

EXTERNAL DIMENSION OF THE EUROPEAN UNION ENVIRONMENTAL POLICY- SELECTED LEGAL ISSUES

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INTRODUCTION

Most environmental problems have a transboundary nature and often a global scope, and they can only be addressed effectively through international cooperation. For this reason, the Lisbon Treaty establishes that one of the key objectives of the European Union (EU) policy on the environment is to promote measures at an international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The EU takes an active part in the elaboration, ratification and implementation of multilateral environmental agreements. Moreover, the EU has already ratified many international environmental agreements, whether at a global level- negotiated under the auspices of the United Nations (UN), at regional level, and sub-regional level. The issues covered by these agreements are very wide, and include among others the following areas: biodiversity and nature protection, climate change, protection of the ozone layer, desertification, management of chemicals and waste, transboundary water and air pollution, environmental governance including impact assessments, access to information and public participation, industrial accidents, maritime and river protection, environmental liability. The EU has also contributed to the development of 17 Sustainable Development Goals that will play an important part in a new transformative global Agenda for Sustainable Development. The 2030 Agenda for Sustainable Development "Transforming our World: The 2030 Agenda for Sustainable Development" was informally agreed by UN Member States in August 2015 and was adopted by Heads of State at a special summit on 25-27 September¹. This Agenda seeks to address the urgent global challenges of poverty eradication, climate change, environmental degradation, conflict and instability, and to strengthen peace and freedom. Moreover, the Agenda has universal scope and applies to all, on the basis of a partnership between all countries, as well as with civil society and the private sector. The EU has played an active role throughout the process and is committed to implementing the Agenda within the EU and in development cooperation with partner countries. The EU

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¹ <http://www.unfpa.org/resources/transforming-our-world-2030-agenda-sustainable-development>.

adopted Conclusions on "A Global Partnership for Poverty Eradication and Sustainable Development after 2015" on 26 May 2015, which identifies means of implementation for the Agenda, including an enabling and conducive policy environment and capacity to deliver; as well as mobilisation and effective use of domestic and international public and private finance². Finally, the European Commission and the Council adopted, on 20 November 2013, Decision No 1386/2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'³.

This paper will focus on two issues: firstly, on the evolution of the EU competences in the area of environment and secondly on the extent and the nature of the EU competence in environmental matters.

International cooperation on environment was one of a number of areas of interest of Prof. Karol Wolfke. In 1979 Prof. K. Wolfke published a book entitled *International Environmental Law (Making and Enforcement)* in which he made an attempt to evaluate the international law-making mechanisms for environmental protection and to survey the means of securing to international environmental law the necessary effectivity⁴. The Author stressed that among all international law-making tools the bilateral legally binding treaties play the most important role. However, he also underlined the importance of non-binding resolutions such as Declarations or Action Plans adopted by intergovernmental organizations.

I. EU EXTERNAL ENVIRONMENTAL POLICY- LEGAL ISSUES

Until the entry into force the provisions of the Single European Act (SEA)⁵, the Treaty establishing the European Economic Community (EEC Treaty) contained no provisions conferring on the European Economic Community (EEC) powers to adopt measures, or to enter into agreements, relating to the environment⁶. However, already before the SEA entered into force, the EEC had carried out its own actions in the area of environment, on the basis of Article 100 and Article 235 EEC Treaty⁷ and the basis for external actions was found in the body of internal measures⁸. The SEA provided a secure legal framework for the European Community's environment policy by inserting into the EEC Treaty a new title - Title VII - Environment, containing Articles 130R - 130T dealing with environment, which introduced the environmental objectives and principles, unanimity for the decision-making procedure and the principle of subsidiarity for the exercise of the

² COM(2015) 44 final.

³ OJ 2013 L 345/171.

⁴ K Wolfke, *Międzynarodowe prawo środowiska* (1979).

⁵ Effective from 1 July 1987.

⁶ I McLeod, ID Hendry, S Hyett, *The External Relations of the European Communities* (1996) 323.

⁷ Article 100 referred to the situations where differences in national environmental legislation had detrimental effect on the common market, while Article 235 covered instances where Community action should provide necessary, in the course of the operation of the common market one of the Community's objectives and the Treaty has not provided necessary powers.

⁸ Case 22/70 *Commission v. Council*, [1971] ECR 263 (AETR case).

shared competence⁹. Since then, every reform of the EEC/EU Treaties has brought a lot of changes within this policy¹⁰. Today, the EU has expressed powers in regard to environment policy under the title of the TEU headed “Environment”¹¹. However, environmental protection is first mentioned in the ninth recital in the preamble to the EU Treaty, intended to reassure the EU citizens that economic and social cooperation within the EU must not come at the cost of other goals, notably sustainable development and environmental protection. That commitment is again repeated in Article 3, which lists the objectives of the EU. With respect to the EU external relations, the protection of the environment is mentioned twice among the main objectives of the EU’s external action, according to which, the EU is obliged to define and pursue common policies and actions, and to work for a high degree of cooperation in all fields of international relations, in order to: foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty and help 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 development¹². The legal bases for the EU external environmental law are to be found in Articles 191-193 in Title XX of Part Three of the TFEU, which formulate main objectives, basic principles, create competences of the EU institutions to conduct this policy and allow the Member States to adopt more stringent protective measures within this policy. In Declaration no 9 on the Article 175 of the EEC Treaty (now Article 192 TFEU), all Member States affirmed their determination to see the EU play a leading role in promoting environmental protection in the Union and in international efforts pursuing the same objective at the global level. To this end, full use should be made of all of the possibilities offered by the Treaty, including the use of incentives and instruments which are market-oriented and intended to promote sustainable development. In addition, Article 11 TFEU states that environmental protection 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.

1. Objectives of the EU environmental policy

The main aims of the EU’s environmental policy are: to preserve, protect and improve the quality of the environment; to protect human health; to ensure prudent and rational utilisation of natural resources and to promote measures at the international level to deal with regional or worldwide environmental problems, and, in particular, combating climate change¹³. The policy on the environment also aims at a high level of protection taking into

⁹ T Fajardo del Castillo, ‘EU Environmental Law and Environmental Crime: An Introduction’ 7; http://efface.eu/sites/default/files/EFFACE_EU%20Environmental%20Law%20and%20Environmental%20Crime_An%20Introduction.pdf (15.04.2016).

¹⁰ T Fajardo del Castillo (n 9) 7-10.

¹¹ Title XX, Articles 191-193 TFEU; OJ 2012 C 326/1.

¹² Art. 21 (d) and Art. 21 (F) TEU.

¹³ Art. 191(1) TFEU.

account the diversity of situations in the various regions of the Union¹⁴. In accordance with Article 192(3) TFEU, the priority objectives in respect of the EU policy on the environment should be set out in a general action programme, which should be adopted by the European Parliament and the Council, acting in accordance with ordinary legislative procedure. Such, a general EU Action Programme in the field of the environment for the period up to 31 December 2020 - the 7th Environment Action Programme was adopted on the basis of Decision No 1386/2013¹⁵. Its general objectives are: to protect, conserve and enhance the Union's natural capital; to turn the Union into a resource-efficient, green and competitive low-carbon economy; to safeguard the Union's citizens from environment-related pressures and risks to health and well-being; to maximise the benefits of Union environmental legislation by improving implementation; to improve the knowledge and evidence base for the Union environment policy; to secure investment for environment and climate policy and address environmental externalities; to improve environmental integration and policy coherence; to enhance the sustainability of the Union's cities and to increase the Union's effectiveness in addressing international environmental and climate-related challenges¹⁶.

2. Principles of the EU environmental policy

Article 191(2) TFEU also lists the four main principles on which the EU's environmental policy is based on: the precautionary principle; the principle of preventive action; environmental damage to be rectified as a priority at source and "the polluter should pay"¹⁷. Moreover, environmental requirements must be integrated into EU policies in other spheres, in particular with a view to promoting sustainable development¹⁸. The environmental policy should prevent ecological damages, which means it should hinder the occurrence of such damage; that is why the EU and its Member States are obliged to reduce known risks of environmental damage at their possible source and, if possible, to prevent them¹⁹. To prevent such damages situations the EU's institutions have adopted several secondary legislation acts; three of them should be mentioned: Directive no 85/337/EEC which obliges all Member States to introduce an environmental risk assessment²⁰; Directive 2008/1/EC concerning integrated pollution prevention and control, aims at reduction of emissions into air, water and soil by industrial installations including waste processing²¹; Regulation (EC) no 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme and finally²² and, finally, Regulation (EC) no 880/92 on a Community eco-label award scheme. However, according to Court of Justice of the EU, in any case the risk assessment cannot be based

¹⁴ Art. 191(2) TFEU.

¹⁵ OJ 2013 L 354/171.

¹⁶ Article 2 Decision No 1386/2013.

¹⁷ Art. 191(2) TFEU.

¹⁸ Art. 11 TFEU.

¹⁹ Case C-318/98 *Fornasar and Others* [2000] ECR I-4785.

²⁰ OJ 1985 L 175/40.

²¹ OJ 2008 L 24/8.

²² OJ 2009 L 342/11.

on a purely hypothetical consideration²³. Next, all environmental damages should be rectified at source - in the country of origin²⁴. Accordingly provisions Article 8 and Article 9 of the Directive 2008/98/EC on waste, obliged all Member States to take care that waste should be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection of the environment and public health²⁵. Finally, anyone who caused damage has to pay for preventive or cleaning measures²⁶.

3. Decision making procedure within the area of environment

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, are to decide what action is to be taken by the Union, in order to achieve the objectives of the environment policy. A very good example is the scheme for greenhouse gas emission trading, set up by the EU to fulfil the commitments of the EU and the Member States under the Kyoto Protocol to the United Nations Framework Convention on Climate Change, to reduce greenhouse gas emission²⁷. In the case of a number of matters, the Council is to take its decision unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions²⁸. In addition, general action programmes setting out priority objectives to be attained are adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions²⁹. However, the Member States are to obliged to finance and implement the environment policy. If a measure based on Art. 192(1) TFEU involves disproportionate costs for a given Member State, the Council may apply temporary derogations, and/or financial support from the Cohesion Fund³⁰. Any Member State wishing to maintain or introduce more stringent measures may do so provided that they are compatible with the Treaties and notified to the European Commission³¹. At the same time, harmonisation measures answering environmental protection requirements are to include, where appropriate, a safeguard clause allowing Member States to take

²³ Case C-95/01 *J Greenham and L Abel* [2004] ECR I-1333.

²⁴ Case C- 422/92 *Commission v Germany* [1995] ECR. I-1097.

²⁵ OJ 2008 L315/3.

²⁶ Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and the remedying of environmental damage, OJ 2004 L 143; Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control, OJ 2008 L 24/8.

²⁷ Directive 2003/87/EC of the European Parliament, and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ 2003, L275/32.

²⁸ Art. 192(2) TFEU.

²⁹ Art. 192(3) TFEU.

³⁰ Art. 192(5) TFEU.

³¹ Art. 193 TFEU.

provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the EU³².

4. EU external environmental competence

Environment is listed as a shared competence under Article 4(2)(e) TFEU, which implies, pursuant to Article 2(2) TFEU, that the EU and the Member States may legislate and adopt legally binding acts in that area. The Member States are to exercise their competence, to the extent that the EU has not exercised its competence. The Member States are again to exercise their competence to the extent that the EU has decided to cease exercising its competence. Which means, according to the provisions Article 5 (3) TFEU, that only if objectives of the environment policy may not be sufficiently reached at the level of the Member States, but can be reached better at the EU level, appropriate measures can be taken by the EU. Otherwise, only the Member States are responsible. However, Article 191(2) TFEU contains a safeguard clause, which allow Member States to take provisional measures, for non-economic environmental reasons, which will be subject to a procedure of inspection by the Union. Within respective spheres of competence, the EU and the Member States are obliged to cooperate with third countries and with the competent international organisations in the area of environment protection. Such cooperation may take many forms from non-binding resolutions, common communications, exchange of information to legally binding international agreements concluded between the EU and third states or other international organisations. On the basis of Article 191 (4) cooperation between the EU and the third parties may be the subject of agreements. There is, therefore, an explicit legal basis for EU external relations in this area, moreover measures based on this article leave the Member States' competence to act internally intact, which implies parallel competence; According to the Declaration of the Conference of the Representatives of the Governments of the Member States, Article 191 (4) subpara.2, TFEU does not interfere with the principles based on the AERT jurisprudence of Case 22/70 Commission v. Council, which means that the competences of the Member States to conclude treaties under public international law are excluded only when, and only insofar, as the EU has exercised its legislative and treaty-making competence³³. However, in Opinion 2/00 on 6 December 2001 on the Protocol of Cartagena on biological safety, the Court of Justice severely limited the applicability of this article as a legal basis³⁴. The Convention on Biological Diversity (the Convention) was signed on 5 June 1992 by the EEC and its Member States at the United Nations Conference on Environment and Development, during the Earth Summit, which took place in Rio de Janeiro, and was approved on behalf of the EEC by Council Decision 93/626/EEC of 25 October 1993³⁵. That decision was adopted on the basis of Article 130s of the EEC Treaty (now Article 192 TFEU). Article 19(3) provides that: the Parties shall consider the need for, and modalities of, a protocol setting out appropriate procedures,

³² Art. 191(2) TFEU.

³³ Case 22/70 Commission v. Council [1971] ECR 263, 724.

³⁴ Opinion 2/00 on Cartagena Protocol [2001] ECR I-9713.

³⁵ OJ 1993 L 309/1.

including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology, that may have an adverse effect on the conservation and sustainable use of biological diversity. On 17 November 1997, the Conference of the Parties to the Convention adopted decision II/5 mandating the parties to negotiate a protocol on biosafety, specifically focusing on transboundary movement, of any living modified organism resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity. The negotiations led to the adoption, on 29 January 2000 in Montreal, of the Cartagena Protocol on Biosafety (the Protocol), which was opened for signature in Nairobi on 15 January 2000 and signed on behalf of the EEC and the Member States on 24 May 2000. The European Commission question to the Court of Justice was: do Articles 133 and 174(4), in conjunction with the relevant provisions of Article 300 of the EEC Treaty, constitute the appropriate legal basis for the act concluding, on behalf of the EEC, the Cartagena Biosafety Protocol? The Court has held that Article 174 EC defines the objectives to be pursued in the context of environmental policy, while Article 175 EC constitutes the legal basis on which EEC measures are adopted. It is true that Article 174(4) of the EEC Treaty specifically provides that the arrangements for EEC cooperation with non-member countries and international organisations may be the subject of agreements negotiated and concluded in accordance with Article 300. However, the Protocol does not merely establish arrangements for cooperation regarding environmental protection, but lays down, in particular, precise rules on control procedures relating to transboundary movements, risk assessment and the management, handling, transport, packaging and identification of Living Modified Organisms. Consequently, Article 175(1) EEC Treaty is the appropriate legal basis for conclusion of the Protocol on behalf of the EU. It is thus also necessary to consider whether the EEC holds exclusive competence under Article 175 EEC Treaty to conclude the Protocol, because secondary legislation adopted within the framework of the Union covers the subject of biosafety and is liable to be affected if the Member States participate in the procedure for concluding the Protocol. It need only be observed in that regard that, as the United Kingdom Government and the Council correctly stated, the harmonisation achieved at Community level in the Protocol's field of application covers, in any event, only a very small part of such a field. It follows from the foregoing considerations that the EEC and its Member States share competence to conclude the Protocol. In conclusion, competence to conclude the Cartagena Protocol on Biosafety is shared between the EEC and its Member States. As a consequence, Article 174(4) EEC Treaty was abandoned as the default legal basis for external environmental agreements, as it, for example, prevents comparing the European Commission proposal regarding the Kyoto Protocol and the eventual Council decision. The United Nations Framework Convention on Climate Change (the Convention), which was approved on behalf of the EEC by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate

Change³⁶, is to achieve stabilisation of greenhouse-gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system³⁷. Contracting Parties, concluded that the commitment by developed countries to aim at returning, individually or jointly, their emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol to the Convention for the Protection of the Ozone Layer to 1990 levels by the year 2000 was inadequate for achieving the Convention's long-term objective of preventing dangerous anthropogenic interference with the climate system and agreed to begin a process to enable appropriate action to be taken for the period beyond 2000, through the adoption of a protocol or another legal instrument³⁸. This process resulted in the adoption, on 11 December 1997, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change³⁹. The European Commission had proposed Article 174(4) EEC Treaty as the legal basis for the conclusion of the Kyoto Protocol. However, the legal basis was changed to Article 175(1) EEC Treaty for the adoption of the relevant Council decision. On 25 April 2002, the Council took Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, according to which provisions the legal bases of approval are: Article 175(1) in conjunction with Article 300(2), first sentence of the first subparagraph, and Article 300(3), first subparagraph, thereof⁴⁰. Most substantive measures were based on Article 175 EEC Treaty and now will be based on Article 192 TFEU. As the Court of Justice appears to have held in Opinion 2/00, the ERTA doctrine in principle applies to such measures. However, concluding from the above, that Article 191(4) TFEU is virtually defunct as a legal basis for international environmental agreements would be premature, as the recently concluded Framework Agreement on Partnership and Cooperation with Philippines demonstrates⁴¹. On 25 November 2004 the Council authorised the European Commission to negotiate a framework agreement with the Republic of the Philippines on partnership and cooperation. On 6 September 2010 the European Commission adopted a proposal for a Council decision on the signing of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part ('the Framework Agreement'), which had as its legal bases Articles 207 TFEU and 209 TFEU, relating, respectively, to the common commercial policy and to development cooperation, in conjunction with Article 218(5) TFEU. Next, on 14 May 2012 the Council adopted unanimously the contested decision authorising the

³⁶ OJ 1994 L 33/1.

³⁷ Article 1.

³⁸ Decision 1/CP.1: "The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2(a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up", OJ 2002 L 130.

³⁹ Decision 1/CP.3: "Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change", <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

⁴⁰ OJ 2002 L 130/1.

⁴¹ P Kuijper, J Wouters, F Hoffmeister, G De Baerse, T Ramopoulos, *The Law of EU External Relations* (2013) 810.

signing of the Framework Agreement, subject to the conclusion of that agreement. In addition to Articles 207 TFEU and 209 TFEU, in conjunction with Article 218(5) TFEU, the Council selected Articles 79(3) TFEU, 91 TFEU, 100 TFEU and 191(4) TFEU as legal bases. The European Commission, on 6 August 2012, brought an action for annulment of Decision 2012/272/EU of the Council of 14 May 2012 on the signing, on behalf of the Union, of the Framework Agreement, insofar as the Council has added the legal bases relating to transport, readmission and environment. The European Commission took the view that the addition of these legal bases was unnecessary and illegal. It stated that it is not disputed that the objective of the Framework Agreement is to establish a framework for cooperation and development, as follows in particular from Article 1(3) of the agreement, and that the contested decision had to be based on both Article 207 TFEU and Article 209 TFEU since the trade part of the Framework Agreement cannot be seen as being merely incidental to the part concerning development cooperation. On the other hand, unlike the Council, the European Commission considers that the provisions of the Framework Agreement which accounted for the addition of Articles 79(3) TFEU, 91 TFEU, 100 TFEU and 191(4) TFEU are entirely covered by Article 209 TFEU. According to the European Commission, it follows from Articles 21 TEU, 208 TFEU and 209 TFEU and from the case-law, in particular Case C-268/94 *Portugal v Council*, paragraphs 37 and 38⁴², that development cooperation policy is conducted within the framework of a wide range of policy objectives which pursue the development of the third country concerned, so that development cooperation agreements necessarily encompass a wide range of specific areas of cooperation without the character of such agreements as development cooperation agreements being affected. According to the Court, the choice of the legal basis for a Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. By way of exception, if it is established that the measure pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the various corresponding legal bases. However, no dual legal basis is possible where the procedures required by each legal basis are incompatible with each other⁴³. According to Article 208(1) TFEU, European Union policy in the field of development cooperation is to be conducted within the framework of the principles and objectives — as resulting from Article 21 TEU — of the EU's external action. The primary objective of that policy is the reduction and, in the long term, the eradication of poverty and the European Union must take account of the objectives of

⁴² Case C-268/94 *Portugal v. Council* [1996] ECR I- 06177

⁴³ Case C-130/10 *Parliament v Council* [2012], paras 42-45; ECLI:EU:C:2012:472.

development cooperation in the policies that it implements which are likely to affect developing countries. For implementation of that policy, Article 209 TFEU, upon which, inter alia, the contested decision is founded, provides in particular, in paragraph 2, that the European Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in Article 21 TEU and Article 208 TFEU. The Court drew the conclusion, that it should be held that the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterisation of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation. That is why, the Council was wrong in selecting Articles 79(3) TFEU, 91 TFEU, 100 TFEU and 191(4) TFEU as legal bases for the contested decision. To sum up, the EU has the competence to conclude international agreements on environmental issues, but its competence is not exclusive. It is open the EU and to the Member States to participate together or separately, in such agreements. However, where the EU has adopted common rules to regulate particular environmental issue, only the EU is competent to enter into international agreements which affect such rules or alter their scope. To that extent, the EU competence in such environmental issues is exclusive. Moreover, if such internal rules are in the nature of “minimum requirements”, the Member States may decide to participate in agreements relating to the matters covered by such internal rules. With regard to provisions of Article 193 TFEU⁴⁴, the Court has held in its Opinion 2/91 that such minimum requirements could not form the basis for exclusive the EU competences because the exclusive or non-exclusive nature of the EEC's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the EEC institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis. Which means, where Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the EEC institutions, assume obligations which might affect those rules or alter their scope.⁴⁵ However, the mere fact that the internal Union rules are minimum requirements does not necessarily justify the conclusion that the competencies are not exclusive, as is evident from Opinion 1/03 concerning competence of the Community to conclude the Lugano Convention⁴⁶. The Court has found there to be exclusive EEC competence, in particular where the conclusion of an

⁴⁴ The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

⁴⁵ Opinion 2/91, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*, [1993] ECR I- 01061.

⁴⁶ Opinion 1/03, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2006] ECR I- 01145, 123-127.

agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law⁴⁷, or where, given the nature of the existing Community provisions, such as legislative measures containing clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue, any agreement in that area would necessarily affect the Community rules within the meaning of the *ERTA* judgment⁴⁸. On the other hand, the Court did not find that the Community had exclusive competence where, because both the Community provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of Community law by the Member States⁴⁹. Similarly, the Court did not recognise the need for exclusive Community competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market, noting that there was nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings⁵⁰. However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of 'an area which is already covered to a large extent by Community rules' is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content⁵¹. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis⁵². In short, it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law. It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish. However, the main question is whether that competence is exclusive or shared? The Community has already adopted internal rules relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, whether in the form of Regulation No 44/2001,

⁴⁷ *ERTA* Case, para 31.

⁴⁸ Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, [1994], E.C.R. I- 05267, paras 95 and 96.

⁴⁹ Opinion 2/91 (n 45) para 18.

⁵⁰ Opinion 1/94 (n 48) paras 78 and 79.

⁵¹ Opinion 2/91 (n 45) paras 25 and 26.

⁵² Opinion 2/91 (n 45) para 25.

adopted on the basis of Articles 61(c) EC and 67(1) EEC Treaty⁵³. The new Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules. It follows from all those considerations that the Community has exclusive competence to conclude the new Lugano Convention. The Court also clarified the scope of Article 193 TFEU concerning the environmental minimum standards in Case C-246/07 of 20 April 2010⁵⁴. On 14 July 2005 Sweden proposed, within the framework of the Stockholm Convention on persistent organic pollutants (POPs), to add a new group of POPs (perfluorooctane sulfonates, PFOS) to those already covered by the Convention. Discussions had taken place within the Council and its Working Party on International Environmental Issues and with the Commission over the substances to be proposed by the EU and its Member States for listing under both the Stockholm Convention and the Aarhus Protocol to the Convention on Long Range Transboundary Air Pollution, but it had not at this stage been agreed at EU level to include PFOS among those to be proposed. The European Commission took the view that this unilateral act by Sweden was a breach of its duty of loyal cooperation under Article 10 EEC Treaty (now Article 4(3) TEU) and brought an action before the Court of Justice, which found that Sweden had indeed failed to fulfil its obligations under Article 10 EEC Treaty. Generally, this case concerns the joint participation of the EU and its Member States in multilateral environmental agreements and carries implications for mixed agreements more generally. However, it also prompts some reflections on policy coherence within the Union: on the coherence between internal and external EU environmental policy; on coherence between environmental protection and other EU policy objectives, including development cooperation; and on the impact of Union policy choices on a Member State's policy priorities. The European Commission disputes the argument that Member States are entitled to adopt national rules which are more stringent than the POPs regulation, on the ground that that regulation constitutes only minimum Community rules, which has the consequence, pursuant to Article 176 EEC Treaty (now Article 193 TFEU), that Member States are entitled to submit proposals for amendments to the Annexes to the Stockholm Convention. According to the European Commission, the purpose of such a proposal is necessarily the introduction of a more stringent international legal rule, with effects not only with regard to the Member State which has made that proposal, but also with regard to the EEC. The Court has held that the duty of genuine cooperation is of general application and does not depend either on whether the EEC competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries⁵⁵. Where it is apparent that the subject-matter of an agreement or convention falls partly within the competence of the EEC and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the EEC

⁵³ OJ 2001 L 12.

⁵⁴ Case C- 246/07 *Commission v Sweden (PFOS)*, [2010] ECLI:EU:C:2010:203.

⁵⁵ Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para. 58, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 64.

institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the EEC⁵⁶. Likewise, the Court has held that the adoption of a decision authorising the European Commission to negotiate a multilateral agreement on behalf of the EEC marks the start of a concerted action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the EEC institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation⁵⁷. This means, that only if the EU is not to be bound by a more stringent measure, the Member States are free to adopt it or propose it in the relevant international fora.

5. The EU and multilateral international agreements

The EU has already ratified many international environmental agreements, whether at global level (multilateral agreements negotiated under the auspices of the UN), at regional level (e.g. in the context of the UN Economic Commission for Europe or the Council of Europe), and sub-regional level (for instance for the management of seas or transboundary rivers). The matters covered by these agreements are very wide, and include among others the following areas: biodiversity and nature protection, climate change, protection of the ozone layer, desertification, management of chemicals and waste, transboundary water and air pollution, environmental governance (including impact assessments, access to information and public participation), industrial accidents, maritime and river protection, environmental liability. A list of Multilateral Environmental International Agreements to which the EU is already a Party or a Signatory is presented below⁵⁸:

Air: Geneva Convention on Long-range Transboundary Air Pollution (1979) and its protocols.

Biotechnology: Cartagena Biosafety Protocol (2000) to the Rio Convention on Biological Diversity (1992) and its Supplementary Protocol on Liability and Redress (2010).

Chemicals: PIC Rotterdam Convention on Prior Informed Consent (1998); POP Stockholm Convention on Persistent Organic Pollutants (2001); Minamata Convention on Mercury (2013).

Civil Protection and Environmental Accidents: Helsinki Convention on Industrial Accidents (1992); Barcelona Convention (1976) as amended and its protocols; Helsinki Convention on the Baltic Sea (1992); OSPAR Convention (1992); Bonn Agreement (1983); Lisbon Agreement (1990).

⁵⁶ Ruling 1/78, *Ruling delivered pursuant to the third paragraph of Article 103 of the EAEC Treaty - Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, [1978] ECR 2151, paras 34 to 36; Opinion 2/91, para. 36; Opinion 1/94, para. 108; and Case C-25/94 *Commission v Council* [1996] ECR I 1469, para 48.

⁵⁷ Case C-266/03, para. 60; Case C-433/03, para 66.

⁵⁸ http://ec.europa.eu/environment/international_issues/pdf/agreements_en.pdf (22.04.2016)

Climate Change and Ozone Depletion: UNFCCC Framework Convention on Climate Change (1992) and Kyoto Protocol (1997) and Vienna Convention for the Protection of the Ozone Layer (1985) and Montreal Protocol as amended.

Governance: Aarhus Convention (1998) on access to information, public participation in decision-making and access to justice in environmental matters and its Protocol on Pollutant Release and Transfer Registers (2009) and Espoo Convention on Environmental Impact Assessment (1991).

Industry: Helsinki Convention on Industrial Accidents (1992).

Land use: Alpine Convention (1991) and its protocols.

Nature and biodiversity: CBD Convention on Biological Diversity (1992) and its Protocols on Biosafety (2003) and on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization (2010); Bonn CMS Convention on the Conservation of Migratory Species (1979); Bern Convention on European Wildlife and Habitats (1979); Convention for the protection of Vertebrate Animals used for Experimental and other Scientific Purposes (1986); Alpine Convention (1991) and its protocols and Convention on the Conservation of the marine fauna and flora of the Antarctic (1980).

Soil: UNCCD Convention to Combat Desertification in Africa (1994).

Waste: Basel Convention on hazardous wastes (1989).

Water: Helsinki Convention on Watercourses and International Lakes (1992); River basin conventions (Danube (1987), Elbe (1990), Oder (1996), Rhine (1999)); Barcelona Convention (1976) as amended and its protocols; OSPAR Convention (1992) as amended; Bonn Agreement (1983) and Helsinki Convention on the Baltic Sea (1992).

Some of these international agreements, in particular those which relate to Europe and European issues, provide that EEC/EU may become their party⁵⁹. Others, especially those which were adopted under the auspices of the UN and other international organisations, do not refer to the EEC/EU, but provide participation of the States and “regional economic integration organizations”⁶⁰. However, all international environmental agreements to which the EEC/EU is the party are mixed agreements, which means that at least one Member State is a party along with the EEC/EU because the scope of such treaties is not determined by the EU and therefore Member States have to complement the Union's powers with their own⁶¹. This means, that mixed agreements concluded within the area of environment are a specific expression of shared competence. Provisions on cooperation in the area of environment can be also found in many other international agreements which, however, have a very general scope of application. Very good examples in this case are: trade and cooperation agreements concluded with one state- e.g.

⁵⁹ The Paris Convention- Arts. 22, 24; the Barcelona Convention- Arts. 24, 26; the European Wildlife and Natural Habitats Convention- Art. 19(1); Convention of the Protection on Rhine- Art. 28; Convention on Persistent Organic Pollutants- Art. 26; Helsinki Convention- Art. 28.

⁶⁰ Basel Convention on hazardous wastes- Art. 22(1); Geneva Convention- Art. 14(1); Vienna Convention for the Protection of the Ozone Layer- Art. 1 (6); the Basel Convention- Art. 2(20); the Convention on Biological Diversity- Art. 2; the Bonn Convention- Art. 1(1K).

⁶¹ I McLeod, ID Hendry, S Hyett (n 6) 329; P Kuijper, J Wouters, F Hoffmeister, G De Baerse, T Ramopoulos (n 41) 105.

Pakistan, Canada, India, Mongolia, China and Sri Lanka or group of states- e.g. General Treaty of Central American Economic Integration; the Charter of the Cooperation Council for the Arab States and the Cartagena Protocol and secondly, association agreements- e.g. EEA Agreement; Lomé Convention; agreement with Mediterranean countries, with Turkey, with Ukraine, with South Africa and with Chile.

CONCLUDING REMARKS

Over the past 40 years, within the EU, a broad range of environment legislation has been put in place, amounting to the most comprehensive modern standards in the world. This has helped to address some of the most serious environmental concerns of citizens and businesses in the Union. Many environmental challenges are global and can only be fully addressed through a comprehensive global approach, while other environmental challenges have a strong regional dimension. This requires cooperation with partner countries, including neighbouring countries and overseas countries and territories. Environmental and climate change in the Union is increasingly caused by developments taking place at global level, including in relation to demographics, patterns of production and trade, and rapid technological progress. Such developments may offer significant opportunities for economic growth and societal well-being, but pose challenges and uncertainties for the Union's economy and society and are causing environmental degradation worldwide⁶². The EU is a party to various international environmental agreements; however the EU may act on the international scene only when there is a legal basis for such action provided with the specific provisions of the EU Treaties. So, the EU's external competences are affected by the internal division of powers between the EU and its Member States in such area. For some cases, the Court of Justice has to decide whether the environmental provisions are the appropriate legal bases, or whether certain trade-relation provisions should be applied. While the Cartagena Protocol was concluded on a legal basis related to environment, the Rotterdam Convention used a dual trade and environment legal bases⁶³. On 10 January 2006, the European Court of Justice gave a judgement in case C-94/03. The European Commission had brought the case against the Council asking the Court to annul Council Decision 2003/106/EC which had approved the Rotterdam Convention on behalf of the EU. The European Commission argued that the decision should have been based exclusively on the Article 133 EEC Treaty which related to the common commercial policy, and not on the Article 175 EEC Treaty. The Court ruled that both Articles were required to provide the appropriate legal base⁶⁴.

⁶² SEC(2011)1067; The European Environment — state and outlook 2010: Assessment of Global Megatrends ('SOER 2010').

⁶³ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; [http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/n-US/](http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/n-US/(28.04.2016)) (28.04.2016).

⁶⁴ Case C-94/03 *Commission v Council* [2006], paras 54-56; ECLI:EU:C:2006:2.

To sum up, the EU has signed up to a large number of legally binding commitments under multilateral environmental agreements as well as to politically binding environmental commitments, including those agreed at the United Nations Conference on Sustainable Development ('Rio + 20'). The Rio + 20 outcome document recognises that the inclusive and green economy is an important tool for achieving sustainable development and poverty eradication. The document sets out a framework for action covering all three dimensions of sustainable development (environment, social and economic), many of which are reflected in EU policy. The EU and its Member States should now ensure that those commitments are implemented within the EU, and should promote their implementation globally.

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