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## Chapter 38 -Regional Organisations: The Case of the European Union

Sandrine Maljean-Dubois

► **To cite this version:**

Sandrine Maljean-Dubois. Chapter 38 -Regional Organisations: The Case of the European Union. L. Rajamani & J. Peel. Oxford Handbook of International Environmental Law,, 2021. <halshs-03494266>

**HAL Id: halshs-03494266**

**<https://shs.hal.science/halshs-03494266v1>**

Submitted on 18 Dec 2021

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HAL Authorization

Référence: S. Maljean-Dubois, **Chapter 38. Regional Organizations: The European Union**, *Oxford Handbook of International Environmental Law*, L. Rajamani & J. Peel (eds), OUP, Oxford, 2021, pp. 650-665.

## ***Chapter 38 – Regional Organisations: The Case of the European Union***

*Sandrine Maljean-Dubois*<sup>(\*)</sup>

### **I. INTRODUCTION**

By nature, the European Union (EU) was created by agreements between States, and belongs to the category of intergovernmental regional organisations. However, by structure, functions and powers, it is very peculiar, and is even regarded as a *sui generis* organisation. Standing out from the model of traditional international organisations, it has been entrusted by Member States with the adoption of legally binding acts which can have immediate and direct effects on national law. In its landmark decision *Costa v Enel* in 1964, the European Court of Justice clearly stated that ‘opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order (...). In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves’.<sup>1</sup> EU law is thus regarded as an autonomous legal order.<sup>2</sup>

The institutional structure of the EU (with the European Council, European Parliament, Council of Ministers, Commission, Court of Justice, European Central Bank, Court of

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<sup>(\*)</sup> I would like to thank warmly my friend and colleague Professor Rostane Mehdi for his helpful feedback on the first version of this paper. Any error or omission lie with me.

<sup>1</sup> CJEU, Judgment, 15 July 1964, *Flaminio Costa v E.N.E.L. Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy*, Case 6–64 [1964] ECR 595.

<sup>2</sup> F. Martines, ‘Direct Effect of International Agreements of the European Union’ *EJIL* 25(2014)1: 130.

Auditors) comes closer to that of a State, but its functioning is different, especially as regards the distribution of executive, legislative and judiciary powers. Furthermore, unlike States, the EU is not sovereign and has only conferred powers, which legal bases are found in the Treaties and mainly in the Treaty on the Functioning of EU (TFEU).<sup>3</sup> Its peculiarities have been internationally recognized, since the EU is often the one-of-a-kind Regional Economic Integration Organisation (REIO), allowed as such to be a member of some international organisations and to enter in agreements with third countries, alone or alongside its 28 member States.

Consolidating step by step its competences regarding environmental protection, the EU has gradually developed a comprehensive body of legislation in this field which legally binds its Member States. At first, the European legislation mainly intended to avoid or limit distortions of competition rather than to protect the environment itself. However, from the precursory European Economic Community (Treaty of Rome, 1957) to the European Union (Treaty on European Union, Maastricht, 1992), the organisation has progressively evolved towards a more preventive and comprehensive policy, including nature conservation. In this area as in others, the dynamic of European integration has benefited from the interaction of political and judicial processes. Meanwhile, the Union has been developing an external environmental policy, and has become an influent international actor at the regional but also at the global levels. It has indeed played a crucial role in different environmental negotiations, organisations and treaty bodies. For these reasons, a focus on the EU's environmental policy is particularly valuable in studying the role of regional organisations in environmental protection.

## **II. THE PROGRESSIVE AFFIRMATION OF EU COMPETENCE IN THE ENVIRONMENTAL FIELD**

### **A. EU competence in the environmental field**

#### ***1. The consecration of EU competence***

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<sup>3</sup> Adopted in 2007 and entered into force in 2009, the Lisbon Treaty amended the Treaty of Rome (1957), known in its updated form as the Treaty on the Functioning of the European Union or TFEU, and the Maastricht Treaty (1993), known in its updated form as the Treaty on European Union (2007) or TEU. These two treaties form the constitutional basis of the European Union.

The EU does not have any autonomous source of authority, independently of its sovereign Member States. According to the principle of conferral, the EU may act only within the limits of the powers conferred upon it by the Member States in the Treaties. And yet, its environmental competence was far from obvious in its early stages. The protection of the environment is not mentioned in the Treaty of Rome in 1957, which was written at a time when the quality of the environment was not a political concern. However, with the development of international environmental law, member States gradually developed legislations in this area that could threaten competition and the free movement of goods and services within the 'Common Market'. It became necessary to seek a certain harmonisation at the European level. At the same time, a landmark Meeting of Heads of State and Government in Paris in 1972 recognised that economic development does not constitute an end in itself, but should serve to improve the quality of life.<sup>4</sup> By this declaration, a flexible interpretation of the Treaty of Rome was then legitimised. This led to the adoption of the First Community Environment Action Programme in 1973, followed by six other programmes over the years. These programmes are guidance documents only but they have played a fundamental role in the strategic orientation of the EU's environmental policy.

While the first Community legislative instruments were adopted in the late 1970s, the legal bases of the Community's competence were the subject of lengthy debate. The Community found them in Article 100 of the Treaty of Rome (now Article 115 TFEU), which allows for the adoption of directives for the approximation of laws, regulations and administrative provisions which have a direct impact on the common market, and thus made it possible to regulate non-market barriers (eg product standards), and / or Art. 235 (now Article 352 TFEU), which states that, if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and the Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures. It is significant that these two legal bases required the unanimity of Member States. This explains why during

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<sup>4</sup> Declaration for the First Summit Conference of the Enlarged Community, *Bull EC V* – 1972, 10, para 3.

this first period, Community environmental law was essentially based on the lowest common denominator.

Founded on fragile legal bases, the Community's competence remained limited until the adoption of the Single European Act in 1986. The latter added a new title on the 'Environment' to the Treaty of Rome, thus laying down the framework for an environmental 'action' of the Community (Title 7, Art. 130 R/S/T, now Art. 191-192-193 TFEU.) From implicit, the Community competence became then clear and explicit, operating therefore on firm legal bases. New changes were made by the Treaty of Maastrich (1992), the Treaty of Amsterdam (1997) and the Treaty of Lisbon (2007.) The initial European Economic Community became a Union with competences broadened far beyond the economic field. Regarding the protection of the environment, the decision-making process gradually evolved from unanimity to a qualified majority of the Council in most cases, which facilitated legal developments. Meanwhile, the objectives of a comprehensive environmental policy were articulated. In addition to its internal environmental objectives, the Union aims at 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change' (Art. 191 (1) TFEU.) Moreover, Article 3 of the Treaty on European Union now states that 'The Union (...) shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.' Sustainable development is thus an overriding objective of the EU. In practice, the legal bases of environmental measures are varied and go beyond Article 192 and the Environment Title. In particular, many measures were also adopted under Article 114 TFEU, which primarily aims at the establishment and functioning of the internal market. The choice of a legal base has practical implications on the legislative process and the residual freedom of Member States, and thus is often highly discussed.<sup>5</sup>

## ***2. A shared competence between the Union and its member States***

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<sup>5</sup> D. Langlet, S. Mahmoudi, *EU environmental law and policy* (OUP, 2016): 97.

Except regarding the common commercial policy and the conservation of marine biological resources under the common fisheries policy, for which the EU has exclusive competence, competence is shared between Member States and the EU in the field of the environment. Both the Union and Member States may legislate and adopt legally binding acts. Member States have an original competence: they can take measures as long as the EU itself has not already regulated the issue. Member States keep also a residual – circumscribed – competence after the EU’s intervention: they can then complete, strengthen or derogate from EU legislation. However, they do not have the right to undertake obligations which would affect the European Union’s rules.

Different principles govern the much-discussed sharing of the legislative power between the EU and its Member States.

The subsidiarity principle was first introduced by the Single European Act in 1986. It was applicable only to environmental measures. It became a general principle afterwards and is now formulated at Article 5 (3) TEU. In accordance with this principle, the Union ‘shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’ By nature, due to their transboundary dimension, environmental actions are generally better achieved at the EU level. It remains however difficult to assess whether a measure’s objective can be better achieved at the European Union’s level and this gives rise to many discussions between the EU and Member States.

The principle of proportionality is also of particular significance here. According to Article 5 (4) TEU, ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’. It applies to both the choice of legal instruments, between a directive or framework-directive, which provides greater flexibility to Member States, or a regulation, and the content of legislative acts that could restrict more or less the freedom of action of individual member states.’<sup>6</sup>

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<sup>6</sup> On this principle, see CJEU, Judgment, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, 17 avril 2018, not yet published in the *ECR*.

Mention should also be made of the principle of sincere cooperation between the European Union and Member States (sometimes called loyal or fair cooperation).<sup>7</sup> This is a far-reaching obligation that has significant implications for Member States. The Court of Justice has for instance derived from this a requirement for Member States' authorities to redress the unlawful consequences of a breach of EU law and a requirement that enforcement shall be effective, proportionate and dissuasive.<sup>8</sup>

Regarding EU external action, it is worth mentioning that according to the implicit powers theory, competence in external matters derives from explicit internal competence. It is the principle of parallelism between internal and external powers. In other words, where the Treaties assign explicit powers to the EU in a particular area, it must also have similar powers to conclude agreements with non-EU countries in the same field.<sup>9</sup>

The issue of the distribution of competence between the Union and its Member States is a very complex and evolving one. It has long been a matter of discussion between the European Commission and EU Member States, regularly arbitrated by the European Court of Justice. Actually, 'the exact definition of competences is not set at the constitutional level, but rather in the implementation of policy (...) and in the substance of fairly technical pieces of legislation.'<sup>10</sup>

## **B. EU environmental policy**

EU environmental law has experienced a very high inflation rate, with about 250 main acts, mainly directives, but also hundreds of soft-law instruments. The environmental policy framework is now relatively comprehensive. In addition to extensive sectoral instruments –pollution of water, air and soil, noise, waste, chemicals, biotechnology, nature conservation, landscape etc.–, EU has adopted some cross-cutting texts –assessment of the effects of certain public and private projects, access to environmental information, public participation in environmental decision-making or liability for environmental damage...

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<sup>7</sup> See Article 4 (3) TEU.

<sup>8</sup> See Case C-201/02, *Wells* [2004] ECR 723, para 64-5 ; Case 68/88, *Commission v Greece* [1989] ECR 2965, para 23-4.

<sup>9</sup> See the landmark judgment of the CJEC of 31 March 1971, Case 22-70, *Commission of the European Communities v Council of the European Communities. - European Agreement on Road Transport* [1971] ECR 63.

<sup>10</sup> H. Vedder 'The formalities and substance of EU external environmental competence: Stuck between climate change and competitiveness' in E. Morgera (ed), *The external environmental policy of the European Union: EU and international law perspectives* (CUP, 2012): 11.

Protecting nature and strengthening ecological resilience, boosting resource-efficient, low-carbon growth, and reducing threats to human health and wellbeing linked to pollution, chemical substances, and the impacts of climate change are among the main priorities of the seventh Environment Action Programme called ‘Living well, within the limits of our planet (2013-2020).’ For several years now, emphasis has been put on improving the implementation of existing instruments, called the ‘environmental acquis’, rather than on adopting new acts.

EU environmental law has had very significant effects on the domestic legislations of Member States. In most of the Member States, the environmental legal framework is simply equivalent to EU environmental law.<sup>11</sup> EU policy has largely contributed to the diffusion and strengthening of environmental law, and has allowed its harmonisation among the Member States on relatively high standards. The EU has also disseminated its rules far beyond its borders, in countries which are members of the European Economic Area,<sup>12</sup> or by setting them as conditions that external actors must meet in order to obtain rewards or avoid sanctions in trade agreements or accession treaties or, even more indirectly, by convincing others of their appropriateness.<sup>13</sup>

EU environmental law is also in constant interaction with international environmental law. Large parts of EU environmental law are being developed under international influence. This is the case in the areas, for example, of trade in endangered wildlife species, protection of the ozone layer, transportation of hazardous waste, acid rain or climate change. EU environmental law is, in some respects, a communitisation of the contents of international environmental law. Conversely, because it often goes further, EU law has had an impact on international environmental law, and has pushed it forward in its turn. The issue of access to environmental information is a very good illustration of the dynamic interactions between international and EU law.<sup>14</sup>

It is first of all up to Member States to implement Community environmental legislation, with the collaboration of regional and local authorities and stakeholders. They shall

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<sup>11</sup> L. Kramer, *EU Environmental Law* (Sweet & Maxwell, 2011).

<sup>12</sup> The European Economic Area has been ratified by the European Union, Iceland, Liechtenstein and Norway.

<sup>13</sup> F. Schimmelfennig, ‘EU external governance and europeanization beyond the EU’, *The Oxford Handbook of Governance*, D. Levi-Faur (ed) (OUP, 2012): 659.

<sup>14</sup> M. Pallemarts, ‘The Aarhus Convention at ten : interactions and tensions between conventional international law and EU environmental law’ (Europa Law Publishing, 2011).

finance and implement environmental policy in their respective national systems. To that end, they must monitor the application of EU law and report on it to the Commission. The Commission on its part is often referred to as the ‘Guardian of the Treaty’; it ‘shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.’ (Art. 17 (1) TEU) It has the possibility of triggering infringement proceedings whenever it believes that a Member State has breached EU law. If necessary, the Commission can then refer the case to the European Court of Justice. Some judgments of the latter have played an important role in improving the application of EU environment law. Moreover, if a Member State does not comply with the Court’s Judgment within a reasonable timeframe, the Commission may trigger new infringement proceedings with, this time, the eventuality of (deterrent) pecuniary sanctions. Obviously, the monitoring of the implementation of European environmental law is more sophisticated and elaborated than the monitoring of international environmental law.<sup>15</sup>

The EU is widely seen<sup>16</sup> as the best guarantee that EU environmental laws are correctly applied.<sup>17</sup> In addition to the cases brought on the Commission’s own-initiative, EU citizens’ complaints are the main source of information on the implementation of EU law; the Commission receives six hundred or so complaints per annum. The highest number of new Commission enforcement actions in 2016 were related to the environmental ‘acquis’ (19%) whereas only 10% of the registered complaints concerned environmental legislation.<sup>18</sup> The Commission, which has unlimited discretion here, affirms that it gives priority to the enforcement of non-transposition and non-conformity cases over those of non-application, but this policy has not been fully applied in practice.<sup>19</sup> Meanwhile the Commission has significantly increased the number of initiatives in order to ensure a better effectiveness of environmental law.<sup>20</sup>

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<sup>15</sup> Cross-reference to other chapters on control/compliance ?

<sup>16</sup> By 83 % of EU citizens.

<sup>17</sup> Environment Poll, January 2018, [https://ec.europa.eu/environment/efe/themes/economics-strategy-and-information/environment-poll-citizens-trust-eu-expect-more\\_en](https://ec.europa.eu/environment/efe/themes/economics-strategy-and-information/environment-poll-citizens-trust-eu-expect-more_en) accessed 23 August 2018.

<sup>18</sup> EU, *Monitoring the implementation of EU Law, Tools and Challenges* – Study (EU, 2017): 7.

<sup>19</sup> E. Hattan, ‘The Implementation of EU Environmental Law’, *Journal of Environmental Law*, Vol. 15, Issue 3 (2003): 273.

<sup>20</sup> See for example Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU actions to improve environmental compliance and governance*, Brussels, 18.1.2018 COM(2018) 10 final.

### C. Recent developments and prospects

At both domestic, regional and international levels, the early years of environmental law – from the 1970s to 1990s– were characterized by normative frenzy. Emphasis was primarily put on the development of a body of regulations aimed at environmental protection. As this body of regulations reached critical mass, academics and practitioners threw light on the causes of the relative ineffectiveness of many adopted instruments and on the means to remedy it. Because environmental threats are worsening, strengthening the effectiveness of environmental law seems to be a major challenge for the future.

The European Commission has followed this trend and has developed a strategy since its 1996 Communication.<sup>21</sup> Since then it has adopted several complementary documents aimed at providing Member States with tools to improve the implementation on the ground and clarifying the Commission’s enforcement strategy to tackle breaches of EU environmental law.<sup>22</sup> The strategy articulates preventive and corrective measures and is based on a large combinaison of means. It fits within a wider Commission’s strategy for improving implementation of EU law.<sup>23</sup> Following this strategic approach, the Commission published on the 3<sup>rd</sup> of February 2017 the Environmental Implementation Review package, which includes a Communication that proposes specific actions in order to improve the situation, and an annex that suggests priorities for action aiming at a better environmental implementation by each of the EU Member States.<sup>24</sup>

A reflection on the choice of instruments leads to experiment market-based tools –emissions trading schemes, ecolabelling...– in addition to more classical command and control approaches. Several instruments aim at supporting the implementation and enforcement

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<sup>21</sup> European Commission, *Implementing Community environmental law. Communication from the Commission*, COM (96) 500 final, 22 October 1996.

<sup>22</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness*, COM/2012/095 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Implementing European Community Environmental Law*, SEC(2008) 2851, SEC(2008) 2852, SEC(2008) 2876, COM/2008/0773 final.

<sup>23</sup> See European Commission, *A Europe of Results - Applying Community Law*, COM/2007/0502 final.

<sup>24</sup> European Commission, *The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results*, COM(2017) 63 final.

of EU environmental legislation, such as the directive on environmental liability,<sup>25</sup> the recommendation providing for minimum criteria for environmental inspections<sup>26</sup> or the directive on the protection of the environment through criminal law.<sup>27</sup> An informal network of environmental authorities of the EU Member States was set up in 1992. Called IMPEL –for European Union Network for the Implementation and Enforcement of Environmental Law–, it associates acceding and candidate countries of the EU, European Economic Area and European Free Trade Association countries. It promotes a more efficient implementation of EU environmental legislation by information and experience sharing or joint projects.

In the last few years, the –liberal-inspired– European Commission focused on its REFIT programme (Regulatory Fitness and Performance Programme) set up by the 2015 ‘Better Regulation Communication’ to determine ‘how to make EU regulation more efficient and effective while reducing burden and without undermining policy objectives.’<sup>28</sup> Under this programme, the Commission is screening the entire stockpile of EU legislation on an ongoing and systematic basis to identify burdens, inconsistencies, ineffective measures and determine corrective actions. The Commission started its systematic review of existing legislation on environmental policy with the legislation on water, waste, environmental liability, protection of birds and habitats and on chemicals legislation outside of REACH<sup>29</sup>. It acknowledges that this is a complex exercise.<sup>30</sup> As of now, REFIT has not produced very concrete consequences yet, but it carries the risk of a deregulation and, in the end, of a lower level of environmental protection. Indeed, a better or smart regulation agenda is easily hijacked by those seeking less regulation for their

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<sup>25</sup> Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (*OJL* 143, 30.4.2004: 56-75).

<sup>26</sup> Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States (*OJL* 118, 27.4.2001): 41–6.

<sup>27</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (*OJL* 328, 6.12.2008): 28–37.

<sup>28</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better regulation for better results - An EU agenda*, 19.5.2015 COM(2015) 215 final.

<sup>29</sup> REACH is the Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals, establishing a European Chemicals Agency, *OJL* 396, 30.12.2006, p. 1-849.

<sup>30</sup> European Union, *Monitoring the implementation of EU Law*, Tools and Challenges – Study (EU, 2017): 23.

own narrow interests.<sup>31</sup> Furthermore, even if simplification is actually a challenge, ‘Given the complexity and wideness of the whole environmental problem, the ideal of a clear, transparent, and easy to understand legislative package is illusionary’.<sup>32</sup>

### **III. THE EXTERNAL DIMENSION OF THIS ENVIRONMENTAL COMPETENCE – THE EU AS A GLOBAL ACTOR?**

The EU participates in environmental international agreements. It contributes to the enforcement of international environmental law in the EU legal order. But can we speak of an external environmental policy?

#### **A. Participation in environmental international agreements: A shared competence**

The EU has an international legal personality and thus the capacity to enter into agreements with States and international organisations, if accepted as a contracting Party. Its external competence has largely been developed by case law originally, and has been codified thereafter by the Lisbon Treaty (Title V TFEU). This competence is clear and explicit in the field of the environment. According to 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. The previous subparagraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements’.

In practice, the EU has had an offensive strategy and is now a party to about forty environmental treaties, among which the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (1976) and almost all its protocols, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), the Espoo Convention on

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<sup>31</sup> A. Farmer, ‘Better Regulation and the Future of EU Environmental Policy’, 2017, <https://ieep.eu/news/better-regulation-and-the-future-of-eu-environmental-policy> accessed 23 August 2018.

<sup>32</sup> M. Peeters, R. Uylenburg, ‘Concluding observations’, in *EU environmental legislation: Legal perspectives on regulatory strategies, New horizons in environmental and energy law*, M. Peeters, R. Uylenburg (eds) (Edward Elgar, 2014): 235.

Environment Impact Assessment in a Transboundary Context (1985), the Stockholm Convention on Persistent Organic Pollutants (2001), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992), the Convention on Biological Diversity (1992), The Montreal Protocol on Substances that Deplete the Ozone Layer (1987), the United Nations Framework Convention on Climate Change (1992), its Kyoto Protocol (1997) and the Paris Agreement (2015) or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (so-called CITES) (1973).

Most of environmental treaties allow its participation as a REIO –Regional Economic Integration Organisation, the only organisation belonging to this category – but it was not the case as regards the oldest treaties, at least initially. Some of them have been amended for this purpose. For instance, the CITES did not originally authorize membership of international organisations. However, the CITES was covering matters such as environmental protection and trade, which fall under the competence of the Union. Decisions taken by the COPs like the amendments to the CITES Appendices affect the EU legislation. The convention has been modified upon EU request in 1983 by the ‘Gaborone Amendment’ which allows REIO to accede the CITES, but the amendment only entered into force in 2013, after ratification by two-thirds of the 80 States that were party to the CITES in 1983. The EU, which was until then given an observer status, finally became a full party in 2015. Article XXI of the CITES now specifies that the convention ‘shall be open for accession by regional economic integration organisations 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.’ (§2) When an agreement affects the EU competence, Member states that are a Party are obliged to act in the Union’s interest in its context.

The EU appears as a particular player in multilateral environmental negotiations. Its unity in external representation, that no other group of countries has

achieved, makes ‘the Union together with its members one of the most influential players in multilateral environmental affairs’.<sup>33</sup>

In the environmental field, as a matter of shared competence, the Union accedes alongside the Member States. This creates complex internal and external problems. It can be confusing on the sharing of competence and responsibility between the EU and its Member States. Third parties need to know and understand what is within the remit of the Union. Continuing with the example of CITES, its Article XXI (3) specifies that ‘In their instruments of accession, such organisations shall declare the extent of their competence with respect to the matters governed by the Convention.’ Then, ‘In matters within their competence, such regional economic integration organisations shall exercise the rights and fulfil the obligations which this Convention attributes to their Member States, which are Parties to the Convention. In such cases the Member States of the organisations shall not be entitled to exercise such rights individually.’ (Art. XXI (4)) Finally, ‘In the fields of their competence, regional economic integration organisations shall exercise their right to vote with a number of votes equal to the number of their Member States which are Parties to the Convention. Such organisations shall not exercise their right to vote if their Member States exercise theirs, and vice versa.’ (Art. XXI (5)) Most of environmental treaties which allow EU’s accession alongside that of its Member States use the same wording. But what seems to be clear in theory is not in practice. The distribution is frequently discussed within the EU and evolves over time, with external consequences. Indeed, the mixed nature of most of international environmental agreements generates peculiar difficulties regarding their negotiation and adoption as well as their implementation. The concluding process of a new convention is now, after the Lisbon Treaty, detailed by Article 218 –except for the common commercial policy covered by Article 207. Since Lisbon, the Commission is explicitly mandated to represent the EU externally.<sup>34</sup> Within the framework of multilateral environmental agreements’ treaty bodies, the Commission’s officials represent the Union as well. However, some Member States are quite reluctant since it reduces their leeway. The continuing power struggle

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<sup>33</sup> M. Buck, ‘The EU’s representation in multilateral environmental negotiations after Lisbon’, in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 76.

<sup>34</sup> Except for matters falling under the Common Foreign and Security Policy (CFSP) which is not the case of environmental policy.

between institutions (Council and Commission) and between institutions and Member States does not facilitate the role of the EU as such. At the end, it hampers the effectiveness and visibility of the European policy.

Once the treaty is adopted and in force, speaking with one voice on the international scene within treaty bodies requires a deepened preparatory work at the European level. Because of its internal contradictions, the EU is not always able to perform, beyond its Member States, as a powerful negotiator and can be weaker as such than the collection of its individual Member States even if, as already mentioned, the EU and its Member States are bound by the principle of loyal cooperation (Article 4 (3) TEU.)

## **B. Enforcement of international environmental law in the EU legal order**

According to the TFEU, ‘Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.’ (Art. 216 (2) TFEU) The European Court of Justice has confirmed on several occasions that the Union is bound by international rules, including customary rules, which are an integral part of the Union legal order.<sup>35</sup> The treaties binding upon the Union are full formal legal sources. The European Court of Justice has recognized the primacy of international law on Union secondary legislation.<sup>36</sup> From this point of view, mixed agreements have the same status as purely Union agreements, in so far as their provisions fall within the scope of Community competence. In the hierarchy of norms, treaties are between primary and secondary legislation. All EU international agreements, once incorporated in the EU legal order, become the *law of the land*.<sup>37</sup> According to the Court, ‘In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States therefore fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement’.<sup>38</sup> Hence, the ECJ has the jurisdiction to interpret and to appraise the

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<sup>35</sup> Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, Judgment of 21 December 2011, [2011] ECR I-13755, §101.

<sup>36</sup> Cf. Judgment, CJEC, 12 December 1972, aff. 21 à 24/72, *International Fruit Cy*, [1972] ECR 1219; 30 April 1974, aff. 181/73, *Haegeman* [1974] ECR 449.

<sup>37</sup> F. Martines, ‘Direct Effect of International Agreements of the European Union’ (n 2) 130.

<sup>38</sup> Judgment, CJEC, 7 October 2004, Case C-239/03 *Commission of the European Communities v French Republic* (*‘Etang de Berre’*) [2004] ECR I-09325, paras 25-6, 31. See also Judgment, CJCE, 30 September 1987,

compatibility of national law with international treaties, as long as the Union is committed, alone or alongside its member States. This also applies to customary law.

The Court has recognized the direct application, or at least the justiciability of international agreements when their provisions are sufficiently clear and detailed and do not need to be completed by subsequent legislation<sup>39</sup>. It is not automatic however; a balance is to be found between the obligation to comply with international law and the integrity of the EU legal order.<sup>40</sup> Due to the special nature of the EU, it has to ensure compliance with international obligations not only by its own institutions, but also by Member States which sometimes are not even contracting parties to EU agreements. By contrast, the EU order is much less permeable as regards the international law obligations assumed only by Member States, in situations in which the EU is not a contracting party.<sup>41</sup>

Notwithstanding this observation, international environmental agreements concluded by the EU benefit from the European monitoring mechanism.<sup>42</sup> Even if it is not perfect, it remains quite sophisticated and effective compared to other international mechanisms.

From an external point of view, this mixed participation raises specific issues regarding responsibility in case of a breach of an international obligation: in this case, is/are the EU or/and Member States liable? The CJEU has suggested that the non-performance of obligations under environmental mixed agreements by the EU and/or Member States can result in joint responsibility.<sup>43</sup> In case of a dispute between EU countries, the *Mox Plant* case has shown that, bound by the principle of loyal cooperation, a Member State cannot institute proceedings against another Member State on the basis of a multilateral

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*Demirel*, 12/86, [1987] ECR 3719, para 9; 19 March 2002, *Commission/Irlande*, C-13/00 [2002] ECR I-2943, para 14.

<sup>39</sup> Judgment, CJEC, 10 January 2006, Case C-344/04, *International Air Transport Association* [2006] ECR I-403 ; CJUE, 16 July 2015, case C-612/13, *Client Earth v. European Commission*, EU C:2015:486, paras 33-7.

<sup>40</sup> F. Martines, 'Direct Effect of International Agreements of the European Union' (n 2) 147.

<sup>41</sup> *Ibid*: 135. See Case 308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport* [2008] ECR I-4057, at para 50; see also Judgment, CJEU, 8 March 2011, Case C-240/09, *Lesoochránárske zoskupenie VLK c/ Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR I-1255, where the Court finds that Article 9 para 3 of the Aarhus Convention has no direct effect in Union Law. Rosas, 'The Status in EU Law of Agreements Concluded by Member States', 34 *Fordham Int Law J* (2011): 1304.

<sup>42</sup> A. Barav, *Judicial enforcement and implementation of European Union Law* (Bruylant, 2017).

<sup>43</sup> Case C-316/91 [1994] ECR I-625, para. 29; Case C-239/03 [2004] ECR I-9325 (*Etang de Berre II*), quoted by A. Nollkaemper, 'Joint responsibility between the EU and Member States for non-performance of obligations under multilateral environmental agreements', in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 305.

environmental agreement (MEA) without previously being cleared by Union institutions.<sup>44</sup>

For an overview, it is also important to consider non-contentious international control mechanisms. Indeed, most MEAs' are now equipped with institutionalised multilateral control procedures known as compliance or non-compliance mechanisms.<sup>45</sup> Member States and/or the Union can be concerned by such procedures. From this point of view, interesting interactions between the European control mechanism and the Kyoto Protocol compliance procedure have been identified, contributing to ensure the very credibility of the Protocol and the reliability of the international and European economic tools to reduce GHGs emissions.<sup>46</sup> In another field, several cases were brought before the Aarhus Convention Compliance Committee that raised delicate issues concerning the participation of the EU and its Member States: the joint/shared responsibility of the EU and its Member States vis-à-vis MEAs; the Union's responsibility with regard to the implementation of MEAs at EU and national levels; the effects of MEAs on the jurisdiction of the European Court of Justice; the responsibility of the EU for the action of Member States that are not Party to a MEA.<sup>47</sup>

### C. Is there a EU external environmental policy?

The EU has now a long-standing practice and a growing role on the international environmental scene. But the organisation –more precisely the Commission or the Commission jointly with Member States– remains torn between its aspiration to an international leadership, aspiration well-reflected in the Lisbon Treaty, and the hurdles to become a global actor. Its capacity to be a global actor has varied over time. In that respect, the Lisbon Treaty established a new constitutional –legal and institutional–

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<sup>44</sup> R. Pavoni, 'Controversial aspects of the interaction between international and EU law in environmental matters: Direct effect and Member States' unilateral measures', in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 375. The Court has recently recalled its exclusive jurisdiction regarding disputes relations to the interpretation and application of the Treaties in CJUE, 6 March 2018, C-284/16, *Slowakische Republik contre Achmea BV*, not published yet in the ECR.

<sup>45</sup> T. Treves, A. Tanzi, C. Pitea, C. Ragni, L. Pineschi (eds) *Non-compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser, 2009).

<sup>46</sup> A.-S. Tabau, S. Maljean-Dubois, 'Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union', *EJIL* (2010) Vol. 21 no. 3: 749.

<sup>47</sup> A. Ali, 'The EU and the compliance mechanisms of multilateral environmental agreements: The case of the Aarhus convention', in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 288.

framework, with new treaty rules on EU external representation. It is now under a general obligation to ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations.’<sup>48</sup>

According to Elisa Morgera, the EU increasingly uses its external action through different instruments –unilateral, bilateral, inter-regional and multilateral– to actively support the development and implementation of international environmental law.<sup>49</sup> It has demonstrated its role as a promoter of environmental protection standards. For instance, EU rewards motivate third states to ratify environmental treaties.<sup>50</sup> In particular, the EU is the world’s largest provider of development assistance. It has, at least in quantitative terms, the potential to support environmental protection objectives and processes.

The channels of influence vary over time, depending on the progress of multilateral cooperation. But the EU actorship varies according to the areas involved as well. For instance, in the field of climate change, it has had high aspirations to leadership and has been successful –at least at times– to play a very active role. Indeed, climate change has been given a high priority and is the most prominent area of EU external action. In addition to its action within the United Nations Convention on Climate Change, the EU has increasingly sought to use its political and economic influence and advance climate change objectives through its bilateral and inter-regional external relations.<sup>51</sup>

Although it acquired new and more convincing means, and gained progressively an external recognition, according to L. Kramer it is ‘not equipped to assume a permanent global leadership function.’<sup>52</sup> Despite the new provisions of the Lisbon Treaty (Article 7 TFEU and Article 21 (3) TEU), ensuring coherence between environmental protection and other conflicting priorities at the European level (horizontal coherence), and between the external action of the Union and of its Member States (vertical coherence) remains a big

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<sup>48</sup> Article 21 (1) TEU; see also Article 3(5) TEU and Article 21 (2) TEU.

<sup>49</sup> E. Morgera, ‘The trajectory of EU biodiversity cooperation: Supporting environmental multilateralism through EU external action’, in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 235.

<sup>50</sup> K. Schulze, J. Tosun, ‘External dimensions of European environmental policy: An analysis of environmental treaty ratification by third states’, *European Journal of Political Research* (2013)52: 581-607.

<sup>51</sup> K. Kulovesi, ‘Climate change in EU external relations : please follow my example (or I might force you to)’, in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 139.

<sup>52</sup> L. Kramer, *EU Environmental Law* (n 10) 443.

issue.<sup>53</sup> Furthermore, in the meantime, the EU has been through successive enlargements, making internal cohesion harder. It remains a complex issue as regards the ‘unique and evolving nature of the Union as a global actor.’<sup>54</sup>

#### IV. CONCLUSION

The EU is definitely a very peculiar regional organisation that played a major role in the development of demanding environmental domestic laws in EU countries, the application of which it monitors and sanctions non-compliance. This is well illustrated by the concerns regarding the impact of Brexit on environmental protection in UK.<sup>55</sup> The EU internal environmental policy expands on the international stage. Even if it lacks the internal structures and resources to fully and effectively assume a role as global environmental player,<sup>56</sup> the EU participates in environmental negotiations, concludes and implements international treaties and exercises its ‘soft power’ to promote the development and implementation of international environmental law. It contributes to improving the effectiveness of international environmental treaties and principles. The content of EU environmental law, being itself the result of an international negotiation, improves in terms of legitimacy and appropriateness. It is able to inspire international environmental rules and domestic legislations of third countries. Legal transplants of EU law into the domestic laws of non-EU countries are frequent.<sup>57</sup>

The Lisbon Treaty offers new opportunities and challenges as regards the consistency and effectiveness of the EU external policy.<sup>58</sup> But there still are uncertainties and thus room for experimentation. The EU has to consolidate its role as a global actor, and to adapt its structures to this end. European integration is a unique adventure and it takes time to overcome understandable resistances. From this point of view, the challenges presented

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<sup>53</sup> M. Cremona, ‘Coherence and EU environmental policy’, in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 34.

<sup>54</sup> E. Morgera, ‘Introduction’, in *The external environmental policy of the European Union: EU and international law perspectives* (n 9) 1.

<sup>55</sup> C.T. Reid, ‘Brexit and the future of UK environmental law’, in *Journal of Energy & Natural Resources Law* 34 (2016) 4: 407.

<sup>56</sup> L. Kramer, *EU Environmental Law* (n 10) 444.

<sup>57</sup> S. Whittaker, ‘The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing’, *Transnational Environmental Law*, 6 (2017)3: 509-30.

<sup>58</sup> E. Morgera, ‘Introduction’ (n 53) 3.

by the last enlargement, as well as the consequences of the announced Brexit, deserve special attention.

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