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The legislator's strategic toolkit. The systemic construction of the New World Order

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Le Costituzioni orizzontali

Les Constitutions horizontales

The Horizontal Constitutions

Tyler Adams, Nicoletta Bersier Ladavac, Andrea Pitasi, Ellen Taricani*

Riassunto

Lo scopo del presente lavoro è quello di descrivere l'”orizzontalizzazione” della costituzione dello stato/nazione in uno scenario di globalizzazione del diritto, in cui l'Elaborazione della Politica Legislativa di un Ordine Mondiale Sovranazionale (*Supranational World Order Legislative Policy Modelling* - WOLPM) sta riprogettando drasticamente la gerarchia tradizionale delle fonti normative, la cui sommità era rappresentata dalle costituzioni nazionali. Lo scenario attuale è molto differente e le costituzioni dello stato/nazione non rappresentano più l'unica cornice per la legiferazione; al contrario le costituzioni fanno parte di una cornice più ampia fino ad essere inquadrate altrove. Tale nuova cornice è più corta in senso verticale e orizzontalmente più lunga e, a causa dello slittamento dei trattati transnazionali e sovranazionali, la sovranità sta diventando sempre più sovranazionale e globale; conseguentemente, sta emergendo una condizione di interdipendenza che delinea una rete non reversibile di reti. Tale processo di orizzontalizzazione evolve nell'innovativo potere della funzione legislativa nel sistema legislativo globale; tale sistema è l'unico che può proattivamente supportare una politica di innovazione praticabile per le sfide chiave dei nostri tempi. Inoltre, tale variazione di potere sfrutta e aumenta la qualità della democrazia: tramite una drastica riduzione dei costi meso e micro organizzativi di Williamson - i quali possono anche facilitare un collegamento diretto tra i livelli macro e psico-sociali - dove sembra emergere un'evoluzione da più persone a una singola persona (es.: dalle singole persone degli stati membri dell'UE al popolo dell'UE). Per meglio comprendere tale evoluzione è possibile basarsi su due basi teoriche. Da una parte i lavori di Lawrence Friedman sulla globalizzazione e sulla cultura della tecnologia, la quale unisce anche le tradizioni sociali, politiche e religiose nel processo di legiferazione globalizzato. Dall'altra la visione di Luhman-Teubner basata sul concetto di Sistema Legislativo (solo uno e globale in tutto il pianeta). In questo caso, un Sistema Legislativo Globale implica due direzioni evolutive: una direzione verticale, la quale significa un aumento nella produzione di leggi in cima a tale Sistema e una direzione orizzontale, la quale consiste di abbinamenti strutturali con i sistemi sociali giuridici locali. Tali abbinamenti possono presentare anche caratteristiche conflittuali. Pertanto, così come delinea Teubner, si assiste a una crisi del costituzionalismo tradizionale, causato da un transnazionalismo. Di conseguenza il costituzionalismo tradizionale si basa sul concetto di nazione-stato e può difficilmente accettare la sovranità sovranazionale. Inoltre, c'è la forte tendenza tra i sistemi sociali ad allontanarsi dallo stato generando un'autonomia individuale o istituzionale. Per prevedere il possibile risultato di tale tendenza, il miglior strumento teorico è la distinzione sistema/ambiente. Tali nozioni operano una netta distinzione tra un ordine mondiale globale sempre più formalizzato e unificato (tramite i trattati sovranazionali come menzionato sopra) e un ambiente sempre più turbolento e rumoroso, costituito da forti proteste. In base alla teoria sistemica, l'irritazione e la risonanza possono far vacillare il sistema legislativo, tuttavia l'ambiente rumoroso non ha funzioni costruttive.

Résumé

Le but de ce document est de décrire l'« horizontalisation » des constitutions d'état/nation dans un contexte de globalisation de la loi, où le Modelage de Politiques Législatives Supranationales d'Ordre Mondial (*Supranational World Order Legislative Policy Modelling* - WOLPM) est en train de révolutionner la hiérarchie traditionnelle des sources juridiques, dont les plus hautes étaient les constitutions d'état-nation. Le scénario actuel est radicalement différent et les constitutions d'état/nations ne représentent plus le cadre de légifération; elles sont plutôt un élément d'un cadre plus vaste, lui-même scindé en différents systèmes. Cette nouvelle structure est plus courte verticalement et plus développée horizontalement, car les traités transnationaux et supranationaux déplacent la souveraineté à un niveau de plus en plus supranational et global. Par conséquent, une condition d'interdépendance est en train d'émerger, définissant un réseau de réseaux irréversible. Ce processus d'horizontalisation établit le pouvoir innovant de la fonction législative dans le système de loi global; ce système est le seul qui puisse supporter proactivement une politique innovante soutenable face aux défis majeurs de notre époque.

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En outre, ce pouvoir fait figure de levier et améliore la qualité de la démocratie: à travers une restructuration drastique des coûts Williamson au niveau méso et macro de l'organisation – qui peut également favoriser un lien direct entre les niveaux macro et psycho-sociaux – une évolution semble émerger, de différentes populations à une population (par ex. : des États membres de l'UE à la population de l'UE). Une meilleure compréhension de cette évolution se base sur deux fondements théoriques. D'une part, les travaux de Lawrence Friedman sur la globalisation de la culture et de la technologie, qui entraîne également la recombinaison des traditions sociales, politiques et religieuses au sein du processus globalisé de législation ; d'autre part, la vision de Luhmann-Teubner basée sur le concept de Système de Loi (un système unique et global pour toute la planète). Dans cette optique, un Système de Loi Global implique deux directions évolutives: une direction verticale, ce qui signifie accroître la production de loi au sommet du système, et une direction horizontale, consistant en un couplage structurel avec les systèmes sociaux juridiques locaux. Ces couplages peuvent également présenter des caractéristiques conflictuelles. En effet, comme le souligne Teubner, le constitutionalisme traditionnel traverse une crise provoquée par la transnationalisation, car le constitutionalisme traditionnel est basé sur l'état-nation, et peut difficilement accepter des souverainetés supranationales. Par ailleurs, de fortes inclinations au sein des systèmes sociaux tendent à les rejeter hors des états et à préférer une autonomie individuelle ou institutionnelle. Afin de prévenir l'éventuelle émergence de cette tendance, le meilleur outil théorique est la distinction système/milieu. Cette notion établit une nette distinction entre un ordre mondial globalement unifié et formalisé (à travers des traités supranationaux comme évoqué plus haut) et un milieu de plus en plus agité et revendicatif caractérisé par de fortes protestations. Selon cette théorie systémique, l'irritation associée à celles-ci pourraient faire osciller le système législatif, tandis qu'un milieu tumultueux n'a pas de fonctions constructives.

Abstract

The goal of this paper is to describe the “horizontalization” of state/national constitutions in a scenario of globalizing law, where the Supranational World Order Legislative Policy Modelling (WOLPM) is dramatically redesigning the traditional hierarchy of legal sources, whose top were with state–national constitutions. The current scenario is radically different and state/national constitutions are no longer frameworks for law-making; rather they are part of a larger frame, but rather framed in a different framework. This new framework is vertically shorter and horizontally much longer, as transnational and supranational treaties are shifting the sovereignty is going more and more supranational and global; as a consequence, a condition of interdependence is emerging, which shapes a non-reversible network of networks. This horizontalization process evolves the innovative power of the legislative function in the global law system; this system is the one which can proactively support an innovation policy viable to the key challenges of our times. Furthermore, this power shift leverages and increases the quality of democracy: by a dramatical downsizing of the meso and the micro organizational Williamson's costs -which can also facilitate a direct link between the macro and the psycho-social levels- an evolution seems to be emerging from different peoples to one People (eg: from the EU member states peoples to the EU people). A better comprehension of this evolution is based upon two theoretical grounds. On one side, Lawrence Friedman's works about the globalization of culture and technology, which is also recombining social, political and religious traditions in the globalized law making process. On the other side the Luhmann-Teubner's vision based on the concept of Law System (just one and global all over the planet); in this case, a Global Law System is implies two evolutive directions: a vertical direction, which means increasing law production at the top of this System; and a horizontal direction, consisting of structural couplings with local juridical social systems. These couplings can also show conflictual features. As a matter of fact, as Teubner points out, there is a crisis in traditional constitutionalism, that is caused by transnationalization. As a matter of fact, traditional constitutionalism is Nation-state based and hardly can it accept supranational sovereignties. Furthermore, tendencies are strong among social systems, to put themselves outside the state and to engender individual or institutional autonomy. In order to foresee the possible outcome of this trend, the best theoretical tool is the system/environment distinction. This notions draws a neat distinction between a more and more formalized and unified global world order (through supranational treaties as mentioned above) and a more and more turbulent and noisy environment, consisting of strong protests. According to systemic theory, irritation and resonance might make the law system oscillate, nevertheless the noisy environment has no construction function.

Key words: horizontalization; Constitutions; WOLPM; Global Law System.

1. Prologue: the globalization of law and the evolution of law sources hierarchy.

The goal of this paper is to describe the “horizontalization” of state/national constitutions in a scenario of globalizing law, where the Supranational World Order Legislative Policy Modelling (WOLPM) is dramatically redesigning the traditional hierarchy of legal sources, whose top

were with state–national constitutions. The current scenario is radically different and state/national constitutions are no longer frameworks for law-making; rather they are part of a larger frame, but rather framed in a different framework. This new

framework is vertically shorter and *horizontally* much longer, as transnational and supranational treaties are shifting the sovereignty is going more and more supranational and global; as a consequence, a condition of interdependence is emerging, which shapes a non-reversible network of networks. This horizontalization process evolves the innovative power of the legislative function in the global law system; this system is the one which can proactively support an innovation policy viable to the key challenges of our times.

Furthermore, this power shift leverages and increases the quality of democracy: by a dramatical downsizing of the meso and the micro organizational Williamson's costs -which can also facilitate a direct link between the macro and the psycho-social levels- an evolution seems to be emerging from different peoples to one People (eg: from the EU member states peoples to the EU people).

A better comprehension of this evolution is based upon two theoretical grounds.

On one side, Lawrence Friedman's works about the globalization of culture and technology, which is also recombining social, political and religious traditions in the globalized law making process.

On the other side the Luhmann (1995, 1997)-Teubner's (1996, 2012) vision based on the concept of Law System (just one and global all over the planet); in this case, a Global Law System is implies two evolutive directions: a vertical direction, which means increasing law production at the top of this System; and a horizontal direction, consisting of structural couplings (quot) with local juridical social systems. These couplings can also show conflictual features. As a matter of fact, as Teubner points out, there is a crisis in traditional constitutionalism, that is caused by transnationalisation. As a matter of

fact, traditional constitutionalism is Nation-state based and hardly can it accept supranational sovereignties. Furthermore, tendencies are strong among social systems, to put themselves outside the state and to engender individual or institutional autonomy. In order to foresee the possible outcome of this trend, the best theretical tool is the system/environment distinction (Luhmann, 1995). This notions draws a neat distinction between a more and more formalized and unified global world order (through supranational treaties as mentioned above) and a more and more turbulent and noisy environment, consisting of rageous protests. According to systemic theory, irritation and resonance might make the law system oscillate, nevertheless the noisy environment has no costruction function.

2. Policy Models in Five.

This distinction system/environment requires further considerations.

According to Luhmann, all systems consist of communication acts, and while law systems consist of epistemological communications (i.e. communication which are supposed to comprehend the possible evolution trends of a number of other systems), also in their environments there can be complex systems, whose basic communications acts essentially base upon doxa (Berger-Luckmann, 1991), i.e media redundancy of emotional elicitations. It is important to highlight the centrality of doxa in contemporary policy-making, which essentially base upon quick decisions aiming at keeping and increasing public opinions' consensus. Furthermore, the distinction environment/system is not absolute, for systems can be environment for other systems and viceversa.

In this specific case, policy systems can be the environment for law systems and law systems for opinion systems; this means they are reciprocally disordered and noisy.

In order to have these two categories of systems communicate, it is necessary to redesign their relationships: a structural coupling should emerge.

Within this framework, law systems will play a major role, because, as above shown, they are epistemologically more complex and innovative. In other words, as the American political scientist T.J. Lowy (1999 and 2009) stated, “policy determines politics”: the legislator is supposed to lead social changes and to have politics drive society towards the new global order.

With this aim, the key basic Legislator’s toolkit is composed of five tools:

a) Institutional tool.

It is the most traditional legislative tool since the Peace of Vestfalien (1648), through the Congress of Vienna (1815) up to the world new order after the Great War.

The national State is the historical key player of this tool.

b) Intergovernmental tool.

This is a key tool adopted to shape the world order since the WWII; the Marshall Plan, UN treaties and agreements, the original core of what is now called European Union, WTO, WIPO and WHO are outcomes of this tool.

c) Federal tool.

It is a very important and nevertheless tricky tool. Most of what the doxa/public opinion would call “nation states” are federal ones: Mexico, USA, Canada, Switzerland, Brazil, Argentina and more.

Moreover, some evolving organizations such as the European Union are considering to redesign according to a federal shape (The option still needs

to be defined whether high centralization federalism - like Brazil - or higher decentralization federalism - Switzerland).

d) Supranational tool.

This tool rapidly spread in the early 1990s, just after the fall of the Berlin Wall. Its basic step is transnationalism as a standard to assess the high speed increase of the global interdependency level in law, finance, politics, technology etc. The basic principle of this tool is that any decision made at a supranational level is automatic valid for all the involved states, that have no power to change or reject them. Since the Treaties of Maastricht (1992) and Lisbon (2009). The European Union in practice moved towards this direction, in spite of the debate about federalism mentioned above; WHO and WIPO are still showing intergovernmental structures, but they are getting more and more aware that they have to redesign themselves transnationally if not yet supranational. The EU-Canada Treaty and the EU-Japan Treaties, both signed in 2017, are clear examples of transnational and supranational decisions.

e) Systemic-functional neo-constructivist tool.

Jean Piaget (2000), Heinz von Foerster, Ernst von Glasersfeld, Niklas Luhmann, Peter Berger and Thomas Luckmann were the masters of this approach applied to several different areas of the social, political and legal sciences. Piaget taught that viable knowledge is scientifically constructed, experimental (which means much more applied testing than empirical research), self reflexive/second order, genetic/generative and historical (as a continuous working out eventually with Simmel and Nachfuehlung), Berger and Luckmann taught how to investigate the common sense “taken for granted worlds” from which no generative-innovative-scientific process can start up;

von Foerster and even more von Glasersfeld taught us that in the “taken for granted world” behaviourism is king and social dynamics are rather mechanics by elicitation feedback or maybe elicitation-adaption-feedback. Nevertheless the taken for granted world’s constructive and generative power is practically meaningless and irrelevant; no common sense based ‘taken for granted’ epistemology is possible: it only generates doxa. Generative, genetic, experimental knowledge comes from constructivist epistemology. Among these pillar authors, Luhmann was the one who devoted many, many pages to power, law and politics (Luhmann 1983, 1989, 1990a, 1990b, 1990c, 1990d, 1993, 1995a, 1995b, 1997, 2000, 2006).

Global Interdependency is a key outcome of the systemic- functional neo-constructivist tool, ofr it can shape technological, IPR, Taxation, Educational ecc. standards which are no doubt *sachlich* but not ontological *wirklich*.

The horizontalization process mirrors the transnational- supranational trend above described and and mainly affects state-national constitutions. As a matter of fact, these constitutions no longer represent the top of the law source hierarchy and they are no longer so strategic to master and command lower level sources. Horizontal constitutions are rather focused on symmetric and mutual alignment within higher traties (just like the EU, for example) and world class agreements (just like the CETA, for example). In short, horizontalization means that while, in the national states, the hierarchy of the legal sources was vertical and multilevel, nowadays the hierarchy has become shorter and the diagram of the sources much flatter, just like in the redesigning EU.

3. From international comparative law to supranational law.

As a matter of fact, EU perspective is a perfect exampl for the problem setting about horizontalization; namely, the focus of this chapter will be the Treaty of Maastricht (1992-93 <https://portal.cor.europa.eu/subsidiarity/whatis/Pages/SubsidiarityfromMaastrichttoLisbon.aspx>) the first big EU Treaty after the Fall of the Berlin Wall. In the 1990s, the challenge was to balance exclusivity and subsidiarity between the EU and its member states; however, the high speed globalization process between the early 90s and the Zero years led to a paradigm shift: in order to keep the decision process as closer as possible to the citizen, it became necessary to downsize intermediate levels of governance and, principally, their Williamson costs. The original conception of international law as the most general, positive, artificial, abstract, formalized and thus valid kind of law source as theorized in kelsenian terms is still valid and paradoxically no longer valid at the same time; as a matter of fact, what Kelsen stated about international law remained valid albeit shifted to the trans-supranational level. Furthermore, transnational and supranational treaties were formally reversible but in practice irreversible while the traditional international treaties, connecting two or more entities without mixing them, allowed a reversibility way which is obsolete and tendentially impossible in a globalized law system.

Since December 1st 2009 the EU Treaty of Lisbon have reinforced the transnational/supranational trend.

This happened in the framework of a more and more leveraged world order whose transnational treaties become shaped on a bigger and bigger scale.

In February 2017, the UE for example, signed the free trade agreements with Canada (<http://ec.europa.eu/trade/policy/in-focus/ceta/>), Japan (<http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>) and Mexico (http://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155524.pdf), in December 2017. The negotiations for a free Trade Agreement between EU and MERCOSUR began through the mediation of Mexico while USA, Australia and Japan began negotiations for a new Transpacific free trade agreement (<https://www.japantimes.co.jp/tag/trans-pacific-partnership>).

In Spring 2018, 44 of the 55 African State created the African Free Market (<https://edition.cnn.com/2018/03/22/africa/africa-n-trade-agreement-world/index.html>) and most of the missing 11 states are going to join while the only opponent country is Nigeria which is worried that this free market area might downsize Nigeria's power as the African strongest economy. Nevertheless, an African Free Market area would become a transnational and supranational global player able to cooperate/compete with the other Global Players such as USA, Canada, EU, Mercosur etc none of them a national state.

4. The Five Policy and Law Models and the Horizontal Constitutions.

The five tools above described form the strategic toolkit of a more and more supranational legislator, as the EU redesigning process clearly witnesses.

It is important to highlight that the "horizontalization process" emerges from a planned policy modeling and lawmaking, rather than from a

spontaneous expression of the Umwelt or Lebenswelt.

The first step of the EU making was essentially technical, as it focused on free trade agreements, markets, finance, centralized banking and so on. This step is still in progress but since 2007-2009 it has structurally coupled with the unified EU social policy.

As a matter of fact, the free trade agreement is mirrored with the Charter of Nice (2007) which turned into a Treaty in 2009 by the reinforcement of the Treaty of Lisbon signed in 2007 and starting its legal validity from December 1st 2009.

Freedom of trade structurally couples in the EU with the respect of fundamental rights granted by the Treaty of Nice and reinforced by the Treaty of Lisbon. It is not (yet?) one step further towards a new EU constitution attempt, rather a horizontalization process, which matches transnational and supranational standards for free trade and fundamental rights together (Walkila, 2016). It implies a radical revolution and redesign of the EU institutions (Hodson-Peterson, 2017), especially subsidiarity/exclusivity dilemma as shaped by the Treaty of Maastricht in 1992-93 (Garben-Govaere, 2017). As a matter of fact, it is necessary to recognize that the EU decisional sphere grows up as far as the single member states are not able to keep their autonomy due to interdependence standards.

This structural coupling implies that the "living law" does not root from the "blood and tears" of social and political action, as if politics were the embeddement of law (just like for example in Ehrlich's traditional perspective); on the contrary, "living law" refers to autopoiesis of the law system, according to the Luhmann (2012-13) Teubner's (Rufino-Teubner, 2005) vision.

5. **The system /environment paradigm is a law globalization/ nationalist populism paradigm for Unifying without Integrating.**

Thus, the living law refers to the autopoiesis of the law system, rather than social and political actions in the “environment/Umwelt”. This is a key concept for the enlightened and enlightening law making, especially when the legislator is supposed to cope with complex issue, like increasing demand of democracy in the EU.

As a matter of fact, it is necessary to define ‘democracy’ conceptually (as a Grundbegriff) and embed this notion in the EU policy modelling framework.

First of all, democracy belongs to systemic Burgerrecht/citizenship rather than “Umwelts” Volksgeist. This is a basic prerequisite for democracy’s effectiveness, as required for example to have legally valid elections.

Second, democracy implies also freedom of thought /speech as defined by legitimate laws, rather than social sentiments.

Third, democracy implies citizens’ proactive participation within the self-referential procedural settings of the law system, as well as viable and functional levels of competence for managing all the possible options of any decision process.

As Luhmann points out "the increase in diversity within the boundaries of the global systems and the increase in possibilities set free by functional differentiation ... leads to a response at the semantic level of societal-descriptions. Relativism generates the quest for legitimation. Within the frame of the possible, society needs a narrower frame of the permissible. It produces a variety of devices to enclose what can then be regarded as meaningful expectations: a frame within the frame of the possible. This internal frame may be described in

terms of institutions” (Niklas Luhmann, 1997a). The structural coupling/interpenetration between the law system and the (shaped as citizen) psychic system, in the decision making process, is a mirroring double process; on one side, there is the law system’s self-referential selection about the allreferential topics provided by the (political) environment. On the other side, psychic systems manage to code their communication according to law system’s meanings and express their self-representations accordingly. If this structural coupling fails, citizenship implodes into Umwelts Volksgeist. Luhmann described this process in the chapter 16th of his well known book about Ecological Communication (Luhmann, 1989): no social movements had never been able to set the agenda of any system. In spite of the most violent streetfights, no G7, G8 or G20 ever changed their agendas or plans.

With all this in mind, let us try now to answer the following question: “ What does democracy mean in the EU?”.

It means:

- 1 Direct participation of the EU people to the EU elections regardless their national appartenance.
- 2 A competent and skilled, well educated, building intensive citizenship labeled as hypercitizenship.
- 3 A procedural-deliberative lawmaking and policy modeling process, which can filter meaningful communication/meaningless noise and to filter macro impact shocks/ micro emotional contingent shifts.
- 4 Within a scenario made of global players, nation-states (at least in Europe) are not able any longer to choose the option of isolation: they will

forcely be under the influence of larger and more powerful entities.

5 Unifying the free trade sets (step 1), unifying the fundamental rights (step 2), is not yet full integration. Step 3 is to facilitate the EU people to cope with the complexity of our times and scenarios.

6. Horizontalization in a Nutshell.

Horizontalization is also a strategic escape from the false problem and meaningless dilemma between a technocratic top-down EU and a radical participative bottom-up EU. Horizontalization essentially means alignment and cutting off obsolete intermediate levels, which merely increase Williamson's transactional costs with no added value for EU procedural-deliberative and organizational process. From this point of view, interesting is Piattoni and Schoenlau (2015)'s contribution: they drew a valid bottom-up EU policy-modelling focused on the EU CoR (Committee of Regions), which highlights a key policy problem: The CoR is pivotal in the EU bottom up multilevel process as far as the Regions are considered key units; nevertheless, EU has also many metropolitan areas (Paris, Madrid, Barcelona, Rome, Bruxelles, Milan, Amsterdam, Lisbon and many more), which could become a strategic cluster, if their interconnerctions were horizontally empowered, passing by "higher" levels. Are both Metropolitan Areas and Regions necessary to a well-designed EU? In case of either/or selection, which should be empowered and which cut off? In which way the selection should take shape and place?

The answer of the supranational legislator is: the best solution is the most horizontal. This most likely means choosing the option Metropolitan Areas,

as many Regions are much more bureaucratic and less wealth generators than Metropolitan Areas, and many times Regions are even smaller than Metropolitan Areas (in Italy for example the two regions Valle D'Aosta and Molise together are much smaller than Rome).

alignment might allow a convergence of tangible and intangible assets in a EU evolutionary cycle of Demography- Food - Technology - Law&Policy Modelling, and would contribute to make of EU a more and more strategic, competitive/collaborative Global Player among other Global Players.

7. Epilogue.

Horizontalization is a three step process of the new EU lawmaking and policy modeling through free trade-fundamental rights and cosmopolitanism which might also shape a Leydesdorff's triple helix (<https://www.leydesdorff.net/lists/th.htm>).

Horizontalization means that Buergerrecht takes shape more and more away from its nation-state roots (Staatasangehoerigkeit) and turns into supranational status of hypercitizenship. This allows a reduction of the multilevel bureacracy of the EU and a faster and more effective alignment between the EU and the other Global Players that characterize the turbulent, complex and global scenarios of our times.

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