporting, envisaged by the Convention and further elaborated by the Operational Guidelines.[25] In addition to this, two other reporting mechanisms have been established by the World Heritage Committee–a special body, established by the Convention and composed of states parties.[26] Reactive monitoring is activated when World Heritage properties are under threat. Specific reports are then submitted by the states if "exceptional circumstances occur or work is undertaken which may have an impact on the outstanding universal value of the property or its state of conservation", as well as "in reference to properties inscribed, or to be inscribed, on the List of World Heritage in Danger"

[20] WH Convention, Preamble.

[21] ibid.

[22] 'Operational Guidelines for the Implementation of the World Heritage Convention' (*WHC.25/01* 16 July 2025) <https://whc.unesco.org/en/guidelines> accessed 17 November 2025.

[23] WH Convention, art. 4.

[24] WH Convention, art. 5.

[25] WH Convention, art. 29 (1), Operational Guidelines, paras. 199-210.

[26] WH Convention, art. 8 (1).

and in the procedures of deletion of properties from the World Heritage List.[27] Similarly, a reinforced monitoring has been proposed by the World Heritage Committee in 2007 in order to strengthen the protection of the site when its integrity or authencity is at risk, or when more effective monitoring and reporting are required.[28] Reinforced monitoring is not explicitly referenced by that name in the Operational Guidelines; however, it is *de facto* incorporated into several paragraphs.[29]

Although states have a primary duty to secure protection of the heritage located in their territories, their efforts may sometimes be insufficient, and states may lack resources–financial or other–to appropriately fulfil their duties. That is why the WH Convention, while emphasizing the respect for state sovereignty, envisages the duty of the international community to cooperate with states on whose territory the heritage is located and to support them in their efforts to conserve and identify that heritage.[30] Such international assistance is secured through the establishment of an institutional framework within the UNESCO, which primarily includes the abovementioned World Heritage Committee, but also other bodies–International Centre for the Preservation and Restoration of Cultural Property (ICCROM), International Council of Monuments and Sites (ICOMOS), and International Union for Conservation of Nature and Natural Resources (IUCN)–whose representatives, along with representatives of other intergovernmental and non-governmental organizations with similar objectives, may attend meetings of the Committee in an advisory capacity.[31]

The fact that the WH Convention envisages "support" from the international community confirms that it assigns the primary role in protecting heritage to the states, conceiving international cooperation not as a replacement for state action, but rather as a subsidiary tool in heritage preservation.[32] Another indicator that state sovereignty remains strongly respected within this legal framework is the absence of sanctions against states that fail to safeguard their cultural heritage in accordance with the Convention properly. The only consequence in such cases is the possible removal of the listed property from the World Heritage List.[33] This is paradoxical, as delisting the property amounts to a form of punishment for the state's failure to protect it, while the actual outcome is a loss of a common

[27] Operational Guidelines, para. 169.

[28] WHC, 31st Session, Christchurch, 2007, WHC-07/31.COM/5.2.

[29] Operational Guidelines, paras. 173.-176.

[30] WH Convention, arts. 6 and 7.

[31] WH Convention, art. 8(3).

[32] Flavia Zorzi Giustiniani, 'Protecting World Cultural and Natural Heritage against Climate Change and Disasters: An Assessment of the Effectiveness of the World Heritage Convention System' (2021) 2 Yearbook of International Disaster Law Online 238.

[33] More on the cultural heritage sites' listing, see *infra*, in Section III.

good for the entire international community.[34]

Having established that the only consequence for failing to protect cultural heritage sites under the Convention is delisting, it is useful to consider how the general system of state responsibility, as reflected in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[35] applies in such situations.

Compared to many other treaties, the WH Convention has certain specific features. Although formally binding, it is often seen as a relatively "soft" instrument, due to the lack of precise obligations imposed on states parties.[36] This lack of precision is reflected in formulations that grant states discretion in implementing their obligations, as well as in the Convention's emphasis on international cooperation in the protection of heritage located within the territory of a particular State, while at the same time respecting that state's sovereignty.[37] The obligations under the Convention can, therefore, be understood as reflecting shared interests of the international community as a whole, rather than obligations owed to specific states.[38] In such a framework, it is difficult to identify an "injured state" in the sense of ARSIWA, which makes it harder to invoke responsibility. While, in principle, the general rules on state responsibility could apply, in practice this is unlikely, as there is no clearly identifiable state that would be both entitled and willing to invoke responsibility in cases of failure to protect cultural heritage.

III. The Listing Mechanism as a Tool for Protecting Cultural Heritage Sites

The 1972 WH Convention introduced a system for listing world heritage sites possessing outstanding universal value. The World Heritage List has been provided in that regard. Inscribing cultural heritage properties on the World Heritage List, which is always done at the request of the territorial state, is conditioned upon proving the fulfilment of certain criteria provided by the UNESCO Operational Guidelines. The state party to the Convention proposing the inscription of a property situated in its territory must first prove the „outstanding universal value" of the property, that is, the fulfilment of one or more of the criteria set

[34] Lenzerini (n 17) 148.

[35] 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2 Yearbook of the International Law Commission, Part Two.

[36] Lucas Lixinski and Vassilis Tzevelekos, 'The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls' in Anne-Marie Carstens and Elizabeth Varner (eds.) *Intersections in International Cultural Heritage Law* (Oxford University Press 2020).

[37] WH Convention, art. 6(1).

[38] 'Chapter 1: Cultural Heritage in International Law' in Valentina Vadi (ed), *Cultural Heritage in International Economic Law* (Leiden: Brill, Nijhoff 2023).

up by UNESCO.[39] Further, the requirements of authenticity and integrity must be fulfilled, and finally, a protection and management plan for the nominated property must be in place.[40] It is important to stress that the inscription of a property is merely a confirmation of the property's value, accompanied by a plan on how to maintain and preserve that value, rather than a means of creating any new value for the property in question.

Properties which have previously been placed on the World Heritage List and which face one of the "serious and specific" dangers enumerated in the Convention, namely, "the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves", may be placed on the World Heritage in Danger List,[41] if they fulfil one or more criteria set out in the Operational Guidelines. Under these criteria, cultural properties may face ascertained dangers, such as the deterioration of materials or the significant loss of cultural significance, as well as potential dangers, including climatic or other environmental factors.[42]

The listing of a specific property is, however, not envisaged by the Convention as a prerequisite for the protection that states are obligated to provide. Article 12 of the Convention specifically highlights that non-inclusion on the lists is not prejudicial to considering that the property in question does have an outstanding universal value, or that it forms a part of cultural or natural heritage. As such, any property, whether listed or not, enjoys the protection provided by the Con-

[39] The first six, out of ten criteria, refer to the cultural heritage, while the other four refer to the natural heritage. The six criteria are: that a nominated property "(i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance". The last criterion should, according to the Committee, "preferably be used in conjunction with other criteria". See: Operational Guidelines (n 22).

[40] Operational Guidelines, para. 108.

[41] WH Convention, art. 11(4).

[42] Operational Guidelines, paras. 178-179.

vention, encapsulated in States Parties' obligation to identify, protect, conserve, and transmit to future generations heritage located in their territory,[43] as well as to take measures to give effect to that protection.[44]

The purpose of listing cultural heritage is to document it and raise public awareness about its value and the need for protection.[45] Specifically, if the property is also inscribed in the "In Danger" List, such inscription results in the possibility of taking extra protection measures, including activating financial help from the World Heritage Fund.[46] These measures can only be regarded as a positive endeavour in the preservation of cultural heritage, and in practice, listed properties are indeed to a large extent safeguarded in accordance with established conservation and management plans. However, when considered in a broader context, the distinction between listed and non-listed cultural heritage may give rise to certain negative consequences.

Some authors point to several unintended outcomes of listing, such as a questionable selection process in which the reasons for including certain sites while excluding others are not always clear; an overextension in the number and type of listed sites, leading to an overly broad interpretation of what constitutes heritage; and excessive tourist focus on listed sites, which can result in their degradation and the loss of elements that confer outstanding universal value.[47] In addition, contrary to the intention of Article 12 of the Convention, listed sites in practice tend to receive more attention than non-listed sites, placing the latter at a disadvantage.[48]

States' attitudes towards placing their cultural property on UNESCO lists vary significantly. The inscription of sites on the World Heritage List is usually well accepted by states, which is evident from the high number of sites currently on the List.[49] More controversial is the inscription of properties on the World Heritage in Danger List, which–unlike the inscription on the World Heritage List–does not require a territorial state's consent and can be done upon the initiative

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[43] WH Convention, art. 4.

[44] WH Convention, art. 5.

[45] 'What does it mean for a site to be inscribed on the World Heritage List?' (*UNESCO*) <https://whc.unesco.org/en/faq/20> accessed 20 November 2025.

[46] WH Convention, art. 21, Operational Guidelines, para. 189.

[47] Bruno S. Frey and Lasse Steiner, 'World Heritage List: Does it make Sense?' (2011) 17 International Journal of Cultural Policy, 555.

[48] Federico Lenzerini, 'Protection of Properties Not Inscribed on the World Heritage List', in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (2nd edn, Oxford Commentaries on International Cultural Heritage Law 2023).

[49] There are 959 cultural properties, plus 40 mixed properties. 'World Heritage List' (*UNESCO*) <https://whc.unesco.org/en/list/> accessed 24 November 2025.

of the World Heritage Committee.[50]

Certain states voluntarily requested that their cultural heritage sites be inscribed on the In Danger List. Yemen, for instance, did so in 2000, regarding its historic town of Zabid, which experienced significant degradation due to modern urbanization and the construction of inappropriate concrete buildings.[51] Iran also requested inscription of its citadel of Bam in 2004, after it had been severely damaged in an earthquake.[52] Other states, like Ukraine, in the case of the war-affected historic town of Odesa, made such voluntary requests for inscription.[53] But not all states are inclined to follow the same path. For some of them, the controversy over inscribing certain property on the In Danger List lies in the fact that, although it was not intended to serve as a sanction, the List is often perceived as a "naming and shaming" tool.[54] Fearing a negative reputation and possibly an undesired impact on tourism, they oppose listing.

The most well-known case reflecting the above problem, and at the same time demonstrating the inadequacy of listing mechanisms to address climate change issues, is the case of Venice and its Lagoon. In recent decades, Venice has been threatened by the adverse impacts of mass tourism, development, and climate change.[55] Sea-level rise and severe storms have caused around 160 floods in the last couple of decades, during which most of the city was inundated, damaging valuable cultural heritage.[56] After having visited Venice in 2020, the UNESCO

[50] After protests by some states to accept the authority of the WH Committee to decide on the inclusion of the property on the List of World Heritage in Danger, it was ultimately agreed that the Committee will be entrusted with such a power. 'Decisions Adopted by the World Heritage Committee at its 6th Extraordinary Session' (*World Heritage Committee*, 17-22 March 2003) <https://whc.unesco.org/archive/6extcom.htm> accessed 24 November 2025. See also: Operational Guidelines, para. 177.

[51] 'Historic Town of Zabid' (*UNESCO*) <https://whc.unesco.org/en/soc/605/> accessed 26 November 2025.

[52] 'First Anniversary of the Earthquake at World Heritage City of Bam (Iran)' (*UNESCO*) <https://whc.unesco.org/en/news/101> accessed 26 November 2025.

[53] 'Odesa inscribed on UNESCO's World Heritage List in the Face of Threats of Destruction' (*UNESCO*) <https://www.unesco.org/en/articles/odesa-inscribed-unescos-world-heritage-list-face-threats-destruction> accessed 25 November 2025.

[54] Herdis Hølleland, Evan Hamman and Jessica Phelps, 'Naming, Shaming and Fire Alarms: The Compilation, Development and Use of the List of World Heritage in Danger' (2019) 8 Transnational Environmental Law 35.

[55] Barbie Latza Nadeau, 'Venice 'Not at Risk' after All? UNESCO Leaves City off its Heritage in Danger List' (*CNN*, 16 September 2023) <https://edition.cnn.com/travel/article/venice-not-at-risk-unesco-intl-hnk> accessed 8 December 2025.

[56] Adam Markham, 'World Heritage Committee ignores UNESCO Recommendation to List Venice as Endangered' (*The Equation*, 14 September 2023) <https://blog.ucs.org/adam-markham/world-heritage-committee-ignores-unesco-recommendation-to-list-venice-as-endangered/> accessed 10 December 2025.

experts issued a Mission Report, in which they requested the inscription of the site on the World Heritage in Danger List.[57] The Recommendation was not implemented due to certain protective measures undertaken by Italy, such as a ban on large cruise ships from entering the Venetian Lagoon. However, the recommendation on inscription was reiterated two years later, when ICOMOS and the World Heritage Centre concluded that Italy did not achieve a significant level of progress in implementing previously required measures, causing the city to face ascertained and potential danger.[58] Despite expert recommendations and strong opposition from Italy,[59] the World Heritage Committee declined to act on the proposed inscription and instead merely called for additional protective measures for the city.[60] This decision has further fuelled criticism that the Committee operates more as a political than a technical body, with outcomes shaped by diplomatic considerations rather than expert judgment.[61]

The stigma associated with the List of World Heritage in Danger, which manifested itself in the case of Venice and possibly in the fact that so far no cultural heritage site has been inscribed on the In Danger List due to climate change consequences,[62] led the World Heritage Committee to take measures to change states' perception of the List.[63] The initiative was taken to inquire about states' negative attitudes toward the In Danger List and to offer new perspectives. An independent study conducted by the World Heritage Centre resulted in issuing a report entitled New Visions for the List of World Heritage in Danger.[64] The

[57] 'Report of the joint WHC/ICOMOS/Ramsar Advisory mission to Venice and its Lagoon (Italy)' <https://whc.unesco.org/en/list/394/documents/> accessed 15 December 2025.

[58] 'State of Conservation of Properties Inscribed on the World Heritage List–Venice and its Lagoon (Italy)' <https://whc.unesco.org/en/news/1353> accessed 10 December 2025.

[59] Anna Somers Cocks, 'For the Second Time, Venice Escapes Listing as at Risk, but Now UNESCO is the Enemy' (*The Art Newspaper*, 15 September 2023) <https://www.theartnewspaper.com/2023/09/15/for-the-second-time-venice-escapes-listing-as-at-risk-but-now-unesco-is-the-enemy> accessed 17 December 2025.

[60] 'Decision 45 COM 7B.189' <https://whc.unesco.org/en/decisions/8110/> accessed 20 December 2025.

[61] Zorzi Giustiniani (n 32) 243.

[62] There are several sites, such as the Minaret and Archaeological Remains of Jam in Afghanistan, Nan Madol: the Ceremonial Centre of Eastern Micronesia, or the Chan Chan Archeological Zone in Peru, that were inscribed on the In Danger List for reasons that can be related to climate change, such as flooding. However, it cannot be maintained that climate change was the sole reason for their inscription.

[63] 'Decision 40 COM 7, State of Conservation of World Heritage Properties' (*UNESCO*) <https://whc.unesco.org/en/decisions/6817/> accessed 29 December 2025.

[64] 'New Visions for the List of World Heritage in Danger, Independent Study Undertaken in Conformity with Decision 40 COM 7 of the World Heritage Committee, adopted at its 40th Session (Istanbul/UNESCO, 2016)' <https://whc.unesco.org/en/danger/> accessed 29 December 2025.

Report lead to the adoption of five recommendations. The first one is to change the narrative through positive storytelling and proactive, strategic communications; the second one is to "turn up the volume" on youth voices, because heritage is to be transmitted to future generations; the third one is to transmit clear, meaningful, and transparent messages; the fourth recommendation is to promote contextualized, localized and participatory communication on List of World Heritage in Danger; and fifth is the so-called "back to basics" messaging, in terms of keeping the conservation of heritage, rather than some other interests, in the focus.[65]

The Report, and the accompanying Guidebook for its implementation,[66] highlighted some real-life situations in which the insertion of property on the In Danger List resulted in positive efforts to safeguard its outstanding universal value. One notable example is the Cologne Cathedral in Germany, which was placed on the List at Germany's initiative due to an urbanization plan that included the construction of high buildings around the Cathedral, threatening its visual identity.[67] Ultimately, initial plans for the construction were changed, and the surroundings of the Cathedral were preserved, thus maintaining the outstanding universal value of the property. This resulted in the removal of the Cathedral from the In Danger List in 2006, two years after its inclusion.[68]

The above example is precisely what placing a site on the In Danger List should aim at–eventual delisting, once the threat to the site's outstanding universal value has been resolved. In the opposite scenario, in which corrective measures do not produce at desired result, resulting in a loss of an outstanding universal value of the site, a property is permanently deleted from the World Heritage List.[69] Such cases are rare, but do exist. The Arabian Oryx Sanctuary, the Dresden Elbe Valley, and the Liverpool Maritime Mercantile City in the United Kingdom of Great Britain and Northern Ireland have been deleted from the World Heritage List, after their placement on the In Danger List failed to prevent further deterioration in their outstanding universal value. The deletion of these properties from the World Heritage List is a loss for the entire humanity, as the purpose

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65 ibid.

66 The Guidebook is a practical tool for all the relevant stakeholders, like states, civil society, indigenous people, and others, which proposes concrete actions to implement the recommendations. 'Implementing New Visions: A Guidebook for Action on the List of World Heritage in Danger' <https://whc.unesco.org/en/danger/> accessed 5 January 2025.

67 Diana Zacharias, 'Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System' (2006) 10 Max Planck Yearbook of United Nations Law 276.

68 'World Heritage Committee sounds the alarm for Cologne Cathedral' (*UNESCO*) <https://whc.unesco.org/en/news/71> accessed 8 January 2026.

69 Operational Guidelines, paras. 192-198.

of inscribing properties on the List is to ensure their protection, so they can be passed on to future generations.[70]

IV. Introducing the Climate Change Component into the Cultural Heritage Legal Framework

1. *Steps toward Recognizing Climate Change as a Distinct Challenge in the Preservation of Cultural Heritage*

The general protection of cultural heritage guaranteed by the 1972 WH Convention, including listing endangered sites on the World Heritage in Danger List, may find its application in the context of climate change. However, the climate threat comes as a very specific circumstance, which was not taken into consideration when the Convention was adopted. That is why it is often suggested that the Convention seems "ill-suited" to respond to the consequences of climate change, as its static nature may not adequately address the dynamic challenges posed by the climate threat.[71] More specifically, there are concrete questions posed by the emergence of climate threat, such as: should a site be inscribed on the World Heritage List while knowing that its potential outstanding universal value may disappear due to climate change impacts or should a site be inscribed on the List of World Heritage in Danger or deleted from the World Heritage List due to the influence of impacts that are beyond the control of the concerned State Party?[72] Also, given the long-term nature of climate change impacts, should the consideration of outstanding universal value be deliberately considered in a longer-term context?[73]

All these questions prompted an approach in which climate change should specifically be addressed within the cultural heritage legal framework. In doing so, it must first be observed that the cultural heritage conventions do not explicitly mention climate change. An implicit reference to the impacts of climate change can be found in Article 11(4) of the WH Convention, which enumerates possible reasons for the inscription of cultural heritage sites to the List of World Heritage in Danger, mentioning "changes in water level" as one of those grounds.

[70] Independent study (n 64).

[71] Malgorzata Kubik, 'Cultural Heritage Protection in the Age of Climate Change: Adapting International Legal Frameworks to Environmental Threats' (*Harvard ILJ*, 2025) <https://journals.law.harvard.edu/ilj/2025/04/cultural-heritage-protection-in-the-age-of-climate-change-adapting-international-legal-frameworks-to-environmental-threats/> accessed 12 January 2026.

[72] 'Report on Predicting and Managing the Impacts of Climate Change on World Heritage, A joint report from the World Heritage Centre, its Advisory Bodies, and a Broad Group of Experts to the 30th Session of the World Heritage Committee' <https://whc.unesco.org/en/activities/474/> accessed 18 January 2026.

[73] ibid.

The 2003 Convention on Safeguarding the Intangible Cultural Heritage, while also failing to mention climate change explicitly, provides that intangible cultural heritage must be "compatible with […] sustainable development".[74] Other documents on the protection of cultural heritage mention "pollution" as a factor that may harm heritage.[75] But none of these documents makes a significant reference to the climate change issue.

In the same way that cultural heritage treaties do not refer to climate change, climate change treaties omit considerations of cultural heritage. None of the relevant treaties–the 1992 United Nations Framework Convention on Climate Change (UNCCC), the 1997 Kyoto Protocol, or the 2015 Paris Agreement–explicitly mentions cultural heritage, though the Paris Agreement speaks of the rights of "indigenous peoples" and "local communities", as well as of "traditional knowledge, knowledge of indigenous peoples and local knowledge systems", without explicitly linking these to the preservation of intangible cultural heritage.[76]

The lack of a clear connection between climate change and cultural heritage in international treaties can be attributed to various reasons. First, at the time cultural heritage treaties were adopted, the consequences of climate change were not yet severe, and no relevant international discussions, either academic or political, were devoted to this issue.[77] When, on the other hand, the consequences of climate change became visible, prompting the adoption of climate change treaties, the focus shifted to state actions aimed at reducing greenhouse gas emissions. This, in itself, was a difficult task for the environmental negotiators, so that other issues, those with "less appalling consequences", remained in the background.[78] Another possible reason for the omission of climate change in the text of the Conventions is that the Conventions apply equally to all states, regardless of their level of exposure to climate change impacts, and they provide general protection for all categories of heritage within their scope, even though cultural heritage properties are made of different materials and are therefore differently susceptible to climate change impacts.[79]

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[74] 2003 ICH Convention, art. 2.

[75] For example, 1978 Recommendation for the Protection of Movable Cultural Property, Records of the General Conference, 20th Session, Paris, 24 October to 28 November 1978, vol. 1, Resolutions; or the 1985 Convention for the Protection of the Architectural Heritage of Europe, 1605 UNTS 451.

[76] Paris Agreement, Preamble and art. 7(5).

[77] Maria Kenig-Witkowska, 'The European Union Perspective on Cultural Heritage and Climate Change Issues' (2019) 3 Journal of Comparative Urban Law and Policy 63.

[78] Chechi (n 12) 181.

[79] Guido Carducci, 'What Consideration Is Given to Climate and to Climate Change in the UNESCO Cultural Heritage and Property Conventions?' in Sabine von Schorlemer and Sylvia Maus (eds), *Climate*

The growing recognition of climate change as a serious and immediate threat to world heritage has prompted an integration of climate considerations within the world heritage legal framework. The issue was first raised in 2005 by a group of organizations and individuals, who brought it to the attention of the World Heritage Committee.[80] The petitions did not result in the sites being inscribed on the In Danger List, but they prompted subsequent UNESCO efforts on the matter. In 2007, UNESCO published a Report on Predicting and Managing the Effects of Climate Change on World Heritage and a Strategy to Assist States Parties to the Convention to Implement Appropriate Management Responses.[81] The Report took a wide approach to dealing with the consequences of climate change, requiring that states develop regional responses to adaptation and mitigation, rather than focusing exclusively on the sites located on their territory.[82] The Strategy proposed three kinds of actions that states could employ: preventive actions; corrective actions, including management, adaptation, and risk management; and collaboration, cooperation, and sharing best practices and knowledge.[83] However, with regard to controlling greenhouse gas emissions, the Strategy pointed to the primary role of the UNFCCC system,[84] clearly limiting the integration of climate change issues into the cultural heritage legal framework.

Following the above developments, along with some other steps in the same direction,[85] the Policy Document on the impacts of climate change on World Her-

Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity (Peter Lang AG 2014).

[80] 'Climate Change and World Heritage' (*UNESCO*) <https://whc.unesco.org/en/climatechange/> accessed 15 January 2026; Ottavio Quirico, 'Amidst Fragmentation and Coherence: A Systemic Interpretation of the World Heritage Convention and the UNFCCC Regime' (2012) 10 New Zealand Yearbook of International Law 37.

[81] Report on Predicting and Managing… (n 72).

[82] ibid.

[83] ibid.

[84] ibid.

[85] For instance, the UNESCO World Heritage Centre presented a collection of 26 case studies on the effects of climate change on global cultural and natural heritage, both those that have already been examined and those that might require examination in the future. 'Case Studies on Climate Change and World Heritage' (*UNESCO*) <https://whc.unesco.org/en/activities/473> accessed 21 January 2026. Other case studies, not necessarily under the UNESCO, are being conducted. One of the best-known studies examining the influence of climate change on intangible cultural heritage is the study of lamprey fishing in Carnikava, Latvia. See more in Sandis Laimev and others, 'Perspectives on Climate Change Impact on Intangible Cultural Heritage: The Case of Traditional Lamprey Fishing in Latvia' (2024) 33 Anthropological Journal of European Cultures 26.

itage properties was adopted in 2007,[86] and later updated in 2021[87] and 2023.[88] The 2023 Policy Document takes a different path from its 2007 predecessor in moving beyond site-based adaptation as the focus for World Heritage, to importing into the WH Convention process many of the issues–and their accompanying political fault lines–of the Framework Convention on Climate Change.[89]

Operational Guidelines for the Implementation of the World Heritage Convention, from 2008, first mentioned climate change as one of the factors that might affect a particular site's outstanding universal value.[90] Subsequent versions of the Operational Guidelines, including the last one of 2025, built upon this, highlighting climate change as an important element to be taken into consideration when establishing effective management systems for cultural heritage protection.[91] Climate change, thus, became an essential component of the cultural heritage discourse.

2. Systemic Integration of Climate Change Law into the Cultural Heritage Law

In the previous section, it was demonstrated that climate change is increasingly being introduced into the cultural heritage protection framework. The climate threat has rightly been recognized as a "risk multiplier", rendering general protection established by the 1972 WH Convention insufficient for tackling the problem. It must be stressed that documents incorporating climate threats into the cultural heritage legal regime are soft law and, thus, lack legally binding force. The only legally binding document governing the protection of World Heritage remains the 1972 Convention.

The application of the WH Convention depends on its interpretation, giving relevance to both the soft law documents, and other relevant international instruments, primarily those constituting the climate change legal regime. To observe how all these instruments create an interrelated whole, rather than being self-standing and fragmented normative tools, it is necessary to depart from the

[86] 'Policy Document on the Impacts of Climate Change on World Heritage Properties' <https://whc.unesco.org/en/CC-policy-document/> accessed 25 January 2026.

[87] 'Updated Policy Document on Climate Action for World Heritage' <https://whc.unesco.org/en/documents/190260/> accessed 25 January 2026.

[88] 'Updated Policy Document on Climate Action for World Heritage' <https://unesdoc.unesco.org/ark:/48223/pf0000390439> accessed 25 January 2026.

[89] Helene Marsh, Anita Smith, and Greg Terrill, 'World Heritage and the Challenge of Climate Change: A Reform Agenda' (2023) 29 International Journal of Heritage Studies 39-48.

[90] 'Operational Guidelines for the Implementation of the World Heritage Convention, 2008', <https://whc.unesco.org/archive/opguide08-en.pdf> accessed 27 January 2026.

[91] See, for example, amended Operational Guidelines for the Implementation of the 1972 World Heritage Convention. 'Operational Guidelines' (*WHC.24/01*, 2025) <https://whc.unesco.org/en/guidelines/> accessed 27 January 2026.

1969 VCLT and its relevant provisions regarding treaty interpretation.

Article 31 of the VCLT provides a general rule of interpretation and states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[92] In interpreting a treaty, there shall be taken into account "any relevant rules of international law applicable in the relations between the parties",[93] as well as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[94]

The above general rule on treaty interpretation points to observing the state obligations stemming from the WH Convention in the context of other relevant international law rules. In doing so, it is first necessary to reflect on the soft law documents previously mentioned. As already noted, they do not constitute binding law, but do have interpretative value as "subsequent practice" within the meaning of Article 31 VCLT. Instruments such as Policy Documents undoubtedly represent subsequent practice, as they were adopted by the General Assembly of the States Parties to the Convention. An interpretative value also lies in the practice of the World Heritage Committee. Although the Committee does not bring together all the state parties to the Convention, it is a body established by the Convention, thus by all the parties, so its decisions bear relevance when the subsequent practice in the application of the Convention is concerned.[95]

The WH Convention, furthermore, should be interpreted in conjunction with the international climate-change legal framework, in particular the UNFCCC regime.[96] This approach reflects the principle of 'systemic integration', as conceptualized by the International Law Commission in its work on the fragmentation of international law. It rests on the understanding that all treaties, irrespective of their subject matter, are products of a single international legal system and should therefore not be treated as separate or mutually independent bodies of law. [97]

[92] VCLT, art. 31(1).

[93] VCLT, art. 31(3)(c).

[94] VCLT, art. 31(3)(b).

[95] 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (2018) Yearbook of the International Law Commission, vol. II, Part Two; Stefan Kadelbach, 'International Law Commission and Role of Subsequent Practice as a Means of Interpretation under Articles 31 and 32 VCLT' (*QIL*, 31 January 2018) <https://www.qil-qdi.org/international-law-commission-and-role-of-subsequent-practice-as-a-means-of-interpretation-under-articles-31-and-32-vclt/#_ftn7> accessed 29 January 2026.

[96] VCLT, art. 31(3)(c).

[97] 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) International Law Commission, A/CN.4/L.682.

The key issue here is whether the pertinent provisions of the WH Convention, which impose obligations on states parties, should be interpreted in the context of climate change obligations, such that they are understood not merely as recommendations for states to take all possible measures to protect heritage within their territories, but as establishing substantive legal duties.[98] When posing this question, we are not asserting that the WH Convention provisions are not obligatory *per se*. However, they are formulated in such a manner as to give states considerable discretion in deciding how to implement them. The wording "will do all it can", in Article 4, and "shall endeavour, in so far as possible", in Article 5, clearly demonstrates the Convention's reliance on open-textured language, creating binding obligations but leaving states considerable leeway in their execution. The situation is somewhat different with Article 6, which provides that states should not take "any deliberate measures" that might damage the heritage. This is particularly relevant in the context of climate change because it raises the question of whether non-compliance with climate obligations may be characterized as a "deliberate measure" under Article 6 of the WH Convention.

First, let us reflect on the obligations stemming from Articles 4 and 5 of the WH Convention. As much as these provisions leave room for a wide discretion of states in implementation of protective measures, they nevertheless oblige states to do "all" they can and "to the utmost of [their]… resources". This would imply, *inter alia*, taking the necessary mitigation measures in the form of a reduction of the anthropogenic greenhouse gas emissions. This obligation, in various forms, stems from several climate change treaties[99] and is confirmed by the ICJ Advisory opinion on climate change from 2025.[100] Also, the Convention's instruction that states should act "to the utmost of [their]… resources" may be correlated with the climate law principle of common but differentiated responsibilities.[101] The idea behind such regulations is the same–making states do all they can, to the extent of their capabilities, to achieve the goals advanced by the prospective treaties. Article 6, in addition, implies that states need to take these measures not only for the preservation of World Heritage sites located in their territory, but also for those located in other states.[102] This obligation derives from the duty of cooperation[103] of the entire international community, as set out in Article 6. The

[98] Erica J. Thorson, 'The World Heritage Convention & Climate Change: The Case for Climate-Change Mitigation Strategy Beyond the Kyoto Protocol' in Wil C. Burns and Hari Osofsky (eds), *Adjudicating Climate Control: Sub-National, National, And Supra-National Approaches* (Cambridge University Press 2007).

[99] See UNFCCC, art. 2, Kyoto Protocol, art. 3(1), Paris Agreement, art. 2(1)(a), 4(1).

[100] Obligations of States in Respect of Climate Change, Advisory Opinion, General List No 187, 23 July 2025, paras. 132-139.

[101] UNFCCC, art. 3(1).

[102] Thorson (n 98) 11.

[103] On the ambiguous nature of the duty to cooperate and the failure of the ICJ to clarify it, see:

duty of cooperation is also explicitly or implicitly provided in several climate law provisions.[104] Article 6, further, obliges states not to take deliberate measures that might damage the heritage. Interpreting this provision with reference to climate obligations poses the question of whether states' failure to reduce greenhouse gas emissions, or–more accurately–failure to take action aimed at reducing these emissions–might be seen as a deliberate act jeopardizing the preservation of heritage. Some of the largest greenhouse gas emitters, such as the United States, have already opposed such an interpretation.[105] The argument in favour of the non-reduction of emissions being deliberate acts that might damage heritage sites is certainly not without controversy. Greenhouse gas emissions result from widespread economic activity and do not constitute a "measure" within the meaning of Article 6.[106] In addition, it would be far-fetched to claim that any state behaviour related to (non)reduction of greenhouse gas emissions is targeted at deliberately harming World Heritage sites.[107]

Thus, if the conclusion is that state obligations from Articles 4 and 5 of the WH Convention, read in conjunction with the climate obligations, include taking the mitigation measures, the next step would be to see what these measures entail, that is, whether they are equivalent to those provided by the climate treaties. It has now become clear that the current climate measures are insufficient to combat climate change effectively.[108] Achieving a goal of holding "the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursuing efforts "to limit the temperature increase to 1.5°C above pre-industrial levels", which was set by the Paris Agreement,[109] requires a decline of 43 % in greenhouse gas emissions by 2030.[110] This is not enough to halt the exceeding of the 2°C threshold, as the relevant data shows that, for instance, the G20 targets in 2030 "remain far from the average global percentage reductions required to

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Khaled Elmahmoud and Natali Gbele, 'When Guidance Becomes Fog: The ICJ and the Normative Uncertainty of the Duty to Co-operate' (*EJIL: Talk!*, 14 January 2026) <https://www.ejiltalk.org/when-guidance-becomes-fog-the-icj-and-the-normative-uncertainty-of-the-duty-to-co-operate/> accessed 20 January 2026.

[104] UNFCCC, art. 3(1), 4(1); Kyoto Protocol, art. 6(1), 10(c); Paris Agreement, art 2(1), 6(1), 7(7).

[105] Quirico (n 80) 52; William C. G. Burns, 'Belt and Suspenders: The World Heritage Convention's Role in Confronting Climate Change' (2009) 17 Southeastern Environmental Law Journal 371.

[106] Quirico (n 80) 51.

[107] ibid.

[108] Kathryn Lafrenz Samuels and Ellen J. Platts, 'Global Climate Change and UNESCO World Heritage' (2022) 29 International Journal of Cultural Property 409.

[109] Paris Agreement, art. 2(1)(a).

[110] 'Climate Change 2023: Synthesis Report–Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC' (*IPCC,* 2023) 35.

align with 2°C and 1.5°C scenarios".[111] Does all this mean that states parties to the WH Convention are not tied to the limits set by the climate treaties if these limits prove to be inefficient to achieve satisfactory results? If the answer to this question lies in determining which of the relevant corpus of law shall be applied, cultural heritage law or climate change law, it must be observed that the climate treaties are *lex posterior* and *lex specialis* in regulating climate measures and have on both counts supremacy in application over the WH Convention. Their primacy in application is also recognized in soft law documents related to cultural heritage protection.

On the other hand, if the current climate regulation is likely to be insufficient to achieve its goals, the obligation to take "all appropriate measures" under Article 5 of the WH Convention might be interpreted as requiring stronger action to protect World Heritage, including emission reductions exceeding those envisaged by the climate treaties.[112]

However, the latter reading of the WH Convention, implying the adoption of general mitigation measures, which go beyond those established by the climate treaties, is not in line with the object and purpose of the WH Convention.[113] Only on-site mitigation measures, adopted on a case-by-case basis, might be considered to remain within the said object and purpose.[114] Therefore, particular measures, rather than general ones, might be based on Article 5 of the WH Convention.

It is also necessary to reflect on the doctrine of *rebus sic stantibus*, a well-established principle of international law codified in Article 62 of the VCLT. Under the VCLT, a treaty may be suspended or terminated where there has been "a fundamental change of circumstances" that occurred with regard to those existing at the time of the conclusion of the treaty, was not foreseen by the parties, constituted an essential basis of their consent to be bound, and has the effect of radically transforming the extent of obligations still to be performed under the treaty. To safeguard the stability of treaty relations and to uphold the principle of *pacta sunt servanda*, the invocation of this doctrine is confined to exceptional cases.

It would not be unreasonable to argue that climate change may constitute such

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111 'UN Environment Programme, No more hot air…please!, Emissions Gap Report 2024' <https://wedocs.unep.org/bitstreams/38f4688c-6bb3-4351-aae7-d50157acfca9/download> accessed 15 January 2026.

112 Erica J. Thornson, 'On Thin Ice: the Failure of the United States and the World Heritage Committee to take Climate Change Mitigation Pursuant to the World Heritage Convention Seriously' (2008) 139 Environmental Law 165.

113 Quirico (n 80) 68.

114 ibid.

an exceptional circumstance, not because climatic variability was unknown at the time of the adoption of the WH Convention, but because the scale and intensity of contemporary climate change were not foreseeable at the time. It is further plausible to contend that the climate threat could substantially alter the context in which states parties' obligations are performed, particularly if general adaptation and mitigation measures, including those exceeding the commitments envisaged under climate treaties, were to be required. Consequently, an interpretation of the WH Convention that stretches its obligations to encompass climate measures broader than those contemplated within the climate change regime risks producing an unintended effect: encouraging reliance on *rebus sic stantibus* under the VCLT, thereby undermining the stability of the Convention itself.

V. Conclusion

When climate change came to be recognized as a "risk multiplier" for a wide range of threats, including those affecting the protection of cultural heritage, the question arose as to whether, and to what extent, interlinkages should be created between the two legal regimes–climate change law and cultural heritage law. From one perspective, both sets of rules could be applied independently, thereby preserving a clearer focus on the specific objectives that motivated their respective adoption. However, as this paper has demonstrated, the general protection guaranteed by the WH Convention appears insufficient to address the specific and systemic challenges posed by climate change. In this context, the development of interlinkages between cultural heritage law and climate change law has emerged as an appropriate and, to a certain extent, necessary means of enhancing the effectiveness of cultural heritage protection.

This convergence is not accidental. Both cultural heritage law and climate change law are ultimately concerned with the protection of shared goods–the environment and cultural assets as part of that broader environment–and with safeguarding interests that transcend national boundaries. This common orientation is reflected in the language of the relevant treaties: the WH Convention refers to the "outstanding universal value" of cultural heritage properties, while the UNFCCC characterizes climate change as a "common concern of humankind".

The paper has shown that recent years have been marked by increasingly intensive efforts to incorporate climate change considerations into the cultural heritage protection framework. This has occurred primarily through the adoption of a range of UNESCO soft law instruments, which, although not legally binding, play an important role in guiding state practice and in informing the interpretation of the WH Convention. The analysis has further demonstrated that the Convention cannot be interpreted in isolation, it must be read in conjunction not only with these UNESCO instruments but also with other relevant treaties, including those constituting the international climate change regime.

At the same time, this paper has sought to identify the limits of such systemic interpretation and integration. It has been argued that the WH Convention should not be interpreted as imposing new, general climate-mitigation obligations on states parties on the basis that such obligations are required for the proper protection of cultural heritage. Such an interpretation would go beyond the object and purpose of the Convention. This however, does not exclude the adoption of site-specific adaptation and mitigation measures aimed at protecting particular heritage properties from climate-related harm.

It is precisely in this area that further normative and policy development is most needed. Future instruments addressing the intersection of cultural heritage protection and climate change should, therefore, focus on elaborating concrete, operational frameworks for site-level adaptation and mitigation. Such an approach would enable a more effective and legally coherent response to climate-related threats, while remaining in line with the purpose of the existing cultural heritage legal regime.

Why Contracts Need a Holistic Approach to Sustainability?*

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Contents

* I declare that, in addition to standard proofreading, I only use artificial intelligence (Grammarly and DeepL) as a language tool to support grammar, clarity, and spelling corrections.

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Abstract

The concept of sustainability—which has become central to today's legal and economic systems— is being transformed from a broad social, ecological and business-related concern into a binding legal principle that concerns and affects both public and private law. In other words, sustainability is also being transformed into a binding legal paradigm in the European Union (EU) and beyond, rather than merely a corporate aspiration. However, despite its established status and ongoing efforts, the process of integrating this relatively new concept into contract law systems remains superficial and fragmented. Sustainability obligations are still treated as a fragmented structure that cannot be clearly defined in contracts; they are mostly integrated into contracts as voluntary commitments and independent provisions, which are binding only on the contracting parties. This study argues that achieving sustainability in the literal sense is only possible through a comprehensive contractual approach that embeds and integrates environmental, social, and governance (ESG) elements into the entirety of the contractual relationship. The examination of regulations such as the EU Corporate Sustainability Due Diligence Directive (CSDDD)[1] and the Corporate Sustainability Reporting Directive (CSRD)[2] reveals that the sustainability obligations imposed on companies are inevitably transferred to private law relationships, particularly global supply chain contracts. A holistic approach could ensure that the sustainability obligations provisions may embody as binding provisions that are supported not only symbolically but also by measurable standards, audits, accountability mechanisms, and transparency.

Keywords: sustainability, EU Law, contractual relations, ESG, holistic approach

I. Introduction

The concept of sustainability[3] has become one of the central concerns in today's

[1] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L2024/1760.

[2] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15.

[3] There is no consensus in the doctrine on how to define the concept of sustainability. In reports and sources published by the UN, the concept of sustainability is defined in various ways and is described as "the least understood and applied concept from the global to the local scale." Ecehan Özmehmet, 'Dünyada ve Türkiye'de Sürdürülebilir Kalkınma Yaklaşımları (Approaches to Sustainable Development in the World and in Turkey)' (2008) 3 Yaşar Üniversitesi E-Dergisi 2; Therefore, if an environmentalist approach is adopted, the concept of sustainability can be defined as "the principle of not consuming existing resources while preventing the potential for future generations to benefit from these resources." Ahmet İçöz and Yavuz Kılınç, 'Çevre Maliyetleri Muhasebesi ve Raporlanması (Environmental Cost Accounting and Reporting*)'* (2016) 9 Uluslararası Sosyal Araştırmalar Dergisi 1521; The most common and comprehensive definition of sustainability can be described that it is "the ability of a society, ecosystem, or function-

legal and commercial environments. In this context, the question arises as to how contract law—a discipline traditionally focused on the private agreements and economic interests/profits of the parties—contributes or can contribute to sustainable development. Traditionally, contracts were seen merely as a tool to facilitate the performance and enforcement of the transactions entered by the contracting parties. However, it can be said that contracts are no longer just such a tool for enforcing private transactions. They can be seen as having far-reaching effects on the environment and society, and in this respect, can either be a crucial tool that can bring about positive change by preventing practices that are not considered sustainable or a crucial tool that can perpetuate such practices.[4] In other words, "contracts are not only neutral; they are powerful tools that shape sustainable or unsustainable practices."[5] It is clearly evident that the short-term economic interest goals prioritized by a narrow perspective are insufficient in addressing urgent issues such as the rapid depletion of resources, the intensity of climate change, and the increasing social inequalities.[6] Also, this global push for sustainability has been supported by a number of important international agreements. One of the most important of these is the United Nations (UN) 2030 Agenda for Sustainable Development[7] and its Sustainable Development Goals, which call for environmental protection, social equity, and economic resiliency to be in line with each other whenever possible in all areas of government and business. These frameworks are not legally binding on contracts and do not impose direct contractual obligations on private law persons, still they provide a framework that significantly effects the way legal powers defining and redefining private law obligations.[8] In such a situation, it leads to the conclusion that the concept of sustainability—which is also the main subject of the study—

ing system to continue functioning for an indefinite future without being adversely affected by the depletion or overconsumption of the essential resources it requires for its continued existence." Robert Gilman, 'Sustainability' (*Context Institute*) <https://www.context.org/about/definitions/> accessed 9 October 2025. The author's definition is "sustainability refers to the ability of a society, ecosystem, or any ongoing system to continue to function into the indefinite future without being forced into decline by depletion or overload of the essential resources on which the system depends.".

[4] Jie Ouyang, 'Reconfiguring Contract Law Through Sustainability' (*Transformative Private Law Blog*, 2024) <https://transformativeprivatelaw.com/reconfiguring-contract-law-through-sustainability/> accessed 9 October 2025.

[5] 'Contract Law → Term' (*Sustainability Directory,* 11 March 2025) <https://sustainability-directory.com/term/contract-law/> accessed 9 October 2025.

[6] Rana Cevahir, 'Anonim Şirket Yönetim Kurulu Üyelerinin Sürdürülebilirlik Raporlarından Doğan Hukuki Sorumluluğu (Legal Liability of the Members of the Board of Directors of Joint Stock Companies Arising from Sustainability Reports)', (Bilkent University 2025) 5 <https://repository.bilkent.edu.tr/server/api/core/bitstreams/0a0beac2-9c3e-4462-b112-520f9609fd94/content> accessed 9 October 2025.

[7] GA. Res. 70/1, 21 October 2015.

[8] Ekaterina Pannebakker, 'Sustainable Development Clauses in International Contracts through the Lens of the UNIDROIT Principles' (2024) 29 Uniform Law Review 355, 359-361.

requires a holistic approach in contract law. A holistic approach in the context of contract law can be defined for the purposes of this study as integrating environmental and social conditions collectively and in the long term, along with economic objectives into contracts. First, the concept of the holistic approach will be explained, followed by a demonstration of how the ESG dimensions are interconnected with sustainability. Subsequently, the approach will be examined in the context of legal regulations, with a particular focus on its reflection in European Union (EU) legislation. The EU treaty principles, regulations, and directives that have incorporated sustainability as a 'recognized' concept in contracts will also be analysed. Although the term 'holistic approach' may not be explicitly stated in the legislation, attention will be drawn to provisions that can effectively be interpreted with a sustainability-focused perspective. Subsequently, examples of court decisions and recent developments that tend toward a holistic sustainability approach will be provided. For instance, court rulings will be discussed in terms of how both environmental and social responsibilities are addressed in contract interpretation, and how certain laws mandate sustainability practices that companies must comply with in supply chains. In conclusion, it will be argued that adopting a holistic approach in contracts transforms them from mere documents serving the immediate interest of the parties as private law instruments into tools that contribute to achieving ecological and social goals for the benefit of future generations. This study examines how a holistic approach to sustainability can be understood in contract law and why such an approach is essential to contractual relations.

II. The concept of holistic approach

The relationship between nature and humans has long oscillated between two distinct perspectives: anthropocentrism, which views nature as a resource to be utilized for the benefit of humans, and ecocentrism, which holds that nature is valuable in its own right, regardless of whether it benefits humans.[9] Besides these approaches, a new approach also emerged: the holistic approach. As mentioned above, there is a change in ethical thinking, as a result of which the holistic approach is increasingly observed.[10] The need for a holistic approach, arising from the clear inadequacy of the traditional resource management based largely on sectoral foundations to meet future challenges, has begun to be recognized and gained momentum since the 1980s.[11] A holistic approach combines environmental integrity, economic efficiency, and social justice as complementary

[9] Tim Hayward, 'Anthropocentrism A Misunderstood Problem' (1997) 6 Environmental Values 49, 60; Jan G. Laitos, 'The Problem of Government Regulation: The Emerging Shift from Anthropocentric to Ecocentric Nonuse Laws', in *The Right of Nonuse*, (OUP 2012) 188.

[10] Orsolya Johanna Zsigmond-Sziebig, *ECOCIDE – An Evolving Legislative Concept in the Light of Care for Creation* (L'Harmattan 2025) 47.

[11] Fraoukje Maria Platjouw, *Environmental Law and the Ecosystem Approach: Maintaining Ecological Integrity Through Consistency in Law* (Routledge 2016) 19.

dimensions. In other words, the holistic approach addresses sustainability not merely as an environmental or economic issue; instead, it emphasises the mutual interaction between humans, law, and nature. While the anthropocentric approach centres on humans, and the ecocentric approach centres on nature, the holistic approach evaluates both perspectives harmoniously.[12]

1. A Holistic Approach to Sustainability

Adopting a holistic approach to the concept of sustainability actually requires that sustainability goals be addressed in an integrated and detailed manner as a whole. In other words, the ESG elements are not considered separately but rather as parts of a whole. This trinity is often referred to as "planet, people and profit" in EU and international frameworks. ESG can be referred as "a set of standards used to measure an organization's environmental and social impact".[13] Although it is still unclear which topics are included in the ESG concept today, it can be said that ESG is an "umbrella term".[14] Despite this uncertainty, the ESG concept—which is accepted to be at the centre of corporate governance and investment issues—encompasses matters such as corporate tax policy, human rights, climate change, and cybersecurity.[15] From the perspective of contracts, a holistic approach acknowledges that social welfare and the ecological system, that is nature, are connected to economic activities, and contractual agreements aim for "contributing to the long-term sustainability of these systems rather than undermining them."[16] However, contract law also often treats sustainability as a secondary (ancillary) element, or in other words, as an 'additional clause'. In fact, with this fragmented structure, each actor in the contract fulfils only their narrow obligation. Adopting such an approach acknowledges that ESG dimensions are directly related to each other; therefore, contracts, corporate governance, and state policies must reflect this interdependence together. In practical terms, this perspective involves not only viewing contracts as transactions aimed at financial gain but also—by thinking more broadly—integrating ESG elements into the entire process, from negotiating and drafting the contract to its execu-

[12] Desta Mebratu, 'Sustainability and Sustainable Development: Historical and Conceptual Review' (1998) 18 Environmental Impact Assessment Review 498, 513-514.

[13] 'ESG Explained a Beginners Guide to Environmental, Social and Governance Criteria' (*Eco-Active,* 2024) <https://ecoactivetech.com/esg-explained-a-beginners-guide-to-environmental-social-and-governance-criteria/> accessed 12 October 2025.

[14] Josephine Sandler Nelson, 'The Future of Corporate Criminal Liability: Watching the ESG Space' (*University of Pittsburgh Legal Studies Research Paper*, 2022) 5, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4057736> accessed 12 October 2025.

[15] Thomas M. Madden and Gerlinde Berger-Walliser, 'Making Sense of ESG with the SEC', (2023) 25 University of Pennsylvania Journal of Business Law 932; Cevahir (n 6) 12.

[16] "It demands a holistic approach that acknowledges the interconnectedness of economic activity with ecological and social systems, aiming to ensure that contractual agreements contribute to, rather than undermine, the long-term sustainability of these systems." Sustainability Directory under the section 'Meaning'.

tion and implementation.[17] In this way, it is possible to structure contracts so that they better align with sustainability goals at every stage. Formun ÜstüThe truth is, it can be interpreted as the ESG concept was created to emphasize a holistic perspective and to give equal importance to all elements. In short, a holistic understanding of sustainability can ensure the combined evaluation of environmental protection/reduction of negative environmental impacts, social justice, promotion of human rights, and economic development elements. In this way, it is also aimed to achieve long-term economic sustainability.[18]

2. The Adoption of a Holistic Sustainability Approach in Contractual Perspective

The adoption of a holistic approach to sustainability in contracts is not merely a preference but a path that addresses the concrete needs of current society and future generations, as well as the challenges that may arise. First of all, since environmental, social, and economic issues are concepts that feed into each other, treating these concepts separately may lead to undesirable outcomes. For example, a profit-driven supply agreement focused solely on speed or cost criteria will very likely overlook pollution generated during production or the poor conditions workers may be exposed to. However, a contract integrating a holistic approach will include guarantees both for the environment and the welfare of the workers. From the perspective of both parties, indeed, directing contracts toward "long-term ecological and social well-being" will help ensure the stable progress of economic activities.[19] In other words, planning will be done in a way that does not jeopardize companies' profit assurance while also ensuring the fulfilment of ESG factors. Secondly, another noteworthy point is that businesses are legally required to increasingly consider their environmental and social impacts. Especially in the EU, provisions are being adopted that require large-scale companies to identify environmental risks and human rights violations in

[17] Sustainability Directory under the section 'Meaning'; Türkiye Teknoloji Geliştirme Vakfı, 'Sorumlu Yatırımcılık / ESG Perspektifinden Sürdürülebilirlik ve Kuruluşlar İçin Genel Bir Çerçeve (Responsible Investing/ Sustainability from an ESG Perspective and a General Framework for Organizations)' (*TTGV,* 2022) 5 <https://ttgv.org.tr/media/2024/03/6255588633f00.pdf> accessed 12 October 2025.

[18] Aria Huys, 'Embracing Sustainability in Value Chains Through EU Legislation: The Labour Rights Perspective' (*Global Workplace Law & Policy,* 2024) <https://legalblogs.wolterskluwer.com/global-workplace-law-and-policy/embracing-sustainability-in-value-chains-through-eu-legislation-the-labour-rights-perspective/#:~:text=The%20term%20%E2%80%98sustainability%E2%80%99%20is%20used,making> accessed 13 October 2025.

[19] "The integration of sustainability into contract law is therefore not merely a matter of adding environmental clauses or social responsibility provisions; it requires a fundamental re-orientation of contractual principles and practices to align with long-term ecological and social well-being. This contextual shift demands a move from contracts as instruments of purely economic exchange to contracts as instruments of shared responsibility for a sustainable future." Sustainability Directory under the section 'Context'.

their supply chains and to address them.[20] Such regulations essentially require the adoption of a holistic approach in practice. To comply with these obligations, companies must include sustainability criteria in the contracts they make with both suppliers and business partners. Companies that do not include these criteria risk failing to comply with new regulations. Entering into contracts that align with sustainability criteria and goals cannot only enhance the company's reputation but also help prevent potential profit losses they may fear, potentially leading to profit increases; it will also help fulfil their ethical duties toward society and future generations. For example, in the EU, it has become a rule that during public tenders, not only price but also environmental and social criteria must be taken into account in the contract, a practice confirmed by a 2002 ruling of the European Court of Justice.[21] Lastly, integrating sustainability holistically—based on the understanding that "sustainability is a mandatory pre-requisite for long-term economic resilience"[22] —can create a "win-win" situation for all parties in the long run. Transitioning to renewable energy, regulating fair labour practices, and efficient resource use can lead to both innovation and cost savings. For example, a contract with a holistic approach can impose obligations on the supplier regarding energy efficiency, which over time will reduce costs for both the buyer and the supplier. In summary, the holistic approach recognizes that contracts do not operate in a vacuum; in other words, it allows them to see the reality beyond their current state.[23] Contract law is now seen as a powerful tool that can either sustain unsustainable practices or actively guide the transition to a more sustainable future.[24]

[20] "On 25 July 2024, the Directive on corporate sustainability due diligence (Directive 2024/1760) entered into force. The aim of this Directive is to foster sustainable and responsible corporate behavior in companies' operations and across their global value chains. The new rules will ensure that companies in scope identify and address adverse human rights and environmental impacts of their actions inside and outside Europe." Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L2024/1760.

[21] "The European Court of Justice (the ECJ) has today issued a landmark judgment (Concordia Bus Finland) that has important implications for the integration of environmental criteria in public procurement. The judgment clarifies the extent to which "secondary" criteria (i.e., criteria that are not purely economic, such as environmental or social) can be taken into account at the stage at which a public procurement contract is awarded." Wilmer Hale, 'European Court Says Environmental Criteria May Be Taken into Account in Awarding Public Contracts' (2002) <https://www.wilmerhale.com/-/media/55cfba43c1084b2d926ed6ba74ee0dd8.pdf> accessed 18 October 2025.

[22] Sustainability Directory under the section 'Economic'.

[23] Monika Zalewska, 'The New Dimension in Judicial Decisions for Acceleration of Water Resources and Biosphere Sustainability', (2025) 25 Ecohydrology & Hydrobiology 114.

[24] Ouyang (n 4) 3-4; Cristina Poncibò, 'A Contract Law for Future Generations', (2020) Journal of Legal Theory and Practice 36; Vibe Ulfbeck and Ole Hansen, 'Sustainability Clauses in an Unsustainable Contract Law?', (2022) 6 CEPRI Studies on Private Governance 11.

III. The EU law integration of holistic sustainability

One of the most obvious examples of the holistic approach to sustainability in contracts is seen in the EU's efforts in this area. It can be said that the EU treaties explicitly adopt a holistic vision of sustainability and that the directives and regulations they have issued in recent years ensure the reflection of sustainability in contracts. In this section of the study, it will also be shown how holistic sustainability is integrated into EU law. Since the founding treaties of the EU, it would not be wrong to say that one of the fundamental goals has been to integrate the concept of sustainability into practice. Art.3(3) and Art.3(6) of the Treaty on European Union (TEU)[25] states that the Union "shall work for the sustainable development of Europe", and that economic growth shall be balanced with a high level of environmental protection. At the same time, Art.9 and Art.11 of the Treaty on the Functioning of the European Union (TFEU)[26] establish an integrative principle, stating that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities." This expression makes it clear that both environmental and social factors need to be taken into account in EU regulations. Also, Art.191, has consolidated the areas concerning human health, environmental protection, and the sustainable management of natural resources, as well as the response to international cooperation, into a single policy framework.[27] Indeed, Art.37 of the Charter of Fundamental Rights of the European Union (CFRU)[28], which is supportive in nature, also lists sustainable development and environmental protection among the values that the EU must safeguard for the welfare of its individuals.[29] Studying these articles, we can say that the idea of integration mentioned in them, in other words, the concept of environmental integration in public law, can also be reflected in private law in terms of sustainability. It is understood that sustainability-related regulations are meant to be included in different areas

[25] "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance." Consolidated Version of the Treaty on the European Union [2016] OJ C202/13.

[26] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

[27] Art. 191. states that "Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.".

[28] "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." Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

[29] Ouyang (n 4) para. 3.

of EU law, including some areas that may also affect contract law. In fact—these treaty provisions may be seen as part of the broader groundwork for sustainability concerns in private law relationships and rules—directing contracts to serve not only economic freedom but also environmental/social goals and to be in harmony with them. However, it should be emphasised that, unfortunately, in practice this situation is still not applied in the field of contract law and instead remains a 'wishful thinking'. Indeed, this situation has been likened to "principles left over from politicians' Sunday speeches."[30] Also, from a holistic approach, it would not be wrong to say that one of the most important developments in EU law is the adoption of the CSDDD. The directive was finalized and came into effect in 2024 as Directive (EU) 2024/1760, imposing obligations to identify and prevent both environmental damage and human rights violations throughout global value chains. With the enforcement of this directive, the EU has shifted from a voluntary corporate social responsibility perspective to a mandatory corporate accountability perspective. We can clearly understand this transition from the fact that companies are now required to "identify and address adverse impacts on human rights and the environment in their own operations and across their value chains."[31] This transition also has important legal implications for contracts, as public law due diligence obligations are often implemented through contractual clauses used in relationships with suppliers and subcontractors. Companies complying with this directive will be required to include sustainability provisions and audit obligations in the contracts they conclude with both their suppliers and subcontractors, and they will be obliged to undertake contractual commitments. In case of violation of these obligations, they will face administrative sanctions as well as legal liability towards the party experiencing harm.[32] It can be said that especially Art.5(1) and Art.10(2)(b)[33] establish a corporate responsibility understanding that directly aligns with a holistic approach. Art.5 requires companies to incorporate the duty of care regarding human rights and environmental matters into all their systems, thereby integrating sustainability goals at every stage. Art.10 further requires companies to include contractual clauses related to the duty of care in the agreements they enter into directly or indirectly with their business partners. In this way, the EU has shifted from a voluntary corporate social responsibility approach to a mandatory corporate accountability approach. At the same time, it has made it obligatory for

[30] ibid.

[31] Huys under the section titled 'Introduction' para. 1.

[32] ibid.

[33] Art. 5. states that "Member States shall ensure that companies conduct risk-based human rights and environmental due diligence as laid down in Articles 7 to 16 ('due diligence') by carrying out the following actions…"; Art. 10. (2)(b) states that "seek contractual assurances from a direct business partner that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan, including by establishing corresponding contractual assurances from its partners, to the extent that their activities are part of the company's chain of activities; when such contractual assurances are obtained, paragraph 5 shall apply…" Directive (EU) 2024/1760.

companies within its scope to "identify and address adverse impacts on human rights and the environment in their own operations and across their value chains." It is clear, that this obligation has direct effects on contracts. If companies wish to comply, they will need to include sustainability provisions in their contracts with suppliers and subcontractors and specify their rights regarding audits. Companies will also be required to establish codes of conduct within their supply chains and enter into contractual commitments, and in case of violation of these obligations, they will face not only administrative sanctions but also legal liabilities. At the same time, the CSRD requires companies to provide comprehensive reporting on environmental, social, human rights, and governance issues. Art.19a(1) and 29a(1)[34], added by CSRD 2022/2464, mandate that businesses disclose both the impacts of their activities on the environment and people, as well as the effects of these sustainability factors on the business itself. In other words, companies are obliged to report not only their financial results but also their environmental and social impacts. Additionally, under the CSRD, companies must disclose plans and targets for aligning their strategies with the sustainable economic transition and the 1.5°C Paris Agreement goal. Also, the EU has various directives and regulations that integrate sustainability into private law obligations. This transition was initiated by the introduction of new rules between 2022 and 2024 to support consumers in the EU's green transition. Directive 2023/851 on Empowering Consumers for the Green Transition[35] has amended existing consumer protection laws to combat greenwashing[36] and to ensure that consumers receive accurate and verified information about the environmental impacts of products. According to this amendment, sellers must be transparent about the durability and reparability of a product, and false eco-la-

[34] "Article 19 (a) (1) and Article 29 (a) (1) of Directive 2013/34/EU require reporting not only on information to the extent necessary for an understanding of the undertaking's development, performance and position, but also on information necessary for an understanding of the impact of the undertaking's activities on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. Those Articles therefore require undertakings to report both on the impacts of the activities of the undertaking on people and the environment, and on how sustainability matters affect the undertaking. That is referred to as the double materiality perspective, in which the risks to the undertaking and the impacts of the undertaking each represent one materiality perspective. The fitness check on corporate reporting shows that those two perspectives are often not well understood or applied. It is therefore necessary to clarify that undertakings should consider each materiality perspective in its own right and should disclose information that is material from both perspectives as well as information that is material from only one perspective." Directive (EU) 2022/2464, recital 29.

[35] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information [2024] OJ L2024/825.

[36] The term greenwashing can be defined as the act of organizations that try to appear environmentally friendly and present themselves as such, deceiving their consumers regarding their environmental practices or the environmental benefits of a product or service. *See detailed information about this term in.* Directive (EU) 2024/825.

bels or unverified carbon-neutral claims are considered misleading commercial practices and are prohibited. This prohibition clearly imposes a *de facto* obligation on companies to act honestly when providing environmental information, not only in contractual terms but also at the pre-contractual stage of consumer communication.[37] Meanwhile, the draft Green Claims Directive[38] aims to standardise how companies verify and communicate their environmental claims.[39] In this way, it seeks to ensure that contractual declarations regarding the environmental impact of products are comprehensively truthful. In addition to the specified points, the Right to Repair initiative[40], which could soon be considered a directive or regulation, can be briefly mentioned. This initiative recognizes consumers' rights and opportunities to have their products repaired and it aims to prevent a culture of waste. These measures actually aim to steer the market towards sustainable consumption, because they will guide companies to produce their products in a long-lasting manner within the framework of legal obligations, provide accurate environmental information, and avoid making harmful and misleading statements to the environment and society. The EU's stance in this area also shows that sustainability is used as a 'lever' in consumer contracts. It is clear that conscious consumers and fairly prepared contract terms will increase demand for sustainable products.[41] In the context of the sustainable products initiative, the EU has also worked in parallel on the new Ecodesign Regulation.[42] This regulation sets certain standards for products regarding energy efficiency, recyclability, and durability. In other words, both producers and sellers will be contractually required to arrange their obligations in accordance with these standards.[43] In such a case, it can be understood with a holistic approach that consumers will no longer have to choose between "unsustainable and sustainable" products, and that sustainable products will be created with a single market standard.[44] Ultimately, it will be mandatory that sales and supply contracts made through the supply chain meet sustainability criteria, and that environmental concerns will be included in contracts at every stage of production. Lastly, al-

[37] Ouyang (n 4) para. 2.

[38] 'Green Claims' (*European Commission*) <https://environment.ec.europa.eu/topics/circular-economy-topics/green-claims_en> accessed 13 October 2025.

[39] Ouyang (n 4) para. 2.

[40] 'Right to Repair: Making Repair Easier and More Appealing to Consumers' (*European Commission*, 23 April 2024) <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20590/right-to-repair-making-repair-easier-and-more-appealing-to-consumers> accessed 13 October 2025.

[41] Ouyang (n 4) para. 2.

[42] Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Regulation (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [2024] OJ L2024/1781.

[43] Ouyang (n 4) para. 2.

[44] Ouyang (n 4) para. 2.

though public procurement, that is tenders, falls within the field of public law, it should not be overlooked that they also strongly affect private law contracts and emphasise a holistic approach. The EU Public Procurement Directives, especially Directive 2014/24/EU[45], state that public authorities can consider not only price but also environmental and social factors when awarding contracts through tenders. At the same time, it should be noted that Green Public Procurement[46] policies are also followed in the EU, and in such cases, sustainability criteria are included in public work or service contracts. For example, this could include requirements for renewable energy, fair working conditions, or the promotion of recycled materials. In this way, the obligations applicable to the contractor awarded the contract will also be reflected in private law contracts, because the main contractor is obliged to pass these criteria on to their subcontractors through the contract. In such a case, it can be said that public and private law are intertwined. In other words, developments in public law can create market demand for the performance of a sustainable contract, and in this case, the harmonisation of private law contract terms may be involved.[47] This also provides a good example of the idea that the private and public sectors should not be separate in terms of sustainability but rather should complement each other. In addition to these developments, some recent developments at the EU level demonstrate the increasing integration between private contracts and public regulation within the area of sustainability. On February 26th, 2025, the EU Commission shared the ESG Omnibus I package with the public.[48] The purpose of the package was to prepare to lift the burden of sustainability-related regulations on private enterprises while supporting the competitiveness of the EU, aiming at narrowing and simplifying the scope of existing obligations.[49] The legislation process of this package progressed really fast. The European Parliament and the Council approved a provisional text on December 9th, 2025[50] and approved the

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[45] Directive (EU) 2014/24 of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

[46] 'Green Public Procurement – Procuring goods, services and works with a reduced environmental impact throughout their life cycle' (*European Commission*) <https://green-forum.ec.europa.eu/green-business/green-public-procurement_en> accessed 13 October 2025.

[47] Huys under the section titled 'Decoding Value Chain Sustainability: The Terminology' para. 1; 'The EU Approach to the Sustainable Development Goals (SDGs) – implementation' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/sustainable-development-goals/eu-approach-sdgs-implementation_en#:~:text=Commission%20commission,will%20bring%20tangible%20progress> accessed 13 October 2025.

[48] 'Omnibus Package – Commission launched simplification package in February as part of increased focus on EU competitiveness' (*European Commission,* 1 April 2025) <https://finance.ec.europa.eu/news/omnibus-package-2025-04-01_en> accessed 19 March 2026.

[49] ibid para. 2.

[50] 'Council and Parliament strike a deal to simplify sustainability reporting and due diligence requirements and boost EU competitiveness' (*Council of the European Union*, 9 December 2025) <https://www.consilium.europa.eu/en/press/press-releases/2025/12/09/council-and-parliament-strike-a-deal-to-simplify-sustainability-reporting-and-due-diligence-require-

final text on December 16th, 2025.[51] Subsequently, the Council adopted the directive on February 24th, 2026. Directive (EU) 2026/470 was published in the Official Journal of the EU on February 26th, 2026, and became legally binding on March 18th, 2026.[52] This directive contains various substantive amendments impacting the CSRD as it will now provide for much narrower definitions and therefore limitations to eligible companies. Effectively, the CSRD will now only apply to companies that have over 1,000 employees with more than €450 million Euro in annual net turnovers. This represents a significant deviation from the initial scope of the CSRD and will result in approximately 90% of companies previously expected to fall within the scope of the CSRD being exempt from the CSRD's compliance obligations. Companies classified as Publicly listed Small and Medium-sized Enterprises (SME) will be exempt. The CSDDD has a threshold of 5,000 employees and annual net sales of €1.5 billion with the EU; non-EU companies that generate net turnover exceeding €1.5 billion within the EU also fall under the CSDDD's parameters.[53] The EU Commission estimates that this simplification yields significant administrative cost saving as much as €6 billion annually for the involved companies and generate potential investment capacity of approximately €50 billion.[54] Beyond narrowing the scope, Directive 2026/470 also brings significant content changes. The obligation to implement climate transition plans has been removed from the CSDDD; the reporting obligation of companies that have already adopted such plans continue under the CSRD framework. In addition, the common legal liability regime to be applied across the EU in the event of violations has also been removed from the directive text; this area will continue to be regulated by each member state within the framework of its national law and judicial procedures. It is also clear that this information request directed at small businesses in supply chains has been limited. Furthermore, under the 'stop-the-clock' directive adopted as separate, some reporting obligations for second and third wave companies under the CSRD have been postponed by two years; the transposition of the CSDDD into national law and its initial implementation phase have been postponed by one year.[55] In terms of the implementation phase, member states are required to

ments-and-boost-eu-competitiveness/> accessed 28 March 2026.

[51] 'Simplified sustainability reporting and due diligence rules for businesses' (*European Parliament*, 16 December 2025) <https://www.europarl.europa.eu/news/en/press-room/20251211IPR32164/simplified-sustainability-reporting-and-due-diligence-rules-for-businesses> accessed 28 March 2026.

[52] Directive (EU) 2026/470 of the European Parliament and of the Council of 24 February 2026 amending Directive 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements [2026] OJ L2026/470.

[53] ibid.

[54] European Commission, 'Omnibus package', para. 3.

[55] 'Simplification: Council gives final green light on the 'Stop-the-clock' mechanism to boost EU competitiveness and provide legal certainty to businesses' (*Council of the European Union,* 14

transpose the CSRD provisions into their national law by March 19th, 2027; the deadline for the transposition of the CSDDD into national law is set as July 26th, 2028, and the implementation start date is set as July 26th, 2029.

At first glance, it can be said that these changes show that the EU's sustainability approach considers the economic sustainability dimension alongside environmental and social goals, adopting a holistic approach. Thus, while ensuring that companies do not bear excessive cost burdens or face competitive disadvantages when fulfilling sustainability requirements, an effort also has been made to establish a balance between sustainable development and the needs of the business world. However, these regulations also brought criticism. It is emphasized that the new thresholds do not take sectoral differences into account and that many companies in sectors with high environmental impact will be exempt from reporting obligations. It has been stated that this situation could weaken sustainability clauses, reduce transparency, and limit the feasibility of sustainability related commitments in supply chains.[56] In this context, it is no longer easy to say that EU law is progressing in a clear direction towards sustainability, as the direction has evolved into a more complex structure based more on multiple stakeholders.

1. Comparative Reflections: The Integration of Holistic Sustainability

Laws have been enacted in some countries requiring companies to adopt a holistic approach in their contracts. First, in France, the Duty of Vigilance Law (*Devoir de Vigilance*)[57] of 2017 introduced regulations obliging large companies to prepare and implement monitoring plans both to prevent environmental damage and to prevent human rights violations within their own operations and

April 2025) <https://www.consilium.europa.eu/en/press/press-releases/2025/04/14/simplification-council-gives-final-green-light-on-the-stop-the-clock-mechanism-to-boost-eu-competitiveness-and-provide-legal-certainty-to-businesses/> accessed 28 March 2026; Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements [2025] OJ L2025/794.

[56] Josef Baumüller, 'EU Omnibus Package on Sustainability – Something We Don't Want to Ride (Yet)? "Omnibus I", CSRD (New) and the Revised Future of Sustainability Reporting in the EU: Evidence from Austria' (2025) 12-14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5195189> accessed 21 March 2026; 'NGOs challenge European Commission's undemocratic Omnibus process' (*ClientEarth,* 2025) <https://www.clientearth.org/latest/press-office/press-releases/ngos-challenge-european-commission-s-undemocratic-omnibus-process/> accessed 23 March 2026; 'Lawyers condemn the Omnibus proposal – a threat to the environment and EU competitiveness' (*ClientEarth,* 2025) <https://www.clientearth.org/latest/press-office/press-releases/lawyers-condemn-the-omnibus-proposal/> accessed 23 March 2026.

[57] 'French Corporate Duty of Vigilance Law No.2017-399 of 27 March 2017 (English Translation)' (*RESPECT International,* 2016) <https://respect.international/french-corporate-duty-of-vigilance-law-english-translation/> accessed 15 October 2025.

supply chains.[58] Although this regulation does not appear to be directly related to contract law, it is understood that French companies are now required to integrate sustainability considerations into their contractual relationships.[59] Similarly, in Germany, the Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*-LkSG)[60] enacted in 2021 obliges companies to assess compliance with environmental standards in their supply chains and to conduct audits (due diligence) aimed at preventing human rights violations. Companies are required to assess risks that may arise from such situations and to take preventive measures.[61] Practically speaking, this situation includes the possibility of companies reviewing contracts and terminating them in cases of serious violations.[62] Companies subject to German law require their suppliers, through contracts, to respect human rights.[63] These commitments include the ethical rules set by the companies and also the right of the company to conduct audits. In the event of serious violations being detected if no other corrective measures remain, companies may terminate the contractual relationship. In other words, the LkSG clearly states that companies must take appropriate corrective or preventive measures in the event of environmental and human rights violations, and if these measures fail, contract termination is required as a last resort.[64] Beyond the European context, certain non-EU legal systems also reflect an explicitly holistic approach. For this reason, it is also necessary to mention China's private law reform. This private law reform can be said to present a clear example of a holistic approach. The Chinese Civil Code[65] (中华人民共和国民法典) came into effect in 2021 and contains a provision stating that private law persons and transactions should

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[58] Cleary Gottlieb, 'Supply Chain Due Diligence Obligations in Germany, France, and the EU: An Overview' under the section titled 'Obligations Under The Vigilance Law' para. 2 (*Clearly Gottlieb*, 5 March 2024) <https://www.clearygottlieb.com/news-and-insights/publication-listing/supply-chain-due-diligence-obligations-in-germany-france-and-the-eu-an-overview> accessed 15 October 2025.

[59] ibid paras. 2 and 8.

[60] 'Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz), BGBI. I 2021, 2959 (No.46)' (*German Federal Ministry of Labour and Social Affairs*) <https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/a753e-supply-chain-act.pdf> accessed 15 October 2025.

[61] 'The German Supply Chain Act: Overview and the Practical Challenges for Companies' under the section titled 'Obligations Along Supply Chain' (*Norton Rose Fulbright,* 2024) para. 1. <https://www.nortonrosefulbright.com/en/knowledge/publications/ff7c1d04/the-german-supply-chain-act> accessed 15 October 2025.

[62] Sebastian Rütz, 'Overview of the German Supply Chain Due Diligence Act' (*Taylor Wessing*, 22 May 2023) <https://www.taylorwessing.com/en/insights-and-events/insights/2021/07/overview-of-the-german-supply-chain-due-diligence-act> accessed 15 November 2025.

[63] Norton Rose Fulbright under the section titled 'Specific Due Diligence Obligations' para. 1.

[64] ibid para. 1.

[65] 'Civil Code of the People's Republic of China (adopted 28 May 2020, effective 1 January 2021, English Translation)' (*National People's Congress of the People's Republic of China*) <http://en.npc.gov.cn.cdurl.cn/pdf/civilcodeofthepeoplesrepublicofchina.pdf> accessed 15 October 2025.

contribute both to the conservation of resources and the protection of the environment. In the provision known as the 'Green Principle', found in Art.9 of the Code, it is regulated that "when conducting a civil activity, a person of the civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment." In other words, all civil activities must be carried out in a way that protects resources and preserves the ecological environment. Indeed, Chinese judges have begun to apply this principle and have started to reflect environmental concerns in private law disputes.[66] For example, courts invalidate contracts that pose a risk of environmental harm or contain content that violates environmental regulations.[67] In conclusion, it is possible to say that the aforementioned laws are actually parallel to the EU approach and that even before the EU's CSDDD and CSRD, similar regulations and obligations had been introduced at the national level.[68] It should be noted that there is a transition to a sustainability responsibility understanding that aligns with a holistic approach at the national level as well. In other words, contracts are no longer seen as entirely private in nature or separate and independent from public law. On the contrary, private law contracts are now increasingly being used to broadly implement public-interest objectives. The message given from a common perspective is clear: contracts must be in line with sustainability goals. If not, it is clear that their commercial and legal validity will be at risk. It is now seen that situations that could previously be considered political are directly within the scope of contract law, which is only possible by advancing with a holistic approach.

IV. Judicial reflections on the holistic approach

To understand why integrating a holistic approach is necessary, it may be helpful to examine judicial decisions in which sustainability concerns are reflected in contracts. The aim of this section is to examine a few important decisions and interpret rulings that demonstrate how the holistic approach has begun to find a place in legal practice. It will be seen through the selected decisions that the holistic approach is no longer merely a theoretical concept but has also become a practical tool in contractual obligations.Formun Altı It should be noted that the

[66] "As for the validity of contracts, Article 52 (4) of the contract law of China stipulates that a contract shall be null and void if it damages public interest, but it is not clear whether "public interest" here includes environmental public interest. Guided by the "Green Principle", the contract rules should clarify that violating the "Green Principle" and damaging environmental public interest shall void a contract." Tiantian Zhai and Yen-Chiang Chang, 'The Contribution of China's Civil Law to Sustainable Development: Progress and Prospects' (2019) 11 Sustainability 12.

[67] Mingzhe Zhu, 'The Ecologization of the Chinese Civil Code' (2020) 64 Pravovedenie 511.

[68] "With the German Supply Chain Due Diligence Act and the French Duty of Vigilance Law (Loi de vigilance, 'Vigilance Law') both countries have already implemented a respective regulatory framework that would be refined by a future European Corporate Sustainability Due Diligence Directive ("CS3D"), which would mandate all other Member States to implement similar laws." Cleary Gottlieb under the section titled 'Introduction'.

decisions discussed in this section have been selected not based on whether they are from national or international courts, but according to their contribution to the subject and their chronological relevance.

1. Millieudefensie et al. v. Royal Dutch Shell plc. (2021)

In this pioneering case, the Dutch court held Shell, a multinational company, directly responsible for its negative impact on climate change. Furthermore, Shell was also obliged to reduce global carbon emissions by 45% by 2030 relative to 2019 levels.[69] Another striking aspect of this decision was that the court included not only Shell's own operations but also the activities of its subsidiaries and supply chain within the scope of its carbon emission reduction obligations. It can be said that, as a first example of its kind, even though there was no contractual dispute[70], it has produced important implications to be considered in terms of contracts. The court explicitly included emissions resulting from the burning of fuel produced by Shell by its users within their responsibility, and it was effectively stated that the company's entire contractual relationships must be aligned with climate goals.[71] In light of this case, a holistic approach can be interpreted as follows: it is no longer possible for a company to view climate damage as a non-contractual matter and evade responsibility. In fact, this case shows that courts can now impose broad sustainability obligations on private law actors, and that general legal principles can be interpreted in line with global sustainability goals.[72] Moreover, it is very important that the court, in making its decision, also referred to international human rights such as the right to life and the protection of private life (European Court of Human Rights (ECtHR) Art.2 and 8) to strengthen the ruling. In this case, it can be seen that a holistic approach was manifested by the combination of human rights and corporate governance obligations with the aim of environmental protection. The interpretation of the decision is that, in economic activities, neither contractual relationships nor corporate strategies are considered separately from their environmental and social impacts.

2. Vedanta Resources plc v. Lungowe (2019)

In the Vedanta Resources Plc v Lungowe[73] case, a compensation claim was filed

[69] 'Milieudefensie et al. v. Royal Dutch Shell plc (District Court of The Hague, Case No. C/09/571932 / HA ZA 19-379)' (*Climate Case Chart*) <https://www.climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 18 October 2025.

[70] This case was a climate lawsuit filed under tort law.

[71] Bengt Johannsen, Louis J. Kotzé and Chiara Macchi, 'An Empty Victory? Shell v. Milieudefensie et al 2024, the Legal Obligations of Carbon Majors, and the Prospects for Future Climate Litigation Action', (2025) 34(1) Review of European, Comparative & International Environmental Law 270.

[72] Ouyang (n 4) para. 7.

[73] 'Vedanta Resources plc and another v. Lungowe and others' (*Supreme Court of the UK*) <https://

on the grounds that toxic acids from the copper mines of Konkola Copper Mines Plc, a Zambian subsidiary of Vedanta, a UK-based parent company, polluted the local people's water sources in the Chingola region of Zambia, harming approximately 1,826 villagers. The High Court of the United Kingdom found KCM responsible for breaching its duty of care by causing harm rather than ensuring environmental standards.[74] In this case, it is evident that companies should now evaluate their environmental and social responsibilities holistically. The court has considered Vedanta's published sustainability report, environmental and health commitments, and factors such as the management contract it signed with Konkola Copper Mines as a whole.[75] For example, the contract clauses of Vedanta that include the obligation to provide employee training and environmental inspections to Konkola Copper Mines, as well as the environmental safety commitments they published, demonstrate that the parent company has assumed responsibility.[76] Such an approach also lays the groundwork for the legal significance of companies' ESG obligations. With this decision, it has been established that companies must consider environmental and social criteria within their internal policies and will be subject to legal liability if these are violated, thereby supporting a holistic understanding of sustainability.[77]

3. Gabčíkovo-Nagymaros Project (1997)

A holistic approach to sustainability necessitates the development of law in harmony with changing environmental and societal realities. We can say that this idea finds its judicial expression clearly in Gabčíkovo-Nagymaros Project case[78] decision. The International Court of Justice examined the project for the construction of a hydroelectric power plant on the Danube River; an agreement signed in 1977 between Hungary and Czechoslovakia. In 1989, Hungary unilaterally suspended the project and ceased its activities under public pressure over its environmental impacts. Czechoslovakia (later Slovakia) withdrew from the original agreement and implemented a new plan to route the project through its

www.supremecourt.uk/cases/uksc-2017-0185> accessed 5 October 2025.

74 Tara Van Ho, 'Vedanta Resources plc and Another v. Lungowe and Others' (2020) 114 American Journal of International Law 110.

75 'UK Supreme Court clarifies issues on parent company liability in Lungowe v Vedanta' (*Norton Rose Fulbright,* April 2019) <https://www.nortonrosefulbright.com/en/knowledge/publications/70fc8211/uk-supreme-court-clarifies-issues-on-parent-company-liability-in-lungowe-v-vedanta#:~:text=,shortcomings%20in%20KCM%E2%80%99s%20mining%20infrastructure> accessed 5 October 2025.

76 ibid; 'Vedanta Resources plc v Lungowe [2019] UKSC 20' (*Siskinds LLP*, 2019) <https://www.siskinds.com/vedanta-resources-plc-v-lungowe/#:~:text=%2A%20Even%20where%20group,17> accessed 5 October 2025.

77 'ESG Litigation in Europe' (*Quinn Emanuel Urquhart & Sullivan, LLP*, 2021) para. 10. <https://www.quinnemanuel.com/the-firm/publications/esg-litigation-in-europe/> accessed 5 October 2025.

78 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7.

own territory. The ICJ ruled that the treaty remained in force and that Hungary had indeed breached its contractual obligation by halting construction. However, it should be noted that the Court, in this decision, considered economic development together with environmental and social values and concerns. Most importantly, the decision involved the use of the concept of 'sustainable development', stating that newly developing environmental standards should guide not only future contracts but also the continuation of activities initiated in the past. The ICJ interpreted the engineering contract not only technically but more broadly as a regulatory framework combining environmental, social, and legal meanings. This case serves as both an early and strong example demonstrating that the contractual obligations of the parties should not be limited solely to their economic interests but must be interpreted holistically within the perspective of evolving environmental, social, and legal responsibilities. This approach reveals that legal obligations cannot be interpreted independently of environmental and social dimensions, meaning that legal responsibility actually requires a holistic understanding.[79]

V. Conclusion

Consequently, it should be recognized that integrating a holistic approach to sustainability into contracts is both necessary and an emerging phenomenon. This approach arises from the fact that contracts, fundamental tools of economic activity, also have profound impacts on the environment and society. By adopting a holistic approach, the scope of specialized agreements will also be expanded, enabling them to consider not only the immediate interests of the parties involved in the transaction but also broader social and ecological objectives. The policies and legislation pursued by the EU regarding sustainability concretely demonstrate this change. With these developments, it will be seen that sustainability is no longer a secondary element in contract practices and will not progress optionally; on the contrary, it will take a central position and become an essential element. The adoption of a holistic approach in contract law will serve the interests of all parties in the long term. Following the doctrine, with the practical adoption of this understanding, contracts will become one of the most important tools for positive change. In fact, in a way, this change reflects the idea of accepting that even private law has a social function. However, of course, this thought does not mean relying on an abstract idea that every contract the parties enter into will solve global problems; rather, when considered collectively, if all contracts are concluded and performed by taking environmental and social impacts into account, it will create an obligation behaviour that guides and habituates sustainable conduct. As mentioned at the beginning of the study, in the face of problems such as climate change, the disruption of environmental balance, and increasing social injustice, the adoption of a holistic approach to sustainability will not only be an idealistic choice but also a neces-

[79] Zsigmond-Sziebig (n 10) 21, 24.

sary way to adapt to the requirements of the age. It should be understood in this context that a holistic approach actually represents a paradigmatic shift in understanding the function of law. In other words, it involves a transition from a purely economic and human-centred perspective to an integrated model in which the interdependence of social welfare and the environment, along with human activities, is acknowledged. Traditionally, contracts have been regarded merely as instruments serving the will and purposes of their parties; however, in today's world where individual outcomes affect global results, this view is insufficient. By integrating a holistic understanding, contractual obligations should not be accepted solely as standalone entities but rather evaluated as part of a collective chain, including their impacts on supply chains, communities, and ecosystems. The recent legislative initiatives and changes introduced by the EU clearly reveal this changing mindset. Regulations such as CSDDD and CSRD will serve as concrete examples demonstrating how the concept of sustainability has found its place within private law mechanisms. With these regulations, not only is there a transformation in corporate behaviour, but also a redefinition of the expectations from the parties to a contract, imposing an obligation on them to assess environmental and social risks when entering into agreements. As a result, the primary aim highlighted throughout this study, that sustainability ceases to be a 'voluntary ideal' and instead becomes a binding and functional principle considered in the processes of contract formation, performance, and interpretation, can be realised.

The Framework Agreement of 21 August 2025 between the US and the EU: "Legal Doubts" as a Response to the New Global Trade Disorder

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Contents

Abstract

The present paper deals with the US-EU framework agreement of 21 August 2025 on fair, reciprocal, and balanced trade. It is a non-binding mutual agreement designed to reduce transatlantic trade imbalances. It proposed a 15% tariff on most EU exports to the US and increased EU market access for US industrial/agricultural goods, aiming for a final agreement, though facing implementation challenges. While announced as a move toward a more "balanced" relationship, the framework agreement faced immediate hurdles, including renewed disputes over digital taxes and EU-level debate over the legality and impact of the proposed tariff changes. For this reason, the framework agreement requires further analysis, especially regarding its implications on international and EU law. Ultimately, from a multilateral and supranational perspective, it seems like

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a highly "dubious" agreement in legal terms, although it certainly represents a timely solution to address the crisis.

Keywords: European Union Law; framework agreement of 21 August 2025; trade policy; WTO.

I. Introduction

A press release of the European Commission dated 21 August 2025, disclosed a joint statement issued by the European Union (EU) and the United States (US)[1] based on a framework agreement for balanced and fair trade. The framework agreement was the result of a compromise reached between the parties to resolve an ongoing trade dispute. It was the result of an aggressive policy of trade tariffs imposed after the second election of President Trump. The current American administration is taking a new direction in political, military and economic relations, thus ushering in a new era regarding its connections with the EU. The framework agreement was therefore the result of a past clash between American and European trade policy.

One of the goals of the new US presidency was to transform a private diplomatic act into a public performance. The addressee was not only the President of the European Commission, Ursula von Der Leyen, but also the European and global public opinion. The critical attitude toward this policy has raised serious legal doubts, especially at the level of the multilateral order, which is consistent with a perspective that characterises Trump's second term. Tensions with historic partners and, on the other hand, strategic allies like the EU have created a difficult situation for relations with rival powers such as China, Iran and the Russian Federation, even reaching the point of international conflict. The current American administration reflects, across the board, the destabilisation of an entire balance of political, strategic and economic relations in the global arena.

II. The path to compromise

The clashes and tensions between the US and the EU, in trade policy, date back to Trump's first tariff announcements, ushering a new era of uncertainty and instability in international trade. Beginning with Trump's first presidency, the US pursued a hostile trade policy toward Europe, even though some European countries were considered "friends" to the US as evidenced by their imposition of increased tariffs on imports of certain steel and aluminium products originating in the EU. We are referring to increases of 25% and 10% compared to the initial levels which were adopted under "Section 232" of the Trade Expansion

[1] 'Joint Statement on a United States – European Union Framework on an Agreement on Reciprocal, Fair and Balanced Trade' (*The White House*, 21 August 2025) <https://www.whitehouse.gov/briefings-statements/2025/08/joint-statement-on-a-united-states-european-union-framework-on-an-agreement-on-reciprocal-fair-and-balanced-trade/> accessed 2 July 2026.

Act of 1962.[2] This basis was legally grounded in the former Article XXI of General Agreement on Tariffs and Trade (GATT) 1994.

Within the WTO, the relevant dispute is United States - Certain Measures on Steel and Aluminium Products, dated 17 January 2022.[3] The dispute concerned, inter alia, the increase in duties on certain products and aluminium originating in the US pursuant to Implementing Regulation of 2018/886.[4] Through balancing forms, this policy has attempted to respond to safeguard measures based on former Art. XIX GATT 1994 and Regulation 654/2014, Article 3, letter c).[5] These American positions are identified, qualified and explained as national security measures and above all as safeguard measures. At the same time, these measures are unjustified under WTO law. After the failure of the attempt at consultations on the relevant procedure between the parties, the EU was entitled to suspend the relevant tariff concessions on products originating in the US, based on paragraph 2 of the former Article 8 of the WTO Agreement on Safeguard Measures,[6] leading to the revocation of the measures.

The trade policy of Trump's and Biden's administration was oriented towards a rapprochement with the EU and towards a shared solution manifested in the joint statement of 17 May 2021. As can be seen in this regard: "[…] They agreed to enter into discussions on the mutual resolution of concerns in this area that addresses steel and aluminium excess capacity and the deployment of effective solutions, including appropriate trade measures, to preserve our critical industries [...] most constructive environment for these joint efforts, they agreed to avoid changes on these issues that negatively affect bilateral trade […] committed to engaging in these discussions expeditiously to find solutions before the end of the year that will demonstrate how the US and EU can address excess capacity, ensure the long-term viability of our steel and aluminium industries,

[2] Kyla H. Kitamura, 'Section 232 of the Trade Expansion Act of 1962' (*Congressional Research Service*, 16 July 2025) <https://www.congress.gov/crs-product/IF13006> accessed 2 July 2026.

[3] 'DS548: United States – Certain measures on Steel and Aluminium Products' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds548_e.htm> accessed 2 July 2026.

[4] Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 [2018] OJ L158/5.

[5] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization [2014] OJ L189/50.

[6] 1994 Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 154.

and strengthen our democratic alliance […]".[7]

The resolution procedure for the ongoing dispute was suspended in the face of a reduction in US protectionist measures against EU products, suspending rebalancing measures until March 2025, pursuant to the Commission Implementing Regulation 2023/2882.[8] Evidently, a precise agreement with standards and reference points was never reached.[9] The second Trump presidency attempted to increase American protectionist measures against its US trading partners. In response to the US, the EU attempted to increase tariffs on steel and aluminium, which also affected products in the automotive sector. For the EU, the recipients of the reciprocal tariffs, as set out in Executive Order No. 14257 of 2 April 2025,[10] involved an increase in *ad valorem* duties on all relevant imported products, i.e., at a rate of approximately 20% for products originating in the Union and other affected countries, including over 50 states such as Lesotho and China, thereby declaring an imbalance in US trade balance. The relevant provisions were clear but inconsistent with various obligations under WTO law, in particular the prohibition on tariff increases that exceed the thresholds of a multilateral forum under Article II of GATT 1994 and the old but still valid most-favoured-nation principle. The basic principle was that any trade benefit granted to a WTO member was immediately extended to all other members, as set out in Article I of GATT 1994, which actually included and prohibited discrimination based on basic origin treatment for imported products.

In a letter to President Ursula von Der Leyen the new administration proposed a new 30% tariff on all Union goods, counterbalancing the EU's tariff and non-tariff barriers as well as related imports from the US. The EU adopted rebalancing measures that replaced the previous ones, which had been extended to all categories and goods affected by the new US tariffs, pursuant to Commission

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[7] 'Joint United States-European Union Statement on Addressing Global Steel and Aluminium Excess Capacity' (*Office of the United States Trade Representative*, 17 May 2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/joint-united-states-europe-an-union-statement-addressing-global-steel-and-aluminum-excess-capacity> accessed 2 July 2026.

[8] Commission Implementing Regulation (EU) 2023/2882 of 18 December 2023 suspending commercial policy measures concerning certain products originating in the United States of America imposed by Implementing Regulations (EU) 2018/886 and (EU) 2020/502 [2023] OJ L2023/2882.

[9] 'Joint EU-US Statement on a Global Arrangement on Sustainable Steel and Aluminium' (*European Comminssion,* 31 October 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5724> accessed 2 July 2026. "(…) the EU will create a technical working group charged with developing a common methodology and share relevant data for assessing the embedded emissions of traded steel and aluminium (…)".

[10] Executive Order 14257, 'Regulating Imports With a Receiprocal Tariff To Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits' (2 April 2025) 90 Fed. Reg. 15041.

Implementing Regulation No. 2025/1446.[11] Specifically, the EU responded with rebalancing measures. It suspended and introduced new measures under the relevant Commission Implementing Regulation 2025/778[12] on tariffs in the steel and aluminium sectors, i.e. in the automotive sector. However, no immediate reciprocal tariff responses were adopted. The new measures were adopted to pave the way for negotiations with the US,[13] based on Implementing Regulation No. 2025/786.[14] This opening toward the USA replaced the horizontal tariff of 20% with a new one of 10%.

These changes brought about some political and legal milestones in trade policy between the US and the EU. As early as July 2025, the parties were discussing a compromise that resulted in a framework agreement under the terms made public in the joint declaration of 21 August 2025. The related declaration contained a list of the relevant commitments undertaken by the parties. The US had committed to applying a tariff of up to 15% on relevant EU products under the reciprocal tariffs. Instead, a tariff of 20% corresponded to the rate applied to products under the most-favoured-nation principle, thus applying a relative rate certainly less than 15% for certain products, such as natural resources, generic drugs and aircraft products. In case of the US, the 15% reduction in tariffs under Section 232 on automotive products was extended to 25%, while also maintaining a threshold for potential tariffs for pharmaceuticals, timber and semiconductors. Regarding the steel and aluminium sectors, the relevant framework agreement did not specify a base tariff threshold. Thus, the parties intended to explore the possibility of cooperating and protecting domestic industries from the risk of global overproduction.

Within this framework, the EU has declared its intention to reduce tariffs on American industrial products to zero, as well as to guarantee privileged access to the EU market for non-sensitive agricultural and fishery products. The EU's non-tariff trade commitments have resulted in US purchases of energy products such as gas, oil and nuclear energy reaching a value exceeding $800 billion, as

[11] Commission Implementing Regulation (EU) 2025/1446 of 14 July 2025 suspending commercial rebalancing measures concerning certain products originating in the United States imposed by Implementing Regulation (EU) 2025/778 and amending Implementing Regulation (EU) 2023/2882 [2025] OJ L2025/1446.

[12] Commission Implementing Regulation (EU) 2025/778 of 14 April 2025 on commercial rebalancing measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/886 [2025] OJ L2025/778.

[13] 'EU pauses countermeasures against US tariffs to allow space for negotiations' (*European Commission*, 14 April 2025) <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1058> accessed 2 July 2026.

[14] Commission Implementing Regulation (EU) 2025/786 of 14 April 2025 suspending commercial rebalancing measures concerning certain products originating in the United States imposed by Implementing Regulation (EU) 2025/778 and amending Implementing Regulation (EU) 2023/2882 [2025] OJ L2025/786.

well as chips worth $40 billion in 2026. This has led to a significant increase in US arms purchases. The EU has discussed investment with the US leading to an increase of $600 billion in 2026. The EU's commitment aimed to simplify the application of unilateral instruments for US companies that have a restrictive impact on goods and services in the EU's single market. Within this framework, particular attention should be paid to Regulation 2023/1115 on deforestation,[15] Regulation 2023/956,[16] which established the related carbon adjustment mechanism for borders, Directive 2024/1760[17] on due diligence for companies and Directive 2022/2464[18] on the sustainability of companies.

These are specific points that demonstrate the parties' commitment to cooperate to reduce and eliminate their respective non-tariff barriers. This work continues to establish a common standard for sectors of mutual interest. In the food sector, it is already clear that the parties have followed health certification requirements for pork and, consequently, agricultural products. Similarly, we can speak of mutual recognition for standards in the automotive sector. It seems mutual that the commitments made within the EU are leading to the Union's path to lowering barriers, which is also among the objectives of a current trade policy that extends overseas. For the US and the EU, the commitment to collaborate on issues related to relations with third countries addresses the related export restrictions for critical raw materials, as well as for workers, intellectual property, technology, and digital trade.

The relevant agreement signed in August 2025 left traces that lead back to another similar agreement signed between the US and the United Kingdom on 8 May 2025 entitled: "General terms for the US and the United Kingdom of Great Britain and Northern Ireland economic prosperity deal".[19] It is clear that the purpose of the declaration was to pursue a path of equitable prosperity

[15] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (Text with EEA relevance) [2023] OJ L150/206.

16 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance) [2023] OJ L130/52.

[17] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance) [2024] OJ L2024/1760.

[18] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance) [2022] OJ L322/15.

[19] 'General Terms for The United States of America and the United Kingdom of Great Britian and Northern Ireland Economic Prosperity Deal' (8 May 2025) <https://assets.publishing.service.gov.uk/media/681d327d43d6699b3c1d2a9d/US_UK_EPD_050825_FINAL_rev_v2.pdf> accessed 2 July 2026.

and balanced trade through an agreement. This declaration does not specify but is oriented towards a new future agreement that simply describes the present framework agreement as a first step in a process of trade liberalisation. The parties have established their commitment to this path. Implementing the framework agreement was the responsibility of the European Commission within the EU, which suspended the duties provided for by the Implementing Regulation 2025/1446 through the Implementing Regulation 2025/1727,[20] which was submitted to the European Parliament and the Council on 28 August 2025.[21] This has eliminated duties on industrial products as well as on agri-food products of American origin. Some agri-food products had a zero rate. This rate was limited to certain quantitative quotas.

III. The legal basis of the framework agreement

Trying to identify the legal basis of the framework agreement is not easy. The joint declaration did not specify whether it is a binding agreement or not. The framework agreement is a political agreement, a temporary solution to address other problems.

In the author's opinion, this is a purely political agreement, given that the European Commission has not taken a declaratory position to characterise it as binding, as noted in the report COM (2025) 471.[22] Furthermore, there is no declaratory position from the US side either. The same conclusion arises if we apply the VCLT Article 2(1)(a) criteria to the framework agreement and then to the US Executive Order of 5 September 2025 (entitled: "Modifying the Scope of Reciprocal Tariffs and Establishing Procedures for Implementing Trade and Security Agreements", having as an object to update the Reciprocal Tariff Policy in order to adjust tariff exemptions on goods like critical minerals as well as to set frameworks for new trade deals with EU and with other partners). In fact, while the framework agreement meets the formal requirements of being in writing between international subjects, it fails the "governed by international law" criterion because it acts as a political framework for future negotiation and implementation, rather than creating immediate, binding obligations under international law. In other words, it is an international agreement concluded between states and subjects of international law in written form embodied in a single or more related instruments

[20] Commission Implementing Regulation (EU) 2025/1727 of 5 August 2025 suspending commercial rebalancing measures concerning certain products originating in the United States of America and certain products exported from the Union to the United States of America imposed by Implementing Regulation (EU) 2025/1564 [2025] OJ L2025/1727.

[21] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the adjustment of customs duties on the import of certain goods originating in the United States of America and opening of tariff quotas for imports of certain goods originating in the United States of America' COM (2025) 471 final.

[22] 'Questions and answers: Questions and answers on the EU-US Joint Statement on Transatlantic Trade and Investment' (*European* Commission, 21 August 2025) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_25_1974> accessed 2 July 2026.

governed however indirectly by international law, as it acts as a framework for future negotiations rather than a finalised treaty.

The same holds for the US Executive Order of 5 September 2025. It generally does not meet the criteria for a treaty under VCLT Article 2(1)(a) in its own right, but functions as domestic implementation for "executive agreements" that do meet these criteria. In fact, the order is partially an international agreement. The Order is a unilateral domestic directive from the US President to executive branch officials. It sets up a "framework" to implement future or current reciprocal trade agreements with foreign partners (e.g., EU, Japan). These associated bilateral frameworks are international agreements. The order is not a direct agreement between states but a domestic law. It is in written form. Finally, the order in itself is governed by domestic and not by international law.

From a technical, formal point of view, it is confirmed that the procedures envisaged by Articles 207 and 218 TFEU for the conclusion of trade agreements have not been applied. This means that from a legal point of view, the framework agreement has a certain value but is not binding.

Formal elements under international law are not sufficient to qualify the framework agreement as binding. In this spirit, we recall the old ruling of the International Court of Justice (ICJ) in the Qatar v. Bahrain case of 1994,[23] according to which the framework agreement is a commitment agreement.[24] The terms seem to indicate a relative presence of consent between the parties, which give legal force to their listed commitments. The formal elements used in the old ICJ case are clarified through: - the legal value of letters of exchange for the use of signed documents that constitute an official record for political negotiations because they are binding international agreements; - the irrelevance of the intentional subjectivity of not being bound. This position was used by the representatives of Bahrain, who had no intention of signing a legally binding agreement. The ICJ itself focuses on the commitments accepted by their own governments; - the Bahrain formula, which required territorial and maritime disputes to be resolved through negotiation within a certain timeframe; - the freedom of form of international agreements, given that the judgment is not solemn enough to create international obligations; and, above all, that diplomatic meetings are sufficient; - a unilateral referral by only one of the two parties, thus recognising that the agreement, allows and leads to a dispute at the ICJ even without a new joint agreement; - a general privilege for the commitments that are made by the parties, i.e. pacta sunt servanda which respects the procedural formality that also makes all the agreements reached during the

[23] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112. paras. 21-30; Dimitris Liakopoulos, *The role of not party in the trial before the International Court of Justice* (Maklu 2020).

[24] In the declaration, the parties stated that the agreement is used with the expressions "commit and/or intend", referring to commitments that have as their object the relevant framework agreement.

negotiations binding.[25]

The subject of the framework agreement indicates the listed commitments. The key terms used are agreed upon by the parties and, above all, by the cooperation, which reflects the vague programmatic contents that are inadequate to precisely establish legal obligations. Thus, the economic value of purchases and the related implementation investments are clearly and precisely identified. It does not bind the parties, including the EU, with regard to the result to be achieved; rather, it concerns measures directed at the regulation of the behaviour of private entities. In the case of investments, the EU has expressly highlighted the free will of the companies in this regard. Thus, a best-effort obligation is identified for the EU, which establishes the tools for private action within an energy framework that follows the basis of the demand mechanism pursuant to Regulation 2022/2576.[26] It seems difficult to follow a prescriptive basis of obligations under international law that identifies mechanisms that ensure their enforceability. Overall, the commitments follow mutual concessions and do not correspond to specific performances and considerations as obligations for the parties that are mutually binding in a relationship of a bilateral nature.[27]

IV. Connections with international law

A framework agreement that is binding under international law falls under the issue of relative enforceability in connection with commitments that concern the parties' international responsibility in the event of non-performance. An issue arises under a formal and theoretical framework in the face of specific circumstances that lead to a compromise enshrined in the framework agreement. Non-performance by the parties leads to outcomes that are independent of the legal nature of their act. This leads to the question of unilateral measures, the compromise nature of which prevents escalation. The parties are expected to suspend the relevant benefits for their intended counterparts by following the implementing measures, as established in the proposed regulation presented in Article 11. 3 of the European Commission Questions and Answers of 21 August 2025 (COM (2025) 471) which reactivate the unilateral measures that were previously suspended. Thus, one can speak of a *status quo ante* situation. It should be noted that the agreement entails actual legal obligations that correspond to rights for the parties. The resulting material is the same one that is independent of a classifica-

[25] Liakopoulos (n 23).

[26] Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders [2022] OJ L335/1.

[27] 'Modifying the Scope of Reciprocal Tariffs and Establishing Prodecures for Implementing Trade and Security Agreements' (*The White House*, 5 September 2025) <https://www.whitehouse.gov/presidential-actions/2025/09/modifying-the-scope-of-reciprocal-tariffs-and-establishing-procedures-for-implementing-trade-and-security-agreements/> accessed 2 July 2026.

tion that goes beyond the countermeasures of the actions undertaken following the failure of the compromise. Countermeasures, including the EU, are acts that are *prima facie* unlawful but rendered lawful when the conditions set out in the ARSIWA/ARIO are satisfied. This distinction is significant because it affects EU's legal position.[28] It is within this spirit that the bilateral relational framework between the EU and the US is concentrated, establishing the framework agreement within the scope of multilateral international law. It is therefore necessary to begin an evaluation analysis.

As noted in previous paragraphs, the US tariff increased. From a European perspective, the benefits are incompatible with WTO rules, given that the agreed-upon rate of 15% *ad valorem* is higher than the maximum thresholds established by the US in its own WTO negotiating rounds and the rates applied by the US under the most-favoured-nation principle, as enshrined in the agreement itself. This means that the framework agreement is widely considered incompatible with WTO Most-Favoured-Nation (MFN) obligations, as it creates a preferential trading arrangement that applies lower tariffs to the EU (and select others) while maintaining higher, punitive tariffs for other WTO members. The deal allows for a 15% tariff cap on many EU goods, whereas the US imposed a 10%-50% tariff range on many other countries via earlier 2025 executive orders.

To be more precise the framework agreement grants preferential treatment for EU goods, violating the fundamental WTO MFN principle which requires that any tariff advantage granted to one country must be extended to all WTO members. Adequately, the framework agreement establishes a "reciprocal" 15% tariff or the MFN rate (whichever is higher), which applies selectively, treating EU-origin goods differently from others. The framework agreement is also a "joint statement" and not a formal, binding WTO treaty, yet it directs changes to the Harmonized Tariff Schedule (HTS) in a way that treats specific countries preferentially. Finally, the related 2025 US actions are viewed as arbitrary changes that disrupt the world trading system and fail to comply with negotiated tariff bindings.

At a multilateral level, the US tariffs appear to sanction a renunciation by the EU, which demonstrates the illegitimacy of the agreed-upon rate under WTO rules. In this spirit, the panel, i.e. the dispute settlement body of the WTO, should be referred to, especially the report of the panel of 24 October 2000 in the dispute

[28] The ARSIWA/ARIO does not permanently transform 'evil into good', as it limits legal defences and, above all, countermeasures that temporarily prevent the permissibility of illegal actions, with the aim of maintaining international legality. Unlawful acts, that is, those that violate international obligations, become lawful only if they are justified by the relevant circumstances that ultimately exclude their wrongfulness and effectively remove their status as illegal acts under international law. Dimitris Liakopoulos, *Complicity in international law* (W.B. Sheridan Law Books 2020).

between: Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico.[29] The Guatemala Cement panel reports (specifically *Guatemala – Cement I* and *Cement II*, DS60/DS156) are relevant to the Most Favoured Nation (MFN) principle by highlighting the systemic risks of discriminatory or procedural non-compliance when treating foreign products. Precisely, the Panel found that Guatemala violated WTO obligations by initiating investigations based on insufficient evidence regarding Mexican cement, failing to treat the foreign importer with the same procedural standards applied to domestic industry. This is a violation of the spirit of fair, equal (MFN) treatment and anti-dumping rules. Guatemala also violated Article 5.5 of the Anti-Dumping Agreement by failing to timely notify Mexico of the investigation, which can act as a hidden barrier to trade, violating the intent of MFN (equal access to trade opportunities). Finally, the panel found that Guatemala improperly used "best information available" to penalise Mexican exporters rather than seeking accurate data, which is crucial for upholding impartial, MFN-compliant market access.

With the framework agreement, the EU accepted the American approach. It is noteworthy that the US agreed to the pretext of unfairness in current trade relations. This pretext is legally unfounded, given that WTO law does not provide for economic equilibrium. On the other hand, the alleged imbalance contested by the US does not take into account the existence of an imbalance in the services sector. Only the EU opted for what it considered the lesser evil: the credibility of a global trading system based on compliance with rules established multilaterally. The parties thus resolved their dispute outside the WTO framework, given that the EU did not challenge the illegitimacy of US tariffs within the WTO dispute settlement system.[30]

From a practical standpoint, this mechanism leads to a paralysis of the Appellate Body crisis caused by the US.[31] It asserts the circular basis of multilateral rules as a threat from the US side.[32] At the same time it demonstrates a compromise of the consultation and

[29] *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (Panel Report, WT/DS156/R, 24 October 2000).

[30] Without following: Brazil 'DS640: United States – Tariff measures on goods from Brazil' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds640_e.htm> accessed 2 July 2026; China 'DS638: United States – Universal and Country-specific Additional Duties on Imports from China' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds638_e.htm> accessed 2 July 2026; and Canada 'DS637: United States – Additional Duties on Imports of Automobiles and Automobile Parts from Canada' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds637_e.htm> accessed 2 July 2026.

[31] Cosette Creamer, 'Can International Trade Law Recover? From the WTO's Crown Jewel To Its Crown of Thorns' (2019) 113 American Journal of International Law 52.

[32] Yong-Shik Lee, 'Unmaking' of International Trade Law?: A Crisis of the Rule-Based International Trading System' 2024 59 Journal of World Trade 2; Geraldo Vidigal, 'The GATTification of the WTO-Regime Change and Thinning Legality in International Trade Relations' (2024) 51 Legal Issues of Economic Integration 306.

conciliation procedures that are provided for within the WTO law.[33]

In this spirit, we must consider the tariffs agreed by the US and the commitments adopted by the EU, which appear to be incompatible with WTO obligations under the general principle of international economic law of the most-favoured-nation.[34] It calls on the EU to extend its benefits, which are granted by the US, to all WTO members. On the contrary, the Framework Agreement presents itself as a preferential trade agreement pursuant to Article XXIV of the GATT 1994.[35] It represents an exception to the most-favoured-nation principle, which allows WTO members to conclude bilateral and multilateral agreements within trade liberalisations that respect those granted to members through the creation of customs unions and free trade areas.[36]

For the EU, this agreement brings qualitative and quantitative benefits to American goods, namely the elimination of duties on certain categories of goods. The US has reduced the increase in tariffs while maintaining the rates above the thresholds permitted under WTO law. The framework agreement does not lay out the foundations for a customs union between the EU and the US. However, it appears to be an agreement that is being developed on a future basis, based on former Article (5) XXIV, of the GATT 1994. This is a varied agreement with foreseen commitments that lay the foundations for new negotiations. The objective was to facilitate trade between the contracting parties, as required by Article XXIV of the GATT 1994 regarding trade flows.[37] The framework agreement between the US and the EU is formally and precisely positioned outside the scope of the WTO. In practice, the two parties have created a parallel relationship that is independent of multilateral trade law, based on an instrument that adheres to the categories of general treaty law.

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[33] 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401.

[34] Joost Pauwelyn, 'How the US Reciprocal Tariff Plan May Save the Global Trading System' (2025) 24 Journal of World Trade 4.

[35] Andrew D. Mitchell and Nicolas J. S. Lockhart, 'Legal requirements for PTAs under the WTO' in Simon Lester and others (eds), *Bilateral and Regional Trade Agreements* (Cambridge University Press 2016).

[36] *ECC – Import Egime for Bananas* (Panel Report, DS38/R, 11 February 1994) para. 159.

[37] See 'Fact Sheet: The United States and European Union Reach Massive Trade Deal' (*The White House*, 28 July 2025) <https://www.whitehouse.gov/fact-sheets/2025/07/fact-sheet-the-united-states-and-european-union-reach-massive-trade-deal/> accessed 2 July 2026, which is used the terms of: "(…) rebalancing the economic relationship (…)". And from the EU: Questions and answers: Questions and answers on the EU-US Joint Statement on Transatlantic Trade and Investment of 21 August 2025, op. cit., (…) stability and predictability in transatlantic trade (…)".

V. Implications under eu law

The implications and legal consequences of the framework agreement often arise beyond the definition of the agreement's nature. For the EU, this is reflected in secondary law through Article 216 (2) TFEU.[38] The implementation of the framework agreement's commitments conflicts with law and the most-favoured-nation principle. The EU includes all principles and rules of the WTO, to obtain the benefits granted by the US. This position has been established by case law.[39] The framework agreement was not concluded in accordance with the procedures established by primary law. This would lead to potential negative consequences under the principle of conferral and institutional balance.[40]

Within this framework, Article 17 (1) TFEU should be noted. The European Commission has the relevant power of external representation to conduct negotiations, but it does not have the power to ratify an agreement that decides and expresses the Union's authority at the international level. A binding agreement is necessary and authorises the Council to open negotiations, sign and conclude an agreement after approval by the European Parliament, pursuant to former Article 218, paragraphs 2 and 6, letter a) of the TFEU. The informal nature of the operation did not allow for the possibility of requesting an opinion from the CJEU, providing a definitive text required by Article 218 (11) of the TFEU before its conclusion. Such considerations govern and address an agreement of a political nature. According to the CJEU, the procedure for adopting non-binding international agreements does not undermine the division of competences, the institutional balance and loyal cooperation between the institutions of the Union, in accordance with the prerogatives they respect.[41] The pronouncement of the role of the Council and the jurisprudential principle also extends the protection of the prerogatives of the European Parliament.[42] The political nature and informality of the agreement are *per se* adequate and justify the exclusion of the Council and European Parliament from the related agreement-reaching process. The Council did not protest and brought to the European Commission: "[...] duly involved throughout the

[38] Case C-66/18 *European Commission v Hungary* [2020] ECLI:EU:C:2020:792, paras. 69-70; Vasiliki Kosta and Darinka Piqani, 'Where trade and academic freedom meet: Commission v. Hungary (LEX CEU)' (2022) 59 Common Market Law Review 814-852.

[39] Case C-149/96 *Portugal v. Council* [1999] ECLI:EU:C:1999:574, para. 47.

[40] Panos Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-making under EU Law' (2019) 68 International & Comparative Law Quarterly 2; Chistophe Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2020).

[41] Case C-233/02 *France v. Commission* [2004] ECLI:EU:C:2004:173 para. 40; Case C-660/13 *Council v. Commission* [2016] ECLI:EU:C:2016:616 paras. 36-43.

[42] Paula Garcìa Andrade, 'The role of the European Parliament in the adoption of non-legally binding agreements with third countries' in Juan Santos Vara and Soledad Rordrìguez Sànchez-Tabernero (eds), *The Democratisation of EU International Relations Through EU Law* (Routledge 2019).

process and endorse the outcome [...]".[43] From a material point of view, the member states, with their own consensus, even informal, have attempted to compensate the Council's lack of participation. The exclusion of the European Parliament has affected the democratic legitimacy of its compromise. Thus, criticisms have been raised in this regard, especially complaints regarding Regulation 2025/1106,[44] which has initiated an action for annulment.

Certain political objections have been raised by opposition groups of the opposing side. Two unsuccessful motions of censure against the European Commission[45] challenged the content of the framework agreement, as noted in the related motions.[46] These motions formulated complaints regarding the violation of an institutional balance, citing the exclusion of the Council. The acquiescence of the European Parliament and its own lack of involvement were also emphasised. This situation calls for the opinion of the CJEU. Questions may also arise from the Member States and the institutions.

A clear procedural violation impacting the institutional balance is limited. The European Commission has attempted to clarify the relevant questions and answers in August 2025. The internal acts implemented the agreed commitments, which are adopted in line with the relevant procedures. The Council and the European Parliament have had the opportunity to exercise the prerogatives of the CJEU. These go beyond the violation of procedural rules that occur in the specific case and concern the framework agreement as an isolated incident. The related systemic impact arises from an analysis that appears to have been overlooked. This is not an exceptional case, but it does have precedents. The framework agreement is linked to the informal practice of EU international relations, creating a friction with the constitutional structure of the EU.[47]

This trend is criticised and further developed in the EU's migration policy.[48] In this

[43] European Commission (n 22).

[44] Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument (Text with EEA relevance) [2025] OJ L2025/1106.

[45] 'MEPs reject motions of censure against the European Commission' (*European Parliament*, 09 October 2025) <https://www.europarl.europa.eu/news/en/press-room/20251003IPR30667/meps-reject-motions-of-censure-against-the-european-commission> accessed 2 July 2026.

[46] 'Motion for a resolution – B10-0402/2025' 2025/2173INS, (*European Parliament*, 16 September 2025) <https://www.europarl.europa.eu/doceo/document/B-10-2025-0402_EN.html> accessed 2 July 2026; 'Motion for a resolution – B10-0400/2025' 2025/2174INS, (*European Parliament*, 16 September 2025) <https://www.europarl.europa.eu/doceo/document/B-10-2025-0400_EN.html> accessed 2 July 2026.

[47] Ramses A. Wessel, 'Normative transformations in EU external relations: the phenomenon of 'soft' international agreements' (2021) 44 West European Politics 72; Andrea Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2020) 39 Yearbook of European Law 569.

[48] Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of*

spirit, our interest is concentrated on the 2016 EU-Türkiye Statement. The statement is an informal act that includes specific commitments of uncertain legal nature.[49] The EU-Türkiye Statement is compared to the framework agreement. The EU-Türkiye Statement similarly to the framework agreement was a political arrangement rather than an international act attributable to the European Council, Council of the EU, or Commission. The statement in contrast to the framework agreement was released as a press release via the Council webpage, not as an adopted legal act. The CJEU ruled in 2016 that EU-Turkey Statement does not have formal authorship by an EU institution. Adequately, the General Court concluded that it was an agreement between Member States and Turkey, not an official EU-Turkey agreement, thus lacking legal accountability. While the Statement aimed to stop irregular migration through rapid returns, its practical implementation—specifically the classification of Turkey as a "safe third country"—has faced intense scrutiny and legal challenges before the CJEU regarding its alignment with European asylum law. In other words, its authorship faced negative consequences regarding the respect of the principle of conferral and the autonomy of the Union legal order.[50]

The framework agreement on the other hand appears to be moving in the opposite direction. It follows a direction that demonstrates the convergence of member states toward the EU. This united path respects the exclusive competence in trade policy, as well as the valorisation of the European Commission as a supranational institution and as a single voice and interlocutor of a grassroots, integrative and positive counterpart. The EU's response to the trade crisis initiated by the US administration's aggressive tariff policy demanded an efficient and prompt reaction at the Union level. This evidence remains as a response to the strain of the legal system that tolerates institutions and member states. As we have seen, the EU-Türkiye Declaration[51] has demonstrated a dynamic focusing on the power of both the European Commission and the European Parliament. Over time, such an approach persists with regulations that end up undermining the rule of law within the Union, especially if it frequently requires addressing aggressive practices by third countries that disregard international law. This excludes the

Migration and Asylum (Springer 2022); Federico Casolari, 'The unbearable 'lightness' of soft law: on the European Union's recourse to informal instruments in the fight against irregular immigration' in Francesca Ippolito and others (eds), *Bilateral Relations in the Mediterranean* (Edward Elgar 2020); Juan Santos Vara, 'Soft international agreements, on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU' in Sergio Carrrera and others (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019).

[49] Steve Peers, 'The Draft EU/Turkey Deal on Migration and Refugees: is it Legal?' (*EU Law Analysis*, 16 March 2021) <https://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html> accessed 2 July 2026.

[50] Case T-192/16 *NF v. European Council* [2017] ECLI:EU:T:2017:128.

[51] Georgios Anastasopoulos, 'Legal analysis of the EU-Turkey statement of 18 March 2016: past and future' (2023) 2 INTEULM 148-205.

de facto delegation of the European Commission, which was used as a tool by the member states and as a measure of a broad agreement criticised by national public opinion, voicing criticisms. Ultimately, the European Commission and the Union emerge diminished and certainly not strengthened on this topic.

VI. Conclusions

From the previous paragraphs, it can be concluded that the European Commission considered the relevant agreement of August 2025 to be superior and more beneficial for Europe.[52] The EU's primary objective was to limit the related damage caused by the US and to safeguard the cooperative and collaborative relationship between the two sides of the Atlantic. The political and economic opportunity for compromise operates outside the violation of supranational and international norms. The perennial risk of "destruction of the Union", especially of the EU, through international law forces the framework agreement to impose a relative reflection on the disintegration of the WTO law. Attempting to align the relevant modalities in international relations, especially now after the new American administration, forces the Union to counteract its own legal system by adopting an international order based on coercion of political, rather than legal means. Over time, the consequences may be worse and more difficult to cope with, but hopefully, a trade war will always be avoided and eliminated, as reflected by this framework agreement.

The ongoing challenge arising from new transatlantic dynamics calls for a political revitalisation of the European project, in the knowledge that the EU's vocation is precisely to provide the necessary tools to promote trade liberalisation and effective counter protectionist tendencies. Within the EU, the dissemination and firmness of its economic interests, including trade policy, coexist. It offers a guarantee of compliance with multilateral rules that promote a commercial order based on cooperation and equal treatment. The EU's structure for international economic cooperation is part of its genetic heritage, developed through multilateral commitments that represent a crucial resource. The EU has not adopted a flexible approach in an unstable geopolitical context. Dialogue remains a constantly evolving path that often consciously finds a solution *a priori*. Other times, however, it continues to be suspended, pursuing other paths without clear objectives.

[52] 'Speech of the president of the European Commission U. Von Der Leyen' (*European Commisison*, 10 September 2025) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_25_2053> accessed 2 July 2026.

The judicialization of the EU posted workers regime through the CJEU case-law

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Contents

Abstract

This article examines the judicialization of the EU posted workers regime and its evolution across three distinct phases: the pre-Directive period, during the 1996 Directive, and the post-2018 amendment period. Using a longitudinal doctrinal analysis of Court of Justice case law, the study investigates how judicial interpretation has shaped the balance among the freedom to provide services, social protection concerns, and Member State regulatory autonomy.

The findings demonstrate that judicialization in this case is neither linear nor uniformly expansionist. In the foundational phase, the Court constitutionally embedded posting within the freedom to provide services, effectively restructuring national competence over labour market access. During the Directive period, the Laval line of case law subjected collective labour rights and public procurement social clauses to a proportionality test. In the post-amendment phase, however, the Court validated the 2018 reform's strengthened protective rationale while simultaneously delimiting its scope through territorial criteria and by reaffirming Member State discretion concerning third-country nationals in shifting geopolitical and migratory contexts.

Overall, the study concludes that judicialization in the posted workers regime is contingent, path-dependent, and politically mediated. Rather than producing uniform regulatory expansion, judicial governance operates through iterative doctrinal stabilization shaped by institutional constraints, economic integration pressures, and evolving social policy objectives.

Keywords: Judicialization; Posted Workers; Freedom to Provide Services; CJEU; Labour Mobility.

I. Introduction

The concept of posted workers sits at the intersection of labour mobility and market integration. The posting of workers is a type of temporary mobility of non-resident foreign workers whose employment relation is with a non-resident entity, in regard to the territory where the work is habitually done. The definition of worker is understood under the law of the member state where the worker is sent[1]. It is from this regard, possible to conceptualize posted labour work as a form of labour mobility. The UN Economic Commission for Europe defined international labour mobility as "all movements of natural persons from one

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[1] Council Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art 2.

country to another for the purpose of employment or supply of services"[2], without excluding hence temporary mobility.

However, from an EU law perspective, there is a distinction in the context of labour mobility between the freedom of movements of workers as in Article 45 of the Treaty on the Functioning of the European Union (TFEU)[3], the freedom of establishment as in Article 49 TFEU[4], and the freedom to provide services as in Article 56 TFEU.[5] Under the Directive on posted workers and its amendment, this type of work is understood under the freedom to provide services. Consequently, their understanding is rooted in transnational economic activity, rather than migration.

Since posted workers do not migrate, they remain attached to the laws of their sending country. However, such a constellation risks the creation of asymmetric work conditions and workers' protection across member states. The significance of such risks became particularly visible following the Eastern enlargements of 2004 and 2007. These enlargements substantially increased the scale of posting, especially in labour-intensive sectors such as construction and transport, where service providers from lower-wage Member States gained access to higher-wage markets.[6] Empirically, this expansion intensified the use of posting as a cost-optimization strategy, enabling firms to capitalize on wage differentials while operating within the legal framework of the internal market.[7]

The role of the Court of Justice, in this context, is observable through the delineation of the relationship between market integration and social protection and the increased intervention in policy-making through case law. This intervention can be analysed through the concept of judicialization, in which courts do not merely resolve disputes but generate normative frameworks that recursively influence politics and policy-making. In the case of posted workers, judicial decisions have both intensified political contestation and structured the terms in which such contestation unfolds.[8] Consequently, the evolution of the posting

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[2] Economic Commission for Europe, Measuring international labour mobility, Conference of European Statisticians, Sixty-sixth plenary session, Geneva, 18-20 June, 2018, p.11.

[3] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 45.

[4] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/67, art 49.

[5] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/70, art 56.

[6] Dorte Sindbjerg Martinsen and Michael BlauBerger, 'The Court of Justice of the European Union and the mega-politics of posted workers' (2021) 84 Law and Contemporary Problems 29.

[7] ibid.

[8] Ninke Mussche and Dries Lens, 'The ECJ's Construction of an EU Mobility Regime Judici-

regime cannot be understood solely through legislative developments but must be situated within this broader process of judicially mediated integration.

The study investigates how the CJEU has shaped the evolution of the Posting of Workers regime by progressively defining the boundaries between market freedoms and workers' protection. The research, therefore, aims to investigate how the CJEU's judicialization of the Posting of Workers regime has constructed normative shifts between the freedom to provide services and the protection of the worker's rights.

II. Methodology

To answer the research question, we have opted for qualitative research based on longitudinal doctrinal analysis of the CJEU case law on posted workers. To comprehend the varying role of the Court, the judgments were collected based on periods that are determined vis-a-vis the adoption of the Posted Workers Directive (PWD) and its amendment, as justified by table 1.

Period	Event	Years	Justification
I. Pre-Directive Jurisprudence	Before Directive 96/71/EC	1989-1995	Construction of the concept of posting and its relation to free movement of services.
II. Directive Jurisprudence (Posted Workers Directive 96/71/EC)	From Directive 96/71/EC to the 2018 reform	1999-2018	Legal consolidation of posting as a form of freedom to provide services; rise of conflicts between market freedoms and fundamental social rights.
III. Post-Amendment Jurisprudence	After Directive 2018/957/EU and establishment of the European Labour Authority	2018-2024	Rebalancing toward social fairness, equal pay, and enforcement. Allows for early judicial tests of the amended framework.

Table 1. Division of periods and their justification based on the author's conceptualization

The Choice of selected case-law is justified by its relevance in the literature on posted workers and the CJEU.[9] Most of the selected cases demonstrate 'land-

alization and the Posting of Third-country Nationals' (2019) 57 Journal of Common Market Studies.

[9] See: Richard Mababu, 'European Union Posting of Workers Law and Equal Treatment in Internal Labour Market for Social Cohesion' (2024) 3 European Journal of Law and Political Science. And see: Marta Lasek-Markey, 'No Turning Back from Social Europe: A New Interpre-

marking' judgements in the matter of freedom to provide services.[10] The classification of the case-law does not assume its complete heterogeneity for analogical reasoning, but rather assures temporal heterogeneity in order to allow the identification of continuities and shifts in judicial reasoning. The selected judgments are treated as constituting a discursive space. Courts are commonly understood as authoritative interpreters of law and legal concepts. Thus, decisions define the intensions and extensions of key concepts through structured reasoning.[11] The texts of judgments therefore represent a specific institutional arena in which legal meaning is articulated, stabilized, and transformed.

The examined case-law consisted of eight judgments selected to represent three periods: before the adoption of the first Posted Workers Directive, after its adoption, and the post-amendment period, as summarised by Table 2.

Case	Parties	Year
C-l 13/89	Rush Portuguesa Lda and Office national d' immigration	1990
Case C-43/93	Raymond Vander Elst and Office des Migrations Internationales	1994
Case C-341/05	Laval un Partneri Ltd vs Svenska Byggnadsarbetareförbundet and others	2007
Case C-346/06	Dirk Rüffert vs Land Niedersachsen	2008
Case C-16/18	Dobersberger v Magistrat der Stadt Wien	2019
C-620/18	Hungary v European Parliament and Council	2020
Case C-626/18	Republic of Poland v European Parliament and Council of the European Union	2020
Case C-540/22	SN and Others vs Staatssecretaris van Justitie en Veiligheid	2024

Table 2. Summary of selected case-law

III. Theoretical background

1. *The Social Europe Pillars and Social Dumping*

Discussion about the social Europe pillars started in 2015 and was amplified by the French presidency of Emanuel Macron in 2017 and the proclamation of the European Pillar of Social Rights (EPSR). The recalibration of the EU's

tation of the Refurbished Posted Workers Directive in Hungary and Poland' (2022) 51 Industrial Law Journal.

[10] Johanna Jacobsson, 'Posted Workers and Free Movement of Services in the European Union – the Impact on National Employment and Immigration Law' (Master's Thesis, University of Helsinki 2008). Accessed on 15 October 2025. And see: Mussche and Lens (n 8).

[11] Terezie Smejkalová, 'Case Law and Collective Construction of Meaning' (2023) 19 Utrecht Law Review, 87.

socio-economic narrative formed part of a broader attempt to rebalance market integration with social protection following the Eurozone crisis and growing contestation around intra-EU labour mobility.[12] France's support for revision was closely linked to the persistent invocation of "social dumping" in public and legal discourse. Although the concept lacks a codified definition in EU primary or secondary law, it has been analytically described as strategic exploitation of cross-national regulatory differentials in labour standards to secure competitive advantage. The concept of dumping itself originates in classical trade theory, where it is defined, as suggested by Viner, as price discrimination across national markets, primarily by monopolists, aimed at maximizing profits or displacing competitors.[13] A modern theory of dumping, suggested by Wilfred, shifts the focus away from monopoly power toward the structural constraints faced by competitive firms operating under demand uncertainty, rigid employment relations, and high fixed costs.[14] In this context, dumping, understood as selling below cost, becomes a rational response to macroeconomic pressures rather than a manipulation of market access.

Both social dumping and trade-related dumping share a common underlying logic: leveraging regulatory or cost asymmetries to gain a competitive advantage. Therefore, social dumping can be analogically understood as the export or imposition of lower labour standards, whether through wage suppression, deregulation, or precarious employment models, to outcompete rivals in the global or regional economy, implying negative social consequences.[15] As noted by Magdalena Bernaciak, the mere increase in the number of migrant workers does not constitute social dumping in itself. Rather, it arises when these workers are employed under conditions that fall below the standards set by host-country labour laws or collective agreements.

The reactivation of the EU's social dimension through the European Pillar of Social Rights did not emerge in an institutional vacuum. Rather, it followed a longer trajectory of changing governance instruments, most notably the Open Method of Coordination (OMC) initiated by the Lisbon European Council in 2000.[16] This momentum weakened considerably during the presidency of José

[12] Lasek-Markey (n 9).

[13] Gottfried von Haberler, 'Dumping, Cartels, Monopolies, and Export Bounties' in Gottfried von Haberler (ed), *The Theory of International Trade with Its Applications to Commercial Policy* (Macmillan 1933) 296–97.

[14] ibid.

[15] Magdalena Bernaciak, 'Social dumping: political catchphrase or threat to labour standards?' (Working Paper 2012. 06, European Trade Union Institute 2012) <https://ssrn.com/abstract=220839> accessed 27 June 2025.

[16] Martina Prpic, 'The Open Method of Coordination' (*European Parliament*, 2014) <https://www.europarl.europa.eu/EPRS/EPRS-AaG-542142-Open-Method-of-Coordination-FINAL.pdf> accessed 25 February 2026.

Manuel Barroso during and after the 2008 financial crisis. In particular, the management of the financial and sovereign debt crises marked a retrenchment of European social policy. Fiscal consolidation, austerity and enhanced market coordination took precedence over social objectives. Instruments such as the Euro Plus Pact encouraged wage moderation, decentralization of collective bargaining and the reconsideration of wage indexation mechanisms.[17] The Barroso years were also characterized by a political shift within Member States toward centre-right dominance, which facilitated the prioritization of fiscal orthodoxy and supply-side reform. However, the social consequences of austerity, rising inequality and political disaffection progressively undermined the legitimacy of this approach.[18]

Hence, three developments contributed to the subsequent reorientation: the perceived failure of austerity strategies and associated learning processes within international and EU institutions; the political shock of Brexit, which centred debates on the Union's social legitimacy; and the rise of Eurosceptic calls, which intensified concerns about the social sustainability of market integration. Against this background, the European Commission under Jean-Claude Juncker advanced a 'triple A' Social Europe, culminating in the proclamation of the European Pillar of Social Rights. The Pillar's 20 principles are structured around equal opportunities, fair working conditions, and social protection and inclusion[19]. Under the subsequent leadership of Ursula von der Leyen, this trajectory was consolidated through the 2021 Action Plan, which translated the Pillar into quantified employment, training and poverty-reduction targets for 2030. Substantively, the revival of Social Europe can be analytically organized along three axes[20]: including the Directive (EU) 2022/2041 on adequate minimum wages[21], the Directive (EU) 2019/1152 on transparent and predictable working conditions[22] and the revision of the Posted Workers Directive 96/71/EC in 2018.[23]

[17] Sonja Bekker and Saskia Klosse, 'EU governance of economic and social policies: Chances and challenges for Social Europe' (2013) 2 European Journal of Social Law 103.

[18] Maarten Keune and Philippe Pochet, 'The revival of Social Europe: is this time different?' (2023) 29 Transfer: European Review of Labour and Research 173.

[19] Sophie Dura, 'The European Pillar of Social Rights: How strategic agency shaped the European Union's flagship social initiative' (2024) 58 Social Policy and Administration 554.

[20] Keune and Pochet (n 18).

[21] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275/33.

[22] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[23] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16.

These instruments, however, form part of a broader legislative landscape relative to EU labour law and the European social model. At the level of labour conditions, the Working Time Directive[24] operationalises fundamental rights related to health and just working conditions, which entered into force, as well as the Charter of Fundamental Rights of the European Union[25], in Article 31 on fair and just working conditions. In fact, the elevation of working conditions to the status of fundamental rights reflects an attempt to constitutionalise the asymmetry inherent in the employment relationship. The addition of dignity in the Charter reflects a normative shift in understanding of working conditions, not only as physical and material but also relative to the whole personality of the worker.[26] Beyond Article 31 on fair and just working conditions, the Charter encompasses a cluster of social and labour rights of direct relevance to the employment relationship: Article 27 on workers' right to information and consultation, Article 28 on the right to collective bargaining and action, Article 30 on protection against unjustified dismissal, and Article 33 on family and professional life.

At the same time, the evolution of EU labour law has been shaped by the fragmentation of the standard employment relationship with the appearance of atypical work. The Part-Time Work Directive 97/81/EC[27] and the Fixed-Term Work Directive 99/70/EC[28] introduced the principle of non-discrimination between atypical and comparable full-time or permanent workers, seeking to prevent the use of flexible employment forms as instruments of systematic disadvantage. Furthermore, the Temporary Agency Work Directive 2008/104/EC[29] extended this logic to triangular employment relationships, establishing equal treatment as the baseline standard for agency workers assigned to user undertakings. At this level, the Posted Workers Directive's amendment in 2018 also pays particular attention to the area of wages of workers, the equality of working conditions in temporary work agencies and the protection of long-term posted workers. In fact, the Directive (EU) 2019/1152 on transparent and predictable working conditions ensured the right of workers, irrespective of their nationality, to have access to all relevant information on working conditions, the essential aspects of

[24] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299.

[25] Charter of Fundamental Rights of the European Union [2000] OJ C364/1, art. 31.

[26] Brian Bercusson, 'A Framework of Principles and Fundamental Rights for European Collective Labour Law' in Brian Bercusson (ed), *European Labour Law* (Cambridge University Press 2009) 288.

[27] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L14/9.

[28] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

[29] Richard Mababu, 'European Union Posting of Workers Law and Equal Treatment in Internal Labour Market for Social Cohesion' (2024) 3 European Journal of Law and Political Science 15.

the work and the time in which the work will take place.[30] Furthermore, for the specific case of posted workers, additional information is required, regarding the country of employment, its duration, and the currency to be used for remuneration. It can be argued that the 2018 revision of the Posted Workers Directive both reflects and contributes to a broader shift in EU labour law, especially with the adoption of Directive (EU) 2022/2041 on adequate minimum wages.[31]

2. *The role of the CJEU through the concept of judicialization*

Alec Stone Sweet, referring to the process through which judges acquire authority over the rules and institutions that govern a social system, first developed the concept of judicialization.[32] It emerges from the transformation of dyadic social interactions -such as contracts- into triadic relations, where a third-party adjudicator resolves disputes. Once actors accept judicial reasoning and precedent as legitimate and authoritative, judicial decisions begin to exert recursive effects on future rulemaking and social interactions. Stone Sweet identifies two interrelated feedback loops in this process: (a) between rulemaking and third-party dispute resolution, and (b) between judicial law-making and future legislative or regulatory behaviour. These loops create a 'virtuous circle' in which adjudication stimulates further norm production, and in turn, the growing reliance on legal norms strengthens judicial authority. Thus, judicialization does not merely refer to the increase of judicial activity; it signifies the structural transformation of governance, whereby the judge's law-making becomes a constitutive mechanism of social order.[33] More specifically, in the context of labour mobility, Mussche and Lens examined the judicialization of the EU mobility regime through the increasing interpretative authority of the CJEU in creating legal and economic realities that can precede or even determine legislative action.[34] For example, in the *Laval* case, the Court's reasoning, subordinated collective bargaining rights to the free movement of services, effectively constitutionalizing a market logic within labour. The subsequent political and legislative responses, such as the revision of the Posted Workers Directive in 2018, represent institutional feedback to judicial lawmaking.

Subsequent scholarship empirically demonstrated how the case law of the Court of Justice of the European Union (CJEU) generated judicialization of the Eu-

[30] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L 186/105.

[31] Marta Lasek-Markey, *Law, Precarious Labour, and Posted Workers* (Routledge 2023) 1-10.

[32] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies 147.

[33] Julien Bois and Mark Dawson, 'Towards a Legally Plausible Theory of Judicialization in the European Union' (2023) 45 Journal of European Integration 823.

[34] Mussche and Lens (n 8).

ropean legal order by addressing public policy issues, where legislative consensus was difficult to achieve.[35] In this view, the CJEU progressively accreted influence over the institutional evolution of the treaty system, shaping not only the interpretation but also the trajectory of integration. Furthermore, understanding the formation of judicialization can be explored through the principal-agent theory. Hence, member States, caught between pressures for deeper market integration and domestic political constraints, delegated authority to the Court as an enforcement agent tasked with ensuring compliance with treaty obligations.[36] However, unlike ordinary agents, the Court is empowered to enforce the law against the principals themselves. As a trustee of the Treaties' constitutional values, it operates in a position of structural supremacy and exercises a degree of discretion uncommon in domestic judicial systems. Because reversal of treaty-based jurisprudence requires unanimous treaty amendment, Member States face substantial obstacles in overriding the Court's constitutional interpretations.[37]

The concept of market constitutionalism is equally central to understanding how judicialization in the EU has primarily advanced the constitutionalisation of market freedoms. In this sense, the Court functions as a constitutional guardian of market integration: its rulings constrain domestic labour regulation whenever it is deemed to restrict cross-border economic freedoms. Consequently, market constitutionalism signals the hierarchical privileging of economic freedoms over collective social rights. However, the codification of case law through secondary legislation also reveals a political reaction to judicialization as an effort to recalibrate the constitutional balance between market integration and social protection. In this sense, scholars dispute the characterization of the Court as an unconstrained agent. Kelemen argues that judicialization has enhanced transparency, accountability and access to justice within the Union.[38] Similarly, Höreth attributes the Court's powerful position to the institutional configuration of EU multi-level governance, rather than to self-directed expansion.[39]

Empirical research further complicates the image of an all-powerful Court. In their quantitative analysis, Carrubba and Gabel demonstrate that the Court is sensitive to the risk of non-compliance and adjusts its rulings when Member State opposition is credible.[40] In this view, judicialization unfolds within an in-

[35] R. Daniel Kelemen, 'Judicialisation, Democracy And European Integration' (2013) 49 Representation 295.

[36] Marcus Höreth, 'The Least Dangerous Branch of European Governance? The European Court of Justice under the Checks and Balances Doctrine' in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013).

[37] Mussche and Lens (n 8).

[38] Kelemen (n 35).

[39] Höreth (n 36).

[40] Clifford J. Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behaviour under Political

ter-institutional dialogue rather than through unilateral judicial dominance. Nevertheless, this responsiveness can be tempered by precedents' path dependency.[41] This is explained by the fact that once legal principles are established, subsequent legislative initiatives operate within their doctrinal boundaries. The court's influence is therefore variable over time, contingent on political reactions that may codify, modify, or partially override jurisprudence. Judicialization is thus best understood as a dynamic interaction between law and politics rather than as linear judicial supremacy.[42]

To sum up, from a theoretical standpoint, the judicialization of the EU mobility regime therefore reflects multiple mechanisms: delegation under conditions of political constraint; a 'trustee' of constitutional interpretation; iterative inter-institutional dialogue; and the path-dependent force of precedent. The Court neither unilaterally determines integration nor operates as a passive agent. Rather, it occupies a structurally privileged position within a multi-level governance system in which adjudication functions as a central driver of norm production.

3. *The impact on the socio-economic position of workers*

From a socio-economic perspective, the EU's posting framework generates an institutionalized form of labour market segmentation by enabling firms to combine transnational service provision with differentiated labour standards and to "use an available, qualified and, above all, less expensive workforce".[43] Interpreted through a social transformation lens, such segmentation is not an isolated regulatory problem but part of a wider structural shift associated with neoliberal market integration, the reconfiguration of national labour regimes, and employer-driven flexibilisation.[44] Posting thus exemplifies a disembedded regulatory arrangement in which economic freedoms take precedence over socially embedded protections, producing stratified employment positions and prompting protective regulatory counter movements at EU and national levels.[45] The legal fiction that posted workers do not "access" the host labour market but merely provide services through their home-country employer, produces

Constraints: Evidence From The European Court Of Justice' (2008) 102 American Political Science, 435–452.

[41] Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015) 7.

[42] ibid.

[43] Sophie Robin-Olivier, 'Posting of Workers in the European Union: An Exploitative Labour System' (2022) 1 European Law Open, 679.

[44] Stephen Castles, 'Understanding Global Migration: A Social Transformation Perspective' (2010) 36 Journal of Ethnic and Migration Studies 1565.

[45] ibid.

a secondary labour market segment within the EU.[46] Drawing on Anderson's argument that immigration controls create legal statuses shaping labour-market positions, the posting framework similarly generates a hybrid and unstable status that combines formal legality with structurally limited rights. Although posting does not rely on immigration authorization, it constructs a category of workers who are present on the territory yet only partially incorporated into host-state protections, remaining tied to home-country labour law, social security, and employer-dependent mobility.[47] This arrangement generates temporal and spatial forms of precarity analogous to those documented in scholarship on 'managed temporariness': the assumption of short-term presence restricts workers' time horizons, limits possibilities for contesting violations, and embeds them in employer-controlled arrangements of accommodation, transportation, and subcontracted deployment.[48] The result is a labour-market position that lies between legality and unfreedom, where triangular employment structures, cross-border liability gaps, and restricted capacity to change employers institutionalize uncertainty rather than merely reflect individual vulnerability. In this sense, the posting regime exemplifies a form of constructed precarity consistent with segmented labour market theory, in which employers' demand for flexible, low-rights labour is matched with a regulatory design that fabricates a workforce with curtailed expectations and constrained agency.[49] Rather than an incidental outcome of EU market integration, this segmentation is produced through the legal architecture itself, confirming that precarity in transnational labour mobility emerges through regulatory design and the differentiated statuses it creates. The posting regime, particularly in the context of East-West labour mobility within the EU, facilitates informalisation strategies by enabling employers, to partially or fully, circumvent host-state labour standards. As Likic-Brboric, Slavnic and Woolfson demonstrate, informalisation is a systemic feature of contemporary labour markets shaped by post-Fordist restructuring, subcontracting chains, deregulation, and the reconfiguration of welfare states. In Central and Eastern Europe, where neoliberal transition produced extensive informalisation, weak enforcement capacities, and segmented labour markets, posting interacts with pre-existing structural vulnerabilities by enabling employers to rely on a mobile workforce positioned at the intersection of formal EU mobility rights and informal employment practices. The result is a mutually reinforcing configuration

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[46] Marco Rocca and Frederic De Wispelaere, 'Posting of workers and the border of the labour market' (2023) 14 European Labour Law Journal.

[47] Bridget Anderson, 'Migration, immigration controls and the fashioning of precarious workers' (2010) 24 Work, Employment and Society 300.

[48] Xinying Chi, 'Challenging Managed Temporary Labor Migration as a Model for Rights and Development for Labor-Sending Countries' (2008) 40 New York University Journal of International Law and Politics 497.

[49] Branka Likic-Brboric, Zoran Slavnic and Charles Woolfson, 'Labour migration and informalisation: East meets West' (2013) 33 International Journal of Sociology and Social Policy, 677.

in which state strategies of flexibilisation, corporate cost-minimizing practices, and migrant workers' constrained agency produce "informalisation from above and below," as Slavnic describes.[50] Posted workers in this sense, absorb the risks of regulatory evasion while employers benefit from institutional loopholes that externalize labour costs. As a result, they are particularly vulnerable to exploitation and restricted social protection. Castles' analysis of the global labour market demonstrates how states and firms rely on differentiated legal statuses to supply flexible, low-cost labour while insulating core labour markets from risk.[51]Posting exemplifies this logic by creating a legally mobile yet institutionally subordinated category of workers whose partial detachment from host-country protections lowers labour costs while sustaining the demand for a hyper-flexible migrant workforce. Building on this, Anderson, Khadka and Ruhs's framework on institutional system effects shows that employer demand for migrant workers is shaped not only by national labour-market conditions but by cross-border regulatory interactions.[52] These institutional effects shape employer preferences for workers whose rights are fragmented, whose employment relationships are mediated through transnational subcontracting chains, and whose capacity to exit or contest abuse is constrained. Analysing the CJEU's jurisprudence through the combined lenses of segmentation, global labour-market governance, and institutional system effects therefore makes it possible to move beyond a doctrinal account of compliance with the posted workers regime. It highlights how judicial interpretations contribute to consolidating a transnational labour regime in which mobility rights, market freedoms, and differential inclusion co-produce a structurally precarious workforce.

IV. Results

The judicialization of the EU's posted workers regime illustrates the Court of Justice's evolving role in shaping the normative balance between market integration and labour protection. The analysis proceeds across three distinct phases, demarcated by the applicable regulatory framework throughout different periods: the period preceding the adoption of the Posted Workers Directive 96/71/EC; the period from its entry into force until the 2018 amendment; and the period following the adoption of Directive 2018/957/EU.

[50] Zoran Slavnic, 'Political Economy of Informalization' (2010) 12 European Societies, 3.

[51] Stephen Castles, 'Migration, Crisis, and the Global Labour Market' (2011) 8 Globalizations 311.

[52] Bridget Anderson, Upasana Khadka and Martin Ruhs, 'Demand for migrant workers: institutional system effects beyond national borders' (2024) 50 Journal of Ethnic and Migration Studies 1202.

1. The period preceding the adoption of the Posted Workers Directive 96/71/EC

The regime governing posted workers in the European Union sits at the intersection of private international law and EU labour law. Under the Rome I Regulation[53], the general principle is party autonomy as cited in Article 3, allowing contracting parties to choose the governing law of the contract, subject to overriding mandatory provisions and public interest considerations as excluded in Article 9. In the absence of such a choice, Article 4 designates the law of the service provider's habitual residence as applicable to contracts for the provision of services. For individual employment contracts, the applicable law is that of the country where or from which the employee habitually carries out their work, with the rule that temporary work abroad does not alter the habitual place of employment.

In the pre-Directive period, the Court's jurisprudence established the functional foundations of cross-border mobility in the freedom to provide services by interpreting the free movement of services as encompassing the temporary movement of workers employed by a service provider. For instance, it interpreted Articles 59 and 60 EEC as encompassing the temporary cross-border movement of workers employed by a service provider. Thus, it redefined the allocation of competences between Member States and the Community.

In the case of *Rush Portuguesa* in 1990, the Court distinguished between the movement of workers and the cross-border movement within the provision of services. Such distinction therefore decouples the concept of posted workers from the mobility of workers and positions it within the economic activity of undertakings.

The facts of the case concerned a Portuguese undertaking subcontracted to carry out railway construction works in France. French authorities required, on their side, work permits for the Portuguese workers brought temporarily by the employer. The Court rejected this requirement, holding that Articles 59 and 60 EEC precluded Member States from imposing conditions such as local recruitment obligations or work permits on workers temporarily posted in the framework of cross-border service provision. Indeed, the requirement for work permits was deemed an unjustified restriction in the single market.

The implication of this decision excludes, as a result, the application of host-state labour market access conditions for other member states' service providers. That reads that the court established by its interpretation of service provision in the ECC Treaty, the principle of non-discrimination against service providers

[53] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

by reason of nationality or place of establishment. In this context, its stance relates to what Joseph Weiler described as a mutation of competences without Treaty amendment. That is to say, that in this context, national law –on the requirement of work permits– was not relevant to the expansion of community competence in the matter of providing services.[54] The mutation of competences led to an "absorption"[55] process by national courts, since these freedoms were transformed from programmatic objectives into directly invocable subjective rights, enforceable before them.

In fact, one year later, the Commission suggested a proposal for a directive concerning the posting of workers, esteemed necessary for the functioning of the internal market and the avoidance of uncertainty that might arise from the sole application of the conflict of law rules. In its explanatory memorandum, it explicitly cites the *Rush Portuguesa* Case to derive general principles in the posting of workers and freedom to provide services based on Article 59 of the ECC Treaty.[56] Thereby it illustrates how judicialization in this phase precedes and conditions subsequent codification.

For the case of third country nationals, the *Vander Elst* case illustrates the role of the Court in shaping principles of the posting regime but within different circumstances. The facts of the case concern a Belgian undertaking that sought to post Moroccan workers –legally employed and resident in Belgium– to France. However, as the French authorities required work permits, the Court similarly held that such requirements constituted a restriction on the freedom to provide services in the case of lawful employment of third-country nationals (TCNs). Through this case, the Court effectively constructs a distinct mobility regime for posted TCN workers, decoupling their legal status from national immigration controls insofar as they are integrated into a cross-border service provision, with the condition of lawful employment and residence rights in the sending country. In the terms of Alec Stone Sweet, this phase reflects a "direct design" mode of judicialization.[57] In the absence of legislative harmonisation, the Court defines both the scope and limits of permissible national regulation, thereby pre-empting Member State control over labour market access for this category of workers. However, during that period, the European Commission sought to codify aspects of the emerging regime through a 1999 draft proposal addressing the posting of third-country nationals.[58] In this regard, the proposal translates

[54] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

[55] ibid.

[56] Commission, 'Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services' COM (91) 230 final.

[57] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies,147.

[58] Commission, 'Proposal for a Directive of the European Parliament and of the Council on the

the Court's jurisprudential principles by affirming that the freedom to provide services extends to the posting of legally employed third-country nationals. Therefore, a common framework would remove duplicative national controls by centralising verification in the Member State of establishment. In this sense, the proposal can be understood as an attempt to translate "direct design" judicialization into legislation; however, it simultaneously exposes the political boundaries of such a process with the abandonment of the proposal in 2005.

2. The period of the entry into force of Directive 96/71/EC until its amendment

The Posted Workers Directive was later on adopted without distinguishing between TCNs and workers from the EU. The Directive is applicable to, rather, "undertakings established in a Member State which, in the framework of the transnational provision of services, post workers".[59] The Directive's proposal builds upon the insufficiency of conflict-of-law rules to address the legal uncertainty surrounding posting and to improve the working conditions of posted workers while eliminating distortions of competition between undertakings.[60] In this regard, the Directive manifests as a shift towards a harmonised community-level model. A comparison of the regulatory framework under the Convention of Rome of 1980 and under the Directive of 1996 reveals the specificity of the posted workers regime and its advancement in terms of legal certainty and the protection of workers.

At the scope level, the Rome Convention provides a general framework for determining the applicable law to contractual obligations, including employment contracts. Article 7 allows for the application of overriding mandatory provisions of the forum or the place of performance. However, this mechanism remains indeterminate, as it neither defines the content of such mandatory rules nor guarantees their systematic application. By contrast, the Directive explicitly specifies such provision with "public policy provisions"[61] in article 3(10). At the level of substantive labour protection, the Directive establishes hard-core rules including: "maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, the conditions of hiring-out

posting of workers who are third-country nationals for the provision of cross-border services' COM (99) 0003 final.

[59] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art 1.

[60] European Commission, Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services COM (91) 230 final.

[61] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art. 3(10).

of workers".[62] Such rules introduce a minimum floor of protection, which is absent under the Rome Convention. Another distinguishable addition of the Directive is the provisions related to collective agreements. Whereas the Rome Convention is silent on the role of collective agreements, article 3(8) of the Directive allows Member States –even in the absence of formal universal applicability mechanisms– to rely on agreements that are generally applicable "to all similar undertakings in the geographical area and in the profession or industry"[63] or concluded by the most representative social partners. While this framework represented an advance in legal certainty and worker protection relative to the Rome Convention, the manner in which the Directive's hard-core provisions were interpreted by the CJEU proved decisive in determining their practical scope. While the Court formally recognized Member States' right to apply local labour standards, its doctrine subordinated social protection to the logic of economic functionality. This orientation is most clearly illustrated by the *Laval* judgment[64], which raised concerns regarding the manner in which minimum harmonization directives must be interpreted.[65] In the case facts, Laval un Partneri Ltd, posted workers to Sweden through its subsidiary to carry out renovation works on school premises in Sweden. After unsuccessful negotiations with the Swedish building workers' union over wage levels and accession to the sectoral collective agreement, Swedish unions initiated a blockade and sympathy action that halted the works and led to the subsidiary's bankruptcy. The Swedish labour court asked, hence, whether Articles 49 and 50 EC precluded such collective action.

The Court of Justice held that the right to take collective action constitutes a fundamental right forming part of the general principles of EU law, yet it does not fall outside the scope of the Treaty and must be reconciled with the freedom to provide services. The relevance of the Court's stance relies on the subjection of collective action by trade unions to the free movement of services. Therefore, collective action aimed at compelling a foreign Service provider to negotiate and sign a collective agreement fixing wage levels beyond the "hard core" defined in the Posted Workers Directive constituted a restriction on Article 49 EC. Such theological interpretation of the Directive 96/71/EC in the context of the freedom to provide services could imply in this case a repositioning of collective

[62] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art. 3(1).

[63] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1, art. 3(8).

[64] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

[65] European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)) [2010] OJ C15E/50.

labour rights as prima facie infringements requiring proportionate justification. Thereby, it looks from this case that collective labour rights are not only subordinate to internal market logic but are also in tension with it. Tension between workers' protection and the freedoms of the market is particularly relevant in decentralised collective bargaining systems, where the *Laval* judgment seems to privilege the legal predictability for service providers over the autonomy of national industrial relations systems, on one hand, and the workers' access to more favourable terms, on the other hand. Thus, the decision implies a transformation of minimum labour terms and conditions into a ceiling rather than a floor of protection.

Similarly, the relevance of the *Rüffert* case[66] lies in the way it consolidated and extended the doctrinal trajectory initiated in *Laval*. The Court of Justice was confronted with a public procurement clause requiring contractors, in Germany, to comply with locally negotiated wage standards, in applicable collective agreements. By interpreting the Posting of Workers Directive strictly through the framework of Article 49 EC, the Court held that only minimum rates of pay, fixed by universally applicable collective agreements or by statute, could be imposed on foreign service providers. Collective agreements applicable solely to public contracts, even when embedded in regional social policy aimed at preventing wage undercutting, were excluded from the Directive's protective scope.

The doctrinal logic of *Laval* was extended in the *Rüffert* case*,* subjecting public procurement-based social clauses to the same market-oriented proportionality. Taken together, Laval and Rüffert produced a coherent but contested doctrinal background, in which host-state social regulation, whether pursued through collective action or public procurement clauses, was subjected to internal market. The political and institutional reactions to this jurisprudence confirm that judicial interpretation did not settle the posted workers regime but instead opened a sustained phase of inter-institutional negotiation –precisely the political reaction that judicialization theory predicts.[67] For instance, in 2008, the European Parliament issued a resolution on challenges to collective agreements in the EU calling for legislative clarification of the relationship between fundamental social rights and economic freedoms. In this sense, the resolution constitutes evidence on the existence of a legitimacy deficit that secondary legislation alone could not absorb. Hence, the evolution of the posted workers regime cannot be understood solely through case-law analysis; rather, it reflects a dynamic interaction between judicial interpretation and political mobilisation. In fact, in 2014, the Enforcement Directive[68] and ultimately, in 2018, the revision of the PWD were

[66] Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989.

[67] Mussche and Lens (n 8).

[68] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework

adopted[69], aiming to recalibrate the social dimension of market integration and to restore coherence with the EU's proclaimed social market economy.[70]

3. The period after the adoption of Directive 2018/957/EU

The process of the 2018 amendment can be understood against the background of growing tensions within the internal market following Eastern enlargement and the intensification of cross-border service provision. This tension, coupled with the persistent wage differentials between Member States, generates concerns about social dumping and regulatory arbitrage. In this context, the European Commission launched its proposal in 2016 to strengthen the protection of posted workers within the regime of posting established with the directive of 1996. Under this proposal, the Commission introduces the principle of "equal remuneration for the same work in the same place", thereby shifting the normative baseline of the Directive from minimal protection toward a more substantive equality framework. However, opposition by Central and Eastern member states reflects the political tensions that this rights-based approach to the market entails. Particularly, wage differentials are, in smaller economies, defined as a legitimate competitive advantage that contributes to increased service exports.

In this context, Hungary and Poland raised actions of annulment of the amendment in front of the Court. Both applicants advanced a structurally similar line of argument: that the 2018 reform altered the centre of gravity of the Directive from market facilitation to social regulation, thereby exceeding the legal basis in Articles 53(1) and 62 TFEU and disproportionately restricting the freedom to provide services under Article 56 TFEU. As contested by both countries, if the amendment's legal basis concerns the protection of workers it should be rather based on Article 153, which excludes EU competence over pay.[71] The action for annulment, thus, crystallises around the boundary of EU competences, particularly whether the notion of "remuneration" constitutes indirect wage regulation within the internal market.

The main role of the court in this regard was to clarify the scope and the interpretation of specific clauses of the new Directive of 2018. More substantively, the Court reformulated the Directive's dual objective: facilitating service provision while ensuring protection of posted workers on a fair competitive basis.

of the provision of services [2014] OJ L159/11.

[69] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16.

[70] Catherine Jacqueson, 'The Internal Market at a Social Turn? Social dumping and the protection of workers' (2020) 22 European Journal of Social Security 403.

[71] See: Case C-620/18 *Hungary v Parliament and Council* [2020] ECLI:EU:C:2020:1001.

This reformulation signals a doctrinal recalibration, where social protection is no longer merely ancillary but embedded in the functioning of the internal market. In contrast to the earlier rhetoric of the Laval line of case law, the Grand Chamber conceptualized 'fair competition' as competition not grounded in excessive disparities in employment conditions within the same host state.[72] Hence, workers' protection becomes an integrated part of this fair competition.

The differentiation between posted workers and the free movement of workers was further highlighted by the court within the examination of the basis of the principle of equal treatment for posted workers. The attention accorded to posted workers' right of equal treatment does not emanate from Article 45 of TFEU, but rather from the freedom to provide services. In this reagard, the Court preserves the functional logic of posting as a form of service provision rather than labour mobility, in line with its previous judgments and with the Directive 96/71/EC. The employment relationship, therefore, continues to be governed primarily by the home state, subject only to a defined set of host-state mandatory rules.

However, this application of the home state's law is limited by the definition of the work limit period. In fact, the 2018 revision of the Posting Directive stipulates that after 12 months –extendable to 18 months upon justified notification– the posted worker becomes subject to the host country's mandatory labour provisions. However, this shift does not establish full equality as certain contractual aspects such as dismissal rules or non-competition clauses remain governed by the law of the sending state.

Overall, the amendment introduced a set of innovations compared to the previous Directive 96/71/EC, especially regarding the wages of posted workers, the equality of working conditions and the protection of long-term posted workers. Table 3 provides a comparative summary between the two directives on different levels. For instance, the introduction of the concept of remuneration implies a larger meaning than wages by including different bonuses and allowances. The Directive 2018/957 consolidates that all the components of remuneration applicable to local employees apply as well to posted workers. As a result, workers can benefit from travel costs and accommodation expenses, reimbursement and lodging expenditure.

[72] Marta Lasek-Markey, 'No Turning Back from Social Europe: A New Interpretation of the Refurbished Posted Workers Directive in Hungary and Poland' (2022) 51 Industrial Law Journal.

Issue	Directive 96/71/EC	Directive 2018/957
Posting Period	Undefined.	12 months, with possible 6 months extension upon justification.
Applicable Law	Home country by default with exceptions related to "core" terms and employment conditions of the host state.	The host country's law starts to apply beyond the posting period (from 12 to 18 months).
Remuneration	"Minimum" rates of pay were applicable.	The concept of remuneration replaces the minimum pay; it includes broader costs such as allowances and bonuses.

Table 3. Comparative summary of the changes between the two directives on the posting of workers

Yet, in the case of *Dobersberger v Magistrat der Stadt Wien*[73], and broadly after the entry of the amendment in force, the Court's stance does not reflect much change from the market constitutionalist logic. After clarifying the normative shift towards balancing the social dimension of posting and its economic benefits, the question with *Dobersberger*'s case shifted towards the definition of who might be considered as posted and thus who is willing to benefit from this new normative shift. The case concerned on-board catering workers employed by a Hungarian undertaking and subcontracted within a transnational railway service. The Court concluded that these workers lacked a "sufficient connection" with Austrian territory and therefore did not fall under the scope of the Posted Workers Directive.

This means that the sufficient connection to the host country in this case was not determined by the cross-border nature of the service contract but the spatial distribution of the workers' activities, particularly the location where shifts began and ended. This criterion does not derogate the constant jurisprudence in the matter such as in the case of *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV* or *OL and Others v Rapidsped*.[74]

The court's role in this case was to assert the territorial connection as the organizing principle in posting. As a result, sectors characterized by high mobility and fragmented work patterns, such as cross-border logistics work, are less likely

[73] Case C-16/18 *Michael Dobersberger v Magistrat der Stadt Wien* ECLI:EU:C:2019:1110.

[74] See: Andrea Iossa, '"This is not a posted worker" – short-term cross-border mobility of logistics workers and spatio-temporal dimensions of exploitation in the EU: evidence from the case law of the Court of Justice' (2022) 1(3) European Law Open 669-678. And see: Case C-429/19 *OL and Others v Rapidsped Fuvarozási és Szállítmányozási Zrt* [2021] ECLI:EU:C:2021:548; Case C-815/18 *Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV and Others* [2020] ECLI:EU:C:2020:976.

to benefit from the Directive's protective framework. The relevance of this jurisprudence shows that if the reform aimed to rebalance economic freedoms and social rights, *Dobersberger* indicates that such rebalancing operates only within a stable and restrictive definition of posting.

In the *SN and Others v Staatssecretaris van Justitie en Veiligheid* case[75], the Court of Justice addressed the intersection between the posting regime and national immigration control in the context of Third Country Nationals (TCNs). The case concerned Ukrainian workers holding valid residence permits in Slovakia and employed by a Slovak undertaking that posted them to the Netherlands. When the duration of the construction project to which they had been posted exceeded initial expectations, the Dutch authorities required additional residence permits, limited in duration and subject to administrative fees. The employer challenged these requirements under Articles 56 and 57 TFEU, arguing that they constituted unjustified restrictions on the free movement of services.

The Court's position is relevant in two respects. First, regarding the posting of third-country nationals (TCNs) and the continuity of the posting regime as operating without prejudice to national rules on entry and residence. Second, in light of the broader political context surrounding immigration and the potential security concerns that may arise where service provision is invoked. The Court held, first, that undertakings cannot rely on a derived right of residence, since such rights are conceptually linked to Union citizenship and therefore to natural persons rather than legal entities. Second, while acknowledging that the Dutch residence requirement constituted a restriction on the freedom to provide services, the Court accepted that such a restriction might be justified by overriding reasons in the public interest, including public policy and the protection of legal certainty for workers, if the measures satisfy the proportionality test. Accordingly, the limited duration of the permits and the administrative fees were considered compatible with EU law.

Although the Court did not explicitly rely on the *Vander Elst* doctrine, it implicitly limited its scope by emphasizing that lawful employment in the sending Member State must be genuine and verifiable. The judgment therefore, shows awareness about the possibility of using posting to circumvent national immigration control, and makes it a legitimate public policy concern that overrides market freedoms. In doing so, the Court reinforces Member State discretion in supervising the residence conditions of TCN posted workers, even where a transnational service provision formally complies with posting notification requirements.

[75] Case C-540/22 *SN and Others v Staatssecretaris van Justitie en Veiligheid* [2024] ECLI:EU:C:2024:530.

V. Implications

1. *Synthesis of the judicialization of the posted workers regime*

The longitudinal analysis of the Court's case law reveals a non-linear trajectory of judicialization that both confirms and refines the theoretical expectations outlined in the literature. Across the three studied periods the Court's role evolves from constitutive market-builder to doctrinal consolidator and, ultimately, to selective stabilizer within a politically constrained environment.

In the pre-Directive period, the jurisprudence established the constitutional foundations of posting through an expansive interpretation of the freedom to provide services. In *Rush Portuguesa*, the Court distinguished the temporary movement of workers in the context of service provision from free movement of workers, thereby insulating cross-border service mobility from host-state entry and work permit requirements. This interpretative move exemplifies what Joseph Weiler described as a "mutation of competences" where national authority over labor market access was effectively displaced through judicial construction of internal market freedoms.[76] The subsequent consolidation of this logic in *Vander Elst* extended the regime to third-country nationals lawfully employed in a Member State, reinforcing the Court's capacity to generate a distinct transnational mobility status through adjudication. In terms of judicialization theory, as developed by Stone Sweet[77], this phase reflects constitutive judicial law-making: the Court did not merely interpret existing norms but structured the governance architecture of labour mobility itself.

During the Directive period, however, the jurisprudence reveals a shift from competence expansion to market-oriented discipline of social regulation. In *Laval un Partneri*, collective action aimed at enforcing wage standards was framed as a restriction on the freedom to provide services, subject to a proportionality test. By granting horizontal effect to economic freedoms, the Court subordinated collective labour rights to internal market logic. This reasoning was reinforced in Rüffert, where public procurement-based social clauses were excluded from the Directive's protective framework. Analogically, if *Laval* subjected trade union action to market scrutiny, *Rüffert* extended that scrutiny to public regulatory strategies designed to prevent wage undercutting. The combined effect transformed minimum harmonization into a ceiling rather than a floor of protection, confirming the socio-economic literature's argument that the posting framework institutionalized labour market segmentation.[78] Considering that posted workers

[76] Joseph H. H. Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403.

[77] Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comparative Political Studies 147.

[78] Robin-Olivier (n 43); Castles (n 44); Rocca and De Wispelaere (n 46); Anderson (n 47).

do not access the host labour market, it can be used as a mechanism of regulatory disembedding, enabling cost differentials consistent with strategies of informalisation.

Yet the post-amendment period complicates the narrative of unilateral judicial marketization. In the annulment actions brought by Hungary and Poland against the 2018 revision, the Court upheld the amended Directive and reformulated its dual objective: facilitating service provision while ensuring fair competition grounded in equivalent employment conditions within the host state. The Grand Chamber recognized that competition based on excessive disparities in working conditions undermines both social protection and market integrity. This doctrinal recalibration aligns with the broader revival of Social Europe under the European Pillar of Social Rights[79] and its legislative concretizations, including Directive (EU) 2018/957, Directive (EU) 2019/1152, and Directive (EU) 2022/2041[80]. Here, judicialization operates less as an expansion of market freedoms and more as a constitutional validation of a rebalanced compromise between market freedoms and social rights.

However, subsequent case law demonstrates that this recalibration remains bounded. In *Dobersberger*, the Court re-centred territorial connection as the organizing principle of posting, excluding certain cross-border logistical activities from the Directive's scope. The decision illustrates path dependency[81]: while the amendment strengthened host-state labour standards, the Court simultaneously defined the boundaries of who qualifies as a posted worker, thereby delimiting the reach of the new protective logic. Judicialization here operates through categorization rather than expansion.

This containment logic is also visible in *SN and Others v Staatssecretaris van Justitie en Veiligheid*, where the Court addressed the posting of third-country nationals. While acknowledging that residence requirements restrict service provision, it accepted such measures when justified by public policy and proportionality. Hence, compatible with the principal-agent accounts, the Court adjusts its jurisprudence where legitimate Member State concerns related to public policy and

[79] Dura (n 19).

[80] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16; Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275/33; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

[81] Martinsen (n 41) 7.

security exist.[82]

2. *Implications on the socio-economic position of workers*

The primary implication is that the Court's rulings have established a hierarchy of norms where the logic of market integration is sometimes privileged. The Court's subsequent post-amendment jurisprudence, characterized by a technocratic retreat and functional exclusions, such as in the case of logistics workers, implies a stabilization of this asymmetry. The normative shift is not a simple pendulum swing from market to social, but rather the permanent embedding of social protection as a secondary or conditional consideration that should be proportionate to the primary objective of market freedom.

The second implication relates to the limits of this regime in reducing segmentation and precarity. In fact, the early jurisprudence facilitated regulatory segmentation by constructing a legally mobile yet partially disembedded workforce. The Directive-period case law entrenched this segmentation through a market-oriented proportionality test. The post-2018 phase, however, does not dismantle segmentation but re-regulates its boundaries. The reform strengthened the host-state working condition application, yet the court's decision still limits its scope territorially and preserves Member State authority in migration-sensitive contexts. Precarity remains structurally embedded, particularly for third-country nationals, whose status continues to combine formal legality with constrained incorporation into host labour markets.

VI. Conclusions

1. *Summary of the findings*

The trajectory of the CJEU's jurisprudence on posted work reveals that judicialization constitutes a process of legal and institutional construction of a labour mobility regime. Judicialization operates through interactive feedback between adjudication and governance, whereby judicial reasoning not only interprets norms but also generates new rules and meanings. In the case of EU labour mobility and posted workers, this process has unfolded different functions such as absorption and rule-making.

Through absorption, the Court has progressively declared national protective measures incompatible with market freedoms, as exemplified in the cases *Laval* and *Viking*, thereby reconfiguring the balance between collective rights and economic integration. The political reaction to this judicial absorption embodied in the codification of case law through the 1996 Posting of Workers Directive and

[82] Carrubba (n 40).

its 2018 revision, illustrates how legislation has followed, rather than directed, the Court's interpretative agenda. The rule-making function reflects the Court's capacity to invent legal categories and regulatory effects ex nihilo. In *Vander Elst*, the recognition of third-country nationals' mobility rights created a new directive, which redefined the relationship between immigration control and market access. Similarly, in *Dobersberger*, the Court's exclusion of mobile railway workers from the PWD's scope exemplified the judiciary's power to delimit rights' applicability, effectively designing the material boundaries of EU labour law.

Overall, the judicialization of the posted workers regime illustrates the transformation of the CJEU from an adjudicative to a governance institution, capable of producing binding norms and entailing policy orientations that pre-structure legislative outcomes. The Court's jurisprudence continues to mediate the tensions between market integration and social concerns, oscillating between market-constitutional imperatives and the normative aspirations of the EU's social market economy. This ongoing dialectic confirms that in EU labour governance, judicialization is both the engine and the constraint of integration: it stabilizes the legal order while reproducing its foundational imbalance.

2. Theoretical and empirical contributions

This study contributes to the literature on judicialization, European integration, and transnational labour mobility in three different ways. First, it refines the concept of judicialization in the field of labour mobility by demonstrating its temporal variability. Rather than confirming a linear narrative of judicial empowerment, the longitudinal analysis shows that the Court's role shifts across phases: from constitutive expansion of market freedoms in the pre-Directive period, to proportionate market-social balance in the Directive period and finally to institutional stabilization and boundary-setting in the post-amendment period. Judicialization thus emerges as a dynamic interaction between jurisprudential path dependency and political recalibration, rather than as continuous judicial supremacy. Second, the study bridges legal-doctrinal analysis with principal-agent theory. While early case law supports delegation-based accounts of judicial empowerment, the post-2018 jurisprudence reveals judicial sensitivity to political constraints, particularly in shifting geopolitical and migratory contexts. The findings, therefore, refine Stone Sweet's intake of judicialization by incorporating political responsiveness without reducing judicial agency. Lastly, the analysis repositions the 2018 revision of the Posted Workers Directive within the broader Social Europe trajectory. The findings slightly differ from the literature that situates the amendment as a corrective to the Laval doctrine. In this paper, the amendment is seen as a corrective but also judicial interpretation simultaneously delineates the categories and situations to which these 'corrections' apply. Empirically, the study provides a diachronic design of the Court's case law, in order to identify doctrinal continuities and discontinuities that are often obscured in single-case analyses.

However, several limitations to the study should be acknowledged. In the study of posted workers regime, especially when it comes to its implications on the socio-economic position of workers, it is beneficial to study implementation outcomes, enforcement practices, or the lived experiences of posted workers. The gap between jurisprudence and practice remains empirically underexplored. Furthermore, the collection of 'landmark' decisions may underrepresent lower-profile decisions or national case law that could nuance the picture of judicial influence. The national level of compliance and implementation is also understudied. Although it could be theorized within the principal-agent model. Overall, the conclusions on the socio-economic position of workers are more theoretical rather than quantitatively assessed. Hence, the structural consequences of jurisprudence are not statistically demonstrated.

3. *Avenues for future research*

Building on the contributions and limitations of the study, research could examine how national authorities apply post-2018 jurisprudence in practice, applying mixed methods combining doctrinal and empirical analysis. Comparative analysis of national implementation and litigation can take research further to test principal-agent claims about judicial responsiveness. On the other hand, qualitative research can allow further exploration of the socio-economic outcomes by involving posted workers or trade unions and experts.

In conclusion, the study demonstrates that judicialization in the posting regime is neither uniformly expansionist nor purely restrained. It is contingent, path-dependent, and politically mediated. Further understanding of the intersection of posting and labour mobility governance, can be expanded through econometrics, social fieldwork and comparative political analysis.

Article 4(6) EAW Framework Decision after C.J. (C-305/22): Mutual Recognition, Consent, and the Execution of Custodial Sentences

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Contents

Abstract

In case C-305/22 C.J., the ECJ examined the relationship between Article 4(6) of Framework Decision 2002/584 (EAW Framework Decision), which is an optional refusal ground in connection with the European Arrest Warrant (EAW), and Framework Decision 2008/909. In the main proceedings, the execution of an EAW issued by a Romanian court was refused for the purpose of executing the judgment in Italy, the executing Member State. However, it was unclear whether the consent of the issuing Member State was required to apply that refusal ground. Through the analysis of the interplay between the two framework decisions, the ECJ established that such consent is necessary for the application of the refusal ground. Additionally, it established that the issuing authority should carefully consider its decision to grant consent to the recognition and execution of a judgment imposing a custodial sentence. However, the aspects that should be considered remain unclear, not to mention that Framework Decision 2008/909 does not provide for such a limitation of the punitive powers of Member States. For this, the judgment of the ECJ seems – at least in this regard – contradictory to say the least.

Keywords: Article 4(6); EAW; Framework Decision 2008/909; social rehabilitation; C-305/22

I. Introduction

On 6 May, 2022, the European Court of Justice (ECJ) received a submission concerning a European Arrest Warrant (EAW) issued by the Romanian *Curtea de Apel București* (Court of Appeal, Bucharest).[1] The referring court initiated the preliminary ruling procedure due to a peculiar situation that has never happened in the EU before (at least not that we know of based on the case law of the ECJ). The execution of the EAW, issued by the referring court in 2020, was refused by the Italian executing authority, namely, the *Corte d'appello di Roma* (Court of Appeal, Rome), invoking Article 4(6) of Framework Decision 2002/584 (EAW Framework Decision). It held that it was appropriate to enforce the judgment that was the basis of the EAW in Italy, rather than in Romania, the issuing Member State. The executing authority claimed that there was ground for optional non-execution of the EAW and for the enforcement of the underlying judgment in the executing Member State because the requested person resided in Italy. The executing authority claimed that executing the sentence in Italy would improve the chances of social rehabilitation of the requested person.[2]

The ECJ's judgment in this case further clarified the relationship between Article 4(6) EAW Framework Decision and Framework Decision 2008/909 on the mutual recognition of custodial sentences. It reiterated that the former refusal ground and the latter framework decision have the same purpose: improving the chances of social rehabilitation of sentenced persons. Additionally, it established that the issuing Member State has a discretionary right to decide whether to give up its punitive power in terms of a specific judgment in connection with Article 4(6) EAW Framework Decision – a novelty in the jurisprudence of the ECJ.

This annotation aims to highlight the importance of the judgment in terms of the relationship between Article 4(6) EAW Framework Decision and Framework Decision 2008/909, which has been a topic of less interest in legal literature. To this end, first, it will introduce case *C-305/22 C.J.*, including the facts of the case, the reasoning, and the judgment of the Court, followed by comments on the case highlighting the novelty of the judgment. The annotation primarily relies on doctrinal legal analysis of the concerned framework decisions and the preliminary ruling procedure, complemented with references to legal literature.

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[1] Case C-305/22 *C.J.* [2025] ECLI:EU:C:2025:665, para. 21.

[2] ibid para. 26.

II. Facts of the case

A Romanian individual was sentenced to prison in Romania in 2017 in the main proceedings. In 2020, the referring court issued an EAW to execute the judgment.[3] After receiving the EAW and arresting the requested person,[4] the Italian executing authority requested the issuing authority to forward the judgment that was the basis of the EAW in order to invoke Article 4(6) EAW Framework Decision for the refusal of the EAW and the execution of the underlying judgment in the executing Member State. Although the issuing authority complied with the request, it did so while expressing its disagreement with the executing authority's intention to execute the judgment in the executing Member State.[5] In another exchange with the executing authority, the issuing authority noted that it would not agree to the indirect recognition of the judgment that was the basis of the EAW and its enforcement in the executing member state, with the executing authority solely relying on Article 4(6) EAW Framework Decision, which allows for the refusal of the EAW if the executing authority pledges to execute the judgment that is the basis of the EAW in its own territory.[6] The issuing authority explained that if the executing authority intended to invoke the refusal ground laid down in Article 4(6) EAW Framework Decision, it would have to acquire the consent of the issuing authority for the recognition and execution of that judgment on the basis of Framework Decision 2008/909.[7] In other words, the issuing authority wished to strictly adhere to the procedure for the mutual recognition of judgments imposing custodial sentences, as laid down in Framework Decision 2008/909.

Regardless of the issuing authority's intention, the executing authority proceeded with the recognition and enforcement of the judgment that served as the basis of the EAW, which was communicated to the issuing authority.[8] Hence, this preliminary ruling procedure originated from different interpretations of Article 4(6) EAW Framework Decision and the corresponding rules of Framework Decision 2008/909 in the issuing and executing Member States. Essentially, the executing authority believed that the application of the refusal ground laid down in Article 4(6) EAW Framework Decision automatically enabled the recognition and enforcement of a judgment that was the basis of an EAW, while the issuing authority was convinced that recognition and enforcement should be carried out

[3] ibid para. 21.

[4] ibid para. 22.

[5] ibid para. 24.

[6] Council Framework Decision 2002/5894/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190, art. 4(6).

[7] *C.J.* (n 1) para. 25.

[8] ibid para. 26-29.

in an individual procedure based on Framework Decision 2008/909.

It is against this background that the issuing authority referred five questions to the ECJ. According to the Court, the first to third questions inquired whether applying the refusal ground laid down in Article 4(6) EAW Framework Decision presupposes that the executing authority complied with Framework Decision 2008/909 as regards the criteria laid down for the recognition and execution of a foreign judgment in the executing Member State, and if not, does the issuing Member State retain the right to execute the EAW.[9]

In addition, by the fourth question, the referring court essentially asked whether the decision to suspend the sentence recognised by the executing Member State results in the applicability of the ne bis in idem principle.[10] Last, but not least, the fifth question was considered irrelevant to the case by the Court.[11] The latter questions and the ECJ's answers to them will not be analysed as they are not relevant to the topic of this annotation.

III. The reasoning and the judgment of the Court

By reformulating the first three questions, the ECJ held that the interplay between the EAW Framework Decision and Framework Decision 2008/909 had to be analysed. First, it considered whether the executing authority must meet the conditions for recognition and enforcement of a judgment imposing a custodial sentence, as laid down in Framework Decision 2008/909, if it intended to invoke Article 4(6) EAW Framework Decision to refuse an EAW with the intention to recognise and enforce the judgment that is the basis of that warrant. Second, it examined whether the issuing Member State retains the right to execute the judgment if the executing authority does not comply with the standards laid down in Framework Decision 2008/909.

To answer the first part of the question, the ECJ examined the rights and obligations of the issuing and executing Member States as set out in Framework Decision 2008/909 regulating the mutual recognition of judgments imposing custodial sentences. First, it compared the purpose of Framework Decision 2008/909 and the refusal ground in Article 4(6) EAW Framework Decision. It noted that both the former framework decision and the latter refusal ground aim to facilitate the social rehabilitation of a sentenced person after the execution of a custodial sentence. Moreover, they set the same requirements for the application of the refusal ground and the recognition and enforcement of judgments.[12] Thus,

[9] ibid para. 38.

[10] ibid para. 33(4).

[11] ibid para. 99.

[12] ibid para. 43-44., 47. According to Framework Decision 2008/909, a judgment may be rec-

it concluded that the refusal ground regulated in Article 4(6) EAW Framework Decision may only be applied in compliance with the rules set out in Framework Decision 2008/909.[13]

Even though the ECJ clearly established that the concerned refusal ground may be applied strictly in compliance with the requirements laid down in Framework Decision 2008/909, it faced another problem, as it had yet to encounter any cases where the issuing authority did not consent to the recognition and execution of a judgment that was the basis of the EAW. Hence, to answer the first question, it also examined whether the consent of the issuing Member State to the recognition and execution of the judgment that is the basis of an EAW is a precondition for the application of the refusal ground in question.

In this regard, the ECJ first observed whether the consent of the issuing Member State is required for the recognition and execution of a judgment imposing a custodial sentence. It held that such consent is indeed indispensable, as indicated by certain rules laid down in Framework Decision 2008/909. First, it noted that Article 4 of Framework Decision 2008/909 states that recognition and enforcement may be initiated by the issuing Member State by sending the judgment and the certificate prescribed therein to the executing Member State. If a Member State does not do so, it indicates that it does not consent to the recognition and enforcement of the judgment. Consequently, the issuing Member State has the discretion to grant the executing Member State the right to execute a judgment delivered in the issuing Member State.[14] Second, the ECJ also noted that Article 13 of Framework Decision 2008/909 entitles the issuing Member State to withdraw the certificate before the execution of the judgment begins, which reinstates its right to execute the judgment. In the Court's view, this also confirms that the consent of the issuing Member State is a condition for the recognition and execution of a judgment in the executing Member State.[15] Moreover, it also held that the purpose of social rehabilitation – existing both in Framework Decision 2008/909 and Article 4(6) EAW Framework Decision previously estab-

ognised and enforced in another member state if the sentenced person is a national or a resident of the executing member state. Article 4(6) of the EAW Framework Decision sets the same conditions for the application of the refusal ground for the execution of the judgment that is the basis of the EAW in the executing member state. See: Framework Decision 2008/909/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures, involving deprivation of liberty for the purpose of their enforcement in the European Union [2018] OJ L327/27 (Framework Decision 2008/909/JHA), art. 4(1)-(2) *cf.* EAW Framework Decision art. 4(6).

[13] *C.J.* (n 1) paras. 49. and 51.

[14] ibid para. 57.

[15] ibid para. 59.

lished in the case law of the ECJ[16] – is not unlimited. Instead, the recognition and execution of a judgment in another Member State must be consistent with the criminal policy considerations of the issuing Member State as well.[17]

Consequently, the executing Member State's request for a sentencing judgment is insufficient in and of itself for the recognition and execution of a judgment under Framework Decision 2008/909.[18] The same applies to the application of the refusal ground regulated in Article 4(6) EAW Framework Decision as well. Even though the executing authority may invoke that refusal ground, it does not establish the consent that must be given by the issuing Member State for the recognition and execution of a judgment in the executing Member State.[19] Furthermore, the ECJ noted that issuing an EAW already presupposes that the issuing Member State intends to exercise its right to execute the judgment. If it had not planned to do so, it would not have issued an EAW in the first place.[20]

After having examined whether the consent of the issuing Member State is necessary for the application of the concerned refusal ground, it turned to the question of what the consequences are of the lack of that consent, since the executing authority proceeded as such in the case at hand.[21] It argued that the right to execute the judgment in such cases is reserved for the issuing Member State,[22] since the purpose of the EAW is to avoid the impunity of offenders escaping from the Member State where their criminal liability was established.[23] It held that if the refusal of execution without the consent of the issuing Member State would be possible, even though Framework Decision 2008/909 clearly provides discretion for it in this regard, it would undermine the very system of criminal cooperation based on the EAW, the purpose of which is to simplify cooperation in order to punish criminals. Such an interpretation of the concerned framework decisions would jeopardise the punitive aim of criminal justice.[24] Thus, the ECJ reiterated that the EAW may be upheld regardless of whether the executing authority decided to invoke Article 4(6) EAW Framework Decision.[25] However, it did note that the issuing authority should carefully consider the consequences of upholding an EAW in such cases so as not to disproportionately affect the

16 Case C-700/21 *O.G.* [2023] ECLI:EU:C:2023:444, para. 49.

17 *C.J.* (n 1) para. 62-63.

18 ibid para. 64.

19 ibid para. 65.

20 ibid para. 67.

21 ibid para. 74.

22 ibid para. 76.

23 ibid para. 77.

24 ibid paras. 79-80. and 82.

25 ibid para. 84.

concerned person with its decision in the process.[26]

IV. Comments

In summary, the ECJ established a clear relationship between Article 4(6) EAW Framework Decision and Framework Decision 2008/909. It highlighted that it is not enough to pursue a legitimate aim when applying the refusal ground; the executing authority must also acquire the consent of the issuing Member State when it wants to execute a judgment that is the basis of an EAW in line with the rules laid down in the latter framework decision. In addition, the ECJ held that if these requirements are not met, the issuing Member State is entitled to uphold the EAW to execute the underlying judgment.

Consequently, the ECJ's judgment in case C-305/22 C.J. clarified the relationship between the EAW Framework Decision and Framework Decision 2008/909 by further developing its case law on the interpretation of the refusal ground regulated in Article 4(6) EAW Framework Decision. Even though it already confirmed in its previous judgments that the refusal ground is only applicable if it serves a legitimate purpose,[27] that is, the social reintegration of the sentenced person,[28] it has failed to emphasise the necessity of acquiring consent to recognise and execute a judgment from the issuing Member State as required by Framework Decision 2008/909 until now. This is especially important because neither the EAW Framework Decision nor Framework Decision 2008/909 provides any rules for cases in which the procedures for the recognition and execution of an EAW and a judgment imposing a custodial sentence overlap.[29] This is a particularly significant problem in terms of Framework Decision 2008/909, which was adopted six years after the EAW Framework Decision, thus it could have easily regulated the relationship between the two cooperation systems, but failed to do so. Nevertheless, the ECJ's judgment in the current case mitigates this overlap by prescribing the application of the same standards for the refusal of an EAW for the purpose of executing the underlying judgment and the recognition and execution of a judgment in the executing Member State, including acquiring the consent of the issuing Member State.

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[26] ibid para. 85.

[27] *O.G.* (n 16) para. 49.; Case C-514/17 *Sut* [2018] ECLI:EU:C:2018:1016, para. 33. and 36.

[28] Stefano Montaldo, 'Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies' in Stefano Montaldo (ed), *The Transfer of Prisoners in the European Union. Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA* (Eleven 2020) 48.

[29] Stefano Montaldo, Alexandru Damian and José A. Brandariz, 'The Road Ahead: Proposals for Improving the Implementation of Framework Decision 2008/909/JHA' in Stefano Montaldo (ed), *The Transfer of Prisoners in the European Union. Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA* (Eleven 2020) 159.

Moreover, the current judgment suggests that these two procedures are not mutually exclusive; hence, judicial authorities are not obliged to choose which one of them they intend to utilise for the execution of a judgment rendered in absentia of the accused, as it was previously suggested by one author.[30] This conclusion is further reiterated by the fact that the ECJ held that the issuing and executing authorities must consult with each other only after the application of this refusal ground is considered.[31] I believe that such a consultation would serve to clarify whether the issuing Member State is willing to give up its role in executing the judgment. If not, the EAW shall be executed even though the executing authority would rather execute the judgment in its own territory for better social rehabilitation.[32] Such practice could prove to be beneficial for judicial cooperation because the question of the execution of a judgment in another Member State does not have to be discussed prior to issuing an EAW, which would prolong judicial cooperation.

Finally, it is worth emphasising that the ECJ drew attention to the significance of the decision of the issuing authority. Although it is acknowledged that the purpose of the social reintegration of the requested person may not be pursued limitlessly and may be subject to restrictions based on the criminal justice policies of the issuing Member State, the issuing authority should still carefully consider the consequences of its decision denying consent to the recognition and execution of a judgment in the executing Member State. Unfortunately, the ECJ has failed to elaborate on its position. Consequently, it remains a question what aspects it deems worthy of consideration when deciding on consenting to the recognition and execution of a judgment imposing custodial sentences. However, I believe that the issuing authority should have fundamental rights-based considerations when deciding on consent to recognition and execution, such as the right to private and family life, which is closely related to social reintegration especially in light of the preamble of Framework Decision 2008/909 which sets out on multiple accounts that the chances of social rehabilitation may be enhanced if the custodial sentence is executed in a Member State to which a sentenced person is attached by family, linguistic, cultural, social or economic links.[33] On the other hand though, it is worthy of emphasis that the ECJ's ambiguous suggestion may constrict the sovereignty of Member States in exercising their punitive powers. Such limitation is not put forward in Framework Decision 2008/909. Moreover, even the current judgment of the ECJ suggests that Mem-

[30] Alessandro Roasó, 'Framework Decision 2008/909/JHA in Context: Interplay with the European Arrest Warrant and (EU) Extradition Law' in Stefano Montaldo (ed), *The Transfer of Prisoners in the European Union. Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA* (Eleven 2020) 85.

[31] *C.J.* (n 1) para. 68.

[32] ibid para. 70.

[33] Framework Decision 2008/909/JHA, Preamble (9)-(10).

ber States have a wide margin of discretionary power when deciding on giving consent to the execution of a judgment in another Member State. Thus, this part of the ECJ's judgment seems contradictory to its other observations. Nevertheless, the Court's real intentions with this statement remain unknown. Perhaps it will elaborate its view on this matter in a future preliminary ruling procedure in the same vein.

V. Conclusion

In conclusion, the ECJ's judgment in case C-305/22 provides valuable additions to its case law regarding the interplay between the EAW Framework Decision and Framework Decision 2008/909. It not only reaffirms that Article 4(6) EAW Framework Decision and Framework Decision 2008/909 have the same purpose, but it also reiterates that the refusal ground regulated in Article 4(6) is applicable only in compliance with the latter framework decision. By doing so, it established that the consent of the issuing Member State is a condition for the recognition and execution of a sentencing judgment in the executing Member State. This is especially important since it was not obvious before the judgment that mere recourse to Article 4(6) EAW Framework Decision cannot substitute the consent of the issuing Member State in this regard. Moreover, it clarified that the issuing Member State retains the right to execute the judgment if consent is not provided, thereby strengthening the underlying logic of the EAW.

As a result, judicial authorities now have clear instructions to follow when they wish to apply Article 4(6) EAW Framework Decision. The judgment suggests that the executing authority must acquire the consent of the issuing Member State for the recognition and execution of a judgment serving as the basis of an EAW. It also became clear that the application of Article 4(6) EAW Framework Decision and the recognition and execution of a judgment based on Framework Decision 2008/909 are not mutually exclusive, which eliminates the need for consultation between issuing and executing authorities prior to the issuance of an EAW, thereby simplifying judicial cooperation in cases concerning the execution of judgments imposing custodial sentences.

Finally, it should be kept in mind that the Court also introduced an unclear obligation for the issuing authority when considering consenting to the recognition and execution of a judgment imposing a custodial sentence, suggesting that the issuing authority should measure the pros and cons of giving consent from the point of view of the requested person. In my opinion, such an assessment can only be carried out from a fundamental rights perspective. However, the Court failed to point this out in its judgment. Nevertheless, if the ECJ further elaborates this obligation in the future, it might turn out that it aims to constrict the Member States punitive powers for the sake of fundamental rights protection and social rehabilitation of sentenced persons, which is clearly not provided for in Framework Decision 2008/909. As such, this part of the current judgment may give rise to confusion in national courts.

The Latest Proposal of the Law on State Property of Bosnia and Herzegovina – Between Political Will and Constitutional Impossibility

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Contents

Abstract

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In November 2025, four members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, as authorized proposers, submitted to the House of Representatives a Proposal of the Law on State Property for consideration under urgent procedure, as it was considered in their opinion "*a draft law of a high degree of urgency*." The proposal was not adopted and was subsequently, in accordance with the Rules of Procedure of the House of Representatives, referred to regular legislative procedure. It should be emphasised that this was not the first attempt to resolve this extremely important issue. By a Decision of the Council of Ministers of BiH in December 2004, a State Property Commission had been established, tasked with drafting criteria for determining which property belongs to Bosnia and Herzegovina and which belongs to the entities and the Brčko District of BiH. Nevertheless, this commission failed to produce any results from 2004 to 2025. Besides this, the Constitutional Court of BiH also significantly engaged in resolving this issue through its decisions. In order to achieve the goals, the activities of the Office of the High Representative (OHR) for BiH need reconsideration.

Keywords: Constitution of BiH, Bosnia and Herzegovina, the Republic of Srpska, state property, Office of the High Representative for BiH, Constitutional Court of BiH.

I. Introductory Remarks

In recent years, the public in Bosnia and Herzegovina has witnessed exhausting debates (and disagreements) on a daily basis, primarily among representatives of political parties, over perhaps the most difficult political issue in Bosnia and Herzegovina, which, during the thirty years of the Dayton Bosnia and Herzegovina, despite all efforts of domestic and international actors[1]—primarily those same politicians, but also certain legal experts—has (not) been resolved. Whether the issue has been resolved remains contested, as there is no unified position within

[1] In 2023, Office of the High Representative (OHR) for BiH established a special Expert Working Group tasked with "preparing, with the participation and contribution of international experts, a series of conclusions, recommendations, and principles to be presented to political decision-makers". A member of this Expert Working Group was also the co-author of this paper Prof. Mitrović. Prof. Mitrović left the group after the first session with the following explanation: At the first and only session of the Working Group that I attended, the views of the representatives of the Republic of Srpska (Prof. Mlađen Mandić, PhD and Prof. Ljubinko Mitrović, PhD), on the one hand, and legal experts from the Bosniak community (primarily Prof. Larisa Vilić, PhD), on the other hand, were strongly polarised. After this first, consultative session, it was completely clear that the implementation of the above task was simply impossible. Given all the events and completely contradictory views expressed at the first working meeting of the Expert Working Group, and especially after receiving the minutes of that first meeting and the draft conclusions, Prof. Mitrović realised that he could not continue working in this Working Group, and therefore, shortly after its establishment, he withdrew from its work, about which he informed the Office of the High Representative for BiH, as well as the wider Bosnian-Herzegovinian public, in writing".

Bosnia and Herzegovina. According to the majority of participants from the Republic of Srpska, the issue was resolved by the Dayton Peace Agreement.[2]

Through several points elaborated below, and primarily through an analysis of the most recent Proposal of the Law on State Property submitted at the end of last year into parliamentary procedure, we attempt to provide our view on the entire situation and answer the long-standing question: Why is state property a stumbling block in Bosnia and Herzegovina?[3]

It should also be noted that in the modern world only two countries have a single law regulating the issue of so-called state property: Montenegro and Uzbekistan. On the other hand, examples from Switzerland,[4] Germany, Belgium, Sweden, Spain, and Austria show that federal or autonomous units generally retain control and management over forests, agricultural land, waters, energy facilities, and other natural resources, while central authorities manage only what is clearly and explicitly defined by constitutions and laws. Similarly, in most classic federations such as the United States or Australia, territory belongs to federal units, while the federation retains ownership only of land necessary for federal institutions.

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[2] In the RTRS program on January 24, 2023, the President of the Republic of Srpska, Milorad Dodik, also spoke about state property: "Property was resolved by the Dayton Agreement. No Constitutional Court will resolve property, nor the House of Representatives, nor the House of Peoples at the level of BiH. Property, as far as its status is concerned, is the property of the Republic of Srpska. This is inviolable and cannot be discussed and will not be on the agenda."

[3] The only thing that is clear when it comes to state property is that political leaders in Bosnia and Herzegovina cannot agree on practically any segment of this problem. Therefore, there is no consensus among them on the answers to any of the following questions: what is the definition of state property, what constitutes state property, who is the legal owner of state property, how should the status of state property be decided, which level of government is competent to regulate the status of state property, and who manages state property and how (more in: State and Property: Policy Analysis, Atlantic Initiative, Sarajevo, 2014). In order to further complicate the situation, the „so-called high representative" in Bosnia and Herzegovina, Mr. Christian Smith by his own decision, in April 2022 enacted the Law on amendments and supplements to the law on temporary prohibition on the disposal of state property of Bosnia and Herzegovina, thereby extending the temporary ban on the disposal of state property until the entry into force of a state-level law regulating the rights of ownership and management of state property. Under this Law, Article 4 is amended in a way: "The temporary ban on the disposal of state property in accordance with this law shall remain in force until the entry into force of a state-level law regulating the rights of ownership and management of state property, which would be adopted by the Parliamentary Assembly of Bosnia and Herzegovina, or until the High Representative decides otherwise."

[4] In Switzerland, the cantons are the original holders of sovereignty and owners of the territory, while the Swiss Confederation has only those powers that the cantons have transferred to it by the Constitution of the Swiss Confederation.

II. The Latest Proposal of the Law on State Property

As stated in the abstract, in November 2025, four members of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, as authorized proposers, submitted to the House of Representatives a Proposal of the Law on State Property for consideration under urgent procedure, as it was considered in their opinion 'a draft law of a high degree of urgency'. The proposal was not adopted and was referred, in accordance with the Rules of Procedure of the House of Representatives, to regular legislative procedure.

The proposal contains a number of highly problematic provisions (many of them unconstitutional), and here we point out the most important ones. The provision of Article 4 (the concept of state property) of the Proposal defines what is considered to be the state property of Bosnia and Herzegovina, including: 1) public goods such as atmospheric air, airspace, river waters, drinking or technical water, lake and sea waters, the seashore, radio frequencies…; 2) public infrastructure such as public roads, streets, squares, railway, electricity transmission, gas, heating, telecommunication corridors and networks…; 3) Goods of general interest such as construction land, agricultural land, forests and forest land, protected natural areas, flora and fauna, and cultural, historical, and ecological assets…; 4) national and cultural-historical monuments of Bosnia and Herzegovina.

The provision of Article 8 of the Law Proposal determines the holder of the right of ownership of all state property in such a way that Bosnia and Herzegovina is the holder of the right of ownership of all state property (listed in the provision of Article 4 of the Law Proposal). On the other hand, paragraph 2 of this Article states that the entities and other levels of government in Bosnia and Herzegovina may manage and use or own such state property needed to exercise their individual competencies, to the extent authorized by this Law, or another law enacted by the Parliamentary Assembly of BiH.

In terms of its constitutionality, the provision of Article 12 of the Law Proposal also appears compelling, which constitutes the so-called The Unified State Property Register as a public register that represents a comprehensive and complete, methodologically standardised and continuously updated record of state property, general goods, public goods and goods of general interest that are at the disposal and managed by Bosnia and Herzegovina and its authorities.

The provisions of Article 25 of the Law Proposal stipulate that the Directorate for the Management and Recording of State Property is established as an independent administrative organization with its headquarters in Sarajevo to perform the affairs related to state property, acquisition, management, disposal of state property in accordance with this law, and to keep records and the Unified

State Property Register.

Hereby we can conclude that the cited provisions (along with some others that we have not elaborated this time) from the proposal of the Law on State Property are unconstitutional, which will be elaborated in more details in the following chapters of this paper. On the other hand, the Republic of Srpska has no right, nor may it give its property to anyone or under any pretext. The adoption of the proposed Law on State Property would precisely entail that.

III. The concept of state property

The concept of state property is very broad and complex, since it encompasses a number of different categories of property, public goods and goods in general use, the owners of which are, in addition to the level of Bosnia and Herzegovina, certainly also other levels of government, i.e. entities, cantons, cities, municipalities. The concept of state property does not exclusively apply to the property that belongs to and is owned by Bosnia and Herzegovina as a collective, but this term encompasses, i.e. implies the property of all, i.e. lower levels of government – entities, cantons, cities and municipalities.[5] The above is certainly supported by the position of the Steering Board of the Peace Implementation Council, which back in 2004 stressed that the issue of (state) property should be addressed in a way that ensures that all levels of government have ownership of the resources (property) they need to exercise their powers. Any other interpretation of the concept of state property is completely unacceptable, especially if it is known that state property arose from social property and that the titleholders of social property were all levels of public authority. For example, the titleholder of state (i.e. public) property is most certainly a city or municipality (and not Bosnia and Herzegovina) that built a sports hall, water supply system or local road using its own funds. Unfortunately, it seems that for a significant number of legal experts from the Federation of Bosnia and Herzegovina, as well as some legal experts from the Office of the High Representative for Bosnia and Herzegovina, state property equals property the titleholder of which is exclusively and solely Bosnia and Herzegovina.

The Constitutional Court of Bosnia and Herzegovina has also embarked on defining the concept of state property (completely contrary to the Constitution

[5] Aware of the legal uncertainty implied by this situation, the Steering Board of the Peace Implementation Council decided that this issue should be addressed in a manner that ensures that all levels of government have ownership of the resources they need to exercise their responsibilities. In its Declaration adopted at the level of Political Directors in Sarajevo on 24 September 2004, the Steering Board called for the achievement of a "durable solution" to the "issue of state property" (more in: Legal observations of the Legal Department of the Office of the High Representative on the Applicant's request in case U – 1/11).

of Bosnia and Herzegovina and its competences granted by that Constitution), Decision U-1/11, point 82 from July 2012, examining whether the Republic of Srpska had constitutional competence to adopt the Law on the Status of State Property Located on its Territory. Even there the concept of "state property"[6] was defined in a very vague and confusing way, even for lawyers.

IV. The Constitution of Bosnia and Herzegovina and the method of solving the issue of state property

Even for someone with non-legal understanding of the Constitution of BiH,[7] it is quite clear that this highest legal act of Bosnia and Herzegovina does not contain the explicit provision which deals with the issue of state property, including agricultural land, i.e. the issue of the division of state property.[8] This

[6] According to that decision, "State property, although it is a form of ownership that is similar in structure to private property under civil law, represents a special legal concept, and for that reason enjoys a special status. State property is characterized by the public law nature of the relationship between subjects and the use of that property, as well as its owner. It includes, on one hand, movable and immovable things that are in the hands of the public authority and which serve it for the purpose of exercising that authority, on the other hand, it can include 'public good'. It, by its nature, as a priority, it serves all people in the state. As such, 'public good' can be exempted from legal circulation because of its importance, since it is the only way to preserve and protect it". Furthermore, "the Constitutional Court reiterates that state property has a special status. It includes, on one hand, movable and immovable things that are in the hands of the public authority and which serve it for the exercise of that authority. On the other hand, 'state property' can include a public good, which by its nature serves as a priority for all people in the state (flowing water, protection of climatic conditions of life, protection of other natural resources, such as forests, necessary state infrastructure network in the sense of Annex 9 of the General Framework Agreement for Peace in Bosnia and Herzegovina etc.). Such property is a reflection of statehood, its sovereignty and territorial integrity. Also, the interest of Bosnia and Herzegovina cannot be ignored, as part of the "state property" that serves all the citizens of Bosnia and Herzegovina, which is not necessary for the effective execution of a specific administrative-territorial level in the state. In addition, this property can also serve as "another way of financing the obligations of the institutions of Bosnia and Herzegovina" IV/4. b) in connection with Article VIII/3. Constitution of Bosnia and Herzegovina".

[7] Constitution of Bosnia and Herzegovina, Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of Bosnia and Herzegovina, No. 25/2009 – Amendment I.

[8] In a separate opinion on disagreement with the Decision of the Constitutional Court of Bosnia and Herzegovina in case No. 1/11, Judge of the Constitutional Court of Bosnia and Herzegovina Zlatko M. Knežević points out: "Finally, I regret that the issue of a constitutional gap, which has its serious consequences for the citizens of Bosnia and Herzegovina and its constitutional system (and the constitutional system of Bosnia and Herzegovina consists, in addition to the Constitution of Bosnia and Herzegovina, of the entity constitutions, and some other constitutional sources of a domestic and international nature), was not resolved in a manner that, in my deep conviction, is Bosnian-Herzegovinian. In accordance with the Constitution of BiH, and if there is no constitutional provision, then through the division of rights and competences

point of view was ultimately taken by the Constitutional Court of BiH, which in paragraph 63 of Decision U-1/11 of 13 July 2012, states: "although the Constitution of BiH divides competences between the state and the entities, it does not contain a single provision related to state property".

This position is also confirmed by the Legal department of the Office of the High Representative for BiH,[9] which states in Legal Observations regarding the applicant's request in the case of the Constitutional Court of BiH – U-1/11 from 2011 the following: "The Constitution of BiH DOES NOT CONTAIN explicit provisions on how state property should be divided among different levels of government, and therefore the State and the Entities have not agreed on what their individual rights are to use, manage and dispose of such property, including the property over which the Socialist Republic of Bosnia and Herzegovina had the right of disposal, and the property that belonged to Bosnia and Herzegovina under the international Agreement on Succession Issues"[10]. A similar position was taken by the Atlantic Initiative in 2014, stating: "The problem of the status of state property in Bosnia and Herzegovina is the result of the lack of legislation at the state level that would define what is considered state property. This applies to both movable and immovable property, both in BiH and abroad. In addition, there is no legislation that defines the legal owner and users of state property."

In the light of the above, it can be safely stated that there is no provision regarding state property in the Constitution of BiH, but also in the entire legislation in Bosnia and Herzegovina.[11] Therefore, the position of the representatives of the Republic of Srpska, according to which the issue of the distribution of state property was defined long ago by the Dayton Peace Agreement (more on this

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between the state and the entities or to paraphrase the opinion of the Venice Commission, [...] both the state and the entities have the right to property in accordance with their needs and the territorial-functional principle."

[9] The following official position of this institution can be found on the website of the Office of the High Representative for BiH: "Myth 2: Status of State Property Claim: The issue of state property has already been resolved." Reality: The issue of state property was not resolved in Dayton in 1995 and still represents one of the goals and conditions for the end of international supervision in BiH. The Dayton Agreement and the Constitution of BiH established BiH as the successor of the former Republic of Bosnia and Herzegovina. The Constitutional Court of BiH confirmed that BiH is a titleholder of state property as one of the successor states of the former SFRY. A comprehensive and sustainable solution for the distribution of property between the state and other levels of government should be adopted by the Parliamentary Assembly of BiH. Until then, those who suffer due to the current legal uncertainty are citizens of Bosnia and Herzegovina.

[10] More: Legal observations of the Legal Department of the Office of the High Representative regarding the applicant's request in case U – 1/11.

[11] More: Atlantic Initiative State and Property: Policy Analysis, (2014).

later),[12] seems accurate.

V. Division of Competences in the Constitution of Bosnia and Herzegovina

The principle of presumption of competence in favour of the entities is one of the basic principles of the constitutional order of Bosnia and Herzegovina (point 1 of Article III determines the competences of the institutions of Bosnia and Herzegovina, and point 3 of Article III, states that everything that is not explicitly entrusted to the institutions of Bosnia and Herzegovina belongs to the entities). Namely, according to the Constitution of Bosnia and Herzegovina (point 3a, Article III): "*all state functions and powers that are not explicitly given in this Constitution to the institutions of Bosnia and Herzegovina belong to the entities*". Therefore, residual competence within Bosnia and Herzegovina belongs to the entities, which means that all competences that are not explicitly given to the institutions of Bosnia and Herzegovina belong to the entities. On the other hand, Bosnia and Herzegovina cannot perform (execute) any task unless it is assigned to it by a special constitutional provision, i.e. unless it is assigned to it based on the consent and agreement of the entities (through coordination, i.e. additional competences). Likewise, it should be particularly borne in mind that Bosnia and Herzegovina is not authorized to assign (determine) certain competences to the entities.

In addition to all of the above, it must also be taken into account that the entire text of the Constitution of BiH does not include any provision that grants competence to any institutions or bodies at the level of Bosnia and Herzegovina (including the Parliamentary Assembly of BiH)[13] to regulate, through legislative or other normative activity, the issue of state property, property rights and the protection of property or property rights. There are different interpretations

[12] See: Siniša Karan, 'Dayton Peace Agreement - twenty-five years of dismantling, ANURS, Round Table, Dayton Peace Agreement - twenty-five years later' (2020); Mile Dmičić, 'Constitutional status of Republika Srpska within Bosnia and Herzegovina - normative and real, Republika Srpska - ten years of the Dayton Peace Agreement, Academy of Sciences and Arts of Republika Srpska' (2005) 163.

[13] On the website of the Office of the High Representative for Bosnia and Herzegovina, one can also find the following, certainly very intriguing (it is unclear what it is based on) official position of this institution: Myth 5: Competence; Claim: The Parliamentary Assembly of BiH is not competent for the issue of state property because it belongs to the entities. Reality: The Parliamentary Assembly of Bosnia and Herzegovina consists of 42 deputies elected from both entities and 15 delegates directly elected by the Parliament of the Federation of BiH and the National Assembly of the Republic of Srpska. This means that, according to its constitutional powers and composition, the Parliamentary Assembly of BiH is the only competent body and best place to adopt a comprehensive law that will resolve the issue of state property for the betterment of all citizens of Bosnia and Herzegovina.

nowadays, primarily in the Federation of BiH, that derived from some other provisions of the Constitution of BiH (such attempts to rewrite the Constitution of BiH seem highly incorrect). Consequently, it is simply impossible, without an adequate amendment to the Constitution of BiH, to establish any new competencies for any institutions or bodies, including the Parliamentary Assembly of BiH, or to give it competence over something that it does not have according to the Constitution of BiH as the highest legal act.

VI. The Constitutional Court of Bosnia and Herzegovina and State Property

According to the Constitution of BiH, legislative power is exercised exclusively by the Parliamentary Assembly of BiH, and according to the provision of point 4 of Article IV, of the Constitution of BiH, which reads: "*The Parliamentary Assembly is competent for: a) Enacting laws necessary for the implementation of decisions of the Presidency or for the performance of the functions of the Assembly under this Constitution* ".

However, by designating the Parliamentary Assembly of BiH in its Decisions No. U-1/11 and Decisions No. U-4/21, as the competent body that will regulate the so-called state property through a special law, the Constitutional Court of BiH has transformed itself from an interpreter and protector of the Constitution of BiH (as are these courts in all the countries in the world) into a constitution-maker (creating its "own" norms and unconstitutionally making judgements according to these norms), which is completely unacceptable[14]. On

[14] In a separate opinion on disagreement with the Decision of the Constitutional Court of BiH, in case number 1/11, Judge of the Constitutional Court of BiH Zlatko M. Knežević says: "Therefore, it is acceptable to me (whether I agree with the decision or not) to declare the article/articles or the entire law that is being challenged to be inconsistent with the Constitution, but not to put the Constitutional Court in the role of a constitution-maker and change an explicit provision of the Constitution on what belongs to the state as a competence and what (everything else) to the entities. This very dangerous tendency according to which the Constitutional Court, through the decisions of nine judges, gives itself the right to simultaneously interpret the text of the Constitution and, not only model but essentially pass new provisions of the Constitution, casts serious doubt on the legitimacy of the representative who was acquired in the General Elections and who alone has the right to change the Constitution". Also, in a separate opinion on disagreement with the Decision of the Constitutional Court of BiH, in case number 4/21, Judge of the Constitutional Court of BiH Zlatko M. Knežević says: "…Namely, at the risk of simplification, but with the intention of not conveying it completely in this text reasoning of the decision (which is available), for me the decision of the majority boils down to three disputed issues (in addition to the already mentioned general positions in Ad II). They are:
a)identification of public good and state property b)the issue of serious violation of the constitutional system of Bosnia and Herzegovina in the sense of toleration, so even emphasizing different legal solutions on the same issue (forests), until acceptance discriminatory status of one constitutional category (Republic of Srpska in relation to another entity and the Brčko District of Bosnia and Herzegovina), which is notoriously contrary to the constitutional principle rule of law; c) the majority opinion, which places the Constitutional Court as superior to the Parliament

the other hand, the competences of the Constitutional Court of BiH are set out in the Constitution of BiH (Article VI, point 3)[15] and it is simply impossible to change, supplement, or reduce them, or to expend competencies without changing that same Constitution. This is the case everywhere in the world, and it should be the same in Bosnia and Herzegovina too. Consequently, the Constitutional Court of BiH could decide whether or not an article/articles, or even a specific law as a whole, are in accordance with the Constitution of BiH. However, the Constitutional Court of BiH could not do so, because no provision of the Constitution grants it the authority to carry out the distribution of constitutional competences, or to allocate competences of various constitutional categories[16]. Ultimately, it is quite clear that the Constitutional Court of BiH, with its decisions on the so-called state property, has repeatedly grossly violated the Constitution of BiH, going beyond the scope of its jurisdiction prescribed by the Constitution of BiH.

VII. Why is there no agreement and what are the possible solutions?

There are three possible directions to this problem, all implying a compromise between all the parties, namely:

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of Bosnia and Herzegovina because it is from the category of negative legislator (which our Constitution prescribes as the competence of the Constitutional court) exceeded the category of a positive legislator before passing the law. To clarify, the competence of the Constitutional Court is to evaluate whether a particular provision is in relation to the adopted laws or the entire law in accordance with the Constitution, and not to mandate in a situation where the law has not been passed to the Parliament what must be in the law or what must not be in the law (as it is in the specific case)".

[15] Point 3 of Article VI, of the Constitution of Bosnia and Herzegovina states: The Constitutional Court shall uphold this Constitution. a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:- Whether an Entity's decision to establish a special parallel relationship with neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.- Whether any provision of an Entity's constitution or law is consistent with this Constitution. Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity. b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

[16] Separate opinion on disagreement with the Decision in case number 1/11, Judge of the Constitutional Court of Bosnia and Herzegovina Zlatko M. Knežević.

a) for Serb representatives, the issue of state property (including agricultural land, forests, rivers, roads, squares...) was resolved by the Dayton Peace Agreement. In the absence of exact provisions of the Constitution, the wording of the Geneva Principles is in support of this position. The Geneva Principles (the Geneva Principles of 8 September 1995[17] in the Article 2 stipulate: "Bosnia and Herzegovina shall consist of two entities, the Federation of Bosnia and Herzegovina established by the Washington Agreement and the Republic of Srpska". The following provision, namely provision 2.1., stipulates: "The ratio of 51:49 of the territorial proposal of the Contact Group is a foundation of the agreement. That territorial proposal is open for changes resulting from the joint agreements". Finally, provision 2.2. states: "Either entity will continue to function with their respective constitutions (amended in the manner to match these basic principles)) and the New York Principles (the continuation of the Geneva Principles are so-called New York Principles of 26 September 1995, which in Article 6.4. stipulate: "Constitutional Court has jurisdiction to decide all questions arising under the Constitution of Bosnia Herzegovina "). The aforementioned principles, which fully define the issue of territorial demarcation between the Federation of Bosnia and Herzegovina and the Republic of Srpska[18], are also clearly confirmed in the General Framework Agreement for Peace in Bosnia and Herzegovina, which states in its preamble: "Affirming their commitment to the Agreed Basic Principles issued on September 8, 1995 (Geneva Principles), the Further Agreed Basic Principles issued on September 26, 1995 (New York Principles) and the cease-fire agreements of September 14 and October 5, 1995 …"

Likewise, Annex 2, entitled Agreement on Inter-Entity Boundary Line between the Republic of Srpska and the Federation of Bosnia and Herzegovina, states: Article 1 - Inter-Entity Boundary Line - The boundary between the Federation of Bosnia and Herzegovina and the Republic of Srpska (the "Inter-Entity Boundary Line") shall be as delineated on the map at the Appendix. Article

[17] On September 8, 1995, the Republic of Srpska and the Federation of Bosnia and Herzegovina, based on United Nations Security Council Resolution No. 942 of September 23, 1994, which approved the territorial division between the Republic of Srpska and the Federation of Bosnia and Herzegovina in the ratio of 49% of the territory to the Republic of Srpska and 51% to the Federation of Bosnia and Herzegovina, concluded a mutual agreement – the Geneva Principles.

[18] The following official position of this institution can be found on the website of the Office of the High Representative for Bosnia and Herzegovina: Myth 3: Territory; Claim: The issue of property distribution is being insisted on in order to deprive the entities of territory. Reality: The issue of state property does not affect the territorial ratio established by the Dayton Peace Agreement. For example, prospective military property registered as the property of the Ministry of Defense of Bosnia and Herzegovina is still part of the entity territory. The same applies to property owned by private individuals or companies, or to large industrial complexes with foreign capital such as the steelworks in Zenica or the refinery in Brod. The issue of state property is a technical and functional issue in order to find the best way to put state property at the service of the well-being of all citizens of Bosnia and Herzegovina.

2 - Adjustment by the Parties - The Parties may adjust the Inter-Entity Boundary Line only by mutual consent, and then Annex 2 entitled Agreement on the Inter-Entity Boundary Line and Related Issues, and the Constitution of Bosnia and Herzegovina[19].

Therefore, the Republic of Srpska finds only acceptable and possible the so-called "territorial principle" according to which "all state property existing at the time of entry into force of Annex 4 to the General Framework Agreement shall be the property of the entity in which it is located, and the joint institutions of Bosnia and Herzegovina may use the property necessary for the exercise of their constitutional and legal competences, to the extent that the entities may authorize it by law";

b) on the other hand, the political representatives of Bosniaks[20] in their statement of April 19, 2023, point out: 2. ...The description of state property, given by the Constitutional Court of Bosnia and Herzegovina, clearly states that state property does not only mean a set of real estate that serves the public authority to exercise its powers. State property is also public goods (sea water, seabed, river water, river beds, lakes, mountains and other natural resources, public and transport network, transport infrastructure), which serve all people in the state as a priority. State property reflects statehood, independence, sovereignty and territorial integrity that belong exclusively to the state of Bosnia and Herzegovina, and not to the entities. 3. ...Only the state of Bosnia and Herzegovina has the exclusive competence to regulate all issues related to state property by general or individual legal acts adopted by the competent authorities in accordance with a precisely defined procedure. These decisions must be respected by the entities, as well as all other lower levels of government. 4. ...The State Property Law should ensure efficient and transparent management and disposal of state property of Bosnia and Herzegovina, which will serve to achieve a higher standard

[19] The Constitution of Bosnia and Herzegovina, in its preamble, states: "Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine..."

[20] In the article of the Factor magazine dated May 13, 2023 titled: State property: OHR hides the names of the members of the Working Group... "the so-called expert on state property issues Muharem Cero explains that there are three types of property - property from continuity, which includes property that was present on December 31, 1991, property from succession, the inheritance of Yugoslavia, and the succession agreement, which states that the property becomes the property of the one on whose territory it is located on the day of the declaration of independence. State property includes property on the entire territory of the state of BiH, and this includes rivers, forests, forest land, agricultural land. It is precisely this part of the property that politicians from the RS do not allow to be registered with the state. M. Cero warns that by lowering state property to the entity level, the state of BiH would become what Milorad Dodik advocates, which is a state union and would encroach on the territorial integrity of Bosnia and Herzegovina".

of living for the population and to protect the interests of the state of Bosnia and Herzegovina, and to ensure responsible disposal, care and improvement of natural resources, cultural and historical heritage and other strategic interests of the state of Bosnia and Herzegovina. This is the principle of the so-called "legal continuity" which was advocated by the representatives of the Bosniak people in 2004, and later in the work of the Commission for State Property formed by the Council of Ministers (this solution was essentially transferred to the latest Law Proposal from November 2025), and according to this principle „Bosnia and Herzegovina, as a legal successor of the Republic of Bosnia and Herzegovina, is the holder of the right of ownership of all state property, provided that the entities and other levels of government may use or own the property they need to exercise their individual competencies, to the extent that they may be authorized by a law passed by the Parliamentary Assembly of Bosnia and Herzegovina“[21].

c) as a third compromise solution, the State Property Commission formed by the Council of Ministers produced a so-called "functional-territorial" distribution of state property. According to this "compromise" theory "the institutions of Bosnia and Herzegovina are the owners of all state property located within its internationally recognized borders, which they need to exercise their constitutional and legal powers, as well as all property of the former SR BiH and property from the Succession Agreement located abroad. According to the aforementioned theory, the governments of the entities, or the Brcko District, will be the owners of all other state property located within their territory". This principle was adopted by the ambassadors of the Peace Implementation Council (PIC) in a statement issued on 30 October 2008, in which they "agreed that the starting position for resolving this long-standing issue should be the compromise reached by the State Property Commission, according to which state-level institutions would receive the property they need to "functionally" exercise their constitutional responsibilities, and other levels of government would receive the remaining state property according to the "territorial" principle. For the reasons already mentioned, the compromise theory had no chance of survival (mostly due to the explicit position of the Bosniak representative, as stated in the previous point) and it has hardly been discussed since then.

Finally, we should not forget (which has been forgotten by both the Expert Working Group and the initiator of its establishment, the Office of the High Representative for BiH, and by the Constitutional Court of BiH, as well as the latest proposers of the Law on State Property in the Parliamentary Assembly of BiH) that legislative solutions regarding the titleholders of state property are completely different in administrative-territorial-political categories in Bosnia and Herzegovina. It is important to note that for example, the Law on Property

[21] Legal observations of the Legal Department of the Office of the High Representative regarding the applicant's request in case U – 1/11.

of the Brcko District of BiH in which the territorial principle is exclusively applied and all property, including property acquired by the Succession Agreement, located on the territory of the Brcko District, according to this legal solution belongs exclusively to the Brcko District (which, interestingly, does not bother the proponents of the theory of so-called legal continuity). Incidentally, all this was carried out with the direct participation of the Office of the High Representative for BiH, as the Deputy High Representative is at the same time the supervisor of the Brcko District of BiH. Likewise, the fact that cantons continue to regulate forestry thorough their own legislation despite the lack of a single Forest Law of the Federation of BiH (which was declared unconstitutional by the Constitutional Court of the Federation of BiH back in 2009) appears to attract little concern. And finally, would it not be logical that the issue of so-called state property be first resolved in the Federation of BiH (between the Federation of BiH and the cantons, i.e. cities and municipalities), where the issue of property is completely unregulated, and that talks on regulating the issue— i.e. the status of state property in Bosnia and Herzegovina— then begin.

VIII. Conclusion

In light of the above, the discussion about property can be reduced to two models. The first one is the pro-state model that is advocated at the level of BiH institutions[22]. The second one is the pro-entity model advocated by the Republic of Srpska. However, this discussion concerns one of the most difficult— and according to many the most difficult and controversial— political issues[23] in Bosnia and Herzegovina. It has been causing serious polemics and heated debates for years, as well as anxiety among all citizens in Bosnia and Herzegovina, often accompanied by frequent mutual threats of deeper political disagreement and even conflict. Despite all the efforts of a significant number of domestic and international, primarily politicians, and also a certain number of legal experts, the issue remains unresolved. Even on this point, we do not have a unified position, as Serb representatives maintain that this issue was resolved by the Dayton Peace Agreement of 1995.

[22] Some scholars from the Federation of Bosnia and Herzegovina argue that the use of state property of BiH is in accordance with territorial sovereignty and integrity are called into question primarily because of the asymmetric Constitutional structures where the state is hostage to politics. See: Amir Dehić, 'Continuity of the state property of BiH' (2014) 13 Annals of the Law Faculty of the University of Zenica 152.

[23] The issue of so-called state property is an exclusively internal issue of Bosnia and Herzegovina as a member of the United Nations, regulated by the Constitution of Bosnia and Herzegovina, Annex 2 of the Dayton Peace Agreement, Security Council Resolution No. 942 and the Geneva Agreement of September 8, 1995, so any attempt to impose any of the laws on so-called state property would represent a flagrant and gross violation of the Constitution of Bosnia and Herzegovina and the UN Charter (more: Warning to OHR: A panel on property was held at the Faculty of Law in Banja Luka, 10.12.2025.).

At the centre of these disputes is the issue of the so-called state property and its allocation among Bosnia and Herzegovina as an internationally recognized state, its entities — the Republic of Srpska and the Federation of Bosnia and Herzegovina— as well as ten cantons within the Federation of Bosnia and Herzegovina, the municipalities and cities, and the Brčko district.

The only currently possible and acceptable solution for all parties (state level, entities and cantons) seems to be the one that implies a compromise according to which the institutions at the state level of Bosnia and Herzegovina would be allocated only such property as is necessary for their constitutional and statutory functions , while all other property would be allocated to the other levels of government -primarily the entities, but also the cantons, municipalities and cities— on the basis of "territorial" principle. The reason for this attitude is the constitutional norm according to which Bosnia and Herzegovina has precisely specified powers, while the entities, by the constitution, are given all other state functions.

In any case, the maximalist demands of any of the opposing sides (or individual political representatives, primarily Bosniaks) do not lead to compromise, and therefore to a final solution to this extremely sensitive issue.