

- DRAFT -

Balancing the EU Regulation on “CO₂ emission standards for new passenger cars”: a case study on “impact assessment”, sustainable development and environmental governance.

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For me, global governance describes the system we set up to assist human society to achieve its common objectives in a sustainable manner, that is, with equity and justice. Growing interdependence requires that our laws, our social norms and values, our mechanisms for framing human behavior be examined, debated, understood and linked together as coherently as possible. This, in my view, is the prerequisite for genuinely sustainable development in economic, social and environmental terms. (“Global governance in the steps of William Rappard,” Pascal Lamy, Secretary General of the WTO, speech delivered on March 15th, 2010.)

I. Introduction

Environmental governance is one of the main challenges faced by the international community, given the shared impact and interdependence of humanity on the environment and the imminence of threats such as climate change and exhaustion of natural resources. Nevertheless, this challenge is inserted in a broader context of challenges within the international scenario: on the one hand, several issues including environmental protection, development and human rights enforcement have a transboundary nature and require collective action, which has led to the creation of legal concepts such as global public goods and common objectives of the mankind.¹ On the other hand, global governance² still lacks effective instruments to cope with processes such as globalization and the growing interdependence changing the international scenario. Multilateral organizations still fail to produce binding agreements on many of these crucial issues³ and lack the implementation and enforcing capabilities needed to bridge the gap between the international commitments achieved and their practical effect.⁴ At the same time, national states, while still formally the basic unit of the organization of international relations, have lost much of their actual sovereignty and capability to act independently when facing these transnational challenges. This framework stresses the need to provide new forms of governance which bridge these gaps between a growing range of common challenges, changes in the international scenario requiring new forms of decision making and regulation, and a set of bold commitments and weak implementation.

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¹ Like international peace, rule of law, economic stability, and the global environment. See Kaul, et al., *Global public goods: international cooperation in the 21st century* (Oxford University Press 1999).

² Definition.

³ See for instance the failure of the UN Climate Change Commission to implement the Kyoto Protocol and achieve a binding agreement to replace it at the Copenhagen Summit in December 2009.

⁴ See, in this regard, the failure of the international community to achieve the “Millennium Development Goals” and their targets in 2015, as agreed at the UN Millennium Summit.

In this context, the concept of sustainable development has emerged both as a goal and as a guiding principle of the international community, encompassing a series of prescriptive and procedural imperatives which aim at leading the global governance process towards a balance between economic development, environmental protection and social cohesion. This concept also implies the use of new governance mechanisms, favoring a shift from traditional means of governance that rely on traditional decision making processes and regulation/compliance instruments, to deliberative and participatory means of governance which focus on procedural instruments aiming at generating social deliberation and dissemination of information in order to achieve a balanced policy/regulation outcome, such as the instrument of “impact assessment” (IA). This type of instrument, today widely spread, is a promising tool for providing more sustainable development oriented outcomes, but nevertheless still faces many challenges such as procedural pitfalls, lack of relevance in the final outcome and limited scope of application.

Within the framework described, this paper aims at presenting a legal/policy perspective on how the emergence of sustainable development as a guiding principle and a goal of the international community implies a broader view of environmental governance - requiring approaches that combine a balance between economic development, environmental protection and social cohesion - analyzing the instrument of impact assessment as a procedural expression of that principle. In this regard, this paper presents a case study on the “impact assessment” procedure developed by the Commission of the European Union (EU) for its policy and legislative proposals. The case study chosen refers to the impact assessment procedure of the proposal for a Regulation setting “CO₂ emission standards for new passenger cars in the EU”, as part of the bloc’s strategy to tackle climate change – being, thus, an instrument of environmental governance.

The paper is divided in two main parts: the first part sets the framework for the forthcoming analysis, making brief remarks about sustainable development as a guiding principle of global governance, followed by a description of “impact assessment” procedures as an expression of this principle and as a tool of environmental governance, and finally highlighting the regulation of this procedure in the European Union. The second part presents the case study mentioned and discusses its relevance in balancing the economic, environmental and social dimensions of a policy proposal, and in providing a channel of public participation in this context. The final conclusions aim to exemplify that “impact assessment” procedures can be an important tool of environmental governance, providing a holistic discussion of initiatives of environmental protection while including the social and economic aspects in the discussion. On the other hand, it highlights that, in spite of this contribution to more societal debate and awareness of environmental protection challenges and possible solutions, this instrument still faces many pitfalls which prevent it from exploring all of its potential as a new governance instrument which is much needed in order to achieve the common goal of sustainable development.

II. – Impact assessment as a procedural expression of the principle of sustainable development

1. Sustainable development as a guiding principle of environmental governance

The expression “governance” is nowadays widely spread and commonly utilized to designate a system of rules, policies and values that go beyond the traditional form of government in order to regulate and pursue the common objectives of humanity, such as the environment, peace, and the global economic system (including trade, investment, the monetary and financial systems).⁵ In this scenario, international law functions as a system of values and norms but also as a regulatory framework for the conduct of States, international organizations, transnational corporations and citizens, and sustainability is emerging in international law as a core value of the international community.⁶

Sustainable development is, above all, a concept which encompasses two main normative assumptions: a horizontal/policy dimension that reoriented the relationship between development and the environment, prescribing that the development process should be carried out in a way that allows for economic development while also assuring environmental protection and social cohesion; in addition, the “sustainability” component highlights an inter-generational/temporal dimension, translated in the need to ensure the rights of future generations to meet their needs of a decent life just as the current one. These ideas are reflected in the famous definition provided by the United Nations World Commission on Environment and Development in 1987: *“development that meets the needs of the present without compromising the ability of future generations to meet their own needs; it contains two key concepts: the concept of needs, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs”*.⁷

This concept was developed progressively mainly under the auspices of the United Nations (UN) through several international conferences and declarations, and goes way beyond the idea of environmental preservation and sustainability with which it is usually associated: in its origins it was related to conservation of natural resources as opposed to economic development. Nevertheless, it was afterwards recognized that development, the environment and social cohesion (mostly identified as equality and human rights) are equally important objectives, and the concept of sustainable development summarizes this idea and prescribes ways of promoting it.⁸ As such, it also reflects the more efficiency-oriented vision of the ecological agenda, and the shift from a resistance to change on environmental issues and protection of the environment as such, to an idea that the change, resulting from the human impact, is inevitable – thus not predicting anymore a withdrawn of mankind from nature, but rather a balancing mechanism

⁵ See EO Czempiel/ J Rosenau, *Governance without government: order and change in world politics* (Cambridge University Press 1992) for an earlier reference; also D Held, A McGrew (eds.), *Governing Globalization: Power Power, Authority and Global Governance* (Cambridge: Polity Press, 2002); AM Slaughter, *A New World Order*, (Princeton University Press 2004).

⁶ N. Schrijver and the Hague Academy of International Law, *The evolution of sustainable development in international law: inception, meaning and status* (Martinus Nijhoff 2008).

⁷ Report of the WCED to the UNGA, recognized by UNGA Resolution 42/187, available at <http://www.un-documents.net/wced-ocf.htm>.

⁸ The 1972 Stockholm Declaration emphasized the human impact on the environment it was the first major international conference in this issue; later, the 1992 Rio Declaration equaled development and the environment as relevant objectives; the social aspects were later strengthened in 2000 through the process leading to the establishment of the Millennium Development Goals and their focus on fighting inequality and poverty alleviation. Finally, the Johannesburg Declaration of 2002 stressed the interdependence and importance of economic development, environmental protection and social cohesion towards the goal of sustainable development.

through which the tradeoffs between these three spheres can be achieved.⁹ Nowadays, sustainable development provides a balance between these three interdependent interests – economic development, social cohesion and environmental protection - rather than absolute environmental protection.

In addition, in order to achieve such balance and assure the sustainability of the development process, sustainable development prescribes a series of prescriptive and procedural measures that aim at guiding policy and law making by the international community.¹⁰ As such, it is unfolded in several dimensions, e.g., sustainable use of natural resources; sound macro-economic development; environmental protection; a temporal dimension: longevity (sustainability) and promptness (urgent needs such as climate change); public participation and human rights; good governance; and integration and interrelatedness of environmental protection and development, which are cited as means of guiding this reorientation of the development process, and achieving the goals prescribed thereto.¹¹

The concept of sustainable development was incorporated into international law, being present in the agenda of regional and multilateral organizations, in international treaties and national legislations worldwide, and cited by international dispute resolution bodies.¹² In spite of still not being unanimously recognized as a formal principle of international law, since most of its definitions are based on “soft law” instruments, as stated by Nico Schrijver, *in the field of sustainable development, international law often functions, at a high political level, as an instrument to record agreed basic principles and prudent courses of action in a legal document, more than to codify what is occurring in accordance with a generally accepted ‘opinio juris’ in the practice of States and international organizations*. In spite of this legal ambiguity, it is undisputed that sustainable development has become a guiding principle and a common “cross-cutting” objective of the international community. In this regard, the use of instruments such as “impact assessment” of the effects of projects, plans, programs, policies and legislation is recognized as a procedural expression of sustainable development, giving practical meaning to the principles of prevention, public participation, good governance and integration of environmental issues on decision making processes.

2. Impact Assessment as a procedural tool of sustainable development

“Impact assessment” is a procedure which produces a statement to guide decision-making, providing decision-makers with information about likely consequences of proposed activities and requiring decisions to be influenced by such findings, while also providing a mechanism of

⁹ J Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford University Press 2004).

¹⁰ The 1992 Rio Declaration principles summarize these prescriptions, i.e., in terms of prescriptive measures: Principle 4, determining that environmental protection should be an integral part of development process; Principle 11, determining the enactment of effective environmental legislation, and 13, asking for the development of law relating to environmental liability; in terms of procedural measures, Principle 10, requiring means of enabling public participation in decision making and access to justice; and 17, determining the use of environmental impact assessment procedures.

¹¹ N Schriver, *op. cit.* See also the 2002 ILA “New Delhi” Declaration on Sustainable development law.

¹² See in this regard M.C. Codornier-Segger, *Sustainable development law: principles, practices and prospects* (Oxford University Press 2004).

participation of potentially affected stakeholders in the decision-making process.¹³ This type of procedure emerged firstly in regard to environmental concerns related to pollution control, and was intended to offer a different form on environmental protection, as a procedural requirement of analysis before authorization for a public or individual project was granted, instead of a prescriptive measure that relies on regulation and compliance. The main idea behind this instrument is to direct change or reorient decision making towards more environmentally favorable outcomes, contributing essentially to political planning procedures used as a precautionary tool, encouraging the consideration of the likely outcomes in advance, being thus an important example of the principle of integration of environmental protection.¹⁴

The “environmental impact assessment (EIA)” is regarded as ‘first generation procedure’, concerned with mitigating the impacts of major developments rather than maintaining the integrity of the environment. A second generation of assessment came in the form of “strategic impact assessment (SEA)”, which extended the scope of the analysis to plans and programs of public authorities, and aimed at addressing both the sources and effects of environmental damage. Nowadays a “third generation” procedure is being developed in international environmental law in the form of “sustainability impact assessment (SIA)”, extending the scope to a full analysis of social, economic and environmental impacts of proposed activities.¹⁵

This shift in international environmental law, influenced by the concept of sustainable development, was reflected in the scope and functions ascribed to IAs in two main ways: firstly, facilitating the balancing of competing interests - economic, social and environmental - rather than favoring absolute environmental protection, so that environmental concerns are taken into account in decision making, but do not necessarily predominate - the idea of environmental management, instead of preservation, is in line with the more efficiency-oriented vision of the ecological agenda nowadays.¹⁶ In addition, the “procedural” aspect indicates the development of new forms of governance that rely less on direct regulation to achieve set standards, and more on education, persuasion and social learning a means of achieving (sometimes unprescribed) results.¹⁷

3. The development of “impact assessment” procedures

This form of assessment was developed in different ways by different actors in the international scenario, being nowadays present in several multilateral organizations, as regards their own activities or in the form of non binding guidelines for national policy, or by national states in varying degrees and scopes.¹⁸ In addition, it can be said that the European Union had an relevant

¹³ P Sands, *Principles of international environmental law* (Cambridge University Press, 2003).

¹⁴ J Holder and M Lee, *Environmental Protection, Law and Policy: Text and Materials* (Cambridge University Press 2007). The principle of integration of environmental concerns on decision making can be seen in several international documents, i.e., Principle 4 of the Rio Declaration and art. 6 of the Treaty of the European Community (now art.

¹⁵ J Holder, *op. cit.*

¹⁶ J Holder, *opt. cit.*

¹⁷ J Holder and M Lee, *op cit.*

¹⁸ A form of ex-ante impact assessment was firstly established in the 1969 National Environmental Protection Act in the United States of America (at national level), and afterwards emerged in a series of non-binding instruments, such as the UNEP Guidelines of 1978 and 1982 and other International Organizations such as the 1985 OECD Council recommendation C(85)104, and the World Bank. The 1987 “Brundtland Report” identifies EIA as an emerging

role in its implementation and further development, in two important steps: firstly, the EU enacted two Directives which created forms of IAs directed to Member States: the “Environmental Impact Assessment” Directive enacted in 1986¹⁹ was the first binding international instrument to provide details on the nature and scope of EIAs, its use, and participation rights in the process, being considered as a first generation process concerned with mitigating the impacts of major development projects. Following, in 2001 the Directive establishing a “Strategic Environmental Assessment” procedure was enacted, representing a second generation process which extended the scope of assessment also to public plans and programs.²⁰

A second step was taken when the Commission of the EU established an IA procedure to its own activities, as it was recognized that it was untenable to require Member States’ compliance with the EIA and SEA procedures when the Commission itself did not apply it to its own action.²¹ In this regard, in 2002 a new procedure was introduced, with two innovative aspects: it was to be applied to all policy and legislative proposals of the Commission, thus having in theory a considerably far reaching scope and impact; in addition, it was based on a “sustainable development” rationale, meaning that included the economic and social spheres apart from the environmental one, and created a mechanism of public participation in the procedure.²²

The legal development of the Commission’s IA procedure followed a different path than the EIA and SIA Directives - which had as legal basis art. 175 of the EC Treaty (the environmental policy) - as it was based on the idea of sustainable development as a guiding principle and objective of the whole Union,²³ and was further developed on the basis of policy guidelines

principle of international law, and the 1992 UNCED (Rio Declaration, principle 17) recognized that EIA, *as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority*, while public participation was also referred to in principle 10; Agenda 21 also makes several references, and endorses the need for individuals, groups and organizations to participate in EIA procedures (para. 23.2); the 2002 WSSD confirmed UNCED’s requirements (para. 18e, 34c and 36i of Plan of Implementation). It also appears in international treaties apart from the EU, such as 1982 UNCLOS, art. 206; the 1991 UNECE Espoo Convention which focuses on transboundary environmental effects; the 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; and the 2003 UNECE Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context.

¹⁹ Directive 85/337/EEC, OJ L175, July 1985.

²⁰ Directive 2001/42/EC, OJ, June 2001.

²¹ Five years report on the effectiveness of the EIA, European Commission, DG for Environment.

²² COM (2002)276.

²³ The Treaty of Amsterdam introduced a direct link to it in article 2 of the Treaty of the EU, which determined that “*The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion*”; in addition, article 2 of the Treaty on the EC stated that “*the Community shall have as its task (...) to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States*”; finally, the new article 6 stated that “*environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development*”. Nowadays the Lisbon Treaty reaffirmed this commitment: in the common provisions part, sustainable development is referred as a guiding principle both for

rather than legal instruments. Two main policy documents were behind this idea: the Goteborg European Council introduced the “First Sustainable Development Strategy” of the EU in 2001, determining the consideration of the effects of policy proposals in their economic, social and environmental dimensions;²⁴ and the 2002 “Better Regulation Action Plan”²⁵, setting out initiatives to promote effective and efficient regulation as part of the efforts of the European Institutions and Member States to fulfill the objectives of the Lisbon Strategy set in 2000.²⁶

Based on these two policy plans and their requirements, and following up on a model that was being developed by the Commission’s Directorate General for Trade regarding external trade policies since 1999,²⁷ in 2002 the Commission issued a communication establishing a “new impact assessment method (that) integrates all sectoral assessments concerning direct and indirect impacts of a proposed measure into one global instrument, hence moving away from the existing situation of a number of partial and sectoral assessments”, and being “developed after examining established procedures in Member States and other OECD countries...to combine the best features of Impact Assessment systems in use elsewhere”. The communication stressed that the IA was a response to the call for regulatory and sustainable development tools, but that was “an aid to decision-making, not a substitute for political judgment” which would “not necessarily generate clear-cut conclusions or recommendations, but provide an important input by informing decision-makers of the consequences of policy choices”, being “an integral part of the process of designing policy proposals and making decision-makers and the public aware of the likely impacts.”²⁸

In this regard, some important observations should be made: firstly, in relation to the coverage of the procedure, “*the aim (...) is that the Commission bases its decision on sound analysis of the potential impact on society and on a balanced appraisal of the various policy instruments*” and thus “*that all Commission legislative and all other policy proposals proposed for inclusion in the Annual Policy Strategy or the Commission and Work Programme (...) will be subject to the impact assessment procedure, provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation. A second principle is that of the proposals submitted (...), impact assessment will only be required for: regulatory proposals, such as directives and regulations, and in an appropriate form, other proposals such as white papers, expenditure programmes and negotiating guidelines for international agreements that have an economic, social or environmental impact. (...) However, certain types of proposal will normally be exempt from the impact assessment procedure*” (emphasis added). For this purpose, the Communication determined a two-step filtering procedure, based on a short preliminary assessment of all work program proposals, and second

internal and external action in article 3.3: “*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.*”

²⁴ COM (2001)264.

²⁵ COM (2002)278.

²⁶ European Council in Lisbon (March 2000).

²⁷ DG Trade had been developing since 1999 a “sustainability impact assessment (SIA) for major trade agreement negotiations, mainly the Doha Round of the WTO. See <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments>.

²⁸ COM (2002)276.

an extended assessment of the selected proposals.²⁹ Analyzing these points, it can be concluded that, in spite of the aim of submitting all proposals to an IA procedure, the criteria determined that a proposal would be assessed in case it had a significant impact and also already listed some exemptions, showing a flexibility of application which could lead to political influences in the decision whether to submit or not a proposal to the assessment.

Secondly, regarding the impact of the findings of the procedure, the Communication stresses that the IA is “*an aid to the final policy choice, (...) not a substitute for political judgment*”. In this regard, the procedure should, firstly, make a recommendation regarding “*a preferred basic approach and the optimal policy instrument*” to adopt the proposed measure, and “*focus on improving the effectiveness of the proposal*”. Finally, “*the impact assessment reports will be adopted by the Commission as a supporting working document of the services and transmitted together and in parallel with the proposal to the other institutions.*”³⁰ It can be inferred, then, that the findings of the assessment, while stressing the impacts of the proposed measure and searching for the best way to implement it within the available options, are not binding on the concerned decision-making authority, but rather should be taken into account in the final decisions.³¹

The technical procedural aspects were determined through guidelines issued by the Commission, creating an Impact Assessment Board that each year, with the Secretariat-General and involving the Commission departments, screen all forthcoming initiatives and decides for which an Impact Assessment is needed, and determining the key analytical and procedural steps to be taken during the process.³² In addition, the Commission issued a Communication specifically on public participation dimension, determining a clear content of the consultation process to be carried out, including a summary of the context, scope and objectives of consultation, and steps for the definition of the target groups to be consulted.³³ Since the start of the activities of the IA procedure, a large number of assessments has been carried out and can be consulted on the website created by the Commission.³⁴

²⁹ COM (2002)276, section 3.

³⁰ COM (2002)276, sections 4 and 5.

³¹ As explicitly said in the guidelines, “*the IA work is a key element in the development of Commission proposals, and the College of Commissioners will take the IA report into account when taking its decisions. The IA supports and does not replace decision-making – the adoption of a policy proposal is always a political decision that is made only by the College.*”

³² SEC(2005)791, renewed in 2009, SEC(2009)92. The analytical steps are: Identifying the problem; Define the objectives; Develop main policy options; Analyze the impacts of the options; Compare the options; Outline policy monitoring and evaluation. The procedural steps are: 1. Plan impact assessment roadmap, Set up an Impact Assessment Steering Group and involve it in all IA work phases; Consult interested parties, collect expertise and analyze the results; Carry out the IA analysis; Present the findings in the IA report; Present the draft IA report together with the executive summary to the Impact Assessment Board (IAB) and take into account the possible time needed to resubmit a revised version; Finalize the IA report in the light of the IAB's recommendations; IA report and IAB opinion(s) go into Inter-Service Consultation alongside the proposal; Submission of IA report, executive summary, IAB opinion(s) and proposal to the College of Commissioners; Transmission of the IA report and the executive summary with the proposal to the other Institutions; Final IA report and IAB opinion(s) published on EU website by SG.

³³ COM (2002)704.

³⁴ See the website of Commission Impact Assessment Program, where a list of all impact assessments carried out to this point is available, including all preparatory documents and reports: http://ec.europa.eu/governance/impact/key_docs/key_docs_en.htm.

There is a widespread consensus that the IA procedure, its integrated analysis and the public participation provided are, in theory, crucial to democratically legitimate decision-making. There are, however, several concerns and pitfalls identified by the literature in this move from representative to participatory forms of decision-making. Firstly, their “power to seduce”, namely the possibility for the developer to present the project with “environmental gloss”, or a mere impression of balancing environmental aspects without being accountable for the outcome of the project/plan, as IAs can also be used as a tool to legitimize a project or program, through increased public consultation and participation.³⁵ Moreover, two main challenges are faced in making the process relevant: firstly, the question of determining which proposals should be assessed, and scoping the assessment itself; secondly, the fact that the final findings are not binding but have only to be taken into consideration in the final decision, which might undermine their practical effect.

In addition, some issues are raised regarding the public participation aspects of the IA. Firstly, it is highlighted that participation might actually turn to generate exclusion, given the difficulty to create institutions and situations in which meaningful public participation can take place: for instance, how to choose and limit the public to be involved? Inviting only certain major sensible environmental groups with more resources would be representative of the “public interest”? On the other hand, there are also concerns about the predominance of interest groups like industry, for which environmental groups can be a good counterbalance. Secondly, regarding the choice of the place of the discussion, which should be accessible, and the possibility of using internet based mechanisms providing online participation, thus having a broader reach. Thirdly, assuring that the framing of the debate is done in a clear and accessible language to the wide public, since a very technical framing could undermine participation in the discussion. Fourthly, a tension in the sense that public participation can turn decision making and regulatory activity more time consuming and complex, and might lead to incompatible solutions, which in turn simply strengthen the status quo by delaying the proposed measure. Finally, a tendency to rely on quantitative analysis about the baseline existing condition, and to model possible scenarios, which could mask the subjective opinions and values of those working on the assessment procedures, while a more a more qualitative approach could reflect more the values and cultures of those affected.³⁶ These issues will be discussed through the case study presented in the following section.

III. Case study: the impact assessment of the Regulation 443/2009.

1. Background of the regulatory measure

As stated above, the EU has incorporated sustainable development as an overall objective and as a guiding principle in its treaties: the TEU affirms that the EU should form a single market, which in turn should work for the sustainable development of Europe³⁷. In this regard, within the EU we can observe the emergence of both prescriptive and procedural instruments to achieve

³⁵ J Holder and M Lee, *op. cit.*

³⁶ Maria Lee, ‘Public Participation, Procedure and Democratic Deficit in EC Environmental law (2002), 3 Yearbook of European Environmental law.

³⁷ Article 2 TEU.

this objective. In terms of normative policies, the EU established a sustainable development strategy that is cross-sector to all policies; in addition, the EU determined the usage of IA procedures for most policy and regulatory plans.

Within this framework of sustainable development promotion, the EU has launched a series of initiatives aiming at tackling climate change in the context of the negotiations of the Kyoto Protocol.³⁸ The Commission proposed an EU objective of a 30% reduction in greenhouse gas emissions by developed countries by 2020 (compared to 1990 levels) and that the EU should make an independent commitment to achieve at least a 20% reduction of greenhouse gas emissions by 2020 (compared to 1990 levels). One of the implications of those commitments was to reduce emissions from passenger cars within the EU, which have significant impacts on climate change, as their use accounts for about 12% of overall EU emissions of carbon dioxide (CO₂), the main greenhouse gas.³⁹

In this regard, the Commission first adopted a Community Strategy to reduce CO₂ emissions from cars in 1995, based on three pillars: voluntary commitments from the car industry to cut emissions, improvements in consumer information and the promotion of fuel efficient cars via fiscal measures. Afterwards, in 2007, two parallel Communications were adopted: a Communication on the results of the review of the Community Strategy to reduce CO₂ emissions from passenger cars and light-commercial vehicles and a Communication on a Competitive Automotive Regulatory Framework for the 21st Century CARS 21, proposing the adoption mandatory reductions of emissions of CO₂ to reach the objective of 130 g CO₂/km for the average new car fleet. These measures were deemed as necessary as the voluntary and asymmetric commitments had shown ineffective, and thus a proposal of regulation was issued by the Commission aiming to ensure the proper functioning of the internal market for passenger cars by laying down harmonized rules to limit the average CO₂ emissions from the new car fleet in the Community to 130g CO₂/km by 2012. Under this approach, legislative proposals would focus on mandatory reductions of CO₂ emissions to reach an average objective of 130g CO₂/km for new passenger cars by means of improvements in vehicle motor technology; a further reduction equivalent to 10g CO₂/km would be achieved by other technological improvements and increased use of bio-fuels.⁴⁰

The proposal was especially relevant for the achievement of the EU's overall objective of the Renewed Sustainable Development Strategy (RSDS), ensuring "*that our transport systems meet society's economic, social and environmental needs whilst minimizing their undesirable impacts on the economy, society and the environment*". Nevertheless, it had a considerable impact on several aspects, since cars as a means of transportation are an important part of the everyday life of the population and the car industry is a very relevant employment provider, but on the other hand car usage has a significant impact on climate change insofar as it accounts for a significant amount of the EU's carbon dioxide emissions (CO₂). Moreover, bearing in mind the ever growing transport sector – in terms of emissions –, the regulation on emission limits of new

³⁸ The Kyoto Protocol is still nowadays one of the most important international environmental agreements signed to date, which rely on the principle of sustainable development as its rationale/legal base: the Kyoto Protocol is an outcome of the UNFCCC, a framework agreement which was one of the main outcomes of the UNCED 92.

³⁹ According to the proposal for regulation, COM (2007)856.

⁴⁰ Final report of the IA procedure, SEC (2007)1723.

passenger cars refers to the interplay of diverging policy preferences and regulatory interests within the European Member States governance network, the influence of the European Commission on the initial policy setting, the relevance of regulating CO₂ emissions for an integrated approach of European climate change policy as well as for a sustainable European public infrastructure. In this regard, the proposal was accompanied by an extensive Impact Assessment, as will be discussed below.

2. The Impact Assessment procedure

The proposed regulatory plan was analyzed by an IA procedure which included an assessment of the policy options and its impacts on the economic, environmental and social spheres and a public consultation process, which gathered input from stakeholders affected by the measures. The assessment was based on the specific objective of reducing the climate change impacts and improving the fuel efficiency of passenger cars by reaching an average emission value of 130g CO₂/km for newly sold cars in 2020. The operational objectives included designing a legislative framework implementing the new target and “ensuring competitively neutral and socially equitable and sustainable reduction targets which are equitable to the diversity of the European automobile manufacturers, while ensuring that the legislative framework will be compatible with the overall objective of reaching the EU's Kyoto targets”. Car manufacturers were chosen as regulated entity responsible for the achievement of the measure, and based on such choice a method was analyzed in order to share the reduction burden between the stakeholders concerned, and three main options have been identified:

- Uniform target: the same obligation could be given to all car manufacturers i.e. they would all have to individually meet the 130 g CO₂/km target by 2012. In view of the wide variety of vehicles and emission levels on the market, the achievement of a uniform target would only be possible with the introduction of market mechanisms (cap and trade) at the manufacturer level, provided that all manufacturers would respect the target or that it is possible to trade a sufficient number of “credits” between manufacturers.
- Utility based target: the CO₂ obligation would be defined as a function reflecting the utility of the cars as perceived by customers, since different cars have different utilities and emit different levels of CO₂ (i.e. that a family station wagon emits more than a mini urban car). The main question raised was which utility parameter would be the most suitable, and two were retained for further consideration: mass and footprint. This system, which reflects better the “diversity” of cars/car makers, would provide more realistic targets for individual manufacturers, but could be the source of perverse incentives (e.g. if carmakers chose to increase utility instead of decreasing CO₂ – see discussion below on utility parameters), and preventive measures were considered in order to ensure that 130 g CO₂/km target is respected.
- Percentage reduction based targets: the CO₂ obligation would be defined as a function of a percentage reduction compared to earlier performance. The “% reduction” method is based at the manufacturer level on a % reduction applied to a baseline (e.g. the 2006 emission level) and could include fines/feebates or trading. This method respects diversity and seems *a priori* fair to all manufacturers as all have to deliver the same relative reduction, although in absolute terms bigger emitters will have to deliver more CO₂ reductions than small ones (percentage), but requires agreement to be reached on a baseline and can only be applied at the manufacturer level.

Having established these three regulatory options, the assessment was done according to the following criteria: *The economic impacts* were analyzed with regard to overall cost-effectiveness, distributional effects among manufacturers and innovation and trade; *the social impacts* were analyzed with regard to employment, affordability of cars and the effect on different segments of the vehicle market. *The environmental impacts*, finally, were analyzed with regard to effectiveness of the different options in achieving the target. The assessment highlighted that the respect of these principles, which can broadly be grouped into social equity, neutrality for competition and cost-efficiency (including achievement of the environmental outcome) could lead to trade offs for example between the competitive position of certain manufacturers on the one hand, and the objective of maintaining the affordability of cars on the other; similarly, depending on its stringency, the compliance mechanism could influence significantly the environmental outcome of the scheme as well as the competitive position of European manufacturers compared to both domestic and international competitors. The analysis of the impacts was thus carried out taking into account the separate principles first, and then bringing together the assessment in order to provide an overview of the impacts and possible trade offs of the three options considered against the said principles. The final assessment showed that there is effectively a trade-off between the different policy options and that no single option was optimal from the perspective of all the objectives, and hence a balance involving comparative value judgments has to be struck between the different considerations. Thus, after balancing the probable outcomes of the three options on the economic, environmental and social spheres, the assessment finally pointed out “Option 2” as the better outcome, since it would lead to a more balanced trade off and also facilitate the accomplishment of the operational objectives of the measure.⁴¹

⁴¹ Regarding the **economic sphere**, the study concluded that while the least cost option for manufacturers overall would be based on Option 2, cost increases per car would not vary greatly when fleet averaging is allowed for other inclinations or options, and thus other options than the cost-optimized one could be taken in view of other objectives. As regards **Option 1**, a uniform target for all means that manufacturers of smaller cars would find it easier to comply than manufacturers of big cars, raising concerns with regard to the diversity of European carmakers not being competitively neutral, as it penalizes manufacturers of larger cars without a sufficient incentive for manufacturers of smaller cars to continue reducing their CO₂ emissions below 130 g/km in the absence of a trading system. **Option 2 would** deliver the most even *sales-weighted* distribution of relative retail price increase per manufacturer (for slopes of 74% to 80% for mass, and 64% to 68% for footprint) and the most even *unweighted* distribution of relative retail price increase per manufacturer (for slopes of 39% to 47% for mass, and 18% to 27% for footprint). **Option 3 would** lead to a lower average cost than Option 1 and 2, and to a seemingly even distribution of the relative retail price increase for all manufacturers, but would lock manufacturers of small vehicles in their present market position, while manufacturers of large vehicles could meet their target by widening their market offering; it would also lead to higher costs for early movers. Trading evens out the distribution of relative price increases, and leads to a reduced sensitivity of manufacturers to the slope for Option 2. Regarding **social impacts, in terms of employment**, the study concluded that, assuming price elasticities for new car sales between 0 and -1 (i.e. fairly inelastic), a 6% price increase will lead to less than 6% reduction in sales - i.e. the total value of sales would rise slightly and, therefore, lower vehicle sales within the EU will not necessarily lead to loss of jobs in the automobile industry, and could lead to a rise in direct employment depending on what share of extra costs go into extra labor. Besides, suppliers play an increasing role in the value chain over time, and higher prices should produce a strong positive multiplier effect higher up the supply chain, and some of this should translate into extra employment. In terms of **social equity**, the vehicle retail price increase will be more than compensated by lifetime fuel savings. Regarding affordability, for **Option 1**, the relative retail price increase for small vehicles is about the same as that for large vehicles, but still larger than that for medium-sized vehicles. For diesel vehicles this condition is met for **Option 1** and **2**. At the manufacturer level, for **Option 2**, for inclinations below 80%, up to 80% or more of the vehicles sold in Europe would be exposed to an average relative retail price increase per manufacturer below

The other procedural stage was integrating the public consultation into the assessment, and two main channels were provided.⁴² A public hearing was held by the Commission in Brussels on July 11th of 2007, in which the chair, Secretary General of the European Commission Catherine Day, organized the debate around the following questions: How to set the target – as a uniform target, as a target modulated by a variable such as the type of car, or as a reduction from a baseline? On what should the target be applied – on different models, different manufacturers, on importers and dealers? What flexibility mechanism would work? What mechanisms are needed to guarantee compliance? The debate had also the contributions of representatives from DG Environment, DG Enterprise and Industry, and of the following groups of stakeholders: the automotive industry and suppliers, whose summarized perspective was the 130 g target should be maintained, but that the timeframe of 2012 was unrealistic and an appropriate lead-time (2015 at the earliest) was necessary; support for the “integrated approach”; and also supported the “mass” appears to be the most suitable parameter. NGOs and consumer/individuals were also represented, but diverged from the other stakeholders by also favoring a 120g target or even a stricter one, and asking for a strict compliance regime. Moreover, a public consultation based on a web-tool was carried out between 5 May and 15 July, 2007. A total of 2.390 contributions was received, among which 2.340 from individuals, 23 from industry organizations, 4 governmental organizations, and 23 NGOs. The general trends expressed that once again individuals and NGOs mostly argued for the stricter application of targets, timeframes and flexibility in order to ensure the environmental outcome of the regulatory framework, and industry organizations generally provided support for a less stringent target and more flexibility.⁴³

It can be perceived that the IA procedure had a comprehensive scope and provided a balanced analysis of impacts on the economic, environmental and social spheres, while also counting on a relevant number of contributions from different interest groups. Nevertheless, the different ways in which the IA seems to have influenced the final regulatory framework adopted shows the ambiguity of this tool and the limited influence of its findings towards a more favorable environmental outcome, as discussed below.

or around the average value. For mass, impacts on certain small car manufacturers can be seen above a 70% inclination. At the vehicle level, for slopes below 60% and without fleet averaging/with cross subsidization, small petrol cars face lower relative retail price increases than medium and large petrol cars. For **Option 3**, the relative retail price increase is higher for manufacturers of small/light/low CO₂ emitting cars, which raises affordability and fairness concerns. **Finally, regarding environmental impacts:** For **Option 1**, because by definition the target is the same for all manufacturers (130 grams), the environmental outcome is linked to liquidity of the market and to the efficiency of the compliance mechanism. It is unclear whether the market would function effectively i.e. whether there would be enough credits to trade. Going beyond market strategies, the level of the premiums will be crucial to the effectiveness of the scheme. In case of **Option 2** “Utility parameter” assumptions on AMI are crucial in the definition of the linear function in order to ensure that the 130 g CO₂/km target will be delivered and not under or over achieved. In addition, to avoid an incentive to increase mass for manufacturers (to have a lower CO₂ obligation) the slope of a mass-based limit function should be below 80%. In the case of **Option 3** “% reduction”, under the hypothesis that the market position of the various manufacturers remain the same both in terms of segmentation and of market share, then the delivery of the environmental outcome will mainly be linked to the level of the premiums. However, in case the market is subject to profound changes, carmakers could meet their CO₂ obligation but the overall target of 130 g CO₂/km would not be delivered.

⁴² A complete list of documents regarding this issue can be found at the public consultation webpage in the EU Commission website: http://ec.europa.eu/reducing_co2_emissions_from_cars/index_en.htm.

⁴³ See the final report of the IA procedure, SEC (2007)1723, which presents a summary of these contributions.

3. The Regulation Adopted

In April 2009, the Council finally adopted the legislative text of the Regulation 443/2009 “*setting emission performance standards for new passenger cars as part of the Community’s integrated approach to reduce CO₂ emissions from light-duty vehicles*”.⁴⁴ Analyzing the text of the earlier proposal and the text of the final regulation adopted, and balancing them with the recommendations pointed out in the IA procedure, it can be said that these recommendations and the variety of concerns expressed during the Impact Assessment with regard to the design of the legislation, possible unwanted effects, implications for competition on automotive markets, and environmental outcome were taken into account, while also downscaling the initially proposed emission standard goal. This is a result of a series of observations:

Firstly, the conclusion of the IA regarding the best parameter to base the strategy of the Regulation was followed, as the “utility parameter” or option 2 of the IA was adopted in the Regulation, showing a preference from legislators for the option that was considered as the most balanced outcome.⁴⁵ In addition, the overall objective was maintained and set as to limit emissions from the average new car fleet to 130g CO₂/km as part of an integrated approach and will be complemented by measures delivering an additional 10g CO₂/km in order to meet the Community objective of 120 g CO₂/km. Furthermore, the Regulation established an additional target for 2020 onwards of 95 g CO₂/km as average emissions for the new car fleet (art. 1).

The main downscale on the Regulation, however, came in relation to the specific emissions targets: while the initial proposal determined that for the calendar year commencing 1 January 2012 and each subsequent calendar year, each manufacturer of passenger cars should ensure that its average specific emissions of CO₂ do not exceed its specific emissions target, the Regulation adopted established a progressive scale of CO₂ decrease: 65 % in 2012, 75 % in 2013, 80 % in 2014 and 100 % from 2015 onwards (art. 4). It is interesting to note, in this regard, that while the IA studies pointed out the viability of the achievement of the 130g of CO₂/km in 2012, the main opponents to this goal were the representatives of the car industry which argued that it was unrealistic and could not be met, to the great disagreement of the civil society representatives, as shown in the public participation report. In the same sense, while the imposition of a fine for lack of compliance with the annual emissions limit was maintained in the final Regulation, there was a change showing a flexibilization in relation to the original excess premium of the proposal, which was also a claim of the car industry expressed in the public hearings and participation channels. The new formula made a differentiation according to a range of excess emissions,

⁴⁴ Regulation EC 443/2009, OJ L 140/1, 5.6.2009.

⁴⁵ As stated in recital 12 of the Regulation prologue: *In order to maintain the diversity of the car market and its ability to cater for different consumer needs, CO₂ targets for passenger cars should be defined according to the utility of the cars on a linear basis. To describe this utility, mass is an appropriate parameter which provides a correlation with present emissions and therefore results in more realistic and competitively neutral targets. Moreover, data on mass is readily available. Data on alternative utility parameters such as footprint (track width times wheelbase) should be collected in order to facilitate longer-term evaluations of the utility-based approach. The Commission should, by 2014, review the availability of data and, if appropriate, submit a proposal to the European Parliament and to the Council to adapt the utility parameter.*

being low emission's excess subject to lower fines, thus also showing a softer approach towards the car industry.⁴⁶ An additional measure was introduced regarding alternative fuel options.⁴⁷

These aspects highlight the ambiguity of the impact assessment procedure and of the public participation in the decision making process: if, on the one side, it aims at assuring more transparency and a more informed decision making process with more democratic legitimacy, on the other hand, being a procedure, it is not meant to achieve a determined set of goals, but rather to reflect the most probable outcomes of proposed measures and the social preferences expressed as a whole through the public consultations. It is, in this regard, an important means of debating the relevant measures to be taken and searching for a balanced outcome while also integrating social concerns on environmental decision-making, but this does not necessarily lead to a more effective environmental protection, as society's interests are also not always privileging this objective. These aspects highlight, finally, another role that is ascribed to IA but which nevertheless is less taken into account: the role as a disseminator of information to all members of society about the impacts of a proposed measure such as the legislative instrument under analysis in this case study.

III – Conclusions

As stated above, the system of global governance relies on norms, principles and values in order to provide tools for decision-making and regulation of humanity's common goals, such as sustainable development became both an objective – representing a balance between economic development, environmental protection and social cohesion - and a guiding principle – proving a set of prescriptive and procedural tools thereto - for international environmental law and governance. Nevertheless, as pointed out by Craik, international law principles such as sustainable development are not self-activating, and thus in order to bridge the gap between commitment and compliance, mechanisms that bring international environmental norms into deliberations must be a part of the institutional setting of environmental governance.⁴⁸

In this regard, one of the instruments prescribed by sustainable development is the use of “impact assessment” procedures in order to integrate economic, environmental and social considerations into decision making procedures and to provide access to information and participation channels for all affected stakeholders. In this context, the European Union has established sustainable development as a guiding principle and created policy instruments such as “impact assessment procedures” which are binding both on its Member States and on its own internal decision making processes. These instruments represent, theoretically, an important step towards a binding and more harmonized system of impact evaluation which is bounded by sustainable development as a final goal.

Regarding the integrated “impact assessment” of the Commission of the EU and the case study presented, some considerations can be pointed out. Initially, the IA instrument is, in theory, a

⁴⁶ See art. 9 of the Regulation. The original proposal determined a stricter formula of “excess emissions x number of new passenger cars x excess emissions premium.

⁴⁷ See art.6 of the Regulation.

⁴⁸ N Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008).

positive tool, being firmly established in the Commission practice and having undergone a evolution in its usage. In spite of the pitfalls cited above, it is important to highlight that a sound analysis provided by an independent source was carried out in order to discuss the better decision-making path to be taken in a very sensitive policy area, namely climate change mitigation strategies and a mandatory reduction of CO₂ emissions from passenger cars. In spite of the non binding nature of the IA final findings, there seems to have been an impact in the final policy outcome, as the preference for the option indicated in the IA procedure - the utility parameter for the regulation — reflected a consideration also for the social aspects, showing that not only the best environmental yield was taken into account, but also the other effects of the proposed measure on society as a whole.

Nevertheless, the case study also highlighted the ambiguous aspect of this instrument, especially regarding the outcomes of the public consultation carried out. The inclusion of deliberative elements, herewith, refers not only to (procedural) public participation as such, but implies at the same time the access to justice in environmental matters and the access to environmental information for third-parties. With regard to the examined regulation proposal, public participation is also crucial for the sustainability of specific regulatory measures having a direct policy impact on social, economic and environmental levels – as the regulation of transport and infrastructure in a globalised world have. Public participation is not only considered as a metaphorical tool providing democracy, but might have a direct impact on the specific outcome of the rule-formulation process and its final regulatory measure. The public's capacity to shape and influence the process of European norm-making is, therefore, *channelled* by the instrument of public participation and is meant to improve the outcome of legitimate decision-making processes by mitigating a range of concerns about the democratic condition of environmental rule-making within administrative bodies. Nevertheless, the final outcome of this process seems unfavorable, as the policy preferences of the stronger stakeholders such as the automotive industry and automotive suppliers seem to have been more influential in shaping the outcome of the regulatory measure: While the European Commission initially proposed an integrated approach with a view to reaching the EU objective of 120g CO₂/km by 2012 through a combination of EU and Member States action (mandatory reductions of the emissions of CO₂ to reach the objective of 130g CO₂/km for the average new car fleet by means of improvements in vehicle motor technology, and a further reduction of 10g CO₂/km by other technological improvements and by an increased use of bio-fuels), the adopted regulation states another objective, based on the rationale to only gradually limit emissions to 120g CO₂/km for 65% of new cars in 2012, to 75% in 2013, 80% in 2014 and 100% in 2015. Furthermore, the final version of the regulation also reduces the proposed fines for carmakers breaching the limits. It should be noted, though, that other stakeholder groups such as NGOs and individuals represented showed support for a stricter target setting and timeframe. Therefore, even though public participation in Environmental Impact Assessment generates legitimacy in the process of European multi level decision-making and should be institutionalized on all levels of public norm-making – one should not ignore the details concerning the procedural aspects and the way in which participation is allowed, which can lead to restricted influence on the final outcome of the assessed regulation.

In spite of the critical aspects highlighted, the normative implications of IA as deliberative element reflecting important developments in a heterarchic decision-making framework make it

a relevant policy tool which should be further developed, as the debate it generates and the dissemination of information it provides are, in the author's opinion, crucial in order to achieve more sustainable outcomes. Even though the IA procedure still faces several pitfalls, it is, after all, a procedure which provides more informed options for decision-making, as result of technical studies, and reflects the majority of the social preferences, as result of public consultations. Thus, even though the procedure itself can and should be improved, society itself has to be more organized around its crucial challenges in order to profit from it. And, in this regard, processes which generate social debate and dissemination of information can play a very important role.

On a recent lecture, Prof. Joseph Weiler made an inspiring comment⁴⁹ regarding the role of individuals in society. He argued that society – namely in Europe - has organized itself on the basis of granting individual rights and establishing state responsibilities, thus putting individuals in the center and leading to a society of self-centered individuals, who are more focused on their rights than on their responsibilities as members of society as a whole, tending to allocate responsibilities to the appropriate level of government and to forget about their role as active members of society. When thinking about the conclusions to this paper, my thoughts have related to those words, concluding that, in the end, there must be a stronger change of social consciousness for things to work better. This involves not only relying in the responsibility of governments and institutions to formulate plans and act accordingly, but also the responsibility that we all have in our different roles as individuals - citizens, but also investors, entrepreneurs and public officials - both in developing a more responsible conduct towards sustainable development in whichever our field of activity is, and also in performing a more active role in promoting and monitoring what is being done in this sense. Only then institutions and procedures such as IA will be a more effective tool.

Thus, more awareness of the importance both of generating an open and inclusive discussion about important issues such as measures to fight climate change, which have an overall impact on economic, environmental and social issues, and also of the participation of all stakeholders affected by these measures, is crucial to enable society to develop more consciousness of its role and of the impact it has on the outcomes of policies and legislative plans. In this regard, “thought provoking” instruments such as the Commission IA can play a very important role, not only by providing a forum in which discussion about important issues take place, but also by disseminating information about issues at stake to society. The extent to which this instrument will be successful will depend not only in the way it is carried out, but also on the level of awareness of each individual about its role as an active member of society.

⁴⁹ Joseph H. H. Weiler, 'Values and virtues in Europe: learning from Aristotle, Aquinas and Maimonides.' Lecture presented in the conference “New values after the Lisbon Treaty” on July 7th 2010, at Pázmány Péter Catholic University, Faculty of Law and Political Sciences, Budapest, Hungary (personal notes of the author, not based on written materials).