EXTRATERRITORIALITY, ENVIRONMENT AND FISHING IN EUROPEAN UNION LAW

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1 INTRODUCTION

Extraterritoriality is often seen in a pejorative way as a violation of territorial sovereignty and the unilateral hegemonic imposition of normative standards, raising waves of criticism by the affected states, although the Lotus admits jurisprudence has discretion in its determination. However, in transnational issues such as those involving the environment or financial markets that are now globalised, in the absence or fragility of international solutions, it may make sense to externalize and extend the effects of national or regional legislation with the aim of ensuring greater effectiveness, either by imposing them or by acting as a reference and incentive for legislation and for changing conduct, including business conduct.

In the following pages, and without entering into a technical discussion about the conceptual cut-off of extraterritoriality (in which, strictly speaking, there would not even be a territorial link to the ordering that should be submitted to a third party that imposes conduct) and its variations as the territorial extension (in which there is already any link - nationality, objective territoriality, effects, universal jurisdiction or the principle of protection), extraterritoriality is assumed in a broad and fluid sense, trying to include measures that seek to regulate behavior or circumstances abroad, especially in a balance between the regulatory freedom of equal sovereign states and the interests of the international community, especially, in what concerns here, in the context of transnational environmental problems, maximizing unsustainable fishing

The European Union (EU) often opts, in terms of the environment and IUU (Illegal, Undeclared, Unregulated) fishing, for unilateral (and other multilateral) mechanisms that extend its regulatory power to conduct, presence, appropriation rights or circumstances that occur or prevail outside the European area, in a manifestation of its global regulatory power and its assumption as a major player in terms of sustainability, especially when it has a principle of a high level of environmental protection.[1] Despite the apparent goodness of the final objective of environmental protection and common resources, such as ichthyologic ones, the solutions found do not always resemble peaceful, fair, effective and efficient, raising the question around the benignity of extraterritoriality and a European environmental activism.

The most significant examples of the European Union's extraterritorial green action and its main lessons will therefore be addressed, and then progress will be made towards the specific problem of the unsustainability of fisheries, particularly IUU fishing, which finds answers in commercial, catch certification and traceability tools, in a complex unilateral web that raises doubts as to its merit and global scope.

2 EXAMPLES OF EXTERRITORIALITY OR TERRITORIAL EXTENSION OF EUROPEAN UNION ENVIRONMENTAL LAW

Environmental issues, in many cases due to their cross-border and global nature associated with the common resource nature of environmental macro-well, with diffuse causes and effects that are neither geographically nor temporally contained, are seen as paradigmatic candidates for extraterritorial legal treatment or territorial extension. Thus, in the context of European Union law, several examples can be found, recalling four of the most significant and doctrinaire cited below.[2]

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[1] Por todos, Alexandra Aragão (2006). O Princípio do Nível Elevado de Protecção e a Renovação Ecológica do Direito do Ambiente, Almedina, Coimbra.

[2] Entre outros, Joanne Scott (2014). Extraterritoriality and Territorial Extension in EU Law, The American Journal of Comparative Law, American Journal of Comparative Law, n. º 62; Natalie L. Dobson (2018). The EU's conditioning of the 'extraterritorial' carbon footprint: A call for an integrated approach in trade law discourse, RECIEL, Vol. 27, n. º 1; Ioanna Hadjiyianni (2017). The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors,
European Papers, Vol. 27, n. º 2; Tomasz Koziel (2012). Extraterritorial Application of EU Environmental Law – Implications of the ECJs Judgment in Air Transport Association of America, The Columbia Journal of European Law Online, n.º 19.

The first two[3] involve the environmental problem par excellence, due to its transversality and complexity, namely the overheating of the planet and climate change which, due to its global dimension, both in terms of sources and impacts, require a coordinated and multilevel response and deserve more attention from us here.

The creation of international solutions is not enough, policies and measures taken regionally, nationally and locally are necessary, not so much in a logic of decentralization, but more of polycentric integration. In this line, it seems understandable the connection not only between the existing emission trading systems but also their relationship with similar mechanisms, allowing the definition of an international price of Greenhouse Gases (GHG) and a better measurement of the costs of combating global warming. The European Union, following the commitments assumed as a whole and individually for each Member State, under the United Nations Framework Convention on Climate Change and, in particular, its Kyoto Protocol (KP), soon understands the potential and the economic and political dividends of the opening of the European Emissions Trading Scheme (ETS). Directive 2003/87/EC, in its original version, provides for an effort to link to other similar schemes, through international agreements, reinforced with Directive 2004/101/EC (DirectiveLinking), which institutionalizes the creation of bridges with the Kyoto Protocol by directly equating the Certified Emission Reduction Units (CDM)45 of projects arising from the Clean Development Mechanism (CDM), stipulated in Article 12 of the Kyoto Protocol, the Emission Reduction Units (ERUs),[4] [5] from the Joint Implementation (JI) mechanism, enshrined in Article 6 of the Kyoto Protocol, and the emission allowances from the European Emissions Trading Scheme, authorizing the trading of reduction credits obtained through projects in countries excluded from Annex I (i).[6] e. without quantified emission reduction or limitation objectives) for the compliance of operators with the coverage of Greenhouse Gas emissions.

The climate issue[7] can lead the European Union to the leadership of the environmental (and energy) dossier and foster the emergence of a new legal framework and concrete substantive obligations, which is intended to extend outside the European sphere. Moreover, the success of the Clean Development Mechanism and its connection to the European Emissions Trading Scheme allow the export of environmental and energy concerns and policies to Developing Countries (DCs) and Least Developed Countries (LDCs), in a phenomenon of major contagion to the climate cause. However, the Clean Development Mechanism also represents the other side of the coin, since the excessive (and even fraudulent) creation of Certified Emission Reductions generates serious problems of corruption, moral risk and deviation from the intended climate stabilization, since, on the one hand, the desired physical reduction of pollutant emissions is not obtained, as, on the other hand, by its connection to the European Emission Trading Scheme, the European effort is contagious, especially with an increase in the emissions ceiling.

However, in order to show the seriousness and conviction of the commitments undertaken, Decision 406/2009/EC limits [8] the use of credits resulting from project activity, so as to ensure that

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[3] Pode-se ainda em matéria de alterações climáticas e "extraterritorialidade" do Direito Europeu, olhar para o Regulamento 2015/757/UE relativo à monitorização, reporte e verificação de emissões de CO2 de transportes marítimos, alterando a Directiva 2009/16/CE. Em sentido mais lato, uma vez que as causas das alterações climáticas e sobreaquecimento do planeta são múltiplas, também neste âmbito se poderia referir a importação ilegal de madeira (a tratar sucintamente mais abaixo) ou os critérios de sustentabilidade dos biocombustíveis decorrentes da Directiva 2009/28/CE.

[4] Em inglês, Certified Emission Reductions (CER).

[5] No seio do MDL e associado à actividade de florestação e reflorestação, atente-se também às URCE temporárias ou URCE-T, designando uma unidade de redução certificada acordada por uma actividade de florestação ou reflorestação no âmbito do MDL, cuja validade expira no fim do período de cumprimento seguinte àquele em que foi criada; e às URCE de longa duração ou URCE-LD, designando uma unidade de redução certificada acordada por uma actividade de florestação ou reflorestação no âmbito do MDL, cuja validade expira no fim do período de contabilização para a atribuição de créditos de emissão da actividade de florestação ou reflorestação no âmbito do MDL para a qual ela foi criada.

[6] Recorde-se que o Anexo I incluía os países-membros da UE à data da ratificação do Protocolo de Quioto pela União e da sua entrada em vigor.

[7] Retoma-se aqui trabalho desenvolvido em Rute Saraiva (2009). A Herança de Quioto em Clima de Incerteza: Análise Jurídico-Económica do Mercado de Emissões num Quadro de Desenvolvimento Sustentado, Tese de Doutoramento, Faculdade de Direito da Universidade de Lisboa, Lisboa.

[8] Note-se que a proposta apenas limita, e não afasta, o recurso às actividades de projecto, o que revela realismo em matéria de custos e uma preocupação com a obrigação de ajuda ao desenvolvimento sustentado dos PVD.

significant reductions in emissions result from domestic measures in a joint effort between the different decision levels, from local to supranational, and the use of flexibility mechanisms is only complementary. In this sense, the annual use by Member States of credits from reduction projects in third countries is limited to a quantity representing 3% of the greenhouse gas emissions of each Member State not covered by Directive 2003/87/EC in 2005 or in other Member States until a future international agreement on climate change is concluded. Member States may, if authorized, transfer the unused part of this quantity to others. However, Member States with an emission reduction target, or an emission increase target, of up to 5%, referred to in Annex II, which are listed in Annex III, may use per year, in addition to the credits referred to above, additional credits corresponding to 1% of their verified emissions in 2005 from projects in Least Developed Countries (LDCs) and Small Island Developing States (SIDS) as a result of fulfilling one of the following four conditions:

- where, according to the Commission's impact assessment, the direct costs of the overall package exceed 0.70% of Gross Domestic Product;
- where there is an increase of at least 0. 1% of Gross Domestic Product between the de facto target adopted for the Member State concerned and the estimated cost-effectiveness according to the Commission's impact assessment;
- where more than 50% of the total emissions of the Member State concerned covered by this Decision correspond to transport-
- related emissions; or - where the Member State concerned has a renewable energy target for 2020 of more than 30% referred to in the Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources. In this situation, Portugal fits, among others,
- not only because of the share of renewable energy, but also because it is possible to increase emissions by 1% compared to 2005.

In this vein, and in view of the intention to support Developing Countries and to achieve greater efficiency, the Union remains committed to improving the Clean Development Mechanism and to the recognition of credits, with the reinforcement of the guarantee of projects that represent real, verifiable, additional and permanent reductions, that constitute a significant added value in terms of sustainable development and with a reduced environmental or social impact and that ensure an equitable distribution of projects. Nevertheless, in the framework of Decision 406/2009/EC, it is recognized that in the Least Developed Countries the number of projects under the Clean Development Mechanism has been very small. However, in the search for a more equitable distribution, in particular through the Global Alliance, [9] the acceptance of credits from projects initiated after the 2008-2012 period in Least Developed Countries, to project categories eligible for use in the European Emissions Trading Scheme for that same phase, is guaranteed. This acceptance should continue until 2020 or the conclusion of an agreement with the Union, whichever occurs first. In addition, to provide more flexibility and promote sustainable development in Developing Countries, Member States may use additional project credits through agreements concluded by the Union with third countries. It should also be noted that the possibility for Member States to continue to use Clean Development Mechanism credits is important to ensure that they have a market after 2012. However, it should again be noted that the text of the intra-EU sharing agreement only allows, once a future convention to replace the Kyoto Protocol has been concluded, the acceptance of credits from countries that have ratified that agreement and are subject to a common approach. The aim is thus to encourage them to accede to the new instrument.

The European experience also reveals, in the context of the territorial extension of compliance with the obligations arising from the European Emissions Trading Scheme, some interesting clues

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[9] Comunicação da Comissão ao Conselho e ao Parlamento Europeu, de 18 de Setembro de 2007, "Criar uma Aliança Global contra as Alterações Climáticas entre a União Europeia e os Países em Desenvolvimento Pobres e mais Vulneráveis às Alterações Climáticas", COM (2007) 540 final. Ver também as Conclusões do Conselho sobre uma Aliança Global contra as Alterações Climáticas entre a União Europeia e os países em desenvolvimento pobres e mais vulneráveis às alterações climáticas - Conselho "Assuntos Gerais e Relações Externas", a 20 de novembro de 2007. A ideia de uma Aliança Global para fazer face às alterações climáticas nasce, em Junho de 2007, da proposta do Livro Verde sobre a Adaptação às Alterações Climáticas na Europa que contém um pilar sobre a integração nas acções externas da UE, exortando o aprofundamento do diálogo e cooperação neste domínio entre a UE e os PVD. Neste sentido também já apontavam a Comunicação da Comissão ao Conselho e ao Parlamento Europeu, "As Alterações Climáticas no Contexto da Cooperação ao Desenvolvimento", COM (2003) 85 final - Diário Oficial C/2004/76, e as Conclusões do Conselho "Assuntos Gerais e Assuntos Externos", de 22 de novembro de 2004, sobre as alterações climáticas no contexto do apoio ao desenvolvimento, com o Plano de Acção 2004-2008.

regarding the contribution of the interconnection between mechanisms. On the one hand, the link with the two flexibility mechanisms (JI and CDM) gives the market a new dimension and dynamics, with the price of its credits influencing not only the decisions of economic agents but also the prospects for the evolution of the value of the permits. However, for the regime to function properly, it is important to block double counting or flooding of the market with these securities that can destroy incentives for the development of internal measures, causing bad assets to drive out the good ones. In other words, it is important, even because of the additionality principle removed from the Kyoto Protocol, because of the very credibility of the European Emissions Trading Scheme[10] and in order to avoid distortions between the sectors of the EU ETS and non-EU ETS,[11] to establish a quantitative limit to the number of "external" credits to the system that may be acquired (concrete ceilings).[12]

However, the direct equivalence between the different assets potentiates situations of imbalance, since some of the credits are achieved almost effortlessly, a fact that has significant economic and environmental implications: economic because, by being more attractive, they reduce the preference and demand for licenses from the European Emissions Trading Scheme, decreasing its value and, as a consequence, stripping the emissions market and technological innovation and development; [13]environmental because, due to their ease, they do not allow the creation of a culture of respect and environmental development, potentiating a scenario of moral risk, besides that not all the projects that grant credits generate the same ecological benefit, and may end up favoring those less effective in environmental terms. [14] In this regard, many voices are raised to warn of Clean Development Mechanism projects that are too lax and have dubious additionality characteristics, which more often than not serve for large transfers to China and India, creating or reinforcing regional distortions.[15] In addition, the opening to other assets makes it possible to import new problems into the receiving regime with loss of control over the mechanism itself.[16] In this way, criticism of the Clean Development Mechanism and the IC is contagious to the European Emissions Trading Scheme, generating potential pockets of resistance and imbalance. Moreover, if there are no guarantees as to the enforcement and sanction for non-compliance in one of the connected systems, mistrust can undermine the functioning of the market, even leading to a race to the bottom with significant environmental costs. In short, fragmentation between different markets and different levels of action can undermine all the effort made by creating distortions and inefficiencies. [17]

In addition, there is the question of the legal nature of the various rights to pollute and their compatibility, particularly as regards their treatment in tax terms, with any impact on the structure of the market. Less problematic will be the link if there is, at least at the formal level, full fungibility between the rights to be exchanged, either through a bilateral link or through open multilateral

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[10] DEFRA (2007). Analysis Paper on EU Emissions Trading Scheme Review Options, Londres, 15.

[11] R. Schüle e W. Sterk (2008). Options and Implications of Linking the EU ETS with other Emissions Trading Schemes, European Parliament, DG Internal Policies of the Union, Policy Department Economic and Scientific Policy, 20.

[12] P. Criqui e L. Viguier (2000). Régulation des Marchés de Droits D'Emission Négociables Pour le CO2 Une Proposition de Plafonds pour les Quantités et pour les Prix, Institut d'Economie et de Politique de l'Energie, Cahier de Recherche, n.º 18, 4 ss.

[13] Ligando-se, por exemplo, dois sistemas com preços de carbono diferentes, o preço das licenças será mais alto do que o estabelecido anteriormente num dos casos e inferior no outro. Deste modo, a procura no sistema que tinha um preço mais elevado e a oferta do sistema que apresentava um preço mais baixo beneficiam com o novo preço. Ao contrário, os compradores do programa com preços mais baixos e os vendedores do programa com preços mais altos ficam a perder, revelando uma alteração na distribuição das rendas mesmo se a ligação trouxer benefícios económicos líquidos em termos totais. Contudo, a ligação pode evidenciar divergências no tratamento de agentes económicos similares e ajudar, assim, a corrigir eventuais distorções concorrenciais identificadas.

[14] J. Jaffe e R.N. Stavins (2008). Linkage of Tradable Permit Systems in International Climate Policy Architecture, NBER, Working Paper n.º 14432, Cambridge, MA, 11; J. Chevallier e N. Raffin (2008). Linking Emissions Trading Schemes: An Assessment with Regard to Environmental Efficiency.

[15] J. Jaffe e R.N. Stavins (2008). 11; J. de Sépibus (2008). Linking the EU Emissions Trading Scheme to JI, CDM and Post-2012 International Offsets. A Legal Analysis and Critique of the EUETS and the Proposals for its Third Trading Period, NCCR Trade Regulation , Working Paper n.º 2008/18, 24; M. Tatsutani e W.A. Pizer (2008). Managing Costs in a U.S. Greenhouse Gas Trading Program. A orkshop Summary , RFF, Discussion Paper n.º 08-23, 11-12.

[16] J. Jaffe e R.N. Stavins (2008). 11.

[17] Nesse sentido, T. James e P. Fusaro (2006). Energy and Emissions Markets. Collision or Convergence?, Wiley, Singapura, 122.

agreements.[18] Even today, at the various political levels of decision making, this problem has been eluded, perhaps hoping that it will be resolved in the market itself or through institutions such as tradition or authority.

In effect, Article 11a of the Linking Directive stipulates that Member States shall issue an emission allowance, which is immediately surrendered, in exchange for a Certified Emission Reduction Unit or Emission Reduction Unit held by the operator in its national registry. The legislator's objective in this situation seems to be, besides the direct link between mechanisms, to reduce transaction costs with the acceptance of those credits and their transformation into an emission permit. Thus, instead of a multiplication of "rights" within the European Emissions Trading Scheme, only emission allowances will circulate. This apparent simplification also allows operators to seek the least costly (and most efficient) means to cover their obligations. However, this susceptibility hides several problems that may, contrary to what the legislator intends, destabilize and burden the European emissions market.

Firstly, three "rights" (Emission Licenses, Certified Emission Reduction Units and Emission Reduction Units) are equated with different legal regimes and contents. Secondly, the transformation into a license of a given Member State (with its own legal nature) will lead to the Certified Emission Reduction Unit and the Emission Reduction Unit being transfigured in a different way depending on the receiving State. These two issues inevitably open the door to distortions. In order to minimize their costs, operators have sought the most advantageous means. This was, in fact, the main motivation behind the Linking Directive. However, at the international level, many of the projects associated with the Clean Development Mechanism (CDM) and Joint Implementation (JI) that make it possible to allocate credits prove to be less costly than buying emission allowances. Therefore, although there are determinations for the number of Certified Emission Reduction Units and Emission Reduction Units to be used within the European space, at national and installation level, the tendency will be to preferably acquire this type of credit, especially when there is an equivalence with the emission allowances and there is no competition with non-EU states for the acquisition of Certified Emission Reduction Units and Emission Reduction Units.[19] With the abundance of these credits in the international market, the European Emissions Trading Scheme is thus exposed not only to the vicissitudes of this system but also to a cheaper competition that may internally corrode the European mechanism with the reduction of the price of community emission allowances. Moreover, the entry of these units will be made by the Member State with the most favorable legal, accounting and financial nature and regime, not least because the question of their nature is not resolved in terms of the European (and national, add) whole. In this way, the companies of that state will act as real intermediaries of emission permits, thus distorting the spirit of the system. Ultimately, they may even come to hold market power although with the limitation of contestable markets and the price of "traditional" emission allowances. In this respect, the changes introduced by the Linking Directive leave some loopholes that could potentiate these problems.

Much of the success of the interconnection therefore lies in the careful design of the system and its institutional framework, reducing segmentation phenomena and increasing transaction and harmonization costs that can generate dangerous inefficiencies. Moreover, it is important not to underestimate the conceptual implications resulting from the opening/connection. In particular, in a logic of convergence towards greater harmonization, the competition between models of emission markets creates a dynamic of affirmation to define the reference structure around which they are reorganized. The winner starts to export its construction and rules, while the others incur in adjustment costs.[20] If the Kyoto Protocol's international mechanisms of flexibility start to impose themselves, influencing the concrete construction of the European Emissions Trading Scheme, the latter's strength in the scope of the Greenhouse Gases markets increasingly plays in its favor, including for its opening and territorial extension.

In short, at the level of extraterritoriality, or more specifically of territorial extension, the territorial connection established relates to the extra-Community carbon rights to be used in the European Emissions Trading Scheme for the fulfillment of the obligations assumed, therefore in a logic of conduct but also of state of ownership, this possibility being, however, conditioned (except for cases involving Least Developed Countries - within the Clean Development Mechanism) to the existence of a bilateral agreement with the Union or of a specific international agreement. Moreover, this solution, natural as a global environmental problem, is intended, on the one hand, to promote extraterritorially the environmental (and energy) awareness and find the most efficient and economical solutions, on the other hand, potentiates risks, gaps and incongruities in the European Emissions Trading Scheme.

The second example of extraterritoriality, still within the climate issue and its necessary cross-cutting treatment, relates to Directive 2008/101/EC, with the introduction of the aviation sector in the European Emissions Trading Scheme. Following the logic of Directive no. 2003/87/EC, the Union intends to involve the big emitters, this time diffuse, of Greenhouse Gases. Thus, it establishes the delivery of emission permits by airlines, taking into account the whole duration of the flight, even the part outside

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[18] IETA (2006). Linking the EU ETS with Emerging Emissions Trading Schemes, Toronto e Genebra.

[19] P. Criqui e A. Kitous (2003). Impacts of Linking Jl and OMM Credits to European Emission Allowance Trading Scheme (KPI-ETS), Kyoto Control Implementation, 13.

[20] J.F. Green (2008). The Regime Complex for Emissions Trading: The Role of Private Authority, Princeton University, Paper presented to the International Studies Association San Francisco, CA, 2.

European space. Thus, the territorial connection involves the conduct and presence, considering all flights departing from or arriving in European Union space. However, it is foreseen the exemption of the obligation to deliver allowances, if the third country of departure adopts measures equivalent to the European Emissions Trading Scheme for the reduction of Greenhouse Gases in flights and it is accepted the amendment of the Directive if an international agreement for the reduction of Greenhouse Gases emissions from aviation is reached.

In this context, and in the face of complaints from non-European companies, the Court of Justice of the European Union (CJEU) was called to rule in case C-366/10 Air Transport Association of America and Others.[21] The Court of Justice of the European Union refuses to violate customary international law due to the extension on the High Seas and recognizes a territorial link (and unlimited jurisdiction) based on environmental effects, which raises criticisms and doubts about a possible European environmental imperialism linked to its political leadership in this matter,[22] and the link between conduct and territory. In this regard, the Court holds that the Directive does not regulate behavior beyond the community space, but rather constitutes a regulation of air transport applicable after landing in one of the airports of the European Union. The Advocate General also considers the existence of a link between the conduct and the territory of a Member State of the European Union to be an unavoidable argument in resolving the challenge to extraterritoriality. However, as pointed out in the introduction, this justification is not sufficient since, beyond a very strict sense, a jurisdiction can have an extraterritorial dimension when related to events that occur beyond the borders of a country. In other words, the Court's thesis is that European law in this case is not applied extraterritorially but has extraterritorial implications, resorting, on the one hand, to the doctrine of effects and, on the other, to that of objective territoriality through contact with European airports. It is a pity that the Court of Justice of the European Union, which is somewhat careful to build its case based on international law, has not taken the opportunity to conceptually and dogmatically deepen the concept of extraterritoriality and to link it and distinguish it namely from the idea of territorial extension or even to further investigate the compatibility of the Directive with customary and conventional law international, in particular the Kyoto Protocol, the Chicago Convention or the bilateral Open Skies Agreement, and therefore with the sovereign rights of states over airspace. It should be noted that the Court of Justice of the European Union advocates some inadequacy of customary law regarding the exclusive submission of the aircraft flying over the High Seas to the State of Registration. [23]

The third example of extraterritoriality (or better, of territorial extension) is the Regulation no. 995/2010/EU, concerning the import of wood (and derivatives), prohibiting the entry into the European area of illegal wood under the law of a third country, establishing as a territorial connection with the EU legal system the conduct of marketing within the European Union. However, there are exceptions to this prohibition. On the one hand, if the wood trade is licensed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). On the other hand, it is allowed for certain species to comply with due diligence standards (due diligence) of Regulation 995/2010/EU and Regulation 2173/2005/EC, which requires transparency in the supply chain, as well as the maintenance of a due diligence system monitored by an organization recognized by the Union. Finally, it is not necessary to submit to these standards if the importer complies with equivalent standards established in a Voluntary Partnership Agreement (PA) between the third country and the European Union.

Finally, fourthly, Directive 2012/19/EU on the export of waste/electric and electronic waste, which regulates the proper treatment of waste and recovery targets for producers, whether they are companies established in the European Union or companies from third countries selling to the European Union, setting as a territorial connection the production pipeline within the Union and for Union targets. According to the Directive, treatment operations in relation to waste generated in the European Union, carried out outside it can count towards the producer's recovery target if the treatment operation takes place under conditions equivalent to those required by European legislation.

From these cases, some lessons can be learned about exterritoriality/territorial extension of European Union law in environmental terms, extendable, with the necessary adaptations, to other areas.[24]

On the one hand, the territorial extension aims at promoting behavior or legal changes in third

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[21] Sobre esta decisão, ver nomeadamente B. Havel e J. Mulligan (2012). 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, Air and Space Law, Vol. 37, n.º 3; T. Koziel (2012).; Geert de Baere e Cedric Ryngaert (2013). The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy, European Foreign Affairs Review, Vol. 18, n.º 3.

[22] T. Koziel (2012). 5; G. de Baere e C. Ryngaert (2013). 400-401. Veja-se que não é possível determinar se os efeitos das alterações climáticas na Europa apenas se relacionam com os voos que partem ou aterram no espaço comunitário. Ou seja, qualquer voo, mesmo não sobrevoando ou entrando no espaço europeu pode, pelas suas emissões, causar impactos na UE, pelo que o recurso à tese dos efeitos implica, em consequência e em última análise, a defesa de uma jurisdição universal que muito esticaria a extraterritorialidade.

[23] T. Koziel (2012). 6-7; G. de Baere e C. Ryngaert (2013). 395-398.

[24] J. Scott (2014). 114 ss.

countries and/or internationally, i.e. to serve as an example and normative reference (of quality), in an export of values and system, not necessarily purely European but accepted at international level. Therefore, it aims to act as a normative catalyst for third countries and multilateral negotiations and cooperation.

Thus, we want to encourage the improvement of standards and performance, especially in the field of imports (i.e., playing with the economic dimension and the possibility of opening the markets of third countries to the European Union) and modify the organization, governance and activity of companies, countries and even regional and global institutions.

Basically, there is not so much a primary concern with European (economic and political) interests, but at least apparently with issues of global interest, as if it were an altruistic mission that highlights the ethical dimension of European action on climate and environmental issues, but also a recognition that the behavior of third parties has more and more influence and impact in the European Union, especially in terms of quality of life and market.

From the examples above, it also results the effort of the Union to base the territorial extension of its legal framework on international guidelines and international law, especially since these are transnational problems. Therefore, there is an exercise to promote greater effectiveness and scope to soft law or to extend the geographical scope of only binding rules to a small number of parties. In the absence of an international basis, the aim is to promote international negotiations and solutions or to use European standards as an anchor. Thus, unilateral cases involve the creation of autonomous obligations of the European Union to comply with international standards, either because they are considerably more detailed and/or more demanding than the corresponding international measures, or because they create a role for the European Union in the promotion and enforcement of international law. [25]

Another important lesson is in the flexibility of extraterritorial solutions that generally meet the concrete conditions of the third state, namely requesting equivalent measures. Furthermore, incentives with differentiated rewards are applied (e.g.: only one entry license for the European market, moratorium on the application of the Greenhouse Gas Regulation, in order to enhance bilateral and international negotiations or equivalent national solutions).

In other words, the extraterritorial approach of European Union law is different from, for example, the traditional American option. Take, for example, in the environmental area, the Turtle-Shrimp case, [26] in which the United States did not seek prior negotiation, nor did it rely on international law and imposed American standards (not equivalent measures). In other words, the European Union, in terms of extraterritoriality, seems to prefer interdependence, responsibility and contingent unilateralism rather than hegemony, protectionism and blind unilateralism.

3 THE FISHING PROBLEM AND THE FISHING INN

The issue of fishing is part of the famous Tragedy of the Commons, which affects common resources without any real definition of appropriation rights. Due to its characteristics of free access and emulating nature, an over-exploitation and under-production of the resource is observed, causing a race to the bottom, with its exhaustion, aggravated by a predator-prey relationship addicted to human hegemony and appetite, thus not allowing the recovery of the species. This is a transnational problem in which the traditional systems of monitoring by the coastal state or flag state fail, as evidenced by the monitoring of fish banks in the search for sustainable capture.

In fact, today there are dynamic and increasingly complex models, used for example by the European Union, to measure and calculate sustainable fishing, taking into account several variables (such as water quality) in addition to the morbidity and natural renewal of the fish. Despite their use in the definition (and monitoring) of fishing rights, it can be observed that, in successive cycles of recovery of species, their overall number has been decreasing slowly but consistently, which clearly indicates a practice of IUU fishing.

The main solutions currently tested to combat IUU fishing involve, roughly, two alternatives: i) trade restrictive measures, also known as "trade sanctions", and enacted by one or more states; and ii) catch certification schemes, with two main specific variants, namely trade documentation schemes and catch certification schemes.

Several regional tuna stock management organizations, for example, prefer trade documentation schemes, which reveal the ability to detect vessel of convenience operations and deter or at least discourage trade in specific species from flag of convenience countries. However, this has led to changes in IUU fishing with more than 95% of such operations being perpetrated by legally registered and licensed fishing vessels that engage in illegal activities, such as misreporting or underreporting of

[25] J. Scott (2014). 113.

[26] No âmbito da OMC/GATT, Turtle-Shrimps India et al. v U.S. (1998). O Painel considera invocação americana de artigo XX injustificável (sem aplicar o teste). O Órgão de Apelo mantém decisão embora discorde da abordagem do Painel mas observa-se uma separação do Direito do ambiente do Direito do comércio, deixando a melhoria dos standards ambientais para futuras negociações.

catches, which can be effectively eliminated by implementation of a catch certificate system. [27]

Multilateral catch certificate systems establish a mechanism for the flag State to certify the legality of the catch of the expected species. When well constructed and implemented along the productive chain, they are effective and simple to supervise, avoiding underreporting and incomplete reporting. Their empirical success translates either in the breakdown of detection of defaults or in the recovery of stocks of fish. The economic component also helps to explain its effectiveness: despite the initial economic and social costs in its implementation, it causes the price of the illegal product to decrease, since it cannot be legally brought to market, thus discouraging IUU fishing. [28]

At European level, which had already tested extraterritoriality in the field of fisheries with Regulation 3094/86/EEC, assessed in the Poulsen and Diva Navigation case by the European Court of Justice, its legal framework is currently the result of Regulations 1005/2008/EC on IUU fishing, No 1006/2008/EC, concerning authorizations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, and No 468/2010/EU of the Commission establishing the European Union IUU vessel list. A unilateral mechanism for catch certification is therefore envisaged, to which trade restrictive measures are added, with a system of "yellow cards" (identification of non-cooperating countries) and "red cards" (ban on imports). In a simple way, Regulation 1005/2008/EC, in its articles 2 paragraph 2 a), and 12 paragraph 3, determines that fishing activities that result in fishery products exported to the European Union, regardless of where they are carried out, are carried out in accordance with the legal requirements of the flag state of the vessel and in accordance with international conservation and management standards.

Under European Union law, and considering formal, procedural and substantive criteria, a fishing ship is presumed to be involved in IUU fishing, namely if it is:

- not holding a valid fishing license;
- failure to comply with its obligations to register or declare capture data or related data;
- falsifying or concealing the respective trademarks, identity or registration number or evidence relevant to an investigation;
- fish in a closed area, during a closed season, without a quota or after dropping a quota or beyond a prohibited depth;
- fishing for unauthorized species;
- use prohibited or non-compliant fishing gear;
- obstruct the activity of the inspectors;
- take on board, transship or land undersized fish;
- participate in activities with ships on the IUU ships list;
- engage in fishing activities in the area of competence of a Regional Fisheries Management Organization (RFMO), without respecting the conservation and management measures of that organization and if it is registered in a country that is not part of that organization, or if it does not cooperate with that organization;
- is a stateless ship.

Regulation 1005/2008/EC establishes a series of measures to prevent IUU fishing products from entering the Union market, namely through port inspections.

Otherwise, and as a central dissuasive measure, the creation and use in the European access and market of a unilateral system of catch certificate that aims to ensure that products imported into the European Union do not come from IUU fishing. They are issued by the flag State and accompany the fishery products along the supply chain in order to allow continuous verification, which indicates a territorial extension of European law, in particular under Articles 12 and 14 of Regulation 1005/2008/EC, respectively on direct and indirect imports, and, 6 of Regulation 1010/2009/EC on simplified certificates (artisanal fishing). However, this unilateral mechanism presents serious flaws and difficulties in its application and enforcement. In fact, it is based on a paper form with no central data record, which in the end hampers effective and verifiable traceability and therefore the exclusion of products illegally extracted from certified supply flows. In addition, due to their one-sided nature, (derived) fishery products can circulate through much of the supply chain without being covered by certificates, and unlike multilateral systems that cover and protect entire stocks, here they do so only partially in many cases. [29]

However, it should be added, similarly to the environmental examples cited in the previous point, that the European certification framework accepts the equivalence of similar certification mechanisms, be they multilateral or national. For example, any products covered by certificates from Regional Fisheries Management Organizations (RFMOs) and imported into the European Union are

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[27] Gilles Hosch (2016). Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches, International Centre for Trade and Sustainable Development, Issue Paper, Geneva, vii.

[28] G. Hosch (2016). vii.

[29] G. Hosch (2016). vii-viii, 29-30.

exempt from the obligation to provide EU catch certificates, such as countries as Norway, Canada or New Zealand, which has developed national certification schemes to meet European requirements, thus providing the same degree of assurance.

As stated above, given the presumed IUU fishing activities, the European Commission will identify fishing ships relatively for which the information obtained is enough to presume their participation in IUU fishing; notify flag States (belonging to EU and third countries); transmit the information to all EU countries and elaborate a list of ships carrying out IUU fishing (althoug with safeguard measures and appeal mechanisms to ensure fair treatment of the ships and countries concerned).

The Commission will also appoint non-cooperating countries outside the European Union in the fight against IUU fishing, as flag State, port State, coastal State or marketing State. After a process of dialogue, and not public, with bilateral consultations and (soft) encouragement of interests alignment that does not finally reach a successful agreement on the allegedly illegal practices, the states found to be infringing will be included on a "black" list (red card) after a pre-identification that functions as a yellow card. This list, although is a soft sanction in view of its nature as a social norm, ends up producing effects due to the shame and discomfort associated with the situation and signaling given in terms of (bad) image of the offending state for the other states and the market. In short, no country (like no operator) yearns to be portrayed negatively before its pairs, and it is also hampered in its access to new markets, so they will tend, if only for underlying economic reasons, to take corrective measures. The empirical data reveal that this measure has led some countries to improve their legal frameworks and fisheries governance, but it is not possible to ascertain whether, in the end, this translates into a reduction in IUU fishing. Moreover, the criteria used to identify bad behavior seem somewhat opaque and dubious, and it is strange to note the lack of coincidence between the European and American lists. [30]

European Union countries must apply effective, proportionate and dissuasive (trade) sanctions, with fair and transparent criteria, to natural or legal persons engaged in IUU fishing activities. These will be all the more effective the more dependent the donor/country is on access to the European market. However, sanctions are only foreseen for fishing by ships of Member States or fishing in waters of Member States, or for serious infringements detected on European territory or in European waters but committed on the high seas or within the jurisdiction of a third country and being sanctioned in accordance with Article 11 (4).

In short, the European Union's trade measures only apply to States in their capacity as flag States, so that in their capacity as port or trading States, even if they participate in the laundering of IUU products, they cannot be targeted. Trade restrictions are implemented across the entire fish and fleet of a given country, regardless of whether or not they have been actively involved in IUU fishing. This results in disproportionate impacts, particularly for small operators who will find it difficult to overcome the embargo, unlike large operators who have the means to find a new flag for their fleet. [31] In other words, European sanctions seem somewhat blind, unfair and, ultimately, largely ineffective.

5 TRACEABILITY

Traceability of fish is also a way of combating IUU fishing on the one hand and of protecting European consumers on the other, making it possible to follow the fish they eat from their catch to their plate, passing through the various intermediaries, namely the importer/first buyer, processor/transformer, transporter, wholesaler and retailer, which in the end translates the extraterritorial influence of European law.

This solution, today supported on technology that can pass through codes, labels and/or cell phone applications, implies, however, along the entire production chain, costs with its implementation, which may or may not be reflected in the price to be paid by the final consumer. In fact, an additional investment is required by the operators (e.g.: equipment and data system, qualified personnel, more storage space for proper separation of lots) and more operating costs (collection, storage and availability of information, separation of lots). [32]

However, the measure is considered proportional and appropriate in view of the various benefits achieved, in particular gains in transparency, fair competition and combating IUU fishing, food safety and easier damage limitation, consumer confidence and better understanding of production and supply cycles. [33]

But, there is some complexity in this area of fisheries traceability, since European law overlaps with food traceability, in particular with the framework arising from the Codex Alimentarius, ISO 8402:1994 and Regulation 178/2002/EC, in addition to the problems and shortcomings identified above with a catch certification system based on paperwork and without central registration, without yet the effective application of the provisions of Article 51(2) of Regulation 1005/2008/EC on an assistance

[30] G. Hosch (2016). viii.

[31] G. Hosch (2016). viii.

[32] I.C. Goulding (2016). Manual on Traceability Systems for Fish and Fishery Products, CRFM Special Publication, nº 13, 13.

[33] I.C. Goulding (2016). 13-14.

system mutual, which includes an automated information system, known as the "IUU fishing information system", managed by the Commission or a body designated by it, to assist the competent authorities in preventing, investigating and prosecuting IUU fishing.

The European Union's traceability requirements, provided for in Regulation 178/2002/EC, apply only within the European area, i.e. they have no extraterritorial effect.

Thus, they apply from the importer to the reseller (i.e. the importer should be able to identify his supplier in a third country - a step back). However, the exporter himself, in a third country, is not bound to traceability. But, he may still have traceability obligations, either through a special regime (e.g. animal products) or due to contractual arrangements or international agreement.

In this respect, Regulation 1379/2013/EU on fisheries labeling and traceability, including the eco-label and the indication of catch area, should be taken into account.

Moreover, Article 12(4) of the IUU Fishing Regulation, together with Regulation 1010/2009/EC, for catch certificates, seek to ensure full traceability of all fisheries products traded with the European Union, by stipulating that:

"The catch certificate contains all the information specified in the regular model in Annex II and is validated by a public authority of the flag State with the necessary powers to certify the accuracy of the information. In agreement with the flag States, within the framework of the cooperation established in Article 20(4), the catch certificate may be established, validated or submitted by electronic means or replaced by electronic traceability systems ensuring the same level of control by the authorities."

For its part, Regulation 1224/2009/EC establishes a Community control system to ensure compliance with the rules of the Common Fisheries Policy. Thus, the whole production and marketing chain must be covered by a control system which must include a coherent traceability system complementary to the provisions of Regulation 178/2002/EC and must also protect consumers' interests by providing information on marine products.

In addition, Article 58, which refers to the traceability of Regulation 1224/2009/EC, stipulates that:

1. "*Without prejudice to Regulation (EC) No 178/2002, it should be possible* ***to track all lots*** *of fisheries and aquaculture products* ***at all stages of production, processing and distribution, from catching or harvesting to retail sale***.

2. *Fishery and aquaculture products placed or likely to be placed on the market in the Community must be* ***adequately labeled*** *to* ***ensure the traceability of each lot***

3. *The lots of fishery and aquaculture products may only be merged or divided after the first sale* ***if it is possible to trace their route to the catch or collection stage***.

4. *Member States ensure that operators have in place systems and procedures to identify the operator who has supplied them with lots of fishery and aquaculture products and to whom those products have been supplied. This information shall be made available to the competent authorities on request.*

5. *The minimum labeling and information requirements for each batch of fishery and aquaculture products shall include at least the following elements*:

a. Identification number of each batch;

b. External identification number and name of fishing ship or name of aquaculture production unit;

c. FAO alpha-3 code of each species;

d. Date of catches or date of production;

e. Quantities of each species expressed in kilograms net weight or, when appropriate, number of individuals;

f. Name and address of suppliers;

g. Consumer information as provided for in Article 45 of Regulation 1379/2013 of the European Parliament and of the Council;

h. Information indicating whether or not fishery products have been previously frozen.

6. (...)

7. The information listed in paragraph 5(a) to (f) do not apply to fishery or aquaculture products imported into the Community and accompanied by catch certificates.

Imports from third countries require catch certificates and are free from traceability requirements of fisheries control. However, imports from non-EU countries are still subject to the need to provide information to the consumer and the retail trade in accordance with Regulation 1379/2013/EU on the common organization of the markets in fishery and aquaculture products (CMO), which regulates labeling indications for all fishery and aquaculture products marketed in the European Union, regardless of marketing method, offered to the final consumer or a retail trader.

Finally, it is also important to make a reference to the Regulation of Information on Food to the Consumer (FIC) nº 1169/2011/EU, which establishes as mandatory information to be provided: Commercial name and scientific names; Production method; Area of capture/country and body of water/country of production; Fishing gear; Defrosting; "To consume before / to use until"; and Allergenic. Of course, other information can be included on a voluntary basis.

In short, in the case of fresh, unprocessed and pre-packaged fish, labeling (which can also be done by banners or posters) must include the trade name and scientific name of the fish, the production method, the area of capture and the category of production equipment, under the CMO Regulation

which, together with the FIC Regulation, requires the affixing of the expiration date / preferential consumption. The latter requires the inclusion of information on net weight, food operator and packaging conditions. In accordance with the CMO Regulation, it will be voluntary to provide information on the port and date of entry, the fast response code and the certification label.

Traceability appears, although entangled in some complexity and bureaucracy due to legislative overlap, as a privileged form of control of IUU fishing and the export of international and European environmental concerns that gradually erode the principle of territorial sovereignty.

However, it is possible to make some comparisons between the various traceability schemes mentioned here, distinguishing between the food safety component and the purely IUU component. [34]

In the first case, the aim of regulation is, in accordance with the principle of consumer safety, to ensure a high level of food safety and consumer protection, taking into account the scope of the Member States and the operating States. The identification refers to all food products, including fishery products, by batch. The establishment authorized to supply the Union market shall be licensed, and catch and management data shall be made available at the request of the competent authority, and the information shall comply with the rules of food and fish labeling (and derivatives).

In the second situation, regulation is guided by a principle that does not focus on consumption, from a pure anthropocentric perspective, but on sustainable fisheries, with an intergenerational and environmental dimension, seeking to ensure, with the Member States and third parties that trade with the European Union, compliance with the rules of the Common Fisheries Policy and, therefore, prevent, prevent and eliminate the practice of IUU fishing. To this end, all fishing vessels must be licensed, and fish products identified when entering the European Union market. The catch and management data involve a catch certification scheme for all fish and fish products traded with and within the European Union, establishing, instead of a labeling system, a harmonized model catch certificate that should accompany the fish in the production chain.

6 FINAL NOTES

Overfishing and IUU fishing, for the most part, are a transnational problem that affects not only the environment, especially from the perspective of maintaining ecological balance and biodiversity, but also the human being, either through the unsustainability of the activity or through the impact on food security and the market.

The global dimension of this Tragedy of the Commons explains and justifies, beyond the development of international and multilateral negotiations and solutions, the search for unilateral mechanisms that discourage its practice and that extend extraterritorially the effects of European Law due to conducts that cause impacts on the community market and environment but also with origin and/or effects in third states. The European Union seeks, especially in the area of IUU fishing, in the name of the Common Good (but also of healthy competition), with the commercial, certification and traceability tools, to promote and achieve both a de facto and de jure "witchcraft effect",[35] i.e., respectively, the alteration of operators' practices throughout the production chain to meet European standards and equivalent formal legislative changes in third countries.

Solutions with a greater or lesser extraterritorial effect, but which, as can be seen from the above described and analyzed, do not constitute an example of pure extraterritoriality with limitations in their application and the presence of links to the European space, go through, as has just been mentioned, a combination of commercial and certification tools and capture traceability. Their greater effectiveness necessarily implies a verifiable traceability system that impartially covers all operators in the supply chain, whether in flag, port, market or processing states. Moreover, it should be built around a certified (or data) central record that requires online data submission and validation at all stages of the chain. Otherwise, to avoid injustices and socio-economic inefficiencies, sometimes perverse, a differentiated treatment, even in terms of commercial sanctions, of operators, country capacity (flag, coastal, port, market) and types of species and products involved in IUU fishing, with the establishment of clear rules and procedures on what constitutes the IUU clause and the identification of countries (in their capacity) and operators, with transparent public records and promotion of dialogue with potential offenders.

Ultimately, regional and international solutions should be promoted in this area (for example via the World Trade Organization (WTO)), seeking the multilateralisation of trade instruments and certification and traceability systems, particularly through mutual recognition and equivalence of certificates. In other words, as in the case of climate change, the European Union should pursue more than the imposition of its standards, the promotion of equivalent domestic solutions in third countries but especially the incentive to build a global negotiated solution.

Finally, it should be stressed that the exercise of procedural rights, such as access to justice or

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[34] Vincent André (2018). EU Requirements for Food Safety and Traceability of Fish and Fishery Products, International Seminar on Sustainable Seafood Value Chain: Traceability 28–30 November 2018, Shanghai, China.

[35] Por todos, Anu Bradford (2012). The Brussels Effect, Northwestern University Law Review, Vol. 107, nº 1.

participation and hearing (see the Air Transport case or the dialogue process between the European Union and non-cooperating states, or the guarantees provided for alleged operators in IUU fishing) constitutes a (justified) limitation of the overall unilateral environmental regulatory power of the European Union, defining and holding it accountable, even though in situations of indirect or diffuse impacts on third state actors there may be some difficulties in implementation rights.36 Still, it is an important weapon against temptations hegemonic.