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EU External Environmental Policy

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 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. At present, it has established itself as a multi-layered global environmental actor, actively engaged in shaping, importing and promoting international environmental norms at various levels of global governance.
- 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 practice in this policy field 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.
- The selected case-studies examined in this Chapter illustrate that EU external action has often involved a complex mix of policy tools, which cannot easily be placed into the neat categories of 'multilateralism', 'bilateralism' or 'unilateralism'.
- A common thread running through these various EU external environmental measures is whether the Union can and should use its market size and structural power to promote – or one could even say to force – third-country and global environmental action.

I. The Constitutional Framework on EU External Environmental Policy

A. EU External Competence for Environmental Matters

The constitutional core of EU external environmental policy is found in Title XX TFEU, which deals specifically with the environment, and which was first introduced by the Single European Act (SEA) of 1986[1] 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

[1] Single European Act [1987] OJ L169/24, Art 130r(5).

[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] TEU, Art 5(2).

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,
- 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] 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 domestic environmental measures with 'extraterritorial' effects.[8]

Therefore, the substantive content of the EU's external environmental policy has been defined through a series of 'Environment Action Programmes' and, driven by changes in the international environmental landscape as well as by the EU's own policy priorities, has evolved considerably over the past four decades.[9] Among the environmental issues prioritised by the EU in its external action, 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.[10] 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 legal framework on climate change, as well as by seeking to 'lead by example' through internal climate policies and legislation – albeit, with mixed results.[11]

H Walker and K Biedenkopf, 'The Historical Evolution of EU Climate Leadership and Four Scenarios for its Future' in S Minas and V Ntousas (eds) *EU Climate Diplomacy: Politics, Law and Negotiations* (Oxford, Routledge, 2018) 33, 34

[T]he EU strengthened its leadership performance by venturing into multiple leadership types and fortifying its initial cognitive leadership with improved exemplary and entrepreneurial leadership.

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

[5] For a more detailed discussion, see Marín Durán and Morgera (n 2) 15–16. Note that TFEU Art 191(3) 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 TFEU, Arts 206–207.

[7] Ibid, Art 192(1).

[8] On this point, see further section II.C below.

[9] See e.g., 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 Environment Action Programme); and its predecessor Decision (EC) 1600/2002 of 22 the European Parliament and of the Council laying down the Sixth Environment Action Programme [2002] OJ L242/1.

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

[11] 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) 118–38.

> Yet, not all factors that determine the EU's successful climate leadership are under its direct control. The EU can improve its production of ambitious and innovative ideas for international negotiations (cognitive leadership), adopt ambitious domestic climate policy to lead the way (exemplary leadership), devise active persuasion and diplomatic outreach strategies (entrepreneurial leadership) and exploit its (limited) structural leadership; but the success of these activities also depends on external factors to which the EU must adapt […]

In this area, the EU has set for itself a number of climate targets over the years,[12] including most recently those enshrined in both its updated nationally determined contribution (NDC) under the Paris Agreement, and its internal European Climate Law, namely: a reduction in EU greenhouse gas (GHG) emissions by (at least) 55 per cent when compared to 1990 levels by 2030, and the ultimate objective of 'climate-neutrality' (net-zero GHG emissions) by 2050.[13] These emission reduction commitments are among the most progressive in the world, and are in line with the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) underpinning the multilateral climate regime, which sets normative expectations on developed countries to 'take the lead' in combatting climate change and the effects thereof.[14] In July 2021, the European Commission put forward an ambitious 'Fit for 55' legislative package to deliver on these mitigation pledges – and some of these new measures will be discussed later in the chapter.

Aside from climate change mitigation and adaptation, the Eight Environment Action Programme (2022–2030) also highlights other thematic priorities for the EU's external environmental policy, notably: (i) accelerating the transition towards a 'circular economy, where growth is regenerative and resources are used efficiently and sustainably'; (ii) pursuing a 'zero pollution' (including in relation to chemicals) and a 'toxic-free' environment (including for air, water and soil); (iii) protecting, preserving and restoring marine and terrestrial biodiversity; and (iv) reducing key environmental and climate pressures related to the Union's production and consumption (including in the area of international trade).[15] In terms of approach, the Action Programme reaffirms the multi-layered character of the Union as a global environmental actor, involving a complex process of normative interactions between its internal and external policy instruments, as well as between its external action at multilateral and bilateral/unilateral levels.

> **Eight Environment Action Programme (2022–2030)**
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> ***Article 3 – Enabling conditions to attain the priority objectives***
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> The attainment of the priority objectives set out in Article 2 shall require the following from the Commission, Member States, regional and local authorities and stakeholders, as appropriate:
> […]
>
> (ah) supporting the global uptake of the priority objectives set out in Article 2, ensuring coherence between internal and external approaches and coordinated action, in particular as regards:
> (i) engaging with third countries on climate and environmental action, encouraging and supporting them to adopt and implement rules in those areas that are at least as ambitious as those of the Union, and ensuring that all products placed on the Union market fully comply with relevant Union requirements in line with the Union's international commitments, …;
> (ii) fostering sustainable corporate governance, including establishing mandatory due diligence requirements at Union level, and promoting the uptake of responsible business conduct in Union external policies, including in trade policy;

[12] See e.g., the 2020 Climate and Energy Framework (European Commission, 'Communication Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth' COM(2010)2020, 3 March 2010): (i) 20% reduction in EU total greenhouse gas (GHG) emissions from 1990 levels by 2020; (ii) (at least) 20% share of renewable energy in EU final energy consumption by 2020 and (at least) 10% share of energy used in the transport sector; and (iii) (at least) 20% improvement in energy efficiency by 2020. See also, the 2030 Climate and Energy Framework (European Commission, 'Communication on a Policy Framework for Climate and Energy in the period from 2020 to 2030' COM(2014)15, 22 January 2014): (i) 40% reduction in GHG emissions from 1990 levels by 2030; (ii) (at least) 27% share of renewable energy in EU energy consumption by 2030; (iii) (at least) 27% improvement in energy efficiency by 2030.

[13] Regulation (EU) 2021/1119 of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 [2021] OJ L243/1 (European Climate Law), Arts 2(1) and (4).

[14] United Nations Framework Convention on Climate Change, 4 June 1992, 1771 UNTS 107, entered into force for the EU on 21 March 1994, Art 3(1) and Paris Agreement, 12 December 2015, entered into force for the EU on 4 November 2016, Art 4(4).

[15] Decision (EU) 2022/591 of the European Parliament and of the Council on a General Union Environment Action Programme to 2030 OJ [2022] L114/22, Art 2 (8th Environment Action Programme).

(iii) enhancing cooperation with governments, businesses, social partners and civil society in third countries and international organisations to form partnerships and alliances for environment and climate protection …;
(iv) demonstrating leadership in international fora by, inter alia, achievement of the SDGs by the Union as well as of the objectives laid down in the Paris Agreement, the Convention on Biological Diversity, the Convention to Combat Desertification and other multilateral environmental agreements, notably by strengthening their implementation**,** and supporting third countries to do the same …;
(v) strengthening international environmental governance by closing remaining gaps and strengthening respect for, and application of, recognised international environmental principles;
(vi) ensuring that the Union and the Member States' financial assistance to third countries promotes the UN 2030 Agenda.

EU external environmental policy is included in the list of shared competences in Article 4(2) TFEU,[16] but it arguably belongs to the special sub-category of *non-pre-emptive* shared competence (see further Chapter 3) – 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 (see Chapter 3) would seem of limited relevance in the environmental sphere, where the EU often adopts legislation establishing minimum standards, rather than aimed at substantial harmonisation 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.

B. 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 Eight Environment Action Programme (2022–2030) mentioned above. However, decision-making on a number of specific matters is still subject to unanimity in the Council:

Article 192(2) TFEU

[16] TFEU, Art 4(2)(e).

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, based on 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 4). 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.

II. 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) 27 Member States and being one of the world's largest trading blocs and major providers of official development aid (ODA) and contributions to the United Nations (UN) budgets.[17]

A. Multilateral Environmental Agreements: Legal Issues from Mixity

The EU is presently a party to over 30 international environmental agreements,[18] including key multilateral environmental agreements (MEAs) negotiated under the auspices of the UN, such as:

The EU as a party to MEAs

[17] In 2023, EU and Member States' collective ODA amounted to €95.9 billion, constituting 42% of global ODA. However, this represents 0.57% of EU Gross National Income (GNI), hence falling short of meeting the UN target of 0.7% GNI. See: https://www.consilium.europa.eu/en/press/press-releases/2024/06/24/official-development-assistance-the-eu-and-its-member-states-remain-the-biggest-global-provider/

[18] European Commission, 'Multilateral Environmental Agreements ratified by the EU'. Available at: https://environment.ec.europa.eu/international-cooperation/multilateral-environmental-agreements-meas_en.

- *In the area of climate change and ozone depletion:* the 1985 Convention for the Protection of the Ozone Layer (Ozone Convention)[19] and its 1987 Montreal Protocol;[20] the 1992 UN Framework Convention on Climate Change,[21] its 1997 Kyoto Protocol[22] and the 2015 Paris Agreement.[23]
- *In the area of conservation and biodiversity:* the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);[24] 1979 Convention on the Conservation of Migratory Species of Wild Animals;[25] the 1992 Convention on Biological Diversity (CBD),[26] its 2003 Cartagena Protocol on Biosafety[27] and its 2010 Nagoya Protocol on Access to Genetic Resources;[28] and the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture.[29]
- *In the area of hazardous substances*: the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;[30] the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention);[31] the 2001 the Stockholm Convention on Persistent Organic Pollutants (POPs Convention);[32] and the 2013 Minamata Convention on Mercury.[33]
- *In the area of soil*: the 1994 Convention to Combat Desertification.[34]

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)[35] and its implementing agreements on fish stocks[36] and seabed mining,[37] as well as to several international environmental agreements negotiated at regional level (eg, in the context of the UN Economic Commission for Europe)[38] and sub-regional level (eg, for the management of seas or transboundary rivers).[39]

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[19] 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.

[20] 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.

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

[22] Kyoto Protocol, 11 December 1997, 37 ILM. 22 (1998), entered into force for the EU on 16 February 2005.

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

[24] 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.

[25] 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.

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

[27] Cartagena Protocol on Biosafety, 29 January 2000, 2226 UNTS 208, entered into force for the EU on 11 September 2003.

[28] 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.

[29] 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.

[30] 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.

[31] 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.

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

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

[34] 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.

[35] 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.

[36] 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.

[37] 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.

[38] Eg, 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.

[39] Eg, 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).

In the vast majority of these MEAs, the EU's participation has been accommodated through so-called 'regional economic integration organization' (REIO) clauses (see also Chapter 6). 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 several internal and external challenges (see Chapter 4). 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]'.[40] Occasionally, the Union has failed to speak with one voice undermining its ability to influence international environmental processes, such as the negotiations of the 2009 Copenhagen Accord in the area of climate change and of the 2013 Minamata Convention on Mercury.[41] Nevertheless, the duty of sincere cooperation set out in Article 4(3) TEU has played a key role in ensuring a coordinated and unified Union position in multilateral environmental fora. This has been gradually interpreted by the Court as entailing for the Member States not only a procedural 'best-endeavours' obligation to consult and cooperate with the EU institutions, but also a more substantive duty of abstention (see Chapter 2). In fact, it is in the context of an MEA (the POPs Convention) that the 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 (PFOS)*, ECLI: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

[40] Opinion 2/91 (*ILO Convention No. 170*), ECLI:EU:C:1993:106, para 36; Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, paras 108–9.
[41] See F. Hoffmeister, 'Of Presidents, High Representatives and European Commissioners – the External Representation of the European Union Seven Years after Lisbon' (2017) 1(1) *Europe and the World: A Law Review* 1, 36-44.

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. But as rightly noted by Delgado and Larik, this case law raises broader questions as to which course of Union action triggers the application of the duty of sincere cooperation and when would EU Member States be allowed to act in areas of shared external competences, such as environmental policy (see further Chapter 2).

A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *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).[42] 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.[43] 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.[44] In most cases, such declarations are very short and merely 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 MEA which 'are covered by [EU] law in force' without further specification.[45] In addition, the declarations often signal that '[t]he exercise of [EU] competence is, by its nature, subject to continuous development.'[46] 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.[47] 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.

B. 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,[48] 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.[49] In the lack thereof, the EU has concluded so-called 'Voluntary' Partnership Agreements (VPA)

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[42] 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).

[43] See eg, 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.

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

[45] See eg, 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.

[46] See eg, 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.

[47] 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.

[48] See Section III.B for examples.

[49] 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) 150–53.

with (thus far) eight timber-producing countries[50] in the framework of its 2003 Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan aimed at fighting illegal logging and associated trade in timber products.[51] 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.[52] To ensure that only legally produced timber is shipped to the EU, VPAs provide for the establishment of a legality assurance system in the partner country, 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 licences 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 Party agrees 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.

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

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

[52] 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-orientated and as a 'novel experimentalist architecture in transnational forest governance',[53] where the EU 'acts as a co-creator of [environmental] norms rather than an exporter' of its own rules.[54] This is partly 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 emphasise 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.[55] Under VPAs, the EU also commits to support 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 (eg, private and public procurement).[56] As progress towards concluding VPAs remained somewhat limited, in 2010, the EU strengthened its bilateral approach with the (unilateral) Timber Due Diligence Regulation, which prohibited the placing of illegally harvested timber in the EU market and required economic operators to exercise due diligence in ensuring the

[53] 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' (2018) 12 *Regulation & Governance* 64.

[54] 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.

[55] See eg, 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, Art 11.

[56] Ibid, Arts 13 and 16.

legal origin of timber products.[57] The Regulation created 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.[58] This green lane into the EU market was 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.[59] At the same time, it raised questions as to the truly 'voluntary' nature of these FLEGT-led partnership agreements.

Nevertheless, it is unclear how far the EU is committed to continue this hybrid model of bilateral and unilateral policy tools under the new Forest Due Diligence Regulation,[60] which was adopted in May 2023 with the aim of curbing its consumption-driven contribution to the destruction of forests around the globe as the world's second-largest importer of forest-risk commodities (FRCs). This Regulation repeals the Timber Due Diligence Regulation and is more ambitious in terms of product coverage, due diligence requirements and compliance mechanisms. Essentially, the new Regulation lays down due diligence obligations for operators and traders that place on the EU market the covered FRCs (i.e., cattle, cocoa, coffee, palm oil, rubber, soy and wood),[61] or export them from the Union.[62] Through the due diligence process,[63] operators and traders must ensure that such commodities have been legally produced (i.e., in accordance with the relevant legislation of the country of origin) and are 'deforestation-free' (i.e., not produced on land that has been subject to deforestation after 31 December 2020).[64] The Regulation further spells out in great detail the obligations of member states' competent authorities to carry out regular controls on operators and traders to assess their compliance with the due diligence requirements,[65] as well as to apply 'interim measures' when potential non-compliance has been detected and 'effective, proportionate and dissuasive' penalties in cases of infringements.[66] However, the due diligence obligations for operators and traders, as well as the surveillance by member states' competent authorities, will vary according to the level of risk assigned to a particular country (or subnational jurisdiction) under the three-tier benchmarking system. This system will be operated by the Commission, which is empowered to identify countries as presenting a 'low' (subject to simplified due diligence requirements), 'standard' or 'high' (subject to enhanced scrutiny) risk of producing commodities that are not deforestation-free, on the basis of a set of quantitative and qualitative assessment criteria.[67]

Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L 150/206

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, …

Article 29 – Assessment of Countries

1. This Regulation establishes a three-tier system for the assessment of countries or parts thereof. For that purpose, Member States and third countries, or parts thereof, shall be classified into one of the following risk categories [high risk, low risk, standard risk]

[…]

2. On 29 June 2023, all countries shall be assigned a standard level of risk […]
3. The classification of low-risk and high-risk countries or parts thereof, pursuant to paragraph 1 shall be based on an objective and transparent assessment by the Commission, taking into account the latest scientific evidence and internationally recognised sources. The classification shall be based primarily on the following assessment criteria:

[57] 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 (Timber Due Diligence Regulation), Arts 1 and 4.
[58] Ibid, Art 3.
[59] European Commission Communication, (n 49) 9–10 and Annex 2.
[60] Council and European Parliament Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union Market and the Export from the Union of certain Commodities and Products associated with Deforestation and Forest Degradation and repealing Regulation (EU) No 995/2010, [2023] OJ L 150/206 (Forest Due Diligence Regulation).
[61] Ibid, Art 1 and Annex 1.
[62] Ibid., Arts 4(1) – 5.
[63] Ibid., Arts 8-13.
[64] Ibid, Arts 2(13) and 3(a)-(b).
[65] Ibid, chapter 3.
[66] Ibid, Arts 23 and 25.
[67] Ibid, Arts 9, 13, 14(8)-(10), 29.

(a) rate of deforestation and forest degradation;
(b) rate of expansion of agriculture land for relevant commodities;
(c) production trends of relevant commodities and of relevant products.

4. The assessment referred to in paragraph 3 may also take into account:
(a) information submitted by the country concerned, regional authorities concerned, operators, NGOs and third parties, including indigenous peoples, local communities and civil society organisations, with regard to the effective covering of emissions and removals from agriculture, forestry and land use in the nationally determined contribution to the UNFCCC;
(b) agreements and other instruments between the country concerned and the Union and/or its Member States that address deforestation and forest degradation and facilitate compliance of relevant commodities and relevant products with Article 3 and their effective implementation;
(c) whether the country concerned has national or subnational laws in place, including in accordance with Article 5 of the Paris Agreement, and takes effective enforcement measures to tackle deforestation and forest degradation, and to avoid and penalise activities leading to deforestation and forest degradation and in particular whether it applies penalties of sufficient severity to deprive of the benefits accruing from deforestation or forest degradation;
(d) whether the country concerned makes relevant data available transparently; and, if applicable, the existence, compliance with, or effective enforcement of laws protecting human rights, the rights of indigenous peoples, local communities and other customary tenure rights holders; […]

While these assessment criteria may appear objective at first sight, they are stipulated in open-ended and loose terms, leaving a considerable margin of discretion to the Commission in differentiating between third countries (and between them and the EU Member States) – something which is likely to prove problematic from both a WTO law and environmental policy standpoint.

G Marín Durán, 'Curbing the European Union's Global Deforestation Footprint through Trade' (2025) *Journal of Environmental Policy and Planning* 8-9

Th[e] lack of clarity and predictability in the operation of the country benchmarking system as laid down in the [Regulation] may prove problematic from both a trade and an environmental standpoint. In fact, the Commission itself has recognised the need for greater transparency and objectivity, and it is in the process of developing general principles for the benchmarking methodology. This, in turn, will be critical in the (likely) event that third countries challenge the [Regulation] in the WTO dispute settlement system. From a trade perspective, it is evident that the regulation has a detrimental impact on the competitive opportunities of products from high-risk countries when compared to (like) products from low-risk countries, potentially leading to a violation of the core non-discrimination obligations under Articles I and III of the General Agreement on Tariffs and Trade (GATT). This is because commodities originating in countries in the low-risk category enjoy a competitive advantage in terms of lower compliance costs and administrative burdens.

However, it is questionable whether this discrimination between products from low-risk and high-risk countries can be justified under WTO law. While there is no doubt that WTO members may adopt trade-restrictive measures to protect the global environment under Article XX(g) GATT, they must ensure that any distinction between countries (or products) is objectively justified by the environmental goals pursued – in our case, forest (and climate/biodiversity) conservation – to avoid charges of 'arbitrary and unjustifiable discrimination'. And yet, the assessment criteria outlined above do not offer a full guarantee that all commodities shipped from low-risk countries to the EU are, in fact, legally sourced and deforestation-free. As such, the less stringent due diligence requirements applicable to the low-risk category could open the floodgates for commodities causing global deforestation to find their way into the EU market. The extent to which this risk can be avoided, and whether the actual country classification by the Commission (to be published by no later than 30 June 2025), will be genuinely based on objective and transparent environmental indicators remain to be seen. But in implementing the benchmarking system […], the EU should learn from the *EC – Seal Products* and *EU and Certain Member States – Palm Oil (Malaysia)* disputes at the WTO. In both cases, criteria under its challenged regulations (concerning the 'Inuit communities' exception and 'low ILUC risk' certification, respectively) that look objective and origin-neutral on their face had not been applied by the EU in an evenhanded manner across countries and found to constitute arbitrary and unjustifiable discrimination […]

In addition, the Regulation is vague on the specific form that cooperation with affected third countries may take, and in particular whether a FLEGT-type VPA approach will be extended beyond those countries with which the

EU has already such partnership agreements in place.[68] Moreover, there are no firm commitments on the part of the EU regarding the provision of financial and technical assistance to affected third countries, but only hortatory language in this regard.[69] As argued by Marín Durán and Scott, this uncertainty is regrettable particularly in light of the strong preference in international environmental law for cooperative approaches to tackle global environmental challenges.

G Marín Durán and J Scott, 'Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union' (2022) 34(2) *Journal of Environmental Law* 245, 265-266

> There are powerful arguments for not abandoning the VPA approach, and not the least the achievements in terms of enhanced stakeholder participation and improved forest governance frameworks in partner countries which the Commission itself recognises. Moreover, such agreements can serve to temper criticism of unilateral EU action in this domain. The Commission contends that one of the main problems is that key EU trading partners have shown little interest in engaging in the VPA process, but this is not the point. Even where third countries eschew the opportunity to enter into negotiations, the EU can still argue that it favours a cooperative over a unilateral approach to addressing the global challenge of deforestation —as it has done in the past in the WTO Trade and Environment Committee. Also, by giving voice to local communities negatively impacted by deforestation, these partnerships can serve as inclusive incubators for defining sustainability in context, as well as providing an institutional framework for the provision of EU technical and financial assistance to address the supply-side drivers of deforestation and forest degradation.

And yet, the new Forest Due Diligence Regulation, alongside other measures adopted as part of the 'Fit for 55' legislative package mentioned earlier, may signal a broader 'unilateral' turn in the EU's global environmental action as the next section will illustrate.

C. Unilateral Environmental Instruments: ETS Directive and CBAM Regulation

Aside from bilateral agreements, the Union has also used its market size and structural power to leverage global or third-country environmental action through *unilateral* instruments, including to promote the development of new international environmental norms. One controversial example in the field of climate change has been the EU's attempt to include GHG emissions from international aviation and shipping into its Emissions Trading System (ETS), which is presently the world's second-largest carbon trading scheme covering GHG emissions from approximately 10,000 installations in power, heat generation and energy-intensive industrial sectors, as well as from commercial flights and from the maritime transport sector.

Back in 2008, the EU adopted the ETS Aviation Directive against the backdrop of global inaction to address rapidly growing GHG emissions from international aviation, and particularly within the International Civil Aviation Organization (ICAO).[70] 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.[71] Essentially, the ETS set a cap for aviation emissions (95% of historical emissions from 2013 to 2020)[72] and required 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 (ie, within or outside the EU airspace).[73] Failure to do so would result in the imposition of financial penalties and operating bans in the EU territory.[74]

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[68] To respect EU commitments under *existing* VPAs, the regulation provides that FLEGT-licensed wood and wood products are deemed to comply with the legality requirement: ibid, preamble, recital 81 and art 10(3).

[69] Ibid, preamble, recitals 28-29.

[70] K Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) 21 *Review of European Community and International Environmental Law* 193, 195–98.

[71] 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 (ETS Aviation Directive), Art 3(a) and Annex I.

[72] Ibid, Art 3(c)(2).

[73] Ibid, Art 3(d)–(e), whereby only 15% of these allowances are to be auctioned, while the rest are to be issued free of charge.

[74] Ibid, Art 16.

While seeking to serve as a catalyst for global/third-country action, the ETS Aviation Directive was initially faced with great hostility from China, India and the United States among other countries, which criticised the EU for using unilateral measures and exercising extraterritorial jurisdiction in violation of international law.[75] Moreover, in the *ATAA* case below,[76] 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 EU Court. 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 Court, 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*, ECLI: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 …

Following its initial unilateral move, the EU ultimately decided to limit the geographical reach of the ETS to intra-EEA flights only[77] in order to allow for progress in multilateral negotiations at the ICAO on a global market-based measure to tackle GHG emissions from international aviation. These negotiations eventually led

[75] Kulovesi (n 70) 200-201; J Scott and L. Rajamani, 'EU Climate Change Unilateralism' (2012) 23(2) *European Journal of International Law* 469, 473.

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

[77] 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 [2014] OJ 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 [2017] OJ L350/7, Art 1(6).

to the adoption of a Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) in 2016.[78] However, the EU has persistently continued in its threat to take unilateral steps: a review clause under the current ETS Aviation Directive contemplates the possibility of reverting back to a full application of the ETS to all flights departing from the EEA (even to airports located outside the EEA), if progress with CORSIA implementation and further developments at ICAO level by July 2026 are not considered by the Union as sufficiently ambitious towards meeting the Paris Agreement goals.[79] More recently, the EU has been seeking to replicate this approach in the context of GHG emissions from international shipping, which were included in the revised ETS Directive adopted in May 2023.[80] As of January 2024, shipping companies have to buy and surrender emission allowances to cover (50% of) GHGs emitted by large ships arriving in, and departing from, the EU.[81] As was the case for aviation, a review clause is included in a bid to steer further multilateral climate action in the shipping sector, which requires the Commission to review the Directive in light of the adoption of a global market-based measure to reduce GHG emissions from international maritime transport by the International Maritime Organisation (IMO).[82]

Insofar as the EU's strategy is catalyzing global climate action at ICAO/IMO levels, it may be viewed as a successful case of what Scott and Rajamani have called action-forcing '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's initiatives in relation to sectoral emissions from international aviation and shipping raise 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 *Review of European Community and International Environmental Law* 193, 201–02.

[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.

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[78] 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 27 September–6 October 2016.

[79] Directive (EU) 2023/958 of the European Parliament and of the Council amending Directive 2003/87/ EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure [2023] OJ L130/115, recital 30 of Preamble and Article 28(b).

[80] Directive (EU) 2023/959 of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system [2023] OJ L130/134 (revised ETS Directive).

[81] Ibid, Arts 3(g)(a) and 3(g)(b), adopting an incremental approach whereby only 40 per cent of maritime emissions are within its scope in 2024, 70 per cent in 2025 and 100 per cent from 2026 onwards.

[82] Ibid, Art 3(g)(g); and on the ongoing IMO negotiations, Marine Environment Protection Committee, 'Resolution MEPC.377(80) – 2023 IMO Strategy on Reduction of GHG Emissions from Ships', adopted 7 July 2023.

> The point that I thus wish to make here is that where agreement on specific multilateral measures is 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 – minilateral 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 minilateral 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 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 'minilateral' action that seeks to advance multilateral objectives in the absence of a global agreement.

However, the question of whether EU-type 'minilateral' action that aspires to advance multilaterally-shared environmental objectives is (or not) within the boundaries of permissible autonomous action under international law does not always have a straightforward answer, but is often the subject of scholarly debate.[83] A recent and highly contentious example is the Regulation establishing Carbon Border Adjustment Mechanism (CBAM),[84] which was adopted by the EU in May 2023 and equally forms part of its 'Fit for 55' legislative package. Its central objective is 'to prevent the risk of carbon leakage, thereby reducing global carbon emissions and supporting the goals of the Paris Agreement, also by creating incentives for the reduction of emissions by operators in third countries'.[85] Once the CBAM fully enters into force,[86] the EU will become the first jurisdiction worldwide to extend the carbon price paid by domestic producers (as determined by the auctioning of emission allowances under its ETS) to emissions that are generated outside its borders but are embedded into its imports of carbon-intensive commodities in six sectors deemed at 'significant risk of carbon leakage': aluminium, cement, iron and steel, fertilizers, electricity and hydrogen.[87]

Hence, the EU is seeking to rely on international law, and more specifically the multilaterally-agreed temperature goals under the Paris Agreement, as a tool to justify using its trade-based market power to incentivise – or arguably, pressure – enhanced mitigation action by third countries. To the extent that the risk of carbon leakage is genuine,[88] it would lead to reduced carbon emissions within the EU being offset by increasing carbon emissions outside the Union, with no net emission reduction (or even an increase) at the global level, and thereby undermine the goals of the Paris Agreement. However, this reading of the Paris Agreement is rather selective, inasmuch as the EU ignores the legal constraints which that very agreement imposes on its autonomous action to pursue global climate goals.

> **G Marín Durán, 'Securing Compatibility of Carbon Border Adjustments with the Multilateral Climate and Trade Regimes' (2023) 72(1) *International and Comparative Law Quarterly* 73, 88-90**
>
> CBAM [will] effectively equalise [carbon prices for] EU and foreign producers … This undercuts the substantial flexibility which the Paris Agreement gives concerning choice of means to pursue

[83] See e.g., N. L. Dobson, 'Competing Climate Change Responses: Reflections on EU Unilateral Regulation of International Transport Emissions in Light of Multilateral Developments' (2020) 67 *Netherlands International Law Review* 67, raising compatibility questions from the perspective of ICAO/IMO Conventions as well as customary law of State jurisdiction; G Marín Durán and J Scott, 'Global EU Climate Action and the Principle of Common but Differentiated Responsibilities and Respective Capabilities' in K Armstrong, J Scott, A Thies (eds) *EU External Relations and the Power of Law* (Oxford, Hart Publishing, 2024) 161, considering the CBDRRC principle.

[84] Council and European Parliament Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L130/52 (CBAM Regulation). See also Chapter 4.

[85] Ibid, Art 1(1).

[86] Ibid, Art 32, whereby for a transition period until December 2025, importers of covered goods will be mainly subject to reporting obligations.

[87] Ibid, Art 2(1).

[88] On this point, see A. Pirlot, 'Carbon Leakage and International Climate Law' (2024) 13(1) *Transnational Environmental Law* 61.

decarbonisation, since Parties are free to decide for themselves whether or not to adopt carbon pricing instruments when implementing their NDCs. Most importantly, heterogeneity in carbon prices and other mitigation policies across jurisdictions remains acceptable as long as this reflects each Party's 'highest level of ambition' in light of its national circumstances …

[Article 4.6 Paris Agreement] differentiates least-developed countries (LDCs) and Small Island Developing States (SIDS) from all other Parties (including other developing countries), meaning that these countries can –but are under no obligation to– undertake emission-reduction action … Insofar as the EU's CBAM would incentivise (or arguably, pressure) producers in LDCs/SIDS to lower carbon emissions, it is not in line with the CBRRDC principle as operationalised in Article 4.6 …

Article 4.5 PA clearly requires ('shall') developed countries to provide financial support to assist mitigation by developing countries, 'recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions' … From this perspective, the [CBAM Regulation] is deeply disappointing [and] strikingly silent on the use of revenue generated through the sale of CBAM certificates … This revenue should be recycled back to the developing countries concerned to support their own decarbonisation programmes [in line with Article 4.5]

III. EU Environmental Policy and Other External Policies

A. Environmental Integration as a Treaty Requirement

The interplay between EU environmental policy and other external policies is explicitly recognised 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 into 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.[89] Nonetheless, it is the oldest of such clauses and has been steadily strengthened within the EU's constitutional setting.[90] 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, 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.[91] In this common set of non-prioritised objectives, environmental protection and sustainable development figure prominently.

Article 21(2) TEU

[89] See TFEU, Arts 7–13.

[90] Marín Durán and Morgera (n 2) 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) 157–61.

[91] Art 3(5) TEU, inter alia, provides that, in its external relations, the EU shall contribute to the 'sustainable development of the Earth'.

> 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:
>
> […]
>
> (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
>
> (f) 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;
>
> (g) 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.[92] In principle, EU legislation infringing Article 11 TFEU is thus liable for annulment by the EU courts. Yet, such a breach may be difficult to prove in practice. This is first because the Court 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.[93] 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.[94] 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 law[95] and itself calls for advancing the three interdependent pillars of economic development, social development and environmental protection in a holistic and non-hierarchical manner.[96] This is also evident in the renewed EU's Sustainable Development Strategy,[97] which was adopted in response to the UN 2030 Agenda for Sustainable Development and addresses all internationally agreed 17 Sustainable Development Goals together.[98] 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 making[99] – 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, 2016) 145–46**
>
> 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

[92] Case C-379/98 *PreussenElektra v Schleswag*, Opinion of AG Jacobs, ECLI:EU:C:2000:585, para 231; Marín Durán and Morgera (n 2) 28–32.

[93] See notably Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl*, ECLI:EU:C:1998:353, paras 32–35 and 53; and for a discussion, Marín Durán and Morgera (n 2) 32–33.

[94] Nowag, (n 66) 163. Exceptionally in Case T-229/04 *Sweden v Commission*, ECLI: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) 145–46.

[95] TEU Art 3(3).

[96] 'Political Declaration of the World Summit on Sustainable Development' (UN Doc A/CONF.199/20), 4 July 2002, Resolution 1, para 5.

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

[98] UN General Assembly, '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.

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

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'.

That said, 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.[100]

B. 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.[101] 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-related measures to promote environmental protection objectives – as exemplified above with the EU Forest Due Diligence Regulation.[102] Conversely, an important aspect of the 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.[103]

Since the 2001 Environmental Integration Strategy,[104] 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 (eg, MEA secretariats), has been provided through various channels.[105] Under the current Neighbourhood, Development and International Cooperation Instrument (2021-2027),[106] the most visible one is the so-called 'Global Challenges' thematic programme, where the 'Planet' appears as the second priority area with an indicative allocation of €793 million for the seven-year period.[107] While this figure may appear relatively modest, it may be partly explained by the subsidiary character of the thematic programme as a source of EU funding, which is meant to complement environment-related assistance provided to individual countries or regions under the various EU geographic financing instruments.[108] Hence, it is difficult to provide the exact amount of EU external aid for environmental protection in the current 2021-2027 financial framework.

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[100] See e.g., S Gstöhl and S Schunz, 'Striking a Balance? The European Union's Management of the Environment-Trade Nexus' forthcoming (2025*) Journal of Environmental Policy and Planning*, Special Issue.

[101] Environmental integration has also taken place in EU internal policies with an important external dimension: see eg, 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] OJ L286/1, including an import ban on fish products from non-cooperating countries (Art 38).

[102] See section II.B, and G Marín Durán and J Scott, **'**Regulating Trade in Forest-Risk Commodities: Two Cheers for the European Union' (2022) 34(2) *Journal of Environmental Law* 245, 261-266. Similarly, for the EU CBAM Regulation, see I Espa, J Francois, H van Asselt, 'The EU Proposal for a Carbon Border Adjustment Mechanism (CBAM): An Analysis under WTO and Climate Change Law' (2022) 20(1) *Oil, Gas & Energy Law* 1; S Sato, 'EU's Carbon Adjustment Mechanism: Will It Achieve Its Objective(s)?' (2022) 56(3) *Journal of World Trade* 383. While these can be considered trade-related measures, they were both adopted on the basis of Article 191 TFEU (i.e., the environmental legal basis) and, hence, were examined in section II.

[103] Rio Declaration, Principle 7 and, for example, CBD, Art 20(4); Paris Agreement, Art 4(5).

[104] European 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.

[105] See Marín Durán and Morgera (n 2) 173-206.

[106] Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe [2021] OJ L209/1 (NDICI Regulation).

[107] Under the previous Development Cooperation Instrument (2014-2020), the thematic programme specifically targeting climate change and environment had an indicative allocation of €1.8 billion: 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, Annex IV.

[108] NDICI Regulation, Arts 10-11.

But aside from 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 (eg, implementation of MEAs and strengthening global environmental governance) and the Union's own policy priorities (including the FLEGT initiative previously examined).[109] 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 be equated with a greater weight for the environment and/or stronger support for multilateral environmental processes within EU development assistance.[110]

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 'GSP-plus'),[111] 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. The current GSP Regulation was due to expire at the end of 2023, but its application has been extended until 31 December 2027 pending a decision by the Council and the European Parliament on the revised GSP scheme proposed by the Commission.[112] Among the changes in this GSP legislative proposal is an extension in the list of international conventions that GSP-plus beneficiary countries must ratify and effectively implement (to a total of 32), including the addition of the 2015 Paris Agreement to the current seven environmental instruments (see below).[113]

Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences [2012] OJ L 303/1

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.

[…]

[109] Ibid, Article 3(1) setting out the general objectives of EU funding as (a) 'upholding and promoting the Union's values, objectives and fundamental interests worldwide' and (b) 'contributing to the promotion of unilateralism, international commitments and objectives that the Union has agreed to, in particular the SDGs, the 2030 Agenda and the Paris Agreement'.

[110] See further, 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).

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

[112] Regulation (EU) 2023/2663 of the European Parliament and of the Council of 22 November 2023 amending Regulation (EU) No 978/2012 applying a scheme of generalised tariff preferences [2023] L2663/1, Article 1.

[113] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council' COM(2021) 579 final, 22 September 2021, Annex VI.

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 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 fulfils 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' (TSD) chapter, which has been systematically included in all free trade agreements (FTA) which the EU has concluded since 2010, whether with developing countries (eg, 2012 EU–Central America Association Agreement),[114] emerging economies (eg, 2016 EU–Vietnam Free Trade Agreement and Investment Protection Agreement)[115]

[114] 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/.
[115] EU–Vietnam Free Trade Agreement and Investment Protection Agreement, initialled 1 February 2016. Available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/.

or developed countries alike (eg, EU–Canada Comprehensive Economic and Trade Agreement).[116] While there is some variation across agreements, all TSD chapters share three basic provisions. First, each FTA party is to effectively implement in their domestic laws and practices the MEAs (and ILO conventions) to which each is already a party. These MEA clauses thus establish a minimum protection floor whereby the relevant international environmental standards cannot be departed from under any circumstance. The second kind of commitments concern existing domestic environmental legislation more broadly (i.e., above and beyond that implementing international standards) and take the form of non-derogation and effective enforcement clauses. These provide that FTA parties shall not waive or derogate, nor fail to effectively enforce, their environmental laws in a manner affecting bilateral trade or investment (or in some agreements, to encourage bilateral trade or investment). The third type of clauses relate to current and future levels of environmental protection in domestic laws but, unlike the other two sets of provisions, are couched in 'best-endeavour' terms. FTA parties undertake to ensure that their respective domestic laws provide for 'high levels' of environmental (and labour) protection and to continue to improve them over time.

EU–Singapore Free Trade Agreement [2019] OJ L294/3

CHAPTER TWELVE – TRADE AND SUSTAINABLE DEVELOPMENT

…

Article 12.2 – Right to Regulate and Levels of Protection

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.

[116] 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.

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 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)[117] or by joint committees (in the case of TSD chapters)[118] 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. However, such a 'promotional' approach to compliance has been criticised by the European Parliament[119] and some scholars for being too soft and ineffective in enhancing global environmental governance, and they have called for a harder sanction-based enforcement of sustainability commitments under TSD chapters.

M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24(1) *Journal of International Economic Law* 25, 51

[…] labour and environmental obligations [in EU FTAs] are not second class. The remarkable panel report issued in January 2021 in the EU–Korea labour dispute demonstrated that the legal nature of many sustainability standards does not differ from other FTA norms that are subject to regular dispute settlement. Consequently, all FTA disputes should be resolved through the same mechanism and result in binding rulings.

[…] as far as sanctions are concerned, they complement rather than contradict the EU's promotional approach towards sustainability. We do not favour trade retaliation. Its drawbacks are well known. Still, even when not explicitly envisaged, the EU may be justified to retaliate. Having said that, we recommend that the EU include financial penalties in its future FTAs as the primary compliance inducement mechanism. In addition, the EU should add targeted sanctions to its toolbox, restricting supplies implicated in labour and environmental transgressions.

To be sure, strengthening and enforcing sustainability standards works both ways. It will put an extra responsibility on the EU and its Member States as well to protect their labour force and the environment.

After some initial reluctance,[120] in its 2021 review of TSD chapters, the European Commission has been more willing to endorse a policy shift towards a more assertive, and indeed 'coercive', approach in furthering compliance with selected (not all) sustainability commitments in TSD chapters.[121] This has been incorporated in the 2023 EU – New Zealand FTA which, in addition to the general MEA clause mentioned above,[122] contains specific obligations to 'effectively implement the UNFCCC and Paris Agreement, including commitments with regard to nationally determined contributions' and 'to refrain from any action or omission that materially defeats the object and purpose of the Paris Agreement' (PA clause).[123] Moreover, in terms of enforcement, a failure to observe the PA clause is not only subject to mandatory dispute settlement proceedings but the general temporary remedies (i.e., compensation and trade retaliation) may be applied where compliance is not reinstated within the arranged period of time.[124] This new approach is not uncontroversial, and raises a number of legal and policy issues.

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[117] For an examination, see Marín Durán and Morgera (n 2) 162–65.
[118] For an examination, see G Marín Durán, 'The EU's Evolving Approach to Environmental Provisions in Free Trade Agreements' in RA Wessel, JB Mata Diz, J Péret, SE Akdoğan (eds), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations* (The Hague, T.M.C. Asser Press, 2025) 257.
[119] 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).
[120] European Commission, 'Non-Paper on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)', 11 July 2017, 8–9.
[121] European Commission, 'Communication on the Power of Trade Partnerships: Together for Green and Just Economic Growth' COM (2022) 409 final, 29 June 2022.
[122] Free Trade Agreement between the European Union and New Zealand, signed on 9 July 2023, O.J. 2024 L 1/229, Art. 19.5 (2).
[123] Ibid, Art. 19.6 (2)-(3).
[124] Ibid, Art. 26.16.2(a)(ii).

G Marín Durán, 'The EU's Evolving Approach to Environmental Provisions in Free Trade Agreements' in RA Wessel, JB Mata Diz, J Péret, SE Akdoğan (eds), *EU External Relations Law and Sustainability: The EU, Third States and International Organizations* (The Hague, T.M.C. Asser Press, 2025) 257, xx

First, the availability of sanctions as a remedy does not necessarily mean that environmental (or labour) complaints will be pursued more frequently to the phase of dispute settlement under FTAs. In fact, FTA practice thus far suggests otherwise […] Second, empirical evidence on the presumed compliance-inducing effect of economic sanctions is scant and at best mixed […]

[Third, the] proportionality requirement limits the degree of intensity of the retaliatory response, and demands that the level of injury caused by the violation be determined in order to calculate the appropriate amount of trade retaliation that may be applied by the offended treaty partner. This determination, however, can be particularly complex in the case of the PA clause: how should we measure injury suffered by an *individual* State resulting from interference by another State with the *global* commons (i.e. the Earth's climate)? […]

[Fourth,] and perhaps most importantly, a shift towards a sanction-based enforcement of environmental obligations raises fundamental questions of equity between FTA partners. As has been well documented in the WTO context, trade sanctions are inherently inequitable as an enforcement tool where significant disparities in market size and economic power exist between the disputing parties […] Proponents of sanction-based enforcement are yet to explain how it can be reconciled, in practice, with their formal acceptance that compliance with environmental provisions in EU FTAs is a reciprocal matter and should go in both directions (i.e., not only by third countries, but equally by the EU and its Member States).

IV. 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 (eg, TSD chapters), of ongoing multilateral environmental objectives or negotiating processes (eg, ETS Aviation Directive and ICAO/IMO), or in the absence thereof (eg, FLEGT Initiative and Forest Due Diligence Regulation). In doing so, EU external environmental action has both cut across and invited us to critically reconsider the traditional divisions between multilateralism, bilateralism and unilateralism in global environmental affairs.

Nevertheless, the making of the 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).

In addition, questions have been raised over the *legality and legitimacy* of EU external environmental action, even more so when it involves unilateral measures. In fact, the EU has often relied on MEAs and other multilateral environmental commitments as a tool to justify its regulatory choices to act autonomously and use its trade-based market power to incentivise – or arguably, pressure – third-country action in the protection of the global environment. But is such EU action really confined to promoting multilaterally agreed environmental standards or objectives and within the permissible boundaries under international law (eg, ETS Aviation

Directive and *ATA & Others* case or CBAM Regulation and Paris Agreement/WTO law)? 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.

V. Sources and Further Reading

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