

CHAPTER 11 – EU EXTERNAL ENVIRONMENTAL POLICY

1. CENTRAL ISSUES

- Since it was attributed external powers over environmental matters in the late 1980s, the EU has gradually developed a mature external environmental policy using a plethora of multilateral, regional, bilateral and unilateral instruments. Moreover, it has increasingly aspired to play a leadership role in international environmental affairs, and most notably in the global fight against climate change.
- In this chapter, we examine the constitutional framework that underpins the formulation and conduct of the EU's external environmental policy and expose the reader to the key legal and policy challenges stemming from the EU's external environmental practice through the lens of selected case-studies.
- The EU's environmental policy is constitutionally linked to other external policies in a number of Treaty provisions, and in particular the environmental integration requirement (Article 11 TFEU) and the common set of objectives for the Union's external action (Article 21 TEU). However, this constitutional imperative will often confront the EU legislator with a delicate balancing and trade-offs between environmental and other (economic, social) policy objectives.
- A common thread running through the various EU external environmental measures examined in the chapter is whether the Union can and should use its market size and structural power to promote –or one could even say to force– third-party and global environmental action.

2. THE CONSTITUTIONAL FRAMEWORK ON EU EXTERNAL ENVIRONMENTAL POLICY

2.1 EU External Competence for Environmental Matters

The constitutional core of EU external environmental policy is found in Title XX TFEU dealing specifically with the environment, which was first introduced by the Single European Act (SEA) of 1986¹ and has undergone several amendments by the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Lisbon.² These provisions first lay down a set of objectives and principles for EU environmental policy which, pursuant to the principle of conferral,³ determine the substantive scope of EU competence (whether internal or external) in this field. The TFEU requires EU environmental policy to contribute to the pursuit of a number of objectives.

Article 191 (1) TFEU

Union policy on the environment shall contribute to pursuit of the following objectives:
— preserving, protecting and improving the quality of the environment

¹ Single European Act, Article 130r(5), 1987 O.J. L 169, at 24.

² For an overview of this historical evolution, see G Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations – Beyond Multilateral Dimensions* (Oxford, Hart Publishing, 2012) 9-13.

³ Consolidated Version of the Treaty on European Union, Article 5(2), 2010 O.J. C 83/01, at 18.

- protecting human health
- prudent and rational utilisation of natural resources
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change

Article 191(2) TFEU further provides a number of principles that are specifically applicable to the exercise of EU environmental competence (both internally and externally)⁴ as a guide for law-making and for interpretation, namely: a high level of environmental protection, prevention, precaution, rectification at the source and the polluter pays.⁵ At first sight, these provisions may appear relatively elaborated when compared to those of other EU external policies, such as the Common Commercial Policy (see further chapter 7).⁶ And yet, the objectives and principles enshrined in Article 191 TFEU are broadly defined, rendering it almost impossible to clearly delineate the substantive boundaries of EU environmental policy. EU primary law does not, in fact, seek to (unduly) restrict the substantive scope of EU environmental competence, but leaves the EU legislator a wide margin of appreciation in deciding what action and measures, if any, are necessary to achieve the environmental objectives and principles stipulated in Article 191 TFEU.⁷ This seems a desirable approach, given the need for flexibility and adaptation in formulating a policy that can address a range of environmental issues and adjust to new developments and specific circumstances. As to the territorial scope of EU environmental competence, reference to ‘regional and worldwide environmental problems’ in Article 191(1) TFEU indicates that the EU can also take measures targeting the environment beyond its borders, in the same way in which its Member States can do so, within the limits imposed by international law on the extraterritorial application of domestic environmental measures.

Therefore, the substantive content of the EU external environmental policy has evolved considerably over the past four decades, driven by changes in the international environmental landscape as well as by the EU’s own policy priorities. Among the environmental issues prioritised by the EU in its external action,⁸ the fight against climate change has undoubtedly taken the lion’s share, as could be anticipated from the prominent attention it receives in Article 191(1) TFEU.⁹ In fact, the EU has aspired to play a leadership role in the global battle against climate change since the late 1980s, both by attempting to influence and strengthen the multilateral framework for climate change mitigation and by

⁴ In addition, this is subject to the general principles of proportionality (Article 5(4) TFEU) and subsidiarity (Article 5(3) TEU).

⁵ For a more detailed discussion, see Marín Durán and Morgera, ‘Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions’, 15-16. Note that Article 191(3) TFEU further lists a number of criteria that the EU legislator ‘shall take into account’ in environmental policy-making, including: available scientific and technical data; environmental conditions in various regions of the EU; potential benefits and costs of action or lack of action; and the economic and social development of the EU as a whole.

⁶ See Articles 206-207 TFEU.

⁷ See Article 192(1) TFEU.

⁸ See and Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 [2013] OJ L354/171 (Seventh Environmental Action Programme); and its predecessor Decision (EC) 1600/2002 of 22 the European Parliament and of the Council laying down the Sixth Environmental Action Programme [2002] OJ L242/1.

⁹ This also evident from the setting up of a specific Directorate General within the European Commission (DG Climate Action) in 2010 to deal with climate change matters, which were previously handled by DG Environment.

seeking to 'lead by example' through internal climate policies and legislation.¹⁰ In this regard, the EU's overarching objective of becoming an 'energy-efficient, green and competitive low-carbon economy' by 2020¹¹ led to the adoption in May 2007 of the 2020 Climate and Energy Package, whereby the EU set for itself the targets of: reducing its greenhouse gas emissions by 20% from 1990 levels; increasing the share of renewable energy to at least 20% in EU final energy consumption and to at least 10% of energy used in the transport sector; and improving energy efficiency by 20%.¹² In October 2014, EU leaders further committed to new and more ambitious targets under the 2030 Climate and Energy Framework.¹³

K Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You To)' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge, Cambridge University Press, 2013) 115-117.

Over the years, the EU has attempted to use its international influence to strengthen the multilateral framework for climate change mitigation under the United Nations Framework Convention on Climate Change (UNFCCC), albeit with modest results. Its efforts to 'lead by example' through internal climate policies and legislation have been somewhat more successful ... However, few developed countries have chosen to follow the EU's footsteps and introduce equivalent, national, climate change legislation ... Given the lack of success of its cooperative international efforts, the EU has recently taken certain steps to force the direction of international climate policy. It has included international aviation emissions in the ETS [Emissions Trading Scheme] and banned credits from controversial industrial gas projects under the Kyoto Protocol's Clean Development Mechanism (CDM). It has also introduced sustainability criteria for biofuels and considered the possibility of trade measures against imports of energy-intensive products from countries lacking effective climate policies.

The EU's global climate change leadership has also been affected by broader trends around multilateralism and international law. Europeans have traditionally sought to promote international law, hoping to model international relations on domestic legalism. This stands in contrast to Americans, who tend to see international legalisation as merely 'a policy choice, a matter of costs and benefits with no *a priori* reason to believe that the latter would outweigh the former' ... [T]hese general attitudes have had a discernible influence on international climate change cooperation and the EU's outlook in terms of guiding the international community towards a strong international legal regime has tended to oscillate between optimism and pessimism.

¹⁰ K Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You To)' in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge, Cambridge University Press, 2013) 118-138.

¹¹ Commission, 'Communication on Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth' COM(2010) 2020, endorsed by the European Council, 'Conclusions' (EUCO13/10), 17 June 2010, 1.

¹² European Council, 'Presidency Conclusions – Brussels, 8/9 March 2007' (7224/1/07), 2 May 2007, 10–12 and 19–18. For a discussion, see *inter alia*, K Kulovesi, E Morgera and M Muñoz, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) 48(3) *Common Market Law Review* 829.

¹³ European Commission, 'Communication on a Policy Framework for Climate and Energy in the period from 2020 to 2030' COM(2014) 15 final, 22 January 2014; and European Council, 'Conclusions – Brussels, 23-24 October 2014' (EUCO 169/14), 24 October 2014, namely: (i) 40% reduction in GHG emissions from 1990 levels by 2030; (ii) 27% share of renewable energy in EU energy consumption by 2030; (iii) 27% improvement in energy efficiency by 2030.

Aside from climate change, the Seventh Environmental Action Plan (2014-2020) also highlights other thematic priorities for the EU's external environmental policy, and notably: the protection of biodiversity, sustainable forest management, sound management of chemicals and of hazardous waste and air and water quality.¹⁴ In terms of approach, the Action Plan reaffirms the EU's multifaceted role as a global environmental actor: a commitment to multilateralism wherever possible, while calling for EU action at regional, bilateral and unilateral levels where deemed appropriate.

Seventh Environmental Action Plan (2014-2020)

98. Many of the priority objectives set out in the 7th EAP can only be fully achieved as part of a global approach and in cooperation with partner countries, and overseas countries and territories. That is why the Union and its Member States should engage in relevant international, regional and bilateral processes in a strong, focused, united and coherent manner ... The Union and its Member States should continue to promote an effective, rules-based framework for global environment policy, complemented by a more effective, strategic approach in which bilateral and regional political dialogues and cooperation are tailored towards the Union's strategic partners, candidate and neighbourhood countries, and developing countries, respectively, supported by adequate finance.

103. The Union should also leverage its position as one of the largest markets in the world to promote policies and approaches that decrease pressure on the global natural resource base. This can be done by changing patterns of consumption and production, including by taking the steps necessary to promote sustainable resource management at international level and to implement the 10-year Framework of Programmes on Sustainable Consumption and Production, as well as ensuring that trade and internal market policies support the achievement of environment and climate goals and provide incentives to other countries to upgrade and enforce their environmental regulatory frameworks and standards, with a view to preventing environmental dumping.

Turning to nature of EU external environmental competence, this is included in the list of shared competences in Article 4(2) TFEU,¹⁵ but it arguably belongs to the special sub-category of *non-pre-emptive* shared competence (see further chapter 4) – that is, the exercise of EU external competence should not, in principle, prevent the Member States from acting in the environmental field at the international level.

Article 191(4) TFEU

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned. [This] shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Moreover, the classic *ERTA* pre-emptive effect would seem of limited relevance in the environmental sphere, where the EU often adopts legislation establishing minimum

¹⁴ European Commission, 'A General Union Environment Action Programme to 2020: Living Well, within the Limits of our Planet' (2014) 81-84.

¹⁵ Article 4(2)(e) TFEU.

standards, rather than aimed at substantial harmonization of rules. Thus, Member States are allowed to adopt more stringent measures domestically and assume more stringent obligations internationally.

Article 193 TFEU

[EU environmental legislation and action programmes] shall not prevent any Member State from maintaining or introducing more stringent protective measures.

However, this possibility can be significantly curtailed in the context of ‘mixed’ agreements by the duty of sincere cooperation (Article 4(3) TEU), which will be discussed later in the chapter.

2.2 Instruments and Institutional Actors

As any other international actor, the EU conducts its external environmental policy through two main types of instruments: international agreements (multilateral, regional, bilateral) and autonomous (or unilateral) measures. In terms of institutional actors, the Council, the European Parliament and the European Commission exercise most direct influence in EU external environmental policy-making.

Autonomous EU environmental legislation (Regulations or Directives) is generally adopted following the ordinary legislative procedure, that is: the Council (by qualified majority voting) and the European Parliament act on a legislative proposal from the Commission, after consulting the Economic and Social Committee and the Committee of Regions. This procedure also applies to the adoption of general action programmes (as Decisions), which are the key tool for setting out the priority objectives for EU environmental policy, such as the Seventh Environment Action Plan (2014-2020) mentioned above. However, decision-making on a number of specific matters is still subject to unanimity in the Council:

Article 192(2) TFEU

By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

- (a) provisions primarily of a fiscal nature;
- (b) measures affecting:
 - town and country planning,
 - quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,
 - land use, with the exception of waste management;
- (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The conclusion of agreements with third countries and international organisations based on Article 191(4) TFEU is undertaken in accordance with the general procedure laid down in

Article 218 TFEU. The Council, usually based on a recommendation from the Commission, will authorise the opening of negotiations. The Commission usually acts as the negotiator for the EU side, on the basis of directives set by the Council and often in consultations with a committee of national representatives set up jointly with the Member States for this purpose. The Council, after obtaining the consent of the European Parliament, will then take a decision authorising the signing of the agreement and another decision on the conclusion of the agreement on behalf of the EU, which is equivalent to an authorisation to ratify the agreement (see further chapter 3). The Council generally acts by qualified-majority voting throughout this procedure, except in cases where unanimous decision-making is required internally (as per Article 192(2) TFEU seen above). However, given the ‘mixed’ nature of most environmental agreements, EU Member States will also take part in the negotiation process, as well as conclude and ratify the agreement in accordance with their respective constitutional requirements.

3. EU EXTERNAL ENVIRONMENTAL POLICY IN PRACTICE

Since it was bestowed with an express external competence for environmental matters by the 1986 SEA, the European Union (then European Economic Community) has increasingly sought to assert itself as an ever more influential player in global environmental governance. This is hardly surprising given that a worthwhile environmental policy necessarily implicates an external dimension, which the EU has gradually developed using a plethora of multilateral, bilateral and unilateral instruments. Furthermore, the EU has a clear potential – and one could even argue responsibility – as a global environmental actor, speaking on behalf of its (presently) 28 Member States and being the world’s largest trading bloc and major provider of official development aid and contributions to the United Nations (UN) budgets.¹⁶

3.1 Multilateral Environmental Agreements: Legal Issues from Mixity

The EU is presently a party to over 30 international environmental agreements,¹⁷ including key multilateral environmental agreements (MEAs) negotiated under the auspices of the UN, such as:

The EU as a party to MEAs

-In the area of climate change and ozone depletion: the 1985 Convention for the Protection of the Ozone Layer (Ozone Convention)¹⁸ and its 1987 Montreal Protocol;¹⁹ the 1992 UN Framework

¹⁶ In 2017, EU and Member States’ collective ODA amounted to €75.7 billion, constituting 57% of global ODA. However, only four EU Member States met the UN target of 0.7% GNI: http://europa.eu/rapid/press-release_IP-18-3002_en.htm.

¹⁷ European Commission, ‘Multilateral Environmental Agreement to which the EU is a Contracting Party’ (August 2017), available at: http://ec.europa.eu/environment/international_issues/agreements_en.htm.

¹⁸ Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293, entered into force for the EU on 22 September 1988.

¹⁹ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3, entered into force for the EU on 1 January 1989.

Convention on Climate Change (UNFCCC),²⁰ its 1997 Kyoto Protocol²¹ and the 2015 Paris Agreement.²²

-In the area of conservation and biodiversity: the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);²³ 1979 Convention on the Conservation of Migratory Species of Wild Animals;²⁴ the 1992 Convention on Biological Diversity (CBD),²⁵ its 2003 Cartagena Protocol on Biosafety²⁶ and its 2010 Nagoya Protocol on Access to Genetic Resources;²⁷ the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture.²⁸

-In the area of hazardous substances: the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;²⁹ the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention);³⁰ the 2001 the Stockholm Convention on Persistent Organic Pollutants (POPs Convention);³¹ and the 2013 Minamata Convention on Mercury.³²

-In the area of soil: the 1994 Convention to Combat Desertification.³³

In addition, the EU is a party to multilateral agreements with an important environmental dimension, such as the 1982 UN Convention on the Law of Sea (UNCLOS)³⁴ and its implementing agreements on fish stocks³⁵ and seabed mining,³⁶ as well as to several

²⁰ United Nations Framework Convention on Climate Change, 4 June 1992, 1771 UNTS 107, entered into force for the EU on 21 March 1994.

²¹ Kyoto Protocol, 11 December 1997, 37 I.L.M. 22 (1998), entered into force for the EU on 16 February 2005.

²² Paris Agreement, 12 December 2015, entered into force for the EU on 4 November 2016.

²³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243, entered into force for the EU 8 July 2015.

²⁴ Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333 entered into force for the EU on 1 November 1983.

²⁵ Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, entered into force for the EU on 29 December 1993.

²⁶ Cartagena Protocol on Biosafety, 29 January 2000, 2226 U.N.T.S. 208, entered into force for the EU on 11 September 2003.

²⁷ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization, 29 October 2010, UNEP/CBD/COP/DEC/X/1, entered into force for the EU on 12 October 2014.

²⁸ International Treaty on Plant Genetic Resources for Food and Agriculture, 3 November 2001, 2400 UNTS 303, entered into force for the EU on 29 June 2004.

²⁹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57, entered into force for the EU on 5 May 1992.

³⁰ Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals and Pesticides, 10 September 1998, 2244 UNTS 337, entered into force for the EU on 24 February 2004.

³¹ Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119, entered into force for the EU on 17 May 2004.

³² Minamata Convention on Mercury, 10 October 2013, entered into force for the EU 18 May 2017.

³³ Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, 14 October 1994, 1954 UNTS 3, entered into force for the EU on 26 December 1996.

³⁴ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, entered into force for the EU on 16 November 1994.

³⁵ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3, entered into force for the EU on 11 December 2001.

international environmental agreements negotiated at regional level (e.g. in the context of the UN Economic Commission for Europe)³⁷ and sub-regional level (e.g. for the management of seas or transboundary rivers).³⁸

Nevertheless, the Seventh Environmental Action Programme (2014-2020) recognizes that:

Seventh Environmental Action Plan (2014-2020)

101. The Union has a good track-record when it comes to membership of multilateral environmental agreements (MEAs), although a number of Member States have still not ratified key agreements. This compromises the Union's credibility in related negotiations. Member States and the Union should ensure the ratification and approval, respectively, in a timely manner, of all MEAs to which they are signatories.

In the vast majority of these MEAs, the EU's participation has been accommodated through so-called 'regional economic integration organization' (REIO) clauses. In the case of CITES, the 1983 Gaborone Amendment permitting REIO membership took several decades to enter into force and the EU could only accede to this treaty in April 2015. By way of illustration, the REIO participation clause in CITES provides:

Article XXI CITES – Accession

1. The present Convention shall be open indefinitely for accession. Instruments of accession shall be deposited with the Depositary Government.
 2. This Convention shall be open for accession by regional economic integration organizations constituted by sovereign States which have competence in respect of the negotiation, conclusion and implementation of international agreements in matters transferred to them by their Member States and covered by this Convention.
- [...]

These MEAs have been concluded as 'mixed' agreements and this joint participation of the EU and its Member States poses a number of internal and external challenges. Internally, the practice of 'mixed' agreements demands close cooperation between the EU and its Member States throughout the conclusion, negotiation and implementation phases with a view to ensuring "the unity in the international representation of the [Union]".³⁹ This has been addressed to a large extent by the duty of sincere cooperation set out in Article 4(3) TEU, which has been gradually interpreted by the Court as entailing for the Member States not only a procedural 'best-efforts' obligation to consult and cooperate with the EU

³⁶ Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of Sea of 10 December 1982, 28 July 1994, 1836 UNTS 3, entered into force for the EU on 28 July 1996.

³⁷ E.g., the UNECE Convention on Long-range Transboundary Air Pollution, 13 November 1979, 1302 UNTS 217, entered into force for the EU on 16 March 1983; and the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447, entered into force for the EU on 30 October 2001.

³⁸ E.g., the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, 16 February 1976, 1102 UNTS 16908, entered into force for the EU on 15 April 1978 (as amended and its protocols).

³⁹ *Opinion 2/91 (re ILO Convention No 170)* EU:C:1993:106, para. 36; *Opinion 1/94 (re WTO Agreement)* EU:C:1994:384, paras 108-109.

institutions, but also a more substantive duty of abstention. In fact, it is in the context of an MEA (the POPs Convention) that Court adopted this stricter reading of the duty of sincere cooperation. In *Commission v Sweden*, it found Sweden in breach of Article 4(3) TEU for unilaterally proposing the inclusion of PFOS (perfluorooctane sulfonates) in Annex A of the POPs Convention, even though it had consulted the EU institutions on the possibility of a common proposal to list PFOS but no formal decision was taken on the matter within Council. The Court, however, held:

Case C-246/07 *Commission v Sweden*, EU:C:2010:203

76. In the present case, it is settled ground that, at the time when the Kingdom of Sweden submitted the proposal for the listing of PFOS in Annex A to the Stockholm Convention on 14 July 2005, the Council had not adopted any formal decision as regards a proposal to list substances in that annex. However, the Court must examine whether, as the Commission maintains, there was at the time a Community strategy in that regard which was not to propose the listing of PFOS immediately in the context of that convention, inter alia for economic reasons.

87. Contrary to what the Kingdom of Sweden and the interveners maintain, it appears that there was no 'decision-making vacuum' or even a waiting period equivalent to the absence of a decision. A number of factors lend support to the argument that the Council's Working Party on International Environmental Issues did not intend to reach a decision on 6 July 2005 – but certainly thereafter – on the substances to be proposed under the Stockholm Convention in addition to those already proposed in May 2005. The urgency of deciding first on the substances to be proposed under the Aarhus Protocol and the economic considerations connected with proposals under that convention may be mentioned in that regard.

89. In any event, it may be regarded as established that, in 2005, there was a common strategy not to propose, at that time, to list PFOS in Annex A to the Stockholm Convention, since, as is apparent from the Council's conclusions of March 2005, the experts of the Member States and of the Community were to choose the substances to be proposed from among those already covered by the Aarhus Protocol and that, as is apparent from the minutes of the meeting of the Council's Working Party on International Environmental Issues of 6 July 2005, PFOS was not one of those substances.

91. It follows that, in unilaterally proposing the addition of PFOS to Annex A to the Stockholm Convention, the Kingdom of Sweden dissociated itself from a concerted common strategy within the Council.

92. Moreover, as is apparent from examination of the decision-making process provided for by that convention, the Kingdom of Sweden's unilateral proposal has consequences for the Union.

98. That argument is, however, based on the assumption that the Union would be in a position to make a declaration of non-acceptance of an amendment proposed and voted for by one or more Member States. Under Article 25(2) of the Stockholm Convention, the Union and its Member States are not entitled to exercise rights under the Convention concurrently.

99. However, even supposing, despite Article 25(2) of the Stockholm Convention, that the Union could still notify a declaration of non-acceptance of an amendment proposed and voted for by several Member States, such a situation could give rise to legal uncertainty for the Member States, the Secretariat of the Stockholm Convention and non-member countries which are parties to that convention.

104. Such a situation is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned.

In the circumstances of this specific case, there were seemingly genuine reasons for safeguarding a united Union position under the Stockholm Convention, particularly since it

was not clear whether the EU would have been able to opt-out from an amendment unilaterally proposed and voted for by one (or more) of its Member States. Nonetheless, this case law raises broader questions as to which course of Union action triggers the application of duty of sincere cooperation and when would EU Member States be actually allowed to act in areas of shared external competences, such as environmental policy.

A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36(4) *European Law Review* 524, 540.

[...] whereas previously the duty seemed to be triggered from the moment a concerted Union position had been launched by a positive legal act (giving the Commission a mandate or at least an official Commission proposal), now, after these cases, it has become unclear until which point Member States would still be free to act. They must now be silent even before the Union has made up its own mind about whether and when it is going to speak. The concept of a Union position has been broadened by the Court so as to include situations in which the EU institutions have not reached a decision ... One might even say that, according to the ECJ, indecisiveness constitutes a valid Union position or strategy ...

[T]he scope of the "duty to remain silent" seems to make the distinction between exclusive and shared competence virtually irrelevant. Simply because a Member State still is competent about a matter, it does not mean that it can speak up about it outside the European Union. As the recent case law shows, it seems that Member States need a kind of EU authorisation in order to exercise "their share" of shared competence. Therefore, what is left for Member States to do on the world stage? Is there any situation in which a Member State could open its mouth in the presence of Union competence (and ECJ jurisdiction) but in the absence of Union authorisation?

From an international law perspective, the 'mixed' character of MEAs inevitably prompts the question as to who – the EU, the Member States, or both – is responsible towards third parties for the performance of obligations assumed under these agreements, and hence for remedying any alleged breach (see further chapter 5).⁴⁰ In an attempt to address this question, a common practice has been for the EU to make a 'Declaration of Competence' in MEAs that explicitly demand clarification as to the distribution of competences between the REIO and its Member States.⁴¹ However, these declarations have generally failed to offer much legal clarity to other contracting parties as to who is responsible on the EU side for the performance of 'mixed' MEAs.⁴² In most cases, such declarations are very short and just indicate the existence of EU external competence for environmental matters on the basis of Article 191 TFEU and its responsibility for the performance of obligations resulting from the

⁴⁰ See generally, A Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements' in E Morgera (ed.) *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge, Cambridge University Press, 2013).

⁴¹ See e.g., UNCLOS, Annex IX, Article 5.1. Subsequent MEAs to which the EU has made a 'Declaration of Competence' include: 1985 Ozone Convention and its Montreal Protocol; the 1992 UNFCCC, its Kyoto Protocol and Paris Agreement; 1998 Rotterdam Convention; the 2001 POPs Convention; 1992 CBD and its Cartagena and Nagoya Protocols.

⁴² See generally, A Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17(4) *European Foreign Affairs Review* 491.

MEA which “are covered by [EU] law in force” without further specification.⁴³ In addition, the declarations often signal that “[t]he exercise of [EU] competence is, by its nature, subject to continuous development.”⁴⁴ In light of this the EU undertakes to update the relevant declarations, but this has hardly happened in practice: for instance, the declaration under UNCLOS has never been updated since 1982 and refers to several pieces of EU legislation that have been amended or indeed fully repealed.⁴⁵ Admittedly, given the complex and dynamic nature of the EU’s external competences, drafting a legally accurate and clear declaration, and keeping it up-to-date, is a nearly impossible endeavour. This being so, a more suitable approach has been adopted under UNCLOS which, however, is exceptional among the multilateral agreements jointly concluded by the EU and its Member States in the sphere of environmental protection. A procedural mechanism has been established under UNCLOS to provide third parties with the possibility of requesting further clarification about the EU and Member States’ respective responsibility on a case-by-case basis and, ultimately, with the legal certainty that somebody on the EU side will be responsible.

UNCLOS, Annex IX, Article 6.2

Any State Party may request an international organisation or its member States which are States Parties for information as to who has responsibility in respect of any specific matter. The organisation and the member States concerned shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability.

3.2 Bilateral Environmental Instruments: FLEGT Voluntary Partnership Agreements

Alongside participating in multilateral environmental agreements, the EU has also advanced environmental protection goals through *bilateral* instruments, not only to promote the implementation of existing MEAs and on-going multilateral environmental negotiations,⁴⁶ but also in the absence thereof. One significant example of the latter is in the area of sustainable forest management, which has long been a priority of the EU’s external environmental policy and where the Union has been supporting the development of an international convention.⁴⁷ In the lack thereof, the EU has concluded so-called ‘Voluntary’ Partnership Agreements (VPA) with (thus far) seven timber-producing countries⁴⁸ in the

⁴³ See e.g., Council Decision of 19 December 2002 concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade [2003] OJ L 63/27, Annex B.

⁴⁴ See e.g., Council Decision of 14 October 2004 concerning the conclusion, on behalf of the European Community, of the Stockholm Convention on Persistent Organic Pollutants [2006] OJ L 209/1, Annex.

⁴⁵ Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof [1998] OJ L179/129, Annex II.

⁴⁶ See [section 4.2](#) for examples.

⁴⁷ A Savaresi, ‘EU External Action on Forest: FLEGT and the Development of International Law’ in E Morgera (ed), *The External Environmental Policy of the European Union – EU and International Law Perspectives* (Cambridge, Cambridge University Press, 2013) 150-153.

⁴⁸ These are: Cameroon, Central African Republic, Ghana, Indonesia, Liberia, Republic of Congo and Vietnam. Negotiations are ongoing with Côte d'Ivoire, Gabon, Guyana, Honduras, Laos, Malaysia and Thailand.

framework of its 2003 Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan aimed at fighting illegal logging and associated trade.⁴⁹ These VPAs are based on the 2005 FLEGT Regulation, which sets up a licensing scheme for controlling the legality of timber imported into the EU.⁵⁰ To ensure that only legally-produced timber is shipped to the EU, VPAs provide for the establishment of a legality assurance system in the third country concerned addressing the following basic elements: a clear definition of 'legal' timber, sophisticated mechanisms for verifying compliance throughout the production and supply chain, issuance of FLEGT licenses by the competent national authority and independent audits.

Voluntary Partnership Agreement between the European Union and Viet Nam

Article 1 – Objectives

1. The objective of this Agreement, consistent with the Parties' common commitment to the sustainable management of all types of forest, is to provide a legal framework aimed at ensuring that all imports into the Union from Viet Nam of timber and timber products covered by this Agreement have been legally produced and, in doing so, to promote trade in timber products from sustainably managed forests and harvested in accordance with the domestic legislation in the country of harvest.
2. This Agreement also provides a basis for dialogue and cooperation between the Parties to facilitate and promote the full implementation of this Agreement and enhance forest law enforcement and governance.

Article 3 – FLEGT Licensing Scheme

1. A Forest Law Enforcement, Governance and Trade Licensing Scheme (hereinafter referred to as "the FLEGT licensing scheme") is hereby established between the Parties. It establishes a set of procedures and requirements aimed at verifying and attesting, by means of FLEGT licences, that timber products shipped to the Union were legally produced. In accordance with Regulation (EC) No 2173/2005 and this Agreement, the Union shall accept such shipments from Viet Nam for import into the Union only if they are covered by FLEGT licences.
2. The FLEGT licensing scheme shall apply to the timber products listed in Annex 1.
3. Each Parties agree to take all measures necessary to implement the FLEGT licensing scheme.

Article 4 – Licensing Authorities

1. Viet Nam shall designate the FLEGT Licensing Authority and notify its contact details to the European Commission. Both Parties shall make this information available to the public.
2. The Licensing Authority shall verify that timber products have been legally produced in accordance with the legislation identified in Annex II. The Licensing Authority shall issue FLEGT licences covering shipments of timber products that are legally produced in Viet Nam for export to the Union.

Article 5 – Competent Authorities

1. The European Commission shall inform Viet Nam of the contact details of the competent authorities designated by the Member States of the Union. Both Parties shall make this information available to the public.

⁴⁹ European Commission Communication, 'Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan' COM(2003)251 final, dated 21 May 2003.

⁵⁰ Council Regulation (EC) No 2173/2005 of 20 December 2005 on the Establishment of a FLEGT Licensing Scheme for Imports of Timber into the European Community, [2005] OJ L347/1.

2. The competent authorities shall verify that each shipment is covered by a valid FLEGT licence before releasing that shipment for free circulation in the Union. The release of the shipment may be suspended and the shipment may be held if there are doubts regarding the validity of the FLEGT licence.

Article 7 – Definition of Legally Produced Timber

For the purposes of this Agreement, a definition of legally produced timber is given in Paragraph (j) of Article 2 of this Agreement and specified in Annex II. This Annex describes Vietnamese legislation that must be complied with in order for timber products to be covered by a FLEGT licence. It also includes documentation containing the principles, criteria, indicators and verifiers serving to prove compliance with such legislation.

Article 8 – Verification of Legally Produced Timber

1. Viet Nam shall establish and implement a Viet Nam Timber Legality Assurance System (VNTLAS) to verify that timber and timber products have been legally produced and to ensure that only shipments verified as such are exported to the Union. The VNTLAS shall include compliance checks and procedures to ensure that timber of illegal or unknown origin does not enter the supply chain.
2. The system for verifying that shipments of timber products have been legally produced is set out in Annex V.

Article 10 – Independent Evaluation

1. The purpose of the Independent Evaluation is to assess the implementation, effectiveness and credibility of the Viet Nam Timber Legality Assurance System and FLEGT licensing scheme, as set out in Annex VI.
2. Viet Nam, in consultation with the Union, shall engage the services of the Independent Evaluation to implement the tasks as set out in Annex VI.
3. The Independent Evaluator shall be a body with no conflict of interest resulting from an organisational or commercial relationship with the Union or with the Vietnam forestry sector regulatory authorities, its licensing authority or anybody given the responsibility of verifying the legality of timber production, or any operator exercising a commercial activity in its forestry sector.
[...]

The FLEGT initiative has been praised as being markedly partnership-oriented, where the EU “acts as a co-creator of [environmental] norms rather than an exporter” of its own rules,⁵¹ as well as a “novel experimentalist architecture in transnational forest governance.”⁵² This is because the national legislation of the partner country is the starting point for assessing the legality of timber products, albeit this is as set out in the VPA and, hence, as agreed by the EU. In addition, VPAs emphasize dialogue and cooperation between the Parties with a view to enhancing forest law enforcement and governance, as well as stakeholder involvement in the implementation of the agreement.⁵³ Under VPAs, the EU also commits to support

⁵¹ E Morgera, ‘Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU’s Environmental External Action’ in B van Vooren and S Blockmans (eds), *The EU’s Role in Global Governance – The Legal Dimension* (Oxford, Oxford University Press, 2013) 207.

⁵² C Overdevest and J Zeitlin, ‘Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana’ (2017) *Regulation & Governance* 1.

⁵³ See e.g., Voluntary Partnership Agreement between the European Union and the Republic of Indonesia on Forest Law Enforcement, Governance and Trade in Timber Products into the European Union, [2014] OJ L150/252, Article 11.

partner countries in upgrading their legal and administrative frameworks on forest management through financial and technical assistance, and to implement measures promoting FLEGT-licensed timber within the EU market (e.g., private and public procurement).⁵⁴

As progress towards concluding VPAs remained somewhat limited, in 2010 the EU strengthened its bilateral approach with the (unilateral) Timber Due Diligence Regulation, which prohibits the placing of illegally-harvested timber in the EU market and economic operators are required to exercise due diligence in ensuring the legal origin of timber products.⁵⁵ The Regulation creates an additional incentive for third countries to enter into VPA negotiations with the Union, by providing a presumption of compliance with the due diligence requirements for FLEGT-licensed timber originating in VPA partner countries.⁵⁶ This is undoubtedly a powerful inducement, considering the EU is the largest importer of wood from Africa, Russia and South America, and the second-largest from Asia.⁵⁷ At the same time, it may raise questions as to the truly 'voluntary' nature of these FLEGT-led partnerships. In addition, the interaction between VPAs and the Timber Due Diligence Regulation exemplifies that EU external action on a given environmental issue may involve a complex mix of policy tools and, hence, cannot always be placed into neat categories of 'multilateralism' or 'bilateralism' or 'unilateralism'.

3.3 Unilateral Environmental Instruments: ETS Aviation Directive

Aside from bilateral agreements, the Union has also used its market size and structural power to leverage global or third-party environmental action through *unilateral* instruments. One controversial example in the field of climate change is the EU's attempt to include international aviation emissions into its Emissions Trading System (ETS), which is the world's largest carbon trading scheme covering greenhouse gas (GHG) emissions from approximately 11,000 energy-intensive power stations and industrial plants, as well as from commercial aviation, in 31 countries (i.e., 28 EU Member States, plus Iceland, Liechtenstein and Norway). Against the backdrop of global inaction to address rapidly growing GHG emissions from aviation, and particularly within the International Civil Aviation Organization (ICAO),⁵⁸ the EU adopted the ETS Aviation Directive in 2008. It was intended to apply to *all* aircraft operators (including foreign-based airlines) with flights to/from an airport located in the European Economic Area (EEA), thus including GHG emissions from flights between EEA airports and airports *outside* the EEA.⁵⁹ Essentially, the ETS sets a cap for aviation emissions

⁵⁴ Ibid., Articles 13 and 16.

⁵⁵ Council and European Parliament Regulation (EU) No 995/2010 of 20 December 2010 laying down obligations of operators who place timber and timber products on the market, [2010] OJ L295/23, Articles 1 and 4.

⁵⁶ Ibid., Article 3.

⁵⁷ European Commission Communication, 'Forest Law Enforcement, Governance and Trade (FLEGT) – Proposal for an EU Action Plan' COM(2003)251 final, dated 21 May 2003, 9-10 and Annex 2.

⁵⁸ K Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) 21(3) *Review of European Community and International Environmental Law* 193, 195-198.

⁵⁹ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ [2009] L8/3 (EU ETS Aviation Directive), Article 3(a) and Annex I.

(95% of historical emissions from 2013 to 2020)⁶⁰ and requires all airlines included in the scheme to surrender allowances each year corresponding to their total (reported and verified) GHG emissions, irrespective of where these took place (i.e., within or outside the EU airspace).⁶¹ Failure to do so may lead the imposition of financial penalties and operating bans in the EU territory.

DIRECTIVE 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
[...]

(9) [...] Appendix L to Resolution A36-22 of the ICAO's 36th Assembly held in September 2007 urges Contracting States not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States. Recalling that the Chicago Convention recognizes expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States, the Member States of the European Community and fifteen other European States placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory.

(10) The Sixth Community Environment Action Programme ... provided for the Community to identify and undertake specific actions to reduce greenhouse gas emissions from aviation if no such action were agreed within the ICAO by 2002.

(16) In order to avoid distortions of competition and improve environmental effectiveness, emissions from all flights arriving at and departing from Community aerodromes should be included from 2012.

(17) The Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. The Community scheme may serve as a model for the use of emissions trading worldwide. The Community and its Member States should continue to be in contact with third parties during the implementation of this Directive and to encourage third countries to take equivalent measures.

(25) In its Conclusions, the European Council meeting in Brussels on 13 and 14 March 2008 recognised that in a global context of competitive markets the risk of carbon leakage is a concern that needs to be analysed and addressed urgently in the new Emissions Trading System Directive, so that if international negotiations fail appropriate measures can be taken. An international agreement remains the best way of addressing this issue.

[...]

Article 16

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release

⁶⁰ Ibid., Article 3(c)(2).

⁶¹ Ibid., Article 3(d)-(e), whereby only 15% of these allowances are to be auctioned, while the rest are to be issued free of charge.

the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.

5. In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned.

[...]

While seeking to serve as a model for global/third-country action, the ETS Aviation Directive was initially faced with hostility from China, India and the United States among other countries, whereby the EU was accused of using unilateral measures and exercising extraterritorial jurisdiction in violation of international law. In addition, the validity of the ETS Aviation Directive was challenged by a group of American airlines before British courts and led to a preliminary ruling request before the CJEU. One of the key questions concerned the territorial scope of the Directive, and more specifically whether it infringed the principles of national sovereignty and territoriality under international law by requiring foreign airlines to surrender emission allowances also for those segments of their flights that take place outside the airspace of the EU Member States. The CJEU, however, rejected such a claim.

Case C-366/10 Air Transport Association of America and Others v The Secretary of State for Energy and Climate Change, EU:C:2011:864

125. In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101 ... does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.

127. It is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme.

128. As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated in the light of the whole of the international flight that its aircraft has performed or is going to perform from or to such an aerodrome, it must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.

129. Furthermore, the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied

upon in the main proceedings, the full applicability of European Union law in that territory [...]

Ultimately, the EU decided to limit the geographic reach of the ETS to intra-EEA flights until 31 December 2023,⁶² following recent progress in ICAO negotiations and in particular the commitment to implement a global market-based measure to tackle GHG emissions from international aviation by 2021⁶³ – failing which the EU may revert back to the full territorial scope of the ETS in relation to aviation activities.⁶⁴ From this perspective, the ETS Aviation Directive can be seen as a catalyst for global climate change action and, indeed, as an example of what Scott and Rajamani have termed the EU's 'contingent unilateralism'.

J Scott and L Rajamani, 'Contingent Unilateralism – International Aviation in the European Emissions Trading Scheme' in B van Vooren and S Blockmans (eds), *The EU's Role in Global Governance – The Legal Dimension* (Oxford, Oxford University Press, 2013) 209.

Fuelled by both environmental and competitiveness concerns, the EU is acting to extend the global reach of its 'domestic' climate change law. It is engaging in climate change unilateralism, albeit unilateralism of a particular and interesting kind. The EU's climate change unilateralism is 'contingent' in the sense that the global extension of EU climate change law depends upon there being no adequate international agreement or third country climate action in place. As such the EU should be viewed as a reluctant unilateralist and as deploying contingent unilateralism as a means of incentivizing urgently needed climate action elsewhere ... [T]he EU is shaping the legal structures of global governance in a multi-polar world by testing the boundaries of permissible unilateral action and by experimenting with a form of action-forcing contingent unilateralism that conceives unilateralism as a necessary policy option but one which, ultimately, is second best.

At a broader normative level, the EU aviation scheme raises interesting questions as to whether clear-cut distinctions between 'multilateral' and 'unilateral' action can still be properly drawn in today's global environmental law landscape, and the extent to which 'minilateralism' should play a role in addressing global environmental challenges.

K Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) 21(3) *Review of European Community and International Environmental Law* 193, 201-202.

[T]he choice is no longer between unilateralism, multilateralism or "doing nothing" but rather between a wider array of more or less collaborative forms of minilateral support to multilateralism. The point that I thus wish to make here is that where agreement on specific multilateral measures is

⁶² Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, OJ [2014] L129/1; and Regulation (EU) No 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, OJ [2017] L350/7, Article 1(6).

⁶³ International Civil Aviation Organization (ICAO) Assembly (39th Session), 'Resolution A39-3: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Global Market-based Measure (MBM) scheme', adopted 6 October 2016.

⁶⁴ Regulation (EU) No 2017/2392, Article 28(b).

hard to find – as tends to be the case with respect to climate change mitigation in general and sectoral emissions from international aviation and maritime transport in particular – unilateral efforts can play a role in advancing the implementation of multilaterally agreed treaty objectives.

[T]he key question is therefore not whether European countries were entitled to take unilateral action on aviation emissions, but whether the occupation of the regulatory space took place in such a way that violates international rules and principles. Here, I would argue that – by and large – it did not do so. While divergent views will remain, there is a sound legal justification for the territorial scope of the scheme, as also affirmed by the CJEU ... [M]ore problematic may be the role of the principle of CBDRRC [Common But Differentiated Responsibilities and Respective Capabilities] in the design of the scheme; including the questions as to whether and how the EU should have taken this principle more carefully and explicitly into account. For this reason, it would be useful for the debate to turn away from the traditional focus on the permissibility of extraterritoriality and unilateralism towards international rules, principles and procedures that curtail EU-type ‘unilateral’ action that seeks to advance multilateral objectives in the absence of a global agreement.

4. EU ENVIRONMENTAL POLICY AND OTHER EXTERNAL POLICIES

4.1 Environmental Integration as a Treaty Requirement

The interplay between EU environmental policy and other external policies is explicitly recognized in several provisions of the EU Treaties, and most prominently in Article 11 TFEU which stipulates the requirement of environmental integration as a general principle of EU law.

Article 11 TFEU

Environmental integration requirements must be integrated in to the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.

This provision is not the only mainstreaming requirement in EU treaty law, but forms part of a series of other policy-linking clauses progressively introduced as part of the Union’s broader efforts to ensure ‘horizontal coherence’ across its various internal and external policies.⁶⁵ Nonetheless, it is the oldest of such clauses and has been steadily strengthened within the EU’s constitutional setting.⁶⁶ The rationale behind Article 11 TFEU lies in the realisation that the furtherance of the EU’s environmental objectives may be hindered, or conversely facilitated, by developments in other policy fields, and hence the requirement for a continuous ‘greening’ of all Union policies and activities. In the case of EU external policies, this environmental integration requirement has been reinforced by the Lisbon Treaty, and in particular by Article 3(5) TEU and Article 21 TEU which lay down the objectives and principles of the Union’s external action.⁶⁷ In this common set of non-

⁶⁵ See Articles 7-13 TFEU.

⁶⁶ Marín Durán and Morgera, ‘Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions’, 25-28; and J Nowag, ‘Article 11 TFEU and Environmental Rights’ in S Bogojevi and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Oxford, Hart Publishing, 2018), 157-161.

⁶⁷ Article 3(5) TFEU *inter alia* provides that, in its external relations, the EU shall contribute to the “sustainable development of the Earth”.

prioritised objectives, environmental protection and sustainable development figure prominently.

Article 21(2) TEU

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...]

- foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
 - help to develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
 - assist populations, countries and regions confronting natural and man-made disasters;
- [...]

It is largely undisputed that Article 11 TFEU is not merely programmatic, but imposes a legal obligation upon the EU institutions to integrate environmental protection requirements when defining and implementing all Union policies, as well as upon the Member States when implementing and applying EU law.⁶⁸ Even though EU legislation infringing Article 11 TFEU is thus liable for annulment by the CJEU, such a breach may be difficult to prove in practice. This is first because the CJEU has generally accorded a wide margin of discretion to the EU political institutions when implementing and striking a balance between environmental concerns and other (at times, competing) policy objectives set forth in the EU Treaties. In this respect, the exercise of judicial review is usually restricted to verifying that the EU legislator did not clearly exceed the bounds of its discretion (by committing a ‘manifest error of appraisal’) or misuse its powers.⁶⁹ In fact, no EU measure has yet been struck down by the EU courts on the sole basis of an infringement of Article 11 TFEU, nor of other Treaty integration clauses.⁷⁰ In addition, the environmental integration requirement in Article 11 TFEU is closely tied to the broader notion of ‘sustainable development’, which is an overarching objective in EU treaty law⁷¹ and itself calls for advancing the three interdependent pillars of economic development, social development and environmental protection in an holistic and non-hierarchical manner.⁷² This is also evident in the renewed

⁶⁸ Opinion of AG Jacobs, Case C-379/98 *PreussenElektra v Schleswag*, EU:C:2000:585, para 231; Marín Durán and Morgera, ‘Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions’, 28-32.

⁶⁹ See notably; Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl*, EU:C:1998:353, paras 32-35 and 53; and for a discussion, Marín Durán and Morgera, ‘Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions’, 32-33.

⁷⁰ Nowag, ‘Article 11 TFEU and Environmental Rights’, 163. Exceptionally in Case T-229/04 *Sweden v Commission*, EU:T:2007:217, para. 262, the General Court did find that the challenged Commission decision was in breach of the integration principle, together with the precautionary and high level of protection principles. However, its reasoning on the breach of the integration principle is succinct and appears largely to rely on finding that the other environmental principles have been infringed: for further discussion, see E. Scotford, *Environmental Principles and the Evolution of Environmental Law*, (Oxford, Hart Publishing, 2017), 145-146.

⁷¹ Article 3(3) TEU.

⁷² ‘Political Declaration of the World Summit on Sustainable Development’ (4 July 2002) UN Doc A/CONF.199/20, 2002, Resolution 1, para 5.

EU's Sustainable Development Strategy,⁷³ which was recently adopted in response to the UN 2030 Agenda for Sustainable Development and addresses all internationally-agreed 17 Sustainable Development Goals together.⁷⁴ In sum, Article 11 TFEU does not entail a strictly enforceable obligation for the EU legislator to effectively integrate, or give precedence to, environmental considerations within the Union's external policy-making⁷⁵ –whether and how this is done is largely a matter of political appreciation.

M Montini, 'The Principle of Integration' in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Cheltenham, Edward Elgar Publishing, 2016) 145-146

In the literature, it has been argued that the principle of integration 'calls for a permanent, continuous greening' of all European Union policies. However, this 'does not allow priority to be given to environmental requirements over other requirements'. It simply means that environmental considerations should be ranked at the same level as other interests and that an adequate balancing of the possibly competing needs should be pursued on a case-by-case basis. This view is also supported by other authors, who argue that the Treaty does not support the view that environmental requirements should be given priority over other policy areas. In fact, as it has been correctly argued, 'the integration principle is designed to ensure that protection of the environment is at least taken into consideration' in the definition and implementation of other EU policies. In sum, it may be concluded that the most correct interpretation of the scope of the principle of integration under TFEU is the following one: wherever any policy and activity of the Union is planned and undertaken 'full consideration must be given to protecting the environment'.

Giving effect to the environmental integration imperative in Article 11 TFEU will often involve complex trade-offs between environmental and other (economic, social) policy objectives, and views are likely to diverge as to whether the EU legislator reached an appropriate balance in each particular case. In this regard, the Seventh Environmental Action Programme (2014-2020) provides:

Seventh Environmental Action Plan (2014-2020)

85. Although integrating environmental protection concerns into other Union policies and activities has been a Treaty requirement since 1997, the overall state of Europe's environment indicates that progress made to date, while commendable in some areas, has not been sufficient to reverse all negative trends. The achievement of many of the priority objectives of the 7th EAP will demand even more effective integration of environmental and climate-related considerations into other policies, as well as more coherent, joined up policy approaches that deliver multiple benefits. This should help to ensure that difficult trade-offs are managed early on, rather than in the implementation phase, and that unavoidable impacts can be mitigated more effectively.

89. In order to improve environmental integration and policy coherence, the 7th EAP shall ensure that by 2020:

(a) sectoral policies at Union and Member State level are developed and implemented in a way that supports relevant environment and climate-related targets and objectives.

⁷³ European Commission Communication, 'Next Steps for a Sustainable European Future – European Action for Sustainability' COM(2016) 739 final, dated 22 November 2016.

⁷⁴ UNGA, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (UN Doc/A/RES/70/1), 25 September 2015, providing the global blueprint for global sustainable development, with 17 SDGs and 169 associated targets.

⁷⁵ Similarly, see Opinion AG Geelhoed in Case C-161/04 *Austria v Parliament and Council*, EU:C:2006:512, para 59.

This requires, in particular:

- (i) integrating environmental and climate-related conditionalities and incentives in policy initiatives, including reviews and reforms of existing policy, as well as new initiatives, at Union and Member State level;
- (ii) carrying out ex-ante assessments of the environmental, social and economic impacts of policy initiatives at appropriate Union and Member State level to ensure their coherence and effectiveness;
- (iii) fully implementing the Strategic Environmental Assessment Directive and the Environmental Impact Assessment Directive;
- (iv) using ex-post evaluation information relating to experience with implementation of the environment acquis in order to improve its consistency and coherence;
- (v) addressing potential trade-offs in all policies in order to maximize synergies and avoid, reduce and, if possible, remedy unintended negative effects on the environment.

4.2 Environmental Integration in Practice

When looking at practice in the area of external relations, environmental protection requirements have been integrated into both the EU's trade and the development policies.⁷⁶ From an international law standpoint, the integration of environmental concerns into development cooperation is less controversial than for trade policy, not least because of the constraints imposed by WTO law on the use of trade measures to promote environmental protection objectives. Conversely, an important aspect of international environmental law's principle of CBDRRC is international assistance, including financial aid and technology transfer, in recognition of the fact that, historically, developed countries have played the greatest role in creating most of today's global environmental problems, and also have greater capacity to address them.⁷⁷

Since the 2001 Environmental Integration Strategy,⁷⁸ the mainstreaming of environmental considerations into the EU's development policy has increasingly gained importance, and environment-related financial and technical support to third countries or regions, or to international bodies (e.g. MEA secretariats), has been provided through various channels. The most visible one is the so-called 'thematic' programme specifically targeting climate change and environment for EU assistance under the Development Cooperation Instrument (DCI).⁷⁹ In quantitative terms, EU thematic funding for the environment raised considerably in absolute terms from the 2000–2006 period (€342 million), to the 2007–2013 period (€987 million) and current 2014–2020 period (€1.8 billion).⁸⁰ Nonetheless, these figures remain relatively modest when compared to the

⁷⁶ Environmental integration has also taken place in EU internal policies with an important external dimension: see e.g., in the Common Fisheries Policy, Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, [2008] L286/1, including an important ban on fish products from non-cooperating countries (Article 38).

⁷⁷ Rio Declaration, Principle 7; and for example, CBD, Article 20(4).

⁷⁸ Commission, 'Working paper on integrating the environment into economic and development cooperation', SEC (2001) 609; Council, 'Conclusions on strategy for the integration of environmental considerations into development policy to promote sustainable development', 31 May 2001.

⁷⁹ Regulation (EU) No 433/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014–2020 [2014] OJ L17/44.

⁸⁰ *Ibid.*, Annex IV.

financial resources allocated to other EU thematic instruments.⁸¹ This may be partly explained by the subsidiary character of the climate change/environment programme as a source of EU funding, which is meant to address ‘global public goods and challenges’ and to complement environment-related assistance provided to individual countries or regions under the various EU geographic financing instruments.⁸²

Aside from these quantitative considerations, the international legitimacy and credibility of EU environment-related assistance ultimately depends on the uses to which it is put. In this regard, environmental integration into EU development cooperation reflects a complex mixture of support for environmental multilateralism (e.g., implementation of MEAs and strengthening global environmental governance) and the Union’s own policy priorities (including the FLEGT initiative previously examined).⁸³ This is hardly surprising, even if not satisfactory, given the essentially unilateral nature of development aid and the limited direct input from recipient countries and interested stakeholders in process of allocating EU funding. However, their increased participation in the programming of EU aid ought not necessarily to be equated with a greater weight for the environment and/or stronger support for multilateral environmental processes within EU development assistance.

G Marín Durán, ‘Environmental Integration in EU Development Cooperation: Responding to International Commitments or its own Policy Priorities’ in E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge, Cambridge University Press, 2013) 323-233

[T]he thematic programme for the environment allows for little direct input from interested stakeholders ... and the responsibility for ensuring environmental integration thus falls largely on the EU, and more particularly the Commission ... In the case of geographic funding, the allocation of resources is instead determined – albeit to varying degrees – on the basis of a dialogue with the aid recipients concerned, which is more in line with the ownership and partnership principles embedded in the Paris Declaration on Aid Effectiveness. This may serve to make EU aid more responsive to the particular environmental needs and priorities jointly identified with each country or region ... The responsibility for ensuring environmental integration through geographic instruments is thus ‘shared’ to some extent, although the bargaining position vis-à-vis the EU certainly differs across beneficiaries. However, increased participation from interested stakeholders in the programming of EU aid ought not necessarily to be equated with a greater weight for the environment and/or stronger support for multilateral environmental processes within EU development assistance. In fact, the levels of attention paid to the environment within [jointly drafted] CSPs [Country Strategy Papers] and RSPs [Regional Strategy Papers] is likely to differ and environmental protection goals may at times be ‘squeezed out’ in favour of other short- to medium-term sustainable development priorities, such as poverty reduction, food security or health issues.

Turning to the EU’s external trade policy, environmental integration has similarly manifested itself in a variety of measures. At the unilateral level, a notable example is the ‘Special Arrangement for Sustainable Development and Good Governance’ (also known as

⁸¹ For example, the Instrument for Stability and Peace with an indicative financial envelope of €2.3 billion.

⁸² Regulation (EU) No 433/2014, Article 1(b).

⁸³ *Ibid.*, Annex II.

'GSP-plus'),⁸⁴ which has been part of the EU's generalised scheme of preferences since 2005. This special arrangement provides additional and non-reciprocal tariff preferences to developing countries that are considered 'vulnerable' by the EU and which are required to ratify and effectively implement a total of 27 international conventions, including seven core MEAs.

Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, [...]

(11) The special incentive arrangement for sustainable development and good governance is based on the integral concept of sustainable development, as recognised by international conventions and instruments such as the 1986 United Nations (UN) Declaration on the Right to Development, the 1992 Rio Declaration on Environment and Development, the 1998 International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, the 2000 UN Millennium Declaration, and the 2002 Johannesburg Declaration on Sustainable Development. Consequently, the additional tariff preferences provided under the special incentive arrangement for sustainable development and good governance should be granted to those developing countries which, due to a lack of diversification and insufficient integration within the international trading system, are vulnerable, in order to help them assume the special burdens and responsibilities resulting from the ratification of core international conventions on human and labour rights, environmental protection and good governance as well as from the effective implementation thereof.

[...]

Article 9

1. A GSP beneficiary country may benefit from the tariff preferences provided under the special incentive arrangement for sustainable development and good governance referred to in point (b) of Article 1(2) if:

(a) it is considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system, as defined in Annex VII;

(b) it has ratified all the conventions listed in Annex VIII (the 'relevant conventions') and the most recent available conclusions of the monitoring bodies under those conventions (the 'relevant monitoring bodies') do not identify a serious failure to effectively implement any of those conventions;

(c) in relation to any of the relevant conventions, it has not formulated a reservation which is prohibited by any of those conventions or which is for the purposes of this Article considered to be incompatible with the object and purpose of that convention.

(d) it gives a binding undertaking to maintain ratification of the relevant conventions and to ensure the effective implementation thereof;

(e) it accepts without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the relevant conventions; and

(f) it gives a binding undertaking to participate in and cooperate with the monitoring procedure referred to in Article 13.

Article 10

1. The special incentive arrangement for sustainable development and good governance shall be granted if the

⁸⁴ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences, OJ [2012] L303/1, chapter III.

following conditions are met:

- (a) a GSP beneficiary country has made a request to that effect; and
- (b) examination of the request shows that the requesting country fulfills the conditions laid down in Article 9(1).

[...]

ANNEX VIII

PART B – Conventions related to the environment and governance principles

16. Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)

17. Montreal Protocol on Substances that Deplete the Ozone Layer (1987)

18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989)

19. Convention on Biological Diversity (1992)

20. The United Nations Framework Convention on Climate Change (1992)

21. Cartagena Protocol on Biosafety (2000)

22. Stockholm Convention on persistent Organic Pollutants (2001)

[...]

At the bilateral level, a more recent and significant example is the ‘Trade and Sustainable Development’ (T&SD) chapter, which has been systematically included in all free trade agreements (FTA) which the EU has concluded since 2010, whether with developing countries (e.g., 2012 EU-Central America Association Agreement),⁸⁵ emerging economies (e.g., 2016 EU-Vietnam Free Trade Agreement and Investment Protection Agreement)⁸⁶ or developed countries alike (e.g., EU-Canada Comprehensive Economic and Trade Agreement).⁸⁷ While there is some variation across agreements, all T&SD chapters share three basic provisions. First, each FTA party is required to comply with the MEAs (and ILO conventions) to which each it is already a party, thus establishing a minimum protection floor whereby these international environmental standards cannot be departed from under any circumstance. Second, FTA parties undertake to improve their domestic laws and provide ‘high levels’ of environmental (and labour) protection –albeit this commitment is couched in ‘best-endeavour’ terms. Third, the T&SD chapters contain a non-derogation clause, whereby an FTA party shall not derogate or fail to effectively enforce its domestic environmental (and labour) laws in manner affecting bilateral trade and investment.

EU-Singapore Free Trade Agreement

CHAPTER TWELVE – TRADE AND SUSTAINABLE DEVELOPMENT

[...]

Article 12.2 – Right to Regulate and Levels of Protection

⁸⁵ EU-Central America Association Agreement, signed 29 June 2012, provisionally applied 1 August 2013, available at:

<http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-america/>.

⁸⁶ EU-Vietnam Free Trade Agreement and Investment Protection Agreement, initialed 1 February 2016, available at:

<http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/>.

⁸⁷ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, [2017] OJ L 11/23.

1. The Parties recognise the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, consistent with the principles of internationally recognised standards or agreements, to which it is a party, referred to in Articles 12.3 (Multilateral Labour Standards and Agreements) and 12.6 (Multilateral Environmental Standards and Agreements).

2. The Parties shall continue to improve those laws and policies, and shall strive towards providing and encouraging high levels of environmental and labour protection.

[...]

Article 12.6 – Multilateral Standards and Agreements

1. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and they stress the need to enhance the mutual supportiveness between trade and environment policies, rules and measures. In this context, they will consult and cooperate as appropriate with respect to negotiations on trade-related environmental issues of mutual interest.

2. The Parties shall effectively implement in their respective laws, regulations or other measures and practices in their territories, the multilateral environmental agreements to which they are party.

[...]

Article 12.12 – Upholding Levels of Protection

1. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, in a manner affecting trade or investment between the Parties.

2. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

[...]

It is noteworthy that, in both of these initiatives, the EU has sought to distance itself from US practice and adopted an innovative model for integrating environmental protection standards into trade policy. This has been so, in particular, at the level of implementation where decision-making by the Commission (in the GSP-plus context)⁸⁸ or by joint committees (in the case of T&SD chapters)⁸⁹ has been linked to the evaluations and expertise of MEA supervisory bodies, as well as at the level of enforcement where the EU has generally favoured a cooperative and non-confrontational approach rather than recourse to sanctions. While the European Parliament and some scholars have questioned the effectiveness of such a ‘carrot’-based approach,⁹⁰ the Commission has expressed a number of pertinent reservations towards moving to a sanctions-based model.

⁸⁸ For an examination, see Marín Durán and Morgera, ‘Environmental Integration in the EU’s External Relations – Beyond Multilateral Dimensions’, 162-165.

⁸⁹ For an examination, see G Marín Durán, ‘Innovations and Implications of the Trade and Sustainable Development Chapter in the EU-Korea Free Trade Agreement’ in J Harrison (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh, Edinburgh University Press, 2013) 136-138.

⁹⁰ European Parliament, ‘Resolution on Human Rights and Social and Environmental Standards in International Trade Agreements of 25 November 2010’ (2009/2219(INI), para. 22(a); ‘Resolution on Implementation of the 2010 Recommendations of Parliament on Social and Environmental Standards, Human Rights and Corporate Responsibility of 5 July 2016’ (2015/2038(INI)), para. 21(c) and (d). See also, M. Bronckers and G. Gruni, ‘Improving the Enforcement of Labour Standards in the EU Free Trade Agreements’ in D. Prévost, I. Alexovicova, J. H. Pohl (eds), *Restoring Trust in Trade – Liber Amicorum in Honour of Peter van den Bossche* (Oxford, Hart Publishing, 2018); B Wardhaugh, ‘GSP+ and Human Rights: Is the EU’s Approach the Right One?’ (2013) 16(4) *Journal of International Economic Law* 827.

European Commission, 'Non-Paper on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)', dated 11 July 2017, at 8-9

The idea behind this model is that providing for sanctions encourages partners to comply more fully with TSD provisions. Partners would be more willing to strengthen legislation or improve effective implementation of labour and environmental standards if there was a risk of economic consequences ... This aspect of effectiveness of sanctions in the context of an FTA would require further analysis. To date, sanctions have never been applied to respond to a violation of labour and environment chapters ... The only panel established under the US FTAs covers labour violations in Guatemala. The panel [found] no violations of the FTA between the US and Guatemala could be determined. One of the reasons was that no trade impact of the non-compliance with the labour provisions could be established ... In the case of the EU, the majority of complaints about TSD implementation concern violations that are relevant in a trade context but have not had a measurable direct impact on bilateral exchanges ... Proving the economic injury necessary for sanctions may be a challenge and the question is whether this may not lead to narrowing the scope of the EU's TSD work.

There is also a question as to what extent a sanctions-based approach would allow the EU to stick to its current strategy of reinforcing the multilateral bodies dealing with sustainable development, taking into account ongoing process and efforts within the multilateral system.

There may be an issue of perception with our negotiating partners, who may consider that the specific nature of trade sanctions in FTAs makes them a more confrontational tool when it concerns implementation of labour and environment commitments ... and so a move to adopt such a model in the EU's FTAs could overall jeopardise long term-links with partners to improve capacity and effect changes. There is also a question about the role of civil society groups and international experts in enforcement, since the use of such an approach would increase national sensitivities. In practice sanctions mechanisms on labour and environment issues have only been triggered in exceptional circumstances. And there seems, so far, to be only very limited evidence to demonstrate a positive impact on the issues in question.

5. THE BROADER PICTURE OF EU EXTERNAL RELATIONS LAW

Environmental degradation knows no borders and, hence, the development of the EU's environmental policy has inevitably entailed a marked external dimension from the outset. Climate change mitigation has been the front-runner of the EU's external environmental policy and has exerted considerable influence on the directions of EU international action in the environmental field. Today, it goes largely undisputed that the EU is an important and influential global environmental actor, both within multilateral environmental processes and at other levels of environmental governance. In fact, over the past three decades, there has been a gradual shift in leadership style from the EU 'leading by example' towards using more assertively its market size and structural power to affect environmental action elsewhere, whether in support of existing MEAs (e.g., 'T&SD' chapters), of on-going multilateral environmental objectives or negotiating processes (e.g., ETS Aviation Directive and UNFCCC/ICAO), or in the absence thereof (e.g., FLEGT Initiative). In doing so, EU external environmental action has cut across, and invited us to critically reconsider, the traditional divisions between multilateralism, bilateralism and unilateralism in global environmental affairs.

Nevertheless, the making of an EU's external environmental policy has encountered legal and practical challenges that are common to other areas of the Union's external

relations. First, we have seen the usual legal complexities emerging in the sphere of shared competences, including the issue of *vertical coherence* between EU and Member States' environmental action on the international scene, which has been to a large extent addressed by the duty of sincere cooperation (Article 4(3) TEU) and its strict interpretation by the Court (*Commission v Sweden (PFOS)*). Second, there is the question of *horizontal coherence* and of how the EU political institutions should go about balancing environmental protection objectives and other (potentially competing) policy goals, as demanded by the environmental integration requirement (Article 11 TFEU). Third, questions have been raised over the *legality and legitimacy* of EU external environmental action and all the more so when it involves unilateral measures. Is such unilateralism really confined to promoting multilaterally-agreed environmental standards or objectives and within the permissible boundaries under international law (e.g., ETS Aviation Directive and *ATA & Others* case or GSP-plus and WTO law), as the EU often claims? Last but not least, the *credibility* of the Union as a global environmental actor in the eyes of third parties will ultimately rest on its own environmental performance and that of its Member States, including with regards to the ratification and effective implementation of key MEAs.

6. SOURCES AND FURTHER READING

- Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36(4) *European Law Review* 524.
- K. Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You To)' in E. Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press, 2013).
- K. Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) 21(3) *Review of European Community and International Environmental Law* 193.
- G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations – Beyond Multilateral Dimensions* (Hart, 2012).
- G. Marín Durán, 'Innovations and Implications of the Trade and Sustainable Development Chapter in the EU-Korea Free Trade Agreement' in J. Harrison (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press, 2013).
- G. Marín Durán, 'Environmental Integration in EU Development Cooperation: Responding to International Commitments or its own Policy Priorities' in E. Morgera (ed), *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press, 2013).
- M. Montini, 'The Principle of Integration' in L. Krämer and E. Orlando (eds), *Principles of Environmental Law* (Edward Elgar Publishing, 2016).
- E. Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's Environmental External Action' in B. van Vooren and S. Blockmans (eds), *The EU's Role in Global Governance – The Legal Dimension* (Oxford University Press, 2013).
- Nollkaemper, 'Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements' in E.

- Morgera (ed.) *The External Environmental Policy of the European Union: EU and International Perspectives* (Cambridge University Press, 2013).
- J. Nowag, 'Article 11 TFEU and Environmental Rights' in S. Bogojevi and R. Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart, 2018).
 - Savaresi, 'EU External Action on Forest: FLEGT and the Development of International Law' in E. Morgera (ed), *The External Environmental Policy of the European Union – EU and International Law Perspectives* (Cambridge University Press, 2013).
 - J. Scott and L. Rajamani, 'Contingent Unilateralism – International Aviation in the European Emissions Trading Scheme' in B. van Vooren and S. Blockmans (eds), *The EU's Role in Global Governance – The Legal Dimension* (Oxford University Press, 2013).
 - Overdeest and J. Zeitlin, 'Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana' (2017) *Regulation & Governance* 1.