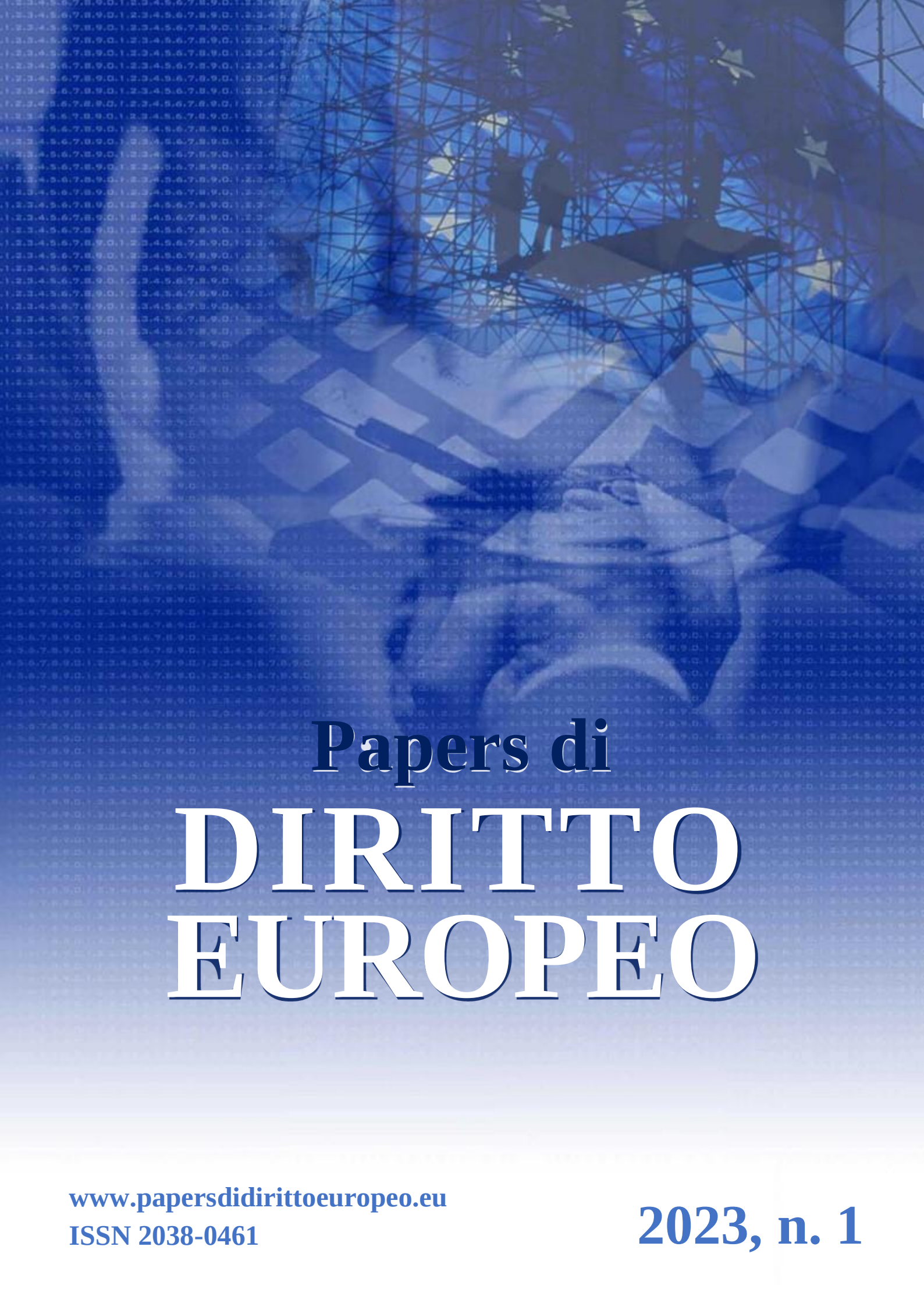

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INDICE

Soft to be strong: the use of bilateral soft law in the EU environmental external action

Francesco Spera[*], Francesca Leucci[**]

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1. Introduction.

The European Union (EU) makes use of a variety of legal instruments in conducting its external relations with third countries and international organizations. Together with international agreements concluded on the basis of Art. 218 Treaty on the Functioning of the European Union (TFEU), the Union also adopts a wide variety of bilateral soft law instruments. Carrying different labels[1] and employed by all EU institutions responsible for EU external relations[2], these soft bilateral tools are normally adopted between the Union and third states and international organizations in several policy areas. An important element that characterizes them, and, at the same time, differentiates them from international agreements, is their «non-binding nature» for the parties that adopt them. From this characteristic, most of the literature in international law has derived the term of «soft»[3] and it has defined soft international instruments broadly as «any written

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[1] Such as memorandum of understandings, joint communications, joint letters, arrangements, and codes of conduct, etc.

[2] Council of the European Union, the High Representative of the Union for Foreign Affairs and Security Policy, the European Union External Action (EEAS) and some EU Agencies (Europol, Eurojust, Frontex).

[3] R.A. WESSEL, J. LARIK, *EU External Relations Law: Text, Cases and Materials*, 2nd ed., Oxford, 2020; R.A. WESSEL, *Normative Transformations in EU External Relations: The Phenomenon of «Soft» International Agreements*, 2020, pp. 72-92, available online; O. STEFAN AND OTHERS, *EU Soft Law in the*

international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour»[4].

Despite the fact that international agreements still continue to be the key legal tool to regulate the EU's external action with third countries and international organizations, it has been observed that the «recourse to non-binding instruments in governing the relations of the EU with the rest of the world is increasingly common and compared to binding international agreements, at least two times more bilateral soft law tools are agreed between EU actors and international organizations or third countries»[5]. In particular, EU institutions have increasingly resorted to international soft law instruments in politically sensitive and technically complex areas, especially in the framework of migration, security, and environmental crisis[6]. Most of the EU External Relations doctrine generally classified them in two main groups, namely political commitments and administrative arrangements[7]. Following the common practice of States and international organizations, the use of soft law seems to be motivated by various reasons. Generally, scholars tend to highlight that this practice is justified by the need to increase the effectiveness of external action, to allow greater smoothness in negotiation and conclusion of an instrument, or to enhance the margin of discretion of the signatories in the fulfilment of commitments[8]. In addition to that, non- binding agreements may be more suitable to the political sensitivity of the subject of the agreement or to its changing nature. These reasons have been analysed and criticized, for instance, in important cases which are often mentioned in the EU law literature such as the Joint Way Forward (JWF) on

EU Legal Order: A Literature Review, 2019, pp. 1-18, available online. F. TERPAN, *Soft Law in the European Union, The Changing Nature of EU Law*, in *Sciences Po Grenoble Working Paper* No. 7, 2013, pp. 1-40, available online; G.C. SHAFFER, M.A. POLLACK, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, in *Minnesota Law Review*, 2010, pp. 1-94, available online.

[4] This definition is adopted generally for the purpose of the research. The term will be discussed in greater detail below in paragraph 2 and chapter 2. D. SHELTON, *Soft Law*, in D. ARMSTRONG (Edited by), *Routledge Handbook of International Law*, Oxon, 2009, pp. 68-80.

[5] R.A. WESSEL, J. LARIK, *EU External Relations Law: Text, Cases and Materials*, cit. See also R.A. WESSEL, *Normative Transformations in EU External Relations*, cit., p. 72; P.J. CARDWELL, *EU External Relations Law and Policy in the Post-Lisbon Era, Cardwell*, The Hague, 2014, pp. 1-16, available online; L.A.J. SENDEN, *Soft Law and Its Implications for Institutional Balance in the EC*, in *Utrecht Law Review*, 2005, pp. 79-99, available online.

[6] The expansion of the use of soft law concerns other policy areas as well. See C. MOLINARI, *The EU and its Perilous Journey through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns*, in *European Papers*, 2022, No 1, pp. 151-170, available online; C. MOLINARI, *EU Institutions in Denial: Non-Agreements, Non- Signatories, and (Non-)Effective Judicial Protection in the EU Return Policy*, in *Maastricht Faculty of Law Working Paper*, No. 2019-02, p. 3, available online; J. ALBERTI, *Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts*, in *federalismi.it*, 2018, n. 7, pp. 1-23, available online; M. MARKAKIS, P. DERMINE, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, in *Common Market Law Review*, 2018, pp. 373-386, available online.

[7] R.A. WESSEL, J. LARIK, *EU External Relations Law: Text, Cases and Materials*, cit., p. 119; see also P. G. ANDRADE, *Insight the Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments, European Papers*, 2016, pp. 115-125, available online.

[8] *Ivi*, p. 116.

migration issues between Afghanistan and the EU of 2016[9], Memorandum of Understanding (MoU) between the European Community and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union[10], or the well-known EU-Turkey Statement[11].

In this context, by taking into consideration the past practices, researchers and critics that these instruments have posed in certain fields such as migration, or environment, the current contribution assesses from a legal and economic perspective the pro and cons of displaying soft bilateral instruments by the European Union in its external environmental action and highlights the risks and opportunities of using soft bilateral legal instrument in EU Environmental external relations. As explained above, they can pursue more than just one goal, since they serve to solve diplomatic, procedural and political issues at the same time[12]. Although the plethora of soft bilateral instruments is quite waste, this research focuses on a specific instrument adopted in 2016 between the EU and India: 2016 Joint Declaration by India and the European Union on an Indo-European Water Partnership[13].

Cooperation between the EU and India has increased significantly in recent years, and recently India is becoming a very important geopolitical partner with the Union. It represents the world's biggest democracy and it represents a strategic actor in contrast with another Asiatic superpower, China. Particularly, the European Parliament stressed the strong political, economic, social and cultural links between India and the Union, with a potential for developing stronger and deeper bilateral relations in order to tackle climate changes and environmental crisis[14]. The EU and India, as the world's third and fourth largest emitters of greenhouse gases, share a common interest in fighting climate change and facilitating the transition to a sustainable economy. The interest of the European Parliament was confirmed by a Joint Statement issued the last 8 of May 2021 between the EU-India leaders' that confirms several commitments and promises for further strengthening the ties between the two regional entities[15].

From a legal point of view, this instrument might represent a potential challenge for the EU legal order, as it has been pointed out for other soft bilateral instruments by

[9] European Commission, Afghanistan: «*Joint Way Forward on Migration Issues between Afghanistan and the EU*», 2 October 2016, available *online*.

[10] COM(2005) 468 final of 20 October 2005, Decision of the Commission on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution.

[11] A. OTT, *The «Contamination» of EU Law by Informalization? International Arrangements in EU Migration Law*, in *Verfassungsblog.de*, 2020, available *online*.

[12] R.A. WESSEL, *Normative Transformations in EU External Relations*, cit., p. 75.

[13] Commission Decision C(2016)156, of 30 March 2016, on a joint declaration by India and the European Union on an Indo-European Water Partnership.

[14] EU-India relations: Parliament calls for stronger ties between the world's two biggest democracies, 29 April 2021, press releases available *online*.

[15] Joint Statement EU-India leaders' Meeting, 8 May 2021.

the European doctrine[16], whereas, from an economic perspective, it might be justified in terms of efficiency.

The outcome that might result is twofold. On the one hand, through its economic perspective, the study might shed light on the potential of these instruments for providing rapid and efficient answers in order to combat climate changes and environmental crises. On the other hand, the legal perspective might show legal and constitutional limits within the EU legal order, hence confirming concerns already raised in the European literature.

Before delving into the analysis of the selected instrument, the next two sections will provide an overview of scholarly explanations for which soft law is employed from both a legal and an economic perspective. Following the analysis of the soft tool, this paper will draw some conclusions. Moreover, given the limited scope of the present research, final suggestions for future research paths will be provided.

2. Why softening the EU external relations: a legal perspective.

All EU actors with external representation competences conclude international agreements. These actors are EU agencies (especially Europol, Frontex or EASA), the EEAS, the High Representative, the Commission[17], the Council and European Council. The reason for this large involvement is based on the treaties structure of the European Union and the competences allocations. The Union is a supranational organization, whereby the competence division does not follow the logic of States. In consequence, the governmental and administrative tasks of representing the Union externally belong to more than one actor. Furthermore, and to make it even more complex, each policy fields provide a different legal framework for the allocation of external action and competences. Thus, each organ derives its concrete mandate from the primary and secondary law that regulates the policy area[18]. For the purpose of the analysis, external relations soft bilateral instruments account for international soft laws that both the EU and its Member States produce as well as internal soft law. The study is relevant because European law scholars have observed the existence of a nexus between the reasons and

[16] A. OTT, *The «Contamination» of EU Law by Informalization?*, cit.

[17] A. Ott argues that the Commission has, exceptionally, the power to conclude international agreements that escape the treaty-making procedure under primary law. The mandate for such Commission treaty-making derives more frequently from secondary EU law, for instance, Art. 8 of the IPA II Regulation. The EU Commission's administrative agreements: «Delegated treaty-making» in between delegated and implementing rule-making', 200-232, in E. TAUSCHINSKY and W. WEIß (edited by), *The legislative choice between delegated and implementing acts in EU law*, Edgar Elgar Publishing, 2018.

[18] The President of the European Council and the Council fulfill external representation tasks as laid out in Arts. 15, paras. 1 and 6, art. 16, paras.1 and 6 TEU. Art. 220 refers to Commission and the High Representative, the EEA according to the Council Decision of 26 July 2010 (Art. 2 and Art. 5 para. 6) on High Representative), Frontex Regulation covering international relations in Regulation of 14 September 2016, (Art. 8, Arts. 14, 15, 52), in A. OTT, *The "Contamination" of EU Law by Informalization?*, cit.

aims of international soft law and EU soft law exists. Many scholars in recent years stressed that those instruments have not been properly assessed in relation to the supranational character of EU law, that can be differentiated from international law[19]. Despite the fact that international soft law and internal EU soft law have been the object of many academic researchers in the last twenty years, it is noted that the legal effects of EU external relations soft law in the EU law are still underexplored[20]. For this reason, the paper tries to address this gap, assessing one of these instruments from a legal perspective. However, the complexity and the multifaceted shapes that characterizes external relation soft law, as an emerging, yet underdeveloped field of research, cannot be fully understood from a pure legal standpoint. Therefore, the economic analysis will also help the reader to understand and discover the international action of the EU from another perspective.

2.1 Why soft law is adopted (an emerging taxonomy of soft laws for the EU external relations).

As mentioned above, the literature presents many reasons for adopting soft law in EU external relations.

From a legal perspective, the use of non-legally binding instruments is considered as a basis for cooperation with third countries especially in the sensitive field such as migration, mostly for political reasons and to avoid democratic check and long formal decision-making process[21]. For instance, under its strategy inaugurated in 2005 and later changed in 2011 for the Global Approach to Migration and Mobility (GAMM), the Union does not exclusively rely on legally binding readmission agreements to cooperate with third countries[22]. Soft bilateral instruments are considered to be an attractive instrument for third country governments and in the Commission view, the idea of informal arrangements, in the forms of compacts, avoids the risk that «concrete delivery is held up by technical negotiations for a fully-fledged formal agreement»[23]. Overall, partner countries therefore maintain a higher level of flexibility and control in the context of non-binding international accords[24].

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[19] A. OTT, *The «Contamination» of EU Law by Informalization?*, cit.

[20] *Ibidem*.

[21] See among all, C. MOLINARI, *EU Institutions in Denial*, cit.; S. POLI, *Articles The Integration of Migration Concerns into EU External Policies: Instruments, Techniques and Legal Problems*, in *European Papers*, 2020, No 1, pp. 71-94, available *online*.

[22] *Ibidem.*

[23] COM(2016) 700 final of 18 October 2016, Communication from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration.

[24] S. CARRERA, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, Switzerland, 2016, available *online*; J.P. CASSARINO, *Readmission Policy in the European Union* (Committee on Civil Liberties, Justice and Home Affairs, European Parliament 2010)

A good example often mentioned and contested by the EU external relation literature is the 2016 Joint Way Forward on Migration Issues between Afghanistan and the EU[25]. In 2015, following the events of the Arab spring and the Syrian war, Europe was facing a migration crisis resulting in the arrival of an unprecedented number of people across the Mediterranean Sea and the Balkans seeking asylum. In particular, one of the most represented nationalities among these asylum seekers was Afghan (20.9%)[26]. A high number of them had little chance of recognition of asylum in the European Member States since it was more difficult for Afghan nationals to be granted for protection and thousands of people had to be sent back[27]. Due to the high number of immigrants, the steadfast demand for a united actions of member states by the media and public opinion, the Union could not conclude a formal EU readmission agreement with Afghanistan because the procedure according to the treaties for concluding an formal readmission agreement would have taken too long[28]. Moreover, the Afghan Parliament was strongly opposed to the conclusion of a readmission agreement for political reasons due to humanitarian concerns regarding their nationals.

As a consequence, in order to overcome the impasse in the negotiations, a need for a «rapid, effective and manageable process for a smooth, dignified and orderly return»[29], led to the adoption of an informal/non-binding instrument circumventing ratification procedures on EU and Afghan side, and escaping the democratic control by the European and the national parliament. In this sense, another well-known example of a soft bilateral instrument circumventing the consent of a national parliament is the Memorandum of Understanding (MoU) between the European Union and the Swiss Federal Council on a contribution by the Swiss Confederation towards reducing economic and social disparities in the enlarged European Union[30].

The majority of researches about the rationale and the characteristics of EU soft bilateral instruments have drawn a possible taxonomy of the practice of the European Union at the international level leads. As mentioned above, although not figuring among

Study for the European Parliament 14-15; N. COLEMAN, *European Readmission Policy: Third Country Interests and Refugee Rights,* Boston, 2009, p. 209.

[25] European Commission, Afghanistan: «*Joint Way Forward on Migration Issues between Afghanistan and the EU*», 2 October 2016, cit.

[26] Monthly Arrivals by Nationality to Greece, Italy and Spain. Refugees/Migrants Emergency Response – Mediterranean. 31 March 2016. Retrieved 14 May 2016, available *online*.

[27] At a time when security in Afghanistan was worsening, policy changes seemed to be a reaction to the migration situation of Member States rather than to the objective security situation in Afghanistan.

[28] European Council on refugees and exiles, EU migration policy and returns: case study on Afghanistan, ECRE: European return policies – getting the numbers no matter the cost, 2017, pp. 1-37, available *online*.

[29] European Commission, Afghanistan: «*Joint Way Forward on Migration Issues between Afghanistan and the EU*», 2 October 2016, cit.

[30] Court of Justice, judgment of 28 July 2016, case C-660/13, *Council* v. *Commission* («Swiss MoU»); C(2013) 6355 final of 3 October 2013, Commission Decision on the signature of the addendum to the Memorandum of Understanding on a Swiss financial contribution.

legal instruments *ex* Art. 288 TFEU, nonetheless it has been observed that they come in a vast variety of shapes and forms[31]. In EU external relations and international law, typologies and rationale of employment of those instruments may differ from each policy areas. Thus, it can be noted that both European and international law studies converge on classifying soft bilateral law based on the function assigned to them by their authors[32]. If the legality of hard law derives in particular from being placed by authorities legitimated for this after a pre-established procedure, in adherence to a formal or institutionalist conception of law, the legal character of soft law derives from its effectiveness, in adherence to a functionalist perspective or, better, exclusively functionalist.

In this sense, the study embraces an international normative transformism approach that has interpreted soft law in a dynamic perspective of the sources of international law whose functions are in common with EU external relations soft bilateral instruments[33]. In consequence, these tools «replace binding bilateral (or multilateral) agreements, and, in general, supplement, interpret and prepare existing or future (multi) or bilateral international treaties»[34].

In conclusion, the examples assessed and chosen for their relevance in the EU practice and EU doctrine, show that soft governance and the use of soft law do not participate in the characterization of the European Union as a unique model of regional integration. On the contrary, they reflect a tendency of EU law to resemble more and more as state law. The author believes that the evolution of certain EU policy fields (i.e., common foreign and security policy) that heavily rely upon soft law tools, participate in what Terpan calls «normalization process», meaning the «transformation of the EU into a "traditional" organization»[35]. Moreover, this transformation can be confirmed by the fact that the EU is embracing, according to Wessel, a global trend in which formal treaties make way for «informal law»[36].

2.2 Why soft law should not be adopted (potential legal challenges).

Although it has been indicated that a turn to informality should not *per se* have

[31] O. STEFAN, *EU Soft Law in the EU Legal Order*, cit., p. 9; R. BAXTER, *International Law in Her Infinite Variety, in International and Comparative Law Quarterly*, in *International and Comparative Law Quarterly*, 1980, available *online*.

[32] R.A. WESSEL, J. LARIK, *EU External Relations Law: Text, Cases and Materials*, cit.

[33] A. OTT, *The «Contamination» of EU Law by Informalization? International Arrangements in EU Migration Law*, cit.

[34] *Ibidem*.

[35] F. TERPAN, *Soft Law in the European Union*, cit.

[36] J. PAUWELYN, R.A. WESSEL, J. WOUTERS, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, in *The European Journal of International Law*, 2014, pp. 733-763; R.A. WESSEL, *Normative Transformations in EU External Relations*, cit., p. 72.

negative consequences for the legality of norms[37], most of the literature agrees that soft law should not be utilized to avoid the basic principles of EU law. Thus, the compliance with these EU constitutional principles provides a criterion to evaluate the legality of soft international instruments[38]. In this regard, García Andrade also concluded that «international soft law measures, as any other legal act, need to find, broadly speaking, a legal foundation in the Treaties in order to be correctly adopted»[39]. Most of the European law scholars are almost unanimous to recognized that the use of these measures may run the risk of stepping outside the EU legal framework challenging the protection and the promotion of certain principles of EU constitutional and administrative law[40]. One of the most quoted authors in this field, Linda Senden, in 2004, already argued that the Commission and the Council for employment soft law instead of legislation upsetting the «horizontal division of powers – between the Community institutions – which in its turn can be seen as affecting the legitimacy of the European Community»[41]. Stating that an act «is not intended to create legal rights or obligations under international law»[42] or is «not intended to create legally binding rights and obligations», regardless of its function, cannot in and of itself side-step values and principles of the EU legal order.

This is the reason at the basis of the current contribution. From a legal point of view, many EU scholars have raised criticisms and issues with regards to the use of soft law in external relations by the EU institution. The assessment of the Joint Declaration with India might help to shed light with regards to the legality of the adoption of soft law in another sensitive field, namely the environment.

3. Why softening the EU external relations: an economic perspective.

The aim of this section is to shed light on the rationale for using soft law from an economic perspective.

Scholars acknowledge that the law and economics has almost bypassed

[37] *Ibidem*.

[38] In the Commission Decision C(2013) 6355 final, cit., the Swiss MoU case where the Court thus underlined the importance of the principles of conferral and institutional balance even in the case of soft external arrangements. In fact – and this is essential for the point made by the present paper – the «soft» nature of the agreement does not transform it being part of the overall EU external relation regime.

[39] R.A. WESSEL, *Normative Transformations in EU External Relations*, cit., p. 83.

[40] See MEIJERS COMMITTEE, *1806 Note on the Use of Soft Law Instruments under EU Law, in Particular in the Area of Freedom, Security and Justice, and Its Impact on Fundamental Rights, Democracy and the Rule of Law*, 2018, available online; L. PECH, *The Rule of Law as a Guiding Principle of European Union's External Action*, in *CLEER Working Papers*, 2012, available online; K.W. ABBOTT, D. SNIDAL, *Hard and Soft Law in International Governance*, in *International Organization*, 2000, available online.

[41] L.A.J. SENDEN, *Soft Law and Its Implications for Institutional Balance in the EC*, cit. p. 97.

[42] European Commission, Afghanistan: «*Joint Way Forward on Migration Issues between Afghanistan and the EU*», 2 October 2016, cit.

international law, with few exceptions[43]. One of the possible reasons for that is the idea that its application in the international domain is not so useful as in the domestic one. Conversely, some scholars highlighted how the economic analysis may help enhance the combination between doctrinal description and prescription effects of rational maximising behaviours under conditions of scarcity, it may shed a light over traditionally neglected questions. For instance, it can help conduct deeper inquiries into the role of international institutions as "*balancers*" and thus solve the institutional choice of which body should be better suited to adopt decisions that affect all international actors (*e.g.*, on the proper environmental standard). These kinds of questions require indeed an examination of relative institutional competencies and strategic interactions among various institutions. Moreover, applied to contexts other than traditional markets, economics does not only aim at wealth maximization but it can also include the maximization of multiple values at the same time[44]. In any case, it is important to bear in mind that the economic analysis of international law looks at states as key units[45]. While states pursue their individual goals, they inevitably create externalities that affect other states, creating a gap between what is optimal for an individual state and what is globally efficient. The goal of international cooperation is thus to close this gap.

Formally binding agreements among states are surely the main tool by which states address externalities created by their actions because they help maximise the value of agreements[46]. The use of soft law from an economic perspective seems to be therefore inefficient. However, Guzman and Meyer[47] pinpointed three complementary reasons that can explain the choice of what has been called as a «middle ground approach to commitment»[48].

First, States resort to soft law as a coordinating device when binding agreements are not needed, meaning that they use it to resolve coordination games. In fact, relationships between countries can be described either as a pure coordination game or as more complex variations with some tension between the parties to agreements. Soft law is traditionally employed when there is some degree of certainty that States' incentives will remain constant in the future. In this case, the expected levels of compliance would be the same across various forms of agreements, including formal legal obligations and informal norms. Therefore, if all is equal from a compliance

[43] J.L. DUNOFF, J.P. TRACHTMAN, *Economic Analysis of International Law*, in *Yale Journal of International Law*, 1999, 1, pp. 1-59, at p. 3.

[44] *Ibidem.*

[45] A. SYKES, A. GUZMAN, *Economics of International Law*, in F. PARISI (edited by), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions*, 2017.

[46] According to Sykes and Guzman, states try to maximise the value of their agreements by creating optimal enforcement mechanisms. Since violations in international law are very frequent, hard laws seem to be much more attractive than soft laws as they carry the maximal penalty for non-compliance.

[47] A. GUZMAN, T. MEYER, *International Soft Law*, in *Journal of Legal Analysis*, 2010, 1, pp. 171-225.

[48] *Ibidem*, p. 188.

perspective, then informal norms may be preferred for many reasons. First of all, they can be adopted by lower rank officials without undergoing long and complex bureaucratic processes of binding agreements. From this point of view, soft law allows to save public money when small efforts to coordinate behaviours are needed. These efforts are normally limited to information sharing among national enforcement authorities[49]. Seemingly, when soft law is used as a coordinating device it does not raise interesting issues as to its compliance. For this reason, scholars have been investigating more in depth the other reasons for which soft laws are used by states.

The second reason why soft law is used in international law is because its violation entails less costs compared to hard law (loss avoidance theory). In fact, when States enter into agreements, they will consider both their gains and their losses, *i.e.* the costs that they will bear if they violate their terms. From this point of view, it is quite intuitive that soft law is preferred every time that marginal costs of sanctions (from hard law) are expected to be higher than marginal benefits (avoided costs of violations). However, the consequences of violations in international law differ from domestic law regimes[50] and they basically refer to «the three Rs of compliance: reputation, retaliation and reciprocity»[51]. Particularly, reciprocity is the pillar of many bilateral agreements and they achieve cooperation exactly because the States prefer mutual compliance rather than mutual defection. If enforcement is not needed, then soft law has to be preferred, since there is no need for a costly promise by hard law. However, the strength of reciprocity is limited by several factors. First of all, reciprocity does not protect against a future change of interests between the parties which may make the threat of reciprocal defection ineffective. Secondly, reciprocity may fail when compliance is hardly credible for reasons unrelated to the Treaty[52]. Thirdly, the threat of ceasing compliance as a response to the violation of another party may not work in the case, for instance, of large multilateral environmental agreements. Based on these cases, it can be argued that reciprocity cannot be regarded as the main reason why soft law should be preferred to hard law. The second «R» of compliance (reputation) might provide a better explanation. In international law, failure to comply makes also future promises less credible towards any states and not only the parties to the violated agreement[53]. Therefore, although

[49] Guzman specially highlights that in the area of international competition policy where regulators are incentivized to cooperate and the main goal of soft law agreements is to improve their communication (A. GUZMAN, *Antitrust and International Regulatory Federalism*, in *New York University Law Review*, 2001, pp. 1142-1163).

[50] In domestic contract law regimes, the cost of violation is traditionally represented by a money transfer imposed by courts that does not have an impact on the total welfare of the State since what is lost by one party is gained by another.

[51] A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 193.

[52] See on this point the example of the International Covenant on Civil and Political Rights (ICCPR), A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 194.

[53] For more literature on this point, see A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 195.

treaties are considered to be the most effective instruments of cooperation[54], if the expected costs of their violation (including reputational losses) are higher than the sum of expected reputational and direct losses, then soft law will be adopted rather than hard law. In the end, all relies on the trade-off between the expected benefits of compliance from the treaty and the expected penalty in case of its violation. In order to simplify the distinction between hard and soft law from an economic perspective, Guzman and Meyer distinguish three main cases: when compliance is expected whether or not the agreement is binding, when compliance is only expected if the agreement is binding, when violation is expected even if a formal treaty is adopted. Arguably, soft law is more convenient in the first case and, in the other two cases, it depends on the trade-off between expected gains from cooperation and costs.

The third reason why states choose soft law is that it provides enough flexibility to change the law in response to changed circumstances (delegation theory)[55]. In fact, non-binding agreements lower penalties associated with violations, they avoid the exercise of a veto over potential amendments, and, on the other hand, they induce unilateral innovations of their terms. From this point of view, the choice between soft and hard law relies on the trade-off between transaction costs involved in the Pareto-improving amendment of international agreements (*e.g.*, unanimity consensus)[56] and the expected costs involved in welfare-enhancing unilateral deviations from nonbinding agreements. Under the delegation theory, States will opt for soft law every time that the expected benefits from unilateral changes exceed the expected costs[57]. This is likely to occur in three cases: 1) when it is uncertain whether actual rules will remain optimal in the future; 2) when it is uncertain whether the states will be able to renegotiate the rules under changed circumstances in the future; 3) when one or a small group of states has the power to change what is expected to be a compliant behaviour. The first case refers to states' uncertainty about future conditions in the world. The second case refers to the fact that unilateral changes might be superior compared to explicit renegotiations. The third case relates to the need of preserving cooperation also in face of future pressures to change[58].

In conclusion, no single theory can explain the use of soft law in international commitments. Coordination, loss avoidance and delegation offer three different rationales for preferring soft law over hard law and they all refer to the expected

[54] C. LIPSON, *Why are some international agreements more informal?*, in *International Organization*, 1991, pp. 495-538, at p. 508.

[55] A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 195.

[56] However, soft law does not always lower transaction costs. For instance, multilateral soft law agreements operating by unanimity raise similar issues to binding agreements. But, soft law makes violations more likely to occur, hence encouraging informal processes of amendments spurred by more frequent violations. A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 198.

[57] A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 199.

[58] For more details and examples on these cases, see A. GUZMAN, T. MEYER, *International Soft Law*, cit., p. 200.

inefficiency of binding agreements which is necessarily case-specific. The next section will thus investigate one selected case of soft law and unveil whether its adoption can be regarded as legally and economically reasonable.

4. 2016 Joint Declaration by India and the European Union on an Indo-European Water Partnership.

The instrument falls in what the emerging EU External Relations doctrine has defined as political commitments according to its label[59]. In this category, non-binding instruments that are generally found are MoU[60], and statements[61] which are normally concluded by the Union with a third country or international organization. This is an important point since, as stated above, the EU doctrine is unanimous to conclude that these instruments have some practical or legal effects, committing somehow the European Union, its states and its institutions. This is particularly true for the EU return policy, with the notable Joint Way Forward with Afghanistan, the EU-Turkey Statement, or the compact with Jordan[62].

In accordance with the Treaty law, ex Art. 218 (paras. 5 and 6), international agreements are adopted by a Council Decisions, by complying with the principle of conferral[63]. However, soft bilateral instruments usually do not fall into any formal obligation. Moreover, the European doctrine critics the lack of transparency given that many soft bilateral instruments adopted by EU Institutions are not published. By looking at the EU Commission register[64], it seems that only one out six documents have been published, whereas the others are only available upon request.

Despite a certain inconsistency in the terminology and the pre-Lisbon difficulty to understand the legal nature of the instruments, a post-Lisbon practice inaugurated by the Commission at least gives the possibility for the reader to trace whether the Parties (or

[59] A. OTT, *The «Contamination» of EU Law by Informalization? International Arrangements in EU Migration Law*, cit.

[60] MoUs are concluded that enable the macro-financial assistance provided to Eastern Partnership and ENP countries: C(2018) 4154/F1, Commission implementing Decision on the Annual Action Programme 2018 in favour of Georgia approving the MoU between the European Union and Georgia related to macro-financial assistance to Georgia. The legal *status* of the 2011 cooperation MoU between the European Commission and the World Organization for Animal Health (OIE) concerning their general relations is, however, not clear.

[61] C(2015) 8742/F1, Commission Decision, of 4 December 2015, on the signing of the Joint Declaration on the Central African Forest Initiative by the Central African partner countries (such as Congo, Cameroon) and by the European Union as well as other countries or organizations (including the Federal Republic of Germany, the Kingdom of Norway, the Republic of France).

[62] The Compact with Jordan is detailed in the Annex of Decision 1/2016 of the EU-Jordan association Council of 19 December 2016 agreeing on EU-Jordan Partnership Priorities.

[63] Art. 17, para. d) and para. e), of the Council rules of procedure; Council Decision of 1 December 2009, adopting the Council's rules of procedure.

[64] The key words in the research that have been used are: «Joint Declaration» and DG ENVI and DG Climate Action.

the Commission on behalf of the European Union) intended to confer a legal binding nature to it or not. Considering that international law doctrine generally maintains that the form of an instrument is not a significant criterion for determining its legal nature[65], agreements may constitute treaties regardless of their form and designation. Similarly, it is a consolidated view of the European Court of Justice that the form of soft bilateral law is «irrelevant»[66]. In fact, since its ERTA doctrine, the Court held the principle that the intention of the parties in the European legal order became a fundamental element and the EU principles are applied[67].

Having said that, it can be implied that the Joint Declaration is a soft law instrument that reflects this practice of the Commission, by stating that «is not intended to create any legal or financial obligations under domestic or international law in respect of either side».

Concerning the aim, as already mentioned, the instruments contain political commitments that are confirmed by certain elements. The Joint Declaration talks of «EU's substantive commitment», together with the Annex to the document, laid the foundations for the Partnership that has been lately created and Joint Working Groups. The former has been characterized by its own organization based on Forums and the latter by meetings on a regular basis. Commitments and actions undertaken according to this tool have been reported and assessed[68]. Furthermore, important intergovernmental commitments were confirmed by the Action Document for India – EU Water Partnership - Phase II, of the Annex 4 of the Commission Implementing Decision on the 2020 Annual Action programme for the Partnership Instrument: «The interest and intention of the GoI (Government of India) to work with the EU on water and river basin management issues was confirmed through the Joint Declaration on Water signed by the Republic of India and the EU in March 2016. The parties committed to work towards the establishment of the India-EU Water Partnership, bringing together representatives of relevant stakeholders, including interested EU Member States and Indian States, European and Indian institutions, businesses and civil society»[69].

Based on the above, it seems that this soft tool falls within the category of preparing and committing contracting parties to adopt later binding arrangements being categorized as political commitments that, according to the most recent EU External Relations researches on political commitments, might raise certain legal issues. Among them, the India-EU Water Partnership (IEWP) and a MoU on the India-EU Water

[65] R.A. WESSEL, *Normative Transformations in EU External Relations*, cit., p. 77.

[66] Court of the Justice, judgment of 23 March 2004, case -233/02, *France* v. *Commission*.

[67] Court of Justice, case C-233/02, cit., para. 26, concerning Commission guidelines; judgment of 16 June 1993, case C-325/91, concerning a Commission communication; see also judgment of 16 July 2015, case C-425/13, Commission v. Council, paras. 26-28; judgment of 4 September 2014, case C-114/12, Commission v. Council (Broadcasting Organizations), para. 39.

[68] See the IEWP website.

[69] Documents are available *online* here and *online* here.

Partnership, signed in October 2016 between the Indian Minister of Water resources, river development and ganga rejuvenation and the EU Environment Commissioner[70]. These actions enabled to conclude several IEWP activities that, after July 2017, have been co-financed by the European Union and the German Federal Ministry of Economic Cooperation and Development (BMZ).

5. Legal analysis of the Joint Declaration.

As with similar Joint Declarations[71], the instrument at issue contains the mandate on what the act is based, namely Art. 17 TEU[72]. However, there is an open interinstitutional and academic debate on the use of Art. 17 TEU, since it only refers to a general representation to external representation without indicating any peculiar instruments to be used[73]. From this point of view, according to the *vademecum* released by the Commission[74], this mandate is precise enough for adopting political commitments if the content of the soft law tool is in line with existing EU policies. In other words, the conclusion of political commitments cannot differ too much from the conclusion of international agreements. The Commission (or, in the case of CFSP, the MoU's High Representative) will negotiate and sign the document, where the actual conclusion is in the hands of the Council. Thus, the transformation may affect the norm, but not always the procedure. Conversely, the Council stressed that Art. 16 TFEU shall provide a more precise mandate to conclude political commitments on behalf of the EU since Art. 17 is too general and only refers to a Union's representation. From the Council's point of view, Art. 16 provides more power and any actions within external relations require an approval by the Council[75].

In this context, the Court of Justice has set certain thresholds when it comes to adopting external soft law by European institutions. They can only act within their competences assigned to them by the Treaties (horizontal conferral of powers) and they have to engage in mutual sincere cooperation[76]. Overall, the Court requires a specific

[70] Materials available *online*.

[71] See for instance COM(2015) 3955 final of 15 June 2015, Commission Decision on the Joint declaration establishing a Mobility Partnership between Belarus and the EU and its participating Member States; C(2015) 4269 final of 25 June 2015, Commission Decision on the signature of an MoU between the EU and China on reinforcing the EU-China IP dialogue mechanism.

[72] T. VERELLEN, *On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case*, in *European Papers*, Insight of 10 October 2016, pp. 1225-1233.

[73] A. OTT, *The «Contamination» of EU Law by Informalization? International Arrangements in EU Migration Law*, cit.

[74] Vademecum on External action of the European Union, available *online*.

[75] Contribution of the legal service, 15809/12, 6 November 2012, 5; contribution of the legal service, 5707/13, 1 February 2013. Only exceptionally and only concerning mobility partnerships, the Commission will also refer to Art. 79 TFEU; see C(2014) 3664 final of 15 June 2015, Joint Declaration establishing a Mobility Partnership between Jordan and the EU and its participating Member States,.

[76] C. HILLION, *Conferral, cooperation and balance in the institutional framework of EU external*

mandate to the Commission in order to act on behalf of the Union. In alternative, the Commission should seek the Council's prior approval for its action. With regard to the instrument at issue, the Commission Decision (para. 7) states that the Council has been informed. According to the established but limited case law, the Court did not find any breach of institutional balance by the Commission because the Council approved the negotiation of soft law and it was informed[77]. However, in the Joint Declaration there is no evidence that proves the Council's prior approval of the negotiation. The only sentence: «the Council has been informed» is not helpful to understand the nature of the institutional cooperation between the Council and the Commission.

In this sense, the Commission's reference to Art. 17 TEU might be problematic since it is argued that this EU co-funded structure – the IEWP - seems to resemble the Partnership Instrument whose legal basis relies on the Regulation (EU) No. 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries. Some elements might suggest this possibility.

Firstly, the 2014 Regulation is also mentioned at the basis of the adoption of the Action Document[78]. However, in the Joint Declaration there is no mention of the 2014 Regulation. Despite the fact that there is no reference to the 2014 Regulation in the official website, the IEWP, for its content, objective and aims is part of the EU-India strategic partnership among whose commitments it is possible to find a «scale up cooperation on water management»[79].

Secondly, in the Preamble of the Joint Declaration that created the IEWP, the words «mutually beneficial cooperation» or «reciprocity» are clearly a reference to the Art. 1 of the 2014 Regulation. «Subject matter and objectives», when it is stated that «[t]his Regulation establishes a partnership instrument for cooperation with third countries to advance and promote Union and mutual interests». Policy dialogues and action plans for promoting cooperation between the Union and a third country are also mentioned in the Joint Declaration and in Art. 1 of the 2014 Regulation. Both instruments promote the possibility to provide «business opportunities» for European companies. For this reason, it seems odd that the IEWP has not been created under the framework of 2014 Regulation. Moreover, since the 2014 Regulation empowers the Commission, in accordance with Art. 290 TFEU, to adopt delegated acts «in respect of the priorities defined in the Annex», it is not clear whether this Joint Declaration is in line with the «action plans and similar bilateral instruments» envisaged by the 2014 Regulation for supporting the implementation of Partnership and Cooperation

action, in M. CREMONA (edited by), *Structural Principles in EU External Relations Law*, Oxford, 2018, pp. 117-174, p. 142.

[77] Case C-233/02, *France* v. *Commission*, cit., paras. 40-41.

[78] See footnote 69.

[79] Factsheet, 8 May 2021, EU-India Strategic Partnership, available *online*.

Agreements[80]. Hence, it raises doubts whether the Commission might have the competence, within its delegated power, to adopt such political commitment at the basis of the creation of a partnership instrument. It seems indeed that the nature of bilateral alliance differs from country to country[81].

In conclusion, the interpretation above suggests that the Commission used its delegated power to adopt a Joint Declaration, namely a «political commitment», on behalf of the whole Union. This soft tool has created the basis for an India-EU Water Partnership, that represents a proper and well-structured partnership instruments, according to the content and aim defined by 2014 Regulation. The IEWP has been the basis for purposing important environmental goals for India, the EU and in particular some EU member states that seemed to be more involved than others. Although it is uncertain whether prior approval has been given by the Council, in this case, Art. 17 TEU might still constitute a breach of institutional balance by the Commission because it does not qualify as such a specific power with regards to the policy field and the commitments involved, following the MoU Switzerland case[82].

A counterargument to that may be that the Commission overused its power while being sure that it was playing within an exclusive competence of the Union, namely oceans and fisheries since the document was signed by Karmenu Vella[83]. This possibility might shield the Commission from any European constitutional principle's breaches. If it is argued that the Joint Declaration does not replace an international agreement, it falls within an exclusive European competence, then it is possible that it prepares or implements other soft or hard instruments as showed above, allowing the necessary flexibility for Member States to reinforce the parallel informal arrangements into which the Member States separately engage[84].

It is therefore possible that a Joint Declaration, as a non-binding instrument, has been a better tool for escaping concerns that were raised in relation with the 2014 Regulation. In its statement attached to the 2014 Regulation, the European Parliament noted that in the Partnership Instrument Framework there is no explicit reference to the possibility of suspending assistance in cases where a beneficiary country fails to observe the basic principles enunciated in the respective instrument and notably the principles of democracy, rule of law and the respect for human rights. Side-lining the role of the European Parliament seems also be the practice of soft bilateral tools according to the

[80] Annex of Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries.

[81] EU Strategic Partnerships with third countries, EU Strategic Partnerships with third countries (etiasvisa.com).

[82] Case C-660/13, *Council* v. *Commission* (MoU Switzerland), cit.

[83] His profile is available *online*.

[84] J.P. CASSARINO, M. GIUFFRÉ, *Finding its place in Africa: Why has the EU opted for flexible arrangements on readmission?*, University of Nottingham Human Rights Centre, 2017, available *online*.

majority of the EU doctrine[85]. Relevant precedents of stepping outside the democratic check of the European Parliament are the Joint Way Forward with Afghanistan and the EU-Turkey Statement. The ECJ in Tanzania and Mauritius cases held that at least an information right for the European Parliament ensures that the Parliament is in a position to exercise democratic control over the European Union's external action and, more specifically, to verify that the choice of the legal basis for a Decision on the conclusion of an agreement was made with due regard to the powers of the Parliament. The ECJ also finally argued that this right contributes to ensuring the «coherence and consistency» of EU external relations[86]. EU scholars have been stressing that these arguments shall be applied also when soft bilateral laws are adopted, in analogy with the information right laid down in Art. 218 TFEU especially when a soft law replaces or constitutes the basis of an international agreement[87].

The legal mandate and how far a soft bilateral tool might infringe EU law is evaluated by looking at its function and aim. From the analysis, it can be argued that the Joint Declaration is the legal basis of an instrument that, deviating from the 2014 Regulation, seems to resemble in its aim and objective a strategic partnership instrument. Perhaps, stricter conditions should have been applied, *i.e.* the participatory right of the EP, formal requirements for publications and clarifications about its adoption.

The consequence of this complex and confused lack of a proper mandate or legal basis might create interinstitutional conflict from an EU law perspective even in international courts, as it was the ITLOS case, when the Council challenged a written statement by the European Commission on behalf of the Union before the International Tribunal for the Law of the Sea. Moreover, the lack of legal certainty and inconsistency in the EU external action might weaken the Union credibility toward third states or international actors to assume obligations and to pursue its agreed goals in fighting climate change.

It is therefore interesting to see whether the instrument can be justified from an efficiency perspective.

6. Economic Analysis of the Joint Declaration.

From an economic perspective, the first factor to take into account is the

[85] R. PASSOS, *The External Powers of the European Parliament*, in P. EECKHOUT, M. LOPEZ-ESCUDERO (eds.), *The European Union's External Action in Times of Crisis*, 2016, Oxford, pp. 85-128; T. VERELLEN, *On Conferral, Institutional Balance*, cit.

[86] Court of Justice, judgement of 14 June 2016, case C-263/14 *Parliament* v. *Council* (Tanzania), para. 42.

[87] A. OTT, *The «Contamination» of EU Law by Informalization? International Arrangements in EU Migration Law*, cit.; see also F. SNYDER, *The effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in *The Modern Law Review*, 1993; K. WELLENS, G. BORCHARDT, *Soft Law in EC Law*, in *European Law Review*, 1989, pp. 267-321; L.A.J. SENDEN, *Soft Law and Its Implications for Institutional Balance in the EC*, cit.; F. TERPAN, *Soft Law in the European Union*, cit.

distinction between multilateral and bilateral agreements. For instance, international environmental agreements proved to be often successful when adopted between two parties. Guzman cites the arrangement between United States and Canada on the reduction of acid rain as an example of that[88]. The success of the instrument seemed to rely on the fact that the commitment was both reciprocal and bilateral. In fact, both parties could take benefit of reduced pollution by their own action and the action of the other[89]. In other words, the threat of reciprocal non-compliance induced reciprocal cooperation. To put it simpler, bilateral agreements in the field of the environment seem to work better than multilateral instruments because they avoid freeriding issues which are inherent to multilateral treaties and they ensure self-enforcement.

Regarding multilateral agreements, the probability of their success is quite low. For example, the Montreal Protocol on Substances that deplete the ozone layer represents a very successful case. Scholars argued that the occurrence of several factors (industrial interests, public interests in reducing health issues and side-payment mechanisms to assist developing countries) probably led to such a high degree of compliance[90]. However, many other arrangements, such as the Kyoto Protocol and other climate-related agreements argue against this evidence. Among the possible reasons for that, researchers cited: the scientific uncertainty about future scenarios, benefits that some countries would gain from climate change, very high costs of emissions abatement[91], especially for the largest polluters[92]. In the area of fisheries protection, the chance of success of multilateral agreements are even lower. Although overfishing is a well-known problem given the common-pool natural resources at stake, freeriding and enforcement issues undermine the chance of success of any multilateral agreements. Freeriding means that the States would better remain outside cooperative regimes. Enforcement issues are related to the fact that costs of compliance are extremely high and no effective mechanism to measure compliance is available[93].

Based on the above, the Joint Declaration between India and the EU, as a form of bilateral agreements, is apt to ensure reciprocity and self-enforcement, which is also one of the first reasons why soft law may be preferred over hard law instruments. In fact,

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[88] A. GUZMAN, *The design of international* agreements, in *European Journal of International Law*, 2005. On this point, see also P.M. DUPUY, *Soft law and the international law of the environment*, in *Michigan Journal of International Law*, 1990.

[89] See also the Boundary Waters Treaty of 1990 between the U.S. and Canada. Its success lasting one hundred years relied on the fact that each party knew that a refusal to apply it would raise violation by the other party.

[90] A. GUZMAN, *How international law works: a rational choice theory*, Oxford, 2008; S. BARRETT, *Environment and statecraft: The strategy of environmental treaty-making: The strategy of environmental treaty-making*, Oxford, 2003.

[91] Measures to reduce greenhouse gas emissions mainly include financing substitutes for fossil fuels and the production of renewable energies which are clearly expensive.

[92] A. SYKES, A. GUZMAN, *Economics*, cit.

[93] A. SYKES, A. GUZMAN, *Economics*, cit.

under the loss avoidance theory, if there is some degree of certainty that States' incentives remain constant in the future, then informal norms turn out to be more beneficial. In other words, if the expected levels of compliance would be the same across various forms of agreements, including formal legal obligations and informal norms, soft laws are preferred. There is no need to waste money over more expensive procedures if it can be highly expected that the parties will respect the terms of the agreement in any case. With special regard to the Joint Declaration on water management, two main factors may contribute to the probability of compliance: the lower degree of expertise of Indian authorities in the field of water management and the aspiration of the EU to show off as a leader of the environment within its external relations. From this last point of view, infringing the agreement's terms would determine a severe drop in credibility of the EU *vis-à-vis* all its current and future partners. Also, it would undermine its credibility for the achievement of the Green Deal's objectives. On the other hand, the violation of the agreement by India would determine the risk of losing a strong partner to solve a truly delicate issue for the whole country (river basin management) through the experiences in implementation, best technological improvements and innovations coming from the European Union.

Additional economic arguments in favour of soft law can be derived from the expected costs of hard laws. They mainly refer to the consequences of future violations (either the probability of violation or the magnitude of expected harm). In this case, reputational losses from violating both soft law and hard law seem to be equal. For this reason, there is no point in bearing the extra-costs of hard laws, given that self-enforcement and compliance can be achieved in any case.

Secondly, uncertainties about the future may sharpen the lack of stability of the agreements, hence making renegotiations of the terms unavoidable (delegation theory). In order to avoid longer and expensive negotiations, soft law instruments may be therefore better placed. Uncertainties on the future may also come from the impossibility to predict how the world would look like in the next decades. It is indeed hard to determine today whether natural resources are going to be severely depleted notwithstanding the policies on sustainability put in place around the world. Emission reductions have been already postponed from 2020 to 2030 raising the risks of climate change and related costs in the long term[94]. Considering that water security is strictly connected to climate risks[95] and many factors play a role in raising these risks, it can be easily understood how easily re-negotiable instruments would ensure a sufficient degree

[94] M. DEN ELZEN, P. VAN VUUREN, J. VAN VLIET, *Postponing emission reductions from 2020 to 2030 increases climate risks and long-term costs*, in *Climatic Change*, 2010, available *online*.

[95] C(2020) 2779 final of 5 May 2020, Commission Implementing Decision on the 2020 Annual Action programme for the Partnership Instrument. Manmade pressures led farmers, households and industry to rely more on groundwater rather than surface waters in rivers and lakes. The unregulated use of groundwater in turn determined its overuse and raised the need to plan and manage water on a river basin and multi-sectoral basis.

of flexibility and lower the expected costs of violating or modifying traditional hard law agreements.

Lastly, considering that the Joint Declaration belongs to the category of political commitments with a preparatory purpose for future agreements, it can be also argued that the instrument is used as a coordinating device and non-binding agreements would thus determine a waste of public money.

In conclusion, under all scholarly interpretations of rationales for employing soft laws (coordination, loss avoidance and delegation), the objectives of the Joint Declaration between EU and India seem to be achievable through soft laws at lower costs rather than by using hard laws. The informal form seems to ensure the same degree of reciprocity and compliance, while leaving room for future adjustments according to changed circumstances. Formal instruments would instead make the whole process of enforcement and renegotiation much more expensive.

7. Conclusions.

The aim of this paper was to provide a novel and unusual perspective over the tools employed by the EU in order to achieve its objectives in the EU external environmental relations.

Seemingly, the use of soft law is quite frequent between the Union and third states (or international organizations) in several policy areas, including the environment. Notwithstanding this fact, legal and economic challenges together have not received enough attention in the literature of international law. Motivated by the need of closing this research gap, this paper tried to compare legal and economic implications underlying the adoption of non-binding instruments in the EU external relations.

After a preliminary examination of the use of soft law from a theoretical perspective (objectives and taxonomy), the paper offered a list of reasons for which soft law should not be used in order to comply with the EU principles and, above all, the horizontal division of powers.

Although the plethora of soft bilateral instruments is quite wide, this research focused on a specific instrument adopted in 2016: the Joint Declaration by India and the European Union on an Indo-European Water Partnership. The non-binding nature of this instrument raises several legal challenges that the article clearly illustrated. In particular, issues have been highlighted regarding the principles of democracy, rule of law and the respect for human rights. Moreover, financial commitments as a consequence of soft laws are more likely to occur (and they already occurred), hence making crucial to ensure that democratic rules are rigorously followed.

Conversely, economic arguments seem to argue in favour of the use of informal procedures since they clearly reduce present and future costs involved in the

implementation and enforcement of soft law instruments. One of the main reasons why soft law is economically justified is indeed the high probability of compliance and reciprocity that make binding agreements useless. Surely, the role of the EU as environmental leader in the world lays the foundations for its strong credibility vis-à-vis its external partners. That would ultimately turn into a lower incentive to use hard laws, with subsequent critical challenges in the EU legal order.

Given the sensitivity of the selected domain (environment and climate change), the authors believe that this area represents a crucial path for future research. In particular, constitutional and legal challenges need to be more explored in respect to all publicly available soft law tools. On the other hand, the legal analysis needs to be complemented by the economic one for three main reasons. First, the economic analysis helps understand the real motivation underlying procedural and contradictory choices. Secondly, economics helps signalise possible inconsistencies between the law and the efficiency, with further implications for legal analysis. Thirdly, economics complements the legal literature regarding how the law should be changed in order to meet present needs and, at the same time, ensuring the respect of the rule of law. In fact, a mismatch between law and economics in EU external actions would ultimately raise the risk of lacking credibility towards present and future partners.

ABSTRACT: Since its attribution as an external power in the late 1980s, the EU has gradually developed a mature external environmental policy using a plethora of multilateral and bilateral instruments with third countries and international organizations. Among them, «soft law» represents an important tool. The EU institutions responsible for external relations have been increasingly resorting to international soft law instruments for the last decades. They seem to play a crucial role, particularly in politically sensitive and technically complex areas, especially in the framework of the environmental crisis. However, the use of soft law raises many questions regarding both its efficiency and effectiveness to pursue the EU external relations goals compared to traditional tools of international «hard law». Moreover, soft law instruments have been largely criticized for by-passing the principles at the basis of the EU Treaties. In light of the above, this paper wishes to answer the following research question: is soft law suitable to pursue EU external relations goals dealing with energy and the environment?

KEYWORDS: European Union; external relations; soft law; law and economics.