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The Current State of Transatlantic Relations: Déjà vu All Over Again?

Abstract: While the United States and Europe share a set of basic values and interests, debates across the Atlantic do repeatedly occur, particularly since the end of the Cold War. Transatlantic relations under the Trump Administration have experienced noticeable political tensions that were last witnessed under the Bush Administration in the early years of the millennium. There is a sense of *déjà vu* in Europe, given that despite Donald J. Trump's unusual rhetoric, the issues in hand are not necessarily new. Washington's take on the international order and transatlantic relations is best described by the concept of conservative internationalism, which differs from other U.S. foreign policy approaches yet continues to be in contrast with the more liberal views in Europe.
Keywords: conservative internationalism, Trump, West, geopolitics

Introduction

Having witnessed a full term of Donald J. Trump's presidency, politicians, experts and pundits often remind that transatlantic relations have mostly gone through anxieties since January 2017. The discord seems stark considering that the transatlantic alliance is referred to as a security community with shared values and interests. While some of the tension does originate from the Trump White House, divergences across the Atlantic are not necessarily new – to quote one of the malapropisms of Yogi Berra: "It's *déjà vu* all over again."

Thus, the article's objective is twofold. On the one hand, it would like to serve as a reminder that certain areas in transatlantic relations tend to show differences and division among allies, regardless of who is sitting the Oval Office. Certain issues in

political thinking, security and defence or economics and trade repeatedly emerge to reveal how the "New World" continues to differ from the "Old." The true novelty of Donald J. Trump is that he has repeatedly highlighted chasms[1], which may raise concerns in Europe, yet these are just reminders of how common problems are viewed from different perspectives. On the other hand, the article would like to point out that in contrast to the general notion among the public (especially in Europe), the Trump Administration has been consistent with regard to foreign policy – even if this stance has been unpopular among major European allies. President Trump's disturbingly open rhetoric may have given the impression that his foreign policy has been solely about nationalistic transactions (associated with the motto "Make America Great Again"), yet in reality it has overall had a consistently conservative take on international relations between 2017 and 2020.

Accordingly, the article's hypothesis is that the Trump Administration's foreign policy has followed the concept of conservative internationalism and that the latter's unpopularity in Europe is due to it being similar to neo conservatism – hence the déjà vu in transatlantic relations. In order to confirm this, the article reviews the concept of conservative internationalism, introduced by Henry R. Nau and highlights its characteristics in U.S. foreign and security policy. The article relies on a qualitative methodology based on theoretical works regarding U.S. foreign policy (particularly works on liberal and conservative internationalism), official documents and policy statements issued by the Trump Administration, and the developments on the ground between 2017 and 2020. The theoretical framework is inspired by the debates on the liberal international order, which is deemed to be in crisis. Although both liberal and conservative internationalists work for an international order based on Western values, the details of their respective approach have set them apart. The debates are present in academia and politics alike, and the transatlantic relationship is not safe from them either: as Europeans generally follow the liberal line, they are less open to a conservative American presidency, leading to tensions across the Atlantic.

1. Theories on U.S. foreign policy and transatlantic relations

1.1. Liberal and conservative internationalism

In order to understand the coherent nature of the Trump Administration's foreign policy, it should first be set in a theoretical framework. The general view of the public is that America's relationship with world under President Trump has been erratic and ad hoc; however, experts have also offered readings reflecting more coherence. According to some, President Trump has followed the nationalist-

1 Apart from the differences in certain values (e.g. the importance of religion in political discourse or the right to bear arms), Americans and Europeans live in different socio-economic realities (e.g. in healthcare, higher education or even employment conditions).

-populist Jacksonian tradition in foreign policy. This reading relies on Walter Russell Mead's classification of American foreign policy traditions, namely the Hamiltonian, Wilsonian, the Jeffersonian and Jacksonian lines. While the first two are internationalist (particularly in trade and democracy promotion respectively), the latter two are more restrained[2]. Jacksonians are protective of traditional national characteristics and are suspicious with regard to immigration and domestic elites who they believe to serve foreign (globalist) agendas. The only time Jacksonians show interest in international affairs is when national defence and prosperity absolutely necessitate it. In such cases, however, they fiercely confront adversaries[3]. A Jacksonian president may be considered as a reason for the recent tensions across the Atlantic: the same characteristics of American society that European elites disdain are praised by Jacksonians who regard Europe to be an out of touch actor in world politics[4]. Still, the re-emergence of Jacksonian tradition is insufficient to explain the current rift in U.S.-European relations. It is limited to presidential rhetoric, as the administration has pursued an active foreign policy instead of isolationism.

Mead's typology was intended to offer a fresh view of American foreign policy thinking in 1990s. Until then, debates on U.S. foreign policy were about its ways and means, namely whether it was isolationist or internationalist, and in case of the latter, whether it was dovish or hawkish. The isolationist-internationalist debate seems to be a constant in American public thinking since the beginnings[5], although realistically speaking American internationalism has been consistent since WWII. In fact, already before the end of the war, Washington established the foundations of the liberal international order and extended it in the aftermath of the bipolar world. The dovish--hawkish debate was originally meant to describe the preferred means of addressing the challenges of Soviet communism throughout the Cold War; nevertheless, the dilemma of means has continued to surround Washington to this day. Similarly, to Mead's archetypes, other traditions of American foreign policy can be identified and arranged in a matrix along goals and means. Based on the American dilemma of spreading democracy or focusing on defence and security, Henry R. Nau identified liberal and conservative internationalist, as well as nationalist and realist strands of U.S. foreign policy. The former two aim more proactive foreign policies, whereas

2 W.R. Mead, Special Providence. American Foreign Policy and How It Changed the World, Routledge Taylor & Francis Books, New York, 2002, pp. 90–94.

3 W.R. Mead, The Jacksonian Revolt, "Foreign Affairs", Vol. 96, No. 2 (March/April 2017), pp. 2–7.

4 W.R. Mead, The Case Against Europe, "The Atlantic", April 2002, Online: https://www.theatlantic.com/magazine/archive/2002/04/the-case-against-europe/302466/ (access: September 6, 2020).

5 The most notable point of reference in this regard was President George Washington's farewell address in which he cautioned his fellow countrymen to "steer clear of permanent alliances with any portion of the foreign world" United States Senate, Washington's Farewell Address to the People of the United States. 2000, Online: https://www.senate.gov/artandhistory/history/resources/pdf/WashFarewell.pdf (access: October 10, 2020), p. 27.

the latter two represent less ambitious agendas. More interestingly, however, Nau's matrix also reveals these traditions' respective emphasis on diplomacy and force in dealing with the outside world: while the former is associated with the practices of realists and liberal internationalists, the latter is more preferred by nationalists and conservative internationalists[6].

Conservative internationalism is a less known tradition in American foreign policy, introduced by Henry R. Nau himself in 2008. Although separated from the aforementioned three traditions, it combines certain aspects of liberal internationalism, realism and nationalism alike by promoting freedom, applying force along certain principles, and relying on national sovereignty[7]. Conservative internationalism is most easily compared to its liberal counterpart. Both strands believe in maintaining an international order based on Western values (and supported by American hegemony). Yet in almost every other aspect, they are at opposite ends. Liberals are optimistic with regard to the fate of the liberal international order, as the "end of history" was explained by Francis Fukuyama[8], whereas conservatives are less certain that this outcome is inevitable. While liberals hold Western values universal, conservatives believe that they can only be spread where appropriate historical and cultural foundations are given. Liberals also have confidence in international institutions and organizations, as these are places to exchange views peacefully. By contrast, conservatives are sceptical with regard to these bodies and associate them with obstacles for defending national sovereignty and interests. Instead, conservative internationalists rely on the nation state and its hard power, which they see as a regular pillar for diplomacy to stand on. Liberal internationalists are not only wary of relying on force but are only willing to do so if they have (preferably international) legal mandate in their hands. Lastly, liberal and conservative internationalists have different views regarding the elites in public affairs[9]: in the liberal tradition, intellectuals are held in high regard, often as leaders of opinion, which can be traced back to Immanuel Kant's secret article for Perpetual Peace[10]. Among conservatives, however, the legitimacy of ideas comes not from elites but from the public (at least in free societies)[11].

6 H.R. Nau, Conservative Internationalism: Armed Diplomacy under Jefferson, Polk, Truman, and Reagan. Princeton University Press, Princeton, 2013, p. 27.

7 H.R. Nau, Conservative Internationalism, "The American Interest", Summer (May/June) 2014, p. 61.

8 F. Fukuyama, The End of History? "The National Interest", No. 16, Summer 1989, pp. 3–18.

9 H.R. Nau, Conservative Internationalism, "Policy Review", No. 150, August & September 2008, pp. 6–10.

10 I. Kant, Perpetual Peace. A Philosophical Essay, George Allen & Unwin Ltd., London, 1903, p. 158.

11 H.R. Nau, Conservative Internationalism, "Policy Review", No. 150, August & September 2008, p. 10.

These quarrels may seem abstract, yet their relevance in contemporary politics becomes clear in light of the current state of the liberal international order recently suffering from internal and external challenges. The former are related to the shock and after effects of the 2008 financial-economic recession and overall trends of globalization that have created inequalities within and among societies. Some of these trends go hand in hand with (neo)liberal policies, especially since their expansion after the Cold War[12]. External challenges come from emerging centres of power trying to gain more influence at the expense of U.S. hegemony in the world. Likewise, the rise of these competitors was enabled by the expansion of liberal policies after the post-bipolar 'unipolar moment', *inter alia* through increased efforts of U.S. interventionism[13]. Overall, not only critics but liberals as well describe the order's current state as being in crisis. Still, mainstream liberal scholars of international relations such as Michael W. Doyle, Joseph S. Nye Jr. and G. John Ikenberry, who introduced the concepts of democratic peace, soft power and interdependencies, and the liberal characterization of the U.S.-led international order respectively, regard the order's Kantian triangle (liberal democracy, international institutions and trade) to be sacrosanct. By contrast, conservatives like Victor Davis Hanson believe that the U.S. stance towards these factors needs to be revisited and fine-tuned[14]. Donald J. Trump's entry into the American body politic reflected this division in practice.

1.2. A brief overview of transatlantic relations

While transatlantic allies do form a security community, U.S.-European relations have not always been harmonious; the geopolitics, the extent of common values and interests, and the character of the Atlantic order have continuously changed throughout the past nearly three centuries from power balancing to forming occasional alliances under peaceful co-existence, to having a common identity in a co-operative community[15]. The latter was most visible after WWII and throughout the Cold War when Washington did not only remain in Europe to balance against Moscow but to keep peace and stability via a liberal internationalist project, namely a rebuilt economy based on open and free markets, and the restraint from extremist political ideologies[16]. Just as the United States assumed the role of hegemon

12 B. Jahn, Liberal internationalism: historical trajectory and current prospects. "International Affairs", Vol. 94, No. 1, (January 2018), p. 57.

13 J. Lind & W.C. Wohlforth: The Future of the Liberal Order Is Conservative. "Foreign Affairs", Vol. 98. No. 2, (March/April 2019), pp. 70–80.

14 V.D. Hanson: New World Order, We Hardly Knew Ye. "Hoover Digest", No. 1, (Winter 2019), pp. 65–168.

15 Ch.A. Kupchan, The Atlantic Order in Transition. The Nature of Change in U.S.-European Relations, [in:] Anderson, Jeffrey J. et. al. (eds.), The End of the West? Crisis and Change in the Atlantic Order, Cornell University Press, Ithaca, 2008, pp. 111–113.

16 Ch. Layne, America as European Hegemon, "The National Interest", No. 72, (Summer 2003), pp. 19–21.

underpinning the rules-based international order (or at least its Western core), America became an "empire by invitation" in Europe, giving birth to NATO which remains to be the most successful alliance in history[17].

Yet as the common Soviet enemy disappeared, the geopolitical reason behind the transatlantic bond began to fade; major Western European allies became more outspoken in their resistance against American policies, as the latter were less mindful of preserving allied unity[18] and focused on other parts of the world. The most vivid rift in post-bipolar transatlantic relations occurred in the early 2000s. Washington's policies (above all the 2003 intervention in Iraq) highlighted allied differences in strategic thinking, operative capabilities and thus actual behaviour. These divisions dominated the international literature on transatlantic relations at the time. Most notably, as Robert Kagan pointed out: "Americans are from Mars and Europeans are from Venus"[19]. Neoconservatives displayed an agenda that differed from European policies; Washington's tendency for a unilateralist approach, emphasis on hard power and decreased attention to environmentalist concerns were in contrast with the ideas of multilateralism, soft power and sustainability that have been descriptive of Brussels.

The reason for today's *déjà vu* is that key policies of the Trump Administration seem to reflect the same cracks in transatlantic relations. Even the characterization of Donald J. Trump echoes that of George W. Bush[20] despite the fact that the two presidents' personas are different. Yet President Trump is no neoconservative. In fact, some neoconservatives criticize him regularly. President Trump seems to break with post-WWII American foreign policy traditions, lamenting its post-Cold War practices, an ill-balanced relationship with allies and adversaries while calling for less democracy promotion and more military power[21]. While this suggests that the Trump Administration discards the liberal international order, the essence of its criticism lies in *how* the order is managed. Thus, a more accurate description of its foreign policy is offered by conservative internationalism. Although conservative internationalism does share key values with liberal internationalism, its means of defending these values makes it unpopular among liberals. The Trump Administration's European reception is a perfect example.

17 G. Lundestad, "Empire by Invitation" in the American Century, "Diplomatic History", Vol. 23, No. 2 (Spring 1999), pp. 190–206.

18 D.M. Andrews, The United States and Its Atlantic Partners: The Evolution of American Grand Strategy, "Cambridge Review of International Affairs", Vol. 17, No. 3 (October 2004), pp. 423–430.

19 R. Kagan, Of Paradise and Power. America and Europe in the New World Order, Alfred A. Knopf, New York, 2003, p. 3.

20 I.H. Daalder, The End of Atlanticism, "Survival", Vol. 45, No. 2, p. 157.

21 D.J. Trump, Transcript: Donald Trump's Foreign Policy Speech, "The New York Times", April 27, 2016, Online: https://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html (access: September 11, 2018).

2. Conservative *déjà vu* in transatlantic relations

2.1. Conservative America, liberal Europe and the world

The reason for European criticism of the Trump Administration is twofold: on the one hand, it is induced by President Trump's harsh rhetoric regarding European partners and the viability of NATO or the EU. On the other hand, it comes from the fact that Donald J. Trump's attitude is in sharp contrast with that of Barack H. Obama who was more popular among Europeans to begin with. The former factor could be offset by performance on the ground. Indeed, Donald J. Trump has made unprecedented and disturbing remarks concerning NATO (once calling the backbone of the transatlantic bond "obsolete") or the EU (once referring to America's first and foremost economic partner as a "foe" on trade). Yet his administration's official documents have been formulated to strengthen the Western alliance. Hence, the real thorn in relations relates to the second factor; the Trump Administration's conservative internationalism prescribes a different approach to transatlantic issues than the Obama Administration's (and overall the European Union's) liberal internationalism.

The Trump Administration's 2018 Europe Strategy aims at preserving the West, i.e. the political and military alliances and partnerships across the Atlantic[22]. However, American and European perceptions on the same issues are not in accord. Firstly, they see the world in different light. The 2017 U.S. National Security Strategy identifies a "competitive world" where America would "preserve peace through strength." It denies the liberal internationalist "assumption that engagement with rivals and their inclusion in international institutions and global commerce would turn them into benign actors and trustworthy partners"[23]. As President Trump's former National Security Advisor H.R. McMaster's noted: 'the world is not a "global community" but an arena where nations, nongovernmental actors and businesses engage and compete for advantage'[24]. The 2018 U.S. National Defense Strategy explicitly declares that "inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security"[25]. This is a noteworthy statement as terrorism and weapons of mass destruction have been the number one security challenge for Washington since the early 2000s.

22 A.W. Mitchell, Anchoring the Western Alliance, "United States Department of State", June 5, 2018, Online: https://www.state.gov/p/eur/rls/rm/2018/283003.htm (access: September 13, 2018).

23 The White House, National Security Strategy of the United States of America, December 2017, pp. 2–4.

24 H.R. McMaster, G.D. Cohn, America First Doesn't Mean America Alone, "The Wall Street Journal", May 30, 2017, Online: https://www.wsj.com/articles/america-first-doesnt-mean-america-alone-1496187426 (access: September 13, 2018).

25 United States Department of Defense, Summary of the 2018 National Defense Strategy of The United States of America. Sharpening the American Military's Competitive Edge. January 2018, Online: https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf (access: October 10, 2020). p. 1.

In the final analysis, the Trump Administration's disappointment in liberal policies aimed at integrating other major powers like the People's Republic of China or the Russian Federation reflects the conservative take on the pressures of the liberal international order. By contrast, the EU's perception remains closer to the tenets of liberal internationalism. The 2016 Global Strategy emphasizes "principled pragmatism" – as opposed to the Trump Administration's "principled realism" – and sees "a difficult, more connected, contested and complex world" where the EU would rely on its "enduring power of attraction" hand in hand with its values[26]. In other words, Washington sets greater emphases on geopolitics, great power competition, hard power and national sovereignty, whereas Brussels continues to rely on the procedures of the rules based international order (for example keeping the Iran nuclear deal), seeking cooperation via soft power and believing in the benefits of further economic and political integration.

2.2. American conservative view of Europe

The European unease over American foreign policy under President Trump has also come from his take on the transatlantic relationship. Although the Trump Administration has officially re-confirmed the U.S. commitment to a strong and stable Europe as well as the importance of the transatlantic bond, its rhetoric and actions have raised questions in this regard. Overall, there is a sense among critics that since 2016, Washington has not considered Europe an important partner[27]. Diplomatic controversies have taken place in Western Europe (in Brussels and Berlin) where the Trump Administration's representatives have broken with diplomatic protocols or caused confrontation. By contrast, U.S. ambassadors in East-Central European capitals have seemed to be more cooperative with their hosts. Whereas German Chancellor Angela Merkel and French President Emmanuel Macron have had indirect verbal clashes with President Trump (with the former even avoiding his presence), Polish President Andrzej Duda has met on several occasions with him on matters of security and defence. In addition to Secretary Pompeo's visit to East-Central Europe in February 2019 and August 2020[28], the White House itself has been more open to heads of state and government from the region than during the Obama years[29]. Thus,

26 European External Action Service, Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy, June 2016, p. 10, p. 13 and p. 16.

27 D.M. Herszenhorn, Trump's relationship with Europe goes from bad to nothingness, "Politico", June 3, 2020, Online: https://www.politico.com/news/2020/06/03/donald-trump-europe-strategy-300074 (access: September 2, 2020).

28 M. Kartinschnig, Mike Pompeo's summer feel-good tour of Europe, "Politico", August 14, 2020, Online: https://www.politico.com/news/2020/08/14/mike-pompeos-summer-feel-good-tour-of-europe-395200 (access: September 12, 2020).

29 E. Tamkin, For love or money? Why Central European leaders are visiting the White House, "The Washington Post", May 2, 2019, Online: https://www.washingtonpost.com/world/2019/05/02/love-or-money-why-central-european-leaders-are-visiting-white-house/ (access: September 12, 2020).

there has been a sense since 2018 that Washington under President Trump re-cycled the neoconservative playbook of undermining transatlantic institutions and dividing European allies.

However, this is not the case. Firstly, the Trump Administration has not opted for a liberal (expanding) but a conservative (preserving) agenda aimed at re-tuning the liberal international order. While its conservative internationalism has been cynical with regard to international organizations and has shown unilateralist tendencies, it has not questioned key alliances[30]. President Trump did not withdraw from NATO but enhanced U.S.-led deterrence measures on its Eastern flank. There is nothing new in Washington's complaints that most European allies do not spend enough on defence. Criticism in this regard had been clear for nearly half a century. The novelty of the Trump Administration's policy lies in its outspoken nature; its National Security Strategy has declared that "the central continuity in history is the contest of power" mentioning geopolitical considerations several times[31]. Moreover, the Trump Administration's efforts have related to allied defence and deterrence, not out-of-area missions. While it has laid greater emphasis on hard power than any European ally, it has restrained from starting serious armed conflicts that would drag half of NATO in and bypass the other half. Urging European allies (who indeed had begun to increase their defence budgets after the 2014 crisis in Ukraine) is not meant to undermine but to strengthen NATO.

Secondly, the Trump Administration's interest in East-Central Europe is rooted in geopolitical realities and the conservative take on addressing them. Conservative internationalists draw their attention to the borders of the West both in terms of defence and offense. One of the key features of the 2018 Europe Strategy is that it primarily deals with the Eastern and Southern flanks of Europe. As a result, Washington has renewed its focus on Central and Eastern Europe even while having troubles with traditional partners such as Britain, France and Germany[32]. The main case in point is the position taken on Ukraine, and Russia. Donald J. Trump is often lambasted for his warm rhetoric vis-à-vis Vladimir V. Putin, and although some of his statements are problematic (like the preference of a competitor power's word over that of his own national intelligence agencies), the tough line against Moscow is still led by Washington, not Brussels, Berlin or Paris. In addition to the enhanced military presence in East-Central Europe, the Trump Administration gave defensive lethal weapons (Javelin anti-tank missiles) to Ukraine. The decision reflected a conservative take on international relations, arguing that diplomatic efforts need to be backed by

30 H.R. McMaster, G.D. Cohn, America First Doesn't Mean America Alone.

31 The White House, National Security Strategy of the United States of America, p. 25 and pp. 26–46.

32 T. Wright, Trump Is Choosing Eastern Europe, "The Atlantic", June 6, 2018, Online: https://www.theatlantic.com/international/archive/2018/06/trump-is-choosing-eastern-europe/562130/ (access: September 21, 2018).

limited force. By contrast, major European leaders like Angela Merkel and Emmanuel Macron emphasized the necessity of peaceful solutions to the conflict. They did not criticize Washington albeit Berlin used to be against arming Kiev[33], fearing that such a change would lead to the conflict's military escalation. Washington's conservative stance has also been in contrast with Brussel's and Berlin's more liberal position on economic ties to Moscow. Washington has been a vocal critic of the Nord Stream II pipeline project – an enterprise that Brussels is unable, and Berlin is unwilling to shut down[34]. In light of the U.S. shale gas revolution, President Trump decided to push LNG-exports which would be welcome in East-Central Europe (once the financial and technical requirements are met), especially since Nord Stream II bypasses countries in the region, raising their worries that Western commercial interest enjoy priority over East-Central European (energy) security.

2.3. Conservative take on Western values

The difference in emphases has been clear in values as well. President Trump's 2017 speech in Warsaw highlighted this perfectly. The speech stressed values such as freedom of religion and the sovereignty of the nation-state while emphasizing the civilizational perils against the West or the regulatory barriers to a free market[35]. The speech was divisive, as most liberal critics saw racism and nationalist populism in it, whereas several conservatives praised it for decisively highlighting cultural factors that have historically defined the West[36]. The Trump Administration's efforts in re--emphasizing certain values was also reflected by the formation of the Commission on Unalienable Rights in 2019. Secretary of State Michael R. Pompeo proposed the commission's establishment to revisit fundamental rights, as throughout the past three decades the expansion of human rights has bought controversies concerning their relation to each other[37]. Though the commission itself is bipartisan, its first draft report received mixed views along a liberal-conservative fault line, as its announcement by

33 M.R. Gordon, Jim Mattis, in Ukraine, Says U.S. Is Thinking of Sending Weapons, "The New York Times", August 24, 2017, Online: https://www.nytimes.com/2017/08/24/world/europe/mattis-ukraine-russia.html (access: September 12, 2020).

34 H. Ellyatt, Germany won't abandon its massive gas pipeline with Russia yet, analysts say, CNBC, September 14, 2020, Online: https://www.cnbc.com/2020/09/14/germany-likely-to-stick-with-nord-stream-2-despite-navalny-poisoning.html (access: September 15, 2020).

35 The White House, Remarks by President Trump to the People of Poland. July 6, 2017, Online: https://www.whitehouse.gov/briefings-statements/remarks-president-trump-people-poland/ (access: September 21, 2018).

36 R.J. Granieri, Whose West is Best?, "Foreign Policy Research Institute", July 10, 2017, Online: https://www.fpri.org/article/2017/07/whose-west-best/ (access: September 12, 2020).

37 United States Department of State, Secretary of State Michael R. Pompeo Remarks to the Press, United States Department of State, July 8, 2019, Online: https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/ (access: September 12, 2020).

Secretary Pompeo implied a hierarchy of values (though the report itself did not)[38]. The controversies around the draft report increased because it coincided with protests and riots in the United States. While the uproars have been officially about ending racism, the related public debates have surpassed the specific cases that had ignited them and started to focus on the moral foundations of the United States, deepening political divisions throughout the West. The European Parliament's vote on an anti--racist resolution raised issues among conservatives whether emphasizing the need for self-restraint among law enforcement officials would be a one-sided criticism (even if everyone agrees that racism should be denounced)[39].

The fact is that divisions with regard to values are present in Europe anyway. Several East-Central European governments have indicated their preference for conservative concepts of national identity and Judeo-Christian heritage over liberal readings of Western civilization. It was therefore no surprise that President Trump expressed his views on Western civilization in Warsaw and not in Brussels, Berlin or Paris. Politically speaking, the Trump Administration has found common ground with the countries in East-Central Europe along the lines of national sovereignty, external border defence and anti-establishment views. This extended to the realm of foreign policy as well. The most apparent example came in the Middle East where the Trump Administration broke with liberal establishment views by moving the U.S. embassy to Jerusalem. The decision received criticism from European countries, as it was deemed too dangerous with regard to the security in the Middle East. Notably, a few East--Central European allies (the Czech Republic, Hungary and Romania) blocked a joint EU statement in May 2018 that would have condemned the U.S. move[40].

This political understanding across the Atlantic is sensitive, as it occurs in parallel to quarrels with EU institutions. This is another reason for the sense of *déjà vu* in transatlantic relations. The last time European allies were divided along their relationship with America was under the Bush Administration when U.S. Secretary of Defence Donald Rumsfeld distinguished "Old Europe" from "New Europe" along the lines of European support for the 2003 U.S. intervention in Iraq. Today this division is not due to some kind of rigid Atlanticism in East-central European capitals. The wider region had been deprioritized in U.S. foreign policy during the Obama years until the crisis in Ukraine; while the Obama Administration was engaged with

38 N. Toosi, Pompeo rolls out a selective vision of human rights, "Politico", July 16, 2020, Online: https://www.politico.com/news/2020/07/16/mike-pompeo-human-rights-hierarchy-366627 (access: September 12, 2020).

39 M. De La Baume, M. Heikkilä, Conservative MEPs wary of backing text condemning Trump, police brutality, "Politico.eu", June 16, 2020, Online: https://www.politico.eu/article/conservative-meps-wary-of-backing-text-condemning-donald-trump-police-brutality-racism/ (access: September 12, 2020).

40 A. Rettman, EU gagged on 'fundamental' shift in Middle East, "Euroobserver', May 14, 2018, Online: https://euobserver.com/foreign/141805 (access: September 12, 2020).

Moscow, its criticism of allies like Warsaw and Budapest left a vacuum behind for others to fill. According to the Trump Administration's former Assistant Secretary of State A. Wess Mitchell, the Trump Administration has tried to reach a balance in renewing engagement and keeping principles[41]. This resulted in a "principled engagement"[42] where the emphasis has been set on security and defence cooperation instead of political and ideological debates. A set of conservative views are shared among these allies, providing an extra political layer to the already intensified geopolitical attention from Washington.

2.4. Conservative take on Western institutions

From a European perspective, one of the main problems with the Trump Administration is its disdain for international institutions, particularly the EU. There is a difference between the mind-set of President Trump and that of his predecessor. While the Obama Administration emphasized the importance of unity among transatlantic partners, the Trump Administration – though looking for a reliable partner in Europe – is less worried about the integration issues of the EU. The most notable examples of this were President Trump's comments on Brexit, his alleged suggestion to Emmanuel Macron to leave the EU, and his views about Germany's position within the bloc. This EU-scepticism was also found at deeper levels. Before becoming a senior advisor to the U.S. Department of State, Jakub Grygiel wrote about the internal problems of the EU, noting that while "a return to aggressive nationalism could be dangerous, […] a Europe of newly assertive nation-states would be preferable to the disjointed, ineffectual, and unpopular EU of today [in 2016]"[43]. Such views are reminiscent of the neoconservative takes on EU integration, strengthening the *déjà vu* in transatlantic affairs. This impression has been particularly strong due to the Trump Administration's diplomatic actions ranging from President Trump's unusual statements to his various ambassadors' remarks and initiatives.

One of the major areas of debate has been European defence. Donald J. Trump's dismissive rhetoric on uneven transatlantic burden-sharing in defence led the French and German leadership to openly play with the thought of establishing a European

41 United States Senate Committee on Foreign Relations, Assistant Secretary of State U.S. Policy in Europe. Subcommittee hearing of Assistant Secretary A. Wess Mitchell, June 26, 2018, Online: https://www.foreign.senate.gov/listen/us-policy-in-europe-062618 (audio, between 21:39–22:47 minutes) (access: September 22, 2018).

42 D.A. Wemer, The United States is back in Central Europe, state department official says, "Atlantic Council", July 17, 2019, Online: https://www.atlanticcouncil.org/blogs/new-atlanticist/the-united-states-is-back-in-central-europe-state-department-official-says/ (access: September 2, 2020).

43 J. Grygiel, The Return of Europe's Nation-States. The Upside to the EU's Crisis, "Foreign Affairs", September/October 2016, p. 95.

defence separate from the U.S.[44]. While this seemed harsh, it was not really new. Transatlantic relations have long had a dualist characteristic in which the United States has tended to turn its attention to other regions (mostly the Middle and the Far East), while Europe has focused on itself (mainly the institutional development of the EU)[45]. Europeans have always been frustrated with the American habit of turning away[46], yet they have also fallen behind in defence efforts and could not offer a clear alternative to Washington's security umbrella. While liberal scholars underline European dismay and the desire to change, conservatives remind them of its fallacy. On the one hand, Washington is looking forward to having a more autonomous transatlantic partner, as it would ease the burden. On the other hand, European dependency on U.S. forces sets Washington in a strong position while the military bases are ideal locations for power projection to other regions. The Trump Administration's take has been reflective of this ambivalence. After hearing about French intentions to support the establishment of a European army, President Trump characterized it as "very insulting, but perhaps Europe should first pay its fair share of NATO, which the U.S. subsidizes greatly"[47].

The other major issue has been trade. The Trump Administration decided to follow a revisionist approach to trade agreements; thus, President Trump withdrew from the TPP and renegotiated NAFTA. This also represented Washington's conservative internationalist thinking. While conservative internationalists are in favour of free trade, they do not trust international organizations, as they believe that the latter work against national interests. Donald J. Trump shares this view when he says that he would like to see not only free but fair trade which, however, is hindered by the other side[48]. The National Security Strategy noted that competitors (primarily the People's Republic of China) were included in international free trade regimes

44 B. Haddad, Trump is getting the European army he wanted, "Politico", November 14, 2018, Online: https://www.politico.eu/article/europe-army-angela-merkel-emmanuel-macron-donald-trump-getting-what-he-wanted/ (access: September 1, 2020).

45 J.P. Kaufman, The US perspective on NATO under Trump: lessons of the past and prospects for the future, "International Affairs", Vol. 93, No. 2 (March 2017), p. 256.

46 This was the case under the Obama Administration as well when Washington announced its desire to 'pivot' to East Asia. President Obama's initiative had to be renamed 'rebalancing', as it was less outspoken on the fact that the United States would draw attention and resources (military troops) away from Europe.

47 R. Morin, Trump calls Macron's comments on building a European army to defend against US 'insulting', "Politico", November 9, 2018, Online: https://www.politico.eu/article/trump-calls-macrons-comments-on-building-a-european-army-to-defend-against-u-s-insulting/ (access: September 1, 2020).

48 W. Ross, P. Navarro, The Trump Trade Doctrine: A Path to Growth & Budget Balance, "RealClearPolicy", October 17, 2016, Online: https://www.realclearpolicy.com/articles/2016/10/18/the_trump_trade_doctrine_a_path_to_growth__budget_balance.html (access: September 1, 2020).

like the WTO because Washington had expected economic developments to lead to political reforms within the countries. Not only was this liberal idea mistaken but competitors have corrupted international organizations with their own agendas[49]. Although the EU is not among these actors, the UN is. The Trump Administration's trade quarrels with the EU have taken a tit-for-tat interaction, starting with Washington's decision to introduce tariffs on steel and aluminium imports. Yet transatlantic disagreements on trade and economic relations did not always originate in the Trump White House. While TTIP is off the table officially due to Washington's withdrawal from the Paris Climate Agreement, its outlook was already dim by the end of the Obama Administration because of European (not least of all German) objections. Meanwhile, the Trump Administration's decision to introduce a set of tariffs on European products was a legitimate move, as it was approved by the WTO as compensation for European subsidies provided to Airbus several years ago[50].

3. Prospects in transatlantic relations

Based on the strategic foreign and security documents and key official statements by the Trump Administration, the article's hypothesis can be confirmed: U.S. foreign policy has followed the main tenets of conservative internationalism between 2017 and 2020. Since these characteristics have led to quite similar issues as neoconservative policies in the early 2000s, there is a sense of *déjà vu* in Europe even though the two concepts are not exactly the same. As for the future, the general wisdom is that a second term by the Trump Administration could deliver further tensions across the Atlantic, as presidents who remain in office for another cycle feel freer to implement foreign policy initiatives. Donald J. Trump has proven to be a surprise in politics on many levels, and foreign policy has been one of his key areas of active performance between 2017 and 2020[51]. By contrast, many experts of international relations believe that a Biden presidency would improve U.S.-European ties[52]. Yet, there are two caveats to this.

Firstly, even if the U.S. administration would alter its conservative internationalist foreign policy to a more liberal one, the geopolitical realities are in the forefront for

49 The White House, National Security Strategy of the United States of America, p. 3 and p. 37.

50 J.H. Vela, Trump poised to hit EU with billions in tariffs after victory in Airbus case, "Politico", September 14, 2019, Online: https://www.politico.eu/article/trump-poised-to-hit-eu-with-billions-in-tariffs-after-airbus-win/ (access: September 3, 2020).

51 The meetings with Kim Jong-un and the negotiated treaties between the State of Israel and countries like the UAE and Bahrein are only a few examples of unprecedented foreign policy moves.

52 E.B. Jackson *et. al.*, Snap Poll: What Foreign-Policy Experts Make of Trump's Coronavirus Response, "Foreign Policy", May 8, 2020, Online: https://foreignpolicy.com/2020/05/08/snap-poll-what-foreign-policy-experts-think-trump-coronavirus-response-election/ (access: September 12, 2020).

the decision-makers in Washington. The sanctions on Russia for example are driven by Congress who was initially wary that President Trump would withdraw his predecessor's executive orders on economic sanctions. Congress has not only enacted but supplemented them with additional measures, including potential secondary sanctions. The Trump White House has shown some restraint in applying these sanctions against European actors. One of the main legal vehicles for these sanctions is CAATSA, which President Trump signed in August 2017, noting that the original version of the bill had to be improved in order to include delays that could prevent U.S. and European companies from the applied sanctions' negative effects[53]. Since then Congress has delivered new pieces of legislation introducing further opportunities for imposing secondary sanctions. Such sanctions are applied extraterritorially often without having serious barriers in international law. Theoretically, the EU could apply countermeasures (as with the blocking statute in the case of sanctions on European companies doing business in the Iranian economy); the financial and economic costs are too high for European actors to play along[54].

Secondly, even European countries are sceptical of fundamental foreign policy change after the elections. German Minister of Foreign Affairs Heiko Maas noted that Europe should expect to do more for its own security (at least in the wider region) without American support. Optimists tend to emphasize Joseph R. Biden's Atlanticist background and European-like agenda which would mean a U-turn *inter alia* in climate change and multilateralism. Nevertheless, they also remind that this would not be realized overnight and would also require European efforts[55]. This is a familiar message for Europeans. Barack H. Obama's presidency was praised in its first months in Europe albeit experts warned that expectations are mutual – and as it turned out, potential recipes for disappointments. Without having any ultimatums whatsoever, the fact is that Europe either cooperates with the United States or comes up with alternatives of its own – in both cases paying the political, military and economic price accordingly. The idea that Europe has to move out of its comfort zone means that inconvenient truths and responsibilities need to be addressed, possibly even in opposition to Washington.

53 The White House, Statement by President Donald J. Trump on Signing the "Countering America's Adversaries Through Sanctions Act", The White House, August 2, 2017, Online: https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-countering-americas-adversaries-sanctions-act/ (access: September 12, 2020).

54 S. Lohmann, Extraterritorial U.S. Sanctions, "SWP Comment, Stiftung für Wissenschaft und Politik", February 5, 2019, Online: https://www.swp-berlin.org/fileadmin/contents/products/comments/2019C05_lom.pdf (access: September 9, 2020), p. 3. and p. 6.

55 A. Soros, A Biden victory could reset transatlantic relations, European Council on Foreign Relations, July 6, 2020, Online: https://www.ecfr.eu/article/commentary_a_biden_victory_could_reset_transatlantic_relations (access: September 12, 2020).

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Overview of the Trade Relations Between the European Community/Union and the United States at the Threshold of Globalization and Post-globalization Era

Abstract: The main goal of this article is to present to the European reader the implications of the unstable relationships between the United States and an integrated Europe. The article focuses on the trade relations between the US and Europe in the globalization era. It explains the meaning of some basic terms used by trade experts, such as globalization, regionalization, glocalization, and strategic trade. The author also tries to explore the reasons for the recent crisis of global trade. The main part of the paper reviews the major disputes between these two regions which resulted in postponing of the negotiations of the Trans-Atlantic Free Trade Agreement. As we have observed in the introduction of the article, the relationships between the European Union and the United States have always been complicated and the article presents the main reasons for these disagreements. In a time of renewed Trans-Atlantic negotiations, pro-American sentiments in Europe grew stronger, and European experts on trade and politics emphasized that the US significantly increased support for the European Deterrence Initiative (EDI). Still, with comments repeated by President Trump many times that "Europe needs its own army", the European media began warning the readers that the crisis in US-EU relations may soon return.
Keywords: American unilateralism, European Community/Union, the Trans-Atlantic Free Trade Agreement, globalization, regionalization, strategic trade, the General Agreement on Tariff and Trade (GATT), the World Trade Organization (WTO), The Chicken War, Banana War, principle of parallelism, Byrd's Amendment, Carousel Procedure, zeroing.

Introduction

The author of this article assumes that this study is dedicated to a reader who has a solid background in the process of European integration and transformation of trade priorities of the economic superpowers in the last two decades. This reflection

resulted in a reduction of the introductory comments to the necessary minimum explaining only the terms used in the title of this study.

Without the detailed examination of the process of European integration, let's remind the reader of only the main stages of the process of the development of the European Community and its transformation into the European Union. In the post--war era this process was launched by the establishment of the European Coal and Steel Community (in 1951 in Paris) and by signing (in 1957 in Rome) the Treaty establishing the European Economic Community and the European Atomic Energy Community – EURATOM[1]. In 1965, the Merger Treaty (Treaty of Brussels--implemented on July 1, 1967) unified the executive institutions of the Communities and in 1986 the Single European Act merged these three entities into a single European Community. The process was continued through subsequent Treaties: Treaty of Maastricht (1992–1993), Treaty of Amsterdam (1999), Treaty of Nice (2003) and Treaty of Lisbon (2009) which formally replaced the name of the "Community" with "Union"[2].

The article focuses on the trade relations between the US and integrated Europe in the globalization era. It assumes that the trend toward protection of the common values important toall human beings, such as human rights, environment, health and food resources, began during the last decades of the twentieth century to compete with internationalization, which focused on the wellbeing of nations. Some historians look for the roots of globalization in the mediaeval era; in fact, however, the recent trend toward a development of the values protected by the global institutions became popular in social science in the last decades of twentieth century.

In the beginning of the twenty-first century, globalization as a dominant trade current was supposed to be coordinated from one center such as GATT/WTO, but the concept of the trading world looked little by little more like the map of the sea with numerous islands. The trade experts claimed that the global world was replaced by the "world of regions". Regionalization, glocalization and recently "strategic trade" focused on the priorities of individual regions, states and individuals.

The first decade of the twenty-first century also brought successive attacks by anti-globalists on the fundamental programs presented by organizations, primarily by international banks. It was indicated that globalists' free trade assumptions do not work in practice; contemporary states led by the United States do not need free trade

1 The Communities created by the Treaties of Rome became operational in January 1, 1958.

2 For more extended analysis of the early process of European integration and establishment of the entities such as the Council of Europe, the European Economic Area (EEA), the Schengen Area, the European Defence Agency (EDA), or the Permanent Structured Cooperation(PESCO) see, The historical development of European integration,https://www.europarl.europa.eu/RegData/etudes/PERI/2018/618969/IPOL_PERI(2018)618969_EN.pdf (last visited on 19.04.2020). See also the author's book, Handel Międzynarodowy (International Trade), IV ed. C.H. Beck, 2019, p. 127–152. (last visited 23.09.2020).

but more trade. The slogan "Goodbye Globalization" was more and more frequently used by the commentators claiming that recently we live in post-globalization era[3].

They repeated the argument that Institutions, such as the World Bank or International Monetary Fund cannot spread democratic principles, which globalization was to promote, because their decision-making system is indeed undemocratic. International relations experts argued that the increase in the trade potential requires a new strategy, which means a policy differentiated based on trade partners' aims and interests. The term "strategy" gradually adopted an almost magic meaning. The supporters of this trend emphasized that the harmonization of trade regulations that took place under the auspices of GATT and the WTO causes more damage than profits. For many years, the United States was against all GATT principles, and it was criticized for not following them. At present, the network of bilateral agreements may serve the American interests better than the network of multilateral agreements signed under the auspices of the WTO. Secondly, in their domestic policy, countries have to work out a series of tactics protecting their national industries against the harmful consequences of competition with states and corporations that are better adjusted to the changing trade conditions. The conclusion is clear: the era of global trade is coming to an end and must be replaced by strategic trade mechanisms[4].

1. Essential trade conflicts between European Community and the United States in the early stages of European integration

At the time the legal framework of the Communities was negotiated, the forecasts for the cooperation of the United States and a united Europe were very promising. The European Recovery Program, popularly known as the Marshall Plan (1948), confirmed the interest of the U.S. in providing aid to Western Europe helping the continent in post-war rebuilding efforts. When, however, the process of development of more independent European economic policy confronted the U.S. sponsored global trade policy, the first problems began to surface. This article focuses only on the most widely commented disputes.

One of the first examples of the growing discrepancies between US and the European Communities was so-called Chicken War, which followed the tensions

3 A. Alcalde, J. Escribano, Will COVID-19 end globalisation? A spectre is haunting the world but it isn't COVID-19, it's the idea that the pandemic could lead to the end of globalization,https://pursuit.unimelb.edu.au/articles/will-covid-19-end-globalisation (last visited 23.09.2020).

4 For a broader commentary concerning the issue of alternative trade strategies, see A.V. Deardorff, R.M. Stern, M.N. Greene, The Implications of Alternative Trade Strategies for the United States, [in:] D.B.H. Denoon (ed.), (last visited 23.09.2020).

triggered by the trade negotiations in 1961, so 4 years after signing the treaties of Rome.

Looking for the roots of this conflict, we have to keep in mind that concurrent with the process of European integration, the Western World tried to develop the Unites States sponsored common world trade policy. The plan, announced during the Bretton Woods conference of 1944, resulted in the several conferences during which the document, the General Agreement on Tariff and Trade (GATT), presenting the major principles of fair trade was prepared, and the Protocol of Provisional Application, being an obligation of the signing parties to observe the provisions of GATT, was negotiated and signed[5].

The European Communities, as a custom union, accordingly to Art XXIV of the GATT was "understood to mean the substitution of a single customs territory for two or more customs territories, (…) where duties and other restrictive regulations of commerce (…) are eliminated with respect to substantially all the trade between the constituent territories"[6]. The custom union was not supposed to raise tariffs or impose more restrictive barriers on the contracting parties (of the GATT) which were not parties to such union.

However, regardless the additional Agreement Between the United States and the European Economic Community Pursuant to art. XXIV/6 of the GATT of March 7, 1962[7], the European Communities, extending their common market, adopted in 1962 Regulation 22[8], which substantially increased charges on poultry exported by the United States to Europe. It particularly affected the export of chicken to West Germany which tripled the tariff on poultry[9].

During the initial negotiations, the Unites States demanded the compensation equal 46 mil. dollars,[10] and European Community agreed only to compensate

5 See, J. H. Jackson, World Trade and the Law of the GATT, Indianapolis, 1968, pp. 882–883. As the EUROPEAN OFFICE OF THE UNITED NATIONS Information Centre Press release (No. 469 Geneva 27 October 1947) stated: "The Final Act also states that the General Agreement, together with the Schedules of tariff concessions will be released by the Secretary General of the United Nations for publication on November 18, 1947, provided that the Protocol has, by November 15, been signed by all the countries named in the Protocol. The countries named in the Protocol are Australia, Belgium, Canada, France, Luxembourg, Netherlands, United Kingdom and United States.", http://sul-derivatives.stanford.edu/derivative?CSNID=90260240&mediaType=application/pdf (last visited on 24.04.2020).

6 See the original GATT Article XXIV, complemented by an "Ad Art XXIV', https://www.wto.org/english/tratop_e/region_e/region_art24_e.htm (last visited on 24.04.2020).

7 See, A. Chayes, T. Erhlich, A. Lowenfeld, International Legal Process, Vol. II, 1968, pp. 215–230.

8 *Ibidem*, pp. 220–230.

9 *Ibidem*, pp. 262–287.

10 *Ibidem*, p. 298.

American damages up to 19 mil. dollars[11]. After submission of the dispute to the GATT Commission, established according to the GATT dispute settlement system, the organization ordered the EC to pay compensation of 26 mil. dollars. Facing the refusal of the EC, the United States raised the tariffs on European trucks from 2.5% to 25% and on European alcoholic beverages[12]. It resulted in an increase of Japanese exports of trucks to U.S., and the American higher tariffs on European alcoholic beverages contributed to a significant development of local wineries in California, Oregon, Virginia and in many Latin American countries. In 2002, Robert Zoellick, the U.S. Trade Representative proposed an elimination of tariffs on all industrial goods around the world. It normalized the trade in trucks, but the production of American alcoholic beverages left import of European wines and whisky much below the pre-war level.

The number of the trade related conflicts between the European Community/ Union and the Unites States which were submitted to the GATT/WTO Dispute Resolution System (cases launched by EU, complaints against EU and cases in which the EU was a third party) is so big that the selection of the hostile disputes in which the term "trade wars" would be most applicable and is most frequently used is necessary.[13]

Picking up as an example another conflict, Patrick Barkham asked the question: "What are the banana wars?" "The people of Europe – he responded- peel back more than 2.5 billion tons of bananas every year. Now, this love of bananas has turned to the war. The "banana wars" was the culmination of a six-year trade quarrel between the US and the EU. The US complained that an EU scheme giving banana producers from former colonies in the Caribbean special access to European markets broke free trade rules"[14].

Explaining the roots of the conflict, the European Community countries have applied preferential duties on bananas imported from former colonial countries of Africa, Caribbean islands and Islands in the Pacific (*African, Caribbean and Pacific "ACP" countries*) since the end of World War II[15]. The problem provoked the reaction of the United States when the Europeans decided to harmonize its banana policy. The *European (EC/EU) Banana Regime,* issued in 1993, introduced a combination

11 The Chicken War: A Battle Guide, "New York Times", Jan. 10, 1964 https://www.nytimes.com/1964/01/10/archives/the-chicken-war-a-battle-guide.html (last visited on 26.04.2020).

12 For more comments see D. Ikenson, Ending the "Chicken War." The Case for Abolishing the 25 Percent Truck Tariff, June 18, 2003, Center for Trade Policy Studies.

13 Full list of the WTO cases involving EU can be found on the official website of the European Union, https://trade.ec.europa.eu/wtodispute/search.cfm?code=2 (last visited on 27.04.2020).

14 P. Barkham, European Union. The banana wars explained, "The Guardian", 03.05.1999.

15 Banana Wars: Challenges to the European Union's Banana Regime (Teaching Note), 1.2.2004, http://www.ksgcase.harvard.edu/case.htm?PID=1534.2.

of quota system and tariff system what meant that up to certain number of tones, bananas imported from ACP countries were exempted from the duty.

The European Union's Banana System has been attacked by the U.S. corporations investing in Latin America, led by *Chiquita Brands International Inc.* and *Dole Foods*. On November 4, 1996, together with Ecuador, Guatemala, Honduras and Mexico, the United States asked the World Trade Organization (WTO), which was created to oversee the global trade rules among nations, to establish the Grievance Commission. The Commission launched action May 8, 1996[16] and after the conclusion of the appellate and arbitration procedure the Commission authorized the United State to impose penalties up to 191.4 mil. USD[17]. The WTO formally accepted the arbitrators report in May 1999.

Almost simultaneously with the development of the banana war, the United States started another one, called "Beef Hormone Trade War". The beef hormone dispute has affected transatlantic trade relations since 1988 when the Europeans, concerned for the health of their citizens, banned imports of beef treated with certain growth--promoting hormones. The States requested consultation and the establishment of a WTO Commission which would consider the legality of the European Community directive. The Commission confirmed that the Directive is incompatible with WTO sanitary regulations[18]. The EC lodged an appeal and the Body of Appeal largely upheld the Commission's findings. The arbitrator set a deadline of 15 months (until May 1999) for the proposed amendments to Community regulation and practice. One month before the deadline, the EC confirmed that it would not be able to execute WTO orders in time. The United States requested a mandate to impose sanctions of up to $202 million. The arbitrators acknowledged that the United States could impose penalties of no more than $116.8 million[19].

For several years the United States and Canada suggested that these states would suspend the imposition of the additional duties if the European Union would in return increase its quota for imports of high-quality beef from the US and Canada.

Disappointed by the lack of concrete results, the US Congress decided to put indirect pressure on the European Commission through European exporters themselves. On September 22, 1999, Senator *Mike DeWine*, supported by nine other senators, submitted a draft law on the Carousel Procedure (*Carousel Retaliation Act of*

16 *Ibidem*.

17 L. Sek, Trade Retaliation: The 'Carousel' Approach, Congressional Research Service, 03.05.2002 (order Code RS20715), p. 2.

18 WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries by Simonetta Zarrilli Division on International Trade in Goods and Services, and Commodities UNCTAD Secretariat. http://www.ceintelligence.com/files/documents/WTO_Agreement_On_Sanitary_and_PhytosanitaryMeasures.pdf, (last visited on 09.05.2020).

19 See Chronology: U.S. Disputes with EU Over Bananas, Beef Hormones, 07.05.2000, http:// www.usembassy.it/file2000_07/alia/a0070523.htm (last visited on 05.05.2020).

1999) to Congress which passed the law after it bounced back and forth between the chambers[20]. The President signed it on May 18, 2000. The law meant penalizing more European producers and exporters and greater centrifugal pressure on EC decision--making bodies. In accordance with this law the U.S. was able to revise periodically the list of the EU companies targeted by the U.S. sanctions.

Indeed, when in the summer of 2000, the banana and beef related conflicts continued, and chances for a constructive dialogue were clearly weak, the United States began to apply sanctions. The US increased tariffs were mainly targeted against EU countries that supported the use of the Banana System, with France and England at the forefront[21]. Almost in parallel with the start of sanctions, the European Union, supported by 10 other WTO countries, requested consultations and shortly thereafter the establishment of a Commission to examine the compliance of the carousel procedure with WTO rules. Indeed, the Commission confirmed the validity of the Union's action[22]. While the U.S. appeal awaited a resolution, the two sides reached a partial agreement in April 2001. The Union has undertaken to suspend further claims on foreign sales corporation tax credits,[23] and the United States has suspended the application of repressive duties on bananas since July 1, 2001. The duties on hormone-produced beef have remained in force.

Searching for the EC v US disputes from the end of the twentieth century, which for some time have been suspended and waited for the final decision of the WTO, the reader has to remember other conflicts between these two parties triggered by the Clinton's administration's adoption of the 1996 "Cuban Liberty and Democratic

20 See The Trade and Development Act of 2000. https://www.law.cornell.edu/topn/trade_and_development_act_of_2000 (last visited on 10.05.2020).

21 For example, the duty on bath seating imported into the United States, mainly from France and England, increased from 4.9% to 100%, resulting in an 83% reduction in imports from England and 45% from France.

22 Suspended in the commercial space of legal disagreements, the issue of legalizing the procedures of the American "intervention carousel" returned to the agenda in 2009, when in January, president Bush's outgoing administration decided to leave the use of "carousel" again at the disposal of the new president. The European Union immediately responded by announcing a renewed complaint to the WTO. For more comments see L. Sek, Trade Retaliation, *op. cit.*, p. 316.

23 In the article on *Foreign Sales Corporation (FSC),* (updated May 31, 2019) W. Kenton explains that "A foreign sales corporation (FSC) is a defunct provision in the U.S. federal income tax code which allowed for a reduction in taxes on income derived from sales of exported goods. The code required the use of a subsidiary entity in a foreign country which existed for the purposes of selling the exported goods. (…) The FSC, established in 1984, was one in a series of measures designed to support U.S. exporters. It followed on from domestic international sales corporations (DISCS) and was succeeded by the Extraterritorial Income Exclusion Act (ETI) in 2000. All of these were successively challenged in – and found non-compliant by – the General Agreement on Tariffs and Trade (GATT) and its successor the World Trade Organization (WTO) as constituting prohibited export subsidies." Investopedia, https://www.investopedia.com/terms/f/foreign-sales-corporation.asp (last visited on 10.05.2020).

Solidarity (Libertad) Act", popularly known as Helms-Burton Act. The Act extended embargo imposed on Cuba by the Unites States, which was supposed to force the Cuban administration to speed up the democratization of the Cuban political system.

The departure of the American companies, whose property was expropriated by the Cuban government, encouraged European corporations to invest (trafficking) in Cuba and the Helms -Burton Act, signed by President Clinton on March 12, 1996 penalized foreign companies allegedly "trafficking" in property formerly owned by U.S. citizens but confiscated by Cuba after the Cuban revolution. The act allowed the administration to sue these companies in the U.S. courts.

In response, the European Union adopted the Council Regulation (No 2271/96)[24] declaring the extraterritorial provisions of the Helms–Burton Act to be unenforceable within the EU and permitting recovery of any damages imposed under it on the European territory. After several rounds of partial waivers of the Act, the dispute survived until the presidency of Donald Trump and the U.S. administration threatened that it will consider the return to the Helms-Burton policy[25].

As we have already noted in the beginning of this section, the size and number of trade disputes involving the EC/EU and the U.S. would shock even the reader with some expertise in the area of international trade. Calling the attention of the researchers to this fact, Dan Ikenson, Director of the Center for Trade Policy Studies at the Cato Institute, in the article "Byrdening' Relations: U.S. Trade Policies" wrote:

> "Since 1995 the United States has been involved (as complainant or defendant) in 155 of the 304 total disputes (51 percent). In 2003 the number of disputes in which the United States was a defendant surpassed the number of disputes in which it was a complainant for the first time. In the first four years of the WTO, the United States was a complainant 51 times and a defendant 27 times. During the most recent four years, the United States was a complainant 15 times and a defendant 42 times[26].
>
> The United States has been playing defense with regularity in recent years, not because of an anti-American bias in the WTO, but because of its own overzealous application of trade restraints and serious flaws in its trade remedy laws"[27].

24 «EUR-Lex – 31996R2271 – EN». Official Journal L 309, 29/11/1996 P. 0001 – 0006.

25 The reader looking for similar cases, which were sort of "suspended" and "reopened" several times should study the case of the European attack on The U.S. Antidumping Act of 1916 and the dispute, Boeing v Airbus, see: R. Ludwikowski, Handel Międzynarodowy, *op.cit*., pp. 246–248; also: editorial team, Boeing vs Airbus – Which is Better & Who is Winning, https://www.aircraftcompare.com/blog/boeing-vs-airbus/ (last time visited on 17.05.2020).

26 Compiled from statistics on the WTO website, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. (last time visited on 14.05.2020).

27 D. Ikenson**,** Byrdening' Relations: U.S. Trade Policies (Washington, D.C.: Cato Institute, 2003). Continue to Flout the Rules," Cato Free Trade Bulletin no. 5, 2., January, 13, 2004 https://www.

Writing about "Byrdening relations", Ikenson referred to another dispute in which EU questioned so-called "Byrd Amendment"[28]. The Act provided that the US government will distribute funds collected from anti-dumping duties and protective duties neutralizing subsidies between companies that have been affected by *unfair* trade practices. Commenting on the effect of the Amendment, Ikenson reported that "in 2001, the first year of the amendment, 155 different corporations filed 894 complaints with the administration, for damages totaling $1.2 trillion. The administration found 61% of complaints (541) justified, meaning an average of 427,000 complaints were allocated some USD per applicant. In 2002, $330 million was distributed, averaging $451,000 per applicant"[29].

Almost simultaneously with the dispute over Byrd Amendment, the United States lost in the WTO the case of so-called "zeroing". The practice was used in antidumping cases when the investigating authority calculating the dumping margin by getting the average of the differences between the export prices (prices in the importing country) and the home market prices (prices in the country of production) of the product in question used a misleading strategy called *zeroing*. It consists in not taking into account the negative dumping margin and introducing the figure '0' instead of the average margin. This strategy obviously violated the WTO rules of fair trade[30].

cato.org/publications/free-trade-bulletin/byrdening-relations-us-trade-policies-continue-flout--rules (last visited on 14.05.2020).

28 Amendment introduced by Senator Robert C. Byrd, also known as the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA) Enacted by: the 106th United States Congress and signed into law by President Clinton on October 28, 2000. For the history of the legislative process for the Act see: U.S. Continued Dumping and Subsidy Offset Act, Statement of the U.S. at the Oral Hearing, 05.06.2003, http://congressionalresearch.com/RL33045/document.php (last time visited on 14.05.2020).

29 See slightly different data: J. Seale Jr, WTO Appellate Body Condemns the 'Byrd Amendment'. The US Must Now Repeal It, Delegation of the European Commission to the United States, Countervailing Duties, Antidumping Tariffs and the Byrd Amendment – a Welfare Analysis, https://www.researchgate.net/publication/23505405_COUNTERVAILING_DUTIES_ANTIDUMPING_TARIFFS_AND_THE_BYRD_AMENDMENT_A_WELFARE_ANALYSIS (last time visited 05.14.2020).

30 In other words, explaining this problem, we have to ask what happens if sales in the producer's own market take place at different prices, but they are not lower than the cost of production. It means that the sales at a 'lower than normal price' are not used long enough or it is possible to compensate for the losses incurred. The practice of the so-called *zeroing* was to provide answers. It consists in not taking into account the negative (or average) dumping margin and introducing the figure '0' instead of the actual "negative figure". For more detailed explanation of this practice see the textbook of the author, supra note 2, p. 251–255.

2. World Trade Organization and prospects of multilateral trade

It was expected that the Uruguay Round (1986–1992)[31] of trade negotiations would open a new opportunity for the stabilization and standardization of the rules of fair trade. In fact; however, only in the minutes ending the meeting of the negotiating parties in December 1990, was the WTO (World Trade Organization) mentioned. Canada came forward again with the idea of reconsidering the possibility of establishing an International Trade Organization. In 1991, the European Union took up this thought but suggested that the organization be renamed to the *Multilateral Trade Organization* (MTO). In December 1991, GATT Director-General A. Dunkel initiated further discussions on a draft of the new organization, which, after many objections from the US, was submitted for discussion in December 1993, essentially in the final hours of the negotiations preceding the approval of the Final Protocol of the Uruguay. The project for the creation of the organization was accepted in general outlines, but it was signed only on 15 April 1994 at the conference in Marrakech, Morocco. The new organization was named the World Trade Organization.

The hopes that the new organization would help the superpowers to resolve all trade related problems were, however, very illusive. In the first decade of the twenty--first century opponents of the new agreement in the United States stressed that their country would lose the right to reject the decision of the GATT settlement committee; other critics of the new package added that during the 46 years of the organization's existence, the United States used the services of the GATT Commission 33 times and without impressive success for the country.

On the one hand, the Central European countries, including Poland[32], were concerned that US environmental policy might be imposed on other parties; on the other hand, (looking especially on the US-China relations) the American protection of intellectual property was highly unsatisfactory.

31 The history of the Uruguay negotiations was most fully illustrated in the three-volume work prepared under ed. T.P. Stewart, Uruguayan GATT Round: History of Negotiations (1986–1992), Brussels 1992. The reader should reach for this book in order to more fully analyse the course and main stages of the negotiations. At this point, it is enough to mention that the Final Act round has 550 pages, and a full package of materials over 22,000 pages and weighs about 200 kilograms. Let us therefore try to limit our comments to presenting the most important stages of the Uruguay negotiations.

32 See editorial article "Morawiecki popiera „mocniejszą" wersję umowy o wolnym handlu z USA. Co to oznacza dla polskiej gospodarki?", 02.03.2016 (last actualization 22.02.2018), "Newsweek". We can read: "However, TTIP also has a number of critics who point out the agreement e.g.., strengthening the role of corporations, which, in simple terms, will be able to influence national legislation. It is also controversial to equate food regulations. Europe is at risk of a flood of cheap artificial food from the US", https://www.newsweek.pl/biznes/polska-popiera-umowe-o-wolnym-handlu-pomiedzy-ue-i-usa-czym-jest-ttip/q10ep8p (last visited on 25.05.2020).

During the successive rounds of negotiations, the Doha Round in Qatar and the WTO Ministerial Conference at Cancun, Mexico[33], representatives of the LDC (Less Developed Countries) demanded full implementation of the Uruguay Round. LDC countries required financial and technical assistance which would allow for an even increase in the efficiency of agricultural production worldwide. It was demanded that the WTO Committee on Agriculture introduce a specific plan (so-called The Development Box) to the WTO indicating measures to ensure that the agricultural reform was essential to make progress on other issues. However, ministers of the developed countries disagreed on how each nation would cut agricultural tariffs and subsidies. In contrast, the LDC countries rejected the proposed U.S. and European Union reductions in subsidies as inadequate, and finally the U.S. and EU felt that the key developing nations were not contributing to reform by agreeing to open their markets. It decided on the failure of Cancun negotiations.

The intellectual ferment around globalization along with enthusiasm and the efforts to define the term itself have also brought a lot of concern and frustration. The search for the sources of globalization has continuously led to the exposure of a number of initiatives sponsored, targeted or largely penetrated by Americans. America's participation in the formation of the post-war political, legal or world trade organization was unquestionable but still insufficient to allow the industries in the LDC states to adequately develop[34].

The proponents of globalization, although admitting the U.S. endeavors to develop trade, often stressed that the phenomenon of so-called "American unilateralism"[35] contributed to the crisis of the global economy[36]. Complaints about Americans' propensity to consider their value list as a globally acceptable have grown at the turn of the twentieth into the twenty-first century, and many economists were inclined to adhere to John Gray who in the article "Goodbye to globalization" wrote in 2011:

> "George Bush and Tony Blair sent out a reassuring message from Camp David. Their schmoozing and backslapping were designed to tell the world that

33 See R.E. Baldwin, Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies, http://fordschool.umich.edu/rsie/Conferences/CGP/May2004Papers/Baldwin.pdf (last visited on 25.05.2020).

34 See, DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION,WT/MIN(01)/DEC/1, 20 November 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last time visited on 25.05.2020).

35 Phenomenon of the *"American unilateralism"*, was defined as attempts to impose a one--way American vision of the world on other countries. For more information see, M. Penn Unilateralism: Definition & International Relations, Study.com, https://study.com/academy/lesson/unilateralism-definition-international-relations.html (last time visited 03.06.2020).

36 Quotation after: Global Economy Part 5: The Proponents of Globalization, https://learn.uncg.edu/courses/learn/global/unit1/unit-1-part-5/ (last visited 03.06.2020).

nothing much has changed since Mr. Bush entered the White House. In fact, there has been a momentous shift in America's stance towards the world. As a political project globalization is dead"[37].

3. Can "strategic trade" reset transatlantic relations?

Regardless of these pessimistic opinions, in the beginning of his second term in 2013, President Obama stressed that the chances for the restoration of global or multilateral trade are strong. In 2013 in the State of the Union Address the President announced that The Transatlantic Trade and Investment Partnership (TTIP) negotiations were advancing, and this may mean a new era of EU-US relations[38].

Entering, on January 20, 2017, the world of political and trade transformations Donald Trump, the 45th president of the United States, with great fanfare announced that his priorities are different than his predecessors. With his economic education and background as financial mogul gaining reputation in the area of real estate and as a TV personality, Trump had to prove that his vision of politics and trade is "new". Giving just several examples, his priority was to enhance domestic not international trade. Building on this assumption he and his administration began to develop the concept of strategic trade, concentrated on the slogan "America first".

Summarizing this doctrine Trump stated the fair trade is now to be called Fool Trade if it "is not reciprocal"[39]. Following the criticism of globalization by the authors of the doctrine of strategic trade, the president claimed that recently the regulations of the GATT and WTO bring more damage than profit[40]. In his opinion, the multilateral treaties should be replaced by bilateral agreements.

Accordingly, with this assumption his first step after the election was the withdrawal of the United States from the *Trans-Pacific Partnership Agreement – TPP.* The deal negotiated by President Obama's administration was intended to develop commercial cooperation between 12 American and Asian countries. The Agreement had a potential to duplicate the structures of the European Union and, in any event, balance China's growing influence in the Pacific region. The remaining 11 countries (outside the United States) signed an agreement on March 8, 2018 to form

37 J. Gray, Goodbye to Globalization, "The Guardian", 26 Feb 2001, (last visited 25.05.2020).

38 See, S. Lester, One Year into TTIP Negotiations: Getting to Yes, CATO Institute, Free Trade Bulletin, Nr 59, Sept 21, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549394 (last visited on 25.05.2020).

39 Quoted in: A. Hopkins and D. Ljunggren, U.S.-Canada dispute escalates after tense G7; Trump renews criticism of Trudeau, Reuters, June 10, 2018, https://ca.news.yahoo.com/u-canada-dispute-escalates-tense-g7-trump-renews-020258874--business.html (last visited on 26.05.2020).

40 D. Denoon, The New international economic order: a U.S. response, 1979, pp. 78–108.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as *TPP11 and TPP-11*[41].

The trade relations with the European Union also became more complicated. Another trade maneuver by Trump was to increase customs duties on imported steel and aluminum goods. After the sanctions were announced, the Trump administration rather unexpectedly excluded Mexico, Canada and European Union countries from the group of states exposed to the sanctions.

It seemed that the United States would repeat G.W. Bush's 2002 mistake when Canada (as the member of NAFTA) was excluded from safeguards imposed by the United States. The World Trade Organization's dispute resolution bodies recognized it as a violation of so-called "principle of parallelism "that did not allow using different standards with regard of regular member states of the WTO and those which signed with the state using trade sanctions the special regional agreements[42].

On May 31, 2018, however, Trump made the next move on the world's commercial chessboard and revoked the special privileges of the United States, excluding Canada, Mexico and European Union countries from customs penalties that have docked exporters of aluminum and steel products. Trade experts have begun to question whether Trump's "trade policy" is evolving or whether the president is chaotically changing his policy.

Many trade experts in Europe have been again horrified by the shift in attitudes in Washington. The possibility that Trump's policy will keep being volatile could have a significant effect on the U.S. economy and for the NATO alliance and these developments should not pass unnoticed by American readers.

US-China relations provided another example. In 2019, Trump changed his strategy again. After a decades-long exchange of threats to impose sanctions and sudden returns in the policies of both countries, on January 15, 2019, the United States and China signed the "First Cycle" ("Phase One") trade agreement, which was considered a significant success for Trump's policy. The positive evaluation of the US –China relations was hampered by the COVID-19 pandemic, which reduced the size of trade between those countries[43]. COVID-19, concluded Shi Yinhong, an

41 For more comments on Trump's policy with Asian and South American states see, R. Ludwikowski, Strategie handlowe Donalda Trumpa. Kilka refleksji nad procesem transformacji NAFTA w USMCA,(Donald Trump's Trade Strategies. A Few Reflections on the Process of Transformation of NAFTA in the USMCA, "Krakowskie Studia Międzynarodowe", Nr 4, 2019, pp 213–224.

42 J. Worland, Trump Wants to Impose Steel Tariffs. It Didn't Work for Bush, Time, updated: March 1, 2018. Originally published: March 1, 2018, https://time.com/5180901/donald-trump-steel-aluminum-tariff/(last visited 26.05.2020).

43 See Vineyard, How Does the Coronavirus Impact International Trade with China?, "Universal Cargo", 30.01.2020, https://www.universalcargo.com/how-does-the-coronavirus-impact-international-trade-with-china/ (last visited 16.02.2020).

adviser to the Chinese government, pushes US-China relations to their lowest point in decades[44].

With regard to the NAFTA agreement ("disastrous", accordingly to Trump's pompous statements) he signed with Canada and Mexico a "phenomenal" pact the USMCA – the United States, Mexico, Canada Agreement[45].

These examples can be multiplied, but let's conclude these remarks only with a couple of comments on the prospects of US and EU cooperation.

Conclusions

On the basis of the analysis presented above, the author has to admit that, at this moment, the prognosis for the stabilization of the EU-US trade relations is extremely unpredictable. American unilateralism, reluctance to cooperate with international organizations, such as the United Nations, lack of confidence in the effectiveness of the World Trade Organizations, aggressive attitude toward World Health Organization, the long list of trade conflicts with European Community/ Union presented above, combined with Trump's inclination to take one step ahead and two steps back and his openly presented nationalistic attitude may threaten the trend toward world-wide solidarity developed by the struggle with COVID-19.

In the following conclusions let's make some comments on the future of the Transatlantic Trade and Investment Partnership between the U.S and EU. For the cooperation of these two regions this Pact is a crucial arrangement. However, we have to admit that in this article, we focused more on the conflicts than on the successful negotiations between the US and EU. Our main point in the comments presented above was that the relationship between the European Union and the United States has always been complicated, and we analyzed above the main reasons for these disagreements.

In the time of renewed transatlantic negotiation, pro-American sentiments in Europe were stronger, and European experts on trade and politics emphasized that US significantly increased support for the European Deterrence Initiative (EDI). Still with comments frequently repeated by Trump that "Europe needs its own army", the

44 See the conclusions of Shi Yinhong, an adviser to the Chinese government, China's diplomatic challenges in a world polarized by the pandemic, "Global Times", 5.10.2020, https://www.globaltimes.cn/content/1187918.shtml; see also: COVID-19 pushes US-China relations to lowest point in decades,https://www.msn.com/en-us/news/world/covid-19-pushes-us-china-relations-to-lowest-point-in-decades/ar-BB13S1Ah (last time visited on 27.05.2020).

45 USMCA goes into effect on July 1, 2020; for more comments see, J. Greenberg, Was NAFTA worst trade deal ever'? Few agree,"Politifact", 29.08.2016, https://www.politifact.coarticle/2016/sep/29/NAFTA-worst-trade-deal-ever-few-agree: For more comments, see, L, McGee, Cracks in the Trump-Europe relationship are turning into a chasm, 6, 4, 2020, CNNhttps://www.cnn.com/2020/07/04/europe/trump-europe-relationship-intl/index.html (last visited 27.05.2020).

European media began to warn the readers that the crisis in US and EU relations may soon return[46].

Let's mention some other obstacles which can delay the signing of the US--EU Treaty. We have to admit that Brexit additionally complicated the relationship between EU and US, and by the time this article was completed, it was not clear whether US will sign the free trade agreement with UK before the negotiations with EU will be concluded[47].

We have to add that deterioration of the US trade relations with China in the second part of Trump's presidency disoriented Europeans. In the early stage of pandemic in China, the European states offered a significant assistance to Beijing. When, however, Covid-19 also hit the countries of EU, China did not express readiness to do a lot on behalf of this region.

All these observations have led us to the final conclusion that President Trump's doctrine of strategic trade may result rather in the US return to a traditional policy of isolationism than a fruitful commercial cooperation.

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R.R. Ludwikowski, Handel Międzynarodowy, IV Wyd. C.H. Beck, 2019.

46 See J. Smith, The EU-US relationship is in crisis, The German Times, 03.2019, http://www.german-times.com/the-eu-us-relationship-is-in-crisis/ (last visited 24.09.2020).

47 S. Lester and D. Ikenson, Core Principles for a U.S.-UK Free Trade Agreement, Cato Institute, 01.30.2020, https://www.cato.org/blog/core-principles-us-uk-free-trade-agreement, see J. Larik, *Brexit and the Future of Transatlantic Relations,* Brexit Institute, 04. 2018, http://dcubrexitinstitute.eu/2018/04/brexit-and-the-future-of-transatlantic-relations/ (last visited 24.09.2020).

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Dispute Resolution That Divides: The EU-USA Conflict on Investment-State Dispute Resolution

Abstract: Investment-state dispute resolution has been a hot topic recently, as we can observe a shift in the international trade agreements – both on the side of politics and economics. The European Union has started to negotiate several new trade agreements – some succeeded, some failed, and among the latter we find the TTIP with the USA. This article focuses on the neuralgic point of ISDS in the trade policy of the EU and the USA and summarizes the arguments for and against the ISDS mechanism reflecting also on the latest scientific literature and statistics.
Keywords: investor-state dispute resolution, ISDS, TTIP, CETA

Introduction

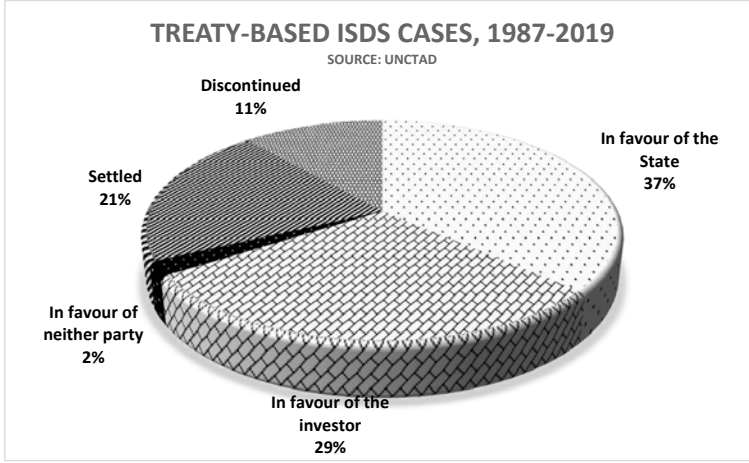
Investment-state dispute resolution (ISDS) is part of most bilateral and multilateral trade agreements. The development of these special arrangements to deal with international produced disputes is one of the most effective as well as one of the most important systems of international dispute settlement[1]. Agreements providing for investment protection may include an investor-to-state dispute settlement mechanism, which allows an investor from a third country to bring a claim against a state in which he has made an investment. Most cases take place at a tribunal operating under the rules of the United Nations Centre for International Trade Related Arbitration Law (under the umbrella of the UNCITRAL) or at the

1 J.G. Merrils, International Dispute Settlement, Cambridge University Press, New York, 2005, p. 211.

International Court for the Settlement of Investment Disputes (ICSID) at the World Bank.

As for the basic principles for international dispute resolution the G20 announced guidelines. "Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse"[2].

According to the latest data published by UNCTAD from 1987 to 31 December 2019, about 1023 treaty-based ISDS cases have been started, ofwhich 674 cases are concluded with the following results[3]:



The dispute-settlement mechanismsof ISDS treaties have come under considerable criticism[4], as also recognized in UNCITRAL's Working Group III on "Investor-State Dispute Settlement Reform"[5], but in the endsome kind of dispute--settlement regime is needed to settle the conflicts between the parties, especially if

2 G20 Guiding Principles for Global Investment Policymaking,https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf (access: 22 July 2020).

3 ISDS Navigator. Data available here: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=6 (access: 22 July 2020).

4 We should mention here the Achmea-case (C-284/16) of the European Court of Justice whose enormous effect on intra-EU bilateral trading agreements ended with a termination of several agreements in May 2020. See details here: Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union OJ L 169, 29.5.2020, p. 1–41.

5 The latest document from the Working Group is: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), Document A/CN.9/970, https://undocs.org/A/CN.9/970 (access: 28 July 2020).

investors do not trust local courts, and governments of host States do not want to use – or cannot use – the courts of investors' home countries.

1. EU reform on ISDS

The EU has started the reform of the dispute settlement institution based on the Lisbon Treaty that widened the EU's jurisdiction on trade related dispute settlements, as foreign direct investment is included in the list of matters falling under the common commercial policy. According to the Regulation No. 1219/2012 on establishing transitional arrangements for bilateral investment agreements between Member States and third countries[6] – which regulation we can see as the first major step towards the EU regulation towards the new regime on ISDS – the Member States shall seek the agreement of the Commission before activating any relevant mechanisms for dispute settlement against a third country included in the bilateral investment agreement and shall, where requested by the Commission, activate such mechanisms. According to the Article 13, section c) the Member State and the Commission shall fully cooperate in the conduct of procedures within the relevant ISDS mechanisms, which may include, where appropriate, the participation in the relevant procedures by the Commission.

On 23 July 2014, the European Parliament and Council adopted a regulation[7] to establish a legal and financial framework for investor-to-state dispute settlement. But beyond principles there is still no result for the concrete form of ISDS. Following protests against the inclusion of ISDS provisions in the CETA[8] and TTIP[9] agreements, the European Commission engaged in state-level multilateral talks to reform the existing ISDS environment, working together with the UNCITRAL, as the Council of the European Union has authorized the European Commission to represent the EU and its Member States at the intergovernmental talks at UNCITRAL.

6 Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJL 351. 20.12.2012. pp. 40–46).

7 Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 established a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, (OJ L 257, 28.8.2014, pp. 121–134).

8 Comprehensive Economic and Trade Agreement – between EU and Canada, entered into force provisionally on 21 September 2017.

9 Trasatlantic Trade and Investment Partnership – between the EU and the USA, launched in 2013 and ended without conclusion at the end of 2016. See some details here: B. Horváthy, Potential Impacts of Transatlantic Trade Negotiations on the EU Environmental Policy, „Hungarian Journal of Legal Studies", 2016, vol. 57. No. 4, pp. 401–415, doi: https://doi.org/10.1556%2F2052.2016.57.4.1.

The EU is committed to creating a fully-fledged multilateral investment court (MIC) of a two-court system (first instance and appeal) including a mechanism with full-time adjudicators (and not party-appointed arbitrators)[10]. The adjudicators can ensure the credibility of the system supported bythe fact that the position is full--time, long term and non-renewable without the possibility of outside activities. As a technical solution, an opt-in convention is proposed that could work as a general framework for all the treaties (bilateral or multilateral) for the signing countries[11].

An important step in the reform process is the CETA-agreement which already contains a next-level ISDS mechanism. CETA established a permanent Tribunal of fifteen members which will be responsibleto hear claims for violation of the investment protection standards established in the agreement. The final text of the agreement also established an Appellate Tribunal. For the future both parties share the objective of establishing a permanent multilateral investment court as discussed earlier. The text of agreement recognizes that such a multilateral mechanism will come to replace the bilateral mechanism established in CETA[12].

2. US policy changing on ISDS and its effect on TTIP

During the Obama administration an important regulation had been adopted to govern the negotiations on international investment agreements. The Trade Promoting Authority (TPA)refers to a process Congress (who has the right of regulation of foreign trade) made available for the President (who has the right to negotiate treaties) for limited periodsto enable legislation to approve and implement certain international trade agreements to be considered under expedited legislative procedures.The TPA was first enacted on January 1, 1975 and has been used for 14 times so far. The current authorization is due to July 1, 2021.

This regulation states that trade agreements should:

- provide meaningful procedures for resolving investment disputes;
- seek to improve mechanisms used to resolve disputes between an investor and a government through mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims;
- provide procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims;

10 H. Yang, The EU's Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System (October 12, 2017), KIEP Research Paper No. Policy References 17–06, http://dx.doi.org/10.2139/ssrn.3063843 (access: 29 July 2020).

11 Forthe proposal and standpoint of the European Commission see: I. Hallak, Multilateral Investment Court – Overview of the reform proposals and prospects, European Parliament Research Service, PE 646.147, January 2020,https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf (access: 29 July 2020).

12 CETA Agreement Article 8.29.

– provide procedures to enhance opportunities for public input into the formulation of government positions; and
– seek to provide for an appellate body or similar mechanism to provide coherence to interpretations of investment provisions in trade agreements[13].

Between 2010 and 2017 the USA did not bring a single complaint against the EU butwas subject to just two EU complaints – one explanations was that Washington and Brussels had come to see the drawbacks of playing tit-for-tat with each one responding to any new filing with another case against the other. The parties' decision to launch the TTIP negotiations in 2013 implied that they preferred negotiation over litigation[14]. One critical point of the TTIP negotiations was the investor protection and the dispute resolution mechanism. Adopting an ISDS mechanism between the two largest economies of the world would have been game-changing in the evolution of ISDS[15]. However, during the negotiations it became clear (even during the Obama--administration) that the ISDS clause is a weak point[16]. The argument against an ISDS clause in TTIP was based upon two assumptions: (1) investment arbitration systems favour large corporation and (2) US companies make active use of ISDS and will thus do so in TTIP in order to stifle public policy[17]. Civil pressure on the side of the EU was one clear obstacle for the agreement, but the election of Donald Trump was the last strawthat put an end to the negotiations of TTIP. According to the Trump administration, trade policy should focus more on the national interests of the United States and for this reason must be harmonious with the country's national security strategy ("America First" initiative). This policy resulted in renegotiating the NAFTA agreement, obstructing the work of WTO,implementing an aggressive amount of tariffs and starting an overall trade war with China. This new trade policy is certainly not fertile groundfor new free trade agreement with the EU. We should note, however,

13 Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114–26) Sec. 102(b)(4)(F)-(H).

14 C. Van Grasstek, The Trade Policy of the United States under the Trump Administration, EUI Working Paper RSCAS 2019/11, https://cadmus.eui.eu/bitstream/handle/1814/60889/RSCAS_2019_11.pdf (access: 28 July 2020).

15 F. De Ville, G. Siles-Brügge, Why TTIP is a game-changer and its critics have a point, "Journal of European Public Policy", 2016, p. 5.

16 The American point of view is quite clear in this article: J. Caytas, From Shield to Sword: TTIP's Lessons on Democratic Legitimacy for International Investment Arbitration,Columbia Journal of Law and Social Problems: Common Law" (Apr. 23, 2015), available at SSRN: https://ssrn.com/abstract=2685501 (access: 29 July 2020).

17 P. Garcia-Duran, L.J. Eliasson, The Public Debate over Transatlantic Trade and Investment Partnership and Its Underlying Assumptions "Journal of World Trade", 2017, Vol 51, No. 1, pp. 23–42.

that in 2020 the USA elects a new president, and changes in the administration may result in changes of the attitude of trade negotiations[18].

3. Pros and cons of ISDS in relations of EU-USA (and international) trade

In 2015 Lise Johnson, Lisa Sachs and Jeffrey Sachs published an article[19] summarizing the possible negative effects of ISDS mechanisms. In the following section I will argue in line with their findings – not necessarily agreeing with their statements, and also citecriticalopinions from the international literature. I find this useful in particular of the EU-USA relations, as the mentioned article collects most of the neuralgic points the US government (especially the Trumpadministration) used to have as arguments against ISDS clauses.

According to the previouslymentioned authors[20], ISDS has the following shortcomings:

– Argument: "Foreign investors alone (including their subsidiaries and shareholders) are able to initiate claims against the government; the government cannot initiate an ISDS proceeding".
  Reasoning against: the host country has the full armament of domestic law to complicatethe business life of the foreign investors. From this point of view, the host country has the advantage of legal power which should be balanced with the investors' right to start an action against the host country in case of unlawful measures. When deciding on its policies, the government usually takes into account the effects on domestic investor profits, whereas the same is not necessarily true for foreign investor's profit. While host country governments typically have an interest in foreign investment, due to some positive spill over, they will ignore the impact of a more stringent regulation on foreign investors' profits once the investment is made[21]. The governments have other forums to apply when they presume that another country is

18 The rival candidateof Donald Trump for the presidency is Joe Biden, who has an entirely different policy plan for international trade, which contains "more friendships, more cooperation, more alliances, more democracy". See in details: Caporal, Jack: What Is Former Vice President Biden's Policy on Trade? Center for Strategic & International Studies, 12 February, 2020. Available: https://www.csis.org/analysis/what-former-vice-president-bidens-policy-trade (Access: 17 August 2020)

19 L. Johnson, L. Sachs, J. Sachs, Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law, Columbia Center of Sustainable Development, CCSI Policy Paper, May 2015, https://academiccommons.columbia.edu/doi/10.7916/D82N52TP (access: 22 July 2020).

20 *Ibidem*, p. 2.

21 See in details: W. Kohler, F. Stähler, The economics of investor protection: ISDS versus national treatment "Journal of International Economics", 2019, Vol. 121.

infringing the regulations of international trade law, like the GATT/WTO dispute settlement system[22] or the ICSID[23], even ICC[24].

– Argument: "The decisionmakers in theISDS proceedings are private arbitrators appointed on a case-by-case basis to decide the investors' claims against the host government".
  Reasoning against: as shown earlier, the EU – working together with the UNCITAL – has proposed a stable and permanent body for ISDS. However, if we analyse the success of the International Chamber of Commerce (ICC) and the International Court of Arbitration, we can see that in international trade conflicts the companies' choices are private arbitrators[25].
– Argument: "When deciding the case, the substantive law the arbitrators apply is not the domestic law of the host state that normally governs the investment. Rather, it is the law of the treaty, as interpreted by the arbitrators".
  Reasoning against: in most of the cases the conflict of the state and the private investor is based on a governmental action or regulation of the host country, so if the conflict is to be managed on the basis of the domestic law, every governmental action would be justified, even if it is opponent to the general principles of the international trade or to the treaty or contract between the host country and the investor based on the principle of *lex posterior derogar priori*. Arbitration is controlled by a combination of public law and private law; the latter is composed of the legally binding agreements between the parties and any applicable rules based on the *iuscogens* of the host country – or based on the procedural code of the arbitration tribunal. All of these legal

22 See in details: Ch.P. Bown, On the Economic Success of GATT/WTO Dispute Settlement "The Review of Economics and Statistics", 2004, Vol. 86, No. 3, pp. 811–823, http://www.jstor.com/stable/3211799 (access: 24 July 2020) or A.D. Mitchell, Legal Principles in WTO Disputes, Cambridge University Press, Cambridge, 2008. We should highlight here that the WTO Appellate Body is not able to function at the time of finishingthis paper (July 2020) because of the lack of appointed members. The calvary of the WTO is not over yet, but the author is optimistic about a future reform of this important institution of the international trade. For the WTO reform, see in details: D. McRae, What is the future of WTO Dispute Settlement "Journal of International Economic Law", 2004, Vol. 7. No.1, pp. 3–21.

23 See in details: Ch.H. Schreuer, et. al., The ISCID Convention: A Commentary, Cambridge University Press, 2009.

24 Since 1996 ICC has registered 42 cases based on BITs.

25 In 2019, the ICC celebrated its centenary and the ICC International Court of Arbitration registered its 25,000 case. 2019 also saw the highest number of cities hosting ICC Arbitrations (116 cities spread over 62 countries) and a record number of new cases involving a state or state entities (20%). See more details on ICC arbitration here: ICC, Dispute Resolution 2019 Statistics, Paris, 2020, www.iccwbo.org/dr-stat2019 (access: 24 July 2020). In contrast,the WTO, ICC is a non-political body, so the current trade war of USA does not affect the Chamber as muchas the formal, policy-backed institutions.

standpoints are known by the parties when they sign the contract (investment treaty) governing their relation[26].

– Argument: "Treaty standards are typically drafted in very vague, broad terms, giving arbitrators in each case substantial latitude to determine what the standards mean in practice; because there is no appellate mechanism, and there are strong rules on enforcement of awards, there are only very limited checks on tribunals' powers of interpretation".
  Reasoning against: An international investment treaty or contract – in most of the cases – is not definitive similar to a standard construction contract. That is a fact. But the aim of these treaties is also different from a civil law contract: the treaties and FDI (foreign direct investment) contracts set up the principles that govern the partnership of the state and the investor company, not necessarily dealing with everyday issues. This way – as a natural consequence – there is more room for interpretation and abstraction of the high-level defined rules. A decision based on common principles however can be in favour of the hosting state as well (see the case: InceysaVallisoletana S.L. v. Republic of El Salvador[27]).
– Argument: "If the arbitrators find that the government violated the treaty, they can order the government to pay the investor substantial damages. Cases to date have included awards of millions or even billions of dollars for breaching the treaty. Arbitrators can and have also ordered "injunctive relief", often in the form of interim measures, effectively mandating governments to take, or not take, certain actions"[28].
  Admitting that the amount of remedies and compensations are rising, we should highlight that the awards are based on facts and numbers (data)

26 For the arbitral awards see in details: M.L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge University Press, 2017. For the details of the legal basis of arbitral awards see: D.W. Rivkin, Enforceability of Arbitral Awards Based on Lex Mercatoria "Arbitration International" 1993, Vol. 9, No 1, pp. 67–84.

27 ICSID Case No. ARB/03/26, awarded on 2 August, 2006. In this case the ICSID analysed the violation of principle of good faith, the principle of nemo auditurpropriamturpitudinemallegans, and principle that prohibits unlawful enrichment, and concluded that in the case the investor behaved improperly in a bidding process, hiding facts from the hosting state and even from the arbitral tribunal.

28 The record-holder case to date is the Yukos vs. Russian Federation (PCA Case No. AA 227), in which about 2.5% of the Russian GDP has been awarded after an unlawfulexpropriation. The award is dated 2014, but the case is still evolving: in February 2020 the Hague Court of Appeal found the arbitral award, but the Russian Federation appealed further in May 2020 to the Dutch Supreme Court. The Russian Federation should pay about 57 billion USD to the investor in compensation for alleged damages – according to the latest decision. See the details of the original award here: https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf (access: 28 July 2020).

that the claimant can prove to be true and justified. The amounts of public money at stake, in damages claims, awards and arbitration costs may be likely to attract public attention[29]. According to a recent study the compensation amount is rising along with arbitration fees and procedural costs[30], but with the European Union's proposal for MIC this problem can also be solved.

– Argument: "There are limited avenues to challenge arbitral awards; errors of law or fact are typically not grounds for overturning the decisions. If a tribunal issues an award against the government, courts of most countries are required to enforce it".

  It is quite common in the international literature that if there is a sphere where the international investment arbitration can improve it is the problem of the appeal mechanism[31]. If we look at the proposal of the UNCITRAL and the EU Commission on MIC or the CETA agreement, both suggest a two--level system of dispute resolution.

  Reasoning against: if we consider that one of the advantages of the arbitration procedure is the timing (i.e. it can be much faster than the 3 or sometimes 4 staged national courts), setting up an appellate forum can diminish this advantage.

Concluding remarks

The change of policy in the international trade relations of the Trump administration has challenged the EU-USA trade agreements and the dispute resolution mechanism as part of the negotiations. The EU however is moving forward in the direction of new forms of investment dispute resolution focusing on multilateral resolutions instead of bilateral agreements. Under the umbrella of a multilateral agreement that is under construction by the UNCITRAL, the possible negative effects of international trade arbitration can be eliminated or at least minimized. We should see however that the trend of investment protection and international investment negotiations are not in favour of this subject. The USA's

29 D. Gaukrodger, Adjudicator Compensation Systems and Investor-State Dispute Settlement, OECD Working Papers on International Investment, 2017/05, OECD Publishing, Paris, http://dx.doi.org/10.1787/c2890bd5-en (access: 28th July 2020).

30 M. Hodgson, A. Campbell, Damages and costs in investment treaty arbitration revisited "Global Arbitration Review", 14 December 2017, http://www.itd.or.th/wp-content/uploads/2019/09/Annex-2-Allen-and-Overy-Damages-and-costs-in-investment-treaty-arbitration-revisited--December-2017.pdf (access: 28 July 2020).

31 See in details: G. Bottini, Reform of the Investor-State Arbitration Regime: The Appeal Proposal, (in:) J.E. Kalicki, A. Joubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System, BRILL, 2015, pp. 455–473.

current administration has a protectionist (and rather aggressive) trade policy that has direct and indirect effects on the world trade as well[32].

While the USA is turning to domesticgoals, the EU always has bigger plans for the common market. I believe that the UNCITRAL Working Group III would be able to create the framework for a multilateral agreement which can assure both investors and hosts states that the international investments can be fulfilled with mutual benefits – even when it comes to time for disputes.

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32 On protectionist trade policies as trends, see in detail: M. Bussière, E. Pérez-Barreiro, R. Straub, D. Taglioni, Protectionist responses to the crisis – global trends and implications, ECB Occasional Paper, No. 110 (2010), European Central Bank (ECB), Frankfurt a. M.

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Political and Economic Feasibility of Contracted American Liquefied Natural Gas for Energy Security in Poland and the Baltic States – Can the American Government Help?

Abstract: At the heart of the European Union ("*EU*") energy policy is energy security. Energy security is maintained, in part, by a diversification of supply. Despite the fact that the EU has prioritized diversification, its dependency on Russian natural gas has increased in recent years. Contemporaneously, the politicalrelationship between the EU and Russia has worsened. Construction of NordStream 2("*NS2*") will further establish Russia as the dominant supplier of natural gas to the EU while lessening the diversification of its energy supply. To further the EU's stated goals of energy diversification and security, another steady source of natural gas imports for the countries along the Baltic Sea is needed. LNG importation assets in Poland and the Baltic states exist for this purpose. Unlike other EU members, these countries have demonstrated the economic and political will to curb the coercive influence ofRussian natural gas imports. America is awash in natural gas, with plenty for export and can sendincreasing volumes of LNG worldwide. In contrast to other sources, America is well located to supply Europe with secure LNG, and its importation should be a shared goal of the EU and America. Despite the desire of some American statesmen to use the "shale gas revolution" to further U.S. geopolitical goals; however, the U.S. hydrocarbon industry (unlike in Russia) is overwhelmingly controlled by private landowners and industry. The goal ofthe American, Polish, and the Balticstates should therefore be narrowly focusedon establishing free trade agreements and the encouragement of longer-term contractual relationships between America and Poland and the Baltic states.

Keywords: energy, LNG, natural gas, Russia, Poland, Lithuania

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Equity Capital Structure, https://www.gazprom.com/investors/stock/structure/ (access 08.19.2020).

Introduction

The energy security of Poland and the Baltic states must remain strong to provide political and economic stability to the region. The use of North American--sourced LNG and, possibly, locally-derived sources of unconventional natural gas as alternatives to coal and Russian natural gas provides a means of curtailing CO2 emissions, a goal of the EU, while restraining Putin's Russia. Even without Russian aggression in Ukraine, the Putin regime is a concern to the collective security of the EU, and relations between the two have deteriorated in the last decade. Despite this, the completion and potential activation of the NS2 pipeline appears imminent.

Will it be economically viable and politically possible to export steady and significant amounts of North American-sourced LNG into the Baltic region? Under the right circumstance, a restrained and realistic American-led effort could deliver some measure of energy security to its friends bordering Russia. This article providesa response by the U.S. and the countries along the Baltic Sea to Russia's direct export of natural gas to Germany. First, the need for energy diversification in the EU is discussed. Then, the currentstatus of LNG assets in Poland and the Baltic states are covered. Next, the state of natural gas production in the USA is discussed. Finally, the feasibility of expanded long-term exports of North American LNG to countries along the Baltic Sea is considered. Here, domestic political and economic issues arise, such as the private ownership of minerals, the need of private financing, the ability to get construction of American export terminals approved, and a realistic assessment of what American and European governments can (and cannot) do to move a larger portion of the LNG trade going across the Atlantic from the spot market to contracted trade.

1. Energy Security & Diversification of the European Union

Russian natural gas provides Europe with one of its primary sources of energy. Russian natural gas also provides the Putin regime with a tool of resource-based aggression. Again and again over the last two decades, Gazprom(publicly traded but 38.37% owned by the Russian Federation directly and 10.97% by Rosneftegaz, a holding company owned by the Russian state through the Federal Agency for State Property Management) appeared to respond to directives from the Russian government by curtailing exportsat inopportune times with dubious excuses, primarily related to Russian designs on Ukrainian territory and conflicts with Naftogaz, Ukraine's state-owned national oil and gas company[2]. Russia has flexed

2 See J. Elkind & T. Boersma, Talking Past Each Other: Transatlantic Perspectives on European Gas Security, https://www.energypolicy.columbia.edu/sites/default/files/pictures/TalkingPastEach%20Other_CGEP_FINAL.pdf (access 08.19.2020).

its natural gas muscles elsewhere, including indirectly curtailing exports to Belarus, Slovakia, Romania, and Bulgaria in the depths of winter.

Despite this history of belligerence, Germany, the largest economy in Europe, is on the cusp of accepting an even larger volume of natural gas directly from northwestern Russia. NS2 is to be a 1230-km long pipeline running along the bed of the Baltic Sea, taking production from the Yamal Peninsula in Siberia directly to Greifswald, Germany. NS2 has drawn invective from several sources–national governments in Eastern and Northern Europe, the USA, and the European Parliament. Yet, companies from Germany, England, France, and the Netherlands are participating in the project. The future of NS2 is not certain, but it will likely become operational–construction is more than 50% complete, and it runs parallel to Nord Stream 1, whose capacity the new pipeline will match. NS2 will significantly increase Russian export capacity and will connect the single largest natural gas market in Europe with one of the largest production regions via a subsea route that crosses the land of no other country.

Opposition to NS2 in Europe is centered in Northern and Eastern Europe and focuses on EU energy policy. Energy security is the core principal, meaning "the uninterrupted availability of energy sources at an affordable price"[3] which could be endangered by a disruption from countries from which the EU imports fuel[4].This desired "security" is brought into reality through "diversification" of sources. The Security of Gas Supply Regulation was enacted in 2017. Within it, diversification of gas supplies is expressly defined as promotion of increased access to extra-EU LNG[5].

The EU's reliance on Russia to meet approximately 38.5% of its total gas demand and 30.0% of the value of all EU imports of gas and oil suggests that no realistic immediate alternative to replace the reliance on Russian gas exists[6]. All the while, NS2 approaches completion. Once complete, it will, despite anxious words from the European Commission and voracious complaints in the EU Parliament, eventually be placed into service. The pipeline will give Russia yet another means to flex its geopolitical muscles. Poland and the Baltic states should have no doubt who will likely get curtailed first in future supply pinches, to say nothing of the threatened curtailments that loom over future political tangles with Russia. This uncertainty

3 Energy Security: Ensuring the Uninterrupted Availability of Energy Sources at an Affordable Price, https://www.iea.org/areas-of-work/ensuring-energy-security (access 08.19.2020).

4 See generally Energy Topics, https://ec.europa.eu/energy/topics/energy-security_en (access 08.19.2020).

5 See generally A. Danielsson, European Debate on Nord Stream 2, https://helda.helsinki.fi/bitstream/handle/10138/302864/Danielsson_Anette_Pro_gradu_2019.pdf?sequence=2&isAllowed=y (access 08.20.2020) (providing an excellent compendium of topics related to NS2 and the related political battles within the EU).

6 Ibidem, § 2.2.

must be considered alongside the costs of natural gas when determining the desired source portfolio for imported natural gas.

2. Regional LNG Importation Assets & Results

Fortunately, the Baltic Coast is now dotted with ports wherein imported LNGcan be liftedoff tankers and regasified for pipeline transport inland. Bordering the Baltic Sea, Belorussia, and Russia itself, Lithuania and Poland lie at the crossroads of natural gas in Northeastern Europe–a position that could be weakened by Russia's NS2 plans. Poland, for example, concentrating on lowering the volumes of imported Russian natural gas, has paid significantly more for natural gas from Qatar than it might from Gazprom after constructing its LNG regasification terminal in 2015.

Poland is partially dependent upon Russia for natural gas imports. In order to diversify its natural gas supply and reduce this reliance, Poland made plans to enhance its energy security. In 2010 construction was launched for Poland's first LNG importation terminal – the President Lech Kaczyński's LNG Terminal in Świnoujście, on the western edge of Poland's Baltic coast[7]. By October 2015, it was complete, and operations began in April 2016. Polskie Górnictwo Naftowe i Gazownictwo S.A. (PGNiG), through its subsidiary Polskie LNG S.A., developed the terminal.The terminal is operated by Polskie LNG. The project cost was originally estimated to be around € 400 m but this increased to € 950 m, of which € 200 m was supplied by the European Bank for Reconstruction and Development and the outstanding € 750m was provided from the sale of Polskie LNG bonds to ten other banks, each valued at € 75 m respectively[8]. The LNG terminal includes an unloading jetty and mooring system, two cryogenic LNG storages tanks each with a capacity of 160,000 cubic meters, and a regasification capacity amounting to five billion cubic meters annually. The terminal also has the ability to send out natural gas through the connected 85-kilometer-long pipeline from Świnoujście to Szczecin to the National Transmission System, onto tanker trucks, and into other containers[9].

Polskie LNG is currently executing a contract to expand the regasification facility of the Świnoujście LNG Terminal. In the first phase, additional Submerged Combustion Vaporizer units will be installed, which will increase the annual regasification capacity from 5 billion cubic meters to 7.4 billion[10]. The second phase

7 LNG Terminal in Świnoujście, https://en.polskielng.pl/lng-terminal/lng-terminal-in-swinoujscie/ (access 08.19.2020).

8 Świnoujście LNG Gas Terminal, Baltic Coast, Poland, https://www.hydrocarbons-technology.com/projects/swinoujscie/(access 08.19.2020).

9 Gaz-System Will Expand the LNG Terminal in Świnoujście, https://en.gaz-system.pl/centrum-prasowe/aktualnosci/informacja/artykul/202479/ (access 08.19.2020).

10 LNG Terminal Expansion Program, https://en.polskielng.pl/lng-terminal/lng-terminal-expansion-program/(access 08.19.2020).

will consist of constructing a third cryogenic storage tank, a second jetty for loading and unloading of LNG carriers, and a LNG-to-Rail transshipment installation for tankers and ISO containers. Furthermore, on June 24, 2020, Polskie LNG signed a deal with a consortium of Porr and TGE Gas Engineering to further expand the LNG terminal to 8.3 billion cubic meters per year by the end of 2023[11].

Poland continues to search for new methods to further reduce their reliance on Russian LNG imports and increase its energy security. Piotr Naimski, the Polish secretary of state responsible for energy projects, has stated Poland plans to begin installing a Floating Storage and Regasification Unit (FSRU) to be located in the Bay of Gdansk[12]. The FSRU will add a storage capacity of four billion cubic metersof LNG per year to supplement the current storage expansion of Świnoujście LNG Terminal.

In the mid-twentiethcentury, natural gas only represented a small percentage of energy sources consumed in Poland as coalwas favoured[13]. With the expansion of natural gas transportation to a range of consumers, however, the demand for gas consumption has grown and even accelerated. According to the U.S. Energy Information Administration, Polish natural gas consumption has increased over 30% during the past 10 years – from 1.4 Bcf/d in 2010 to 1.8 Bcf/d in 2019. In 2010, around 90% of the gas imported was supplied by Russia. By 2019, in part due to the construction of the Świnoujście LNG Terminal, Russian imports declined to 60% – accounting for 48% of total gas consumption[14]. With the Świnoujście LNG Terminal connecting to the Polish gas transmission grid, Poland can provide an alternative energy supply from previous coal-powered industries, commercial purchasers, and Polish citizens.

The terminals provide for the import of natural gas to Poland from anywhereand create a path for the actual diversification of gas supplies. This permanently changes the natural gas market in Poland and its environs and increases the competitiveness of LNG vis-à-vis piped-in natural gas, particularly from American LNG[15]. Between 2016 and 2019 (the four years after the construction of the LNG terminal) Poland's LNG imports have grown three and a half times over – from 94 Mmcf/d in 2016 to 331 Mmcf/d – accounting for 18% of the country's total consumption[16]. The

11 A. Barteczko, Poland Signs Deals to Expand its LNG Terminal, https://www.reuters.com/article/poland-energy-lng-idUSL8N2E12PB (access 08.19.2020).

12 P. Jabri, Poland Plans Floating Terminal to Boost LNG Imports, https://www.brecorder.com/2019/05/02/494139/poland-plans-floating-terminal-to-boost-lng-imports/ (access 08.19.2020).

13 See generally E. Chłopińska & M. Gucma, The Impact of a Liquefied Natural Gas Terminal on the Gas Distribution and Bunkering Network in Poland, "Science Journal of the Maritime University of Szczecin" 2018, vol. 53, p. 155.

14 Natural Gas Weekly Update: Poland Seeks to Diversify Natural Gas Imports,https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2020/05_21/ (access 08.19.2020).

15 LNG Terminal, https://en.gaz-system.pl/en/lng-terminal/ (access 08.19.2020).

16 Natural Gas Weekly Update..., *op. cit.*

ability to cover almost 20% of demand for natural gas from alternative sources has provided Poland significant independence from Russian influence and will further help to reduce natural gas prices as Poland's negotiating position over Russia improves[17].

Concerned about the high cost of Russian natural gas, and facing the loss of its own primary source of electricity–the Ignalina nuclear power plant–Lithuania made its own plans for LNG imports. Lithuania has had constructedanLNG importation terminal, the Lithuanian Natural Gas Terminal,which opened in early 2016. The Lithuanian project was funded through a loan of € 87 million through the European Investment Bank. Höegh LNG, a Norwegian company, constructedtheFSRU*Independence* in South Korea to be used as an LNG import terminal in Klaipeda Harbor. It has an annual capacity of between 2–3 billion cubic meters of natural gas. In addition, the Klaipedos Nafta AB (Lithuania's state--controlled energy company) hired PPS Pipeline Systems to connect the terminal to Lithuania's natural gas grid. The link to shore is a 20-kilometer pipeline, completed in 2014. All this effort shows the seriousness with which Lithuania considers its energy security.Lithuania accepted its first LNG spot shipment from America at Klaipeda on August 18, 2017, with final client destinations being in Estonia and Latvia as well as Lithuania[18]. By the middle of 2020, five cargos from the USA had arrived, and LNG imported from the USA accounts for more than 6.00% of the total amount of LNG arriving at the Klaipeda LNG terminal thus far[19,20].

Finland and Estonia have recently completed the Baltic Connector, a 152-kilometer-long bi-directional pipeline between their countries that will also connect the pipeline grid of Latvia. Completion of this pipeline will enable a planned LNG lifting terminal to serve all three countries with natural gas derived from imported LNG[21].

17 See E. Chłopińska & M. Gucma, The Impact..., *op. cit.*

18 A. Sytas, Lithuania Receives First LNG from the United States, https://www.reuters.com/article/us-lithuania-lng/lithuania-receives-first-lng-from-the-unitedstates-idUSKCN1B11BW (access 08.19.2020).

19 L. Woellwarth, Lithuanian LNG Terminal Proving to be a Player in the Global Market, https://www.lngindustry.com/liquid-natural-gas/26052020/lithuanian-lng-terminal-proving-to-be-a-player-in-the-global-market/ (access 09.21.2020).

20 A. Sytas, Lithuania Receives First LNG from the United States, https://www.reuters.com/article/us-lithuania-lng/lithuania-receives-first-lng-from-the-unitedstates-idUSKCN1B11BW (access 08.19.2020).

21 Baltic Connector Gas Pipeline Up and Running Since 1 January 2020, https://ec.europa.eu/info/news/balticconnector-gas-pipeline-ready-use-1-january-2020–2020-jan-08_en (access 08.19.2020).

3. American Production and Exportation

The USA is almost unique in that the surface owner may also own the mineral estate (or an exclusive license to develop same), unlike most other countries where the national government or its state-owned corporate interests own and direct development of minerals[22]. While private ownership has its drawbacks–fractionalized ownership among cotenants and problems of overproduction caused when conservation practices are ignored–the history of production in America shows that development is tied to commodity prices and only secondarily to government control. Further, recovery of slowed American production triggered by a trough in prices occurs very quickly when prices later rebound, as OPEC learned to its woe after it relented on its late 2014 decision to depress oil prices with increased production in the hope of strangling America's burgeoning shale gas development[23].

Modern directional drilling and fracturing practices, access to capital and pipeline space, and private ownership of minerals means that America is inundatedwith natural gas. Estimates suggest that the USA has almost 1,750 Tcf (trillion cubic feet) of technically recoverable natural gas, including 200 Tcf of proved reserves (the discovered, economically recoverable fraction of the original gas in place). Technically recoverable unconventional gas–a category that includes gas derived from shale and "tight sandstone" formations as well as coalbed methane ("CBM")–accounts for approximately 60 percent of the onshore recoverable resource. At 2007 production rates, about 19.3 Tcf, the current recoverable resource is sufficient to supply the USA for the next ninety years. Separate estimates of the shale gas resource extend this supply to 116 years[24].

The U.S. has strong economic reasons to support LNG sales contracts to Europe. Since significant U.S. domestic oversupply–currently made worse by COVID-19 issues–curtails any near-future price hikes, LNG exports offer a far better option over domestic use to increase demand for gas. By the end of 2018, the U.S. LNG exporting capacity passed six billion cubic feet, up from no capacity outside of distant Alaska at the end of 2015, enough natural gas to provide electricity to all the homes in California, Texas, and Florida. The continued expansion of this exporting capacity provides the best way to bleed off the current overabundance of domestic natural

22 E. Kuntz et al., A Treatise on the Law of Oil & Gas,Anderson Publishing Co. 2019 update, p. 59.

23 See B. Clark, Jr., OPEC Delivers a Thanksgiving Turkey, (in:) B. Clark, Jr. (ed.), Oil Capital: The History of American Oil, Wildcatters, Independents, and Their Bankers, Houston 2016, p. 370 (describing the attempt by OPEC to stymie burgeoning American shale development by lowering prices in late 2014, only to see the American producers almost immediately rebound when OPEC relented approximately two years later).

24 J. Loweet al., Cases and Materials on Oil and Gas Law, West Academic St. Paul, MN2018, p. 20.

gas and lift the fortunes of domestic shale producers[25]. For Europe, alternatives to American LNG are more politically unstable (Nigeria), more distant and closer to the Southeast Asia demand sink (Australia), or in unstable regions (Qatar). The primary competition is, as always, Russian natural gas.

The LNG transportation business relies on longer term contracts designed to guarantee the income stream necessary to finance the very expensive liquefaction, gasification and transportation assets and provide investors and lenders with a relatively predictable return[26]. Suchlong-term agreements link all the parties involved in the transportation chain: the consuming importers, the terminal facilities and shippers, and the financiers that make it all possible[27]. LNG projects generally employ multiple lenders. Liquefaction projects must be designed so that they includeboth pipelines to the export train and long-term lifting contracts with buyers worthy of credit[28].

The last ten years have brought optimistic forecasts by politicians from both major American political parties prognosticating that the "shale gas revolution" would give American diplomats a new tool with which to leverage geopolitical power. The nature of theownership of minerals, combined with private exploration, development, transportation and refining of oil and gas in the USA, all financed with private lending, however, means thatthe investment determinations of thousands of companies, primarily based on economic forecasts, lifting costs, and transportation models, has sidelined diplomatic puffery. Investment decisions are based on price forecasts, estimates of reserves, production costs, availability of transport and the terms of production sales contracts, and the volume of competing domestic demand, among other factors. Thus, while the private ownership of minerals and private sources of financing ensure that oil and gas are developed, they also ensure that economic factors–instead of geopolitical–dominate the decision to develop and export hydrocarbons. Claims that American production and export of hydrocarbons can be harnessed in the service of broad but unfocused regional diplomatic ends that are not realistically and steadily promotedare imprudent[29].

25 S. Di Savino, After Six Decades, U.S. Set to Turn Natgas Exporter amid LNG Boom, Reuters (Mar. 29, 2017, 12:08 AM), http://www.reuters.com/article/us-usa-natgas-lng-analysis/after-six-decades-u-s-set-to-turn-natgas-exporter-amid-lng-boom-idUSKBN1700F1 (access 09.11.2020).

26 M. Tay & A. Sheldrick, UPDATE 2-LNG Supply Gap May Form as Investment Drop Stymies Projects,http://in.reuters.com/article/japan-gastech-lng/update-2-lng-supply-gap-may-form-as-investment-drop-stymies-projects-idINL3N1HC1B4 (access 08.19.2020).

27 For a discussion of the past and present of financing oil and gas transactions from exploration to transportation to distribution, see B. Clark, Jr., Oil Capital: the History of American Oil, Wildcatters, Independents, and Their Bankers, Houston 2016.

28 B. Richards, New Transport Options for Liquefied Gas, Energy World Dec. 2016.

29 See generally T. Boersma & C. Johnson, U.S. Energy Diplomacy, https://energypolicy.columbia.edu/sites/default/files/pictures/CGEPUSEnergyDiplomacy218.pdf (access 08.19.2020).

In contrast, Russia, with its government ownership of minerals, its mercurial control of taxes on exported gas, and its political influence on its domestic oil and gas companies, can much more easily manipulate the price of Russian gas. Gazprom is publicly owned, but the pressure the Putin regime can exert means that it sometimes acts with motives other than economic ones. In addition, while oil production and exportation in Russia are more tied to economic forces as the primary product of the Russian hydrocarbon industry, natural gas sits on the margin–a toy to be manipulated, not a GDP staple dependent on market forces[30].

Obviously, Russia has geographic advantages as well, being both far closer to the EU and possessing outlets to the Baltic and Black Seas. NS2 is meant to accentuate this inherent benefit by bringing natural gas directly to industrial consumers and utilities in the most heavily populated portion of Europe located within its biggest and richest country.

4. Passive and Active Steps

The first tenant of any American government desiring to support LNG exports to Europe should be to do no harm. This means not holding up federal approvals of LNG exportation terminals, as well as not actively hindering the completion and operation of pipelines. Although the increasingly activist judicial branch of America has proven more than capable of holding up development of pipelines[31], the executive branch should not pressure agencies to hinder domestic infrastructure projects nor international trade.

Moving to the proactive, establishment of Free Trade Agreements (FTAs) with Poland and the Baltic states are needed. While the current American administration has not looked favourably upon some current FTAs such as NAFTA, it was open to superseding it with the USMCA – the US-Mexico-Canada Agreement, suggesting openness to other FTAs provided the flow of trade is at least initially favourable to the U.S.[32]Permits for the construction of LNG exporting facilities are required by

30 Interview with Ben Semmes, LNG Trading Analyst (Jun. 15, 2020). See also Russia's Natural Resources Valued at 60% of GDP, https://www.themoscowtimes.com/2019/03/14/russias--natural-resources-valued-at-60-of-gdp-a64800 (access 08.20.2020); See also D. Dediu et al., How Did the European Natural Gas Market Evolve in 2018?, https://www.mckinsey.com/industries/oil-and-gas/our-insights/petroleum-blog/how-did-the-european-natural-gas-market-evolve-in-2018 (access 08.20.2020).

31 See generally P. Douglas, DAPL Ruling Accomplishes What It Should Have Prevented, https://news.bloomberglaw.com/environment-and-energy/insight-dapl-ruling-accomplishes-what-it-should-have-prevented (access 08.19.2020).

32 L. Teeboom, Negative Effects of Free Trade, https://smallbusiness.chron.com/negative-effects-trade-5221.html#:~:text=Free%20trade%20is%20meant%20to,countries%2C%20and%20environmental%20damage%20globally (access 9.12.2020).

the U.S. Department of Energy ("DoE") through the Federal Energy Regulatory Commission ("FERC"). Permits are then requiredby DoE's Office of Fossil Energy for the export of LNG to most countries. As provided for in Section 3 of the Natural Gas Act, anybody wishing to export LNG from America to a country without an FTAneeds authorization from the Secretary of Energy. The Secretary shall then determine if the proposed LNG export is consistent "with the public interest" – a decision point subject to political whim. If found so, DoE then issues a conditional authorization. Thisauthorization may be affected by subsequent applications, asDoE will continually scrutinize the cumulative effect of all approved exports on the American natural gas market. The potential impact that changing the permit could have on projects*after* construction concerns project lenders[33]. The establishment of FTAs with Poland and the Baltic states that prevent these permitting concerns would help facilitate future LNG trade.

A secondary goal of the U.S. and Polish/Baltic governments might be to fund studies inquiring as to the feasibility of development of locally-derived sources of natural gas from shale formations found in Poland and Lithuania and their neighbours located along the northern Carpathian shale belt. Prior tentative exploration has not beenoverly promising[34], but continued cooperation between the U.S. Geological Survey, its local counterparts, and industry might prime future development as well as provide some measure of geopolitical leverage to the U.S. and Polish/Baltic governments and their respective regulated industries involved with natural gas import and distribution.

Afterthat, more focused proactive steps avail themselves. American LNG projects are structured in any number of ways and this inherent flexibility means that American exporters have a good chance of becoming a swing supplier. For example, unlike in other countries, U.S. LNG tolling agreements generally do not have fixed destination clauses, allowing U.S.-sourced LNG cargoes to participate more freely in spot markets[35]. In addition, because American LNG export projects take years to go from planning to activation, they are not competing with current liquefied natural gas supplies, but for the gap that will exist in the future for new demand around the world. The responsiveness of the U.S. market and the idea that future demand in Europe exists at the right price bodes well for lasting LNG exports across the Atlantic.

In the Baltic states and Poland, filling that future gap with American LNG that can be resold without penalty away from shore should motivate the respective governments to actively encourage longer term purchase and sale contracts. They should recognize, however, that companies in the LNG trade primarily respond to

33 B. Richards, New Transport Options..., *op. cit.*

34 Poland Overview, https://www.eia.gov/international/analysis/country/POL (access 08.19.2020).

35 See generally K. Marietta, LNG Tolling Agreements (Export) – Key Considerations, https://lnghub.biz/lng-tolling-agreements-export-key-considerations/ (access 08.19.2020).

price and not entreaties or fiats of governments. Therefore, the limited goal of direct federal backing should be to alleviate price concerns in order to push long-term contracts into reality. When new demand is forecast in Poland and the Baltic states, and the marginal cost of meeting that new demand is within a reasonable measure of the cost to fill that same demand with Russian gas, the American government, with the assistance of the importing country,could disperse a hedging subsidy. This subsidy would entice the importer and exporter to execute a purchase and sale agreement of a certain desired length. To be sure, recognizing economic realities is crucial. Therefore, the success of enticements to contract may hinge on keeping subsidies small and relatively unheralded.

Conclusion

All the pieces are coming together in the countries bordering Russia for LNG imports and natural gas distribution among themselves. These expansion programs have been in response to increased domestic demand and will provide a means of reducing the Baltic littoral's reliance on Russian natural gas. The question is*if*–or under what conditions–*when* will contracted American LNG, and perhaps native European shale gas, step up to help provide energy security to the Baltic region? The first steps have been taken, with limited volumes of American LNG landing on a contract basis in Poland in the last couple years[36] and more planned for later[37]. The international energy market is dependent on prices and politics, and although it is almost impossible to predict the individual events that affect energy prices, North American LNG should flow to Europe in increasing quantities for the foreseeable future.

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36 See example A. Barteczko, Poland's PGNiG Receives LNG Delivery from U.S., https://www.reuters.com/article/health-coronavirus-poland-pgnig/polands-pgnig-receives-lng-delivery-from-u-s-idUSL5N2CG6QW (access 08.19.2020).

37 See example T. Gardner, Poland's PGNiG to Buy More LNG from U.S. company Venture Global, https://www.reuters.com/article/usa-poland-lng/polands-pgnig-to-buy-more-lng-from-u-s-company-venture-global-idUSL2N23J0MZ (access 08.19.2020).

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The Influence of Populistic and Protectionist Policy of the Trump Administration on the Treatment of Foreign Nationals Applying for Immigration Benefits

Abstract: The article focuses on the obstacles to legal immigration imposed by the Trump administration against those who are already in the US pursuant to their valid non-immigrant classification and those who are abroad and trying to reunite with family members in the US or seeking entry having a legitimate job offer from a US employer. Recent changes in US immigration policy have been achieved through restrictive interpretation and enforcement of existing law by the USCIS which is part of the Department of Homeland Security, and by the State Department (DOS) rather than by substantive legislative changes done in Congress. The article provides an overview of the most recent governmental restrictions affecting so called "business immigration" and family-based immigrant processing, and also restrictions on suspension of entry to the US due to Covid-19, introduced through presidential proclamations. Although the federal courts blocked several of these administrative initiatives, the anti-immigrant atmosphere is having a big negative impact on many groups of foreign nationals. Nationalistic notions of "making America great again" that should be accomplished through "buy American and hire American" principle, and legal uncertainty causing ongoing federal lawsuits will undoubtedly lead to America's further isolationism if President Trump wins the November 2020 election.
Keywords: Immigration law, immigration policy, Congress, President, Supreme Court, federal lawsuits, visas, presidential proclamations, executive orders, international students, foreign workers

Introduction

The United States of America for years was proudly portrayed as a "nation of immigrants", a land founded and built by immigrants. Immigration to the US is still increasing. According to most recent data available, there were 44.7 million

immigrants residing in the United States as of 2018, which is 14% of the population[1]. This number includes naturalized US citizens, permanent residents (green card holders) and undocumented immigrants (about 11 million). In addition to immigrants, there are also non-immigrants residing legally in the US. This category includes those foreigners who are in the US on temporary basis and for specific purpose: students, non-immigrant workers, exchange visitors, visitors for business or tourism, etc. In Fiscal Year 2019, more than 8.5 million non-immigrants visas where issued by US posts[2].

Under the Trump administration the attitude towards newcomers is becoming more and more hostile, and the symbolic change in this approach was done through the revision of the mission statement of the US Citizenship and Immigration Services (USCIS), the agency within the Department of Homeland Security (DHS), and adjudicating petitions for immigration benefits. After the appointment of Francis Cessna as a new USCIS Director in February 2018, the language referring to the US as nation of immigrants was deleted. Currently, the mission of the agency is "to administer the immigration system through adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honouring our values"[3].

Donald Trump while still on the campaign trail left no doubt about his attitude to immigrants. He called for "a total and complete shutdown" of Muslims entering the United States "until our country's representatives can figure out what the hell is going on"[4]. One of his biggest campaign promises was to build the wall on the border with Mexico and immediate termination of DACA (Deferred Action of Childhood Arrivals) -the program suspending deportation of children of undocumented immigrants if they were under 16 when their parents brought them to the US and if they have lived there for at least 5 years[5].

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1 American Immigration Council, https://www.americanimmigrationcouncil.org/research/immigrants-in-the-united-states, (accessed April 23, 2020).

2 Department of State, Nonimmigrant Visa Statistics, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXVI-A.pdf (accessed July 10, 2020).

3 See R. Gonzales, America no longer a nation of immigrants, USCIS says, NPR, February 22, 2018, https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation--of-immigrants-uscis-says (accessed July 20, 2020).

4 J. Johnson, Trump calls for "total and complete shutdown of Muslims entering the United States, "Washington Post", December 7, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering--the-united-states/?noredirect=on(accessed April 23, 2020).

5 A. Restuccia, A, Johnson, Trump at war with himself over Dreamers, "Politico", August 30, 2017, https://www.politico.com/story/2017/08/30/trump-immigration-dreamers-242152, (accessed April 24, 2020). See also: A. Ludwikowski, The Role of Congress, President and the Supreme Court in Defining Immigration Policy in the United States, "Ad Americam", vol. 14, 2013, p. 108–109.

Trump started his presidency with issuing controversial executive orders, such as "travel bans", barring entry into the US from Muslim majority countries. While the first two bans were enjoined by the courts, the third executive order[6] was upheld by the Supreme Court (in *Trump v. Hawaii)* which split sharply along partisan lines[7]. The Court held that this ban neither violated the Immigration and Nationality Act nor the Establishment Clause of the Constitution and reversed the lower courts' preliminary injunctions. The third travel ban (Travel Ban 3.0) includes 7 countries: Iran, Libya, North Korea, Syria, Venezuela, Yemen and Somalia. The Supreme Court confirmed that under Section 1182(f) of INA, the president has a broad discretion to suspend the entry of non-citizens into the United States, and the Proclamation was the result of a "worldwide, multi-agency review" that determined that entry by certain non--citizens would be detrimental to the interests of the United States[8].

Another move to limit the numbers of newcomers to the US by the Trump administration was a substantial reduction of refugees' admission. At the beginning of each fiscal year, the president, in consultation with Congress, sets caps on the number of refugees to be accepted by the country annually. President Trump reduced the number of refugees the United States accepts annually - first reducing the 110,000 level originally set for FY 2017 by the Obama administration to 50,000, then to 45,000 for FY 2018, to 30,000 for FY 2019 and to a record low 18,000 for FY 2020, since 1980[9].

These examples were cited to describe the anti-immigrant atmosphere regarding those foreign nationals who either remain outside the US and are trying to enter it from abroad legally (coming on non-immigrant or immigrant visas, or as refugees), and those who are already in the US. This article will focus on the obstacles to legal immigration, imposed by the Trump administration against those who are already

6 "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public Safety Threats," Proclamation No. 9645, 82 Fed. Reg. 45161 (Sep. 24, 2017).

7 Trump v. Hawaii, 138 S. Ct. 2392 (2018). The five Justices appointed by Republican presidents (Justices Roberts, Kennedy, Thomas, Alito, and Gorsuch) voted to uphold the ban, while the four Justices appointed by Democratic presidents (Justices Breyer, Kagan, Sotomayor, and Ginsburg) would have enjoined the ban. Justice Thomas wrote separately to question the practice of district courts issuing nationwide injunctions. 138 S. Ct. at 2424–2429 (Thomas, J., concurring).

8 Thus, according to the Supreme Court, the Travel ban 3.0 does not exceed presidential power, and adding two non-Muslim countries made the ban more religion-neutral. In January 2020, President Trump issued yet another travel ban: "Presidential Proclamation: Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats," Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020), adding restrictions on six new countries - Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania.

9 J.M. Krogstad, Key facts about refugees to the US, Pew Research Center, October 7, 2019, https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/ (accessed April 20, 2020).

in the US pursuant to their valid non-immigrant classification and those who are abroad and trying to reunite with family members in the US or seeking entry having a legitimate job offer from a US employer. The author, who is a practicing immigration attorney, has first-hand knowledge about recent changes in the policy affecting the rights of lawful non-immigrant foreign nationals who are coming to the US with the temporary intent to either work or study, and those who are applying for permanent residence based on a job offer from a US employer.

Recent changes in US immigration policy have been achieved through restrictive interpretation and enforcement of existing law by the USCIS which is part of the Department of Homeland Security, and by the State Department (DOS) rather than by substantive legislative changes done in Congress[10]. The most recent law on immigration passed by Congress was H-1B Reform Act signed by President G.W. Bush in 2004[11]. Since then, Congress has not been able to pass any major law, not to mention comprehensive immigration reform.

There were several bills introduced either in the House or in the Senate; however, they never received sufficient support to be passed by both chambers. President Trump expressed his support for one of these proposals: the "RAISE Act" (Reforming American Immigration for a Strong Economy) proposed by Republican Senators T. Cotton and D. Purdue[12]. This bill sought to reduce levels of legal immigration to the United States by 50% and introduced so called "points-based system". It would eliminate most family preferences, diversity visa program and take immediate relatives' status from parents of US citizens[13]. However, the bill did not receive a vote in the Senate, despite Republicans holding the majority. It was reintroduced in 2019 without any further success.

The next parts of this article will be devoted to the measures taken by President Trump during his term to accomplish his nationalistic immigration policy goals and curbing legal immigration without seeking Congress' advice or approval.

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10 See 2018 report of Migration Policy Institute, written by S. Pierce, J. Bolter, and A. Salee, Andrew: 2018. US Immigration Policy under Trump: Deep Changes and Lasting Impacts. Washington, DC. Migration Policy Institute, pp. 3–5 and 7–9, https://government.report/Resources/Whitepapers/c2673a0f-5adc-4b74–94e1–58b87f6e98d9_TCM-Trump-Spring-2018-FINAL.pdf (accessed July 20, 2020).

11 It was a part of Title IV of the Consolidated Appropriations Act, 2005 that focused on changes to regulations governing H-1B visa. This legislation reduced the H-1B annual cap from 195,000 to 65,000 visas but introduced exemptions for the first 20,000 applicants with US advanced degrees per year.

12 White House. President Donald J. Trump Backs RAISE Act, https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/ (accessed April 24, 2020).

13 The category of immediate relatives includes: spouses, parents and unmarried children under 21, of US citizens. Immediate relatives are not subject to any numerical quotas, so they are receiving immigration benefits much faster than those in family-preference categories (for example, spouses of permanent residents). INA § 201 (b).

1. Buy American and Hire American (BAHA)

On April 18, 2017, President Trump signed the "Buy American and Hire American" Executive Order ("BAHA"), which confirmed the tough stance his administration would be taking on business immigration, particularly on the H-1B non-immigrant visa category (the only visa type specifically named in the Executive Order)[14]. Although the Executive Order itself did not put into action any substantive changes, it directed the agencies responsible for immigration – including those within the Departments of State, Homeland Security and Labor – to propose new rules and reforms "to protect the interests of the United States workers in the administration of our immigration system"[15]. In light of the Trump administration's pronouncement, the named government agencies have adopted questionable policies to reinterpret INA provisions of the relevant statutory criteria and methods they use to adjudicate immigration benefits. BAHA in a protectionist way aims to "create higher wages and employment rates for US workers,"[16] and its effect on legal immigration is seen in several areas of the procedure. The most visible aspect was an aggressive issuing of requests for evidence in H-1B and L-1 petitions filed by US companies on behalf of foreign professional workers. H-1B non-immigrant classification is designated for foreign workers who have a job offer in a "specialty occupation", meaning that a bachelor's degree or foreign equivalent is required for entry into a given profession. H-1B classification is most often granted to IT specialists (software engineers, information systems managers, database administrators), financial analysts, statisticians, and civil engineers, to name a few. L-1 classification was designed by Congress to allow multinational companies to transfer key employees to related entities (subsidiaries, branches, etc.) in the US. Multinational companies can use the L visa category to transfer their managers and executives (L-1As) and employees with specialized company knowledge(L-1Bs) who have worked for the company abroad for one of the previous three years. Both H and L visa are non-immigrant visas issued for a temporary period only, and they are "employer specific," meaning that the foreign national is authorized to work only for the company that secured approval of the petition from the USCIS.

There are quotas (caps) on H-1B visas that can be issued each fiscal year. It is not enough that the US employer extends a valid job offer meeting the prevailing wage requirements set up by the US Department of Labor for each profession in all locations (counties) within the United States, and pays all filing fees to the government. First, the petition must be selected for processing. This year, the USCIS received approximately

14 See Exec. Order No. 13788, 82 Fed. Reg. 18837, 18839 (Apr. 21, 2017).
15 Id at 18838.
16 BAHA, Section 2(b).

275,000 registrations for H-1B 85,000 available slots[17]. It shows that those visas are in high demand by US employers; however, only 65,000 visas for applicants with a bachelor's degree can be issued each year, plus additional 20,000 for those applicants who attained a US master's degree or higher. Only the petitions selected in the lottery conducted by the USCIS can be submitted for processing.

After the promulgation of BAHA, we see a significant increase in the H-1B denials. Most of them are based on the USCIS's new policy of reinterpreting INA: USCIS has been interpreting "specialty occupation" increasingly narrowly. Essentially, the agency has been taking the position that the occupation for which H-1B classification is sought must require a degree in the specific field (for example, an architect needs to have a degree in architecture). USCIS insists on positions that accepts a range of education (as opposed to one-degree major), a bachelor's degree in a specific specialty is not required, and therefore the position cannot be an H-1B specialty occupation. The agency has stated that a position as a market research analyst does not qualify for specialty occupation because the OOH states "market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have backgrounds in business administration, the social sciences, or communications"[18]. In essence, USCIS's newly restrictive interpretation of what constitutes a specialty occupation has paved the way for the substantial increase in denials of H-1Bs petitions, especially for positions of market research analysts and computer systems analysts[19].

L-1 petitions for intracompany transferees are denied at even higher rate, although this approach is harming US business, and disregarding employers' priorities in hiring someone who has internal knowledge about the parent, subsidiary or branch oversees, rather than an American worker without those special insights. The Trump administration definitely puts a greater emphasis on protecting the local labor market and American workers than on US employer's particular priorities and business needs. Thus, US companies are encouraged to search for employees within the US "to create higher wages and employment rates for US workers".

17 USCIS, https://www.uscis.gov/news/news-releases/fy-2021-h-1b-cap-petitions-may-be-filed-april-1, April 1, 2000 (accessed September 23, 2020).

18 USCIS relies heavily on the Occupational Outlook Handbook(OOH), a publication of the US Department of Labor's Bureau of Labor Statistics to obtain information regarding the requirements for a specialty occupation, despite OOH's disclaimer: "(…) education requirements for occupations may change over time and often vary by employer or state. Therefore, the information in the *OOH* should not be used to determine if an applicant is qualified to enter a specific job in an occupation", https://www.bls.gov/ooh/about/disclaimer.htm?view_full.

19 L. Dellon, USCIS consistently denies H-1B petitions. This Lawsuit Argues it is Misinterpreting the Law, "Immigration Impact", April 17, 2020, https://immigrationimpact.com/2020/04/17/uscis--h1b-class-action-lawsuit/?emci=28c66e67–2a80-ea11-a94c-00155d03b1e8&emdi=cf21f97e--6182-ea11-a94c-00155d03b1e8&ceid=4494015#.XqCev0BFzOb (accessed April 22, 2020).

In addition to higher denial rates under the Trump administration, the Requests for Evidence (RFEs) increased from 22.3% in FY 2015 to 40.2% in FY 2019[20]. Responding to draconian Requests for Evidence are costly because attorneys need more time to respond to absurd and often non-related questions asked in these requests than to prepare an initial petition.

To conform with BAHA, the Department of State is also adjudicating non--immigrant visa applications at their consular posts with the goal to "create higher wages and employment rates for workers in the United States, and to protect their economic interests. DOS has made changes to its Foreign Affairs Manual (FAM) with respect to providing guidance to consular officers regarding of issuing of H, L, O, P, and E visas"[21].

In addition, on October 23, 2017 the USCIS announced that it would no longer defer to prior determinations of eligibility when adjudicating petition extensions involving the same parties and underlying facts as the initial petition[22]. The adjudicating officers must apply the same level of scrutiny to both initial petitions and extension requests for certain non-immigrant visa categories. As a result, the extensions of H-1B and L-1 status are also subject to massive requests for additional evidence, the procedure is delayed, and the uncertainty for employer and employee deepens. For example, an IT company who employed a software developer for the past three years and is interested in extending this contract for additional three years (up to six years maximum stay in this non-immigrant category) cannot be certain that the petition will be approved, even if there are no changes in terms of employment that previously passed USCIS' criteria, and must have a backup plan in case the petition will be denied, and the employee would need to leave the country before the completion of the project.

2. Policy Memo on new calculation of unlawful presence of students

The Trump administration is also targeting international students. On May 10, 2018, USCIS posted a policy memorandum changing the way the agency calculates

20 NFAP Policy Brief, H-1B approved petitions and denial rates for FY2019, National Foundation of American Policy, February 2020, https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020–1.pdf (accessed April 25, 2020).

21 See, respectively: 9 FAM 402.10–2(b), 9 FAM 402.12–2(d), 9 FAM402.13–2(c), and 9 FAM 402.9–2 (b).

22 PM-602–0151: Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017–10-23Rescission-of-Deference--PM6020151.pdf (accessed April 24, 2020).

unlawful presence for those who were in student (F non-immigrant), exchange visitor (J non-immigrant), or vocational student (M non-immigrant) status[23].

Under federal regulations, students and exchange visitors are admitted to the US for "duration of status". "Duration of status" is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution approved by the Service for attendance by foreign students, or engaging in authorized optional practical training (OPT) following completion of studies[24]. Accordingly, their authorized stay does not have a fixed end date, as is the case for other visa categories. Under the prior policy, which had been in place for 20 years, the unlawful presence count began only after a formal finding of a status violation by a DHS officer in the course of adjudicating an application for immigration benefits or by an immigration judge in the course of removal proceedings.

Unlawful presence begins to accrue when the period of authorized stay expires or after an entry to the U.S. without being admitted or paroled (crossing the border illegally). Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 imposes re-entry bars on those who accrue "unlawful presence" in the US. The three-year bar to re-entry into the US applies to individuals who have been unlawfully present in the US for a continuous period of more than 180 days, but less than one year, and who voluntarily depart the US. The ten-year bar to re-entry into the U.S applies to individuals unlawfully present in the US for an aggregate period of one year or more who depart voluntarily or are removed (deported)[25].

Under the policy described in USCIS's August 2018 memo, unlawful presence would have begun to accrue the day after a status violation, if the violation occurred on or after August 9, 2018, or on August 9, 2018, if the violation occurred prior to August 9, 2018. Students would have been subjects to a very harsh penalty of three- or ten-year bar on re-entry to the US -even for minor or inadvertent status violations (for example, not notifying USCIS about changing the dormitory). In some instances, students might not know they have committed violations in some cases until after more than 180 days had elapsed from the status violation, and they were already subject to a three-year re-entry bar.

On February 6, 2020, the US District Court for the Middle District of North Carolina issued a nationwide injunction, permanently enjoining USCIS from enforcing the Policy Memorandum[26]. The Court concluded that the August

23 PM- 602–1060.1, Accrual of Unlawful Presence and F, J, and M Nonimmigrants, August 9, 2018, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018–08-09-PM-602–1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf, (accessed April 24, 2020).

24 8 CFR 214.2(f)(5)(i).

25 INA §212(a)(9)(B)(i).

26 Guilfordv.Wolf,https://www.uscis.gov/sites/default/files/document/injunctions/Guilford-College-v.-Nielsen-summary-judgment-permanent-injunction.pdf (last accessed June 5, 2020).

2018 Policy Memo impermissibly conflicts with the text of the INA, pursuant to which a non-immigrant is not "deemed to be unlawfully present" until "after the expiration of the period of stay authorized by the Attorney General"[27] and, based on Administrative Procedure Act (APA) provision, the court held unlawful and set aside the agency actions as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[28].

The Trump administration did not appeal the decision; probably it realized that it had no chances of overturning the decision on both of the substantive and procedural defects (USCIS violated the provisions of the APA that require notice and comment rulemaking prior to issuing a substantive policy enforcement change)[29].

3. Public Charge Rule

In February 2020, the US Supreme Court again sided with the Trump administration to allow enforcing a harsh rule towards foreigners, this time those applying for permanent residency in the United States ("green cards").

According to federal law, an individual seeking admission to the United States or seeking to adjust status is inadmissible if the individual, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge"[30]. In other words, such individual is not eligible for a green card.

In making a public charge determination, immigration officers review all of applicant's circumstances, including: age, health, family status, assets and resources, and education and skills. The immigration officer may also consider Affidavit of Support prepared on behalf of the intending immigrant by his/her sponsor. Under previous longstanding policy, a sponsor's Affidavit of Support in family-based cases could overcome negative factors in a public charge determination. Under a new rule, such affidavit is just a positive factor in the above-mentioned totality of the circumstances test. It is not sufficient on its own to protect an applicant for a green card from being determined "likely to become a public charge".

The Trump administration changed the scope of public charge inadmissibility rule through restrictive interpretation of existing law. In addition, both the US Department of Homeland Security and State Department enacted new rules on Public Charge which after a lengthy legal battle in federal courts came into effect on

27 8 U.S.C. § 1182(a)(9)(B)(ii).

28 5 U.S.C. § 706(2)(A).

29 See: JDSUPRA, Why the Guilford College Decision is so Important? Klasko Immigration Law Partners, LLP, February 18, 2020, https://www.jdsupra.com/legalnews/why-the-guilford-college-decision-is-so-56133/ (accessed June 18, 2020).

30 INA 212(a)(4).

February 24, 2020, after the US Supreme Court allowed for the rule's enforcement nationwide[31].

Until recently, the emphasis in public charge determination was put on cash benefits received from the government. According to a new policy, "public charge" means an alien who receives one or more public benefits, for more than 12 months in the aggregate within any 36-month period. The use of public benefits, application for receiving such benefits or certification to receive Medicaid (other than for emergencies, for those under 21, or pregnant women), Supplemental Nutrition Assistance Program – SNAP (food stamps), Section 8 Housing and Public Housing for more than 12 months in a 36-month period beginning on February 24, 2020 are now considered a heavily weighted negative factor in a public charge determination.

As a result, applications for permanent residence ("green card") became much more complicated with the new public charge rule. The application requires submitting more supporting documents than before February 24, 2020 (for example, credit history and credit score, proof of enrolment in US health insurance, and policy coverage statements). Unfortunately, for seniors, this may become a barrier to immigrating to the US, because of a number of negative factors (age, lack of knowledge of English, pre-existing medical conditions and no perspective for finding a job) that are typically prevailing in their case. It means that sponsoring one's own parents for a green card will be much more difficult, even if the US citizen sponsor's financial situation is very stable; the sponsor's guarantee is not good enough to eliminate likelihood of parents becoming a public charge[32].

4. Covid-19 related restrictions

After the coronavirus outbreak, it was obvious that travel restrictions will be imposed to protect the country. From January 31 to March 14, 2020, clearly motivated by health concerns arising globally, President Trump signed four separate proclamations suspending entry of foreigners who were physically present in China, Iran, Schengen Area, and lastly in UK and Ireland, within the 14 days preceding entry or attempted entry into the US[33].

31 DHS rule: 8 CFR 212.20–23; DOS rule: 22 CFR 40.41. More on Supreme Court's ruling: see, J.E. Moreno, The Supreme Court allows 'public charge' rule to take effect nationwide, "The Hill", February 2, 2020, https://thehill.com/regulation/court-battles/484196-supreme-court-allow-public-charge-rule-to-take-effect-across-country (accessed July 19, 2020); See also: Immigrant Legal Resource Center (ILRC), Public Charge, https://www.ilrc.org/public-charge (accessed July 19, 2020).

32 R. Kitson, Coming to America. Limited Immigration Options for Senior Parents, "ABA Experience", vol. 30, no. 3, April/May 2020, pp. 11–16.

33 Presidential Proclamations on Novel Coronavirus, US Department of State, June 29, 2020, https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-coronavirus.html (accessed July 20, 2020).

But not all restrictions can be included in "obvious restrictions" category. On Monday night April 20, 2020, President Trump tweeted: "In light of the attack from the Invisible Enemy, as well as the need to protect the jobs of our GREAT American Citizens, I will be signing an Executive Order to temporarily suspend immigration into the United States!"[34]. This dramatic tweet was clearly meant to create uncertainty and fear among immigrants and at the same time please the anti-immigrant groups that support Trump's hard policy on immigration. For two days there was a lot of speculation regarding the scope of a new ban, and fears that it would also cover those who already applied for a green card inside the United States. On April 22, the Presidential Proclamation 10014 was published on the White House website[35].

The ban suspends entry of spouses and minor children of permanents residents, parents of US citizens and adult and married children of US citizens, those who won visa lottery, and all employment-based immigrant visas, except EB-5 investors. In other words, it means that immigrant visas cannot be issued to the above-mentioned categories of potential immigrants – however, if they have a valid visa as of April 23, 2020, their entry to the US cannot be denied based solely on the language of the proclamation.

As the title of the proclamation makes clear, the ban applies only to entries, so those who are already in the US are not affected by the ban. Their green cards applications should continue to be processed. In addition, petitions for Alien Relative that initiate the permanent residence processs hould still be accepted for processing by the USCIS. So, for example, a US citizen can still file the petition on behalf of his parents with the agency. Once the petition is approved, the USCIS would send it to National Visa Center that in turn will send it to the appropriate US Consulate for processing of an immigrant visa.

On one hand, many foreign nationals started to feel relieved once the Proclamation was published. Most consulates around the world are still closed due to COVID-19, and visa services are suspended anyway, so the ban has not been changing too much in the short term.

On the other hand, it was reasonable to expect that the administration may want to extend the ban after 60 days for an indefinite period of time using a high unemployment rate to shut down legal immigration. In addition, Section 6 of the Proclamation imposed a duty on the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, to review non-

34 See Q. Owen, Trump's threat of total immigration ban ignites outrage, confusion, ABC News April 21, 2000, https://abcnews.go.com/Politics/trumps-threat-total-immigration-ban-ignites-outrage-confusion/story?id=70265156 (accessed April 26, 2020).

35 Proclamation Suspending Entry of Immigrants Who Present Risk to the US Labor Market During the Economic Recovery Following the COVID-19 Outbreak, April 22, 2020, https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/ (accessed April 23, 2020).

-immigrant programs and recommend to the President other measures appropriate to stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers. Those expectations came true as the first Covid-19 Proclamation led to a subsequent proclamation issued on June 22, 2020 which suspended entry of certain H-1B, H-2B, J-1 and L-1 workers until December 31, 2020[36]. The June 22, 2020 proclamation affects those who are abroad and do not have a valid visa stamp; it does not apply to foreigners in the H, L, J status who already are in the US. It also extends the effective period of the April 22 proclamation until December 31, 2020. Significantly, both proclamations leave no doubt the US suspended the entry not for health-related issues but because of "risk to US labor market". It is consistent with Trump's downplaying the virus threat and hoping it "will go away" "even without the vaccine"[37]. In addition, it can be speculated that the June 22 proclamation was directed not to actual H, L, J visa holders but rather to conservative anti-immigrant Trump supporters who were pleased to hear that their chances of finding new jobs or being re-hired after furloughs and layoffs would become higher by eliminating foreign competition.

In July 2020, Trump again tried to use the coronavirus to impede legal immigration. On July 6, the Student and Exchange Visitor Program (SEVP) which is part of Immigration and Customs Enforcement (ICE) agency, unexpectedly announced the modifications to temporary exemptions for non-immigrant students taking online classes due to the pandemic for the fall 2020 semester[38]. If the order had been implemented, F-1 and M-1 students attending schools operating entirely online would not have been able to take a full online course load and remain in the United States. This change could affect tens of thousands of international students. The State Department would not have issued visas to students in online-only programs and Customs and Border Protection would not have allowed these students to enter the country even if they had a valid visa in their passport. Two days later, on July 8, The Massachusetts Institute of Technology (MIT) and Harvard University filed a lawsuit and asked the court to prevent ICE and DHS from enforcing the new guidance and to declare it unlawful[39]. The argument in the suit was that the order has the effect of

36 Proclamation Suspending Entry of Aliens who Present a Risk to the US Labor Market Following the Coronavirus Outbreak, June 22, 2020, https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-aliens-present-risk-u-s-labor-market-following-coronavirus-outbreak/ (accessed July 14, 2020).

37 According to The Washington Post, since the beginning of the pandemic, President Trump repeated 34 times that 'the virus will go away": https://www.washingtonpost.com/video/politics/22-times-trump-said-the-coronavirus-would-go-away/2020/04/30/d2593312–9593-4ec2-aff7–72c1438fca0e_video.html? (accessed September 23, 2020).

38 ICE, https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during#wcm-survey-target-id (accessed July 15, 2020).

39 Harvard and MIT vs. DHS/ICE, US District Court for the District of Massachusetts, Case 1:20-cv-11283, https://www.pacermonitor.com/view/BVPHELQ/President_and_Fellows_of_Harvard_v_

forcing schools to reopen on campus and thus cause the students, faculty and other staff members to be exposed to Covid-19[40].

Facing the numerous lawsuits from 17 states and District of Columbia, backed by more than forty US universities and colleges, a week later, on July 14, the administration rescinded the rule and reversed to its earlier guidance from March 13 acknowledging unusual circumstances and suspending limits around online education during the pandemic[41]. Accordingly, the foreign student visas and legal status will be unaffected even if the schools decide to offer only distance learning in the Fall 2020 semester[42].

5. The unclear future of DACA

It should be emphasized that controversial DACA program does not provide its recipients any pathway to citizenship; it only grants the eligible applicants "deferred action": a protection from deportation. However, it provides an eligibility for work authorization that can be renewed every two years. It was established by President Obama's executive order due to the inactivity of Congress to pass the legislation to resolve the issue of legal status of childhood arrivals[43].

By way of background, on August 1, 2001, the bipartisan legislative proposal was introduced to the U.S. Senate called the Development, Relief, and Education for Alien Minors Act – DREAM Act, that would open a pathway for certain undocumented immigrants who were brought to the United States as children to apply for U.S. legal permanent residency and eventually be eligible for US citizenship[44]. Congressional gridlock has stopped the DREAM Act from becoming law every time it has been introduced in Congress[45]. On June 15, 2012, President Obama announced his

United_States_Department_of_Homeland__madce-20–11283__0001.0.pdf (accessed July 20, 2020).

40 Ibidem, p. 14.

41 M. Chin, Seventeen states sue Trump administration over new students visa guidelines, "The Verge", July 13, 2020, https://www.theverge.com/2020/7/13/21322780/ice-lawsuit-states-universities-international-students-visa-pandemic-trump (accessed July 18, 2020).

42 Provided that the students have been in valid F-1 or M-1 status since March 9, 2020, they will be able to continue to take online classes based on the March 9, 2020 policy. See: ICE.gov, Broadcast Message: Follow-up: ICE continues March Guidance for Fall School Term https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf (accessed July 28, 2020).

43 For more detailed explanation of DACA in Polish literature, see: R.R. Ludwikowski, A.M. Ludwikowski, Prezydencjalizm Amerykański w Pryzmacie Reformy Imigracyjnej Baraka Obamy [American Presidentialism in the Light of Barack Obama's Immigration Reform], "Krakowskie Studia Międzynarodowe", nr 4, 2015, pp. 129–148.

44 American Dream Act, H.R.1751, 111th Congress (2009–10).

45 L.C. Romero, Activism Leads, The Law Follows: DACA and its Fate at the Supreme Court, American Bar Association (ABA), April 28, 2020, https://www.americanbar.org/groups/crsj/

decision to stop deportations of Dreamers and make them eligible to obtain work permits. Effectuating this new policy, then secretary of the Department of Homeland Security, Janet Napolitano, issued a memorandum to the immigration agencies that explicitly deprioritized Dreamers from deportation[46]. According to 2017 statistics, almost 80% of DACA beneficiaries came from Mexico[47].

On September 5, 2017, under Trump's directive, the DHS rescinded DACA[48]. It opened the door to states wide litigations and finally, in June 2020, the Supreme Court rejected the DHS attempt to end DACA[49]. The court's decision was made on procedural grounds; the Supreme Court ruled that the agency violated Administrative Procedure Act (APA), as DACA termination was done in an arbitrary and capricious manner[50]. Although the Court's ruling was a tremendous victory for DACA recipients, what happened next was not comforting at all. It became clear that Trump administration wanted to eliminate those benefits at all costs. First of all, in a nonprecedential move the USCIS issued a statement of his Deputy Director for Policy Joseph Edlow on the USCIS website, openly disapproving the US Supreme Court for not agreeing to end DACA: "Today's court opinion has no basis in law and merely delays the President's lawful ability to end the illegal Deferred Action for Childhood Arrivals amnesty program"[51]. Secondly, the USCIS refused to accept new applications for DACA, notwithstanding the Supreme Court's ruling, and started sending rejecting notices to the applicants. On July 17, 2020, the federal district court in Maryland ruled that the Trump administration must resume accepting new applications for the DACA program and comply with a recent Supreme Court

publications/human_rights_magazine_home/immigration/activism-leads-the-law-follows/ (accessed July 20, 2020).

46 Ibidem.

47 USCIS, https://www.uscis.gov/sites/default/files/document/data/daca_population_data.pdf (accessed July 4, 2020).

48 Memorandum on Rescission of Deferred Action of Childhood Arrivals (DACA), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca (accessed June 14, 2020).

49 Department of Homeland Security v. Regents of University of California, 591 US (2020), https://www.supremecourt.gov/opinions/19pdf/18–587_5ifl.pdf

50 The Court noted: 'We do not decide whether DACA or its rescission are sound policies. "The wisdom" of those decisions "is none of our concern." Chenery II, 332 U. S., at 207. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.' Ibidem, p. 29.

51 At the time of writing this article, the statement was still posted on the USCIS's website: https://www.uscis.gov/news/news-releases/uscis-statement-on-supreme-courts-daca-decision (accessed September 24, 2020).

ruling[52]. However, on July 28, 2020, the DHS issued the statement announcing that it will reject the initial DACA requests, and that the extensions of valid DACA status will be granted for one year only[53].

The agency's open disregard for the court's ruling causes legal chaos and uncertainty, and even more confusion arises because of President Trump's flip-flop stands on the issue. After the Supreme Court ruling, Trump said he would move quickly to terminate the program again — in a way that would pass muster with the Supreme Court. But a few days later, in the interview with Telemundo, when asked whether he really wants to deport approximately 30,000 US hospital workers who are on DACA, he said that in "next four weeks" he will be signing "a big immigration bill", that will include DACA and provide a road to citizenship to those who are on DACA program[54]. So basically, he claims that he has presidential authority to decide about DACA future and create new immigration benefits through executive order – although his main argument for eliminating DACA always was that President Obama abused his power by creating a temporary program deferring deportations. According to Trump's statement during the above-mentioned interview, he not only considers extending DACA ("and everyone will be so happy of it"[55]) but also creating the pathway to US citizenship for Dreamers. Reversing his course on this issue is highly possible though – even through a random tweet.

Conclusions

In July 2020, the polls were showing Joe Biden's double-digit lead over Donald Trump 52% to 40% of votes[56], however 2 months later Biden's approval dropped,[57] and

52 See, C. DeChalus, Trump admin must accept new DACA applications, court rules, "Roll Call", July 17, 2020, https://www.rollcall.com/2020/07/17/trump-administration-must-accept-new--daca-applications-court-rules/ (accessed July 21, 2020) and P. Alvarez, Judge orders Trump administration to accept new DACA applications, CNN, July 17, 2020, https://www.cnn.com/2020/07/17/politics/daca-trump-judge/index.html (accessed July 21, 2020).

53 DHS, Department of Homeland Security Will Reject Initial Requests for DACA As It Weights Future of the Program, July 28, 2020, https://www.dhs.gov/news/2020/07/28/department--homeland-security-will-reject-initial-requests-daca-it-weighs-future (accessed July 28, 2020). See also Memo of Chad Wof, Acting Secretary of DHS, https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf (accessed July 28, 202)

54 Telemundo, July 17, 2020, https://www.telemundo.com/noticias/2020/07/10/exclusive-trump-sign-merit-based-immigration-executive-order-would-include-path-tmvo9506039 (accessed July 21, 2020).

55 Ibidem.

56 CNN Poll of Polls, July 20, 2020, https://www.cnn.com/2020/07/20/politics/poll-of-polls-july-trump-biden-coronavirus/index.html (accessed July 20, 2020).

57 S. Milligan, Biden's Shrinking lead is a Jolting Reminder for Democrats – Trump Could Win, U.S. News, September 2, 2020, https://www.usnews.com/news/elections/articles/2020–09-02/joe-

at the time of writing this article it is very difficult to predict a winner of November 3 elections. Of course, it can be expected that Biden's win would lead to overturn on harsh internal policies of USCIS, and that the agency will reduce the number of unnecessary requests for evidence, and denials of benefits based on unreasonable standards will decrease. DACA will be extended until Congress finally passes the long-awaited legislation addressing the issue of more than 700,000 immigrants who were brought to the US as children. The students would be able to focus on their coursework (either in classroom settings or online), and practical training options giving them hands-on experience in their field of study.

Nevertheless, Trump's core base remains strong, and if he wins November 2020 elections, it can be expected that his immigration policy will become even harsher, to please his hard-line supporters. He may play with DACA until elections to please Latino voters but most likely, if elected, he would continue his efforts to eliminate DACA, and extend Covid-19 related restrictions to create more jobs for Americans. He will also try to reduce family-based immigration, making family reunification more bothersome, and support legislation in Congress to create a points-based system for employment-based green cards without increasing the numerical cap of immigrant visas that can be granted each year. The US will become less attractive for international students who are already exploring educational opportunities and post--graduate professional training in Canada or Australia instead[58]. Practical Training Reform has been on DHS's Regulatory Agenda since 2017, and in Fall 2019, ICE was directed to amend the existing regulation and revise the practical training options after graduation for students in F-1 and M-1 status[59]. It is highly probable that OPT program will be limited, or even suspended, to promote economic recovery during Covid-19 pandemic. It also appears that Trump is utilizing Covid-19 to bring the current immigration system closer to the earlier-mentioned RAISE Act that he openly supports. As noted earlier, the presidential proclamations halt immigrant

-bidens-shrinking-lead-is-a-reminder-for-democrats-trump-could-win (accessed September 23, 2020).

58 See, for example, S. Anderson, Trump Plans Far-Reaching Set of Immigration Regulations, Forbes, Nov. 21, 2019, https://www.forbes.com/sites/stuartanderson/2019/11/21/trump-plans-far-reaching-set-of-new-immigration-regulations/#310bfb4d262a (accessed July 21, 2020) and P. Bourke, Five reasons why international students are choosing Canada over the United States, Moving2Canada, https://moving2canada.com/international-students-choosing-canada-over-the-united-states/ (accessed July 21, 2020)

59 Office of Information and Regulatory Affairs, OMB, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1653-AA76 (accessed July 20, 2020). See also: NAFSA, Practical Training Reform, June 3, 2020, https://www.nafsa.org/professional-resources/browse-by-interest/practical-training-reform (accessed July 20, 2020).

visas for family and employment-based petitions, diversity visa lottery program[60] and entry of certain non-immigrants (H-1B, L-1, and J-1).

To sum up, on the basis of the analysis presented above, it should be noted that the chances of strengthening business and educational exchange between the US and European countries are rather slim under the current President. To the contrary, the nationalistic notions of "making America great again" that should be accomplished through "buy American and hire American" and legal uncertainty causing ongoing federal lawsuits will undoubtedly lead to America's further isolationism. Trump's negative perception of foreign presence in the US – no matter if it is based on pursuing education, cultural exchange or business needs of foreign companies and investors – gives less and less incentives to foreign students and professionals to seek accomplishments in the US, either on a temporary or permanent basis.

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Independence of the Prosecution Service: European Approaches

Abstract: Nowadays, a modern state without the institution of prosecution could rarely be found. It is considered one of the crucial elements for the proper functioning of the system of justice and for the application of the rule of law through such functions as carrying out of pre-trial investigation and / or the prosecution in criminal matters, safeguarding social interests, and judicial independence. The objective of this article is to provide a brief reflection on the necessity and the content of the independence of the modern prosecutor's office. The article is based on the policy tendencies used in the Council of Europe and the European Union and with the more profound analysis of the legal regulation of the Spanish prosecutor's office and its conformity with these tendencies.
Keywords: Prosecutor, prosecution office, principle of independence, independence of prosecutors, impartiality of prosecutors, system of justice

Introduction: Prosecutor's service as a state institution

Prosecutor's service is one of the state institutions originated in fifteenth to sixteenth centuries that went through different stages of development depending on state policy, in particular in criminal matters. Nowadays, in many states, it is a constitutional body and a key player in the system of justice, especially in the application of accusatorial criminal procedure that helps to maintain the efficiency of criminal prosecution and judicial independence[1].

1 See T. Armenta Deu, Principio acusatorio y derecho penal, Barcelona, 1995, pp. 32–33.

Recommendation Rec (2000) 19 of the Committee of Ministers to Member States on the role of Public Prosecution in the criminal justice system states that prosecutors in all European states can decide to initiate, continue and perform the criminal prosecution as well as to appeal some judicial decisions. It also lists some other more common tasks of prosecutors (such as the implementation of the national criminal policy, decision on alternatives to prosecutions, and supervision of the execution of court decisions), and it does not discard the possibility to act in other types of processes, such as civil ones[2].

Considering the most common functions of the prosecution services, in particular, supervision of judicial independence, it is difficult to imagine their proper implementation being dependent on one of the State Powers[3]. Therefore, this article proceeds with the analysis on the need and content of the independence of prosecution service.

1. Independence of the prosecution services

1.1. General remarks

We can find different principles applicable to the functioning of the prosecution service depending on its role, functions and the relation with the State Powers. As the most common principles can be named legality, impartiality and hierarchy. But nowadays, there is more and more predisposition to talk about the independence of prosecutors which can be met as they are considered one of the key players of the criminal justice system that safeguards the rule of law, and their activities within the criminal process can result in the limitation of some fundamental rights and have an impact on a fair trial[4].

Notwithstanding, this independence is not easy to define, as it could be addressed to the work of an individual prosecutor solving a particular case (functional independence) or to a prosecutor's office as an institution or General Prosecutor as chief of the service (institutional/structural independence). For example, European Commission for Democracy through Law (Venice Commission) points out that "The prosecutor's offices are often referred to as 'autonomous' and individual prosecutors

2 Recommendation Rec (2012)11 "Role of Public prosecutors outside criminal justice system" specifies that it might be a representation of the general or public interest, protection of human rights and fundamental freedoms, and upholding the rule of law.

3 See J.A. Zaragoza Aguado, El Ministerio Fiscal Español y la Fiscalía Europea. Su configuración institucional. La autonomía y la independencia ensu estatuto jurídico. Conflictos de competencia y mecanismos de resolución. La Fiscalía Europea y la orden europea de detención, Revista del Ministerio Fiscal, no. 9, 2020, p. 72.

4 See S. Guerrero Palomares, El principio acusatorio, Navarra, 2005, p. 132.

would be referred to as 'independent'"[5]. The same idea is shared by the Special Rapporteur on the independence of judges and lawyers within the framework of the United Nations that stresses the importance of the autonomy and the functional independence for the "credibility of prosecutorial authorities and public confidence in the administration of justice"[6].

With respect to the term of independence, we could also find different opinions whether it is similar to the independence of judges or not. For example, the International Commission of Jurists refers to the independence of the justice system that is understood as a totality of judges, lawyers and prosecutors[7]. On the other hand, we can also find some indications that the content of the independence of prosecution offices differs from the judicial independence as they, as a general rule, are hierarchical institutions with accountability to the superiors. They can be also required by the State to implement some public policies related to criminal justice, for example, to "prioritise the prosecution of one type of criminal activity over another"[8]. Nevertheless, it should be stressed that these peculiarities of structural (in) dependence shall be compatible with the functional independence of prosecutors in the application of the law and that makes it more similar to judicial functional independence. Some authors also contend that if the independence is understood as a judge's submission exceptionally to the law in solving a criminal case, a prosecutor never can be independent in criminal process, as he/she is a prosecuting party in defence of legality[9]. However, in defence of the legality in general, proper actions of the prosecutors' service also have to be legal, meaning within the limits established by the law and not interfered by any other authorities[10].

From our perspective, the principle of independence of prosecutors should be understood in broad manner and closer to the content of the judicial independence,

5 European Commission for Democracy through Law (Venice Commission), Report on European standards as regards the independence of the judicial system: part II – the prosecution service", 2010, p. 7. The same idea is followed by the European Network of Councils for the Judiciary. See. European Network of Councils for the Judiciary "Independence and Accountability of the Prosecution. Report 2014–2016", p. 14.

6 Special Rapporteur on the independence of judges and lawyers (Unites Nations), Independence of Judges and lawyers, 2020, p. 10.

7 International Commission of Jurists, "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, 2007, p. 4.

8 European Network of Councils for the Judiciary, Independence and Accountability of the Prosecution…, loc. cit., p. 11.

9 See J.L. Gómez Colomer, La Fiscalía Española, Debe ser una institución independiente?, Teoría y Realidad Constitucional, 2018, no. 41, p. 161.

10 See T. Armenta Deu, Lecciones de Derechoprocesal penal, 12th Edition, Madrid, 2019, p. 99, International Commission of Jurists, "International Principles on the Independence…", loc. cit., p. 5.

meaning a guarantee that prosecution service is not influenced either by the executive or the legislative power.

1.2. European approach towards the independence of prosecutors

One of the best ways to see the development of the principle of the independence of the prosecution service is the analysis of the work done in the framework of the Council of Europe. Looking chronologically at the provisions developed within this organisation duringthe last two decades, some tendency of enhancing the independence could be perceived.

The Recommendation Rec (2000)19 did not discard the possibility of the subordination of the prosecutor's office to the government; however, it required respect for some guarantees, such as the legality of governmental powers towards prosecutors regarding publicity and the written form of general instructions. It also outlined that in case of possibility foreseen in national law to give governmental instruction to the prosecutor in individual cases, and transparency and equity should be respected. Concerning the internal functioning, the Recommendation foresaw that principles of impartiality and independence should be applied to the assignment of cases.

Despite maintaining this possible dependence of the prosecutor's office under the executive power, the European Commission for Democracy through Law (Venice Commission) in 2010 stated that an individual prosecutor is expected to act judicially[11].

In the Opinion No. 9(2014) of the Consultative Council of European Prosecutors the wording became stronger considering the independence of the prosecution services as 'an indispensable corollary to the independence of the judiciary" that have to perform their functions without "external pressure or interference, having regards to the principles of separation of powers and accountability'[12]. Therefore, the independence of prosecutors shall be similar to the independence of judges and should embrace such aspects as a recruitment system, career, salaries and disciplinary responsibility.

In its opinion No 13(2018) the Consultative Council of European Prosecutors pointed out that the European Court of Human Rights supports the prosecutors' independence, whether they are considered judicial authorities or not. It also highlighted external and internal independence saying that prosecutors "must enjoy external independence, i.e. vis-à-vis undue or unlawful interference by other public or

11 See. European Commission for Democracy through Law, Report…, *op. cit.*, p. 5

12 Consultative Council of European Prosecutors, Opinion No 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors" CCPE(2014)4Final. The same opinion is shared by some practitioners, for example, see. J.-A. Zaragoza Aguado, El Ministerio…, *op. cit.*, p. 72.

non-public authorities, e.g. political parties; they must enjoy internal independence and must be able to freely carry out their functions and decide, even if the modalities of action vary from one legal system to another, according to the relationship to the hierarchy"[13].

Looking at quite recent case-law of the Court of Justice of the European Union (hereinafter – CJUE),a stronger position about the independence of prosecution service from the executive power could be noticed. For example, in Joined Cases C-508/18 and C-82/19 the CJUE pronounces itself about the independence of German prosecutor's offices. According to German Law on Judicial System, they belong to a hierarchical structure under the Minister for Justice (Federal or of the respective country) and the minister may exercise the power of their supervision, direction, and instruction. The CJUE calls these ministerial powers as external ones that could influence the decisions of a prosecutor's office. Although German law foresees that instructions in respect to a specific case cannot exceed the limits of the law and some countries even establish the requirement that they have to be written, the CJUE states that this "cannot wholly rule out the possibility, in all circumstances, that a decision of a public prosecutor's office (…) be subject to an instruction from the minister for justice of the relevant Land" and the existence of the principle of legality is "not capable of preventing the minister for justice of a Land from influencing the discretion enjoyed by the public prosecutors' offices of that Land" if the law does not specify how the legality is ensured[14].

In Joined Cases C-566/19 PPU and C-626/19 PPU the CJUE analyses the status of the French prosecution service that is a hierarchical institution with the application of the directions and control of superiors, but in which the Minister of Justice is endowed with the power only to issue general instructions about the development of the criminal policy that is accompanied by the explicit prohibition to instruct concerning individual cases. The CJUE underlines that independence requires that there are adequate statutory or organisational rules to ensure that the authority is not exposed to the risk of receiving individual instructions from the executive, and in this case such requirement is fulfilled[15].

Summarising, the CJUE refers to the independence "ad extra" that excludes the possibilities of individual instructions from institutions other than judicial ones, but the possibility of internal ones remains[16].

13 Consultative Council of European Prosecutors, "Opinion No 13(2018) of the Consultative Council of European Prosecutors. Independence, accountability and ethics o prosecutors" CCPE(2018)2, point 31.

14 Judgement of CJEU of 27 of May 2019 on the joined cases C-508/18 and C 82/19, points 80, 81.

15 Judgement of CJEU of 12 of December 2019 on the joined cases C-566/19 and C-626/19, points 8, 10, 52, 54.

16 R.A. Morán Martínez, Investigaciones transfronterizas y cooperación judicial internacional en la Fiscalía Europea, Revista del Ministerio Fiscal, no. 9, 2020, p. 47.

When it comes to European legislation, the independence is found in the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')[17] as one of the key principles applied to this European body with the powers of investigation and prosecution.

Article 6 of the above-mentioned Regulation outlines the independence of the EPPO as a European body, as well as the independence of the European Chief Prosecutor, his deputies, the European Prosecutors and the European Delegated Prosecutors, meaning all prosecutors under the EPPO. It also refers to the prohibition of the above-mentioned prosecutors to seek or take any external instructions and for the Member States of the European Union and the institutions, bodies, offices, and agencies of the Union to influence them. Thus, the obligation to secure independence is dual: of the prosecutors by themselves and of the rest of the actors that might use their influential power.

Summing up European tendencies, it could be said that although the content of the independence of the prosecutors' services might be different from the judicial independence, it is an indispensable element for the Rule of Law and an independent judiciary.

2. Some comparative analysis: a closer look at Spanish regulation

After a brief description of the European approach towards the independence of the prosecutor's office, which could be considered as guidelines or a general framework to be followed, it would be interesting to have a closer look at some real national regulation.

In Spain, the prosecutor's office can be considered as a constitutional institution, as its brief regulation is foreseen in the Spanish Constitution of 1978. Article 124 establishes the tasks and principles of the functioning of the Office of Public Prosecutor, as well as the rules of appointment of its chief – State Public Prosecutor (General Prosecutor). The prosecutor's office acts in the defence of the rule of law, citizens' rights, and public interests as well as in the protection of the independence of the judiciary and satisfaction of social interest. These functions are carried out based on four principles: legality, impartiality, unity of action and hierarchical dependency. The constitutional regulation has its peculiarity as article 124 belongs to the Part that regulates Judicial Power in order to emphasise a lack of hierarchical dependence of prosecutors to the Government[18]. But at the same time, it establishes that the State

17 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1–71).

18 J.A. Zaragoza Aguado, El Ministerio…, *op. cit.,* p. 72.

Public Prosecutor is nominated by the Government (after consultation with the General Council of the Judiciary) and formally appointed and removed by the King. In conclusion, the constitutional provisions neither describe precisely its position among state powers nor describe precisely its role[19].

It should be mentioned that Spain belongs to that minority of countries where the pre-trial investigation is led by the pre-trial (investigating) judge and not the prosecutor[20]. However, the task to present an indictment and to participate as an accusatory part in the process belongs to prosecution service. The latest drafts of criminal procedure code have tried to introduce modifications of current pre-trial system towards investigation led by the prosecutor's office, but that means radical changes of the current system of justice and implies significant expenditures and for the time being does not have enough support to pass legislative procedure.

The Act 50/1981, of December 30th, on the organic statute of the prosecution service (with its later modifications, especially of the Act 24/2007, of October 9th) sheds more light on the autonomous functioning of the Prosecutors' Office, stating that it has functional autonomy and proper legal personality. In the words of Moreno Catena, this autonomy separates the Prosecutors' Office from the general State administration and weakens the supremacy of the Executive Power[21].

In article 7 of the Act 50/1981 we can also find a direct reference to independence. It outlines that "Pursuant to the principle of impartiality, the Prosecution service will act objectively and *independently* in defence of the interests entrusted thereto". Is the content of this independence similar to the independence of the Judicial Power? The answer seems to be partially negative. It is explicitly prohibited to affect the independence of Judicial Power, and in case of infringement of this rule a legal action can be initiated. This prohibition is applied both to external entities and persons as well as to judge-to-judge relations due to the lack of hierarchical dependency, one of the principles of the functioning of the Office of Public Prosecutor. But when it comes to the individual action of judges or prosecutors, they have to act impartially (objectively and independently), and they have a right and obligation to refrain from a case where their impartiality could be doubted[22].

19 V. Moreno Catena, El papel del Ministerio Fiscal en el Estado democrático de Derecho, 2002, no. 16, p. 141.

20 The only exception to this rule for the time being is the investigation of the juvenile delinquency that since 2000 has been endowed to prosecutors.

21 Ibídem, p. 146.

22 Article 219 of the Organic Act 6/1985 of the 1 July, on Judicial Power, establishes 16 situations that serve as a motive to refrain from a specific case. For example, when judge or prosecutor: – Has marriage ties or similar de facto situation, kinship by consanguinity or affinity to the second degree with any of the parties or their attorney involved in the suit or legal proceedings; – Has acted as legal counsel or representative of any of the parties, or has issued an expert report in the proceedings; – Has a direct or indirect interest in the suit or in the proceedings.

Interpreting article 124 of the Spanish Constitution in a systematic way, the scope of the prosecutor's independence should be also interpreted as having in mind the principles of unity of action and hierarchical dependency. As explained in the previous part, these principles by default do not mean a lack of independence, everything depends on the content that is given to them by the law, especially concerning the possibility to give instructions in individual cases. If the prosecutor's office functions based on general and individual instructions from superior prosecutors, but with the possibility to appeal the latter, it is compatible with the scope of independence that prosecutors should have. However, if an external entity is endowed with the power to give instructions in individual cases, that negatively affects the proper functioning of the prosecution service and its independence.

Let see how this issue is regulated in the Act 50/1981. Article 23 outlines that any assignment given to a prosecutor through an ordinary case distribution system can be reassigned by the direct superior to another prosecutor. In this case, a motivated resolution shall be issued. As it is a hierarchical institution, article 25 establishes that "the General Prosecutor may issue general or specific orders and instructions to subordinates relating to the service and the performance of their duties". The same article foresees a safeguard if such instructions is related to any member of the government. In this case, before giving instruction, the General Prosecutor shall consult the Board of High Prosecutors.

According to article 26, the General Prosecutor also has the power to summon any prosecutor and to receive his/her reports or give direct instructions. If a prosecutor considers such instructions as unlawful, he or she can consult the Board of High Prosecutors and act according to its considerations. Thus, it seems that hierarchical dependency stays within the prosecutor's office and does not affect the independence.

Let continue with the analysis of the entities/persons that are allowed by the law to give instructions to the prosecutors. Article 8 of the Act 50/1981 allows the government to ask the General Prosecutor to promote legal action in the defence of the public interest. As a general rule, it is done through the Ministry of Justice, but in case of the necessity, it could be done directly by the President of the Government. To proceed with such a request, the General Prosecutor has to consult the Board of High Prosecutors and take a motivated decision. Thus legally, the governmental request does not mean unconditional order. The Government can also request information on "any of the matters handled by the Prosecution service", meaning also individual cases under prosecution and possibly those with the involvement of political figures. The law does not stipulate a possibility to give direct governmental instructions to the prosecutors; thus, from the legal point of view a direct interference of the Executive Power in work of the prosecutor's office does not exist. Notwithstanding, the total correctness of this statement could be evaluated only after analysis of the appointment of the General Prosecutor.

As mentioned above, article 124 of the Spanish Constitution establishes the way to appoint a General Prosecutor: "appointed by the King on being nominated by the Government, after consultation with the General Council of the Judiciary".

The Act 50/1981 provides more details on nominations and limits the possibility to choose the General Prosecutor only from among "Spanish attorneys of prestige who have been practicing for over fifteen years". This provision ensures that a General Prosecutor is a legal professional and not a politician and shall be considered as a positive development. The Act 24/2007 that modifies the Act 50/1981 introduced a novelty that a nominee shall be summoned to a hearing before the respective parliamentary committee. Thus nowadays, in legal terms, all three state powers are participating in the appointment of the General Prosecutor. Nevertheless, it should be pointed out that the weight of this participation is not equal, but with the prevailing role of the Government that takes the final decision. The consultation with the General Council of the Judiciary is not always free of at least indirect political influence as according to article 567 of the Organic Act on Judiciary, the members of the General Council of Judiciary are elected by the Chambers of Parliament (and not by judges). Political dependence could be noticed even more looking at the motives of dismissal of the General Prosecutor, as one of them is "when the government that nominated him/her leaves power".

Considering what has been said, there is a doubt whether instructions given by the General Prosecutor would always be free of political influence and would not affect the impartiality of the Prosecutor's office.

Questions of independence of judicial authorities and prosecutors were the subject matter of the Fourth evaluation round "Corruption prevention in respect of members of parliament, judges and prosecutors", carried out by the Group of State against Corruption (GRECO) of the Council of Europe between 2012 and 2017.

In its Evaluation report of Spain, among other comments, GRECO outlined that the independence and impartiality of individual prosecutors is not questioned, but there are some doubts about the structural independence of the governing bodies of the prosecution service and "the term of office of the Prosecutor General should not coincide with that of Parliament or the continuance in office of the Government as this could create an impression that the Prosecutor General is linked to or a part of the executive branch of Government."[23] In light of the findings made by the GRECO, it was recommended to Spain:

– To reconsider the method of selection and the term of tenure of the Prosecutor General;

23 Group of State against Corruption (GRECO), Fourth evaluation round. Corruptions prevention in respect of members of parliament, judges and prosecutors. Evaluation Report. Spain, 2013, p. 35.

- To increase transparency of communication between the Prosecutor General and the Government;
- To explore possibilities to provide for greater autonomy in the management of the means of the prosecution services[24].
- For the time being, none of these recommendations have been fully implemented, although respective drafts of modifications have been developed.

Currently, the Ministry of Justice is drafting a new Criminal Procedure Code where again the idea to change a pre-trial investigation model and transfer the investigating power to the prosecutor's office is being raised. In this light, it is even more important to strengthen the independence of this institution in order to ensure proper application of the rule of law and guarantees of the fundamental rights.

Conclusions

Though it is more common to assign the feature of independence to the judiciary, the importance of independence of prosecutor's services has evolved recently. Policy developments within the Council of Europe point at the independence of prosecution as an essential condition to the independence of the judiciary and protection of fundamental rights. Prosecutors' independence is not equal to judicial one in all its aspects, but they do have common denominators: impartiality of individual judges and prosecutors towards individual cases and lack of external influence in solution of these cases.

From the few examples of national regulation analysed in this article (German and French in the context of the case-law of the CJUE and Spanish in more details), no severe criticisms towards the impartiality of individual prosecutors have been identified; however, national legislators shall take more steps to eliminate possibilities of external influence in individual cases in two ways: by the prohibition of direct external instructions in individual cases and by the exclusion of the political dependence of the prosecution service and the General Prosecutor.

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24 See Ibidem, p. 37.

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The COVID-19 Post-lockdown Italian Scenario from an Eco-Socio-Legal Perspective

Abstract: This paper offers an analysis of the possible COVID-19 post-lockdown effects on the powerful factors that constitute the Italian national interest. The interdisciplinary perspective, being at the base of this study, considers a scenario characterized by three factors: time, budgetary policy, and communication. Since the social post-lockdown crisis began, Italy has been facing a problem of social justice in terms of participation, which is absent for now, especially in the political framework. The policy proposals should take account of unpopular decisions, whereas from a legal and geopolitical perspective it is necessary to have a more defined foreign policy, a clearer Italian positioning concerning international alliances with national interest as a reference point.
Keywords: Italy, EU, COVID-19, post-lockdown, budgetary policy

1. Post-lockdown in Italy

The contribution analyses the economic, social, and legal fallout in this difficult period for the European Union (EU) and Italian history.

This article offers an analysis of the COVID-19 post-lockdown possible effects on the powerful factors that constitute the Italian interest in apolitical context. The interdisciplinary perspective, being at the base of this study, outlines a scenario characterized by the following factors.

The COVID-19 (SARS CoV–2) pandemic outbreak all around the world shows how institutional failures may end up in catastrophic events. The precautionary principle has been proposed as the proper guide for the decision-making criteria

to be adopted in the face of ambiguous and vague catastrophic risks. Unfortunately, and unforgettably the political institutions at the national and supranational level, such as the EU Commission, disregarded its application opening the scenario to a very aggressive and mortal pandemic disease without targeted therapeutics for treatment and vaccines. The health, social, economic, and political consequences of the COVID-19 pandemic are difficult to predict, but they appear tragic also because it could not run into the next year[1].

The COVID-19 pandemic is not just a global emergency; besides health, the impact on everyday life is enormous, as well as on rights and freedom[2]. To contain the virus-spread, the involved Governments (in agreement with WHO) implemented some draconian measures, derogating to laws and limiting some fundamental rights and freedoms, declared by the international Charters; furthermore, great support in detecting and tracking the spread came from the use of Artificial Intelligence, with a possible invasion of individual privacy. A holistic-complex analysis of the interactions between Artificial Intelligence and social aspects analyses the legitimacy of such strong strategies, although it highlights the need for a new paradigm based on mutual trans-national collaboration and is aimed at implementing a more adequate legislative framework to guarantee that even the post-pandemic impact would not affect human, social and political rights[3].

The pandemic requires us to investigate the reasons for the crisis of the "modern" state. At the time, these reasons were identified essentially as the difficulty of ensuring adequate political representation for the interests expressed by the world of economics and work. The true legacy of the pandemic is not only having given health as a value capable of overwhelming any other constitutional value but also having entrusted the task of defining the hierarchy between constitutional values[4].

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1 M. Basili, L'epidemia di "CoVid-19": il principio di precauzione e i fallimenti istituzionali, "Mercato concorrenza regole", 2019, no. 3, pp. 475–483.

2 See: B. Caravita, L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana, "Federalismi.it", 2020, no. 6, pp. 1–8; P. Caretti, I riflessi della pandemia sul sistema delle fonti, sulla forma di governo e sulla forma di Stato, "Osservatorio sulle fonti", 2020, no. 10, pp. 1–4; A. Celotto, La quarantena dei diritti. Come una pandemia può sospendere le nostre libertà, Historica Giubilei Regnani, Roma, 2020.

3 M. D'Agostino Panebianco, Covid-19: AI supports the fight, but reduces rights and freedoms, "OIDU - Ordine Internazionale e Diritti Umani", 2020, no. 2, pp. 1–31.

4 See: M. Borgato and D. Trabucco (eds.), Covid-19 vs. democrazia. Aspetti giuridici ed economici nella prima fase dell'emergenza sanitaria, ESI, Napoli, 2020; A. Celotto, Necessitas non habet legem? Prime riflessioni sulla gestione costituzionale dell'emergenza coronavirus, Modena, Mucchi, 2020; G.L. Conti, La crisi dello "Stato moderno" e l'emergenza pandemica: appunti sul ruolo delle Camere nella lotta contro il coronavirus, "Osservatorio sulle fonti", 2020, no. 10, pp. 1–23 (access 10.10.2020).

Firstly, the time factor and the gradualness of the phenomenon. The analysis has a tactical nature and considers the time target of one-year from the end of the Italian lockdown (June 2, 2020).

Secondly, the financial factor. The analysis is based on estimates of the current state funding; approximately EUR 50 billion have been allocated for income support[5]; approximately EUR 400 billion have been instead allocated for the two-years 2020/2021 to guarantee liquidity to the business system, the effects of which will be seen starting from the second half of 2020[6].

Subsequent additional resources could modify the expected scenario; hence the study could be updated accordingly.

Thirdly, the communicative factor. Communication produces direct and immediate effects on both economy and citizens' behaviour. The management of institutional communication by the EU, the Italian Government, the Civil Protection, and regional authorities has caused and is still causing significant negative effects[7]. For example, as a consequence of the statements announced by the President of the ECB Lagarde on March 12, 2020, the Milan stock exchange lost 17%, causing at the same time an increase in the Italian debt[8]. The overlapping contradictions of institutional communication have had a legal impact on the effective contrast of the crisis from the health, economic, and social point of view. Yet, the consensus of the present Italian government has sharply increased (in April 2020 Prime Minister Conte relies on a 67.3% consensus, whereas the left party leader Zingaretti barely receives 40.6% of popular support)[9].

The importance of good institutional communication on the economic front is demonstrated by a 2012 speech given by ECB President Draghi at the Global

5 Decree Law March 17, 2020, No. 18, passed, with amendments, into Law April 24, No. 27.

6 Decree Law August 14, 2020, No. 104, Decree Law May 19, 2020, No. 34, passed, with amendments, into Law July 17, No. 77, and Decree Law April 8, 2020, No. 23, passed, with amendments, into Law June 5, No. 40.

7 G. Arfaras (ed), L'Italia delle autonomie alla prova del Covid-19, Guerini e associati, Milan, 2020 and L. Chieffi, La tutela del diritto alla salute tra prospettive di regionalismo differenziato e persistenti divari territoriali, "Nomos", 2020, no. 1, pp. 37 (access 10.10.2020).

8 See: "We are not here to close the spread. There are other tools and other actors to manage these issues". After these words had been pronounced, the bond yields of the Italian government exploded from 1.22% on 10-year maturities at 2:42 pm, before Lagarde began answering reporters' questions, to a peak of 1.88% at the end of the year. It is a colossal leap in the cost of public debt that risks costing many billions to Italian taxpayers, being the result of the words were spoken by Lagarde precisely when the country was brought to its knees by the epidemic, as, incidentally, it was spreading throughout Europe. P. Padoin, Lagarde talks about the spread: "Italian government bond yields explode, Milan stock market collapses", "firenzepost.it", March 12, 2020, available at https://www.firenzepost.it/2020/03/12/le-parole-di-lagarde-sullo-spread-fanno-esplodere-i-rendimenti-dei-titoli-di-stato-italiani-villages-alloy-asks-the-resignation (access 10.10.2020).

9 MG Research survey of April 14, 2020.

Investment Conference in London to save the EU economy by defending the euro[10]. This speech is estimated to be worth €5,000 billion[11].

The same communication patterns on social networks and television are creating a "panic effect" whose consequences can be unpredictable, as they arbitrarily affect social behaviour. In particular, communication via WhatsApp is not measurable through algorithms, producing thereby unexpected effects[12].

It should be also noted that, as written in the conclusions of this paper, the matter of social unease has been repeatedly analysed. This criticality undoubtedly contributes to the so-called erosion of the middle class and, simultaneously, to a more and more severe gap between the rich and the poor. Every day, one can notice this exponential increase in social hardship, which is obviously of great interest to organized crime, as it spots therein an interesting pool for new recruitment. The economic difficulties of small and medium-sized enterprises represent a great opportunity for criminal organizations. As is well known, criminal organizations have abundant financial liquidity that enables them to take possession of economically distressed enterprises to launder the money obtained, partially through drug dealing, but also by managing illegal immigration. Italy, indeed, is still coping, even in this period of health emergency with the arrival of streams of immigrants, albeit to a limited extent.

The present study also emphasizes Italy's progressive disaffection with the EU.

An important part of the Italian population at this time would probably be likely to express the desire to leave the EU. With this in mind, it may be however easily overlooked that a referendum, if not purely consultative, on the potential *Italexit*, likewise on the exit from the common euro currency, cannot be held, since the EU consists of an international policy validated by multilateral agreements and approved by the EU Parliament. That being said, some keep assuming that *Italexit* would be the best cure for Italy, as it does not seem that there are clear ideas about the near future of the country.

It is also evident that, if no reduction of policy costs and streamlining of the bureaucratic apparatus is forthcoming, it will not be possible to rebalance what in this study is reported as a gap not only among social classes but above all between politicians and state *grand commis*. These interests like common citizens, among

10 M. Draghi, "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough!", Global Investment Conference, London, July 20, 2012.

11 M. Cellino, Draghi's "whatever it takes"? Worth 5 trillion for European stock exchanges and bonds, "Il Sole-24Ore", July 26, 2017, available at https://www.ilsole24ore.com/art/il-whatever-it--takes-draghi-vale-5mila-miliardi-le-borse-e-bond-europei-AEyLkF3B (access 10.10.2020).

12 L. Giungato, La pandemia immateriale. Gli effetti del Covid-19 tra social asintomatici e comunicazione istituzionale, "Società Italiana di Intelligence Press", April 14, 2020, available at https://press.socint.org/index.php/home/catalog/book/3 (access 10.10.2020).

whom there now seems to be no more understanding and, least of all, dialogue. At the moment, when rulers legislate, they no longer respect not only the current Italian Constitution but also what all those who have acquaintance with law, even to a minor degree, to know to be as the hierarchy of sources. Undoubtedly, changes, i.e. paradigm shifts, as they are called in the present study, must be eventually brought in, as required by the current situation. Otherwise, the very risk of a more or less declared subversion could threaten the public order.

From the geopolitical perspective, it is clear that it is necessary to have a more defined foreign policy, a clearer Italian positioning concerning international alliances, national interest taking as a reference point[13].

The proposal of introducing a tracking app to download on mobile phones together with the discussion on the protection of the cyber domain amplified both matters of preventing and mapping the current virological threat as well as possible further threats of this type. All experts, indeed, are warning of a COVID-19 pandemic comeback as well as of new unknown pandemics to come. The controversy that has developed in recent days regarding the security of data and digital infrastructures, in particular concerning health facilities and data on individual health, makes us understand how it is a much-debated and still unresolved topic in Italy. The need to strengthen cyber-security, which is fundamental in many strategic and economic sectors, is becoming a national priority interest[14].

Therefore, in the social, economic, military, scientific, and health fields, careful monitoring of problems and a 360° intelligence should respond with security, at least with certainty, to the challenges that the next twelve months will pose to those who govern not only Italy . Europe too must find a way to handle these international problems that primarily concern individual states but ultimately affect Europe as a whole continent, as it is losing (or has already lost!) its driving force in the global international political scene. There is no doubt that intelligence, which in the past was mainly military, should now be structured even better in the newly emerged areas of investigation. These are nowadays equipped with specialists trained in individual sectors, in addition to professionally valid experts, already operating in relevant institutions.

13 M. Iannarone, Covid-19 e nuovi assetti geopolitici, Tempra, Ariano Irpino, 2020 and G. Torzi, Thinking outside the box. Pandemia e geopolitica: i nuovi assetti globali, Guerini e Associati, Milano, 2020.

14 G. Manzini, La cybersecurity ai tempi del Coronavirus, Aracne, Canterano, 2020.

2. The Social Post-pandemic Crisis

Most probably, national governments will face after the end of the emergency a critical situation in terms of social unrest, which will be primarily of an economic but also psychological and educational nature[15]. Taking into account that EU societies are gradually returning to their normal functioning, the real effects of social distress could be graduated. High-profile political initiatives are therefore required, aiming at tackling any sort of structural problems, while putting aside immediate and short-term political consensus. Moreover, other factors that are momentarily unforeseeable should be also considered, such as timing in terms of a comeback to normality in other countries to promote economic and commercial exchanges, the impact on personal relationships in the forthcoming months, the risk represented by social contacts (the so-called "plague spreading effect"), lastly organizational changes of companies and institutions as a result of the forced acceleration of remote work.

In any case, the economic response will be insufficient both because Italy, despite the suspension of the EU stability pact, already has a very heavy budget and because governmental choices are following income support criteria, rather than focusing on investments, while deferring real problems such as taxation burdens[16], nor can one reasonably rely on the availability of Europe because EU aid, at best, would have just a relative impact. The recent US opening, however, offers interesting prospects[17].

The economic crisis opens many possibilities, in Italy as in the rest of the world, for further criminal infiltrations into the legal economy and therefore into the social, political, and institutional framework[18].

Moreover, during the current debate on the use of the European Stability Mechanism (ESM) in support of the economic and financial crisis resulting from the COVID-19 pandemic, the application of the ESM in a light configuration, conditioned only by the expense commitment due to the assignment of the credit line

15 M. Caligiuri, Post Covid-19. Analisi di intelligence e proposte di policy 2020–2021, Rubbettino--Formiche, Soveria Mannelli-Rome, 2020.

16 G. Licini,Rapporto OCSE. L'Italia è il terzo Paese al mondo più indebitato con 62.700 dollari a testa, "Il Sole-24Ore", November 14, 2019, available at https://www.ilsole24ore.com/art/l-italia-e-terzo-paese-mondo-piu-indebitato-62700-dollari-testa-AC9Ckuy (access 10.10.2020).

17 President Trump, in the Memorandum on Providing COVID-19 Assistance to the Italian Republic of April 10, 2020, announced a series of support measures that add up to the $ 100 million of aid, in medical material, already planned. It would allow Italy to have coordinated access to American health and industrial resources for the management of the health crisis and, at the same time, guaranteeing economic support to counter the severe recession of phase two. See D.J. Trump, Memorandum on Providing COVID-19 Assistance to the Italian Republic, "Presidential Memoranda", available athttps://www.whitehouse.gov/presidential-actions/memorandum--providing-covid-19-assistance-italian-republic/(access 10.10.2020).

18 R. Baldwin and B. Weder di Mauro (eds), Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes, CEPR Press, London, 2020.

called Pandemic Crisis Support (PCS), established based on the existing Enhanced Conditions Credit Line (ECCL), *ad hoc* to face the pandemic crisis, is questioned by the letter of the regulatory body governing its operations. Besides that, according to the analysis of the regulations, there are some concerns about the possibility of modifying the conditionality in a stricter sense at a time following the access to precautionary financial assistance. There are no guarantees about scenarios that are likely to be expected as a consequence of the activation of the ESM in an anti--pandemic purpose, especially considering the nature of this Institution, created to guarantee the financial stability of the Eurozone and with the role of lender of last resort[19].

The great health emergency caused by the spread of the COVID-19 outlines a scenario in which serious negative economic and financial implications have been produced as a consequence of the foreseeable recession due to the sudden halt of the production processes and the lock-down of all activities except for those related to essential services. For a complete analysis of this reality, the EU reactive measures shall be considered and, in particular, those promoted by its key institutions as well as by other global players. Many analysts and politicians are convinced that to deal with the issues resulting from the COVID-19 it is necessary to fully fertilize the financial systems, recognizing the need for a salvific financial intervention. The Italian Government has adopted many measures to face this situation, but also there is also a widespread awareness that to implement a wide-ranging program only the achievement of a common EU response against the health emergency, which afflicts most of the Member States, will make possible the giving of credence to the aims probably pursued by the Italian Government. After some initial hesitations, the EU has shown its willingness to consent, to counter the pandemic, greater economic flexibility in the management of the public accounts of the Member States. The EU Commission presents a "draft proposal for a temporary state aid framework to support the economy in the context of the COVID-19 outbreak", also allowing these States to deviate from compliance with their previous budgetary targets before the explosion of COVID-19 infection. The ECB, after the forecast of a massive long--term loan program, the so-called TLTRO III, launched the Pandemic Emergency Purchase Program (PEPP) of 750 billion Euros 'to counter the serious risks to the monetary policy transmission mechanism and the outlook for the Euro area posed by the outbreak and the escalating diffusion of the "coronavirus", COVID-19'. There is no doubt that COVID-19 has marked a new frontier in unifying the EU

19 F. Salmoni, L'insostenibile "leggerezza" del Meccanismo europeo di stabilità. La democrazia alla prova dell'emergenza pandemica, "Federalismi.it", 2020, no. 20, pp. 280–313 (access 10.10.2020).

construction[20]. However, what appears to be a rediscovered spirit of solidarity has been stopped after the request of the Italian Prime Minister to allow Member States to make use of the ESM without being subject to conditions. Hence, a clear contrast emerges with the Countries of northern Europe who oppose the creation of Eurobonds fearing that they will have to share the financial plus/value of their bonds with the Mediterranean States. Italy and Spain reject the "draft agreement discussed by the Council of the European Union" on COVID-19, leaving a glimpse of a storm that increasingly causes a critical look at the "cornerstones of the Union" if the leaders of the EU institutions persist not to understand that a Europe of rules must be replaced by Europe of solidarity[21].

Regardless of the health event that has generated such a situation, the management of the crisis itself, both in terms of economic and communicative choices, poses problems of primary importance since it has caused damage that directly affects those who were touched by the pandemic[22].

Legislative provisions deserve a separate discussion. On the one hand, they are undoubtedly necessary. On the other hand, doubts concerning their timing and legitimacy have recently been raised. Regarding the former, there are criminal complaints whose validity must be verified[23]; as to the latter, doubts also arose on both the constitutionality and suitability of certain measures which have produced regulatory uncertainty, creating confusion among citizens and distrust of investors and entrepreneurs[24].

20 E. Chiti, L'Unione e le conseguenze della pandemia, "Giornale di diritto amministrativo", 2020, no. 4, pp. 436–444 and M. Marchi, Covid-19 e caos europeo: ripartenza o Finis Europae?, "Rivista di politica", 2020, no. 2, pp. 49–54.

21 F. Capriglione, La finanza UE al tempo del "coronavirus", "Rivista Trimestrale di Diritto dell'Economia", 2020, no. 1, pp. 1–39.

22 Already at the beginning of the pandemic, it was highlighted in N. Barone, and M. Bartoloni, Coronavirus, dal panico allo scontro con le Regioni: 5 errori nella gestione dell'emergenza, "Il Sole-24 Ore", February 28, 2020, available at https://www.ilsole24ore.com/art/coronavirus-panico-scontro-le-regioni-5-errori-gestione-dell-emergenza-AC6Q4TMB(access 10.10.2020). See also: E. Balboni, Autonomie o centralismo contro il coronavirus, "Quaderni costituzionali", 2020, no. 2, pp. 373–375; E. Longo, Episodi e momenti del conflitto Stato-regioni nella gestione della epidemia da Covid-19, "Osservatorio sulle fonti", 2020, 10, pp. 1–31; G. Mazzola, Coronavirus: crisi o sviluppo dell'Autonomia?, "Nomos", 2020, no. 1, pp. 1–14 (access 10.10.2020).

23 Criminal charge, *ex* artt. 40, para. 2, 438, 452, and 589 with aggravated by art. 61, para. 3) and 9), criminal code, available at https://www.studiolonoce.it/articoli/1753/(access 10.10.2020).See A. Bernardi, Il diritto penale alla prova della COVID-19, "Diritto penale e processo", 2020, no. 4, pp. 441–451.

24 S. Cassese, Coronavirus, il dovere di essere chiari, "Corriere della Sera", March 23, 2020, available at https://www.corriere.it/editoriali/20_marzo_23/dovere-essere-chiari-b5b36828–6d39–11ea-ba71–0c6303b9bf2d.shtml (access 10.10.2020).

Some believe that emergency legislation restricts citizens' freedom[25] as they can be more easily manipulated in a climate of fear than normally[26]. A similar debate took place in the US regarding the Patriot Act of 2001[27]. Cassese expressed many doubts about the language, often indecipherable, used in this emergency decree[28].

There is clear evidence that the rulers of all countries are in trouble and that while proper conduct must be observed in the middle of the emergency, the actual results will be seen once it is over. It should be however considered that it may take some years.

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25 See: R. Bartoli, Legalità e coronavirus: l'allocazione del potere punitivo e i cortocircuiti della democrazia costituzionale durante l'emergenza, "Osservatorio sulle fonti", 2020, no. 10, pp. 1–17; P. Bonetti, La Costituzione regge l'emergenza sanitaria: dalla pandemia del coronavirus spunti per attuarla diversamente, "Osservatorio sulle fonti", 2020, no. 2, pp. 1–51; L. Cuocolo (ed), I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata, "Federalismi. it", May 5, 2020 (access 10.10.2020); G. Mastandrea Bonaviri, International Humanitarian Law and the Fight against Epidemics: An Analysis of the International Normative System in Light of the COVID-19 Public Health Emergency, "OIDU - Ordine Internazionale e Diritti Umani", 2020, no. 3, pp. 1–22; A. Mazzola, Brevi riflessioni sul sistema delle fonti nel contesto del nuovo--coronavirus, "Nomos", 2020, no. 1, pp. 1–15 (access 10.10.2020); A.J. Palma, Pandemia e diritti umani: l'Italia e lo stato di eccezione al tempo del coronavirus, "OIDU - Ordine Internazionale e Diritti Umani", 2020, no. 2, pp. 1–27; P. Pantalone andM. Denicolò, Responsabilità, doveri e "coronavirus": l'ossatura dell'ordinamento nelle emergenze "esistenziali", "Il diritto dell'economia", 2020, no. 1, pp. 125–166; U. Ronga, Il Governo nell'emergenza (permanente). Sistema delle fonti e modello legislativo a partire dal caso Covid-19, "Nomos", 2020, no. 1, pp. 1–34 (access 10.10.2020).

26 For a sociological view, see U. Beck, La società del rischio. Verso una seconda modernità, Carocci, Rome, 2013 and Z. Bauman, Paura liquida, Laterza,Roma-Bari, 2012. For a legal approach: G. Marazzita, L'emergenza costituzionale. Definizioni e modelli, Giuffrè, Milan, 2003 and S. Romano, Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano, (in:) S. Romano, Lo stato moderno e la sua crisi: saggi di diritto costituzionale, Giuffrè, Milan, 1969, pp. 117–150.

27 An analytical reconstruction of the text of the law of the USA Patriot Act, Electronic Privacy Information Center, its history, and the debate that followed is available at https://www.epic.org/privacy/terrorism/usapatriot/(access 10.10.2020).

28 "It is understandable - but not justifiable - to have chosen the wrong path to quickly create a new right of the health emergency, basing on the existing health policy laws such as the Constitution on international and the consolidated text of health laws. However, it is not clear why our rulers continue to declare such obscure proclamations. The last decree of the President of the Council of Ministers, announced on television on the evening of March 21, signed the following evening and entered into force the following day, contains, in its dispositive part, 864 words and ten references to other decrees, laws, ordinances, codes, protocols. At Palazzo Chigi do they think that all Italians can consult all regulations, including ordinances? (...)". On 9 August 1940, Churchill signed a one--page document in the War Cabinet at 10 Downing Street, entitled "Brevity", which lists in four points how governmental documents should be written. If you do not want to cross the Channel, you can read the 'style code' of public administrations, published in 1994 by the Ministry of Public Administration». See S. Cassese, Coronavirus…, *op. cit.*

3. The Policy Proposals

One possible way to contain the inevitable social unease is to make unpopular decisions.

In the near future, it will be necessary to make painful choices to meet minimal social justice criteria. Among these, we can discuss the following: taxing generous pensions, limiting gold pensions, reducing rewards and benefits of parliamentarians and regional councillors, decreasing the remuneration of directors-general of health and top figures of Ministries and Regions, as well as limiting the remuneration of employees of high institutions (Parliament, Presidency of the Republic, Government, Constitutional Court, and others at the regional and local level).

These employee categories are accustomed to very high salaries that do not meet the criteria of equal social utility or reasonableness; hence, they could be reduced through a legislative decree. Although the remuneration for the above-mentioned categories requires moderate expenditure compared to the state budget, a reduction in their paycheque could positively affect not only the selection of the ruling class but also the social distress, bringing elites closer to citizens.

That being said, the priority should currently be given to an income redistribution policy, including, for demonstrational purposes, the following aspects: formulating state budget, orienting public spending by reviewing the Bassanini Acts of 1997–1999 on administrative rules with urgent features[29], launching bureaucratic streamlining, planning intervention on the prison issue, and lastly, arranging the construction of new buildings.

The central issue that Italy will face is the following one: effective social stability will depend on the balance that will be reached between the conditions of poverty and the reduction of well-being.

In this context, it is necessary to set out some considerations on the following topics: the role re-articulation between State and Regions, drawing inspiration from the outcomes reported during the present emergency, and the fact that many doctors and nurses who are working and dying for our health in these days are part of a system in which health care is often a private affair with gigantic interests[30] and structural and organizational deficiencies that have highlighted the weaknesses of the national

29 The legislation produced, at greater costs, the strengthening of managerial roles, yet with no benefits in terms of efficiency and bureaucracy. On the contrary, public immobility has increased while the reduction of administrative controls has objectively favoured the infiltration of mafias in local and regional administrations.

30 In 2017, public health expenditure in Italy amounted to 6.6% of GDP, a value about three percentage points lower than that of the German one (9.6%) and the French one (9.5%), by one percentage point compared to the United Kingdom and slightly higher than in Spain (6.3%), Portugal (6.0%) and the Czech Republic (5.8%). See Court of Auditors, Report to Parliament on the Financial Management of the Regional Health Services, 2017 financial year, Resolution No. 13/SEZAUT/2019/FRG.

health system although the Italian health care system is one of the most celebrated in the world[31].

Mafias are against the implementation of health measures; for this reason, they are spreading more and more; not only for their great economic capacity but above all due to the inefficiency of public elites and due to all forms of legalized social injustice.

Urgent policies are required on the infiltration of organized crime into the legal economy, as political parties have responsibly highlighted several times.

The economic sectors most exposed to the appetites of economic crime are those that were most affected not only by the lockdown but also by a slower recovery related to phase 2. The aggression of organized crime will be more evident in the medium to long-term than in the short one, mainly in the tourism, events, catering, transport industries, in particular, in the airline industry[32].

Particular attention must be paid to ownership changes reported to the Chambers of Commerce and the procedures of bankruptcy sections of the Courts.

In this complex framework, national intelligence plays a demanding, forecasting role about social unease and further criminal infiltration.

The Conclusive Remarks from an Eco-Socio-Legal Viewpoint

A new phase in the great international geopolitical game began at the same time as the spread of the pandemic[33]. In this context, Italy, being historically at the centre of geostrategic interests, must develop a clear strategy[34].

EU internal contrasts could determine two distinct opposite poles: a resumption of the secessionist ideal between the North and the South of the Union, on the one hand, the strengthening of nationalisms with the ever-clearer intention to leave the EU, as recent polls show, on the other hand[35].

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31 Cereda D., *et al.*, The early phase of the COVID-19 outbreak in Lombardy, Italy, "arXiv:2003.09320", 2020.

32 L. Capuzzi, Criminalità. Narcos, assalto all'Europa Messico-Calabria prove di alleanza, "Avvenire", January 19, 2011, available at https://www.avvenire.it/mondo/pagine/narcos-assalto-alleuropa_201101191029451700000 (access 10.10.2020).

33 S. Cont, Geopolitical Shifts and the Post-COVID World: Europe and the Multipolar System, "IAI", June 2020, available at https://www.iai.it/sites/default/files/iaicom2043.pdf (access 10.10.2020).

34 E. Poli, Italy: Yes to more international cooperation, but not external solidarity per se, (in:) L. Debuysere (ed), Coronationalism' vs a geopolitical Europe? EU external solidarity at the time of Covid-19, CIDOB, Barcelona, 2020, pp. 13–14.

35 According to a survey carried out by Euromedia Research of 15.04.2020, for 59% of the respondents the EU would have no reason to exist. A survey conducted in early April by the SWG Institute of Trieste records a collapse in Italian confidence to 27%, compared to 42% in 2019. See: Italpress, Coronavirus, un sondaggio: per 59% intervistati UE non ha più senso, April 15, 2020, available at https://www.italpress.com/coronavirus-un-sondaggio-per-59-intervistati-ue-non-ha-piu-senso/ (access 10.10.2020); N. Corda, Sondaggi, l'Europa crolla nella fiducia degli italiani.

Italy will have to deal with the effects of the reorganization of international balances and, particularly, with the following challenges: the actual role of the EU and its fundamental contradictions, as revealed by the actual pandemic hardships; the leading role of China[36], which immediately launched a "sanitary silk road" alongside the" economic silk road"; US policies, which in the period between the time of writing and November 2020 will inevitably be conditioned by presidential elections; and the role of Russia, which has accentuated its interest in EU and Italian politics.

In Italy, there are supporters of the EU, the US, and China; the links with Russia seem instead less present and evident.

It is, therefore, necessary to overcome such fluctuating policies, without losing sight of the traditional Italian alliances linked to NATO and the EU though pursuing long-term national interest as the main compass. This requires the development of the ability to interpret world trends. In this context, the role of intelligence is more strategic than ever.

In addition to the health tragedy experienced in Italy with clear initial governmental responsibilities[37] as well as the economic and social consequences should be also taken into account. The present analysis took into consideration the issue of social hardship, as it accentuates both territorial and civic inequalities along with the erosion of the middle class and the widening gap between the rich and the poor.

At the same time, social hardship risks widening the recruitment pool of criminals and accentuating the separatist forces of the more developed areas of the country. Similarly, strong opposition tendencies to EU policies are rising, so increasingly that EU separationist trends are slowly taking shape within Italian society. Talking about state policies, the emphasis was placed in this study on measures that could rebalance the gap among social classes and, in particular, between public management elites and citizens, through a series of structural interventions aimed to reduce the costs of both political and bureaucratic system. It should be also highlighted the need to redefine the power between State and Regions, especially in the health sector. This could be the proper occasion to introduce paradigm changes, which in any case will

Germania nemico numero uno, "eunews.it", April 8, 2020, available at https://www.eunews.it/2020/04/08/sondaggi-leuropa-crolla-nella-fiducia-degli-italiani-germania-nemico-numero-uno/128811 (access 10.10.2020).

36 See: G. Cuscito, Molto soft power, pochi affari. La Cina in Italia dopo il coronavirus, "Limes", 2020, no. 4, pp. 65–72; A. Selvatici, Coronavirus. Made in China. Colpe, insabbiamenti e la propaganda di Pechino, Rubbettino, Soveria Mannelli, 2020; D. Shen, Così la Cina sta vincendo la partita del coronavirus, "Limes", 2020, no. 3, pp. 59–68.

37 See: M. Nacoti, *et al.*, At the Epicenter of the Covid-19 Pandemic and Humanitarian Crises in Italy: Changing Perspectives on Preparation and Mitigation, "NEJM Catalyst", March 21, 2020; F. Ratto Trabucco, Fra omissioni, contraddizioni e riduzionismo: le responsabilità degli organi deputati alla sanità pubblica italiana nella prevenzione della pandemia Covid-19, "Quaderni amministrativi", 2020, no. 3, pp. 22–29.

be imposed by the ongoing events. A better approach to them should be attempted in some way in order to govern rather than passively endure.

At the geopolitical level, the issue of a clearer Italian positioning concerning international alliances following the COVID-19 pandemic has arisen, which has the natural interest as a reference point.

At the military level, the present analysis examined the probable downsizing of funds in the state budget. Implementing the criterion of linear cuts, if the reduction in our country's GDP for 2020 will be envisaged by the IMF, the reduction in military expenditure could be around €3 billion. Moreover, the emphasis of this study was placed on those areas of intervention that should be strengthened, such as the protection of the cyber domain and the prevention of NBC threats, considering that the current pandemic may not be the last one.

At the economic and industrial level, the Italian position in international markets is at risk. This weakening affects the reputation of the country, which could be threatened by further criminal infiltrations and may be "conquered" by other countries. The risk is that foreign multinationals may take advantage of the Italian weakening to strengthen their role, especially in the manufacturing industry.

Indeed, the global competition perspective is not reflected in global economic regulation[38]. In such a scenario, in political and socio-economic crises, like the one related to the COVID-19, the important role of the State and national sovereignty resurface, and this is shown by the growing recourse to national interests' defence measures, among which golden power and screening of foreign direct investments can be included. At the same time, the pandemic COVID-19 as well as the interpretative uncertainties related to the principle of solidarity between the Member States, call into question – probably in an irreversible manner – the process of EU integration[39].

The principle of solidarity, widespread in the founding EU Treaties, has assumed a particular meaning in the field of economic policy. In the present case, as a result of the measures assumed following the interventions adopted by the EU institutions in the context of the previous financial crisis, it currently means that the taking on of other people's debts is not allowed, but it is, however, possible to grant loans to the Member States at a rate of more favourable interest than that offered by the market, provided that they undertake to implement certain economic reforms (so-called conditionality). The measures that have been put in place by the EU institutions to deal with the COVID-19 pandemic, despite the emphasis with which they have been accepted and despite certain journalistic proclamations, do not seem to constitute

38 V. Minervini, Insolvency, Competition, Economic Growth (and Recovery), "Federalismi.it", 2020, no. 16, pp. 250–265 (access 10.10.2020).

39 F. Gaspari, Poteri speciali e regolazione economica tra interesse nazionale e crisi socioeconomica e politica dell'Unione europea, "Federalismi.it", 2020, no. 16, pp. 118–134 (access 10.10.2020).

an effective derogation from the usual interpretation and the role of the principle of solidarity in the economic policy[40].

In this context, the governmental reaction should be updated, supplementing it with the definition, still not clarified, of "assets and relationships of strategic importance for the national interest"[41]. Therefore, at this stage, it could be considered whether to prohibit the sale of shares of strategic assets. Among these, health care should also play a significant role, as precisely health care should be strengthened by investing in pharmaceuticals, digital technologies, including telemedicine as well as other areas enjoying a high level of innovation.

Risks must be monitored not only immediately, but also in the medium term; since the organized crime, multinationals, investment banks, sovereign wealth funds, and foreign countries could act after some time, encouraged by media hype of the emergency, and pose the foundations for their future intervention.

Some measures have been considered in this study in support of small and medium-sized enterprises and the workforce supported by them. One of these themes is the incentive for the production from low-income countries to Italy as well as proper legislative and tax conditions to encourage the reactivation of registered offices belonging to foreign activities so that the Italian tax revenue could take advantage of it.

At the scientific level, the need to strengthen the security of data and digital infrastructures, in particular of health facilities, has been extensively highlighted in this paper. Some important research fronts are constantly developing, including vaccine and therapy research, progress in terms of health policies, the use of digital technologies, and the study of mental and psychological impacts. The importance of balancing the role of scientific research and national security with political decision--making was also mentioned throughout this study. As concerns research policies, more specifically, the importance of referring to institutional sources that perform coordination functions, as in the case of the World Health Organization (WHO), was mentioned, too. Eventually, it was pointed out that the educational emergency cannot be addressed by simplifying learning paths, but rather by introducing real teaching and verification mechanisms that may lead to the consolidation of knowledge.

In all these aspects, explicitly provided by the 2007's Italian reform law of intelligence services[42], intelligence still covers a fundamental function in the Italian COVID-19 post-lockdown era; hence, it should be constantly enhanced and developed. A related issue to the intelligence service and the participation of the

40 G. Contaldi, La solidarietà europea in campo economico ai tempi della pandemia da Covid-19, "OIDU – Ordine Internazionale e Diritti Umani", 2020, no. 3, pp. 1–17.

41 Golden Power, available athttps://www.governo.it/it/dipartimenti/dip-il-coordinamento-ammini strativo/dica-att-goldenpower/9296, 2020 (access 10.10.2020).

42 Law August 3, 2007, No. 124.

community is the right of access to the Technical-Scientific Committee reports for the pandemic governmental management that are published only 45 days after. To date, the intervention of the Administrative Courts[43] has not managed to overcome the resistance to the full and immediate transparency of the pandemic management acts adopted by the Conte Government and characterized by opacity from the perspective of publicity of these particular acts, also approved by a parliamentary majority[44].

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43 Council of State, no. 5426/2020 and Regional Administrative Court of Lazio, no. 8615/2020 on the right of access to some reports of the Technical-Scientific Committee.

44 In the session of September 29, 2020, the Chamber of Deputies rejected the motion Meloni, Molinari, Gelmini, Lupi, and others no. 1–00376, concerning initiatives aimed at guaranteeing the integral and direct publication of the reports of the Technical-Scientific Committee (241 votes against, 199 in favour and 5 abstentions).

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A Look at the Evolution of the Right to Self-determination in International Law

Abstract: The article takes stock of the historical development of the notion of the right of a people to self-determination in international law. It provides a coherent review of the main international treaties, customary rules, and legal rulings that shaped the evolution of the term over the course of the twentieth century. In doing so, it focuses on the main historical and political events, which had an impact on that process as well as the preconditions that have to be met in order for a people to have the legal capacity to execute the right to self-determination. Three main processes, which it focuses on are: decolonization, the establishment of a number of new countries following the dissolution of the Soviet Union, and the recent developments following ICJ's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. It also delineates the subject of the legal definition of a "people" as opposed to a "minority", describes the legal tension between the right to self-determination and the principle of territorial continuity in international law, and discusses potential further development of the term.
Key words: self-determination, minorities, territorial continuity, International Court of Justice, Kosovo, secession

Introduction

The right of a people to self-determination is a fundamental principle of the modern international law system. At its core is the notion that every people has a right

to freely choose its political status[1]. It is enshrined in the Article 1 of the Charter of the United Nations, which states:

"The Purposes of the United Nations are:

(…) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"[2].

However, despite its prominent character, the exact boundaries of the term have never been conclusively defined in a document qualifying as a source of international law. Instead, the scope of the right to self-determination has been evolving shaped to a large extent by State practice and, after 1945, jurisprudence of the International Court of Justice. In this article I aim to present how the scope of applicability of the term has changed after World War II in response to the geopolitical context. By tracking these shifts, we are able to anticipate the potential future evolution of applicability of the term.

1. Evolution of the term self-determination in the modern history

The UN Charter, being the foundation of the modern system of international law, was signed in 1945. It was at this time that the right to self-determination, previously on the borderline between being a political postulate and an actual legal premise, definitively shifted toward the latter.[3]Historically, the principle was acknowledged by the Western international community already in the year 1648 in the Treaty of Westphalia, which ended the Thirty Years' War and granted international legal status to a mosaic of small German States making up Holy Roman Empire. The Treaty formally established the principle of sovereign equality as the defining feature, by which every State, regardless how big or small, has an equal legal status in international law[4].This formula ushered in a new model of international relations, remaining the foundation of the international legal system until today, in which the right to self-determination is a gateway for a people to assume statehood, and thus become a subject of the international law[5].

1 R. Augestad Knudsen, Moments of self-determination: the concept of 'self-determination' and the idea of freedom in 20th- and 21st century international discourse. PhD thesis, The London School of Economics and Political Science, London 2013, p. 9.

2 Charter of the United Nations, 1 UNTS XVI, United Nations, 1945, Art. 1(2).

3 J. Tyranowski, Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym, Warszawa – Poznań 1990, p. 190; M. Perkowski, Samostanowienie narodów w prawie międzynarodowym, Warszawa 2001, pp. 18–20.

4 G. Simpson, Great Powers and Outlaw State: Unequal Sovereigns in the International Legal Order, Cambridge, Cambridge University Press, 2004, p. 35.

5 L. Gross, The Peace of Westphalia, 1648–1948, The American Journal of International Law, vol. 42, no. 1, 1948, pp. 20–41.

Whereas the existence of the principle is acknowledged at this point by all main actors of international law, its extent and limitations are being hotly contested. Following the establishment of the UN, the right to self-determination became one of the themes picked up by anti-colonial movements[6]. In 1960, "Year of Africa,"[7] the UN General Assembly passed Declaration on the Granting of Independence to Colonial Countries and Peoples, in which it asserted:

"All peoples have the right of self-determination (…)"[8].

This unconditional universal framing was repeated in a number of other international declarations and treaties, most notably in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States from 1965[9], International Covenant on Civil and Political Rights and International Covenant on Civil International Covenant on Economic, Social and Cultural Rights from 1966[10], and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nationsfrom 1970. The last one of them stated:

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self--determination by that people"[11].

According to the document, not only is self-determination a universal right of all peoples. It is also the duty of every State to promote the realization of this right on the international stage. This bold language reflected the struggle on behalf of newly recognized States to bring an end to Western colonialism.

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6 L. Antonowicz, Rzecz o państwach i prawie międzynarodowym, Lublin 2012, s. 90.

7 S. Gurjar, 1960 and African Independence: Revisiting the 'Year of Africa', Indian Council of World Affairs, 7 February 2020.

8 Declaration on the Granting of Independence to Colonial Countries and Peoples, UN GA, Res. December 14 1960, 1514 (XV), p. 2.

9 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UN GA, Res. 21 December 1965, A/RES/36/103, UN Doc. A/36/51, section II, point f).

10 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN GA, Res. 16 December 1966, A/RES/2200, Art. 1.

11 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN GA, Res. 24 October 1970, A/RES/2625(XXV), UN Doc. A/5217, Art. 1.

During this period, when the political majority at the UN General Assembly was pressing for a wide applicability of the term, the International Court of Justice(the ICJ) served as a hedging influence. Since its rulings are an essential element of the body of international law, it had an ability to concretize the scope of the term "right to self-determination" in a case-based manner. In 1966, the ICJ refused to recognize Liberia's and Ethiopia's direct legal interest in facilitating the exercise of right of self--determination by Namibians in a case filed against South Africa[12], rendering their direct involvement there unlawful. The International Court of Justice further hedged the applicability of the right to self-determination in its Advisory Opinion on Western Sahara from 1975 in a seemingly neutral statement:

"(…) the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned"[13].

The Court deducted the requirement of a free and genuine expression of willingness to exercise the right of self-determination from the fragment of UN General Resolution 1514 adduced above. In the Court's interpretation, it meant a prohibition of external interference aimed at inducing the creation of a new state. This more guarded understanding of term was accepted by the international community, especially by Western countries. This can be seen in subsequent political statements such as the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki later in the same year (1975) which stated:

"All peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference"[14].

This short statement incorporated ICJ's interpretation that a proclamation of independence cannot by induced by external interference, and that it must be preceded by a free expression of the wish of the people concerned. This understanding of the term formulated a basis for denying certain *de facto regimes* international recognition as States due to the way in which they were established. This was in line with the prevailing State practice, for instance regarding the State of Manchukuo, created via Japanese invasion in 1931, which was denied recognition by the League of Nations[15]. The year 1975, when this approach was reinforced in the context of the right to self--determination, was also when the UN was grappling with the Turkish invasion of Northern Cyprus and the subsequent illegal declaration of independence[16], which might have influenced the line of reasoning. It also signaled that unfettered right to

12 Judgment of the ICJ on case South West Africa, Second Phase, 1966, p. 6.

13 Advisory Opinion of the ICJ on case Western Sahara, 1975, p. 55.

14 The Final Act of the Conference on Security and Cooperation in Europe Helsinki, 1 August 1975, section VIII: Equal rights and self-determination of peoples.

15 The League of Nations, The National Archives of the UK Government, Section Credibility and end of the League, November 2020; See also: J. Frowein, De Facto Regime, Max Planck Encyclopedias of International Law, March 2013.

16 UN Security Council, Res. 550, 11 May 1984, Art. 2.

self-determination can be a destabilizing factor. The logic of external interference deeming a declaration of independence null and void retains much relevance. For instance, the argument was used in the Opinion of the Legal Advisory Committee to the Minister of Foreign Affairs of Poland when describing the situation in Russian--occupied Ukrainian province of Crimea[17].

The anti and post-colonial context dominated debates on the right to self--determination through the 1980s. By 1991 that process was essentially complete. A watershed moment for further evolution of the term took place during the aftermath of the fall of the Soviet Union. Its collapse created a momentum for new types of independence movements around the globe, many of them of non-post-colonial origin. This new context engendered a wave of jurisprudence on behalf of the ICJ.

This time round, the Court assumed a much bolder position in terms of expanding the applicability of the term compared to its earlier stance. For example, in the Judgement on the Case Concerning East Timor in 1995, the ICJ asserted that right of self-determination enjoys an *erga omnes* position (binding for all) within the framework of international law:

"In the Court's view, Portugal's assertion that the right of peoples to self--determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court"[18].

The emphasis on the *erga omnes* character rather than on hedging prerequisites moved the Court toward the position of universal applicability of the term. Nine years later, in 2004, in its Advisory Opinion on Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, the ICJ once again stated that the right to self-determination has the *erga omnes* character*:*

"The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination"[19].

It is worth mentioning that, according to the ICJ's judgement from 1964 on Barcelona Traction, Light and Power Company Limited, *erga omnes* rights are a concern of all States, and, therefore, all States have a legal interest in protecting them[20].

17 Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland, The incorporation of Crimea into Russian Federation in light of international law, 14. 12. 2014, p. 7.

18 Case Concerning East Timor (Portugal v Australia), Judgment, 1995, the ICJ Rep. 90, p. 102.

19 Advisory Opinion of the ICJ on the case of Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, 2004, p. 155.

20 Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), Judgement, 1964, the ICJ, p. 33.

Confirming the *erga omnes* character of the right to self-determination bore important legal consequences, since it eliminated ambiguity on that aspect that might have been stemming from the above-mentioned Court's judgment on Namibia from 1966. The *erga omnes* character of the right to self-determination has been since repeated in publications of *Institut de Droit International*[21]. Importantly, the ICJ stopped short of declaring the right to self-determination as *ius cogens* – a peremptory norm from which no derogation is permitted. It follows then that the actualization of the right to self-determination is a concern of all the States (erga omnes), but there might exist circumstances that could render it invalid in specific cases.

The high point of ICJ's espousal of a universal interpretation of the term might have happened in 2010 when its Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo strengthened the right to self-determination by proclaiming that:

"State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence"[22].

While, "no prohibition of declarations of independence" does not equate stating that all of them will end up being effective, it can be read as an encouragement of sorts. The ruling was invoked by the Crime an authorities in the region's declaration of independence in 2014[23] and by the Russian Federation during the speedy annexation that followed only five days later[24]. Those events led to critique of the ICJ taking the interpretation of the term as enabling secessionist movements[25].

2. Criteria for being considered a people

A key aspect regarding the applicability of the right to self-determination is deciding what criteria a group of people has to meet in order to be considered "a people" and hence be eligible to exercise it. The initial anti-colonial context in the period following formation of the UN led to a specific interpretation in that regard, as people inhabiting non-self-governing territories were declaring independence within

21 Resolution 2005/1 - Obligations erga omnes in International Law, Institut de Droit International, 2005, Art. 3.

22 Advisory Opinion of the ICJ on the case of accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2010, p. 79.

23 Ch. Walter and A. von Ungern-Sternberg and K. Abushov, Self-Determination and Secession in International Law, Oxford University Press, 2014, p. 297.

24 Address by President of the Russian Federation, Presidential Executive Office, 18 March 2014.

25 G. Matteo Vaccaro-Incisa, Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law, 15 Santa Clara Journal of International Law, p.132; R. Caplan and S. Wolff, Some Implications of the Advisory Opinion for Resolution of the Serbia-Kosovo Conflict, The Law and Politics of The Kosovo Advisory Opinion, p. 320.

colonial borders defined by European metropolises[26]. This formula lost its relevance toward the end of the twentieth century. Tensions around the status of Turks in Cyprus, Serbians in Bosnia and Russians in post-Soviet republics, to list a few cases, underscore the importance of establishing who can actually invoke the right to self--determination with all the consequences of it.

The legal definition of a *people* is vague and distributed across a number of sources of international law. It is a surprising state of affairs, regarding how crucial it is for determining, whether a certain collection of individuals is actually entitled to exercise one of the most fundamental rights in the system of international law. The ambiguous nature of a "people" has caused many disputes on eligibility of various aspiring communities aiming to establish a new State, especially after the 1960 when the narrow post-colonial definition began to lose its relevance.

International Covenant on Civil and Political Rights (ICCPR), a multilateral treaty agreed-upon by UN General Assembly in December 1966 is one of early legal sources from that time, which dealt with the complexities of the definition of a "people" (its "twin" Covenant on Economic, Social and Cultural Rights also addresses the subject). Since its inception 50 years ago, it has grown in importance, having been signed so far by a total of 173 parties and thus serves as one of the pillars of the international law framework. The Covenant introduced a division between the terms "people" and "minority". Article 1 of the ICCPR opens the Covenant by reinforcing the universal character of the people's right to self-determination:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[27].

Later in the Covenant, article 27 addresses the subject of "minorities", defining their rights in a much more limited way:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"[28].

The distinction between a "people" and a "minority" is crucial. If a certain group of people is labelled as a minority but not as a people, its members are entitled to practice their collective culture and pursue individual protections of their identity--related rights. However, attaining the status as a subject of international law is

26 J. Tyranowski, Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym, Warszawa – Poznań 1990, p. 109.

27 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN GA, Res. 16 December 1966, A/RES/2200, Art. 1.

28 Ibidem, Art. 27.

beyond that scope. It means that if a group is categorized as a minority rather than as a people, it does not have a right to self-determination. This argument is strengthened by the *Travaux Preparatoires* of the ICCPR where such a conclusion is explicitly stated[29]. One example of a minority which failed to be acknowledged as a people is the Mikmaq tribe in Canada. Mikmaq are the aboriginal inhabitants of Nova Scotia and Quebec. In 1980, some of the tribe's members unsuccessfully sought to be recognized as a people by the UN Human Rights Committee in light of the Article 1 of the ICCPR. The Committee is in charge of overseeing the implementation of rights enshrined in the ICCPR among Covenant's State Parties[30]. The tribespeople were hoping that the UN HRC would recognize a number of rights relating to the legal status of Mikmaq culture and their political self-determination. The Committee refused to proceed with the case, citing inadmissibility of Mikmaq's claim due to the difference between a *people* and a *minority*, and they were included in the latter category[31].

The Conference on Security and Co-Operation in Europe Final Act, signed in Helsinki in 1975 a political declaration of USA, Canada and European States, further addressed the topic of *minorities,* confirming their cultural and human rights:

"The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere"[32].

The omission of political self-determination in that statement and its focus on personal rights within national legal frameworks, rather than collective ones can be perceived as a reinforcement of the distinction laid out in the ICCPR.

The issue grew even more pressing in the 1990s due to fragmentation of both the Soviet Union and Federal Republic of Yugoslavia. In 1990, recognizing this situation, the United Nations Educational, Scientific and Cultural Organization (UNESCO) organized a high-profile conference on the subject, gathering the best experts in the field. In the official conclusion of the event we read:

"The definition of 'peoples' is uncertain and the notion of peoples' rights could lead to dangerous proliferation of claims, undermining settled borders, national sovereignty and international peace and security. (…)during the meeting the

29 M. Aukerman, Definitions and Justifications: Minority and Indigenous Rights in a Central/East European Context, "Human Rights Quarterly", Vol. 22, 2000, p. 1035.

30 International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, UN GA, Res. 16 December 1966, A/RES/2200, Art. 40,41.

31 Communication of Human Rights Committee on The Mikmaq tribal society v Canada, UN Doc. A/39/40, No. 78/1980.

32 Conference On Security And Co-Operation In Europe Final Act, Conference On Security And Co-Operation In Europe, Helsinki August 1st 1975, p. VII.

following characteristics were amongst those mentioned as inherent in a description (but not a definition) of a 'people'(...):

1. a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life;
2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;
3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such grows, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
4. the group must have institutions or other means of expressing its common characteristics and will for identity.

It is possible that, for different purposes of international law, different groups may be a 'people'. A key to understanding the meaning of 'people' in the context of the rights of peoples may be the clarification of the function protected by particular rights(...)"[33].

While the statement is not a source of international law and does not deliver an exhaustive definition, it provides a list of criteria, which a group can be tested against. It also introduced, in the last part of the statement, an argument that classification as a "people" depends on the circumstances of each case. Additionally, distinguishing between claims and desirable objectives might mean that self-determination translates to different outcomes in various contexts, sometimes taking on a form of creating a new State but sometimes meaning autonomy within a federation or yet something else.

This framing, in which both the term "self-determination" and "a people" are relative and can be expressed in diverse ways, received recognition among an array of international law scholars. For instance, M. Perkowski and L. Antonowicz discussed various ways in which a people can express its right to self-determination, where establishing a new State is only one of many options[34]. Regarding the relative nature of the definition of "a people," Władysław Czapliński, in his publication from 1998 on self-determination in Central and Eastern Europe, claimed that a 'people' should possess an objective and a subjective element in addition to living on

33 International meeting of experts on further study of the concept of the rights of peoples, UNESCO, SHS- 89/CONF. 602/7, Paris, 22 February 1990, p. 22, 23.

34 M. Perkowski, Samostanowienie narodów w prawie międzynarodowym, Warszawa 2001, pp. 92–105; L. Antonowicz, O zmianach mapy politycznej świata w XX w. (kilka uwag ze stanowiska prawa międzynarodowego), Studia Iuridica Lublinensia 19, Lublin 2013, p. 47.

a certain, defined piece of territory. The objective element can include such features as: a separate language, customs, history and culture. The subjective element is the people's collective desire to preserve their distinctive character and pursue political sovereignty, expressed in political discourse and majority opinions among members of the community. According to Professor Czapliński the definition of a "people" also entails that if a given people already has a sovereign State, the right to self--determination is consummated[35]. The last part is a critically important perspective gaining legal and scholarly momentum as presented in the paragraphs below. It also represents a hedging approach to the subject to self-determination since it potentially limits the number of new States that could potentially be established.

In the early 1990s, the Arbitration Commission of the Peace Conference on Yugoslavia, known widely as the Badinter Commission after its chairman Robert Badinter, further developed the definition of a people as part of its effort to stabilize the legal situation in the Western Balkans after the Yugoslavian war. The Commission's work developed a framework to apply the right to self-determination in a context different than decolonization, effectively re- conceptualizing the term for the post-Cold-War era. The establishment of the Commission was agreed on by representatives of the Council of Ministers of the European Economic Community and the Socialist Federal Republic of Yugoslavia during a meeting in Brussels on August 27, 1991. It was granted the task of defining new viable international borders, based on internal Yugoslavian borders and the situation on the ground. Although its conclusions are not a source of international law, they are often cited as a crucial point of reference regarding the right of self-determination[36]. In its final opinion the Badinter Commission stated:

"Norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics vis-à-vis the minorities on their territory. The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international convention as well as national and international guarantees"[37].

It is important that the Badinter Commission referred to the Serbian population groups in Croatia and Bosnia-Herzegovina as minorities rather than a people. Since Serbians, as a people in general, already have their own Serbian-identity-based

35 W. Czapliński, Zmiany terytorialne w Europie Środkowo-Wschodniej i ich skutki międzynarodowoprawne, Warsaw 1998, p. 51.

36 J. Vidmar, Explaining The Legal Effects Of Recognition, The International and Comparative Law Quarterly 61(2), p. 370; C. Navari, Territoriality, self-determination and Crimea after Badinter, International Affairs (Royal Institute of International Affairs 1944-) 90(6), p. 1299; M. Pomerance, The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence, 20 Michigan Journal of International Law 31(1998), p. 31.

37 Appendix: Opinions of the Arbitration Committee of the Peace Conference on Yugoslavia, Council of Ministers of the European Economic Community, 11 January 1992, Opinion No. 2.

sovereign State (back then known as the Socialist Federal Republic of Yugoslavia, now simply as Republic of Serbia), their right to self-determination had been successfully *consummated*. Members of Serbian minorities in surrounding countries, identifying with their compatriots in Serbia, had no right to create yet another State. The logic goes that their collective right of self-determination as a whole *people* ends when one State is successfully created. What Serbian communities in other countries are entitled to in this situation are cultural and human rights reserved for *minorities*, without a possibility of a secession.

3. The right to self-determination and the principle of territorial continuity

Another important aspect of the right to self-determination is the tension between it and the principle of territorial continuity of existing States. To analyse that tension, let us first take a closer look at the requirement a people has to fulfil to establish a new country. A State is created when a people manages to establish a territorial organization, which meets the criteria for statehood laid out in Article 1 of the Montevideo Convention on the Rights and Duties of States. The Convention was developed at the forum of the Seventh International Conference of American States and signed on December 26 1933. It serves as a restatement of globally acknowledged customary international law. This means that norms included in it are applicable not just among the signatories but across the whole system of international law. This is reflected for example in the fact that the Badinter Commission invoked the Convention as a source of law in its First Opinion on the conflict in West Balkans[38]. The government of Switzerland was also citing the Convention as a source of international law[39]. Article 1 of the Convention lays out four requirements for State:

1. Permanent population;
2. Defined territory;
3. A government;
4. Capacity to enter into relations with the other States[40]. (This last requirement is sometimes perceived as a consequence of the previous three).

Besides the requirements listed in the Article 1, the Montevideo Convention says that the existence of a State is a matter of effective control. This was further

38 Appendix: Opinions of the Arbitration Committee of the Peace Conference on Yugoslavia, Council of Ministers of the European Economic Community, 29 November 1991, Opinion No. 1.

39 Recognition of States and Governments, Switzerland's Ministry of Foreign Affairs, DFA, Directorate of International Law, 2005.

40 Montevideo Convention on the Rights and Duties of States, Seventh International Conference of American States, December 26 1933, Art. 1.

acknowledged by the doctrine, among others by M. Shaw and J. Crawford[41]. This seemingly neutral list of prerequisites created a tension between the right of self-determination of a people on a land already recognized by the international community as part of another State and inviolability of territorial continuity of existing States – another recognized principle of international law. At the textual level, if the list of requirements has been met, a new State becomes reality.

The principle of territorial integrity pertains to interactions between existing States while the right to self-determination can be invoked an entity different than a State – "a people"[42]. For this reason, it might appear that the right to self-determination can overcome the principle of territorial continuity. This state of legal uncertainty prompted the ICJ in 2010 to attempt to reconcile the tension in its Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo:

"During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for[:]
[1.] the peoples of non-self-governing territories and
[2.] peoples subject to [2.1] alien subjugation, [2.2] domination and [2.3] exploitation.
A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases"[43].
(Square brackets added by the author.)

The ruling takes stock of various paths a people can take to actualize its right to self-determination by establishing a new state. Importantly, the number of these paths is limited, implying that creating a new state is not available in a situation not included among the enumerated categories.

The first viable path listed by the Court – proclamation of independence by non-self-governing territories – has been practically exhausted at this point, with essentially no relevant territories of that kind left following the process of decolonization. As noted by L. Antonowicz, the international community has a collective duty to facilitate actualization of the right to self-determination by non-

41 M. Shaw, International Law, Cambridge 2008, p. 202.; J. Crawford, The Creation of States in International Law, New York 2007, p. 97.

42 J. Tyranowski, Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym, Warszawa – Poznań 1990, p. 243; P. Łaski, Dezintegracja Związku Radzieckiego i Jugosławii w świetle prawa międzynarodowego, "Annales Universitatis Mariae Curie-Skłodowska" 1992, p. 63.

43 Advisory Opinion of the ICJ on the case of accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2010, p. 79.

-self-governing territories[44]. It has delivered on this duty for the most part. Since the establishment of the UN, around 100 non-self-governing territories became sovereign States[45]. 17 territories still listed by the United Nations as "non-self-governing territories" are Gibraltar, Western Sahara, and 15 small islands, mostly, in the Caribbean and the Pacific Ocean[46].

The second path – *peoples subject to alien subjugation, domination and exploitation*– is much more controversial. The theory states that a *people* is entitled to secede from a State to create another one, in case the previous one is committing massive atrocities against humanity. This view received recognition in the doctrine[47]. In case of Kosovo War, 8,692 Kosovar civilians and 3,631 insurgents were killed or went missing due to actions taken by the Serbian army. 90% of the Kosovo population was displaced[48]. These atrocities were deemed sufficient to make the Kosovar independence bid viable in the system of international law.

This theory was buttressed by various States around the world. Take Canada. Its Supreme Court, in its landmark ruling espoused by the government, declared that Quebecers, even if they were to be seen as a *people,* would not be allowed to create a State due to lack of atrocities committed against them[49].

While Canada's internal organ's ruling is not a source of international law, it remains an indication of State practice, which can become a building block of customary legal rules if other conditions are met, too. While Canada's Supreme Court rejected the independence bid, it validated a possibility of one, in case a government commits a sufficient number of atrocities. However, determining the necessary threshold of such atrocities proves difficult as not enough customary cases have accrued for its clear delineation. The one available case of Kosovo provides an important point of reference but a question remains open whether a smaller number of atrocities would be deemed sufficient, too.

Conclusion

The scope of the applicability of the term "right to self-determination" has been evolving since the establishment of The United Nations depending on the geopolitical situation. The initial anti-colonial context created momentum at the UN

44 L. Antonowicz, Zagadnienie podmiotowości prawa międzynarodowego, „ "Annales UMCS" 1998, Vol. XLV, p. 12.

45 L. Antonowicz, Rzecz o państwach i prawie międzynarodowym, Lublin 2012, s. 90.

46 List of Non-Self-Governing Territories by Region, United Nations, November 2020.

47 See F. Kirgis Jr., The Degrees of Self-determination in the United Nations Era, „American Journal or International Law" 1994, pp. 306–308; M. Perkowski, Samostanowienie narodów w prawie międzynarodowym, Warszawa 2001, p. 103

48 Kosovo Memory Book, 1998–2000.

49 Reference re Secession of Quebec 2 SCR 217, Supreme Court of Canada, 1998, p. 154.

General Assembly toward a universal and unconditional interpretation of the term. At the time, the ICJ served as a hedging influence, strengthening legal prohibition of creating States via external interference or intervention.

As the post-colonial drive lost its relevance and the collapse of the Soviet Union ushered in a slew of new countries, the focus shifted to the subject of the definition of "a people" vs. "a minority" and prerequisites necessary for the right to self--determination to supersede territorial continuity of an existing country. During this period, which spanned the 1990s and the 2000s, the ICJ proved to be in favor of an expanded version of the definition, which found a conclusion in its 2010 Advisory Opinion on the case of Kosovo.

The 2010s bore witness to a number of controversial cases of breakaway regions, including Catalonia, Scotland, Iraqi Kurdistan, and Crimea. The last one led to an effective secession and subsequent annexation by Russia. This dynamics drew the international community's attention to the risks that the right to self-determination might pose to the stability of the international system. This new political context, combined with the relative rise of the clout of China in the UN system, might lead to a shift of the pendulum once again towards a narrower and more guarded interpretation of the right to self-determination.

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REVIEW

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G. Terzis, D. Kloza, E. Kużelewska, D. Trottier (eds.)

Disinformation and Digital Media as a Challenge for Democracy

Intersentia, Cambridge 2020, pp. 388.

Deceit as a phenomenon endures as a pesky aspect of our routine, as old as human communication itself and surely used by corrupt rulers since the first state emerged and long before *propaganda* entered the English language. Yet the research interest for the essence and tools of telling lies have sky-rocketed since the notion of 'fake news' was born. The monograph edited by Terzis et. al. presents an ambitious interdisciplinary study focused not only on the concept of disinformation and the variety of its forms but also the possible solutions to the problem that stem from technology, public policy and legal framework. While most authors leave the complex legal dilemmas of the so-called post-truth era behind the brackets, the present work offers to look at the sensitive questions in the field, e.g. is all scientific research (as defined by the GDPR) *good* research? While Singapore takes effective legal action against online manipulations, will the EU develop a comparable injunction in the nearest future? And, if enacted, would the latter violate the freedom of expression?

The book begins with several takes on the concept of disinformation: its origins, history and possible threats to representative democracy as a 'rational project' largely dependent on a free press. In the first chapter, *Papakonstantinou* defies the novelty of 'fake news', which is hard to disapprove of, while the semantic analysis of the term as an obvious oxymoron can be questionable, if the reader understands the element of 'news' as a sort of media product, not a set of facts. The following

chapters scrutinize the historical parallels with Nazi Germany, borrow from the elite theory and build their prognoses for democracy with diverse amounts of optimism. Referring to the modern history of the Netherlands, *Lukkasse*nasserts that nowadays an 'honest and sincere representative democracy is impossible' due to the massive impact of digital technology in the public sphere and the sectoral monopoly of the key players in certain areas, i.e. internet search. This conclusion goes in line with another fundamental explanation of the post-truth era origin offered by Francis Fukuyama in his *Identity: The Demand for Dignity and the Politics of Resentment.* Indeed, in 2016 the conservative voices resonated better with the *identities* of the voters, especially in the economically deprived regions of the US and the UK, but it is also true that a reboot of the participatory democracy is slowly taking place with digital media being an effective means to mobilize grassroots movements, such as #BlackLivesMatter or #MeToo.

The second part of the book is dedicated to country case studies of spreading and countering disinformation collected from across the EU and the US. The selection of the chapters provides the reader with a not-so-typical overview of stories from post economic crisis Greece, deeply divided Northern Ireland and the US under George Bush Jr.'s administration, coupled with an empirical study on the matrices of fact-checking instruments by *Pavelska et al*. Within the setting of vicious info-attacks on the EU, it is extremely compelling to look at the instrumentalization of anti-fake news policy within the Union in the last part of the book. *Hanych & Pivoda* follow the evolution of the ECHR's position on the thin line between the freedom of expression and fighting against falsehood. In the respective summaries, the contributors propose an array of the traditional 'cures' for the malfunctioning democracies – information hygiene, modified legal framework as opposed to e.g. automated filtering of content.

Disinformation and Digital Media as a Challenge for Democracy is a comprehensible and straightforward piece of work, which is definitely of interest for political scientists, lawyers, media researchers and anyone interested in better understanding how the digital media is intertwined with political power in the twenty-first century. Maybe some readers would question the relevance of G. Bush Jr's 'war on terror' to the contribution as it took place before the massive digitalization of media or wonder why the impact of disinformation has not been assessed from the standpoint of e.g., climate change deniers or in the countries of Global South. As the book aimed rather for deep insight from political philosophy and theory of law, the scarce cultural perspective does not harm the overall great research value of the volume.

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