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The Court of Justice of the European Union as a Transnational Actor through Judicial Review of the Territorial Scope of EU Environmental Law

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Abstract
When courts are faced with questions regarding the territorial scope of internal legislation, they are required to engage with controversial issues pertaining to the permissible boundaries of regulatory reach, which go beyond traditional conceptions of state sovereignty and non-intervention on which the functioning of courts is normally based. This Article examines the role of the Court of Justice of the European Union ('CJEU') in reviewing the legality and interpretation of the extraterritorial reach of EU environmental law, including animal welfare. It assesses the extent to which judicial review by the CJEU serves as a transnational mechanism for addressing legitimacy concerns raised by the unilateral exercise of EU regulatory power beyond EU borders.

Keywords: environment, animal welfare, extraterritorial, third countries, legitimacy, judicial review

I. INTRODUCTION

Courts are increasingly faced with legal questions that extend beyond the confines of the regulating jurisdiction in which they operate and concern the relationship of the internal legal order with external legal orders. This Article deals with the extraterritorial reach of the law of the European Union ('EU') that is increasingly emerging in many policy areas and which raises significant legal questions across established territorial and jurisdictional borders. The analysis focuses on environmental law, broadly understood to include animal welfare, and assesses the role of the Court of Justice of the European Union ('CJEU') in reviewing the legality and interpretation of its territorial scope.[1] Environmental law provides a good test-case for

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[1] 'CJEU' refers both to the Court of Justice and to the General Court in accordance with Article 19(1) Treaty on European Union ('TEU'). In certain instances, separate references will be made to the individual courts. When it is not necessary to distinguish between the two courts, references will be made to the 'CJEU' or the 'EU courts'.

examining the approach of the CJEU in specific cases, while providing insights as to how the CJEU may and should deal with extraterritoriality issues in other policy fields.

Cases that concern the extraterritorial reach of EU law blur the distinction between the 'internal' and the 'external' aspects of the EU legal order and demonstrate the changing role of courts in an increasingly globalised and interconnected world. When courts are faced with questions regarding the territorial scope of internal legislation, they are required to engage with controversial issues pertaining to the permissible boundaries of regulatory reach, which go beyond traditional conceptions of state sovereignty and non-intervention on which the functioning of courts is normally based.[2] The analysis is concerned with how EU 'internal' legislation affects actors outside of EU borders and the role of the CJEU when it is called upon to determine the extent of the EU's power to regulate in relation to the rest of the world.

It has been observed that 'adjudication on exercises of extraterritoriality by domestic constitutional courts sets the stage for a broader debate as to the appropriate place of national courts in global governance' and the place of states in unilaterally regulating transboundary or global problems.[3] The CJEU, as the internal judicial body of the EU legal system, can also play an important role in recognising the extraterritorial effects of EU legislation on third-country actors and in upholding EU legal requirements and individual rights that are granted to non-EU nationals when EU law applies to them. This is in line with the EU's self-proclaimed values in external action, which include, among others, consolidating and supporting democracy, the rule of law and human rights, fostering the sustainable development of developing countries and multilateral cooperation,[4] as well as upholding and promoting the strict observance of international law.[5]

The rest of the Article is structured as follows. Part II provides an overview of the emerging phenomenon of the extraterritorial reach of EU environmental law, drawing attention to the legitimacy concerns it raises. On the basis of this background, Part III identifies the role that the CJEU could and should play in reviewing the territorial scope of EU legislation so as to control the EU's global regulatory power and provide due consideration to third-country affected interests. Parts IV and V analyse the constructs and judicial reasoning employed by the CJEU in four key cases when faced with questions relating to the territorial scope of EU legislation in the areas of animal welfare and environmental protection. This analysis demonstrates both the shortcomings of how the CJEU usually engages with issues of extraterritoriality as well as the unfulfilled potential for judicial review in the EU to function as a transnational legitimising mechanism. Part VI concludes the Article.

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[2] J Scott, 'The Geographical Scope of the EU's Climate Responsibilities' (2015) 17 *Cambridge Yearbook of European Legal Studies* 92.

[3] D Ireland-Piper, *Accountability in Extraterritoriality* (Edward Elgar, 2017).

[4] Art 21 TEU.

[5] Art 3(5) TEU.

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II. THE EXTRATERRITORIAL REACH OF EU ENVIRONMENTAL LAW AND ITS LEGITIMACY

Alongside the EU's extensive external environmental action in the realm of public international law, the EU is extending the scope of application of its internal legislation beyond EU borders through what will be termed 'Internal Environmental Measures with Extraterritorial Implications' or 'IEMEIs'. The EU increasingly resorts to such unilateral measures to address issues that are inadequately addressed at the international level. IEMEIs render access to the EU market conditional on the basis of how processes take place partly outside EU borders. They often exhibit what Scott identifies as 'territorial extension', whereby the EU exercises regulatory power as long as there is a territorial connection between the regulated activity and the EU territory, while taking into account conduct or circumstances abroad.[6] Examples of IEMEIs designed with territorial extension include: the sustainability criteria for biofuels, which impose requirements on the harvesting processes of biofuels imported to the EU;[7] the inclusion of international aviation emissions in the EU Emissions Trading System ('EU ETS') for flights arriving to or departing from EU airports;[8] and the Regulation of imports of timber, which imposes requirements concerning the legality of timber harvesting in third countries.[9]

IEMEIs also include measures with a different connecting factor to the EU, on the basis of nationality, such as the Regulation on Ship Recycling, which imposes requirements on third-country recycling facilities when they receive ships that fly the flag of a Member State.[10] Additionally, IEMEIs are proliferating in the area of animal welfare. For example, the Regulation on the protection of animals at the time of slaughter requires third countries to comply with EU standards on food hygiene and stunning when they export meat and other products from slaughtered animals to the EU,[11] while the Seals Regulation largely prohibits placing seals and seal products on the EU market and is discussed below in Part V.[12] Notably, beyond measures that have been designed with a broad territorial scope, the extraterritorial reach of EU law is sometimes created with the CJEU subsequently interpreting EU legislation with a broad territorial scope, thus judicially transforming an internal market measure into an IEMEI, as discussed below.[13]

Due to the economic power of the EU market, third-country operators have strong incentives to comply with IEMEIs. The EU's unilateral action can thus have

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[6] J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87.

[7] Parliament and Council Directive 2009/28/EC [2009] OJ L140/16, Art 17.

[8] Parliament and Council Directive 2008/101/EC [2009] OJ L8/3.

[9] Parliament and Council Regulation (EU) 995/2010 [2010] OJ L295/23.

[10] Parliament and Council Regulation (EU) 1257/2013 [2013] OJ L330/1.

[11] Council Regulation (EC) 1099/2009 [2009] OJ L303/1; D M Broom, 'Animal Welfare in the European Union', Study for the Committee on Petitions of the European Parliament (January 2017).

[12] Parliament and Council Regulation (EC) 1007/2009 [2009] OJ L286/36.

[13] Section IV below.

important extraterritorial legal impacts, affecting the practices of foreign companies and influencing the regulatory approaches of non-EU countries.[14] In contentious areas where international consensus is difficult to reach, IEMEIs often render application of EU legislation 'contingent' upon legal developments in third countries or upon international agreements.[15] For example, as discussed below in Part V, the Aviation Directive, provided for its provisional application pending regulatory developments at the international level and for the recognition of third-country measures that would address the climate change impact of flights.[16] Furthermore, IEMEIs often incorporate international standards and encourage bilateral and multilateral cooperation with third countries. For example, the Ship Recycling Regulation largely incorporates standards agreed under the Hong Kong Convention on Ship Recycling,[17] while the Timber Regulation provides the possibility to conclude bilateral Voluntary Partnership Agreements (VPAs) as an alternative 'green lane' for accessing the EU market.[18] IEMEIs are thus designed in a unique way to catalyse international regulatory developments that demonstrate the EU's commitment to multilateral cooperation and its openness to a dynamic interaction with other legal orders.

Despite the potential of the extension of EU regulation beyond EU borders to incentivise regulatory action by third countries on pressing environmental problems, it also raises significant legitimacy concerns from the perspective of affected third countries. For the purpose of this analysis, legitimacy is understood as 'justification of authority', supplemented by the interrelated aspect of 'acceptance of authority' by those affected by regulatory power, as defined by Bodansky in the context of international environmental governance.[19] On this basis, the exercise of EU global regulatory power through IEMEIs can create different kinds of interrelated legitimacy gaps.[20] These include, at least, an 'accountability gap', a 'participation and representation gap', and a 'justice gap'. These gaps reflect a series of legitimacy concerns from the perspective of affected third-country actors.

First, given the unilateral and extraterritorial aspects of IEMEIs and the lack of formal consent to their application by third countries, their source of legitimacy is not obvious. This is because they challenge conventional bases of legitimacy centred on territorially restrained state sovereignty and the principle of self-determination. Externally, the EU's action bears the risk of misunderstanding and possibly creating mistrust by foreign stakeholders. The EU could be perceived as a 'normative empire',

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[14] A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1.

[15] See note 6 above. For example, see Section V.A below in relation to the Aviation Directive.

[16] Consolidated Version Directive 2003/87/EC [2003] OJ L275/32, Art 25a(2); note 8 above, Rec 17.

[17] Hong Kong International Convention on the Safe and Environmentally Sound Recycling of Ships, 19 May 2009, SR/CONF/45 (not yet in force).

[18] See note 9 above, Art 3.

[19] D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 623.

[20] For the elaboration of this legitimacy framework, see I Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Hart Publishing, 2019).

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which engages in protectionism and exports its own standards.[21] This is particularly problematic under World Trade Organization ('WTO') law. Even if EU standards could in principle be avoided by not engaging in trade with the EU, given the EU's significant market power, foreign trading partners *de facto* often have to follow EU standards.[22] In reality, it might be impossible for third-country actors to avoid the EU market altogether, with the result that IEMEIs can have significant coercive effects for third-country actors. The legitimacy of the EU's unilateral action is arguably less problematic when IEMEIs incorporate internationally agreed standards or are based on international instruments.[23] However, even in those situations where the EU's action is not purely unilateral, IEMEIs can raise legitimacy questions due to the unilateral enforcement of international standards in the form of market access requirements that impose obligations on third-country operators outside and beyond international regimes. This unilateral imposition, of regulatory standards—however relative—could give rise to 'ecological imperialism',[24] which may be illegitimate from the perspective of third-country actors that are economically disadvantaged as a result, and whose local demands and characteristics may be ignored.

Second, with unilateral extension of regulatory standards, there is always the risk that powerful actors like the EU could abuse their power by imposing undue burdens on third-country operators. And, especially because those bearing the costs may not be represented in the regulating entity, the costs imposed on them can be ignored or insufficiently accounted for, thereby giving rise to an 'accountability gap' and a 'procedural justice gap'.[25] The controversy of IEMEIs is accentuated by the fact that EU unilateral choices about distribution of costs and benefits in pursuing environmental protection goals often largely affect developing countries. The EU may be imposing higher environmental standards than developing countries have the capacity to cope with, ignoring their special needs and capacities, thus giving rise to a 'distributive justice gap'.[26] In particular, the EU's unilateral action may violate international principles on the distribution of global responsibilities, such as the principle of Common but Differentiated Responsibilities ('CBDR'),[27] which has been particularly

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[21] Z Laïdi, *The Normative Empire: The Unintended Consequences of European Power* (2008 Centre d'études européennes de Sciences Po), https://hal-sciencespo.archives-ouvertes.fr/hal-00972756/document.

[22] B G Davies, 'International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism' (2012) 13 *German Law Journal* 1203.

[23] B Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar, 2017).

[24] T Cottier and S Matteotti-Berkutova, 'International Environmental Law and the Evolving Concept of "Common Concern of Mankind"' in T Cottier, O Nartova, and S Z Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press, 2009).

[25] See note 22 above.

[26] E Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' in B Van Vooren, S Blockmans, and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013).

[27] J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469; see note 2 above.

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developed in relation to climate change,[28] but is also relevant in a more general context.[29]

Finally, through IEMEIs, the EU is 'purporting to govern actors that do not have a voice in its political processes'.[30] Even though IEMEIs are domestic measures developed within the EU legal order, they regulate processes that partly occur abroad and have important legal impacts in third countries. This gives rise to situations where those regulated by IEMEIs do not have a say in the formulation and implementation of decisions that affect them. The exercise of transnational power over interests in other jurisdictions that do not have a say in the law-making processes of the regulating jurisdiction, creates a 'constitutional gap',[31] or an 'accountability gap',[32] whereby power is exercised 'without accountability or representation'.[33] As Benvenisti argues, when sovereigns legislate for the benefit of humanity rather than solely for the stakeholders within their territory, they should be subject to other-regarding obligations to take into account foreign interests of affected stakeholders.[34] The logic of 'power brings responsibility'[35] may justify the extraterritorial reach of EU environmental law with the EU fulfilling a moral responsibility in addressing global problems,[36] or addressing negative environmental impacts beyond its borders because it has been complicit in creating them.[37] At the same time, sufficient constraints should be in place to guard against abuse of power that may lead to the creation of different kinds of negative impacts for third countries.

The legitimacy gaps identified could be filled through a combination of legitimacy norms and mechanisms, that can ensure due consideration of third-country interests. Such norms range from procedural standards of fairness and due process, to more substantive requirements of the rule of law, including mechanisms of judicial review. A combination of legitimacy norms and mechanisms to legitimise the exercise of transnational regulatory power is supported by global administrative law proponents

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[28] UN Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, Art 3(1). See also Paris Agreement adopted under the UNFCCC, 12 December 2015, FCCC/CP/2015/L.9, Art 2(2).

[29] Rio Declaration on Environment and Development, 12 August 1992, UN Doc A/CONF.151/26, Vol 1, Principles 6, 7.

[30] G Shaffer and D Bodansky, 'Transnationalism, Unilateralism and International Law' (2012) 1 *Transnational Environmental Law* 31.

[31] See note 22 above, p 1204.

[32] R O Keohane, 'Global Governance and Democratic Accountability' in D Held and M Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press, 2003).

[33] See note 22 above.

[34] E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.

[35] S Caney, 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' (2014) 22 *Journal of Political Philosophy* 125.

[36] See note 2 above.

[37] J Scott, *The Global Reach of EU Law: Territorial Extension and the 'New Harms'* (paper presented at the EUI Law Faculty, March 2018); J Scott 'The Global Reach of EU Law: Is Complicity the New Effects?' in J Scott and M Cremona (eds), *EU Law beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press, 2019).

who suggest that global governance can be legitimised through adequate standards of transparency, participation, reasoned decisions, legality, and independent review.[38] These mechanisms can be particularly useful for the governance of global public goods, such as the protection of the global environment, as they also apply within domestic legal orders where such governance often takes place.[39] This Article focuses on the EU legal order and explores the operation and potential of judicial review as one key mechanism in addressing the legitimacy concerns outlined in this section.

III. THE LEGITIMISING FUNCTION OF JUDICIAL REVIEW BY THE CJEU

EU law, as the 'home' legal system from which IEMEIs originate can play a significant role in contributing to fill the different kinds of legitimacy gaps. In particular, EU law can play a dual role. On the one hand, EU law can enable and facilitate the adoption of IEMEIs by legally authorising the EU to act through unilateral measures with extraterritorial reach. On the other hand, it can constrain and discipline how the EU exercises global regulatory power to prevent abuse of power. Under EU law, the EU enjoys well-established and broad environmental competences,[40] including the mandate to adopt trade regulation to pursue environmental protection[41] and animal welfare objectives.[42] These largely enable the adoption of unilateral process-based measures to pursue such objectives, as analysed by Ankersmit in the context of the EU internal market regime.[43]

At the same time, EU law can operationalise a system that controls how transnational regulatory power is exercised by EU institutions and how third-country actors affected by IEMEIs may be afforded legal protection when they come under the scope of application of EU law. The scope for such EU legal control is supported by its declared commitment to the rule of law, which encompasses substantive values linked to democracy, respect of human rights, and good governance principles, and to which it commits in relation to its external action.[44] Such constitutional principles should guide not only EU external action, but also the external aspects of its other policies,[45] including development and trade, fisheries, transport, and energy

[38] B Kingsbury, N Krisch, and R B Stewart, 'The Emergence of Global Administrative Law' (2005) *Law and Contemporary Problems* 15.

[39] G Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 *European Journal of International Law* 669.

[40] Arts 191, 192 Treaty on the Functioning of the European Union ('TFEU').

[41] Art 11 TFEU.

[42] Art 13 TFEU.

[43] L Ankersmit, *Green and Fair Trade in and with the EU, Process-Based Measures in the EU Legal Order* (Cambridge University Press, 2017).

[44] Art 21 TEU.

[45] Art 21(3) TEU.

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and environmental policies.[46] On this basis, the EU's own constitutional requirements may require the EU to open up its decision-making processes and expand administrative procedures and legal doctrines of accountability, participation, and justice to accommodate the legitimacy concerns generated by IEMEIs. Within this framework, the CJEU as the final arbiter on the interpretation and legality of EU law can play a significant role in legitimising the extraterritorial reach of EU regulation by determining the balance between the enabling and constraining functions of EU law, which in turn determines the extent of the different legitimacy gaps. Enabling IEMEIs without sufficiently disciplining EU regulatory power can exacerbate the legitimacy gaps.

As mentioned above, the legitimacy gaps related to IEMEIs could be filled in many different ways in the EU legal order; judicial review is only one out of multiple available mechanisms. Other such mechanisms include participation of third-country actors in the EU's decision-making processes, which often takes place on an *ad hoc* basis, through online consultations and impact assessments. These may be more appropriate politically than recognised legal rights amenable to judicial review. However, at the same time, the 'soft law' nature of these processes raises significant questions as to their ability to provide sufficient accountability and participation mechanisms to fill the legitimacy gaps related to IEMEIs. In practice, the EU's regulatory processes create important lobbying opportunities that enable participation by economic stakeholders and countries with large resources, while excluding sufficient participation by developing-country interests and vulnerable communities within those countries. As Korkea-aho concludes, an '"access deficit" emerges between economic and non-economic actors, not between EU actors and those in third countries'.[47] Beyond lobbying opportunities, third-country actors can also rely on different kinds of administrative law safeguards, such as the right to be heard, the obligation of EU institutions to provide reasons for their decisions, and 'access to information' rights that can significantly enhance transparency of decision making. All these EU legal mechanisms can contribute to different degrees in addressing the different legitimacy gaps associated with IEMEIs.[48]

While recognising the great variety of mechanisms through which third-country actors could be represented in the EU legal order, this Article focuses on the role of the CJEU and the potential of judicial review to enhance participation and representation of third-country actors in the EU as well as upholding procedural and substantive justice safeguards. The CJEU can often determine the application of the aforementioned administrative law safeguards and provides a significant and promising avenue of legal control that could be directly employed by third-country actors in challenging the EU's unilateral action.

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[46] M Cremona, 'Coherence and EU External Environmental Policy' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press, 2012), p 37.

[47] E Korkea-Aho, '"Mr Smith Goes to Brussels": Third Country Lobbying and the Making of EU Law and Policy' (2016) 18 *Cambridge Yearbook of European Legal Studies* 1.

[48] For a detailed assessment of these administrative mechanisms, see note 20 above, ch 3.

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The function of judicial review in controlling the EU's global regulatory power is partly determined by the extent to which third-country actors can have *access to the EU courts* and partly by the *intensity of review* applied by the CJEU in relation to different grounds of review. Firstly, third-country actors could access the EU courts through two main avenues. On the one hand, third-country actors, including state, individual, and sectoral interests, could directly challenge the legality of IEMEIs under Article 263(4) TFEU. However, direct access to the EU courts is restricted due to the standing requirements of 'individual' and 'direct' concern, which have been interpreted narrowly by the CJEU and would often exclude this course of action both for EU and non-EU actors affected by IEMEIs. On the other hand, third-country actors could challenge the interpretation and legality of IEMEIs through the preliminary reference procedure under Article 267 TFEU by bringing a case in the national courts of Member States. Realistically, this avenue is more readily available to big multinational corporations with registered offices in the EU rather than weaker third-country actors with no presence in the Member States. Therefore, while access to the EU courts is in principle open to third-country actors, in practice the opportunities for access to the EU judicial system by different kinds of third-country actors are often restricted.[49]

Secondly, IEMEIs could be challenged on the basis of multiple grounds of review under Article 264(3) TFEU.[50] Third-country actors could challenge IEMEIs on the basis of 'lack of competences', relating to the broad territorial scope and the unilateral nature of IEMEIs. As seen below in Sections IV and V, EU competences are usually interpreted broadly by the CJEU and tend to enable, rather than constrain, the adoption of IEMEIs. IEMEIs could also be challenged on the basis of 'essential procedural requirements', which can ensure procedural fairness for third-country actors. From a substantive point of view, third-country actors could also challenge IEMEIs on the basis of proportionality. However, given the CJEU's usual approach to reviewing complex EU policy decisions involving economic and political decisions, such review would likely amount to light and deferential review of the legality of IEMEIs. Finally, IEMEIs could potentially be challenged on the basis of infringement of fundamental rights, particularly when certain rights are owed to everyone as a matter of EU law. However, it is still unclear, as a matter both of international and EU law, how and whether EU extraterritorial human rights obligations would apply in situations where EU internal legislation, such as IEMEIs, detrimentally affects the rights of actors situated in third countries.[51] Overall, despite the lack of

[49] For a more detailed account on the issues arising in relation to *access* of third-country actors to the EU courts in this context, see I Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) 2(2) *European Papers* 519.

[50] For a more detailed account on the operation of the different grounds of judicial review in the context of the extraterritorial reach of EU law, see note 20 above, ch 4.

[51] D Augenstein, 'The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon' in Morgera, note 46 above; L Bartels, 'The EU's Human Rights Obligations in relation to Policies with Extraterritorial Effects' (2014) 25 *European Journal of International Law* 1071.

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a general requirement of non-discrimination towards third countries under the principle of equal treatment in EU law,[52] including external aspects of internal policies, such as environmental protection,[53] third-country impacts do not entirely escape judicial review of EU measures, nor should they.

In assessing the CJEU's role in transnational environmental governance, this Article analyses four key and relatively recent cases relating to animal welfare and environmental protection where the CJEU played a critical role in reviewing the territorial scope of EU legislation. Analysing the judicial reasoning employed by the CJEU in these cases provides useful insight as to the parameters of permissible extraterritoriality in EU law and the systematic understanding of the relationship of the EU legal order with external legal orders when the EU purports to govern processes taking place beyond its borders. These cases illustrate the dual function of EU law for the legitimacy of IEMEIs and an imbalance in these functions with a bias towards enabling the exercise of EU global regulatory power with less oversight in how it is controlled.[54] There is also evidence that the CJEU adopts a permissive stance to the extraterritorial reach of EU law in other policy areas, including data protection[55] and competition law,[56] which the analysis draws upon.

The CJEU could and should play a more balanced role by further constraining how the EU exercises regulatory power beyond its borders. Judicial review should match the regulatory ambition and outward-looking approach embedded in IEMEIs that are legally designed to apply to conduct that partly takes place beyond the borders of the EU, so as to require sufficient consideration of third-country impacts. This would be in line with EU external action values and objectives, which provide the normative foundation for conducting the EU's external relations. Among others, these require the EU to foster the sustainable economic, social, and environmental development of developing countries, promote protection of fundamental rights, reduce trade barriers,[57] and uphold the strict observance and development of international law.[58]

The application of these external action values could 'transnationalise' the development of legal doctrines by the CJEU by requiring consideration of how EU internal measures affect third countries. Through judicial review, the CJEU can hold EU institutions to account and uphold the constitutional values that the EU has

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[52] *Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof*, C-55/75, EU:C:1976:8, para 14.

[53] Opinion of AG Saugmandsgaard Øe in *Swiss International Air Lines AG v The Secretary of State for Energy and Climate Change, Environment Agency*, C-272/15, EU:C:2016:573, paras 58–59.

[54] E Fahey, *The Global Reach of EU Law* (Routledge, 2017), ch 2; see notes 37 and 43 above.

[55] *Maximillian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650; *Google Spain v AEPD and Mario Costeja Gonzalez*, C-131/12, EU:C:2014:317; *Bodil Lindqvist*, C-101/01 EU:C:2003:596.

[56] *Gencor Ltd v Commission,* Case T-102/96, EU:T:1999:65; *InnoLux Corp v Commission,* Case C-231/14 P, EU:C:2015:451; *Intel v Commission*, C-413/14, EU:C:2017:632.

[57] Art 21 TEU.

[58] Art 3(5) TEU.

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committed to in its external action.[59] Given the political nature of conducting external relations and the broad discretion inherent in these values, upholding the EU's external action values is not in the sense of strict enforceability.[60] Rather the 'practical function' of EU external action values lies in the 'interpretation of other constitutional norms in their light'.[61] They are thus relevant in the reasoning of the CJEU when reviewing or interpreting EU measures on the basis of other principles, such as proportionality and the protection of fundamental rights. The analysis of the case law reveals how the CJEU fails to sufficiently incorporate these values in its reasoning so as to develop systematic parameters for how to conduct external action, through unilateral measures with extraterritorial reach, in line with the EU's constitutional values. At the same time, the CJEU seems increasingly willing to employ some of these values, particularly the commitment of the EU to international law, so as to determine the interaction of the EU legal order with external legal orders in more dynamic ways.

In determining the role played by the CJEU in reviewing the extraterritorial impacts of EU internal legislation, the case law analysis highlights three central themes that emerge when the CJEU engages with the geographical scope of EU law and that can determine the extent to which judicial review fulfils a legitimising function in this context. First, it identifies judicial mechanisms developed to manage extraterritoriality in order to *avoid conflicts with third-country norms* as a way of respecting the sovereignty of third countries and accepting legal pluralism. Second, it assesses the extent to which judicial review of the territorial scope of domestic legislation involves examining *how unilateral regulation fits with cooperative efforts and parallel international regimes* again in ways that show openness to international cooperation and respect for state sovereignty of third countries. Third, the analysis evaluates the extent to which challenges relating to the *enforcement of domestic standards in third countries* play a role in judicial reasoning, which raises issues relating to the effectiveness of the EU's attempt to achieve legitimate objectives beyond its borders, while not imposing undue obligations on third-country actors.

As Parts IV and V demonstrate, the approach adopted by the CJEU in these cases illustrates the extent of the legitimacy gaps related to IEMEIs by highlighting the shortcomings of the CJEU to seriously engage with extraterritorial impacts. At the same time, it also demonstrates the unfulfilled potential of judicial review by the CJEU in controlling the EU's regulatory power by serving as a transnational

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[59] P Eeckhout, 'A Normative Basis for EU External Relations? Protecting Internal Values Beyond the Single Market' in Markus Krajewski (ed) *Services of General Interest Beyond the Single Market: External and International Law Dimensions* (T.M.C. Asser Press, 2015).

[60] M Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart, 2014).

[61] J Larik, 'Shaping the International Order as an EU Objective' in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2014).

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accountability mechanism, providing for participation and representation of affected third-country interests, and upholding requirements of procedural and distributive justice. By analysing the opinions of the Advocate Generals, which usually provide more elaborate explanations, and by identifying ways in which the CJEU could have more appropriately engaged with third-country interests, the analysis exposes the potential that judicial review could fulfil in enhancing the legitimacy of the global reach of EU law.

The case law analysis which follows is divided on the basis of the CJEU's function in reviewing either the *interpretation* or the *legality* of acts adopted by EU institutions.[62] Part IV examines cases where the CJEU was required to determine the interpretation of EU legislation relating to its territorial scope and where the CJEU played a crucial role in extending the territorial remit of EU regulation abroad. Part V deals with cases where third-country applicants sought to invalidate EU legislation explicitly designed with a broad territorial scope, and where the CJEU instead endorsed the legislative design of IEMEIs.

IV. JUDICIAL INTERPRETATION OF THE TERRITORIAL SCOPE OF EU LEGISLATION

In situations where the CJEU is required to determine the territorial scope of EU legislation when this is not clear from the legal design of the measure, the role of the CJEU is critical for transnational governance given that judicial interpretation can extend the territorial scope further than what was explicitly intended in the legislation. As this section shows, the CJEU tends to interpret the competences and objectives of the EU in a broad manner that effectively extends the geographical scope of EU legislation. When legislation is not designed with a broad territorial scope from the outset, third-country impacts do not play a central, if any, part in the decision-making processes, and the involvement of affected third-country actors would have likely been very limited. Legitimacy gaps, particularly relating to accountability and participation, may thus be accentuated when EU legislation is *ex post* interpreted with a broad geographical scope.

A. *Transport of Animals through Third Countries:* Zuchtvieh-Export

The *Zuchtvieh-Export* case arose out of a preliminary reference request regarding the interpretation of Regulation 1/2005 on the protection of animals during transport.[63] The case was brought before the national court because the German competent authority refused customs clearance to a shipment of live animals from Germany to Uzbekistan, via Poland, Belarus, Russia, and Kazakhstan. The Court of Justice was asked to determine whether the Regulation's requirements are applicable to

[62] Art 19(3) TEU and Arts 263, 267(b) TFEU. The CJEU recently emphasised this distinction in *Front Polisario*, C-104/16, EU:C:2016:973, paras 81–86.

[63] *Zuchtvieh-Export GmbH v Stadt Kempten*, C-424/13, EU:C:2015:259; Council Regulation (EC) 1/2005 [2005] OJ L3/1.

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stages of the journey taking place in third countries when the journey originates in a Member State.

The Court held that EU requirements apply to animal transport in third countries, provided that animal transport was initiated in the EU territory,[64] while not specifying whether this extension would also apply for journeys ending on the territory of the EU. The Court presented its decision as giving effect to legislative intent regarding the objective of animal welfare as embedded in Article 13 TFEU, Protocol No 33 on the protection of the welfare of animals, and in the Regulation itself.[65] With this decision, the Court, in effect, contributed to the international conversation about which state has the obligation or right to regulate activities only somewhat connected to its territory,[66] without recognising the broader implications of its approach for transnational governance.

Even though the Court presented the territorial scope of the Regulation as being clear and unambiguous, the actual language and structure was not so clear-cut. While in some parts of the Regulation, the provisions focused on checks for transport entering or leaving the EU, the lack of specific reference to journeys between Member States and third countries and of related enforcement mechanisms may have indicated the opposite. According to Advocate General ('AG') Bot, if the legislator intended for EU requirements to apply abroad, it would have included specific provisions and requirements to that effect.[67] While the AG recognised the importance of the 'wish' to give practical effect and apply the Regulation as widely as geographically possible, he held that the legislative intent at that point in time was to limit the *ratione loci* of the Regulation to journeys between Member States.[68]

In effect, the judicial intervention in this case resulted in greater extraterritorial reach than the legal design of the legislation necessarily indicated with significant extraterritorial implications.[69] The geographical extension of the EU Regulation could lead to international trade distortions if costs of transport are higher and exporters avoid animal road transport to third countries.[70] Regrettably, the Court did not discuss the principle of territoriality, which was raised by the applicant as indicating territorial restriction of the Regulation,[71] thus failing to develop clear parameters for the exercise of EU regulatory power over activities taking place in third countries. The Court did not extensively engage with impacts of its interpretation for third-

[64] See note 63 above, para 47.

[65] Ibid, para 35.

[66] J Lawrence, '*Zuchtvieh-Export GMBH v Stadt Kempten*: The Extraterritorial Reach of EU Animal Welfare Rules' (*European Law Blog*, 18 June 2015), https://europeanlawblog.eu/2015/06/18/zuchtvieh-export-gmbh-v-stadt-kempten-the-extraterritorial-reach-of-eu-animal-welfare-rules.

[67] Opinion of Advocate General Bot in *Zuchtvieh-Export*, C-424/13, EU:C:2014:2216, para 47.

[68] Ibid, paras 93–94.

[69] See note 43 above, ch 3.

[70] C Ryngaert, 'The Long Arm of EU Law: EU Animal Welfare Legislation Extended to International Road Transport' (*Renforce Blog*, 24 August 2015), http://blog.renforce.eu/index.php/en/2015/08/24/the-long-arm-of-eu-law-eu-animal-welfare-legislation-extended-to-international-road-transport-2.

[71] See note 63 above, para 31.

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country actors in ways that would indicate that judicial review served as a transnational accountability avenue.

Notably, the Court of Justice did not discuss how unilateral extension of EU standards to international transport fits with third-country legislation or international standards. Compliance with international standards was deemed insufficient by the referring court,[72] but was invoked in the AG's opinion, who considered that international parts of the journey should be subject to international agreements and not to EU requirements.[73] The Regulation refers to such international standards in Article 21(1), and the Court could have used this in its reasoning so as to encourage international cooperation rather than exporting the EU's own regulatory requirements in ways that may instead 'discourage international collaboration by inviting retaliatory conduct from third countries'.[74] The Court missed an opportunity to link the application of the EU's unilateral measure with international efforts to address animal welfare, such as standards under the World Organisation of Animal Health ('OIE'),[75] or the European Convention for the Protection of Animals during International Transport, concluded under the auspices of the Council of Europe.[76] For example, the Court could have linked compliance with EU standards with this Convention in relation to countries that are not parties to the EU but have ratified the Council of Europe Convention, such as Russia. The Court should have taken additional steps to ensure that avenues for international cooperation remain open, similarly to how the legislature designs IEMEIs flexibly to encourage international cooperation as discussed in Section II. These mechanisms could provide for indirect representation of third-country interests that are involved in the development of international standards and for ways of ensuring the EU's external legitimacy on the basis of international instruments.

The Court also failed to address concerns about the *extraterritorial enforcement of EU standards* in the absence of checks in third countries. It only indicated that the national competent authority had discretion to take due account of uncertainties involved in a long journey, including for parts carried out abroad. Although restraint in extending the enforcement jurisdiction of the EU abroad is in line with international principles and earlier EU case law,[77] completely ignoring enforcement challenges is problematic. Usually in situations where EU legislation is designed to apply abroad, it provides for some arrangements for third-country compliance and enforcement. For example, the EU Ship Recycling Regulation provides for a detailed

[72] Ibid, para 25.

[73] See note 67 above, para 62.

[74] D Mahoney, '*Zuchtvieh-Export GmbH v. Stadt Kempten*: The Tension Between Uniform, Cross-Border Regulation and Territorial Sovereignty' (2017) 40 *Boston College International and Comparative Law Review* 363.

[75] For example, standards relating to transport of animals under the OIE Terrestrial Animal Health Code, http://www.oie.int/international-standard-setting/terrestrial-code/access-online.

[76] European Convention for the Protection of Animals during International Transport, 6 November 2003.

[77] *Poulsen*, C-286/90, EU:C:1992:453.

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authorisation procedure, including inspection of foreign facilities and unannounced checks by EU officials,[78] and the possibility for individuals and civil society to request action by the Commission in case of suspected violation of the Regulation's requirements.[79] While enforceability issues seem to have influenced determinations of the CJEU as to the territorial scope of EU law in the past, for example in the area of data protection,[80] enforcement was not a material consideration in the Court's reasoning in *Zuchtvieh-Export*. Given the absence of appropriate checks in the Animal Transport Regulation, expanding its territorial scope gives rise to questions about the effectiveness of EU legislation to regulate activities beyond its borders and the legitimacy of extending EU requirements abroad without specifying how they will be implemented in practice.

Additionally, and related to challenges of enforcement of EU standards abroad, the Court failed to deal with capacity challenges that facilities in certain third countries would face in complying with EU requirements, given their lack of necessary economic resources and appropriate infrastructure. It also failed to address risks of cross-contamination when animals are unloaded in substandard facilities in order to comply with the Regulation, which could prove counterproductive.[81] If the Regulation was explicitly designed with a broad territorial scope from the outset, such issues would have likely been examined when the Regulation was being formulated or reviewed, including through input by third-country facility operators about local circumstances.[82] Instead, the extension of the EU's requirements abroad through judicial review ignored such issues. Furthermore, these implementation challenges could have triggered obligations for the EU to provide assistance to less-developed third countries in adapting their facilities to meet EU requirements. Such assistance would be in accordance with international standards and recommendations,[83] and with the EU's own constitutional commitments in external action,[84] including in relation to development cooperation.[85] Recognising such considerations as relevant in the Court's reasoning would have been a significant step towards addressing concerns as to the unilateral imposition of undue obligations on developing countries in ways that could contribute to filling the *distributive justice gap*

[78] See note 10 above, Art 15.

[79] Ibid, Art 23.

[80] *Lindqvist*, note 55 above, para 69; C Kuner, 'Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law' (2015) 5 *International Data Privacy Law* 235, p 245.

[81] See note 63 above, para 27.

[82] COM (2011) 700 final, Report to the European Parliament and the Council on the impact of Council Regulation (EC) 1/2005 on the protection of animals during transport. The Report does not refer to third-country impacts or address implications for international transport.

[83] One of the main principles of the Food and Agriculture Organization of the United Nations on animal welfare is that support should be given to good animal welfare practices in countries with less developed economies. FAO Investment Centre, 'Review of Animal Welfare Legislation in the Beef, Pork, and Poultry Industries' (2014), http://www.fao.org/3/a-i4002e.pdf.

[84] Art 21 TEU.

[85] Art 208(1) TFEU.

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related to IEMEIs. However, the Court's approach has not as yet shown signs of such a demanding level of judicial review that would significantly contribute to enhancing the legitimacy of the EU's action.

Instead, the only clear engagement of the Court of Justice with the consequences that a broad reading of the Regulation would have for third countries was evident in paragraph 54 of the judgment, which reads:

> Should it nevertheless be the case that the law or administrative practice of a third-country through which the transport will transit verifiably and definitely precludes full compliance with the technical rules of that regulation, the margin of discretion conferred on the competent authority of the place of departure empowers it to accept realistic planning for transport which, … indicates that the planned transport will safeguard the welfare of the animals at a level equivalent to those technical rules.

With this passage, the Court read 'equivalence' into the Regulation even if it was not explicitly there. In an effort to avoid a *potential conflict of norms*, the Court provided the possibility for mutual recognition of third-country arrangements. On the one hand, the Court imposed certain limits to the extraterritorial reach of the Regulation by providing for recognition of third-country arrangements safeguarding animal welfare to an equivalent level in ways that show some openness to accepting the approaches of other legal orders and embracing legal pluralism. On the other hand, the reference to 'verifiably and definitely' seems to confer considerable regulatory discretion in determining equivalence, narrowing the exception only to situations where it would be impossible to comply with EU technical rules due to third-country legal or administrative requirements.[86] In reality, the situations where it would be legally impossible to comply with EU requirements are limited, given that most third-country legislation is designed in the form of minimum obligations allowing for facilities to adopt stricter standards for animal welfare.[87]

Furthermore, the Court failed to provide guidance as to the determination of equivalence. Equivalence decisions are delicate determinations about the adequacy of third-country law and when the legislator opts for equivalent clauses in designing EU legislation, these determinations are made on the basis of Commission guidance,[88] sometimes after consultation with the third-country concerned.[89] The Court should have required for centralised guidance by the Commission or called for consultation with third countries when determining equivalence in individual cases that would contribute to filling the *participation and representation gap* related to IEMEIs. This could in turn carve out a role for review of equivalence by the CJEU that would contribute to addressing the *accountability gap* by reviewing the factual

[86] See note 63 above, para 54.

[87] See note 70 above.

[88] For example, see note 10 above, Art 15(5); Commission, 'Requirements and procedure for inclusion of facilities located in third countries in the European List of ship recycling facilities—Technical guidance note under Regulation 1257/2013/EU on ship recycling' (Communication) [2016] OJ C128/1.

[89] For example, see note 16 above, Art 25(a); note 8 above, Rec 17.

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basis and procedural guarantees involved in equivalence determinations, thus upholding legal certainty and legitimate expectations. While the CJEU has shown readiness to invalidate equivalence determinations by the Commission when these would interfere with fundamental rights of EU citizens in the area of data protection,[90] it is less likely to engage in such review when equivalence determinations detrimentally affect third-country actors, demonstrating the differing role of the CJEU in relation to internal and external interests. There is thus significant unfulfilled potential for judicial review in controlling the unilateral exercise of EU global regulatory power, which stands in stark contrast to the CJEU's approach in reviewing the unilateral measures of Member States.

In contrast to its approach in reviewing the territorial scope of Member State measures that aim at protecting concerns outside of their jurisdiction, where the CJEU closely reviews proportionality, the Court in *Zuchtvieh-Export* did not apply proportionality in the conventional sense of balancing between the objectives of protecting animal welfare and facilitating trade. In earlier cases, Member State measures that went beyond EU legislation to protect animals in transport, for example through requirements on the height of internal compartments,[91] or through a ban on the export of calves,[92] had to be proportionate and should not result in adverse interference with the functioning of the internal market.[93] This change in approach may indicate a progressive recognition of the importance of animal welfare as a general objective of the EU.[94]

However, these earlier cases are of a different nature to *Zuchtvieh-Export*, which concerns judicial review of 'external' extraterritoriality. In earlier cases, the CJEU had to deal with issues of extraterritoriality from an 'internal' perspective—relating to whether Member States are allowed to adopt unilateral measures to pursue non-trade objectives beyond their territory. Internally, the starting point is mutual recognition of regulatory requirements,[95] with unilateral measures having to be justified under Article 36 TFEU or mandatory requirements. In contrast, externally there is no requirement under EU law for equal treatment of foreign traders.[96] Instead, equivalence is sometimes embedded in qualified terms as a way of avoiding direct conflict of norms and potentially as deference to third-country sovereignty. Inherently the issues arising in relation to 'internal' and 'external' extraterritoriality are fundamentally different. Internally, the CJEU reviews the permissibility of

[90] *Schrems*, note 55 above.

[91] *Danske Svineproducente*, C-316/10, EU:C:2011:863.

[92] *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd*, C-1/96, EU:C:1998:113.

[93] A Oriolo, 'The *Zuchtvieh-Export GmbH v. Stadt Kempten* Case—The Triggering of a Substantial Link to "Export" EU Animal Welfare Law?' in GZ Capaldo (ed) *The Global Community Yearbook of International Law and Jurisprudence 2016* (Oxford University Press, 2017).

[94] Ibid.

[95] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 120/78, EU:C:1979:42.

[96] See note 52 above, para 14.

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unilateral measures that may hinder harmonisation of EU law,[97] while externally the CJEU seeks to create a level playing field with third-country operators by extending EU regulatory obligations on foreign competitors.

In many respects, *Zuchtvieh-Export* represents a novel direction in the CJEU's role in transnational governance. By interpreting the EU Regulation with a broad territorial scope, the CJEU actively extended the EU's regulatory authority to activities taking place in third countries. At the same time, the Court devised a mechanism for disciplining extraterritoriality through an equivalence clause, which was mainly driven by a desire to avoid a potential conflict of norms. However, the CJEU did not sufficiently engage with the extraterritorial implications of extending EU requirements to international transport of animals regarding the burdens imposed on third-country facilities, enforcement challenges of implementing EU requirements in third countries, and the coexistence of the EU's unilateral regulation with international regimes. Overall, the judicial process might have exacerbated certain legitimacy gaps by extending EU requirements to third-country facilities without third-country input in their formulation and without clear guidance as to how the Regulation will be implemented and enforced.

B. Animal Testing for Cosmetic Products: European Federation for Cosmetic Ingredients

The second case examined in this Article concerns a reference for a preliminary ruling regarding the EU Regulation which prohibits animal testing for cosmetic products.[98] Similarly to *Zuchtvieh-Export*, the question in *European Federation for Cosmetic Ingredients* ('EFCI') explicitly related to the territorial scope of the Regulation and particularly whether the prohibition on testing cosmetics on animals applies to testing carried out in third countries in order to comply with third-country law. The case was brought by a European federation, regarding cosmetics not yet placed on the EU market, which contained cosmetic ingredients that had been tested on animals abroad in order to comply with legal requirements in China and Russia. In this situation, the Court of Justice was thus faced with an actual conflict of norms depending on the interpretation that it would adopt.

The Court was asked to interpret the extent of the prohibition on animal testing of cosmetics in two respects: (1) whether the prohibition applies to testing carried out abroad, and (2) whether it entirely excludes products that were tested on animals from

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[97] *Gourmetterie van den Burg*, C-169/89, EU:C:1990:227; *Criminal Proceedings Against Godefridus Van der Feesten*, C-202/94, EU:C:1996:39; *Hedley Lomas*, C-5/94, EU:C:1996:205. See G Davies, '"Process and Production Method"-Based Trade Restrictions in the EU' (2007) 10 *Cambridge Yearbook of European Legal Studies* 69; L Ankersmit, J Lawrence, and G Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 *Minnesota Journal of International Law Online* 14.

[98] *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills and Attorney General (EFCI)*, C-592/14, EU:C:2016:703; Parliament and Council Regulation (EC) 1223/2009 [2009] OJ L342/59.

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being placed on the EU market. In particular it was asked to interpret Article 18(1)(b) of the Regulation, which prohibits:

> the placing on the market of cosmetic products containing ingredients or combinations of ingredients which, in order to meet the requirements of this Regulation, have been the subject of animal testing using a method other than an alternative method after such alternative method has been validated and adopted at Community level with due regard to the development of validation within the OECD.

The Court ruled that this provision does not distinguish on the basis of *where* animal testing takes place, although it does not explicitly provide that it applies abroad. The Court grounded its reasoning on the need to ensure the effectiveness of the Regulation's important objective of animal welfare, which would be seriously compromised if it could be circumvented by carrying out animal testing abroad.[99] This aligns with the CJEU's approach in extending the territorial scope of EU law in other areas of law, such as data protection.[100]

By extending the scope of application of the EU prohibition to testing carried out in third countries, the Court sent a strong signal to the rest of the world about the EU's commitment to phasing out animal testing in this sector and effectively put pressure on third-country governments to do the same. The judgment has implications for foreign manufacturers of cosmetics and exporters, who will be required to carry out different kinds of testing. Prohibiting the use of animal testing for cosmetic products will likely result in additional costs for manufacturers that may have to test their products with two different methods to meet differing third-country and EU requirements. This can lead to streamlining of testing methods through the use of non-animal testing methods even when complying with third-country law. A *de facto* 'Brussels effect' may thus arise because it might make economic sense and it would also be technically easier to apply the same kinds of testing across the board.[101] Additionally, this could create additional momentum for a '*de jure Brussels effect*' with third countries changing their own domestic legislation to match EU requirements. Indeed, many countries around the world have already followed the EU's example in banning animal testing for cosmetics, including India, Israel, Turkey, Norway, New Zealand, and Taiwan,[102] while the ASEAN Cosmetics Directive largely aligns with the EU's ban.[103]

As to the second interpretative question, the Court, following the AG's opinion, held that the prohibition applies when animal testing is 'relied upon' in the cosmetic product safety report to meet the safety requirements of the Regulation. Therefore,

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[99] *EFCI*, note 98 above, para 43.

[100] For example, *Google Spain*, note 55 above, paras 53–54.

[101] See note 14 above.

[102] European Parliament Resolution of 3 May 2018 on a global ban to end animal testing for cosmetics (2017/2922(RSP)).

[103] Z Zakaria, 'Cosmetic Safety Regulations: A Comparative Study of Europe, the USA and Malaysia' (PhD Thesis University of Manchester 2012).

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the wording 'in order to meet the requirements of the Regulation' relates to whether the data from the animal testing is relied upon to prove safety for human health for the purpose of placing products on the EU market and not whether it is done with the motivation to market products in the EU or comply with third-country legislation. The Court rejected both arguments by the applicants to exclude the prohibition altogether when testing is carried out in order to meet the requirements of foreign law, and arguments by some interveners for the prohibition to be extended to all products containing substances that have been tested on animals, thus opting for a 'middle ground'. While the Court's judgment was thinly argued and short, it implicitly managed to strike a balance between leading to the impossible situation of *double conflicting standards* while ensuring the effectiveness of the ban in relation to products marketed in the EU. By limiting the prohibition to when results are relied upon for entry into the market, the Court indirectly balanced the extension of EU regulatory standards abroad with the regulatory autonomy of third countries, thereby 'crafting its own interpretation of the appropriate limits on the extraterritorial reach of EU authority'.[104]

In his opinion, AG Bobek arrived at the same conclusion but employed more explicit and comprehensive reasoning. He explained that if the ban was extended to all products containing substances tested on animals, then 'the marketing ban could be triggered by apparently unconnected events (temporally, territorially and sectorally)'[105] and would have led to 'extreme results'.[106] This language indicates constraints on the extraterritorial reach of EU law pertaining to the need for a territorial connection that would trigger the application of EU legislation. In this case, the trigger was the *reliance* on animal testing to prove compliance with EU safety requirements in order to market products in the EU.[107] The AG explicitly drew attention to the fact that the broad interpretation advocated by the interveners could result in direct conflict with third-country norms, forcing manufacturers to choose where to market their products and thus create a *de facto* import or export ban that would possibly be incompatible with WTO law.[108] The AG reached his conclusion through a textual, contextual, and purposive analysis, including examining the legislative history of the Cosmetics Regulation and the coherence between different pieces of EU legislation, including Registration, Evaluation, Authorisation and Restriction of Chemicals ('REACH'), which does not prohibit animal testing for purposes other than cosmetics.[109] As evidenced by the AG's Opinion, the Court's

[104] J Lawrence, 'The Extraterritorial Reach of EU Animal Welfare Rules (Again): Case C-592/14 *European Federation for Cosmetic Ingredients*' (*European Law Blog*, 16 November 2016), http://europeanlawblog.eu/2016/11/16/the-extraterritorial-reach-of-eu-animal-welfare-rules-again-case-c-59214-european-federation-for-cosmetic-ingredients.

[105] Opinion of Advocate General Bobek in *European Federation for Cosmetic Ingredients*, C-592/14, EU:C:2016:179, para 63.

[106] Ibid, para 60.

[107] Ibid, para 88.

[108] Ibid, para 72.

[109] Ibid paras 66–68.

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narrow teleological approach to interpretation of the Cosmetics Regulation as giving effect to the objective of animal welfare could have been improved by more elaborate and legitimate judicial reasoning that would have boosted both the Court's own credibility and the credibility of EU law.

The Court of Justice again missed an opportunity to systematically and coherently develop reasoning on how and when EU legislation can extend its application beyond EU borders. It did not refer to the development of international standards and the EU's cooperation with third countries on these issues in grounding the EU's approach in extending moral concerns abroad. While extraterritorial effects may have been 'partly intended' by the legislature,[110] which wished to send a strong signal to the rest of the world, the Regulation was not designed explicitly with a broad territorial scope. Indeed, the judgment provided support for greater regulatory action in this area and was explicitly referred to in a subsequent resolution adopted by the European Parliament, which calls for a global ban of animal testing for cosmetics.[111] Remarkably, unlike the Court, the European Parliament places particular emphasis on avenues of international cooperation through diplomatic means, using the EU's Regulation as a model for a establishing a global ban, demonstrating more readiness for cooperative action while recognising the EU's global leadership position.[112] The Court's reasoning could have also referred to international considerations, including the development of non-animal-testing methods under the Organisation for Economic Co-operation and Development ('OECD'), which the Regulation refers to,[113] or the EU's cooperative efforts with several third countries in developing such methods.[114] Such considerations in the Court's reasoning could enhance legitimacy by demonstrating respect for international cooperation and representation of third-country governments, which take part in the formulation of international standards and are engaged in cooperative networks with the EU. This would be in line with the EU's commitment to the strict observance of international law and the promotion of multilateral cooperation,[115] and would have contributed to addressing the participation and representation gap related to IEMEIs.

To conclude, in these two cases, the Court of Justice played a critical role in the emergence of transnational governance by interpreting EU legislation with a broad territorial scope. The subsequent interpretation of legislation with a broad territorial scope could become a more frequent phenomenon when determining the obligations of UK operators trading with the EU after Brexit, including in relation to animal

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[110] COM (2013) 135 final, 'Communication on the Animal Testing and Marketing Ban and on the State of Play in Relation to Alternative Methods in the Field of Cosmetics', p 6; Commission response to Petition to the European Parliament 0471/2013.

[111] See note 102 above.

[112] Ibid, p 5.

[113] Regulation (EC) 1223/2009, note 98 above, Art 18.

[114] For example, with the US, Canada, and Japan under the network of International Cooperation on Cosmetic Regulation ('ICCR').

[115] Arts 3(5), 21 TEU.

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welfare issues.[116] In cases of *ex post* interpretation of EU legislation with a broad territorial scope, however, the judicial process may be accentuating the participation and representation gap given that third-country actors would likely not have sufficiently participated in the formulation of EU measures. Additionally, the CJEU may be exacerbating the accountability gap given that the legislature would not have justified a broad territorial scope when designing the measure and procedural guarantees on the application of EU law to third-country actors would not have been sufficiently embedded in the regulatory framework. These two cases largely enabled the exercise of EU global regulatory power through EU 'internal' legislation. While the Court imposed some limits through avoidance of a conflict with third-country norms, it did not engage with enforcement challenges or with how the EU's unilateral action would fit with international developments.

Although the cases considered in this section were brought by EU operators, they explicitly questioned the territorial scope of EU legislation and had important extraterritorial effects, which were only marginally recognised and dealt with by the Court. In contrast, the cases examined in Section V were brought by third-country actors, who questioned the legality of EU legislation explicitly designed with a broad territorial scope. The CJEU was thus 'forced' to more openly deal with issues of extraterritoriality.

V. JUDICIAL REVIEW OF THE LEGALITY OF THE TERRITORIAL SCOPE OF EU LEGISLATION

This Part deals with two cases where the CJEU was required to review the legality of EU legislation *designed* with a broad territorial scope. They provide examples where the CJEU directly engaged with third-country actors affected by EU legislation as the applicants to the cases and demonstrate how judicial review can serve as a transnational accountability avenue for foreign actors. At the same time, they also show the readiness of the CJEU to uphold the broad geographical scope of EU legislation, while lightly reviewing the extraterritorial impacts of EU legislation on the basis of different grounds of judicial review under Article 263(4) TFEU, such as competences, international law, and fundamental rights.

A. *International Aviation Emissions:* Air Transport Association of America

The most high-profile case on the extraterritorial reach of EU law in recent years concerned a challenge by American airlines regarding the legality of Directive 2008/101, which included international aviation emissions in the EU ETS.[117] This case is different from the two previously discussed, as the territorial scope of the Directive was

[116] A Griffin, 'Animal Sentience: What Is Really Going on with the Controversial Brexit Amendment?' (*Independent*, 23 November 2017), http://www.independent.co.uk/environment/animal-sentience-brexit-vote-caroline-lucas-michael-gove-truth-fact-argument-a8072071.html.

[117] *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* (*ATAA*), C-366/10, EU:C:2011:864; see note 8 above.

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made explicitly clear in the legislation and the question before the Court of Justice was rather whether its broad territorial scope was compatible with international law.

As mentioned above in Part II, the Aviation Directive required all flights arriving to or departing from EU airports to surrender allowances for emissions emitted during their trips, including parts of the journey that take place entirely outside of EU airspace. Failure to comply with surrendering allowances would lead to airlines incurring fines[118] and potentially being excluded from EU airports.[119] The Directive included several 'contingency' features that enabled flexibility in its application. First, it provided the possibility for revising the scheme in case an international agreement was reached under the International Civil Aviation Organization ('ICAO').[120] Second, it provided the possibility for journeys departing from countries which adopted equivalent legislation to be exempted from the EU ETS.[121] Following the adoption of the Directive, there was strong international reaction to the EU's action and threats for retaliatory action.[122] The case before the Court was therefore in the midst of a political debate about the appropriate jurisdictional limits of the EU's regulatory power in relation to global aviation emissions. Given that third-country actors were not able *ex ante* to influence the formulation of the Aviation Directive, they employed *ex post* strategic litigation to voice their concerns. As Korkea-aho argues, this case may be seen as a successful effort of 'judicial lobbying' with third-country actors raising their concerns about the EU's action before the CJEU in ways that did not occur or succeed during the formulation of the Directive.[123]

In the case of *Air Transport Association of America* (*ATAA*), both the Court of Justice and the AG upheld the EU's competence unilaterally to include international aviation emissions in the EU ETS, largely facilitating the unilateral exercise of EU global regulatory power. While EU environmental competence provides that Union policy should contribute to 'promoting measures *at international level* to deal with regional or worldwide environmental problems, and in particular combating climate change',[124] it is questionable whether this includes *unilateral* extension of the regulatory remit of EU domestic legislation. The EU's commitment to multilateralism may rather indicate that unilateral action is contrary to promoting international action and cooperating with third countries.[125] However, as AG Kokott put it, EU institutions 'could not reasonably be required to give the ICAO bodies unlimited time in which to develop a multilateral solution' and thus it was within

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[118] See note 8 above, Art 16(3).

[119] Ibid, Arts 16(5)–16(12).

[120] Directive 2003/87/EC, note 16 above, Art 25a(2).

[121] Ibid; note 8 above, Rec 17.

[122] See E Morgera and K Kulovesi, 'The Role of the EU in Promoting International Standards in the Area of Climate Change' in I Govaere and S Poli Ghent (eds), *EU Management of Global Emergencies, Legal Framework for Combating Threats and Crises* (Martinus Nijhoff, 2014).

[123] See note 47 above.

[124] Art 191(1) TFEU.

[125] Art 21(1) TEU.

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their powers to opt for a unilateral solution.[126] In justifying the EU's unilateral move, the Court emphasised the importance of environmental protection objectives in the EU Treaties and that these objectives 'follow on' from international agreements.[127] This approach seeks to achieve a balance between unilateralism and multilateralism by justifying EU unilateral action in light of insufficient international action and validating the existence of IEMEIs as necessary, albeit second-based, solutions to global environmental problems.

The territorial scope of environmental competence was also given a broad meaning in this case, justifying the EU's measure on the basis of a territorial link between the EU and the regulated activity. The EU's competence was found to extend to situations where the EU unilaterally imposes conditions to third-country operators when they choose to conduct business with the EU—in this case when airlines choose to depart from or arrive to EU airports.[128] The physical presence of foreign airlines in EU airports subjected them to the 'unlimited jurisdiction of the EU' and the Directive was found not to infringe the customary principle of territoriality or the sovereignty of third countries.[129] However, this line of judicial reasoning seemed to be disconnected from commercial reality which makes it difficult or commercially impossible for airlines to avoid EU airports altogether.[130] Additionally, avoiding EU airports by rerouting aircrafts to other airports could lead to higher emissions, undermining the environmental integrity of the measure.

The AG's opinion engaged more dynamically with the transboundary nature of the regulated issue and with the innovative design of the Directive, while also holding that the Directive did not have any extraterritorial effect. The AG emphasised that there is an adequate territorial link with the EU and taking into account the whole duration of the flight is necessary due to the transboundary nature of air pollution which 'knows no boundaries' and requires regulating GHG emissions wherever these may occur.[131] Effects-based reasoning was thus used by the AG in explaining the need for a broad territorial scope of climate change regulation. While the effects of air-polluting activities within the EU were alluded to by the Court as well,[132] the existence of effects within the regulating jurisdiction was not determined as a prerequisite for a broad territorial scope of EU law in this area.[133] Additionally, the AG clarified that the Directive does not have any adverse effect on the sovereignty

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[126] Opinion of Advocate General Kokott in *Air Transport Association of America*, C-366/10, EU:C:2011:637, para 186.

[127] *ATAA*, note 117 above, para 128.

[128] Ibid, para 127.

[129] Ibid, para 125.

[130] B F Havel and J Q Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air and Space Law* 3.

[131] Ibid, para 154.

[132] *ATAA*, note 117 above, para 129.

[133] In contrast, the CJEU explicitly endorsed effects-based jurisdiction in competition law: *Gencor*, note 56 above; *Intel*, note 56 above.

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of third countries. Despite the possibility of double regulation where flights might be subject to two different emissions trading systems, this is not against international law. In any case, the Directive provides a savings clause expressing the EU's willingness to accept third-country measures, thus avoiding a conflict with third-country norms.[134] The AG thus used the 'contingent' unilateral nature of the Directive, which provided the possibility to exclude certain arriving flights, to demonstrate the openness of the EU to accepting and deferring to third-country equivalent legislation.

The Court could have also engaged with the 'contingent' nature of the legislation, drawing attention to how the EU legislator ensured that *unilateral regulation would fit with cooperative action with third countries* both through an international agreement and through coordination with foreign legislation so as to avoid any conflict of norms. It could also have emphasised the requirement to consult with third countries when determining the 'optimal interaction' between the EU's measure and third-country measures[135] as evidence of the EU respecting state sovereignty and potentially creating avenues for input by third-country governments that would contribute to addressing the representation and accountability gap related to IEMEIs.

Beyond determining the parameters of EU competence, with this judgment, the Court engaged with transnational governance by reviewing the compatibility of EU legislation with international law. By upholding the EU's commitment to international law as incorporated in Article 3(5) TEU, the Court opened avenues in relation to the kinds of legal arguments that can be put forward by third-country actors when challenging the legality of EU law with extraterritorial reach. Judicial review of EU law on the basis of international law could develop into an important avenue for enhancing the accountability gap of IEMEIs in two different ways. On the one hand, through review of the legality of EU law on the basis of international law, including customary international law norms on jurisdiction,[136] and on the other hand, through the principle of consistent interpretation of EU law in line with international law. The Court's approach in reviewing the legality of the Aviation Directive on the basis of international law demonstrates the complexities of the former approach in ways that may suggest that consistent interpretation could offer a preferable alternative avenue of accountability.

The Court of Justice in *ATAA* applied strict requirements for review of EU law both on the basis of international agreements and of customary law. For example, it held that the provision of the Kyoto Protocol that provided for aviation emissions to be tackled through the ICAO lacked direct effect because of its imprecise and conditional nature.[137] As for customary rules on jurisdiction, the Court clarified that only those rules that could call into question the EU's competence and those which are liable to affect rights which the individual derives from EU law or create

[134] See note 126 above, paras 158–59.

[135] See note 8 above, Rec 17.

[136] See note 59 above.

[137] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 148, Art 2(2). See *ATAA*, note 117 above, paras 77–78.

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obligations under EU law could be relied upon.[138] Even when such conditions are met, the assessment of compatibility would be limited to whether EU institutions exercised a 'manifest error of assessment' in applying the relevant rules as they would never be found to be sufficiently precise.[139] Given that IEMEIs incorporate and refer to international law instruments explicitly, the Court could move beyond marginal review of the compatibility of EU legislation with international law instruments that have been identified as relevant by the legislator. A middle ground that would allow for full review in cases where sufficient precision is found would have arguably been preferable.[140] This would be in line with the CJEU's approach in extensively recognising direct effect of sufficiently precise EU law provisions in the legal orders of the Member States. The CJEU however is more willing to hold Member States to account in relation to their commitments under EU law than it is in holding the EU institutions to account in relation to the EU's commitments under international law. In any case, given the broad interpretation of the unilateral and extraterritorial aspects of IEMEIs discussed above, it is unlikely that the EU would be found to have overstepped jurisdictional boundaries in accordance with customary rules.

The reluctance of the EU courts to find direct effect of international law may be partly explained because of the remedies available in the EU judicial system. Annulment of EU law by the courts is a 'nuclear' solution that challenges the EU political process and is particularly contentious on the basis of international law.[141] In this respect, consistent interpretation of EU law in line with international law may provide a more appropriate and less controversial way for holding the legislature to account in relation to extraterritorial effects on the basis of international law.

Rather than invalidating EU legislation on the basis of international law, the EU courts can instead interpret EU measures so far as possible, in a manner consistent with international agreements,[142] as indicated by AG Kokott in *ATAA*.[143] Additionally, recent case law on external relations demonstrates that even if the CJEU might not invalidate EU legislation, it can play a critical role in determining the territorial and constitutional boundaries of the interaction of the EU legal order with the rest of the world. In *Western Sahara*, UK campaigners challenged the validity of the EU's fisheries agreement with Morocco, claiming that it was in violation

[138] Ibid, para 107.

[139] Ibid, para 110.

[140] G de Baere and C Ryngaert, 'The ECJ's Judgment in *Air Transport Association of America* and the International Legal Context of the EU's Climate Change Policy' (2013) 18 *European Foreign Affairs Review* 389.

[141] P Eeckhout, 'The Integration of Public International Law in EU Law: Analytical and Normative Questions' in P Eeckhout and M L Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing, 2016), p 199.

[142] *Commission v Germany*, C-61/94, EU:C:1996:313, para 52.

[143] See note 126 above, para 163.

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of Article 3(5) TEU on the strict observance of international law.[144] The Court used Article 3(5) TEU to interpret the concept of 'territory' in the Agreement with Morocco, holding that it was not applicable to the territory of Western Sahara as this would have been contrary to the right of self-determination and other international law, to which the EU legal order has committed as part of its own constitutional principles.[145] The use of consistent interpretation in a more dynamic way could enhance the legitimacy of EU unilateral action in accordance with international norms and would be particularly justified in relation to IEMEIs that specifically make references to international instruments, as discussed below in relation to the *Inuit* cases.

Overall, the Court in *ATTA* played a significant role in transnational environmental governance in many respects. While the Court upheld the validity of the Directive, the EU was under political pressure to withdraw the measure and decided to temporarily freeze the application of the full scope of the Directive in light of developments under ICAO.[146] Nonetheless, finding the Aviation Directive compatible with international law reinforced the legitimacy of the EU's claim to unilaterally regulate GHG emissions. Notably the judgment has been cited in subsequent action on international aviation emissions in support of the EU's claim to regulatory authority over activities taking place partly abroad.[147] It also paved the road for expanding this type of climate change regulation, for example in relation to shipping emissions.[148]

B. Trade in Seal Products: The Inuit Saga

The final instance analysed in this Article where the CJEU engaged with extraterritoriality concerns the Inuit series of cases. In *Inuit I*, third-country applicants directly challenged the validity of the Seals Regulation,[149] while in *Inuit II* they challenged

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[144] *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, C-266/16, EU:C:2018:118.

[145] J Larik, 'A Line in the Sand: The Strict Observance of International Law in the *Western Sahara* Case' (*Verfassungsblog on Matters Constitutional*, 2 March 2018), https://verfassungsblog.de/a-line-in-the-sand-the-strict-observance-of-international-law-in-the-western-sahara-case.

[146] Parliament and Council Decision 377/2013/EU [2013] OJ L113.

[147] COM (2013) 0722, Proposal for a Directive amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, p 2; Parliament and Council Regulation (EU) 2017/2392 [2017] OJ L350/7, Rec 5; SWD (2017) 31 final, Impact Assessment on the Proposal for a Regulation amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community in view of the implementation of a single global market-based measure to international aviation emissions, p 96.

[148] Parliament and Council Regulation (EU) 2015/757 [2015] OJ L123/55.

[149] *Inuit Tapiriit Kanatami v Parliament and Council (Inuit I)*, T-18/10, EU:T:2011:419; *P Inuit Tapiriit Kanatami and others v Parliament and Council (Inuit I)*, C-583/11, EU:C:2013:625. See note 12 above.

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the validity of the Seals Regulation and of the Implementing Regulation.[150] The Seals Regulation prohibits trade in seal products in the EU and applies both to seals hunted within the EU, as well as to imported seal products. The Regulation, from the outset, included an exception permitting for imports of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities under certain conditions.[151]

In Inuit I, both the General Court and the Court of Justice focused on standing. As discussed above in Part III, while access to the CJEU is in principle open to third-country actors, standing requirements have been interpreted strictly by the CJEU in ways that substantially limit direct access to the EU courts, both for EU and non-EU actors. The legal design of IEMEIs, which often imposes direct obligations on EU actors while indirectly affecting third-country interests, means that in practice direct access by third-country actors is often more restricted, raising questions as to whether judicial review in the EU can serve as a transnational accountability mechanism.[152]

In this case, the General Court elaborated on the meaning of 'direct concern' under Article 263(4) TFEU in a way that was notably important for third-country actors. The General Court expanded the understanding of standing adopted in earlier case law, according to which an EU unilateral act could not create rights and obligations outside the EU territory.[153] However, the General Court made a distinction between those applicants that were active in placing seal products on the EU market, whose legal position would be directly affected by the EU measure, and those applicants engaged in seal hunting outside the EU, whose economic position would be indirectly affected.[154] The General Court found direct concern only in relation to the former category. AG Kokott sought to expand this interpretation by emphasising that 'direct concern' should not be limited to those whose legal position is affected but also extend to those directly factually affected in their capacity as market participants in competition with other market participants.[155] However, the AG stressed the importance of not opening the category of directly affected interests 'endlessly' to those active in the upstream of trade. This legal point was not reviewed by the Court of Justice, which determined that the measure was not a regulatory act and applicants lacked individual concern in any case.[156]

The way in which IEMEIs are often designed, by imposing direct obligations on EU operators and only indirectly affecting third-country actors, signifies that foreign operators will usually not have direct access to the EU courts. This reveals the

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[150] *Inuit Tapiriit Kanatami v Parliament and Council* (*Inuit II*), Case T-526/10, EU:T:2013:215; *Inuit Tapiriit Kanatami and Others v European Commission* (*Inuit II*), Case C-398/13, EU:C:2015:535; Commission Regulation (EU) 737/2010 [2010] OJ L216/1.

[151] See note 12 above, Art 3(1).

[152] See note 49 above.

[153] *Commune de Champagne v Council and Commission*, T-212/02, EU:T:2007:194, para 2.

[154] *Inuit I*, Case T-18/10, note 149 above, para 75.

[155] Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami*, Case C-583/11, EU:C:2013:21, para 71.

[156] *Inuit I*, Case C-583/11, note 149 above.

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limitations of judicial protection of less directly affected interests in the EU judicial system, which may instead resort to the WTO dispute settlement as third countries did in relation to the Seals Regulation.[157] At the same time, it shows how standing rules, as currently interpreted, delimit who is sufficiently affected in a restrictive way so as to avoid 'floodgates' or 'endless' claims. This in turn can strengthen the argument for greater substantive protection of those interests that *are* directly affected, which formed the focus of *Inuit II*.

Contrary to *Inuit I*, the focus of the judgment in *Inuit II* was largely on the merits of the case and dealt with legality challenges on three grounds: (1) incorrect legal basis; (2) infringement of proportionality and subsidiarity; and (3) infringement of fundamental rights.

First, regarding the choice of legal basis, the relevant scope of affected interests was determined in a narrow manner focusing on the fact the aim of the Seals Regulation was to improve the functioning of the internal market under Article 114 TFEU and not animal welfare. Thus, effects on international trade were merely secondary.[158] This approach was adopted, irrespective of the fact that most actors affected by the Regulation were located outside the EU.[159] Importantly, both the General Court and the Court of Justice held that Article 114 TFEU is not subject to a *de minimis* rule relating to the minimum volume of trade in products within the EU.[160] In reviewing the alternative argument put forward by the applicants to use Article 207 TFEU on the common commercial policy for trade with third countries alongside Article 114 TFEU, the General Court adopted a very broad approach in finding that the Seals Regulation did not amount to an import ban given that the 'entry, processing, manufacture and storage of seal products' was not prohibited so long as those products were not released on the market.[161] The effects on external trade were merely secondary. While the General Court's approach is understandable in avoiding a situation where the EU's exclusive competence under Article 207 TFEU would be expanded considerably to prevent Member States from adopting national legislation to ban products from their markets,[162] this approach also demonstrates how third-country effects constitute an 'afterthought' and are downgraded in the Court's assessment.

Second, in reviewing proportionality, the General Court applied marginal review, leaving considerable discretion to decision makers.[163] While it reiterated that the

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[157] AB Report on EC—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R adopted 18 June 2014. However, unlike access to the CJEU, the WTO dispute settlement system is restricted to state disputes.

[158] *Inuit II*, Case T-526/10, note 150 above, para 71.

[159] Ibid, para 70.

[160] Ibid, paras 55–56; *Inuit II*, Case C-398/13, note 150 above, paras 39–42.

[161] *Inuit II*, Case T-526/10, note 150 above, para 70.

[162] L Ankermsit, 'The Seal Product Cases (II): Case T-526/10 *Inuit Tapriit Kanatami and others*' (*European Law Blog*, 7 May 2013), https://europeanlawblog.eu/2013/05/07/the-seal-product-cases-ii-case-t-52610-inuit-tapriit-kanatami-and-others.

[163] The CJEU did not examine this issue.

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choice for a measure had to be based on objective criteria, the test to be applied was whether the measure was 'manifestly inappropriate' in pursuing the objective, which demonstrates the reluctance of the EU courts to interfere with policy choices in areas involving 'political, economic and social choices'.[164] The fact that the Regulation was not an outright ban, as initially envisioned in the Commission's proposal, provided evidence of having sufficiently taken into account the situation of the Inuit communities. An alternative measure in the form of labelling was not deemed to be as effective and easy to comply with in ensuring free movement of goods and satisfying consumer concerns.[165] Notably the Court did not engage in an analysis of this alternative less trade restrictive measure itself, as it often does in relation to Member State measures, but rather deferred to the legislature's reasoning, thus exacerbating the accountability gap related to the unilateral exercise of EU global regulatory power. At the same time, while the General Court engaged with the question of strict proportionality, in the sense of the Regulation having considerable effects on the survival of the Inuit communities in particular, it dealt with this question very briefly. It held the evidence put forward in showing detrimental effects to the Inuit communities was general and unsubstantiated,[166] thus insufficiently addressing the distributive justice gap related to IEMEIs.

It should be noted that the animal welfare integration principle in Article 13 TFEU requires EU policies to 'pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage'. If the objective of the Regulation was held to be that of animal welfare, then the assessment of proportionality could have been informed by the need to strike a balance between these different interests and values. However, in any case, Article 13 TFEU refers to Member States' practices and not those of third countries, which may signal greater discretion for decision-makers for how to respect third-country practices.

In reality, despite the Inuit exception, the Regulation would significantly affect the traditional way of living and subsistence of indigenous communities in third countries in ways that could exacerbate an accountability and justice gap in relation to the effects of EU legislation on local communities in third countries. However, regrettably the CJEU's approach did not sufficiently engage with such effects. On the basis of the Court's reasoning, it is unlikely for the Seals Regulation to be successfully challenged through the EU courts unless when seal products originating from traditional hunts are specifically excluded and the affected Inuit communities can demonstrate actual harm.[167] However, even in such situations, it is unclear how the CJEU will engage in reviewing the balance struck between the protection of animals in third countries and the effects on Inuit communities in third countries.

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[164] *Inuit II*, Case T-526/10, note 150 above, para 88.

[165] Ibid, para 95.

[166] Ibid, paras 97–98.

[167] S Vezzani, 'The *Inuit Tapiriit Kanatami II* Case and the Protection of Indigenous Peoples' Rights: A Missed Opportunity?' (2016) 1(1) *European Papers* 307.

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The Court's likely approach can be further informed by how it dealt with the final ground of review, relating to infringement of fundamental rights, which also involves a proportionality assessment.

Third, the CJEU was called upon to deal with how the Seals Regulation would affect the fundamental rights of indigenous communities whose subsistence was largely dependent on seal hunting in ways that could exacerbate the distributive justice gap related to IEMEIs. In relation to the alleged infringement of the applicants' right to property, the CJEU held that unlike *Kadi*, where the property of an individual was clearly impaired as a result of an asset-freezing measure,[168] in this case the applicants were unable to demonstrate that their right to property had been impaired. Notably, both the General Court and the Court of Justice reiterated that the right to property does not extend to the protection of mere commercial interests or opportunities and thus 'the mere possibility of being able to market … products' in the EU market is not considered to be protected.[169]

Beyond the right to property, the applicants also claimed that their right to be heard had been infringed, which is particularly important in addressing the procedural justice and accountability gaps related to IEMEIs. The applicants argued that the legislature failed to consult with and obtain the consent of Inuit communities in accordance with Article 19 of the UN Declaration on the Rights of Indigenous Peoples,[170] raising issues as to how EU unilateral action fits with parallel international regimes protecting the rights of indigenous peoples. The General Court held that as a matter of EU law, the legislature was not under an obligation to consult in the absence of a specific provision requiring it to do so in the EU treaties or secondary legislation.[171] Second, in relation to the UN Declaration, it was found not to have binding effects on the EU legislature.[172] On appeal, the Court of Justice refused to rule whether Article 19 of the Declaration amounted to a customary rule of international law, rejecting this argument on procedural grounds.[173] Even if the Court had examined the issue, it is unlikely that it would be found to amount to customary law, and even more unlikely that the EU measure would be incompatible with it. As the CJEU has held on numerous occasions, including in *ATAA* discussed above, the standard of judicial review of compatibility of EU law with customary principles of international law is that of a manifest error of assessment, which is largely deferential to the regulator. Given that the legislator consulted with Inuit communities and

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[168] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, C-402 and 415/05 P, EU:C:2008:461; *Commission et al. v Kadi*, Joined Cases C–584/10 P, C–593/10 P & C–595/10P, EU:C:2013:518.

[169] *Inuit II*, Case T-526/10, note 150 above, para 109; *Inuit II*, Case C-398/13, note 150, paras 60–62.

[170] UN Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, Art 19: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.

[171] *Inuit II*, Case T-526/10, note 150, para 113.

[172] Ibid, para 112.

[173] *Inuit II*, Case C-398/13, note 150, paras 56–58.

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included an exception to the Regulation, no manifest error of assessment would be found. The Court could have shown more readiness in engaging with international law in this case while arriving at the same conclusion that the Seals Regulation did not infringe this principle of international law. By refusing to examine this issue, the Court seemed more closed to international law arguments that it needed to be.

The AG reviewed this issue and held that Article 19 of the Declaration does not amount to a rule of customary rule but recognised the important effects of soft law, which can have political weight and influence the behaviour of decision makers.[174] In this respect, AG Kokott was satisfied that the legislature consulted with Inuit communities and included an exception in the legislation, stressing that not more could have been expected by the legislature. These consultations were considered to fall within political discretion and did not amount to a legal obligation amenable to judicial review.[175] The Court could have adopted a broader approach to recognising legal effects of the UN Declaration through the use of consistent interpretation, using Article 3(5) TEU that calls for strict observance of international law. This approach is also supported by the fact that the UN Declaration was explicitly mentioned in the Seals Regulation and therefore the legislator considered it relevant.[176] In such a case, the CJEU could have reviewed whether the consultations were carried consistently with Article 19 of the Declaration, in accordance with the principle of good faith as well as the extent to which consultations led to the obtainment of free, prior, and informed consent by indigenous communities.[177] In this way the CJEU could have significantly contributed to addressing the participation and representation gap as well as the distributive justice gap related to IEMEIs.

Overall, by upholding the validity of the Regulation, the EU legislator was allowed to 'externalise the internal market' without clear limits as to how and when it does so.[178] The CJEU did not approach fundamental rights in ways that would accommodate for different cultural interpretations in line with international developments on the collective rights of indigenous peoples,[179] which could have contributed to addressing the distributive justice gap created through the imposition of trade restrictions to protect EU consumer preferences, while not sufficiently accounting for the detrimental impacts on the subsistence of vulnerable communities in third countries.

VI. CONCLUSION

To conclude, given increasing globalisation and economic interdependence, judicial determinations on internal trade regulation largely affect foreign actors that are

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[174] Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami*, C-398/13 EU:C:2015:190, para 94.

[175] Ibid; *Inuit II*, Case T-526/10, note 150 above, para 114.

[176] However, the Regulation refers to the Declaration in general terms and not to the consultation rights under Art 19: Regulation (EU) 737/2010, note 150 above, Rec 14.

[177] See the text of Art 19, note 170 above.

[178] Fahey, note 54 above.

[179] See note 167 above.

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dependent on large market economies. By making the final interpretative and legality determinations in one of the largest markets in the world, the CJEU has inevitably emerged as an important actor in transnational governance. Its judgments contribute to international developments on the exercise of jurisdiction and have significant effects on regulatory developments abroad.

As emerges from the analysis of the case law, the CJEU is consistently prepared to expand the territorial scope of EU environmental law and uphold the legislature's such expansions, thus largely enabling EU global regulatory power without always devising systematic constraints. While in principle, judicial review in the EU provides an important mechanism that can contribute to filling the accountability, participation, and justice gaps related to IEMEIs, its function to date falls short of providing a satisfactory mechanism for controlling the EU's global regulatory power. When reviewing the extraterritorial reach of EU environmental law, the CJEU tends to focus on internal reasoning that insufficiently considers the impacts of EU law beyond its borders. In particular, the CJEU bases the EU's justification for authority in regulating conduct abroad on the need to enhance the effectiveness of EU law (*EFCI*), the importance of the legitimate objectives that EU regulation pursues (*Zuchtvieh-Export*), the compatibility of EU regulation with international legal instruments (*ATAA*), and the need to improve the functioning of the internal market with merely secondary external impacts (*Inuit*).

At the same time, the CJEU has developed some judicial limits on the extension of the EU's regulatory reach and shows some openness to other legal orders. The interpretation of EU legislation with an equivalence clause in *Zuchtvieh-Export* or the limitation of its extraterritorial reach in situations where foreign actors are engaged in trade with the EU in *EFCI*, present different judicial mechanisms for avoiding a conflict with third-country norms. Additionally, reviewing the compatibility of the EU's Aviation Directive with international law and requiring for the existence of a territorial link between the EU and the regulated activity in *ATAA* present additional limitations to the extension of the regulatory remit of EU legislation. While these limits impose some constraints on the EU's global regulatory power, they fall short of sufficiently recognising and addressing the impacts of EU legislation on third-country actors in ways that enhance the acceptance of the EU's regulatory authority by third-country affected actors. In particular, judicial review by the CJEU fails to serve as a transnational accountability avenue due to constraints of accessing the EU courts and the deferential approach of judicial review of EU complex policy decisions. Additionally, the CJEU does not function as a forum or representation and participation of third-country interests given that the CJEU does not recognise participation rights beyond what is already recognised under EU law. For example, in *Inuit II*, while the CJEU drew attention to the consultations of the EU legislature with the Inuit communities, this was not found to be a legal requirement but rather part of the political process at the discretion of the EU legislature. Finally, the CJEU does not seem prepared to examine issues relating to distributive justice both at country level, in terms of the support provided to developing countries in meeting EU requirements (*Zuchtvieh-Export*) and at individual level, pertaining to the impact of EU trade regulation on the fundamental rights of third-country actors

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(*Inuit*). These shortcomings demonstrate untapped potential for judicial review by the CJEU to fulfil a legitimising function in controlling the EU's global regulatory power. Particularly when the CJEU itself interprets legislation with a broad territorial scope, this should be accompanied by constraints relating to the determination of equivalence, the relationship of EU standards with relevant international law and the mechanisms of enforcement abroad.

The validation and extension of the extraterritorial reach of EU law by the highest judicial body of the EU can significantly influence the EU's external relations and provides support for the EU to engage in further unilateral action through territorial extension. The CJEU needs to be aware that with its judgments on the territorial scope of EU law, it enters and contributes to the international discourse about the appropriate boundaries of state sovereignty and jurisdiction. Therefore, it should develop reasoning that provides systematic and consistent delimitation of the EU's regulatory power in ways that also respect the rights of other states to regulate activities cantered on their territory. Embedding judicial reasoning with international considerations can significantly enhance the external credibility of the EU.

Beyond judicial review by the CJEU, the extent to which the EU's global regulatory power is sufficiently controlled is also determined by EU decision-making processes which can provide additional opportunities for input by third-country actors and for holding the EU institutions to account through 'soft law' and political mechanisms. Beyond EU law, other legal systems relevant to IEMEIs, such as WTO law and subject-specific international regimes, could provide additional ways for filling the different kinds of gaps and controlling the EU's unilateral regulatory activity. Legally examining the extraterritorial reach of EU law thus requires analysing this phenomenon across multiple legal systems and exploring interactions among them. The analysis of this Article thereby forms part of a larger research agenda in assessing the legality and legitimacy of the phenomenon of IEMEIs, and offers useful insights as to the permissible boundaries of the EU's global regulatory power according to the CJEU.

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