

**AMBIENTE, ENERGIA,
ALIMENTAZIONE
MODELLI GIURIDICI COMPARATI
PER LO SVILUPPO SOSTENIBILE**

*ENVIRONMENT,
ENERGY, FOOD
COMPARATIVE LEGAL MODELS
FOR SUSTAINABLE DEVELOPMENT*

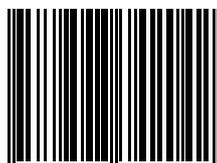
a cura di

**GINEVRA CERRINA FERONI, TOMMASO EDOARDO FROSINI
LUCA MEZZETTI, PIER LUIGI PETRILLO**

VOLUME 1 - TOMO I

cesifin on line

www.cesifin.it



9 788898 742042

AMBIENTE, ENERGIA, ALIMENTAZIONE MODELLI GIURIDICI COMPARATI PER LO SVILUPPO SOSTENIBILE

a cura di

**GINEVRA CERRINA FERONI, TOMMASO EDOARDO FROSINI
LUCA MEZZETTI, PIER LUIGI PETRILLO**

VOLUME PRIMO

TOMO I

scritti di

VANIA AIETA, GAIA ALLORI, IVANO ALOGNA, DANIELA BELVEDERE, SARA BENVENUTI, RAFFAELE BIFULCO, ELENA BUOSO, MARCO CALABRÒ, FRANCESCA CARPITA, **GINEVRA CERRINA FERONI**, IMMA CIRILLO, VALENTINA COLCELLI, **CARMELA DECARO**, VINCENZO DE FALCO, FRANCESCA DEGL'INNOCENTI, FRANCESCA DELLA ROSA, OTTAVIO DI BELLA, GIUSEPPE DI GENIO, BRUNO DI GIACOMO RUSSO, LUCA DI GIOVANNI, **GIAMPIERO DI PLINIO**, LUCA FANOTTO, SOLANGE FATAL, FIORE FONTANAROSA, TIZIANA FORTUNA, **TOMMASO EDOARDO FROSINI**, CRISTINA GAZZETTA, ANNALaura GIANNELLI, YLENIA GUERRA, THIAGO JORDACE, VINCENZO LARUFFA, EMANUELA LATERZA, **DONATO LIMONE**, CLAUDIO LOFRUMENTO, VALERIO LUBELLO, PIETRO MASALA, GRETA MASSA GALLERANO, CRISTIANA MAZZUOLI, **LUCA MEZZETTI, PIER LUIGI PETRILLO**, MARIA NAZARENA RODRIGUEZ FIRPO, STELLA ROMANO, PIER MARCO ROSA SALVA, FLORIANA SANTAGATA, SIMONA SASSO, ELISA SCOTTI, ANNA SIMONATI, CHIARA SORBELLO, ALESSANDRA TOMMASINI, BARBARA VALENZANO, ALESSANDRO ZAGARELLA

TOMO II

scritti di

LORENZO BAIKATI, CARLA BASSU, ANTONIO BELLIZZI DI SAN LORENZO, SILVIA BOLOGNINI, BARBARA LILLA BOSCHETTI, LUCA BUSCEMA, **GIAN FRANCO CARTEI**, MARÍA JOSÉ CAZORLA GONZÁLEZ, **GINEVRA CERRINA FERONI**, TANJA CERRUTI, LUDOVICA CHIUSI, DANIELA CORONA, LAURA DE GREGORIO, LUCA DI DONATO, CATERINA DRIGO, VERONICA FEDERICO, ALESSANDRA FORTI, **TOMMASO EDOARDO FROSINI**, FRANCESCO GALLARATI, FEDERICA GIRINELLI, ANTONIO GUSMAI, ANDREA IURATO, PAMELA LATTANZI, FRANCESCA LEONARDI, NICOLA LUCIFERO, ANTONIETTA LUPO, FRANCESCO MARTINES, GIOVANNA MASTRODONATO, EDOARDO MAZZANTI, **LUCA MEZZETTI**, PIETRO MILAZZO, FRANCESCA MINNI, MARIA MOCCHEGIANI, **ANDREA MORRONE**, LEANDRO MOURA DA SILVA, ALESSANDRO ODDI, VALERIA PAGANIZZA, BARBARA PASA, **PIER LUIGI PETRILLO**, FRANCESCA POLACCHINI, ALBERTO QUINTAVALLA, EDOARDO C. RAFFIOTTA, GIADA RAGONE, LUIGI RUFO, ROBERTO SAJJA, LAURA SALVI, CLAUDIO SCIANCALEPORE, FRANCESCA SPAGNUOLO, GIULIANA STRAMBI, **GIOVANNI TARLI BARBIERI**, STEFANO VILLAMENA, ALICE VILLARI

Il volume contiene i *Paper* presentati nelle sei Sessioni tenute al Convegno internazionale *Ambiente, energia, alimentazione. Modelli giuridici comparati per lo sviluppo sostenibile*, Roma 5-6 ottobre (volume 1, tomo I), Firenze 7-8 ottobre 2015 (volume 1, tomo II), promosso dall'Istituto Italo-Iberoamericano di Diritto Costituzionale, dall'Università Unitelma Sapienza di Roma, dalla Fondazione CESIFIN Alberto Predieri, in collaborazione con l'Accademia dei Georgofili, con il patrocinio dell'Università degli Studi di Firenze, del Dipartimento Giuridico dell'Università di Firenze e di Milano EXPO 2015.

I contributi raccolti nel volume sono stati sottoposti a referaggio del Comitato Scientifico

Comitato scientifico:

Ginevra Cerrina Feroni, Marcello Figuereido, Tommaso Edoardo Frosini, Gaetano Golinelli, Luca Mezzetti, Giuseppe Morbidelli, Pier Luigi Petrillo, Calogero Pizzolo

This E-BOOK collects the Papers presented to the Six Sessions of the International Conference Environment, Energy, Food. Comparative Legal Models for Sustainable Development, Rome, October 5th - 6th (Volume 1, Tome I), Florence, October 7th - 8th 2015 (Volume 1, Tome II), promoted by Istituto Italo-Iberoamericano di Diritto Costituzionale, Università Unitelma Sapienza di Roma, Fondazione CESIFIN Alberto Predieri (Florence), in collaboration with Accademia dei Georgofili, with the sponsorship of Università degli Studi di Firenze, of Dipartimento Giuridico of Università di Firenze and Milano EXPO 2015.

The contributions collected in the book have been approved by Scientific Committee

Scientific Committee:

Ginevra Cerrina Feroni, Marcello Figuereido, Tommaso Edoardo Frosini, Gaetano Golinelli, Luca Mezzetti, Giuseppe Morbidelli, Pier Luigi Petrillo, Calogero Pizzolo

© 2016 Fondazione CESIFIN Alberto Predieri

ISBN 978-88-98742-04-2

Cesifin on line
gennaio 2016

www.cesifin.it

*Indice tomo I**

PRESENTAZIONE DEL VOLUME	p. 13
Ginevra Cerrina Feroni - Tommaso Edoardo Frosini Luca Mezzetti - Pier Luigi Petrillo	
INTRODUCTION	p. 17
Ginevra Cerrina Feroni - Tommaso Edoardo Frosini Luca Mezzetti - Pier Luigi Petrillo	
PRESENTAZIONE DEL TOMO I	p. 21
Luca Mezzetti	
INTRODUCTION TO THE ROME SESSIONS	p. 23
Luca Mezzetti	
1ª SESSIONE	
LA TUTELA GIURIDICA DELLA DIVERSITÀ BIOCULTURALE, L'UNESCO E LA DIETA MEDITERRANEA	
ILLUSTRAZIONE DEI CONTENUTI DELLA SESSIONE	p. 27
Donato Antonio Limone	
LA TUTELA GIURIDICA DELLA DIVERSITÀ BIOCULTURALE, DIETA MEDITERRANEA, UNESCO	p. 33
Imma Cirillo	
A CRITIC LECTURE OF THE EU TWO FACED APPROACH TO BIODIVERSITY: EQUAL GUARANTY OR MULTINATIONAL BIO-RAID? THE IMPORTANCE OF A SELF-RECONSIDERATION OF EU POLITICS IN BIODIVERSITY	p. 41
Valentina Colcelli	
SIMBOLI DELLA CULTURA SPAGNOLA E RIVENDICAZIONI AUTONOMISTICHE: LE LINEE DI TENDENZA NELL'INTERPRETAZIONE COSTITUZIONALE	p. 53
Vincenzo De Falco	

* Il presente volume è diviso in due tomi. Il tomo I comprende le Sessioni del convegno tenute a Roma, il tomo II comprende le Sessioni tenute a Firenze.

LE POLITICHE DI SOSTENIBILITÀ DEL PROGRAMMA INTERGOVERNATIVO UNESCO “MAN AND THE BIOSPHERE” (MAB)	p. 65
Ottavio Di Bella - Alessandro Zagarella	
I DIRITTI DI PROPRIETÀ COLLETTIVA NEI PAESI MEGADIVERSI DEL COSTITUZIONALISMO IBEROAMERICANO	p. 77
Giuseppe Di Genio	
LA TUTELA GIURIDICA DELLA BIODIVERSITÀ IN QUANTO BENE CULTURALE	p. 85
Cristina Gazzetta	
LE TRADIZIONI ENOGASTRONOMICHE: UN PATRIMONIO DA TUTELARE E VALORIZZARE	p. 97
Cristiana Mazzuoli	
GLI USI CIVICI NEL CONTESTO DEL PATRIMONIO CULTURALE (IMMATERIALE): PER UN NUOVO PARADIGMA GIURIDICO DEI DEMANI COLLETTIVI	p. 109
Marco Calabrò - Anna Simonati	
IL PATRIMONIO CULTURALE IMMATERIALE E LE TRADIZIONI ALIMENTARI: VERSO UN PIANO DI GOVERNANCE PER LA DIETA MEDITERRANEA PATRIMONIO DELL'UMANITÀ UNESCO.....	p. 121
Alessandro Zagarella	
2ª SESSIONE	
AMBIENTE, ECONOMIA, ISTITUZIONI E SVILUPPO SOSTENIBILE	
ILLUSTRAZIONE DEI CONTENUTI DELLA SESSIONE.....	p. 135
Giampiero Di Plinio	
LA CIRCOLAZIONE DEL MODELLO DI SVILUPPO SOSTENIBILE. PROSPETTIVE DI DIRITTO COMPARATO PER UN PERCORSO MULTIDIREZIONALE	p. 145
Ivano Alogna	

LA TUTELA PRECAUZIONALE DELL'AMBIENTE E IL RUOLO DELLA GIURISPRUDENZA NEL RICONOSCIMENTO DEL RISCHIO DA FATTORI INQUINANTI.....	p. 157
Daniela Belvedere	
EQUITÀ AMBIENTALE E SVILUPPO SOSTENIBILE: SPUNTI PER UNA RIFLESSIONE A PARTIRE DALL'ESPERIENZA DELL'ENVIRONMENTAL JUSTICE.....	p. 169
Raffaele Bifulco - Elisa Scotti	
LE AREE PROTETTE TRA CONSERVAZIONE DELLA BIODIVERSITÀ E CONTENIMENTO DELLA SPESA PUBBLICA.....	p. 181
Francesca Carpita	
PROBLEMI E PROSPETTIVE DELLA GESTIONE INTEGRATA DELLE COSTE: PROFILI COMPARATIVI TRA ITALIA E SPAGNA	p. 193
Luca Fanotto	
PROPRIETÀ COLLETTIVE E RISORSE NATURALI: UN NUOVO MODELLO PROPRIETARIO PER LA GESTIONE SOSTENIBILE DEI COMMONS.....	p. 205
Fiore Fontanarosa	
SPUNTI PER UNA RIFLESSIONE IN TEMA DI BILANCIABILITÀ DEL VALORE COSTITUZIONALE DELLA TUTELA AMBIENTALE.....	p. 217
Annalaura Giannelli	
AMBIENTE, ENERGIA, ALIMENTAZIONE. LO SPRECO ALIMENTARE COME PARADOSSO E IL RUOLO DEL DIRITTO	p. 229
Ylenia Guerra	
ENERGIE RINNOVABILI E TUTELA DEL PAESAGGIO IN ITALIA FRA STATO E REGIONI: IL CASO SARDEGNA.....	p. 241
Pietro Masala	

LA EFICIENCIA DE LAS LEYES DE PRESUPUESTOS MÍNIMOS	p. 253
María Nazarena Rodríguez Firpo	
EVOLUZIONE NORMATIVA SUI NUOVI SISTEMI DI ANALISI PER LA VALUTAZIONE DEL POTENZIALE RISCHIO AMBIENTALE-INCIDENTALE CONNESSO ALLE ATTIVITÀ INDUSTRIALI	p. 265
Simona Sasso - Barbara Valenzano	
EXCURSUS LEGISLATIVO SUL “CASO ILVA”. SCENARI PRESENTI E FUTURI	p. 275
Simona Sasso - Emanuela Laterza Claudio Lofrumento - Barbara Valenzano	
3ª SESSIONE TUTELA DELL’AMBIENTE E BIODIVERSITÀ	
ILLUSTRAZIONE DEI CONTENUTI DELLA SESSIONE.....	p. 285
Carmela Decaro	
L’IDENTITÀ SOSTENIBILE: NUOVI MODI DI ABITARE L’AMBIENTE. UNA PROSPETTIVA COMPARATA SUL RICONOSCIMENTO DEGLI ECOVILLAGGI	p. 293
Gaia Allori	
IL RUOLO DELLA BIOMASSA COME FONTE DI ENERGIA RINNOVABILE NELLA PROMOZIONE DEI DIRITTI SOCIALI IN BRASILE	p. 305
Vânia Aieta - Thiago Jordace	
LE NUOVE SFIDE DELLA PIANIFICAZIONE URBANISTICA, TRA SOSTENIBILITÀ AMBIENTALE E RESILIENZA	p. 313
Sara Benvenuti	
IL PRINCIPIO DI PROPORZIONALITÀ AMBIENTALE E IL SUPERINTERESSE AL CONTENIMENTO DEL CONSUMO DI SUOLO	p. 325
Elena Buoso	

LA RESPONSABILITÀ PER DANNO AMBIENTALE COME EFFICACE STRUMENTO DI TUTELA PER UNO SVILUPPO SOSTENIBILE?	p. 337
Francesca Degl’Innocenti	
“ENERGIA SOSTENIBILE” NELLE ZONE MONTANE: CRITICITÀ E PROSPETTIVE DI SVILUPPO A LIVELLO INTERNAZIONALE	p. 349
Francesca Della Rosa	
SPECIFICITÀ MONTANA, AMBIENTE ED ENERGIA. UN MODELLO DI SVILUPPO SOSTENIBILE DELLA MONTAGNA	p. 361
Bruno Di Giacomo Russo	
TUTELA DELL’AMBIENTE E DEL PAESAGGIO: PROFILI CRITICI E ASPETTI CONTROVERSI.....	p. 373
Luca Di Giovanni	
LA NOZIONE DI “SOBRIETÀ” NEL DIRITTO FRANCESE. TRANSIZIONE ENERGETICA, DIRITTO DELL’ENERGIA E DIRITTO DELL’AMBIENTE	p. 385
Solange Fatal	
L’APPROCCIO PRECAUZIONALE ALLA TUTELA DEL MARE E LO SFRUTTAMENTO SOSTENIBILE DELLE RISORSE ALIEUTICHE	p. 399
Tiziana Fortuna	
LA TUTELA DELL’AMBIENTE NELL’ATTUALE CONTESTO COSTITUZIONALE ITALIANO, LUCI ED OMBRE DI UN SISTEMA DA RIFORMARE.....	p. 411
Vincenzo Laruffa	
LE ENERGIE RINNOVABILI NELLA RIFORMA ENERGETICA MESSICANA.....	p. 423
Valerio Lubello	
CRISI ECONOMICA, DISMISSIONE DEI TERRENI DEMANIALI AGRICOLI E CONSUMO DI SUOLO IN ITALIA	p. 435
Greta Massa Gallerano	

IL DIRITTO ALL'INFORMAZIONE COME "INTERESSE PUBBLICO FONDAMENTALE" PER LA TUTELA INTERNAZIONALE DELL'AMBIENTE	p. 447
Stella Romano	
ENTI LOCALI E SVILUPPO ENERGETICO SOSTENIBILE	p. 459
Pier Marco Rosa Salva	
RIVISITAZIONE DEL SISTEMA FISCALE IN MATERIA AMBIENTALE: RIFLESSIONI E PROPOSTE	p. 471
Floriana Santagata	
L'AMBIENTE NELLA GIURISPRUDENZA QPC DEL CONSEIL CONSTITUTIONNEL: RECENTI SVILUPPI E CRITICITÀ ALLA LUCE DELLA CHARTE DE L'ENVIRONNEMENT "A GEOMETRIA VARIABILE"	p. 483
Chiara Sorbello	
FONTI RINNOVABILI IN FUNZIONE DELLA "SOSTENIBILITÀ" (AMBIENTALE E ALIMENTARE)	p. 495
Alessandra Tommasini	
BIBLIOGRAFIA VOLUME 1, TOMO I	p. 507
GLI AUTORI VOLUME 1, TOMO I	p. 557

A CRITIC LECTURE OF THE EU TWO FACED APPROACH TO BIODIVERSITY: EQUAL GUARANTY OR MULTINATIONAL BIO-RAID? THE IMPORTANCE OF A SELF-RECONSIDERATION OF EU POLITICS IN BIODIVERSITY

Valentina Colcelli

CONTENTS: 1. Biodiversity EU legal framework. A brief introduction. - 2. Mutually agreed terms and Contract for the fair and equitable sharing of benefits. - 3. Fair and equitable sharing of benefits as displing the EU general principle of solidarity. - 4. The nullity of Mutually agreed terms and protection for compensation of providers. - 5. For reconsidering EU approach in Biodiversity. - 6. Conclusion.

Abstract

European Union seems to have a two-faced approach to the Biodiversity. One of this is a support to the biodiversity defence by EU political position and now through EU law with direct effect, the Reg. n. 511/2014. On the other side, a limitation of certification and marketing of vegetable seeds as by European Court of Justice affirmed in the case C-59/11. The article aims to lay down an analysis for developing a juridical framework able to defend biodiversity, its guarantee, local and native population's benefit and jurisdictional prevalence of patents. This meanwhile expects that the EU institutions must "align" their two-faced approach to the Biodiversity in their legal system. To achieve these goals the paper analyses the nature of invalidity by contracts and mutually agreed terms if missing specific provisions for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources or of the traditional knowledge associated with genetic resources. Thus, in the light of the legal framework described the paper studies how applying for the vegetable patent under the light of the aims of the Reg. EU n. 511/2014 despite no apt coordination between the Regulation itself and the system for the protection of plant variety rights established by EU legislation.

1. Biodiversity EU legal framework. A brief introduction

The activities of the modern factory laboratories, Universities and Researcher Centres have got a lot of precious information regarding genetic resources and their traditional knowledge. They grooved incomes through the free access

to this kind of knowledge, non protected information and genetic resources aimed to develop their business¹. The Multinational Trademarked full use of the traditional knowledge, but the local community, farmers and Indigenous persons do not give a conscientious assent expressed by a decent remuneration from Multinational beneficiaries of their knowledge².

As the matter of fact inside the iniquity approach there is the abusive exploitation of the traditional knowledge that has a wickedness which is not politically or ethically correct. The Iniquity approach above mentioned is amplified by the Multinational Firms common behaviours which are able to obtain (also in EU legal system) patent protection or other forms of intellectual property rights (trademark, utility model, short-term patent, plant variety right) made from traditional knowledge or genetic sources.

In the EU legal system, matters relating to seed are governed by various directives: Council Dir. 2002/55/EC of 13 June 2002; Commission Dir. 2009/145/EC of 26 November 2009; Commission Dir. 2003/91/EC of 6 October 2003; Council Dir. 2002/53/EC of 13 June 2002; Council Dir. 98/95/EC of 14 December 1998.

It was only during 2014 that the European Union ruled measure for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization in the European Union (Reg. UE n. 511/2014). Though, just in the second part of 2015 the Arts. 4, 7 and 9 of the Reg. UE n. 511/2014 will enter into force. The articles above mentioned respectively run the “Obligations of Users”, the “Monitoring user compliance” and the checking of user compliance. For “users” Reg. UE n. 511/2014 means the natural/legal persons that utilise genetic resources or traditional knowledge associated with genetic resources.

The above-mentioned legal framework has to comply with the EU jurisprudential approach to biodiversity guarantee. In fact, on the 12th of July 2012, European Court of Justice in the case C-59/11 (*Association Kokopelli v. Graines Baumaux SAS*) confirmed that “old varieties” could be traded if they are listed in the official catalogues of one or more of the Member States and if they comply with the requirements of the Dir. 2002/55/EC. The directive allows for a trading of certain “conservation varieties” and “varieties developed for growing under particular conditions”.

¹ D.A. POSEY, *Intellectual Property rights and Just Compensation for Indigenous knowledge, Amazonia and Siberia: Legal Aspects of the preservation of the Environment and Development in the Last Open Spaces*, *Anthropology Today* 6, 1993, 4, 287.

² P. DUTFIELD, *Sharing the benefit of Biodiversity. Is there a role for the Patent System?*, in G.P. SAMPSON-J. WHALLEY (eds.), *WTO, Trade and the Environment*, Cheltenham, 2005, 513.

The EU Court of Justice reconfirmed only the seed of registered varieties may be traded within the EU.

The EU seems to have a two-faced approach to the Biodiversity. One of this is a support to the biodiversity defence by EU political position and now through EU law with direct effect, the Reg. n. 511/2014. On the other side, a limitation of certification and marketing of vegetable seeds as by EU Court of Justice affirmed in the case C-59/11.

The article aims to lay down an analysis for developing a juridical framework able to defend biodiversity, its guarantee, local and native population's benefit and jurisdictional prevalence of patents. This meanwhile expects that the EU institutions must "align" their two-faced approach to the Biodiversity in their legal system.

To achieve these goals the paper analyses in paragraph n. 2, the function of Contract and Mutually agreed terms for the fair and equitable sharing of benefits and the section n. 3 evaluates whether or not the obligations of Art. 3, Reg. EU n. 511/2014 are an EU law general principle. Starting from this, the paper investigates the nature of invalidity by contracts and mutually agreed terms if missing specific provisions for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources or of the traditional knowledge associated with genetic resources. Thus, in the light of the legal framework described in previous sections, paragraph n. 5 studies how applying for the vegetable patent under the light of the aims of the Reg. EU n. 511/2014 despite no apt coordination between the Regulation itself and the system for the protection of plant variety rights established by EU legislation. The same paragraph shortly considers art. 1, Prot. 1, ECHR underpin as support of the Biodiversity guarantee in the EU legal system. Paragraph n. 6 is the concluding section on contractual liability and actions for damages and nullity of contract as measures to safeguard the EU economic order.

2. Mutually agreed terms and Contract for the fair and equitable sharing of benefits

Reg. EU n. 511/2014 identifies a set of criteria using in the identification of the area (country, region, etc.) from which the genetic material used for developing new varieties comes. These criteria will reflect the enforcement of legal rights, the rate of entrepreneurship, the structure of the higher education system, etc. of partner countries of the Nagoya Treaty. Firstly, they should guarantee the effectiveness of legal contracts and technology transfer agreements once the biotech research activity is completed.

Second, they have to contribute to developed potential market value of new crop varieties. Thus, measurement of returns – mainly monetary – to

commercialising innovation will be crucial to identify a fair price to which the new varieties could be sold with particular attention to local communities.

One of these criteria is a provision for benefit sharing with the provider of the genetic resources or of traditional knowledge inside in the contract made for utilisation, subsequent applications and commercialization of them.

Competent authorities of Member States should check whether users comply with the obligations (see point 29, Reg. UE n. 511/2014). Competent authorities could also refer to the Judge of the National and European Union Courts too. Through the jurisdictional control of the contract for utilisation, subsequent applications and commercialization of genetic resources and traditional knowledge linked with them, it will be possible to fulfil the Reg. UE n. 511/2014 goal. In the European Union internal market, this means fairing and equitable sharing of benefits arising from the utilisation of genetic resources and traditional knowledge.

Reg. EU n. 511/2014 uses Mutually agreed terms and contract to obtain prior informed consent and have established mutually agreed terms for benefits sharing with the provider of genetic resources or of traditional knowledge associated with genetic resources.

These kinds of contracts have to set out specific conditions for the fair and equitable sharing of benefits arising from the utilisation of genetic resources or of traditional knowledge associated with genetic resources. According to the Art. 3 Reg. UE n. 511/2014 they have also included further conditions and terms for such utilisation as well as subsequent applications and commercialization.

In this case and to better understand what kind of juridical control there could be on the contracts and mutually agreed terms, it relevant settling the nature of the invalidity of them. This situation is intertwined and takes different contours depending on the nature of the interests to be protected.

It is relevant understanding whether or not the obligations of Art. 3 Reg. UE n. 511/2014 are EU law general principle.

Starting from this, the following paragraph will reflect about the nature of invalidity of the contracts and mutually agreed terms if they are missing specific provisions for fair and equitable sharing of benefits arising from the utilisation of genetic resources or of traditional knowledge associated with genetic resources.

3. Fair and equitable sharing of benefits as displing the EU general principle of solidarity

True, more often than not, the general principles of EU law were not developed or based on a thorough textbook style analysis. This does not make it less interesting to look at the interaction of EU law and comparative law in

this particular field³.

The Reg. EU n. 511/2014 links “General principles of law” to one of the most visible areas of intersection between EU law and ethic choice in the light of conserving the EU legal system. The Mutually agreed terms and Contract ruled by Art. 3 Reg. EU n. 511/2014 is correlated to distributive justice and the principle of solidarity underpinned all the EU legal system.

As a matter of fact legal traditions of some of the EU Member States (formerly planned economies) impact on the EU legal system to deal with distributive aims and approaches⁴.

It is only after the adoption of international treaties of human rights, and of the “second generation” of Constitutions, that is possible to refer to the Solidarity Principle in explicit terms⁵. In second half of the XX century an exploration began of the idea that people could make claims to public authorities in order to obtain social benefits, as explained by Thomas H. Marshall, who recognised a new political notion of citizenship⁶.

The most recent development of the literature now recognises a horizontal effect to Constitutional norms, since the interpretation of constitutional rules in the European States is increasingly related to the concept of individualisation⁷. Individualisation is an anthropocentric approach based on full respect of human dignity as a precondition for the protection of fundamental rights, which has to be the largest possible and functionally efficient⁸.

The presence of the solidarity principle underpinning the EU legal system – that means access to essential services by EU citizens in destination Member States – could be better explained by this spill-over effect⁹. Because, the status of

³ B. AMABLE, *The Diversity of Modern Capitalism*, Oxford, 2003.

⁴ D. ACEMOGLU, *Theory, General Equilibrium, and Political Economy in Development Economics*, in *Journal of Economic Perspectives*, 24, 3, 2010, 17-32.

⁵ S. MEZZADRA, *Costituzionalizzazione del lavoro e stato sociale: l'esperienza weimariana*, in AA.VV., *Ai confini dello Stato sociale*, Roma, 1995, 81; C. MORTATI, *La Costituzione di Weimar*, Firenze, 1946, 49.

⁶ T. H. MARSHALL, *Cittadinanza e classe sociale*, Laterza, Bari-Roma, 2002, 48.

⁷ R. ARNOLD, *Le droit constitutionnel européen et le rôle des cours de Karlsruhe, de Luxembourg et de Strasbourg*, Vrabie (dir.), Institutul European Iasi/Roumanie, 2003, 53-62.

⁸ R. ARNOLD, *Protección de los derechos fundamentales (en Europa)*, in M.I. ÁLVAREZ LEDESMA-R. CIPPITANI (coord.), *Diccionario analítico de derechos humanos e integración jurídica*, Roma-Perugia-México, 2013, 563.

⁹ V. COLCELLI, *The Solidarity Principle in New EU Member States*, in C. PERUGINI-F. POMPEI (eds.), *Inequalities during and after transition in Central and Eastern Europe*, Basingstoke, 2015, 247-265.

citizenship also incorporates the right of free circulation, which is interconnected to distributive justice, through the possibly of acceding essential services and benefits in destination Member States (COM(2002)694). No limitation to the free circulation of the EU citizenships is also realised according to the principle of solidarity.

The principles of solidarity, also supporting Reg. UE n. 511/2014, could be defined as the general principles common to the laws of the Member States (Art. 340(2) TFEU)¹⁰.

4. The nullity of Mutually agreed terms and protection for compensation of providers

Starting from the above conclusion, Reg. EU n. 511/2014 and according to the Art. 191, 192(1) and Art. 340(2) TFEU, it is possible to say that in the field of biodiversity, EU framework aims at structuring and safeguarding the EU internal market as a market avoiding bio-piraterie.

The nature of the General principles of law described for the purpose of conserving the EU legal system, carried out by individuals against other individuals, means ensuring the effect utile of EU rights¹¹. In this situation as in other similar situations, the EU legal system assigns to contract not only the role of self-regulation of private interests directly involved in it, but also the function of guaranteeing the economic order sought by the European Union.

Comparison of the Reg. EU n. 511/2014 “nature” with the Art. 101 TFEU helps to better understand the above consideration.

By Art. 101, paragraph 1, TFEU (Art. 81 of the EC Treaty) (conferring of rights on individuals), persons can claim for damages caused by actions or contracts, which may restrict or distort the competitive process.

In protecting the economic order of the Community, the nature of Art. 101 TFEU legitimates anyone to rely on the invalidity of competition-restricting agreements and, therefore, seek the remedy for damages suffered if a causal link can be established between the aforementioned agreements or practices and damages¹².

Anyone (not only businesses but also consumers) who suffers damages because of competition-restricting agreements can claim for damages¹³.

¹⁰ R. CIPPITANI, *La solidarietà giuridica tra pubblico e privato*, Roma-Perugia-Mexico, 2011.

¹¹ ECJ, Judgement 20 September 2001, case C-453/99, *Courage v. Crehan*.

¹² ECJ, *Courage v. Crehan*, cit.

¹³ Cass., sentenza 2 febbraio 2007, n. 2305/07.

As Art. 101 TFEU, also the general principles inside the Reg. EU n. 511/2014 and nature Reg. EU n. 511/2014 (conferring rights on individuals) work in the EU legal system to guarantee the economic order of the EU. It legitimates anyone to rely on the invalidity of mutual agreements lacking of specific conditions for the fair and equitable sharing of benefits arising from the utilisation of genetic resources or of traditional knowledge associated with genetic resources and therefore to seek damages suffered, if a causal link can be established between agreements or practice and the damage suffered.

Or better the local community, native populations and everybody conserve the biodiversity and traditional knowledge associated with genetic resources as weaker persons legitimate to rely on the invalidity of mutual agreements lacking specific conditions above mentioned. Because the infringement of EU rules regarding the non setting out specific conditions for the fair and equitable sharing of benefits arising from the utilisation of genetic resources or of traditional knowledge associated with genetic resources in the contract means nullity of the same contract.

Referring to case law of the Court of Justice on infringement of Arts. 101, 102 et seq. TFEU, often combine claims for damages with those for absolute or relative nullity of the competition-restricting contract¹⁴.

That said, the fundamental interests of the weaker party may be assert before the civil courts have a double order and coincide with those already examined in respect of the contracts to sharing competitive bidding:

- a) The interest in the elimination of the unfair unbalanced contract and
- b) The interest in the preservation of the contract by the balancing of the contracts' terms.

Overlooking the heart of the legal problem of contracts that pursue a prohibited agreement is derived from avoiding the public policy of economic protection that prohibits the hindering of the freedom of contract of the weaker party.

5. For reconsidering EU approach in Biodiversity

In the light of the above-mentioned legal framework, it is possible to analyse in a critical manner the EUs two-faced approach to Biodiversity which proposes legal transfer models based on “benefit sharing” to the local community avoiding multinational bio-raid.

When Art. 4 Reg. EU n. 511/2014 entered into force, a problem occurred regarding the correct interpretation of documents requesting a patent for

¹⁴ ECJ, Judgement 16 July 2006, case C-295-298/04, *Manfredi*.

vegetables. Settling the different approaches that seem to exist between the jurisprudential defence of patents (ECJ, Judgment 12 July 2012, case C-59/11, *Association Kokopelli v. Graines Baumaux SAS*) and the EU law on the biodiversity defence, particular attention will need to be posed by the use of benefit-sharing tools on the new varieties that are derived from the traditional plant material, with the view to increase the benefits for the local communities that traditionally maintain the selected.

Users (Art. 3, point 4), Reg. EU n. 511/2014) have to exercise due diligence to ascertain the genetic resources. The due diligence obligation should apply to all users regardless of their size (including micro, small and medium-sized firms) (point 23, Reg. EU n. 511/2014). Art. 4 Reg. EU n. 511/2014 explains what users must do in order to comply with the purpose to fulfil “due diligence” in their own activities linked with genetic resources ascertain: transferring and keeping of genetic resources, also for food and agriculture not contented under the Annex I of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), require the presence of international- recognised certificate of compliance.

According with the point 21 of the Reg. EU n. 511/2014, “genetic resources have been accessed by applicable legal or regulatory requirements and to ensure that, where relevant, benefits are fairly and equitably shared”. In that context, it is relevant that the user has “internationally-recognised certificates of compliance as evidence that the genetic resources covered were legally accessed and that mutually agreed terms were established for the user and the utilisation specified therein” (point 21), and also national authorities reckoned them.

Where no international certificate exists, documents and information have to be verified by the users (Reg. EU n. 511/2014). Also, regulation stated users have to declare and provide evidence that they have exercised due diligence when requested.

Due diligence and an information-recognised certificate for compliance, as well as full information on genetic material and resources that pay the attention to and address how to apply for a vegetable patent under the aims of Reg. EU n. 511/2014.

It is relevant to underline point 25 of the Reg. EU n. 511/2014 which affirms that one suitable point for such a declaration is when research funds are received, and also at the final stage of utilisation. This means at the stage of final development of a product before requesting market approval for a product developed *via* the utilisation of genetic resources or traditional knowledge associated with such resources, or, where market approval is not required, at the stage of final development of a product before first placing it on the Union market.

Also if – in accordance with Art. 291(2) TFEU – the already mentioned

point 25 underlines the need to implement the power of the EU Commission to determine the stage of final development of a product, in accordance with the Nagoya Protocol, the system for the protection of plant variety.

Reg. EC n. 2100/94 of 27 July 1994 on Community plant variety rights, Reg. EC n. 1238/95 of 31 May 1995 that establishes rules for the application of the fees payable to the Community Plant Variety and Reg. EC n. 1768/95 of 24 July 1995 for implementing rules on the agricultural exemption built the system for the protection of plant variety rights established by the European Union. The legislative framework above mentioned allows intellectual property rights, valid throughout the EU, to be granted for plant varieties.

Without waiting for the Commission power implementation, how to apply for the vegetable patent under the light of the aims of the Reg. EU n. 511/2014 could be realized. The quickest solution could be to not grant the vegetable patent if the due diligence in the documents required for applying for vegetable plants patents is not provided and would likely produce a nullity of the bad patent if granted. Also, in accordance with the nature of the juridical goods protected by the Art. 1 Prot. 1 ECHR, and allowing the direct effect of the Reg. EC n. 2100/94 each Member State of the ECHR to claim the European Court of Human Rights in order to evaluate the legitimating of the vegetable patents granted which have started from the genetic resources and traditional knowledge and not if they do not comply with the Nagoya Protocol.

This hypothesis is strengthened by the Art. 1 of the Prot. 1 of ECHR and the scholar's studies¹⁵ on the nature of genetic resources and traditional knowledge as juridical goods protected by ECHR. Genetic resources and traditional knowledge could be qualified as "goods" protected by the Art. 1 of the Prot. 1 of ECHR. It is clear, therefore, how the scope of the cited article is truly extensive, including any measure that involves a legal situation regarding goods¹⁶. Genetic resources and traditional knowledge represent a mix of private and public characteristic. Thus, they could be treated as impure public goods.

By case-laws of the European Court for Human Rights, the notion of goods protected by the law has a broad meaning. It is not limited to the ownership of material goods, and it does not only cover private ownership rights but extends to public benefits¹⁷ and entitlements like genetic resources and traditional

¹⁵ S. VEZZANI, *Il Primo Protocollo alla Convenzione europea dei diritti umani e la tutela della proprietà intellettuale di popoli indigeni e comunità locali*, in *Diritti Umani e Diritto Internazionale*, 2007, 1, 305-342.

¹⁶ V. COLCELLI, *The problem of the legal nature of green certificates in the Italian Legal System*, in *Energy Policy*, 2012, 40, 301-306.

¹⁷ ECHR, 18 June 2002, 47122/99, *Woonbron Volkshuisvestingsgroep & Others v. the Netherlands*.

knowledge.

The nature of the goods, and the increasing resource complexity as well as the changing roles for the State is usually analysed because it is challenging to understand the introduction of adaptive ecosystem governance¹⁸.

6. Conclusion

The nature of Reg. EU n. 511/2014 is correlated to distributive justice and the principle of solidarity underpinning all the EU legal system as the General principles of EU law, means that the infringement of EU rules regarding specific conditions for the fair and equitable sharing of benefits arising from the utilisation of genetic resources or of traditional knowledge associated with genetic resources in the contract means nullity of the same contract/mutually agreed terms (which is absolute) or contract revision in accordance with protection for compensation guarantees that it would be in the weaker party's fundamental interests to preserve it. Local community, native populations conserving biodiversity and traditional knowledge associated with genetic resources as weaker persons legitimate to rely on the invalidity of mutual agreements lacking specific conditions for the fair and equitable sharing of benefits. Action for damages claimed by the weaker party to supply an unfair contract is also expected.

Reg. EU n. 511/2014 also means nullity of bad patents. Because due diligence, and the information-recognised certificate for compliance, full information on genetic material and resources to apply for a vegetable patent under the aims of Reg. EU n. 511/2014. As a matter of fact, Art. 1 Prot. 1 ECHR lays down a jurisprudential path to protect the genetic and material resources to implement fully of the spirit of Nagoya protocol. Thus, according with the nature of the juridical goods genetic resources and traditional knowledge and allowing the direct effect of the Reg. EC n. 2100/94. This means that each ECHR State Member can claim the European Court of Human Rights in order to evaluate the legitimating of the vegetable patents granted in the EU legal system if they do not comply with the Nagoya Protocol.

These conclusions confirm the EU legal system trend of using of new complementary/alternative ways to govern its market integration¹⁹, such

¹⁸ A. SANDBERG, *Property rights and ecosystem properties*, in *Land Use Policy*, 2007, 24, 613-623.

¹⁹ Le Livre blanc sur la gouvernance européenne COM 428 (2001) final and Suivi du Livre blanc sur la gouvernance européenne – Pour un usage mieux adapté des instruments, COM (2782002) final, 5 June 2002, Recours encadré à un mécanisme de corégulation.

familiar private law instruments²⁰. Thus tort or contract now appear as only a small part of many possible tools harnessed with the aim of obtaining allocative efficiency or distributive justice and are synthetically described as the correction of market failures (e.g. law rules applying to contracts for services, EC environmental law, environmental liability, product safety, product liability, etc.). Additionally private law assumes the effects of externalities suffered by third parties (see f.i. liability that may give ex post situational remedies as well, in case one party has been seriously underprivileged)²¹. In this situation, the EU legal system assigns to the contract not only the role of self-regulation of interests of individuals directly involved in it but also a function of guarantee of the EU economic order²². Scholars talk about “Social” regulation of private law²³.

²⁰ V. COLCELLI, *Private law instruments as way of EU regional integration*, in M.I. ÁLVAREZ LEDESMA, R. CIPPITANI (coord.), *Derechos Individuales e Integración regional (antología)*, Roma-Perugia-México, 2013, 575-597.

²¹ E.S. AMUNDSEN-F.M. BALDURSSON-J.B. MORTENSEN, *Price Volatility and Banking in Green Certificate Markets*, Working Papers in Economics 02, University of Bergen, Department of Economics, 2003.

²² F. CAFAGGI-H.M. WATT, *The Regulatory Function of European Private Law*, Chaltenham, 2008.

²³ C. JOERGES-E.U. PETERSMANN, *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford, 2006.

