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BIOFUEL PRODUCTION THROUGH SUSTAINABLE INVESTMENTS FROM THE STANDPOINT OF THE EUROPEAN UNION

Estratto

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SUMMARY: 1. Introductory remarks on the connection among foreign investments, land management in non-EU Member States and EU law on biofuel production. — 2. The relevance of sustainable development and land management within the international agreements on trade and investment of the European Union after the entry into force of the Lisbon Treaty. — 3. The EU internal action towards the sustainability of biofuel production. — 4. Conclusion.

1. The relationship between foreign investments for biofuel production and land management in developing and least-developed States has arisen as a specific topic of the debate on the relevance of sustainable development in terms of the protection of the environment and the preservation of biodiversity, as well as the realization of food security, within the international investment regulatory and policy framework (1).

Since the 2008 financial crisis, foreign investments in the agriculture sector for products, such as vegetable, seed oils, palm oil, sugarcane and corn, needed for industrial production of food and of conventional biofuels (2) in industrialized countries, have increased. In

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(1) See, among others, COTULA, *Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries*[2], London, 2014; *Natural Resources Grabbing: an International Law Perspective* (Romanin Jacur, Bonfanti and Seatzu eds.), Leiden/Boston, 2015; SATURNINO, BORRAS jr. and FRANCO, *Food, Justice, and Land*, in *The Oxford Handbook of Food, Politics, and Society* (Herring ed.), Oxford, 2015, p. 253 ff.; *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Hindelang and Krajewski eds.), Oxford, 2016; RUOZZI, *Argentina and Trade in Biofuels: Development and Sustainability Issues and Their Impact on Foreign Investment*, in *International Investment Law in Latin America. Problems and Prospects* (Tanzi *et al.* eds.), Leiden/Boston, 2016, p. 763 ff.; MONTILLA FERNÁNDEZ, *Large-Scale Land Investment in Least-Developed Countries,* Heidelberg, 2017.

(2) According to Directive 2015/1513/EU of the European Parliament and of the Council, 9 September 2015, amending Directive 98/70/EC concerning the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the

certain developing countries in Africa, Asia and Latin America no land registration or land-ownership legislation had been in force and small-scale farmers lacked the capacity to acquire or rent the land that they had been cultivating. The impact on the management of local rural land of the realization of foreign investments in the agriculture sector, in particular of those for the production of conventional biofuels from crops, such as ethanol and biodiesel, has become an issue, as these investments require the use of large areas of rural land and can bring about land use conversion. "Indirect land use change" has emerged as a further specific issue. This occurs because of a human alteration and/or loss of natural biodiversity, when non-croplands, such as grasslands and/or forests, are brought into production. As a result, the production of biofuels can end up causing an increase in greenhouse gas emissions ([3]), although it has been promoted as a tool for greenhouse gas emissions savings.

Certain international organizations operating within the United Nations system and some transnational non-governmental organizations have highlighted the need to safeguard access to land by local small-scale farmers, in particular through a tenure or property regime in order to improve rural living standards, and avoid the direct and/or indirect conversion of the use of local land to the detriment of food and

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use of energy from renewable sources (*O.J.E.U.* 15 September 2015 *L* 239, p. 1 ff.), conventional biofuels are those "produced from cereal and other starch-rich crops, sugar and oil crops and from crops grown as main crops primarily for energy purposes on agricultural land" (see, in particular, points 4, 5, 17, 18 of its preamble). To define the various materials that can be used for biofuel production, whether conventional or not, Article 2 of this Directive amends the second paragraph of Article 2 of Directive 2009/28/EC of the European Parliament and of the Council, 23 April 2009, concerning the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (*O.J.E.U.* 5 June 2009 *L* 140, p. 16 ff.).

([3]) On the negative relationship between gas emissions and land use changes, see Article 3, in particular paras. 3 and 4, of the 1997 Kyoto Protocol to the 1992 United Nations Convention on Climate Change. See, among others, *Land Use, Land Use Change, and Forestry* (Watson *et al.* eds.), Cambridge, 2000. In 2003 the Intergovernmental Panel on Climate Change (IPPC) published a *Good Practice Guidance for Land Use, Land Use Change, and Forestry*. See also KAMPMAN, VAN GRINSVEN and CROEZEN, *Sustainable Alternatives for Land-Based Biofuels in the European Union*, Delft, December 2012 (available on the website of Greenpeace, www.greenpeace.org). According to certain non-governmental organizations (NGOs), such as Greenpeace International, the lack of local legislations on land registration or land ownership has however not been the main cause of "land-grabbing" as similar legislation might be an instrument of neo-colonialism through the exportation of the concept of property from the "North-side of the world" into the developing one. For a different view, see MANFREDI, *Land Investments and "Land Grabbing": the Need for a Legal Framework*, *Diritto del commercio int.*, 2013, p. 803 ff., in particular pp. 824-828.

feed needs (4), as well as of the environment (5). International organizations and specialized agencies of the United Nations, such as the Food and Agriculture Organization (FAO) and the World Bank, and the Organization for Economic Cooperation and Development (OECD) have published the results of specific studies on the impact of foreign investments in agriculture on land management and adopted non-binding guidelines, principles and policy frameworks. These acts aim at influencing the conduct of investors and the attitude of host States and rendering foreign investments in the agriculture sector that are directed to the production of biofuels in line with the principles at the root of sustainable development, to the satisfaction of the basic needs of local populations. More specifically, the guidelines, principles and policy frameworks adopted by international organizations and specialized agencies of the United Nations aim at mitigating the possible economic competition between food production and biofuel production, by promoting the voluntary adoption by investors and host States of a coherent integrated approach based on economic, environmental and social considerations (6). Important examples of this approach are the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests* adopted by the FAO Committee on World Food Security (CFS) in 2012 (7) and the *Performance*

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(4) See the Report, submitted to the United Nations Human Rights Council, of the Special Rapporteur on the right to food, DE SCHUTTER, *The transformative potential of the right to food*, UN Doc. A/HRC/25/57, 24 January 2014, especially para. 23.

(5) For a general overview, see COTULA, *Land Rights and Investment Treaties: Exploring the Interface*, London, 2015, especially p. 15 ff.; WILLIAMS, KERR, *Investment and Trade in Biofuels: Will There Be a Market in the US for Developing Country Ethanol?*, *The Journal of World Investment and Trade*, 2013, p. 995 ff.; JANSSON, ROMPPANEN, *Biofuels*, in *Research Handbook on International Law and Natural Resources* (Morgera and Kulovesi eds.), Cheltenham/Northampton, 2016, p. 281 ff.

(6) See, among others, UNCTAD, *Making Certification Work for Sustainable Development: the Case of Biofuels*, New York/Geneva, 2008; UNCTAD, *Opportunities and Challenges of Biofuels for the Agriculture Sector and the Food Security of Developing Countries*, New York/Geneva, 2008; UNEP, *Towards Sustainable Production and Use of Resources: Assessing Biofuels*, Paris, 2009; FAO, *Biofuels and the Sustainability Challenge: A Global Assessment of Sustainability Issues, Trends and Policies for Biofuels and Related Feedstocks*, Rome, 2013; UNEP, *Assessing Global Land Use: Balancing Consumption with Sustainable Supply*, Paris, 2014; World Bank, *The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments*, *World Bank Report No. 86175 — GLB*, 2014; United Nations Economic Commission for Africa, the African Development Bank, African Union, *Guiding Principles on Large Scale Land Based Investments in Africa*, Addis Ababa, 2014.

(7) The 2012 FAO *Guidelines on the Governance of Tenure* "are intended to contribute to the global and national efforts towards the eradication of hunger and poverty, based on the principles of sustainable development and with the recognition of the centrality of land to development by promoting secure tenure rights and

Standards on Environmental and Social Sustainability adopted by the International Finance Corporation in 2012 (8).

The EU regulatory framework on renewable energy and biofuels from crops that was in force at the time of the 2008 financial crisis, that is Directives 2001/77/EC and 2003/30/EC (9), has been criticized as a contributing factor to foreign investments based on the use of large areas of rural land in certain developing countries, without a specific approach to sustainable land management.

The sustainable and equitable use of natural resources, including rural land, is one of the principles at the root of sustainable development (10). This principle promotes a rational and prudential use of these resources (11). A sustainable approach to land management is an appropriate tool to satisfy the sustainable and equitable use of natural resources, when the natural resources at stake are agricultural or pastural land. The effective implementation of such a principle relies on the actions of multi-actors both at the international and national levels for the safeguard of the interests of present and future generations. This is in line with the fact that the definition of sustainable development, which is commonly accepted at the international and EU

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equitable access to land, fisheries and forests". For further information, see the website of the FAO, particularly fao.org/nr/tenure/voluntary-guidelines/en/.

(8) The *Performance Standard No. 5* concerns *Land Acquisition and Involuntary Resettlement* (for further information see the website of the IFC: www.ifc.org).

(9) Specifically, Directive 2003/30/EC of the European Parliament and of the Council, 8 May 2003, concerning the promotion of the use of biofuels or other renewable fuels for transport (*O.J.E.U.* 17 May 2003 *L* 123, p. 42 ff.) and Directive 2009/28/EEC on the promotion of energy from renewable resources (above, footnote 2).

(10) Important UN international conferences on sustainable development, such as those held in Rio de Janeiro in 1992 and 2012, have contributed to the identification of a number of principles for achieving such a development. The chief principles are: the sustainable and equitable use of natural resources, equity — both inter-generational and intra-generational —, common but differentiated responsibilities, cooperation through a multilateral approach, prevention, precaution, public participation and access to information and justice, good governance, integration and the rule of law. According to the *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* that was adopted by the International Law Association at its 70th Conference held in New Delhi, India, 2-6 April 2002, a number of these principles are important for "the objective of sustainable development in an effective way".

(11) As to the relevance of the sustainable use of natural resources, in particular of land, as a tool for poverty reduction, see BEYERLIN, *Sustainable Use of Natural Resources. A Key to Combating Poverty*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2003, p. 417. For a general overview, see WÄLDE, *Natural Resources and Sustainable Development: from "Good Intentions" to "Good Consequences"*, in *International Law and Sustainable Development* (Schrijver and Weiss eds.), Leiden/Boston, 2004, p. 119 ff.

law level (12), presupposes good governance, based on the participation of public and private actors, transparency, accountability and the rule of law within the exercise of decision-making powers and the realization of implementing actions (13).

The present article will focus on how the European Union has engaged in sustainable land management within both its external and internal binding regulatory actions.

As a relevant percentage of crops for conventional biofuels is produced outside the EU through the realization of foreign investments, its approach to international investment law has to be scrutinized. Because of legal diversification, sustainable development, as a macroeconomic objective, and its instrumental objectives were not taken into consideration in the international investment treaties concluded during the period from the sixties to the nineties. It will be illustrated that, as other important players of the international investment arena, the European Union has dealt with competing interests within its international agreements on trade and investment by introducing specific clauses and/or provisions on the correlation between the safeguard of economic and non-economic interests. This line of action has fostered the idea expressed by certain scholars (14) that, after the entry into force of the Treaty of Lisbon in 2009, the European

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(12) Sustainable development is a non-investment concern that refers to three aspects: economic growth, social development and environmental protection. According to the definition commonly accepted at the international and EU law level, sustainable development is "development which meets the needs of the present without compromising the ability of future generations to meet their own needs". This definition is included in the 1986 *Bruntland Report* (Report of the World Commission on Environment and Development, *Our Common Future*, Oxford, 1987).

(13) See, among others, PUPPIM DE OLIVEIRA, *Green Economy and Good Governance for Sustainable Development: Opportunities, Promises and Concerns*, Tokyo/New York/Paris, 2012; GISSELQUIST, *Good Governance as a Concept, and Why This Matters for Development Policy*, Working Paper No. 2012/30, March 2012; UNDP, *Issues for a Global Development Agenda*, Human Development Report Office, Occasional Paper Series, 2013 (hdr.undp.org/sites/default/files/issues%5Ffor%5Fa%5Fglobal%5Fhuman%5Fdevelopment%5Fagenda-hdro-feb%5F2013.pdf); WEISS, SORNARAJAH, *Good Governance*, in *Max Planck Encyclopedia of Public International Law*, June 2013.

(14) Cf., among others, BROWN, ALCOVER LLUBIÀ, *The External Investment Policy of the European Union in the Light of the Entry into Force of the Treaty of Lisbon*, *Yearbook on Int. Investment Law and Policy*, 2010-2011, especially p. 161; DIMOPOULOS, *Shifting the Emphasis from Investment Protection to Liberalization and Development: The EU as a New Global Factor in the Field of Foreign Investment*, *Journal of World Investment and Trade*, 2010, p. 5 ff.; PERFETTI, *Ensuring the Consistency of the EU Investment Policy within the EU External Action: the Relevance of Non-trade Values*, in *General Interests of Host States in International Investment Law* (Sacerdoti *et al.* eds.), Cambridge, 2014, p. 308 ff.; HOFFMEISTER, *The Contribution of EU Trade Agreements to the Development of International Investment Law*, in *Shifting Paradigms in International*

Union would have facilitated a quality-oriented revision of the international regulatory and policy framework on investment for the safeguard of the basic interests at the root of sustainable development. This idea has been based on Articles 21 of the Treaty on the European Union and 205 of the Treaty on the Functioning of the European Union, as well as on a few relevant documents adopted by the EU Commission, Council and Parliament (15). In effect, the inclusion of safeguards in the EU international treaties on trade and investment for the effective realization of sustainable development shows that the EU's regulatory approach to international investment law has been influenced by some of the principles and values set out in Articles 21 of the Treaty on the European Union and 205 of the Treaty on the Functioning of the European Union (TFEU). However, as will be seen, the EU investment policy has yet to bring about a revision of the typical structure of international treaties on investment on the basis of a different balance of the interests at stake.

The debate on the design of the EU common investment policy, on the legitimacy of international investment law, in particular of investment treaty-based "direct arbitration" (16) and on the on-going negotiations with the United States for the Trans-Atlantic Trade and

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Investment Law: More Balanced, Less Isolated, Increasingly Diversified (Hindelang and Krajewski eds.), Oxford, 2016, p. 357 ff.

(15) After the entry into force of the Lisbon Treaty in 2009 the EU institutions adopted a number of non-binding acts on the design of the EU common investment policy. These acts, as the relevant Articles of the *post*-Lisbon EU Treaty, provide for consistency between the EU external action and the principles and values at the basis of the EU integration process. These principles and values include sustainable development and the protection of the environment. See, in particular, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 343 final, 7 July 2010, *Towards a Comprehensive European International Investment Policy*. See also the Council's *Conclusions on a comprehensive European International Investment Policy*, 25 October 2010, and the Report of the Committee on International Trade of the European Parliament, *Future European International Investment Policy*, 22 March 2011.

(16) Investment treaty-based arbitration is established for the settlement of disputes between one of the Contracting States, that is the host State, and an investor national of the other Contracting State, in accordance with arbitration clauses provided in international investment treaties. These treaties, in particular BITs, include an arbitration clause providing for arbitration administered by the International Centre for the Settlement of Investment Disputes (ICSID) often in combination with clauses providing for other international institutionalized arbitrations, such as those administered by the UN Commission on International Trade Law (UNCITRAL) and/or by the International Chamber of Commerce (ICC). This kind of dispute settlement is named "direct arbitration" because it can be activated by an investor who is a national of one of the Contracting States, without the intercession of such a State, against the other Contracting State.

Investment Partnership Agreement (TTIP) would lead to a reconceptualization, or at least a revision, of the investment regulatory and policy framework, as today the environmental and social dimensions of foreign investments are scrutinized within both their home and host States (17). The Directive 2015/1513/EU concerning the quality of petrol and diesel fuels recognizes, for instance, that "the estimated indirect land-use change emissions are mostly expected to take place outside the Union, in areas where the additional production is likely to be realized at the lowest cost [...]" (18).

In addition, it will be shown how the European Union has improved the real impact on gas emission savings of its internal applicable regulatory framework concerning biofuel production, as a special category of renewable energy. This framework was revised through the adoption of Directive 2009/28/EC of 23 April 2009 on the promotion of energy from renewable resources (19) (the so-called "Renewable Energy Directive"), which refers to the need of the sustainability of biofuels and bioliquids (20) to reduce greenhouse gas emissions (21) and to safeguard food security (22). As conjectured in Directive 2009/28/EC (23), a specific Directive on "indirect land use change" was adopted in 2015, that is Directive 2015/1513/EU (the so-called "Fuel Quality Directive") (24). By adopting this Directive, the European Union has shown that a hierarchy of biofuels in accordance with their different impact on land use and gas emissions savings can be established.

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(17) See, among others, LESTER, *Reforming the International Investment Law System*, *Maryland Journal of Int. Law*, 2015, p. 70 ff.; VIÑUALES, *International Investment Law and Natural Resource Governance*, 2015 (available on the website e15initiative.org/); NOTTAGE, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches*, *The Journal of World Investment and Trade*, 2016, p. 1015 ff.

(18) See Directive 2015/1513/EU, point 12 (above, footnote 2).

(19) Above, footnote 2.

(20) According to the website of the European Union, biofuels can be distinguished from bioliquids because they are used "in transport", whereas bioliquids are used "for electricity and heating".

(21) See, in particular, the preamble, points 69-71, 85, 92. See also Article 17.

(22) See, in particular, the preamble, points 9, 69 and 78. See also Article 17, specifically para. 7.

(23) According to Article 19, para. 6, of Directive 2009/28/EC (above, footnote 2), "[t]he Commission shall, by 31 December 2010, submit a report to the European Parliament and to the Council reviewing the impact of indirect land-use change on greenhouse gas emissions and addressing ways to minimise that impact. The report shall, if appropriate, be accompanied, by a proposal, based on the best available scientific evidence, containing a concrete methodology for emissions from carbon stock changes caused by indirect land-use changes, ensuring compliance with this Directive, in particular Article 17, para. 2".

(24) Above, footnote 2.

In the conclusion a few proposals will be made on how the action of the European Union as a protagonist of international economic relations might be directed to preventing conflicts of interest related to the sustainability of transnational investments in biofuel production. There will also be a few comments on the concerns and priorities at the root of the EU internal action.

2. The European Union has attempted to facilitate the equitable use of natural resources both inside and outside its borders, by improving its contribution to the effectiveness of sustainable development through foreign investments.

In 2007 the European Union became an important regulatory protagonist of the international investment arena because of its new competence on foreign direct investment (FDI), within the framework of the common commercial policy, provided in the Treaty of Lisbon at Article 207 TFEU.

Since the entry into force of the Treaty of Lisbon in 2009, the European Union has signed a relevant number of international agreements on economic relations including an investment chapter that is designed as the typical regulatory model of international investment treaties ([25]).

([25]) A few of the EU international agreements on economic relations aim at liberalizing foreign investments. The Comprehensive Economic and Trade Agreement (CETA) with Canada and the TTIP under negotiation between the European Union and the United States are examples of the new trend towards the conclusion of "mega-regional" trade agreements. Cf. PÁEZ, *Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment*, *The Journal of World Investment and Trade*, 2017, p. 379 ff.; *Mega-Regional Trade Agreements* (Rensmann ed.), Heidelberg, 2017; RIFFEL, *Mega-Regionals*, *Max Planck Encyclopedia of Public International Law*, December 2016. The European Union has also shown its intention to negotiate free trade area agreements including an investment chapter with the members of the Association of Southeast Asian Nations (ASEAN) in order to replace bilateral investment treaties of EU Member States with one "mega-regional" treaty. The European Union is also working on the conclusion of investment and trade agreements or partnership and cooperation agreements with other States. Treaties with Indonesia, Malaysia, Mexico and Tunisia, as well as with the four founding Members of Mercosur — Argentina, Brazil, Paraguay and Uruguay — for the purpose of negotiating a "bi-regional" association agreement, are under negotiation. Negotiations with a number of States, like India, Thailand, Myanmar and Philippines, have so far been suspended. As to investment, a few agreements provide that a specific treaty in this field will be negotiated shortly after. See Article 7.16 of the 2010 Free Trade Agreement between the European Union, its Member States and South Korea on the "[r]eview of the investment legal framework", according to which "1. [w]ith a view to progressively liberalising investments, the Parties shall review the investment legal framework, the investment environment and the flow of investment between them consistently with their commitments in international agreements no later than three

These EU agreements do not refer to a single regulatory approach or a model, whereas, for a long time, that is from the sixties to the end of the last century, international investment treaties had been concluded in accordance with a typical regulatory model. These treaties have been mainly bilateral, commonly named BITs (from "bilateral investment treaties"), and pro-investor oriented. These treaties establish a regulatory framework that is designed for the safeguard of the interests of nationals of one Contracting Party when they invest in the other Contracting Party. This transpires from the open-ended definition of the field of application of such treaties, from treaty provisions related to non-discriminatory, as well as fair and equitable, treatment, from the reference to the main requirements of the *Hull formula* for the determination of compensation for expropriation and any other possible taking, from the inclusion of a reference to "direct arbitration" for the settlement of disputes between one Contracting Party and a national of the other Contracting Party.

The pro-investor approach is one of the reasons why international investment treaties have become a matter of discussion (26). After decolonization, the design of a pro-investor regulatory framework through the conclusion of bilateral investment treaties appeared to States the best solution to balance at an international law level the conflicting interests of home and host States with regard to foreign investments. This approach is inevitable because of the diversification typical of international law, that is the regulation of different issues

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years after the entry into force of this Agreement and at regular intervals thereafter". Certain agreements provide that a specific treaty on investment will be negotiated when this might be appropriate (see Article 116.2 of the 2013 Free Trade Area Agreement with Colombia and Peru; Article 80.2 of the 2014 Association Agreement with Georgia). The association agreements and the international agreements on trade and investment signed by the European Union or under negotiation are available on-line on the website of the European Union (europa.eu.int).

(26) As to the (possible) conflicting relationship between the protection of the environment and international investment treaties, see, in particular, GANTZ, *Potential Conflicts between Investor Rights and Environmental Regulation under NAFTA's Chapter 11*, *George Washington Int. Law Review*, 2001, p. 651 ff.; WÄLDE, KOLO, *Environmental Regulation, Investment Protection and Regulatory Taking in International Law*, *Int. and Comparative Law Quarterly*, 2001, p. 811 ff.; MOLOO, JACINTO, *Environmental and Health Regulation: Assessing Liability under Investment Treaties*, *Berkeley Journal of Int. Law*, 2011, p. 1 ff.; POTESTÀ, *Mapping Environmental Concerns in International Investment Agreements: How Far Have We Gone?*, in *Foreign Investment, International Law and Common Concerns* (Treves, Seatzu and Trevisanut eds.), London/New York, 2014, p. 193 ff.; BARTELS, *Human Rights, Labour Standards, and Environmental Standards in CETA*, in *CETA, TTIP, and TISA: New Orientations for EU External Economic Relations* (Griller, Obwexer and Vranes eds.), Oxford, 2017, p. 202 ff.

through separate legal instruments and the establishment of special mechanisms for dispute settlement. In line with this diversification, the applicable international agreements have not included relevant provisions to connect the protection and/or liberalization of investment and the promotion of sustainable development. More specifically, international agreements on trade and/or investment have not provided for a direct connection among land use, water management, greenhouse gas emission savings, food security and foreign investments.

Since then, the trend has been towards a change (27).

Certain States have revised their approach to the design of investment treaty in the search for a different balance between economic development arising from the safeguard of private interests, on the one hand, and environmental and human sustainability associated to the safeguard of certain public non-investment concerns, on the other.

This new approach has been, to some extent, a reaction to the outcomes of specific treaty-based investment arbitration cases where the competent arbitral tribunals decided for the legitimacy of a change in the host State's legislation (28). In brief, in these cases the claimants have argued that a change in the host State's legislation — aimed at safeguarding non-investment concerns, such as the environment, public health and religious sites for local indigenous communities, — had been a frustration of their expectations and thus constituted a breach of the clauses on the fair and equitable treatment standard included in

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(27) See, among others, Acconci, *The Integration of Non-investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?*, in *General Interests of Host States*, cit., especially pp. 169-181; Nowrot, *How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law*, *Journal of World Investment and Trade*, 2014, p. 612 ff.; Dimopoulos, *Integrating Environmental Law Principles and Objectives in EU Investment Policy: Challenges and Opportunities*, in *Bridging the Gap between International Investment Law and the Environment* (Levashova, Lambooy and Dekker eds.), The Hague, 2016, p. 247 ff.; Mercurio, *Safeguarding Public Welfare? Intellectual Property Rights, Health and the Evolution of Treaty Drafting in International Investment Agreements*, in *Mega-Regional Trade Agreements*, cit., p. 241 ff.

(28) See, in particular, *Methanex v. The United States*, NAFTA/UNCITRAL Arbitration, Final Award on jurisdiction and merits of 3 August 2005; *Chemtura v. Canada*, NAFTA/UNCITRAL Arbitration, Award of 2 August 2010; *Glamis v. The United States*, NAFTA/UNCITRAL Arbitration, Award of 8 June 2009; and *Philip Morris Asia v. Australia*, UNCITRAL, Award on Jurisdiction and Admissibility of 17 December 2015, PCA Case No. 2012 - 12 (dismissed); and *Philip Morris v. Uruguay*, Award of 8 July 2016, ICSID Case No. ARB/10/7 (dismissed). The investment arbitral awards are available on-line on the website of *International Treaty Arbitration* (ita.law.uvic.ca/). Most of the awards of arbitral tribunals established by the International Centre for the Settlement of Investment Disputes are also available on its website (icsid.worldbank.org/ICSID/Index.jspe).

the applicable treaties (29). Varios treaty-based arbitral tribunals have rejected these claims. More specifically, as far as the protection of health and the environment is concerned, in the *Methanex v. The United States* case the competent arbitral tribunal established that the change in the legislation of the United States, on the components of gasoline did not amount to a breach of international obligations under the Investment Chapter of the 1993 NAFTA Treaty (30), whereas in the *Chemtura v. Canada* case the competent arbitral tribunal concluded for the legitimacy of the change in the Canadian legislation on the prohibition of the sale of lindane because it had been "a valid exercise of the Respondent's police powers" (31). In the *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay* case the arbitral tribunal decided that the domestic anti-tobacco legislation, that the host State had enacted for the implementation of the 2003 Framework Convention on Tobacco Control when the claimants had already

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(29) The cases mentioned in the present article are examples of the attempts made by a number of claimants to refer to legitimate expectations as a legal assumption to request compensation, in accordance with the applicable international treaties, for the lack of profit returns or of the host State's regulatory support. This assumption has been accepted and enforced by the tribunals of a few relevant cases, that is the *Metalclad v. Mexico* (Award of 30 August 2000, ICSID Case No. ARB(AF)/97/1, para. 99), *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (Award of 29 May 2003, ICSID Case No. ARB(AF)/00/2, para. 157 ff.) and *CMS Gas Transmission Co. v. Argentina* (Award of 12 May 2005, ICSID Case No. ARB/01/8, para. 277) cases. In other cases the tribunals concluded that an investor's alleged legitimate expectations had been crucial to ascertain whether or not a breach of the standard of fair and equitable treatment occurred (*Saluka Investments B.V. v. Czech Rep.*, Partial Award of 17 March 2006, UNCITRAL, para. 302), as long they had been reasonable (*Duke Energy Electroquil Partners, Electroquil S.A. v. Ecuador*, Award of 18 August 2008, ICSID Case No. ARB/04/19, para. 347). According to the tribunal of the *Saluka* case, an investor's conduct is also to be considered to avoid an interpretation too pro-investor of the standard (para. 305 ff.). Over the last decade, many scholars have focused on the implementation of the standard of fair and equitable treatment, specifically on the relevance of a foreign investor's legitimate expectations in this connection. See, among others, KLÄGER, *Fair and Equitable Treatment in International Investment Law*, Cambridge, 2011; PAPARINSKIS, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford, 2013; VALENTI, *The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment Standard*, in *General Interests of Host States*, cit., p. 26 ff.; BERNASCONI-OSTERWALDER, *Giving Arbitrators* carte blanche — *Fair and Equitable Treatment in Investment Treaties*, in *Alternative Visions of the International Law on Foreign Investment. Essays in Honour of Muthucumaraswamy Sornarajah* (Lim ed.), Cambridge, 2016, p. 324 ff.; LEVASHOVA, *Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases*, in *Bridging the Gap between International Investment Law and the Environment* (Levashova, Lambooy and Dekker eds.), The Hague, 2016, p. 53 ff.

(30) See, in particular, the Award (above, footnote 28) part IV, Chapter D, para. 7.

(31) *Ibid.*, para. 266.

made their investment, was not "arbitrary and unnecessary" but rather potentially "effective means to protecting public health", in accordance with statements by the World Health Organization and by the Pan American Health Organization (PAHO), and was "a valid exercise by Uruguay of its police powers for the protection of public health" (32). The concurring and dissident opinion by Arbitrator Born "makes clear that Uruguay possesses broad and unquestioned sovereign powers to protect the health of its population, both in the context of tobacco regulation and otherwise" and that "[n]othing in the BIT prevents Uruguay from exercising these powers" (33).

The references by these arbitral tribunals to the host State's "police powers" for the protection of public interests have been an important "turning point" in the pro-investor approach of investment arbitral tribunals. However, such references have not been consistent so far. A relevant general trend has not been detected (34).

A number of international investment treaties have acknowledged the importance of sustainable development by referring to the environment, health and labour conditions in their preambles. A few international investment treaties have included clauses on non-precluded measures (35). The conservation of natural resources is sometimes mentioned among the interests that can justify the adoption of such measures by one of the Contracting Parties (36). These clauses are exceptions to the treaty provisions on the treatment of the investors

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(32) *Ibid.*, paras. 306-307.

(33) See the concurring and dissident opinion by Arbitrator Born, 28 June 2016, especially paras. 90 and 197.

(34) See, in particular, BOUTE, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, *Journal of Energy and Natural Resources Law*, 2009, p. 333 ff., especially p. 352 ff.; RANJAN, ANAND, *Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal*, in *Judging the State in International Trade and Investment Law: Sovereignty* (Choukroune ed.), Heidelberg, 2016, p. 127 ff.

(35) See, among others, the 2004 Model BIT of Canada, Article 10, letter (*c*); the Investment Chapter of the 2004 Free Trade Area among Dominican Republic, Central America and the United States (CAFTA — DR), Article 10.9, para. 3, letter (*c*), and Article 10.11 that reads as follows: "[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns". International investment agreements are available on-line on the website of the UNCTAD (unctadxi.org/templates/DocSearch____779.aspx).

(36) See, for instance, the 2007 BIT between Canada and Peru, Article 10; the Free Trade Agreement between China and New Zealand, Article 200; the Investment Chapter of the 2015 Tran-Pacific Partnership Agreement (TPP), Article 12.7, para. 3, (*c*) (iii).

of the Contracting Parties and/or to specific treaty obligations, such as those on the prohibition of performance requirements. This has contributed to the idea that a narrow interpretative method would be the most appropriate for these clauses in line with the interpretative method of exceptions adopted within the frameworks of the European Union and World Trade Organization (37).

Certain States have moved forward by including specific clauses into their investment treaties for the protection of the environment and labour (38) and/or for the safeguard of their right to take regulatory actions "for public legitimate objectives" (so-called "right to regulate") (39). A few treaties refer to corporate social responsibility (40) and/or to land management as a *caveat* to treaty obligations on the protection of a foreign investor's interests in case, for instance, of expropriation with the particular purpose of mitigating the calculation of compensation (41).

Like the new approach of certain States, the EU *post*-Lisbon approach to international investment law is not contributing to mitigate regulatory diversification at an international law level (42). The basic

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(37) For a general overview, NEWCOMBE, *General Exceptions in International Investment Law*, in *Sustainable Development in World Investment Law* (Cordonier Segger, Gehring and Newcombe eds.), Alphen aan den Rijn, 2011, p. 355 ff., especially pp. 361-369; KEENE, *The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements*, *Journal of World Investment and Trade*, 2017, p. 62 ff. As to criticism to the resort to a narrow interpretative method for exceptions within international trade and investment law, see GAZZINI, *Bilateral Investment Treaties and Sustainable Development*, *Journal of World Investment and Trade*, 2014, especially p. 953.

(38) See, for example, the 2012 US Model BIT, Articles 12 and 13.

(39) The Annex on *Expropriation* of the 2004 Model BIT of Canada is the first relevant example of the reference to the "right to regulate" in international investment treaties.

(40) The 2015 TPP Agreement, Article 9.16, and the 2015 revised Indian Model BIT, Chapter III, Articles 11-12, are recent examples of the trend towards the reference to corporate social responsibilities within international investment treaties.

(41) See, for example, the 2009 Investment Agreement between the ASEAN and China, Article 8, para. 4, which runs as follows: "any measure of expropriation relating to land shall be as defined in the expropriating Party's existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations"; the 2009 Association Agreement among ASEAN, Australia and New Zealand, Article 9, para. 6 and footnote 8; the 2015 TPP Agreement, Article 9-C, and the 2015 revised Indian Model BIT, Article 5.1, footnote 3.

(42) See, among others, DE MESTRAL, *Is a Model EU BIT Possible — or even Desirable?*, *Columbia FDI Perspective*, No. 21, March 24, 2010 (available on ccsi.columbia.edu/publications/columbia-fdi-perspectives/ visited on 25 August 2017); REINISCH, *Putting the Pieces Together ... an EU Model BIT?*, *Journal of World Investment and Trade*, 2014, p. 679 ff.; TITI, *International Investment Law and the European Union:*

provisions of the investment chapters of the Comprehensive Economic and Trade Agreement (CETA) signed with Canada in 2016, which has entered into force provisionally on 21 September 2017, and the TTIP are similar to those typical of recent bilateral investment treaties because, on the one hand, they maintain the pro-investor orientation, particularly by providing for an open-ended definition of investment (43), referring to non-discriminatory treatment standards (44), as well as to the full protection and security and fair and equitable treatment standards (45), and, on the other, include a few provisions on the safeguard of certain non-investment concerns at the root of sustainable development in the form of a clause on non-precluded measures (46) and a clause on the safeguard of the "right to regulate" of the Contracting Parties (47).

This situation also transpires from a few EU association agreements and from the other *post*-Lisbon international agreements on trade and investment that have been signed or are under negotiation with a number of non-EU Member States (48). As to association agreements, the 2014 Agreement between the European Union, its Member States and Georgia includes provisions on "the sustainable management of forests and trade in forest products" (49), on the involvement of "local level authorities in regional policy cooperation" that refers to "cooperation in the fields of regional development and

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Towards a New Generation of International Investment Agreements, *European Journal of Int. Law*, 2015, p. 639 ff.; DICKSON-SMITH, *Does the European Union Have New Clothes? Understanding the EU's New Investment Treaty Model*, *Journal of World Investment and Trade*, 2016, p. 773 ff.

(43) See Article 8.1 of the Investment Chapter of the 2016 text of the CETA.

(44) See Section C, especially Articles 8.6-8.7, of the Investment Chapter of the 2016 text of the CETA.

(45) See Article 8.12 of the Investment Chapter of the 2016 text of the CETA.

(46) See Article 8.4, para. 2, especially (*d*), of the Investment Chapter of the 2016 text of the CETA.

(47) See Article 8.9 of the Investment Chapter of the 2016 text of the CETA.

(48) The European Union and its Member States signed the Association Agreements with Georgia, Moldova and Ukraine in 2014, Trade Agreements with Colombia and Peru in 2013, Free Trade Area Agreements with South Korea in 2011, Central America in 2012 and Singapore in 2013, Partnership and Cooperation Agreements with Vietnam and Iraq in 2012, *Interim* Agreements Establishing a Framework for an Economic Partnership Agreement (EPA) with Cameroon in 2009 and with ESA (Eastern and Southern Africa) in 2012, the Interim Agreement with SADC in 2009, the Framework Agreement on Comprehensive Partnership and Cooperation with Vietnam in 2016 and the main elements of the Economic Partnership Agreement (EPA) with Japan in 2017.

(49) See Article 233. See also the 2014 Association Agreement between the European Union, its Member States and Moldova, Article 369.

land use planning" (50), on "industrial and enterprise policy and mining" (51) and a list of horizontal reservations on "public utilities" that each Contracting State, in particular the EU Member States, have made, *inter alia*, in order to limit "the acquisition of land and real estate ... by foreign natural and juridical persons" (52). It is interesting that these specific reservations on land acquisition are in the section of the horizontal reservations on "real estate" rather than in the section of the horizontal reservations on "investment". The 2014 Association Agreement between the European Union, its Member States and Moldova refers to the "sustainable utilisation of natural resources" (53). The *post*-Lisbon international treaties signed within the common commercial policy focus on the promotion of free trade, as well as on the protection and/or liberalization of foreign investments. As to the relevance of sustainable development, pertinent provisions are in the article on "environment and natural resources", rather than in the article on "investment" (54). A number of such treaties include a general non-relaxation clause (55) and/or a specific non-precluded

(50) See Article 373, para. 2, according to which "[t]he Parties will cooperate to consolidate the institutional and operational capacities of Georgian institutions in the fields of regional development and land use planning by, *inter alia*: (*a*) improving inter-institutional coordination in particular the mechanism of vertical and horizontal interaction of central and local public authorities in the process of development and implementation of regional policies; (*b*) developing the capacity of local public authorities to promote reciprocal cross-border cooperation in compliance with EU principles and practices; (*c*) sharing knowledge, information and best practices on regional development policies to promote economic well-being for local communities and uniform development of regions". The 2014 Association Agreement between the European Union, its Member States and Moldova provides for a similar provision at Article 108.

(51) See Articles 313-315.

(52) See *O.J.E.U.* 30 August 2014 *L* 261, pp. 205-206. Similar reservations are included in the 2014 Association Agreement between the European Union, its Member States and Moldova (see *O.J.E.U.* 30 August 2014 *L* 260, pp. 338-339).

(53) See Article 87.

(54) The 2011 Partnership and Cooperation Agreement with Iraq, for instance, establishes a connection among agriculture, rural and social development. See Article 90 on "cooperation on agriculture, forestry and rural development" which clarifies that "[t]he objective is to promote cooperation in the agriculture, forestry and rural development sectors with a view to promoting diversification, environmentally sound practices, sustainable economic and social development and food security. To this end the Parties will examine: [...] (*d*) measures relating to sustainable economic and social development of rural territories, including environmentally sound practices, forestry, research, transfer of know-how, access to land, water management and irrigation, sustainable rural development and food security".

(55) See the 2010 Free Trade Agreement among the European Union, its Member States and South Korea, Article 1.1 which reads as follows: "to promote foreign direct investment without lowering or reducing environmental, labour or

measures clause (56) and/or a specific provision on the "right to regulate" (57) in favour of the safeguard of certain non-investment concerns. Certain agreements include relevant provisions on land management (58), particularly as a *caveat* to treaty obligations on the protection of a foreign investor's interests in case of expropriation with the particular purpose of mitigating the calculation of compensation (59).

A few treaties appear to be based on a less diversified approach because they include a Chapter on "Trade and Sustainable Development". The 2013 Trade Agreement among the European Union, its Member States, Colombia and Peru and the main elements of the EPA signed with Japan on 6 July 2017 are examples of this trend. More specifically, the Chapter on "Trade and Sustainable Development" of the first treaty provides that "[t]he Parties agree to promote best business practices related to corporate social responsibility" (60), whereas the Chapter on "Trade and Sustainable Development" of the second treaty provides that "[t]he Parties shall strive to facilitate trade and investment in goods and services of particular relevance for climate change mitigation, such as sustainable renewable energy [...], in a manner consistent with other provisions of this agreement" (61).

3. In line with the goals of rational use of natural resources, greenhouse gas emission savings, the preservation of biodiversity and energy security, the European Union has analysed the impact of the production of renewable energy, in particular of biofuels, through foreign investments on the management of natural resources within a

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occupational health and safety standards in the application and enforcement of environmental and labour laws of the Parties". See also the 2013 Free Trade Area Agreement among the European Union, its Member States, Colombia and Peru, Article 277.

(56) See the 2013 Free Trade Area Agreement between the European Union, its Member States and Singapore, Article 9.3 on *National Treatment*, para. 3.

(57) See, for instance, the 2016 Framework Agreement on Comprehensive Partnership and Cooperation among the European Union, its Member States and Vietnam, Article 13-*bis*.

(58) The 2012 Partnership and Cooperation Agreement with Vietnam refers to the principle of "sustainable land management" in connection to the protection of soil and the preservation of "soil functions", as well as to the enhancement of "land management capacity". See Article 30, respectively (*i*) and (*j*).

(59) See, for example, the Investment Chapter of the 2016 Framework Agreement on Comprehensive Partnership and Cooperation among the European Union, its Member States and Vietnam, Article 16, para. 3.

(60) See the Chapter on *Trade and Sustainable Development*, Article 286, para. 3.

(61) See Article 5 (*c*) of the Chapter.

number of non-binding acts. Before the 2008 financial crisis, the EU institutions already perceived the assessment of such an impact as an instrumental objective of the EU action for sustainable development. Specifically, in 2005 the Commission published its *Thematic Strategy on the Sustainable Use of Natural Resources* including a workable definition of sustainable use of natural resources. This refers to the need to "reduce the environmental impacts associated with resource use and to do so in a growing economy" and underlines that "[f]ocusing on the environmental impacts of resource use will be a decisive factor in helping the European Union achieve sustainable development" (62).

At that time, criticism to the social impact of the EU regulatory and policy framework had already been expressed. The inclusion in Directive 2009/28/EC of a few criteria for the sustainability of renewable energy production and consumption in the European Union has been an important response made by the EU institutions within their binding regulatory action. As specified in the website of the European Union, in accordance with Article 17, para. 2, of that Directive, "[...] only biofuels and bioliquids that comply with the criteria can receive government support or count towards national renewable energy targets". The main criterion is that, "to be considered sustainable, biofuels must achieve greenhouse gas savings of at least 35% in comparison to fossil fuels. This savings requirement rises to 50% in 2017. In 2018, it rises again to 60% but only for new production plants" (63). In accordance with Artice 18 of Directive 2009/28/EC, the EU Commission and Member States share the competence to ensure the effective observance of such criteria by economic operators. To this end, the EU can also conclude *ad hoc* agreements with non-EU Member States. If the contents of such agreements are in line with the sustainability criteria provided in Article 17, "the Commission may decide that those

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(62) See COM(2005) 670 final, 21 December 2005. For further information, see the website of the European Union, specifically ec.europa.eu/environment/archives/natres/index.htm. In 2004 its Task Force on Land Tenure had adopted the non-binding *EU Land Policy Guidelines to Support Land Policy Design and Reform Processes in Developing Countries* (Communication from the Commission to the Council and the European Parliament, COM(2004) 686 final, 19 October 2004).

(63) Article 17, para. 2, of Directive 2009/28/EC provides, in particular, that "[t]he greenhouse gas emission saving from the use of biofuels and bioliquids taken into account for the purposes referred to in points (*a*), (*b*) and (*c*) of paragraph 1 shall be at least 35%. With effect from 1 January 2017, the greenhouse gas emission saving from the use of biofuels and bioliquids taken into account for the purposes referred to in points (*a*), (*b*) and (*c*) of paragraph 1 shall be at least 50%. From 1 January 2018 that greenhouse gas emission saving shall be at least 60% for biofuels and bioliquids produced in installations in which production started on or after 1 January 2017".

agreements demonstrate that biofuels and bioliquids produced from raw materials cultivated in those countries comply with the sustainability criteria in question" (64).

In light of additional criteria, biofuels are sustainable if they are not produced in areas converted from previously high carbon stock and/or from lands with high biodiversity (65). For the implementation of these criteria, the EU Commission has enacted the Decision on *Guidelines for the Calculation of Land Carbon Stocks and of Highly Biodiverse Grasslands* in 2010 (66) and the Regulation on *Defining the Criteria and Geographic Ranges of Biodiverse Grasslands* in 2014 (67). In accordance with the subsidiarity principle, the EU Member States are competent to assess national agricultural lands that meet those additional criteria and identify those that are suitable for biofuel production, whereas the EU Commission is competent to make such an assessment in relation to non-EU Member States (68).

A company producing bioliquids and biofuels can show that its products are compliant with the criteria for the sustainability set by Directive 2009/28/EC if that company takes a pro-active approach by adopting, or being part of, a "voluntary scheme" recognised by the EU Commission (69). "Voluntary schemes" promote sustainable development in broader terms. These schemes are recognised if they aim not

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(64) See Article 18, para. 4, of Directive 2009/28/EC.

(65) The website of the European Union highlights that "[a]ll life cycle emissions are taken into account when calculating greenhouse gas savings. This includes emissions from cultivation, processing, and transport. 2. Biofuels cannot be grown in areas converted from land with previously high carbon stock such as wetlands or forests. 3. Biofuels cannot be produced from raw materials obtained from land with high biodiversity such as primary forests or highly biodiverse grasslands". For further information, see ec.europa.eu/energy/en/topics/renewable-energy/biofuels/sustainability-criteria.

(66) Decision 2010/335/EU. It is also relevant that, on 4 August 2010, the Report submitted by the Commission to the European Parliament and the Council, *The Feasibility of Drawing up Lists of Areas in Third Countries with Low Greenhouse Gas Emissions from Cultivation*, COM(2010) 427 final.

(67) Commission Regulation 1307/2014.

(68) See Directive 2009/28/EC (above, footnote 2), Article 19, respectively paras. 2 and 4.

(69) From the website of the European Union it transpires that, according to the EU Commission, "[f]or a scheme to be recognised [...], it must fulfil criteria such as: feedstock producers comply with the sustainability criteria; information on the sustainability characteristics can be traced to the origin of the feedstock; all information is well documented; companies are audited before they start to participate in the scheme and retroactive audits take place regularly; the auditors are external and independent; the auditors have both the generic and specific auditing skills needed with regards to the scheme's criteria". As to the increasing relevance of "private certification schemes for sustainable biofuels", see Naiki, *Trade and Bioenergy: Explain-*

only at enhancing greenhouse gas emission savings and biodiversity preservation, but also at contributing to the conservation of clean water, soil and/or air.

The Directive 2009/28/EC refers to a wide-ranging definition of renewable energy (70), by promoting the use of "advanced biofuels", that are produced from materials other than food and/or feed crops (71), such as second and third generation biofuels produced from straw, wood and forestry residues and/or from municipal wastes and/or algae, in order to discourage large-scale land acquisitions and "indirect land use change".

These biofuels, that are more expensive than conventional ones, would offer more safeguards for the achievement of competing objectives, such as greenhouse gas emission savings, biodiversity preservation and food security. The second generation biofuels might however not be the most appropriate tool for the pursuance of sustainable land use (72) through the avoidance of local land conversion, in particular "indirect land use change". These biofuels are mainly produced from biomass (73). Biomass, as a source of energy production, has also an environmental impact, in terms of "effects on food production and local prosperity" because biomass can implicate the exploitation of relevant areas of rural lands. According to Directive 2009/28/EC, the impact of "biomass cultivation" is shown by "land-use changes, including displacement, the introduction of invasive alien species and other effects on biodiversity" (74). The Directive provides for the adoption of sustainability schemes of biomass use at the national level of the EU Member States. These schemes are another specific example of how subsidiarity works in this field. The Commission is competent to lay down the requirements of the schemes, in light of "the best available scientific evidence, taking into account new developments in innovative

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ing and Assessing the Regime Complex for Sustainable Bioenergy, *European Journal of Int. Law*, 2016, especially pp. 137-142.

(70) According to Article 2 (*a*), of Directive 28/2009/EC (above, footnote 2), "'energy from renewable sources' means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases".

(71) See, in particular, Article 17, para. 9.

(72) See the preamble of the Directive, in particular its point 35.

(73) According to Article 2 (*e*), of the Directive 28/2009/EC (above, footnote 2), "biomass" means "the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetal and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of industrial and municipal waste".

(74) See, in particular, the preamble, point 78.

processes" (75). The EU Member States are competent to adapt such requirements, by designing the sustainable schemes of biomass use at the national level and by ensuring their implementation.

The Commission in reviewing the impact of biofuels production through investment on land use acted on Article 19, para. 6, of Directive 2009/28/EC (76) and so proposed the adoption of Directive 2015/1513/EU (77). This Directive aims to promote the sustainability of biofuels production through investments, in accordance with the aim of "decarbonizing the transport sector" and with the principle of "waste hierarchy" at the root of Directive 2008/98/EC (78).

As it transpires from the EU website, this Directive "limits the share of biofuels from crops grown on agriculture land that can be counted towards the 2020 renewable energy targets to 7%" and "sets an indicative 0,5% target for advanced biofuels as a reference for national targets that will be set by EU countries in 2017". In accordance with Article 193 TFEU, as well as with the subsidiarity principle, the EU Member States can adopt higher targets than those set by the Directive, in order to promote the resort to advanced biofuels (79).

The management of the detrimental impact of "indirect land use change" on gas emission savings and on biodiversity preservation is the primary policy and regulatory objective of Directive 2015/1513/EU. In addition, this Directive acknowledges the need of mitigating the competition between food production and biofuel production, by contributing to the effective implementation of the actions towards the sustainability, in terms of food security, of energy production through investment that have been undertaken at the international level, in particular within the United Nations. The Directive 2015/1513/EU refers to the *Principles for Responsible Investment in Agriculture and Food Systems*, approved by the Food and Agricultural Organization

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(75) See, in particular, the preamble, point 69.

(76) See above, footnote 23.

(77) Above, footnote 2. See, in particular, the Commission's Report on *Indirect Land-Use Change Related to Biofuels and Bioliquids*, COM(2010) 811 final, 22 December 2010; and the Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources, COM(2012) 595 final, 17 October 2012.

(78) See Directive 2008/98/EC of the European Parliament and of the Council, 19 November 2008, concerning waste and repealing certain Directives (*O.J.E.U.* 22 November 2008 *L* 312, p. 3 ff.). Directive 2015/1513/EU (above, footnote 2), at point 15 of its preamble, underlines that "[s]ome of the feedstocks that pose low indirect land-use change risks can be considered to be wastes".

(79) The Directive points out the possibility left to EU Member States to adopt lower limits. See, in particular, points 17 and 18 of its preamble.

Committee on World Food Security (CFS) in October 2014. The Directive also encourages the EU Member States to support the implementation of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. These *Guidelines* were adopted by the CFS in October 2013 (80).

The EU Commission is engaged in mitigating the possible economic competition between biofuel production and food production by also taking international guidelines, principles and/or standards on land management into account within some of its external actions. In 2014, for instance, the Commission announced a new financial program for Sub-Saharan Africa. This programme aims to facilitate the implementation of the 2012 FAO *Guidelines*, contribute to land management, tenure management, food and nutrition security of small-scale farmers and thus to poverty eradication, in particular through the empowerment of local populations and the establishment of specific technological mechanisms for land registration (81).

It is also important that the European Union has been contributing to the achievement of "Target 1.4" related to "Goal 1" of the Sustainable Development Goals (SDGs). These Goals were adopted within the UN *post-2015 UN Development Agenda* on 25 September 2015. "Goal 1" aims at the "end poverty in all its forms everywhere". "Target 1.4" concerns land management. According to this "Target", it would be appropriate to "ensure" that "by 2030 [...] all men and women, particularly the poor and the vulnerable, have [...] control over land and other forms of property". The European Union has been contributing to its effective implementation by adopting special initiatives, such as that on "[b]uilding partnerships for change in developing countries" related to "the environment and sustainable management of natural resources including energy" through "integrated approaches for climate change adaptations" in specific developing States of Africa and Asia. Furthermore, the European Union has been engaged in supporting the use by local indigenous communities of rural land in non-EU Member States (82). Conversely, "Target 1.4" of the 2015

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(80) See, in particular, point 26 of the preamble of the Directive.

(81) See the Press Release of 9 April 2014.

(82) The European Union has financed a number of relevant projects within its initiatives for international cooperation and development named *Building Partnerships for Change in Developing Countries*. For further information see the EU website, in particular ec.europa.eu/geninfo/query/index.do?QueryText=land+community+rights&op=Search&swlang=en&form_build_id=form-JgN96tRxXI0T06VjkDLp6XXAEwIEavIQlDhenpcnLFs&form_id=nexteuropa_europa_search_search_form.

SDGs does not refer to community land rights, as a tool for the improvement of local rural living conditions.

4. Over the years of its financial crisis the European Union has focused on enhancing its protagonism in international economic relations, on the one hand, and on consolidating its internal liberalization process, on the other. The European Union has also resorted to this double approach in relation to biofuel production through foreign investments.

As to the mitigation of the possible side-effects of foreign investments for biofuel production through a revision of international investment law, I have illustrated above that the EU political institutions have given indications that they are ready to tackle the typical diversification that keeps international regulatory safeguards of economic and non-economic interests separately. However, the EU institutions have not yet proposed the adoption of a single regulatory approach, nor even designed a new approach to international investment law based on a revision of the balance of interests between investors and host States. In particular, as far as the topic of this article is concerned, the EU institutions have not yet connected sustainable and equitable land use and foreign investments within the relevant number of *post*-Lisbon international trade agreements that these institutions have signed and/or are still negotiating.

As already said, the first method that a few States and the European Union have used in order to find a new balance has been the reference to sustainable development in the preambles and/or to the environment in a few of the rules in international investment treaties. This has also been applied in a few treaties in relation to land management. Such a method is not the most satisfactory means for reconciling foreign investments and a non-investment concern like the prevention of "land commodification", land misuse and/or "indirect land use change", because it is a method that keeps regulatory diversification and thus a different intensity in the regulatory safeguard of economic and non-economic concerns/interests at the international and EU law level. The safeguard of the concerns and interests of foreign investors would still be ensured by the binding rules included in the international investment treaties that are in force, whereas the safeguard of the environment, as well as of the concerns and interests of people and small-scale farmers in non-EU developing States would mainly depend on non-binding rules and principles adopted by international organizations. These latter concerns and interests could be

invoked within the international and EU investment regulatory and policy framework only as exceptions.

As to the mitigation of the possible side-effects of foreign investments for biofuel production through a revision of the EU internal applicable regulatory framework, the Commission has worked to attribute a specific relevance to the sustainable use of natural resources, on account of the importance of such a production within the internal liberalization process and in order to protect the environment, biodiversity and, to some extent, ensure food security, in accordance with the recommendations, guidelines and principles endorsed within the framework of the United Nations.

The combination of the subsidiarity and precautionary principles is at the root of this internal binding EU regulatory action. In light of the considerable scientific uncertainty that still characterizes the production of renewable energy in relation to its environmental and social impact, the European Union has acted as the best regulatory level to establish targets (83), "default values for greenhouse gas savings for different fuel production pathways" (84) and any other objective based on scientific data and statistics, as well as to estimate the environmental impact of biofuel production in terms of land misuse and "indirect land use change". The national level of the EU Member States has been considered the best regulatory level to implement targets, values, any other objective and control their effective observance.

To prevent conflicts of interest arising from foreign investments based on the use of rural land in non-EU developing countries and to sustain its protagonism in international economic relations, the European Union could give regulatory responses from other two perspectives.

From a transnational private law perspective, the European Union might facilitate the transparency of land transactions in all circumstances, by adopting and promoting the resort to qualitative-oriented

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(83) Directive 2009/28/EC provides for national renewable energy targets for each EU Member State, in accordance with its own starting situation and possibilities for the future. Accordingly, the EU Member States have to adopt their respective national "renewable energy plans" (Article 4 of the Directive, above, footnote 2) and, every two years, have to publish their national "renewable energy progress reports" (Article 22 of the same Directive). Directive 2009/28/EC promotes cooperation, through statistical exchanges, joint projects and support schemes, among the EU Member States, and also third countries, to meet their respective targets. See, in particular, points 25, 34-35 of the preamble and Articles 7, 9-11 of the Directive.

(84) As to "default value for biofuels produced with no net carbon emissions from land-use change", see, in particular, Directive 2009/28/EC, part A of Annex V (above, footnote 2).

model contracts between a foreign investor and a host State when large-scale foreign investments in rural land, particularly in non-EU developing States, are at stake. Special clauses aimed at discouraging significant acquisitions of rural lands and "indirect land use change" could be incorporated in such contracts. For the protection of the environment, the preservation of biodiversity, the safeguard of social and human rights, in terms of access to water and food, these contracts might include special clauses on land management, on the use of environmental and social impact assessment mechanisms and certifications. For the promotion of sustainable development in terms of good governance, these contracts might include a reference to participatory mechanisms involving local communities to be activated if and when the accountability and transparency of a specific investment project becomes controversial (85).

From the international law perspective, the EU institutions have the decision-making power to adopt a regulatory approach likely to bring about binding rules inspired by a different balance between investment and non-investment concerns/interests. The EU institutions might be the drivers of a new attempt towards multilateralism on investment. As underlined in some previous articles (86), this attempt could lead to the conclusion of a multilateral investment treaty or the adoption of non-binding guidelines related to specific issues, such as the relationship between the protection of investments and land use management. The European Union could attempt to foster the activities of the World Bank, UNCTAD or OECD, which are interested in influencing the conduct of States and private corporate investors, in accordance with the principles of sustainable development. Multilateral rules might address the diversification of international investment law, by reducing its inconsistency. As to the topic of this article, multilateral rules and/or guidelines would mitigate potential norm conflicts by identifying a few minimum relevant conditions that must be met by large-scale foreign investments based on the use of land in developing

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(85) See Report of the Special Rapporteur on the right to food, DE SCHUTTER, on *The transformative potential of the right to food*, A/HRC/25/57, 24 January 2014, as to his final "key recommendation B.4" on contract farming as a tool to support "local food systems", especially (*d*). See also COTULA, *Democratising International Investment Law. Recent Trends and Lessons from Experience*, London, 2015.

(86) See, in particular, ACCONCI, *The Integration of Non-investment Concerns*, above, footnote 27; ID., *La tutela della salute nel diritto internazionale e dell'Unione europea in materia di investimenti*, in SIDI (Società Italiana di Diritto Internazionale e dell'Unione Europea), *La tutela della salute nel diritto internazionale ed europeo tra interessi globali e interessi particolari*, *XXI Convegno (Parma, 9-10 giugno 2016)* (Maffei and Pineschi eds.), Napoli, 2017, especially pp. 314-315.

or least-developed States (87). In particular, the conclusion of a multilateral investment treaty, including provisions on the co-ordination of international treaty obligations of the contracting States, would prevent conflicts arising from the interpretation and application of different treaties. The multilateralization of international investment law through substantive treaty rules for a better realization of sustainable development requires strong efforts because non-binding rules are, in principle, more widely-accepted on this matter by both industrialized and developing States. That is why, in light of its traditional engagement in promoting sustainable development, the European Union appears to be the international actor that can make the difference from a regulatory perspective. It is relevant that the European Union has been making a few attempts to include, for instance, a specific provision on the resort to the precautionary principle in certain association agreements (88). It is also relevant that a number of its *post*-Lisbon treaties provide for the commitment of Contracting Parties to the promotion of corporate social responsibility in the field of trade and investment (89).

On account of the objections to multilateralism brought about by the current United States Administration, the regulatory protagonism

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(87) A few scholars agree on the idea of attributing a specific relevance to environmental impact assessment mechanisms within international investment law. See, in particular, MAYEDA, GRAHAM, *Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation*, *The Journal of World Investment and Trade*, 2017, p. 131 ff.; GEHRING, STEPHENSON, CORDONIER SEGGER, *Sustainability Impact Assessments as Inputs and as Interpretative Aids in International Investment Law*, *ibid.*, p. 163 ff.

(88) The 2014 Association Agreement between the European Union, its Member States and Georgia includes an express reference to the precautionary principle. See its Article 236 on *Scientific Information*, which reads as follows: "[w]hen preparing and implementing measures aimed at protecting the environment or labour conditions that may affect trade or investment, the Parties shall take account of available scientific and technical information, and relevant international standards, guidelines or recommendations if they exist. In this regard, the Parties may also use the precautionary principle". See also the 2014 Association Agreement between the European Union, its Member States and Moldova, Article 372; and the 2014 Association Agreement between the European Union, its Member States and Ukraine, Article 292.

(89) See the 2014 Agreement between the European Union, its Member States and Georgia, Article 231 (*e*), which reads as follows: "the Parties agree to promote corporate social responsibility, including through exchange of information and best practices. In this regard, the Parties refer to the relevant internationally recognised principles and guidelines, especially the OECD Guidelines for Multinational Enterprises". See also Article 239 (*f*) and (*g*). In addition, see the Association Agreement between the European Union, its Member States and Moldova, Article 367; the Association Agreement between the European Union, its Member States and Georgia, Article 231; and the Chapter on *Trade and Sustainable Development* of the main elements of the 2017 Economic Partnership Agreement (EPA) with Japan, Article 5 (*e*) (see above, footnote 60).

of the European Union in international economic relations would be both appropriate and strategic. The on-going attempts of the European Union towards the multilateralization of international investment law, as to the reform of "direct arbitration" through the establishment of a permanent investment court system (90), have so far been welcomed by certain bodies of the United Nations and by Canada, that is by an important player of international economic relations. During its fiftieth session, on 10 July 2017, on the proposal, among others, of the European Union and its Member States, the UN Commission on International Trade Law (UNCITRAL) has enlarged the mandate of its "Working Group III on Dispute Settlement" to study this matter. Canada agreed to include provisions for the establishment of such a court in the CETA (91).

This international leading regulatory position of the European Union in relation to the multilateralization of substantive investment rules would also be appropriate and strategic because of the wide-ranging contents of its internal regulatory framework and of the persistent lack of any comparable regulatory framework on renewable energy at the international level.

From the perspective of the internal regulatory dimension of the EU single market, there are still a few critical points. The main issues are to set appropriate rules on greenhouse gas emissions accounting, to assess their environmental impact and to determine the relevant "default values" that can guarantee the sustainability of the various biofuels produced by economic operators, in accordance with the three patterns chosen by Directive 2009/28/EC, that is greenhouse gas emission savings, impact assessment of biofuel production on land use and biodiversity preservation.

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(90) See, in particular, the proposal made by the European Union on *Investment Protection and Resolution of Investment Disputes* within the framework of the TTIP negotiations on 12 November 2015. Cf., among others, GALLO, *Portata, estensione e limiti del nuovo sistema di risoluzione delle controversie in materia di investimenti nei recenti accordi sul libero scambio dell'Unione Europea*, *Diritto del commercio int.*, 2016, p. 827 ff.; LÉVESQUE, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?*, Investor-State Arbitration Series, Paper No. 10, 2016; SCHILL, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, *ASIL Insights*, Issue 9, 22 April 2016.

(91) See, especially, the investment Chapter of the CETA, Articles 8.29-8.45. As to the relevance of the EU proposal on the establishment of an investment permanent court as a reason for a new text of the CETA in 2016, see VIOLI, *Formal and Informal Modification of Treaties before their Entry into Force: What Scope for Amending CETA?*, *Questions of Int. Law*, *Zoom-in*, 2017, p. 5 ff.

In light of the legal bases chosen by the Commission for the adoption of Directives 2009/28/EC and 2015/1513/EU — the article on the approximation of laws of the Member States, Article 114 TFEU, and that on the competence of the European Union for the protection of the environment, that is Article 175 of the former Treaty on the European Community, now Article 192 TFEU —, the primary concern of EU institutions has been to ensure that energy production would not hinder the protection of the environment. The EU regulatory action on the connection between biofuel production and food and nutrition security has had a lower intensity because the European Union has adopted non-binding acts, in particular plans of action and specific programs, such as the *Food Security Thematic Program* (FSTP) aimed at addressing "the structural causes of food insecurity for the world's poorest and most vulnerable populations", as underlined on the EU website. On the assumption that a regulatory action is more intensive if its outcomes consist of binding acts, there is a different intensity of the EU regulatory action. This could be due to the fact that, under the Treaties, the European Union lacks a specific competence on food and nutrition security.

The binding nature of the EU competence in the field of the environment does not appear the only possible explanation of this different regulatory intensity.

One specific aim of the EU regulatory approach to renewable energy is to establish "changes in the behaviour of market actors", as it is pointed out in the preamble of Directive 2009/28/EC (92), and thus a reorientation of the business strategies of EU producers of biofuels, in order to establish a connection between their competitiveness on the world markets and the protection of the environment and biodiversity. The primary concern of EU institutions to ensure a sustainable correlation between biofuel production and the protection of the environment derives from their interest in the safeguard of the "smooth functioning of the single market" and in "the long-term competitiveness of [EU] bio-based industrial sectors" within transnational eco-

(92) See, in particular, point 76 that specifies "[s]ustainability criteria will be effective only if they lead to changes in the behaviour of market actors. Those changes will occur only if biofuels and bioliquids meeting those criteria command a price premium compared to those that do not. According to the mass balance method of verifying compliance, there is a physical link between the production of biofuels and bioliquids meeting the sustainability criteria and the consumption of biofuels and bioliquids in the Community, providing an appropriate balance between supply and demand and ensuring a price premium that is greater than in systems where there is no such link [...]".

nomic relations. This transpires from the preamble of Directive 2015/1513/EU (93).

It is noteworthy that, on the one hand, the EU internal regulatory framework aims at discouraging "investments in installations with a low greenhouse gas emission savings performance" (94) and encourages the resort to "voluntary schemes" and, on the other, a few *post*-Lisbon association and/or trade agreements include the commitment of the Contracting Parties to the promotion of corporate social responsibility (95). This shows that the EU institutions are directed to distinguish not only among biofuels, but also among economic operators, in order to facilitate the effective achievement of the objectives of the EU internal regulatory framework on biofuel production through sustainable investments and the consolidation of the internationally leading position of the European Union in this field. To achieve such a result, the Commission focuses on the smooth functioning of the single market, in terms of the accommodation of the choices of consumers and those of economic operators, rather than on the national policies of the EU Member States. Since 2008, for a reason or for another, all these States have engaged in tackling the hard economic and social effects of the financial crisis. In these circumstances, the EU Member States have had little policy space for undertaking pro-active actions in favour of the sustainability of the production of renewable energy, as a whole. A few of them, specifically Italy and Spain, have experienced a conflicting relationship with a number of foreign investors in the renewable energy field because of the choice of withdrawing feed-in tariff incentives to solar power projects provided in their domestic laws, in light of national financial difficulties (96).

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(93) See especially point 13, which refers to the Communications of the EU Commission, respectively, on *Innovating for a Sustainable Growth: A Bioeconomy for Europe*, 13 February 2012, and on *Roadmap to a Resource Efficient Europe*, 20 September 2011; and point 25.

(94) See, in particular, point 16 of the preamble of Directive 2015/1513/EU.

(95) See, for instance, Article 231 (*e*) of the 2014 Association Agreement between the European Union, its Member States and Georgia which reads as follows: "the Parties agree to promote corporate social responsibility, including through exchange of information and best practices. In this regard, the Parties refer to the relevant internationally recognised principles and guidelines, especially the OECD Guidelines for Multinational Enterprises". See also Article 239 (*f*) and (*g*).

(96) Italy and Spain changed their domestic laws on tariff incentives to solar energy because of the financial constraints following the Euro-zone crisis. A number of investment arbitration cases — based on the Investment Chapter of the Energy Charter Treaty — have arisen from these changes. As to the cases against Italy, see, in particular, *Blusun S.A. and Others v. Italy* (Award of 27 December 2016, ICSID Case No. ARB/14/3; pending annulment proceeding), *Silver Ridge Power B.V. v. Italy*

The relationship between the orientation of the EU institutions and the conduct of economic operators in the field of biofuels within and outside the single market could become another matter of discussion. A piece of evidence is that some EU corporate producers of biodiesel, that is a conventional biofuel, have criticized the proposal for the revision of Directive 2009/28/EC for the *post*-2020 period made by the EU Commission on 30 November 2016, as a part of the new *Clean Energy Pack*. This proposal is based on the gradual phase-out of conventional biofuels. Having held on-line public consultations on the revision of the internal regulatory framework in Spring 2016, in accordance with the principle of participatory democracy incorporated in the Lisbon Treaty at Article 11 of the Treaty on the European Union (97), the EU Commission has justified such a proposal by declaring that both "economic models and scientific theories" and the public opinion matter when the protection of the environment and biodiversity are at stake (98). This could not be the only reason. By forging the playing-field of biofuel producers in terms of bio-based competitiveness within and outside the single market, the Commission would be able to support the EU economic operators that orient their business in accordance with the EU regulatory and policy framework, as well as to sustain the international leading position of the European Union in this field. The European Parliament has endorsed this line of action (99), whereas the EU Energy Council has been cautious (100).

(ICSID Case No. ARB/15/37, pending), *Belenergia S.A. v. Italy* (ICSID Case No. ARB/15/40, pending) and *Eskosol S.p.A. in liquidazione v. Italy* (ICSID Case No. ARB/15/50, pending). For an overview of the issues at the root of such cases, see FERNANDO, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking*, *Denver Journal of Int. Law and Policy*, 2017, p. 251 ff.

(97) Cf. ACCONCI, *Participatory Democracy within the Revision of the European Economic Governance Due to the Euro-Zone Crisis*, in *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (Sciso ed.), Heidelberg, 2017, especially pp. 112-116.

(98) See *Proposal for a Directive of the European Parliament and of the Council on the Promotion of the Use of Energy from Renewable Sources (recast)*, COM (2016)767, 30 November 2016. See also the website of the European Union, in particular ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition. It is relevant to point out that, according to the proposal of the EU Commission, in 2030 the contribution of conventional biofuels to the achievement of national renewable energy targets of the EU Member States should be (only) 3,8%.

(99) See, in particular, *The EU Legislation in Progress Briefing*, 9 March 2017 named *Promoting Renewable Energy Sources in the EU after 2020* (available on europarl.europa.eu/RegData/etudes/BRIE/2017/599278/EPRS_BRI(2017)599278_EN.pdf). These briefings are published by the European Parliamentary Research Service.

(100) On 27 February 2017 the Ministers of the EU Member States competent on energy matters discussed the proposal for a new *Clean Energy Pack* of the Commission.

Biofuel production is eventually another field where the EU Member States appear to be reluctant to giving the leadership to the European Union.

PIA ACCONCI

Abstract. — The EU regulatory and policy framework on biofuels has been criticized because it has encouraged large-scale foreign investments in developing countries when most of these States lacked domestic laws on rural land use. A relevant number of those investments have brought about a conversion of land use from the cultivation of crops for local food and feed needs to the cultivation of crops that are used for the production of conventional biofuels and bio-liquids, such as vegetable and seed oils. "Indirect land use change" has been a further issue because, in order to ensure crops for food and feed needs, non-agricultural and/or pastural lands, usually grasslands and/or forests, have been brought into production. In tackling these issues, the European Union has rendered its internal regulatory framework on biofuels more quality-oriented. The present article focuses on these regulatory changes, after illustrating how the European Union has also attempted to facilitate a quality-oriented revision of the regulatory approach at the root of international investment law through the inclusion of specific clauses related to sustainable development within its *post*-Lisbon international treaties on trade and investment. A few proposals are made on how the European Union might contribute to preventing conflicts of interest related to land use in non-EU developing countries, by focusing on its international protagonism. Some final comments on the concerns and priorities at the root of the EU internal action are also made.

See *Outcome of the Council Meeting on Energy*, 3521st Council Meeting, 6719/17 (OR. en), PRESSE 9 PR CO 9, p. 8 (available on consilium.europa.eu/en), where it is specified that certain Ministers were in favour of a "cautious approach on the economic consequences of the gradual phasing out of first-generation biofuels, since this could lead to sanction 'early movers' and to investor uncertainty in general".