



## ARTICLES

### SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

#### THE EXTRATERRITORIAL REACH OF EU ENVIRONMENTAL LAW AND ACCESS TO JUSTICE BY THIRD COUNTRY ACTORS

IOANNA HADJIYIANNI\*

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ABSTRACT: The EU conducts its external relations through different types of tools, including through unilateral domestic measures with extraterritorial implications that extend its regulatory power to processes occurring partly abroad. These are increasingly prevalent in the area of environmental protection, including climate change. Examples include the sustainability criteria for biofuels, the inclusion of aviation emissions in the EU emissions trading system, ship recycling, exports of electrical and electronic waste and imports of timber. Because these measures are unilateral in nature, developed within the EU legal order, but have important legal and policy effects beyond EU borders, they raise complex legitimacy questions and may give rise to an external accountability gap. The role of EU administrative law, which controls the exercise of EU public power, is important in “disciplining” the exercise of EU power beyond EU borders and filling this gap. The *Article* explores some of the novel regulatory techniques employed in these kinds of internal measures to conduct external action and how administrative law responds to their complexities. It focuses on access to justice in the EU legal order in exploring the extent of an external accountability gap. The constraints of accessing the EU judicial system may accentuate the external accountability gap if the

\* Max Weber Postdoctoral Fellow, Law Department, European University Institute, ioanna.hadjiyianni@eui.eu.

EU cannot be held into account on the basis of its own rule of law by third country actors affected by its action.

KEYWORDS: environment – climate change – extraterritorial implications – access to justice – Aarhus Convention – third country.

## I. INTRODUCTION

The EU pursues external action through different kinds of legal mechanisms and regulatory techniques, including unilateral measures that extend its regulatory power to processes taking place abroad. These measures are proliferating in many EU policy areas, including financial services regulation<sup>1</sup> and data protection law.<sup>2</sup> The focus of this *Article* is on such measures as they become increasingly prevalent in the area of environmental protection and climate change. Examples of *Internal Environmental Measures with Extraterritorial Implications* (IEMEIs) include the sustainability criteria for biofuels,<sup>3</sup> the inclusion of aviation emissions in the EU Emissions Trading System (EU ETS),<sup>4</sup> regulation of ship recycling,<sup>5</sup> exports of waste of electrical and electronic equipment,<sup>6</sup> imports of timber,<sup>7</sup> and imports of fish and fishery products.<sup>8</sup> By their legal design, IEMEIs regulate conduct or processes taking place, at least partly, in third countries (TCs),<sup>9</sup> and influence business practices and regulatory approaches abroad, thus having important impacts on different kinds of TC actors.<sup>10</sup> IEMEIs reflect the extraterritorial reach of EU environ-

<sup>1</sup> J. SCOTT, *The New EU 'Extraterritoriality'*, in *Common Market Law Review*, 2014, p. 1343 *et seq.*

<sup>2</sup> C. KUNER, *Extraterritoriality and Regulation of International Data Transfers in EU Data Protection Law*, in *International Data Privacy Law*, 2015, p. 235 *et seq.*

<sup>3</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (hereinafter, also Renewable Energy Directive).

<sup>4</sup> Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (hereinafter, also Aviation Directive).

<sup>5</sup> Regulation (EU) 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling (hereinafter, also Ship Recycling Regulation).

<sup>6</sup> Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE; hereinafter, also Directive on electrical and electronic waste).

<sup>7</sup> Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (hereinafter, also Timber Regulation).

<sup>8</sup> Regulation (EC) 1005/2008 of the Council of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU; hereinafter, also IUU Fishing Regulation).

<sup>9</sup> TCs are understood as non-EU countries.

<sup>10</sup> TC actors consist of non-EU public and private interests, including government, industry, civil society and individual interests situated outside EU borders.

mental law and constitute an important manifestation of the exercise of EU global regulatory power.<sup>11</sup>

In situations where cooperative regimes fail or are inadequate, the EU increasingly resorts to IEMEIs, partly as a way of filling international regulatory gaps. However, the unilateral exercise of global regulatory power through measures that originate in one legal order but affect actors and regimes beyond its borders may give rise to important accountability questions. In the absence of state consent for their application to TCs, IEMEIs could create mistrust, as the EU could be perceived as outsourcing climate and environmental responsibilities outside its territory and engaging in protectionism. IEMEIs can be particularly contentious because they often affect developing countries,<sup>12</sup> such as ship recycling and timber producing countries, which may lack the necessary resources and capacity to adapt to EU standards. Furthermore, IEMEIs give rise to global governance that involves “rule-making and power-exercise at a global scale, but not necessarily by entities authorised by general agreement to act”<sup>13</sup> and can raise questions about controlling regulatory power exercised across and beyond established jurisdictional borders. IEMEIs can therefore be problematic because regulatory standards are extended to TC actors that do not usually have a voice in the formulation and implementation of decisions that affect them. Also, the EU is usually not under an obligation to justify and explain its action in relation to TC effects. Therefore, in accordance with Mark Bovens’ definition of accountability,<sup>14</sup> there is no clear relationship between the EU institutions in exercising regulatory power through IEMEIs and TC affected interests as a relevant forum for holding EU actors to account.<sup>15</sup> This can lead to exercise of power without accountability or representation of affected interests situated outside the EU as the regulating jurisdiction,<sup>16</sup> thus creating an external accountability gap.<sup>17</sup> As Benvenisti argues, when sovereigns legislate for humanity rather than solely for domestic stakeholders, they should be subject to obligations to take into account foreign interests of affected stakeholders.<sup>18</sup> While the logic of “power brings responsibility” may justify IEMEIs in terms of the EU instigating environmental regu-

<sup>11</sup> J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, in *American Journal of Comparative Law*, 2014, p. 87 *et seq.*

<sup>12</sup> The term developing countries includes countries at different stages of development, including less developed, developing and least developed countries, depending on the countries affected by each IEMEI.

<sup>13</sup> R.O. KEOHANE, *Global Governance and Democratic Accountability*, in D. HELD, M. KOENIG-ARCHIBUGI (eds), *Taming Globalization: Frontiers of Governance*, Cambridge: Polity Press, 2003, p. 132.

<sup>14</sup> M. BOVENS, *Analysing and Assessing Accountability: A Conceptual Framework*, in *European Law Journal*, 2007, p. 447 *et seq.*

<sup>15</sup> See M. CREMONA, P. LEINO, *Introduction: The New Frontiers of EU Administrative Law and the Scope of our Inquiry*, in *European Papers*, 2017, Vol. 2, No. 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 467 *et seq.*

<sup>16</sup> G. DAVIES, *International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism*, in *German Law Journal*, 2013, p. 1203 *et seq.*

<sup>17</sup> R.O. KEOHANE, *Global Governance and Democratic Accountability*, cit., pp. 139-142.

<sup>18</sup> E. BENVENISTI, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, in *American Journal of International Law*, 2013, p. 295 *et seq.*

latory changes in TCs, EU global regulatory power should be disciplined and held to account in relation to TC effects in order to “guard against abuse”.<sup>19</sup>

On the basis of this background and in light of uncertain accountability relationships between the EU as a regulating jurisdiction and foreign interests affected by its domestic legislation, this *Article* explores the extent to which EU administrative law contributes to filling an accountability gap related to IEMEIs. In governing and controlling the exercise of global regulatory power through IEMEIs, EU law can play a dual role. On the one hand, EU law can *enable* the adoption of IEMEIs by providing the legal basis for the EU to act, particularly through broad interpretation of competences. On the other hand, EU law can *constrain* the exercise of EU global regulatory power by holding it to account in relation to TC effects. Enabling IEMEIs without sufficiently disciplining the exercise of EU regulatory power can exacerbate an external accountability gap. In this respect, EU administrative law, which controls the exercise of public power, may provide mechanisms that protect the rights and interests of those affected by EU regulatory power, including those situated outside the EU, and thereby create transnational accountability avenues. There are different mechanisms through which an accountability gap could be filled in this context, including through participation rights in the formulation of IEMEIs, due process rights, transparency, as well as judicial review. This *Article* examines judicial review as a promising mechanism for enforcing *legal accountability*<sup>20</sup> and disciplining the exercise of EU global regulatory power through IEMEIs.

The *Article* first explores novel regulatory techniques in various examples of IEMEIs, which provide unique challenges for EU administrative law in controlling EU regulatory power, and demonstrates how the distinction between internal and external EU action is often blurred (section II). In evaluating the extent of an accountability gap in relation to IEMEIs, the *Article* examines judicial review of IEMEIs and related acts in the EU legal order as a transnational accountability avenue for TC affected actors, particularly focusing on access to justice hurdles faced by TC applicants in the EU judicial system (section III). While this is done in the context of the extraterritorial reach of EU environmental law, some aspects of the analysis are also relevant more broadly for the inquiry of this *Special Issue* into the existence of an accountability gap in EU external relations, and for other policy areas where the extraterritorial reach of EU law is evident.

## II. THE LEGAL PHENOMENON OF IEMEIS

The global reach of EU environmental law is increasingly prevalent in IEMEIs, which manifest “territorial extension”, whereby the application of EU legislation takes into ac-

<sup>19</sup> J. SCOTT, *The Geographical Scope of the EU's Climate Responsibilities*, in *Cambridge Yearbook of European Legal Studies*, 2015, p. 92 *et seq.*

<sup>20</sup> On the different types of accountability see M. CREMONA, P. LEINO, *Introduction: The New Frontiers of EU Administrative Law and the Scope of our Inquiry*, *cit.*, p. 467 *et seq.*

count, as a matter of law, conduct or circumstances taking place abroad.<sup>21</sup> This section sets out several legal features of IEMEIs in regulating access to the EU market, with the aim of demonstrating their extraterritorial character, as well as showing how different kinds of TC actors come within the scope of application of EU law in different ways. This discussion also draws attention to the kinds of acts involved in the implementation of IEMEIs to TC actors, on the basis of which judicial challenges may be brought. The analysis explores three features of IEMEIs relating to their transnational functioning: 1) how IEMEIs “regulate” conduct abroad through environmental regulatory requirements; 2) how these requirements are used as market access conditions in the form of direct or indirect obligations on TC actors; and 3) how IEMEIs link compliance to developments abroad.

## II.1. IEMEIs REGULATING CONDUCT ABROAD ON THE BASIS OF ENVIRONMENTAL REGULATORY REQUIREMENTS

The legal design of IEMEIs in regulating conduct that partly takes place abroad operates in at least two ways. First, certain IEMEIs regulate conduct abroad by conditioning access to the EU market on the basis of how production or waste treatment processes take place in TCs. Such examples include the sustainability criteria for biofuels, the requirements for environmentally sound ship recycling, the regulation of imports of timber, the exports of electrical waste and regulation of illegal, unregulated and unreported (IUU) fishing. “Regulating” conduct abroad on the basis of process standards does not necessarily entail exporting EU-set standards, but also covers situations where the EU indirectly asserts regulatory power over processes abroad. For example, while the EU Timber Regulation requires that only legally harvested timber can enter the EU market, it regulates market access by reference to legality standards of the country of origin.<sup>22</sup> Also, certain IEMEIs impose restrictions on processes abroad on the basis of TC and international law. For example, the IUU Fishing Regulation requires fishing activities, which result in fishery products exported to the EU, wherever these may occur, to be carried out in accordance with legality requirements of the flag state of the fishing vessel and in accordance with international standards on conservation and management.<sup>23</sup> Second, beyond process standards, other IEMEIs “regulate” conduct abroad by attaching economic incentive obligations to such conduct. For example, the inclusion of flights departing from or arriving at EU airports in the EU ETS initially required airlines to surrender ETS allowances on the basis of their entire journey, including those parts taking place outside EU borders.<sup>24</sup>

<sup>21</sup> J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 87 *et seq.*

<sup>22</sup> Regulation 995/2010, cit.

<sup>23</sup> Arts 2, para. 2, let. a), and 12, para. 3, of Regulation 1005/2008, cit.

<sup>24</sup> Directive 2008/101, cit.

Notably, “regulating” processes abroad through IEMEIs does not mean that the EU imposes restrictions on how conduct takes place abroad even when not accessing the EU market.<sup>25</sup> Nonetheless, the effects of such EU market-related measures can be far-reaching in practice. Through “unilateral regulatory globalisation”, the EU is sometimes able to “externalize its laws and regulations outside its borders”, giving rise to a “Brussels effect”.<sup>26</sup> EU market-related measures create incentives for non-EU economic operators to comply with EU standards when trading with the EU, which may lead to changes in business practices more generally. Foreign companies may change their business practices to match EU regulatory standards across their entire production, irrespective of their ultimate market (“*de facto* Brussels effect”).<sup>27</sup> In turn, domestic industry may urge TC governments to change their regulatory policies to be similar to those of the EU, thus leading to formal changes in TC domestic law (“*de jure* Brussels effect”).<sup>28</sup> Through different kinds of market mechanisms, the EU uses its market power as leverage for compliance and regulatory change beyond its borders.<sup>29</sup>

## II.2. IEMEIs REGULATING TRADE: MARKET ACCESS CONDITIONS AND OBLIGATIONS ON THIRD COUNTRY ACTORS

In regulating trade, environmental regulatory requirements in IEMEIs function as market access conditions in different ways. As demonstrated through various examples in this section, IEMEIs are legally designed either as *mandatory conditions* or as *partial restrictions* to the EU market, and impose different kinds of obligations on foreign actors, either *directly* or *indirectly*. The ways in which market access restrictions apply to TC actors ultimately determines their legal position in the EU legal order, including whether they have access to EU courts, as discussed in section III.

IEMEI standards are often designed as *mandatory conditions for access to the EU market*. This is the case with the IUU Fishing Regulation,<sup>30</sup> the Timber Regulation<sup>31</sup> and the Ship Recycling Regulation.<sup>32</sup> Under the IUU Fishing Regulation, access of fishing vessels to EU ports is subject to authorisation, including an obligation to have a catch certificate on board the fishing vessel,<sup>33</sup> which has been validated by an eligible flag state.<sup>34</sup>

<sup>25</sup> R. HOWSE, D. REGAN, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, in *European Journal of International Law*, 2000, p. 249 *et seq.*

<sup>26</sup> A. BRADFORD, *The Brussels Effect*, in *Northwestern University Law Review*, 2012, p. 1 *et seq.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> J. SCOTT, *EU Global Action on Climate Change: Contingent Unilateralism and Regulatory Penalty Defaults*, in *SADC Law Journal*, 2012, p. 1 *et seq.*

<sup>30</sup> Regulation 1005/2008, *cit.*

<sup>31</sup> Regulation 995/2010, *cit.*

<sup>32</sup> Regulation 1257/2013, *cit.*

<sup>33</sup> Arts 7, para. 1, and 12 of Regulation 1005/2008, *cit.*

<sup>34</sup> *Ibid.*, Arts 12, para. 2, and 20.

The IUU Regulation contains far-reaching enforcement measures for excluding illegal fishery products from the EU market<sup>35</sup> and ensuring *direct* compliance both by TC individual fishing vessels and by flag states. On the one hand, fishing vessels can be included in the Community IUU vessel list when there is information about the vessel engaging in IUU fishing and the flag state fails to investigate and take enforcement measures against it.<sup>36</sup> On the other hand, flag states that fail to take action to prevent, deter and eliminate IUU fishing may be identified as non-cooperating countries whose products and catch certificates are not accepted in the EU market.<sup>37</sup>

Mandatory conditions for access to the EU market take a different form under the Timber Regulation, which imposes a due diligence obligation on operators placing timber on the EU market for the first time.<sup>38</sup> Operators are required to provide information on the imported timber,<sup>39</sup> carry out a risk assessment evaluating the risk of illegal timber in their supply chain<sup>40</sup> and take risk mitigation steps when the risk of illegality is found to be non-negligible.<sup>41</sup> Notably, the Timber Regulation sometimes *directly* imposes these obligations on non-EU actors when they place timber on the EU market for the first time. Even in situations where non-EU suppliers are not the ones placing timber on the EU market, the Regulation requires them to provide information about their harvesting processes to the operator.<sup>42</sup>

Mandatory restrictions to trade are also imposed in export measures. The Ship Recycling Regulation requires ship recycling facilities to apply to be included in the “European list” in order to be able to recycle ships flying the flag of an EU Member State.<sup>43</sup> In this way, it imposes *direct* obligations on TC facilities regarding safe and environmentally sound ship recycling if they want to receive EU ships. The Commission authorises facilities to be included in the European list in implementing legislation on the basis of technical requirements set out in the Ship Recycling Regulation, and further spelled out in post-legislative Commission guidance, and following site inspections.<sup>44</sup> Although the primary aim of export waste treatment standards is to ensure that EU ships are not recycled in facilities with lower standards, their operation can influence TC practices more

<sup>35</sup> Products not accompanied by catch certificates will be refused importation: *ibid.*, Art. 18.

<sup>36</sup> Art. 27 of Regulation 1005/2008, cit.

<sup>37</sup> *Ibid.*, Arts 31, 33, and 38.

<sup>38</sup> Art. 6 of Regulation 995/2010, cit.

<sup>39</sup> *Ibid.*, Art. 6, para. 1, let. a).

<sup>40</sup> *Ibid.*, Art. 6, para. 1, let. b).

<sup>41</sup> *Ibid.*, Art. 6, para. 1, let. c).

<sup>42</sup> *Ibid.*, Art. 6, para. 1, let. a).

<sup>43</sup> Art. 13 of Regulation 1257/13, cit.

<sup>44</sup> Communication COM(2016) 1900 from the 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 (EU) 1257/2013.

generally. The technical and economic “non-divisibility”<sup>45</sup> of standards, such as those relating to the design and construction of ship recycling facilities,<sup>46</sup> could lead TC facilities expanding EU standards to all ships received (“*de facto* Brussels effect”). This could lead to regulatory reforms in ship recycling countries (“*de jure* Brussels effect”) and prompt international developments. However, in practice, widespread “out-flagging” practices may result in EU ships circumventing EU regulatory requirements.

Beyond mandatory conditions to trade, certain IEMEIs *partially and indirectly restrict access to the EU market*. Such IEMEIs do not entirely close the EU market to non-complying TC products or operators, but reduce the incentives for EU operators to trade with non-complying products or operators. Examples of such legislation include the sustainability criteria for biofuels, which impose restrictions on the origin of biofuels from specific types of land and stipulate specific greenhouse gas emission savings.<sup>47</sup> Non-complying biofuels are not excluded from the EU market, but compliance is required for energy from biofuels to count towards the target for biofuel use in transport, and for EU operators to be eligible for funding for consumption of biofuels.<sup>48</sup> Similarly, electrical and electronic equipment waste shipped from the EU to TC facilities should be treated in conditions that “are equivalent to the requirements of the Directive”<sup>49</sup> in order for it to count towards the recovery targets imposed on EU Member States.<sup>50</sup> Equivalent conditions are to be determined on the basis of criteria set by the Commission in delegated acts.<sup>51</sup> Recovery targets reduce the incentives for EU exporters to export waste to facilities that do not meet equivalent standards. Although indirectly restricting the EU market, these IEMEIs function on the basis of a similar logic to mandatory market access conditions and can have similar impacts beyond EU borders.

### II.3. COMPLIANCE WITH IEMEIS: “CONTINGENT UNILATERALISM”, EQUIVALENCE AND FLEXIBILITY

In incentivising regulatory changes abroad, IEMEIs often render application of EU legislation to TCs “*contingent upon legal developments abroad*,”<sup>52</sup> thus implicating TC governments, qualifying the unilateral nature of the EU’s action, and alleviating the trade-

<sup>45</sup> A. BRADFORD, *The Brussels Effect*, cit., p. 17 (non-divisibility occurs when “the exporter has an incentive to adopt a global standard whenever its production or conduct is non-divisible across different markets or when the benefits of a uniform standard due to scale economies exceed the costs of forgoing lower production costs in less regulated markets”).

<sup>46</sup> Art. 13 of Regulation 1257/13, cit.

<sup>47</sup> Art. 17 of Directive 2009/28, cit.

<sup>48</sup> *Ibid.*, Art. 17, para. 1.

<sup>49</sup> Art. 10, para. 2, of Directive 2012/19, cit.

<sup>50</sup> *Ibid.*, Art. 11.

<sup>51</sup> *Ibid.*, Art. 10, para. 3.

<sup>52</sup> J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 87 *et seq.*



restrictiveness of IEMEs through flexible compliance clauses. For example, the inclusion of aviation emissions in the EU ETS provided the possibility for revising the scheme in case an international agreement was reached.<sup>53</sup> TC regimes were also initially implicated by providing the possibility for airlines departing from countries with legislation reducing the climate change impact of flights to be exempted from the EU ETS,<sup>54</sup> requiring the Commission to ensure “optimal interaction” with TC measures with an equivalent environmental effect.<sup>55</sup> The interaction between the EU’s unilateral measure with international action and TC regimes would have raised novel questions concerning the considerable discretion given to the Commission in determining the “contingency” of EU action, which should have been determined in consultation with the relevant TC without much further direction. Notably, equivalence determinations by the Commission could be subject to judicial review by the CJEU, as demonstrated in the field of data protection.<sup>56</sup> In response to an overwhelmingly negative international reaction to the inclusion of aviation emissions in the EU ETS, the EU temporarily excluded international flights from the regime.<sup>57</sup> The possibility that the application of the EU ETS to international flights might be resumed functioned as a “stick”<sup>58</sup> in seeking a global agreement. Following the 2016 agreement on a global market-based mechanism in the International Civil Aviation Organisation (ICAO),<sup>59</sup> the Commission proposed that the current domestic geographical scope of the EU ETS should continue, at least until 2020, to demonstrate commitment to a global solution.<sup>60</sup> It remains to be seen whether a “contingency” clause would be included in the application of the EU ETS, making its application contingent on the implementation of the ICAO mechanism.

A different kind of contingency manifests in the design of IEMEs through *equivalent requirements of environmental protection* in TCs. Instead of exporting EU standards, this feature leaves room for discretion and variation of TC standards as long as they meet an equivalent level of protection. However, equivalence can have different meanings

<sup>53</sup> Art. 25a, para. 2, of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community (consolidated version).

<sup>54</sup> *Ibid.*, Art. 25a.

<sup>55</sup> Recital 17 of Directive 2008/101, cit.

<sup>56</sup> Court of Justice, judgment of 6 October 2015, case C-362/14, *Schrems*.

<sup>57</sup> Decision 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community.

<sup>58</sup> V.L. BIRCHFIELD, *Coercion with Kid Gloves? The European Union's Role in Shaping a Global Regulatory Framework for Aviation Emissions*, in *Journal of European Public Policy*, 2015, p. 1276 *et seq.*

<sup>59</sup> ICAO, Resolution A39-3: Consolidated statement of continuing ICAO policies and practices related to environmental protection—Global Market-based Measure (MBM) scheme, 2016, [www.icao.int](http://www.icao.int).

<sup>60</sup> Commission Proposal for a Regulation of the European Parliament and of the Council amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, COM(2017) 54 final.

and is ultimately determined by the EU Commission. Apart from equivalence at country-level, as illustrated in the Aviation Directive above, equivalence is imposed directly on TC economic operators, specifically within the export IEMEs that impose conditions on how processes take place in TC facilities. As mentioned above, under the Directive on electrical and electronic waste, waste treatment in TC facilities should take place in equivalent conditions determined on the basis of criteria set by the Commission.<sup>61</sup> Additionally, the Ship Recycling Regulation requires TC facilities that receive EU ships to demonstrate that waste management facilities carry out waste recovery or disposal operations in accordance with broadly equivalent human health and environmental standards, which are explicitly set out in Commission guidance.<sup>62</sup>

In terms of compliance, other IEMEs provide for alternative or supplementary routes for satisfying market access requirements that particularly influence compliance by TCs. These flexible compliance modes manifest in two ways. First, TCs can conclude *bilateral agreements* with the EU, such as the possibility to conclude a Voluntary Partnership Agreement (VPA) under the Timber Regulation, which provides a “green lane” for access to the EU market.<sup>63</sup> Despite incentives to conclude VPAs prior to the Timber Regulation, VPAs expanded only after the adoption of the Regulation restricting access to the EU market, showing the strong incentivising function of such trade-restrictive measures.<sup>64</sup> On the one hand, VPAs are more cooperative in prompting legal developments abroad and incorporate greater involvement of TC local actors, including civil society, in their formulation and implementation. On the other hand, there is minimal information about how the negotiating procedures of VPAs are to be carried out and there is no mechanism for appeal of suspension of negotiations.<sup>65</sup> Their political nature may therefore hinder possibilities for TCs to challenge their formulation and application.

Second, TC operators can use *private certification and monitoring* in complying with EU standards. For example, monitoring organisations established in the EU and recognised by the Commission<sup>66</sup> can be used as a supplementary route for complying with the Timber Regulation by providing due diligence systems.<sup>67</sup> Additionally, producers of biofuels can verify compliance with the sustainability criteria through private voluntary

<sup>61</sup> Art. 10, para. 3, of Directive 2012/19, cit.

<sup>62</sup> Art. 15, para. 5, of Regulation 1257/13, cit.; Communication COM(2016) 1900, cit.

<sup>63</sup> Art. 3 of Regulation 995/2010, cit.

<sup>64</sup> C. OVERDEVEST, J. ZEITLIN, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, in *Regulation and Governance*, 2014, p. 22 et seq.

<sup>65</sup> A. FISHMAN, K. OBIDZINSKI, *European Union Timber Regulation: Is It Legal?*, in *Review of European, Comparative and International Environmental Law*, 2014, p. 258 et seq.

<sup>66</sup> Commission Delegated Regulation (EU) 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) 995/2010.

<sup>67</sup> Arts 4, para. 3, and 8 of Regulation 995/2010, cit.

certification schemes authorised by the Commission,<sup>68</sup> in accordance with Commission guidance.<sup>69</sup> The procedures for authorisation of certification schemes on the sustainability of biofuels have been criticised for lengthy delays, interference of third parties and general lack of transparency.<sup>70</sup> Given the absence of clear provisions on the administration and selection of private certification schemes,<sup>71</sup> a TC applicant would face difficulties particularly in challenging the basis of a negative decision.

Overall, flexibility and conditionality features exhibit a mixture of unilateralism and cooperation.<sup>72</sup> Clauses linking to developments beyond EU borders are used in various ways: as negotiation tools, as incentives for concluding bilateral agreements and advancing international regimes, and as catalysts for the development of private regimes. They all contribute to creating a dynamic relationship between EU unilateral measures and legal developments in TCs. This mixture of unilateralism and cooperation is also reflected in the implementation of IEMEIs through different types of acts and in the ways in which market access conditions apply to TC actors, which ultimately determine their access to the EU market and to the EU legal order. In this respect, TC actors could seek to challenge different kinds of acts, including general regulatory acts as well as individually addressed EU acts that authorise operators and products. Importantly, depending on the legal design of IEMEIs and their effects in TCs, it could also be the case that the TC affected actors would seek to challenge TC domestic law adopted in response to IEMEIs.

To conclude, this section has exposed some of the novel regulatory techniques employed in IEMEIs, which give rise to novel administrative acts and procedures as well as novel challenges for controlling EU global regulatory power. As *internal* measures, which pursue *external* action, IEMEIs blur the distinction between internal and external EU action. As a mode of EU external environmental action, IEMEIs first operate within EU constitutional and external relations law. Beyond conventional issues of EU external environmental competence, concerning the delimitation of powers between the EU and the Member States and the EU's international representation,<sup>73</sup> IEMEIs implicate areas of EU law that have been less explored in relation to EU external action. Particularly, they

<sup>68</sup> Art. 18 of Directive 2009/28, cit.

<sup>69</sup> Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme, COM(2010) 160/01 (hereinafter, also Communication on voluntary schemes and default values).

<sup>70</sup> M. GAEBLER, *Recognition of Private Sustainability Certification Systems for Public Regulation (Co-Regulation): Lessons Learned from the EU Renewable Energy Directive*, in C. SCHMITZ-HOFFMANN, M. SCHMIDT, B. HANSMANN, D. PALEKHOV (eds), *Voluntary Standard Systems: A Contribution to Sustainable Development*, Heidelberg: Springer, 2014.

<sup>71</sup> *Ibid.*

<sup>72</sup> J. SCOTT, *Extraterritoriality and Territorial Extension in EU Law*, cit., p. 114.

<sup>73</sup> G. MARIN-DURAN, E. MORGERA, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions*, Oxford: Hart Publishing, 2012, pp. 5-25.

raise “transnationalised” questions in EU administrative law about controlling the unilateral exercise of global regulatory power and holding it to account in relation to TC impacts. In this respect, judicial review of IEMEs and their implementing acts becomes particularly important in controlling how EU institutions exercise discretion and how procedural and substantive principles and rights under EU law apply to TC affected actors. The rest of this *Article* explores judicial review in the EU as a transnational accountability avenue for IEMEs by assessing the extent to which TC actors may have access to justice in the EU legal order. As there is no special framework to determine the position of TC actors affected by EU domestic legislation, their position is determined by the application of mainstream EU law doctrines and procedures and how they apply to TC affected actors.

### III. ACCESS TO JUSTICE

Judicial review is an important mechanism for holding regulatory power to account and upholding the rule of law.<sup>74</sup> In developing doctrines and procedures that determine the legality of EU action, the CJEU’s role has been critical, particularly in relation to internal EU action. In relation to IEMEs, it could be argued that, ideally, TC actors would be able to challenge their legality before an international court. However, there are limited opportunities for this, and these would not consist of challenges to IEMEs on the basis of EU law, which constitutes the internal law of the regulating jurisdiction. Access of TC affected actors to the EU judicial system is therefore important in holding EU institutions to account on the basis of the EU’s own rule of law.

The extent to which TC actors can challenge IEMEs in the EU legal order is partly determined by whether they can access EU courts and partly by the grounds of review, which can determine how TC interests may be protected as a matter of EU law. The different grounds of review under Art. 263 TFEU demonstrate how the external accountability gap could be filled through various procedural and substantive considerations of TC affected interests. IEMEs could be challenged on the basis of competences, relating to the broad territorial scope and the unilateral nature of IEMEs in pursuing environmental protection goals. Competences in this sense, are usually interpreted broadly by the CJEU and tend to enable, rather than constrain, the adoption of IEMEs, as long as there is a territorial link between the regulated activity and the EU.<sup>75</sup> IEMEs could also be challenged on the basis of essential procedural requirements, which can ensure procedural fairness for TC actors, particularly when IEMEs are implemented through individual decisions. Furthermore, substantially the effects of IEMEs on TC actors could potentially be reviewed under proportionality. However, the lack of a general requirement

<sup>74</sup> C. SCOTT, *Accountability in the Regulatory State*, in *Journal of Law and Society*, 2000, p. 38 *et seq.*

<sup>75</sup> Court of Justice, judgment of 21 December 2011, case C-366/10, *Air Transport Association of America and Others (ATAA)*.

for equal treatment of TCs<sup>76</sup> and the deferential review of EU complex policy decisions involving economic and political choices would likely result in a light review of TC effects. Finally, IEMEIs could potentially be challenged on the basis of infringement of fundamental rights of TC actors, particularly when certain rights are owed to “everyone” as a matter of EU law. However, it is still unclear how EU extraterritorial human rights obligations would arise in situations where EU domestic legislation, such as IEMEIs, have effects in TCs.<sup>77</sup>

While both access to justice hurdles and the intensity of review by EU courts are equally relevant in assessing judicial review as a transnational accountability avenue for IEMEIs, the rest of this *Article* focuses on access to justice issues. Assessing the extent of an accountability gap and the position of TC actors in the EU legal order is particularly determined by the extent to which they can access EU courts, even before considering the grounds of review. In examining the extent to which TC actors can challenge the legality and interpretation of IEMEIs within the EU legal order, this section explores: (1) the routes through which different kinds of TC litigants can have access to the EU judicial system; (2) the conditions that determine whether litigants have *locus standi* to bring a case before EU courts; and (3) the Aarhus Convention,<sup>78</sup> which is legally relevant for access to justice in environmental matters. It is also notable that, apart from general rules on access to justice in the EU, the legal design and effects of IEMEIs may determine whether IEMEIs can be challenged in the EU legal order on the basis of a reviewable EU act. Particularly in cases of “*de jure* Brussels effect”, where the TC may change its own regulation in response to EU standards, or when the EU measure defers to TC law, such as the Timber Regulation,<sup>79</sup> it could be the case that it is domestic TC law that imposes obligations on TC actors, which cannot be challenged before EU courts.

### III.1. AVENUES FOR ACCESS TO JUSTICE FOR DIFFERENT KINDS OF THIRD COUNTRY ACTORS

Depending on the legal design of IEMEIs, different kinds of TC actors may seek to challenge IEMEIs and related acts, ranging from TC individuals to TC governments. As a general rule, any natural or legal person can access EU courts<sup>80</sup> and apply for annulment of EU law under Art. 263, para. 4, TFEU irrespective of nationality, place of resi-

<sup>76</sup> Court of Justice, judgment of 22 January 1976, case 55/75, *Balkan-Import-Export*, para. 14.

<sup>77</sup> D. AUGENSTEIN, *The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon*, in E. MORGERA (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge: Cambridge University Press, 2012, pp. 263-286.

<sup>78</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 337 (Aarhus Convention).

<sup>79</sup> Regulation 995/2010, cit.

<sup>80</sup> Art. 19, para. 3, TEU.

dence or registration.<sup>81</sup> In fact, there are many examples of cases brought by TC natural or legal persons.<sup>82</sup> The CJEU has not conclusively ruled whether this covers non-EU countries. However, it has implied that companies that constitute “emanations of the state” would have access to EU courts as there is no rule preventing them from doing so and denying them access would go against the principle of effective judicial protection.<sup>83</sup> Therefore, in principle, TC actors, including TC governments, could apply to EU courts for annulment of IEMELs or IEMEL-related acts. However, contrary to Member States that have privileged access to EU courts under Art. 263, para. 2, TFEU, TC governments must satisfy the standing requirements under Art. 263, para. 4, TFEU, which as discussed in section III.2. are difficult to fulfil for both EU and non-EU affected actors.

Apart from direct access to EU courts, TC actors could also challenge the validity and interpretation of IEMELs through the preliminary reference procedure.<sup>84</sup> Notably, foreign companies incorporated under national law in Member States can bring cases before national courts that could then be referred to the CJEU. This is particularly important as it would be unlikely for such companies to have standing before EU courts directly, as discussed below. This route has been employed in several cases, including in *ATAA*,<sup>85</sup> where US airlines challenged the legality of the Aviation Directive before the High Court in the UK. However, at the same time, it would be unlikely for TC individuals to be able to bring a case before Member State courts and have access to EU courts through this route. Their access through the preliminary reference route is thus, in practice, more restrained in comparison with EU nationals. The access of TC actors through this route is thus easier for rich multinational corporations with registered offices in the EU than it may be for weaker TC actors, such as smaller companies and individual actors, particularly from developing countries. This demonstrates how “accountability in world politics is inextricably entangled with power relationships” and how weak actors are in a disadvantaged position to hold powerful actors to account.<sup>86</sup>

Overall, TC individual actors face similar challenges in directly accessing EU courts as do EU actors,<sup>87</sup> while their access to national courts may be more restricted. As for TC governments, their position, as non-privileged applicants, imposes additional limitations for accessing EU courts, compared to access by Member States. This is due to strict standing requirements for non-privileged applicants.

<sup>81</sup> K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 316.

<sup>82</sup> For example, General Court, judgment of 25 October 2011, case T-262/10, *Microban*.

<sup>83</sup> Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter); General Court, judgment of 18 September 2015, case T-156/13, *Petro Suisse*.

<sup>84</sup> Art. 267 TFEU.

<sup>85</sup> *ATAA*, cit.

<sup>86</sup> R.W. GRANT, R.O. KEOHANE, *Accountability and Abuses of Power in World Politics*, in *American Political Science Review*, 2005, p. 29 *et seq.*, p. 40.

<sup>87</sup> E. KORKEA-AHO, ‘Mr Smith Goes To Brussels’: *Third Country Lobbying and the Making of EU Law and Policy*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 1 *et seq.*

### III.2. STANDING

Although standing requirements do not formally discriminate or delimit access on the basis of nationality or place of establishment, in practice TC applicants face difficulties in directly accessing EU courts. This is due to the restrictive interpretation of standing as well as different features of the legal design of IEMEIs discussed in section II, including whether IEMEIs impose direct obligations on TC actors and whether it is the EU act or TC act that could be challenged.

In EU law terms, having established that TC actors are eligible to bring a case before EU courts, the next step concerns the admissibility of a case. In this respect, the regulatory design of IEMEIs may determine whether TC actors fulfil the standing requirements under EU law. According to Art. 263, para. 4, TFEU, “any natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”.

The easiest way of accessing the courts is when a decision is addressed to a specific person as this right is granted unconditionally. Thus, in principle a decision addressed to a TC actor that is refused access to the EU market can be challenged before EU courts, irrespective of nationality. For example, a negative decision refusing to include a TC ship recycling facility on the European list, a decision rejecting a TC biofuels certification scheme or a decision identifying a TC as a non-cooperating country under the IUU Fishing Regulation<sup>88</sup> could potentially be challenged by the relevant TC actor.

However, as most EU acts related to IEMEIs would not be individual acts addressed to a specific person, TC actors would usually have to satisfy the accompanying strict conditions of Art. 263, para. 4. In particular, the condition of “individual concern” has been narrowly construed by the CJEU. Standing is accorded only where a decision affects applicants “[...] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons [...]”.<sup>89</sup> This gives rise to restrictive access to affected interests, which in relation to environmental matters are often represented by NGOs that would not satisfy this test.<sup>90</sup> With respect to IEMEIs, TC operators, TCs or NGOs representing TC affected interests would usually not satisfy the “individual concern” test as they would not be distinguished by such special attributes. Nonetheless, at least some IEMEI decisions, such as the inclu-

<sup>88</sup> For example, Implementing Decision (EU) 2017/889 of the Commission of 23 May 2017 identifying the Union of the Comoros as a non-cooperating third country in fighting illegal, unreported and unregulated fishing.

<sup>89</sup> Court of Justice, judgment of 15 July 1963, case C-26/52, *Plaumann*, para. 107.

<sup>90</sup> Court of Justice, judgment of 2 April 1998, case C-321/95, *Greenpeace*; L. KRÄMER, *Environmental Justice in the European Court of Justice*, in J. EBBESSON, P.N. OKOWA (eds), *Environmental Law and Justice in Context*, Cambridge: Cambridge University Press, 2009, pp. 195-210.

sion of a fishing vessel on the IUU vessel list, could be challenged on this basis given that such vessels are individually named under an implementing regulation.<sup>91</sup>

The alternative Lisbon test for standing under Art. 263, para. 4, TFEU, according to which an applicant can challenge “a regulatory act which is of direct concern to them and does not entail implementing measures”, covers measures of general application. However, as interpreted, this test does not substantially expand the standing requirements. First, it only applies to regulatory acts, which exclude legislative acts.<sup>92</sup> Second, these acts should not entail any implementing acts, which has also been interpreted narrowly.<sup>93</sup> Once these two requirements are met however, regulatory acts that apply to objectively determined situations and produce legal effects with respect to categories of persons envisaged in general and in the abstract are covered.<sup>94</sup> Importantly, the Lisbon test can lead to more extensive judicial review of non-legislative acts,<sup>95</sup> which are often used in the implementation of IEMEIs, such as the delegated act on equivalent requirements for treatment of electrical waste<sup>96</sup> and implementing acts setting out the European list of ship recycling facilities.<sup>97</sup>

An additional element of the standing requirements relevant for TC actors, which often practically limits their access to EU courts, is the interpretation of “direct concern”, specifically as applied by the General Court in *Inuit I*.<sup>98</sup> The *Inuit* series of cases is particularly relevant for the analysis of IEMEIs because they are cases brought by TC actors affected by an EU measure which established a qualified import ban for hunted seals and seal products.<sup>99</sup> In identifying whether the applicants were directly concerned, 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 affected by the EU measure, and those applicants engaged in seal hunting outside the EU, whose economic position would be affected.<sup>100</sup> The Court found direct concern only in relation to the former category. This legal point was not reviewed by the Court of Justice, which deter-

<sup>91</sup> Implementing Regulation (EU) 2015/1852 of the Commission of 19 October 2016 amending Regulation (EU) 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

<sup>92</sup> General Court, order of 6 September 2011, case T-18/10, *Inuit* (hereinafter, *Inuit I*).

<sup>93</sup> General Court, order of 4 June 2012, case T-381/11, *Eurofer*.

<sup>94</sup> *Microban*, cit.

<sup>95</sup> C. BUCHANAN, *Long Awaited Guidance on the Meaning of Regulatory Act for Locus Standi under the Lisbon Treaty*, in *European Journal of Risk Regulation*, 2012, p. 115 et seq.

<sup>96</sup> Art. 10, para. 3, of Directive 2012/19, cit.

<sup>97</sup> Art. 16, para. 1, of Regulation 1257/2013, cit.

<sup>98</sup> *Inuit I*, order of 6 September 2011, cit.

<sup>99</sup> Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (hereinafter, also *Seals Regulation*).

<sup>100</sup> *Inuit I*, order of 6 September 2011, cit., para. 75.



mined that the measure was not a regulatory act and that the applicants lacked individual concern.<sup>101</sup>

This distinction can be important for TC actors affected by IEMEIs when they are not directly involved in placing products in the EU market but rather are indirectly affected by requirements imposed on processes abroad, which is often the case.<sup>102</sup> For example, the Timber Regulation places due diligence obligations on operators who place timber on the EU market and that indirectly affect harvesters of timber. Although there may be situations where “the operator” under the Regulation will be the non-EU entity, in most transactions the “operator” will be the EU entity importing the timber.<sup>103</sup> In this case, TC harvesters could instead potentially challenge TC standards determining legally harvested timber under TC law, on the basis of which the Timber Regulation and VPAs apply, before TC courts. However, given that timber producing countries are often developing countries with less established legal and judicial systems, affected actors may face other kinds of hurdles in challenging timber regulation in TCs. Generally, when obligations are imposed on a different level of the supply chain, TC operators cannot challenge IEMEIs, even if they are directly economically affected and possibly also indirectly legally affected. Indirectly affected TC actors may instead resort to external review mechanisms under the WTO, as TCs did in relation to the Seals Regulation.<sup>104</sup> However, review of IEMEIs before the WTO dispute settlement system does not provide opportunities for challenging IEMEIs on the basis of the legal system from which they originate. Additionally, WTO rulings lack direct effect in the EU,<sup>105</sup> thereby restricting their disciplining function with respect to IEMEIs.

Apart from the standing requirements discussed above, EU courts have developed a rights-based approach to a participation exception,<sup>106</sup> which could provide an alternative avenue for TC actors directly accessing EU courts. This allows those with a legally recognised right of participation to challenge its application.<sup>107</sup> However, when recognised participation rights do not exist, this avenue of standing would not be available by general consultation with TC actors in the formulation of IEMEIs, for example in impact assessments. Recognised participation rights, particularly in the form of a right to be heard, may be explicitly provided in secondary legislation or arise as general principles of law. For example, in the context of IEMEIs, a right to be heard is specifically provided

<sup>101</sup> Court of Justice, judgment of 3 October 2013, case C-583/11, *Inuit*.

<sup>102</sup> See *infra*, section II.2.

<sup>103</sup> Commission, Guidance Document for the EU Timber Regulation, COM(2016) 755 final, Annex I.

<sup>104</sup> WTO DSB, appellate body report of 18 June 2014, case no. ds400, *United States v. European Communities, EC – Measures Prohibiting the Importation and Marketing of Seal Products*.

<sup>105</sup> Court of Justice, judgment of 9 September 2008, joined cases C-120/06 P and C-121/06 P, *FIAMM*, para. 129.

<sup>106</sup> J. SCOTT, S. STURM, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, in *Columbia Journal of European Law*, 2006, p. 565 *et seq.*

<sup>107</sup> General Court, judgment of 9 April 2002, case T-339/00, *Bactria*.

in the IUU Regulation when an adverse decision is taken against a TC fishing vessel<sup>108</sup> or a TC flag state.<sup>109</sup> As a general principle however, a right to be heard is recognised only in limited circumstances. For example, it is recognised in relation to individual measures adversely affecting a person<sup>110</sup> but it does not, however, extend to legislative measures, or acts of general application.<sup>111</sup> In the context of IEMEs, a right to be heard could potentially apply when a TC facility applies to be included in the European list of ship recycling facilities.<sup>112</sup> The ship recycling facility would be under investigation, including through site inspections. However, it is not clear whether a right to be heard would apply in the absence of an explicit right given that authorisation of facilities is done on the basis of general conditions, and the European List is set out in implementing legislation that lists all authorised facilities. A right to be heard could arise at different stages of implementation of the Ship Recycling Regulation. The Commission's guidance provides for TC facilities the opportunity to present their case and answer the Commission's questions when the Commission considers removing a facility from the European list.<sup>113</sup> Although this is provided in a non-legally binding instrument, such a right would likely apply as a general principle given that removing a facility from the list would be set out in an individual decision or administrative act. In any case, when standing is established on the basis of legally recognised participation rights, the applicant cannot challenge the substantive content of a decision,<sup>114</sup> but rather they must show that they would have been in a better position to ensure their defence if they had been given the opportunity to be heard.<sup>115</sup>

Overall, direct access to EU courts is restricted. This is despite a right to effective judicial protection under the Charter.<sup>116</sup> As the Court of Justice has emphasised, the complete system of legal remedies of the EU consists of a combination of direct action before EU courts as well as judicial review in national courts and references for preliminary rulings.<sup>117</sup> The shortcomings of providing a full system of judicial protection through the preliminary references route have been repeatedly identified, both by the

<sup>108</sup> Art. 27, para. 2, of Regulation 1005/2008, cit.

<sup>109</sup> *Ibid.*, Arts 32 and 33.

<sup>110</sup> Art. 41 of the Charter.

<sup>111</sup> General Court, judgment of 11 December 1996, case T-521/93, *Atlanta*.

<sup>112</sup> Art. 15 of Regulation 1257/2013, cit.

<sup>113</sup> Communication COM(2016) 1900, cit., p. 5.

<sup>114</sup> *Eurofer*, order of 4 June 2012, cit.

<sup>115</sup> General Court, judgment of 9 June 2016, case T-276/13, *Growth Energy and Renewable Fuels*, para. 252.

<sup>116</sup> Art. 47 of the Charter; A. ARNULL, *Judicial Review in the European Union*, in A. ARNULL, D. CHALMERS (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, pp. 376-402.

<sup>117</sup> Court of Justice, judgment of 25 July 2002, case C-50/00, *Union de Pequenos Agricultores* (UPA).

judiciary<sup>118</sup> and by academia.<sup>119</sup> These shortcomings are equally true, or perhaps even more so, in relation to judicial protection of TC interests when domestic measures, such as IEMEIs, are designed to extend beyond EU borders. TC actors may not have easy access to national courts; their review can raise political issues affecting EU external relations; and their varying review by national courts can affect the effectiveness of the harmonisation of common European environmental standards that determine access to the European single market. For these reasons, consideration of TC impacts should preferably be determined by EU courts rather than national courts, because access to national courts may favour some kinds of privileged TC actors while excluding weaker ones.

The alternative routes for access to the EU judicial system do not necessarily compensate for the restrictive approach to standing for direct access to EU courts. This was recently highlighted by the Aarhus Convention Compliance Committee (ACCC) in reviewing the compliance of the EU with its obligations under the Aarhus Convention,<sup>120</sup> which is also legally relevant when examining the possibilities for access to justice in environmental matters.

### III.3. THE AARHUS CONVENTION AND ACCESS TO JUSTICE

While there is scepticism as to whether the Aarhus Convention (the Convention) has had a real impact in the EU in terms of accountability and transparency,<sup>121</sup> its implementation in the EU legal order is significant for the inquiry of this special issue into the crossroads of EU administrative law and external relations in three ways. These relate to how an international agreement can create new substantive and procedural rules and principles within the EU legal order; how these rules and principles can develop through the oversight of external compliance bodies; and how ensuring access to justice in accordance with the Aarhus Convention could expand judicial review as a transnational accountability avenue by broadening the personal scope of procedural rights to non-EU actors.

The Aarhus Convention is legally relevant for IEMEIs particularly in terms of access to justice and access to environmental information. Notably, its provisions do not discriminate on the basis of nationality in terms of who can access the Convention's rights and could thus be relied upon by TC actors. In the context of access to EU courts, the third pillar of the Aarhus Convention on access to justice is particularly relevant. This

<sup>118</sup> General Court, judgment of 3 May 2002, case T-177/01, *Jégo-Quéré*, para. 51. See also Opinion of AG Jacobs delivered on 10 July 2003, case C-50/00, *Union de Pequenos Agricultores (UPA)*.

<sup>119</sup> M. LEE, *EU Environmental Law: Challenges, Change and Decision-Making*, Oxford: Hart Publishing, 2005, pp. 139-144.

<sup>120</sup> Findings and Recommendations of the Compliance Committee adopted 17 March 2017 with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union (ACCC Findings).

<sup>121</sup> C. HARLOW, R. RAWLINGS, *Process and Procedure in EU Administration*, Oxford: Hart Publishing, 2014, pp. 297-321.

relevance lies in the international commitments of the EU under Art. 9 of the Convention, and in its implementation in EU law, demonstrating how the external accountability gap could be filled through the implementation of an international agreement in the EU legal order.

Depending on the kind of act that applicants seek to challenge, different standing requirements apply in the Aarhus context. In relation to a negative decision for access to information, applicants can ask for a re-examination of their request following which they can challenge a negative decision before EU courts.<sup>122</sup> In relation to IEMEs and external accountability, it is notable that the first pillar of the Aarhus Convention – that is, access to environmental information – extends to any person in the world.<sup>123</sup> This is notwithstanding the formulation of access to documents and information under Art. 15, para. 3, TFEU and Art. 42 of the Charter, which provide for access to information for “any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State”. The Aarhus Regulation<sup>124</sup> provides that request for access to environmental information under the Transparency Regulation,<sup>125</sup> which is also limited in scope, applies without discrimination as to citizenship, nationality, domicile or where legal persons have their registered seats or effective centre of activities.<sup>126</sup> A combined reading of the Aarhus and Transparency Regulations covers persons from non-signatory states to the Aarhus Convention, enabling TC actors to require the disclosure of information based on which IEMEs are adopted and applied, as well as providing the possibility to institute court proceedings in cases where access to information is refused. For example, TC actors could require information and challenge refusals of access regarding the basis of default values for biofuels, which can be used to more easily prove compliance with specific sustainability criteria<sup>127</sup> or the bases on which the criteria for equivalent treatment of electrical waste are determined.<sup>128</sup>

Importantly, “environmental information” is a broad concept that includes any measures likely to affect environmental factors as well as cost benefit and other eco-

<sup>122</sup> Art. 8 of Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation).

<sup>123</sup> A. BERTHIER, L. KRÄMER, *The Aarhus Convention: Implementation and Compliance in EU Law*, ClientEarth EU Aarhus Centre, 2014, [www.clientearth.org](http://www.clientearth.org), p. 14.

<sup>124</sup> Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Aarhus Regulation).

<sup>125</sup> Regulation 1049/2001, cit.

<sup>126</sup> Art. 3 of Regulation 1367/2006, cit.

<sup>127</sup> These are set out in Annex V of Directive 2009/28, cit., but the Commission can also add default values in accordance with criteria and processes set out in the Commission Communication on voluntary schemes and default values.

<sup>128</sup> Art. 10, para. 3, of Directive 2012/19, cit.

conomic analyses and assumptions used within the framework of measures and policies.<sup>129</sup> For example, in the context of IEMEs, environmental NGOs brought a case against the Commission for failure to provide access to information about the authorisation of biofuels voluntary certification schemes.<sup>130</sup> Particularly, this information also related to effects in TCs in terms of food prices and effects on the environment, which the Commission is specifically required to monitor under the Renewable Energy Directive,<sup>131</sup> and which TC actors may also wish to challenge. Recently, information relating to the environment was interpreted to include foreseeable emissions into the environment<sup>132</sup> which can be particularly relevant for IEMEs relating to climate change.

Beyond access to information, the Aarhus Convention and its implementation in the EU provide for access to justice in relation to “acts or omissions relating to the environment”. Art. 9, para. 3, of the Aarhus Convention requires signatories to ensure that the public has access to “administrative or judicial procedures to challenge acts or omissions by [...] public authorities which contravene provisions of its national law relating to the environment”. This includes a caveat that contracting parties can lay down any criteria that will determine access to justice. While the implementation of Aarhus access to justice requirements at first sight seem promising, implementing legislation has been construed and interpreted narrowly, considerably limiting this accountability avenue.

In complying with Art. 9, para. 3, the EU established a procedure to apply for an internal review of an administrative act or alleged omission in relation to environmental law under the Aarhus Regulation.<sup>133</sup> This procedure is limited in two important respects. First, it can only be invoked on the basis of violation of EU environmental law.<sup>134</sup> Second, it is only open to a specific class of legal persons – NGOs established under national law of an EU Member State – whose primary objective is the promotion of environmental protection.<sup>135</sup> While the administrative review procedure provides a significant avenue for social accountability by environmental NGOs, these limitations are important. The review does not extend to issues of procedural fairness that may have been circumvented and is not open to non-environmental NGOs such as trade unions, which may also be affected by such acts or omissions,<sup>136</sup> or to other members of the

<sup>129</sup> Art. 2, para. 1, let. d), of Regulation 1367/2006, cit.

<sup>130</sup> General Court, order of 9 November 2011, case T-449/10, *ClientEarth et al. v. Commission*.

<sup>131</sup> Art. 17, para. 7, of Directive 2009/28, cit.

<sup>132</sup> Court of Justice, judgment of 23 November 2016, case C-673/13, *Commission v. Stichting Greenpeace Nederland and PAN Europe*.

<sup>133</sup> Art. 10 of Regulation 1367/2006, cit.

<sup>134</sup> *Ibid.*, Arts 10, para. 1, and 2, para. 1, let. f).

<sup>135</sup> *Ibid.*, Art. 11.

<sup>136</sup> M. PALLEMAERTS, *Access to Environmental Justice at EU Level: Has 'the Aarhus Regulation' Improved the Situation?*, in M. PALLEMAERTS (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Groninger: Europa Law Publishing, 2011, pp. 273-312.

public.<sup>137</sup> This can be particularly problematic in light of the EU's commitment to sustainable development<sup>138</sup> and coherence among its different policies.<sup>139</sup>

Furthermore, internal review is only available for "administrative acts" under environmental law, thus excluding legislative acts adopted by ordinary legislative procedure.<sup>140</sup> "Administrative acts" include only measures of individual scope, excluding measures of general application,<sup>141</sup> something that enables the Commission to refuse most requests for internal review. Even though the narrow scope of acts covered by the internal review has been challenged, the CJEU has avoided assessing the compatibility of Art. 10 of the Aarhus Regulation with Art. 9, para. 3, of the Aarhus Convention by holding that the Regulation is not meant to implement these provisions and that the Convention lacks direct effect in the EU legal order.<sup>142</sup> Despite its narrow scope, this procedure allows for review of some transnational regulation, such as authorisations under the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)<sup>143</sup> or the authorisation of placing genetically modified organisms on the market,<sup>144</sup> but may still be restrictive on the merits.<sup>145</sup> On the basis of the current interpretation of the administrative review procedure, environmental NGOs could potentially challenge IEMEI-related decisions, such as the inclusion of a ship recycling facility on the European list, if the implementing act is considered to be of individual scope, or the recognition of a biofuels sustainability certification scheme which is set out in individual implementing acts.<sup>146</sup> However, in this respect, environmental NGOs could seek to challenge Commission decisions because of contravention of environmental law, which in effect may be conflicting with TC economic or developmental interests affected by IEMEIs. This demonstrates the various kinds of contradictory accountability claims that IEMEIs may raise from the perspective of internal and external interests.

What is of particular interest in terms of access to justice, is the possibility for NGOs to challenge the process of internal review under the Aarhus Regulation before EU

<sup>137</sup> This was found to be contrary to Art. 9, para. 3, by ACCC Findings (Part II), cit., paras 93-94.

<sup>138</sup> Art. 11 TFEU.

<sup>139</sup> M. PALLEMAERTS, *Access to Environmental Justice at EU Level*, cit., pp. 273-312.

<sup>140</sup> Art. 10 of Regulation 1367/2006, cit.

<sup>141</sup> *Ibid.*, Art. 2, para. 1, let. g).

<sup>142</sup> Court of Justice: judgment of 8 March 2011, case C-240/09, *Lesoochránárske zoskupenie*; judgment of 13 January 2015, joined cases C-404/12 P and C-405/12 P, *Stichting Natuur en Milieu*.

<sup>143</sup> Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

<sup>144</sup> M. PALLEMAERTS, *Access to Environmental Justice at EU Level*, cit., p. 284.

<sup>145</sup> *Ibid.*, pp. 283-286.

<sup>146</sup> For example, Implementing Decision (EU) 2016/1361 of Commission of 9 August 2016 on recognition of the "International Sustainability and Carbon Certification system" for demonstrating compliance with the sustainability criteria under Directives 98/70/EC and 2009/28/EC of the European Parliament and of the Council.

courts,<sup>147</sup> which could provide for a combination of social and legal accountability. Although at first sight it may seem as if the standing requirements are relaxed, it is doubtful, however, whether this would amount to a full review of the legality of the act or instead be limited merely to review of the written reply provided under the Aarhus Regulation.<sup>148</sup> If the NGO wants to challenge the initial act or omission, it would likely have to qualify under the normal standing rules,<sup>149</sup> which as analysed above are restrictive for NGOs.

The restricted nature of EU standing requirements has been repeatedly criticised by the ACCC, which oversees the implementation of the Aarhus Convention. In 2011, the ACCC noted that if EU courts continued with the same restrictive approach to standing, this would lead to a breach of the Convention's access to justice provisions, unless administrative review procedures compensated for the restrictive approach.<sup>150</sup> In March 2017, the Committee issued its final findings, holding that the post-Lisbon Art. 263, para. 4, TFEU,<sup>151</sup> the internal review procedure under the Aarhus Regulation<sup>152</sup> and the CJEU's case law discussed above,<sup>153</sup> do not constitute a change in direction to the effect of bringing the EU in compliance with the Convention. While the ACCC findings are not legally binding, the EU has committed to international obligations under the Aarhus Convention and to comply with findings of the ACCC. In terms of accountability, there is at least some political pressure on the EU to comply with access to justice requirements to enable members of the public to have access to effective judicial redress. While it seems unlikely for standing requirements to be drastically expanded, designing and interpreting Aarhus implementing legislation in accordance with the Aarhus Convention, possibly through more expansive administrative procedures, could extend access to justice in the EU legal order in some respects. It remains to be seen whether and how the EU will change its approach to be in line with the Aarhus Convention and what this would mean for access to justice for different kinds of TC actors.

Overall, while TC actors have access to justice through several avenues in the EU legal order, in practice direct access of TC affected interests to EU courts is restricted. This calls into question whether judicial review in the EU provides sufficient ways to hold EU global regulatory power into account, rendering it an imperfect accountability avenue for IEMEIs.

<sup>147</sup> Art. 12 of Regulation 1367/2006, cit.

<sup>148</sup> M. PALLEMAERTS, *Access to Environmental Justice at EU Level*, cit., pp. 295-296.

<sup>149</sup> C. PONCELET, *Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?*, in *Journal of Environmental Law*, 2012, p. 287 *et seq.*

<sup>150</sup> ACCC Findings (Part I) adopted 14 April 2011 on the compliance of the European Union, para. 88.

<sup>151</sup> ACCC Findings (Part II), cit., paras 67-80.

<sup>152</sup> *Ibid.*, paras 95-105.

<sup>153</sup> See *supra*, footnote 142.

#### IV. CONCLUSION

Territorial extension through IEMEs blurs the distinction between internal and external EU action, with IEMEs simultaneously regulating the internal market and catalysing developments outside EU borders by regulating conduct abroad. Given the uncertain nature of accountability relationships between the EU as the regulating jurisdiction and TC interests affected by its action, this phenomenon gives rise to complex questions about controlling the exercise of EU global regulatory power.

With the unilateral exercise of EU global regulatory power proliferating, not only in environmental law, but in many policy areas, judicial review in the EU legal order has a significant role to play in holding EU regulatory power to account in relation to TC affected interests. Judicial review in the EU has some disciplining potential in relation to IEMEs by providing access to EU courts when TC actors are directly affected, through the preliminary rulings procedure, and when individual decisions are addressed to them. However, direct access by TC actors is restricted when they are affected by IEMEs in indirect and general ways. The restricted access to EU courts exacerbates an external accountability gap when TC affected actors cannot judicially challenge IEMEs on the basis of the home legal system of EU law. Further, while this *Article* has focused on *access to justice* in determining the disciplining potential of judicial review for controlling EU global regulatory power, the extent to which the disciplining potential of judicial control of IEMEs is realised also depends on the grounds and intensity of review by EU courts. Research into the intensity of review on the basis of grounds such as proportionality and fundamental rights in relation to TC effects can also help determine the extent to which legal accountability through judicial review contributes to addressing an external accountability gap related to IEMEs.