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European environmental law

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This chapter aims to illustrate the development of the environmental law of the European Union (EU) through policy and legislative developments, with a view to emphasising the unique characteristics of the EU legal framework and their relevance from an international environmental law perspective. The objectives and principles of EU environmental law are then discussed, and some of the present challenges facing EU environmental law are identified.

Introduction

There are several reasons why the environmental law of the European Union (EU) makes an interesting topic for international environmental lawyers. First of all, the EU is a prominent international actor, proactively engaged in the development and implementation of international environmental law. For example, the EU is a party to over 40 multilateral environmental agreements (MEAs).[1] This has required changes in the process of international law-making and implementation, to enable the EU as a Regional Economic Integration Organization to participate more effectively in international fora,[2] possibly paving the way for other regional organisations to do so in the future.

In addition, EU environmental law is the most sophisticated example of a regional regime of international environmental law that can be of inspiration (in its successes and shortcomings) to other regions establishing free trade agreements.[3] Within MEAs and other

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1 European Commission, 'Multilateral Environmental Agreements to which the EC is a Contracting Party or a Signatory'. Online. Available HTTP: <http://ec.europa.eu/environment/international_issues/pdf/agreements_en.pdf> (accessed 16 March 2012) (although updated only to 2006).

2 L. Kramer, 'Regional Economic Integration Organizations: The European Union as an Example', in D. Bodansky, J. Brunnée and E. Hey (eds) *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press, 2007, pp. 853–76.

3 P. Sands, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, 2003, p. 733.

international processes the EU in practice makes a powerful negotiating block, speaking on behalf of its 27 Member States and often of other associated countries[4] and representing the largest provider of official development aid and contributions to UN budgets.[5] Thus, the EU uses its external policies at the multilateral level to increase its influence over the making of international law and policies of international organisations.[6] Furthermore, international environmental law plays a significant role in the bilateral and unilateral external action of the EU, both in its development cooperation and in its political and economic cooperation with neighbouring countries and distant emerging economies.[7]

Significantly, attempts to influence international environmental law by the EU are not confined to its (multilateral or bilateral) external action. The EU is also increasingly using its 'domestic' law-making powers to inspire the development of international environmental law: the most notable case is that of the EU Climate and Energy Package adopted in 2009, which anticipates agreement on a future international climate change regime.[8]

Furthermore, as a 'new legal order of international law' that imposes obligations and confers rights not only on states but also on their nationals,[9] EU environmental law provides additional legal means to ensure prompt and effective implementation of international environmental law at the EU and Member State level (a phenomenon called 'Europeanisation of international law').[10] By becoming part of the EU legal order, international environmental law acquires primacy over conflicting provisions of national law of the EU Member States. In addition, national courts are obliged to interpret provisions of national law in conformity with Europeanised international environmental norms. Equally, EU law itself is to be interpreted in conformity with international environmental instruments to which the EU is a party, so that international environmental instruments and norms can be used in principle to control the validity of EU norms. In addition, enforcement of international environmental law, once included in the EU legal order, can be ensured through the EU-level enforcement procedure against Member States that either do not transpose or fail to actually apply and enforce international treaties concluded by the EU (this may also lead to the imposition of financial penalties). Action for damages brought by individuals against the EU or against

4 For instance, at the UN World Summit the EU spoke on behalf of 36 countries – see E. Morgera and G. Marín Durán, 'The UN 2005 World Summit, the Environment and the EU: Priorities, Promises and Prospects,' *Review of European Community and International Environmental Law* 15, 2006, 1–18.

5 EU@UN website, 'Overview: European Union at the UN'. Online. Available HTTP: <http://www.europa-eu-un.org/articles/articleslist_s88_en.htm> (accessed 3 May 2012).

6 J. Wouters, A. Nollkaemper and E. de Wet, 'Introduction' in Wouters, Nollkaemper and de Wet (eds), *The Europeanization of International Law: The Status of International Law in the EU and its Member States*, The Hague: TMC Asser Press, 2008, p. 7.

7 G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions*, Oxford: Hart Publishing, 2012.

8 H. Vedder, 'Diplomacy by Directive: An Analysis of the International Context of the Emissions Trading Directive', Social Science Research Network, 2009; K. Kulovesi, E. Morgera and M. Muñoz, 'Environmental Integration and the Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package', *Common Market Law Review* 48, 2011, 829–91.

9 Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend en Loos* v*Nederlandse Belastingsadministratie* [1963] ECR 1; Sands, op. cit., p. 734. Note that the Court has no longer used that expression, but rather referred to the EU as a *sui generis* legal system: M. Puder, 'The Rise of Regional Integration Law: Good News for International Environmental Law', *Georgetown International Environmental Law Review* 23, 2011, 165–210, p. 172.

10 Wouters et al., op. cit., pp. 7–11.

Member State authorities for breaches of Europeanised international environmental norms is also in principle possible.[11]

From a comparative perspective, EU environmental law is not only significantly influencing the development of national environmental law in the EU Member States,[12] but also national law beyond its borders: countries in the process of acceding to the EU and also those aspiring to this,[13] as well as those interested in a closer political and economic relationship with the EU, have concluded international treaties providing for the approximation of their environmental laws to those of the EU.[14]

This chapter will illustrate the development of environmental law of the EU with a view to stressing the unique characteristics of the EU legal framework and their relevance from an international environmental law perspective. The chapter will then discuss the objectives and principles of EU environmental law and identify some of its present challenges.

The evolution of EU environmental law

Traditionally, the evolution of EU environmental law is illustrated by successive phases characterised by the entry into force of the treaties that instituted and regulate the EU (the Treaties).[15] This is because the EU can only act, both externally and internally, within the limits of the powers conferred upon it by the Treaties and towards the objectives assigned to it therein (principle of conferral or of attributed competences[16]). While Treaty developments are certainly key elements in the evolution of EU environmental law, other influential factors should also be taken into account: notably, the influence of concurrent developments in international environmental law and the different economic conditions and environmental law traditions of new Member States.[17] It will also be clarified that often Treaty amendments, rather than introducing radically new elements, endorsed developments that had already appeared and crystallised in the practice of the EU.

First phase (1958 to 1972): birth of the EEC and 'incidental'[18] environmental action

The founding Treaty of the European Economic Community (EEC) (Treaty of Rome) entered into force in 1958: it provided for the creation of a single common market in Europe, with a view to preserving and strengthening peace and stability.[19] The common market was

11 Ibid., pp. 9–10. On the special legal protection afforded to EU environmental law, see J. Jans and H. Vedder, *European Environmental Law*, Groningen: Europa Law Publishing, 2008, Ch. 5.
12 It has been calculated that around 70 to 80 per cent of national environmental legislation within the EU Member States is adopted as a consequence of EU environmental law (Kramer, op. cit., p. 860.)
13 K. Inglis, 'Enlargement and the Environment *Acquis*,' *Review of European Community and International Environmental Law* 13, 2004, 135–51.
14 Marín Durán and Morgera, 'EU Environmental Law' op. cit.; Wouters et al., op. cit., p. 7.
15 Jans and Vedder, op. cit., pp. 3–9; Sands, op. cit., pp. 740–9. The Treaties are currently the *Treaty of the European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU) [2010] OJ C83/1.
16 TEU, Art. 5.
17 I. von Homeyer, 'The Evolution of EU Environmental Governance', in J. Scott (ed.) *Environmental Protection, European Law and Governance*, Oxford: Oxford University Press, 2009, pp. 1–26.
18 Jans and Vedder, op. cit., p. 3.
19 J. Steiner and L. Woods, *EU Law*, Oxford: Oxford University Press, 2009, p. 1.

based on a customs union, the prohibition of restrictions to the free movement of goods, workers, services and capital among the Member States, a competition policy and a common commercial policy, as well as common policies on agriculture and transport.[20] The same parties to the Treaty of Rome (France, Germany, Italy, Belgium, the Netherlands and Luxembourg) had also signed a 50-year Treaty establishing the European Steel and Coal Community in 1952 and a Treaty establishing the European Atomic Community in 1958. As a result, these European Communities created a 'single, unrestricted Western European market in potential pollutants – steel, iron, coal and nuclear materials, as well as other goods'.[21]

The Treaty of Rome did not contain any reference to the environment, which in retrospect can be considered 'hardly surprising' considering that environmental issues were 'virtually invisible' as a policy concern in the 1950s.[22] Nonetheless, certain 'incidentally environmental' action was taken by the EEC[23] – that is, legislative developments with relevance for environmental protection occurred with a view to attaining the common market.

Second phase (1972 to 1987): emergence of the EEC Environmental Policy

With the convening of the first global summit on environmental protection, the 1972 Stockholm Conference on the Human Environment, the EEC together with the international community identified environmental protection as an issue requiring urgent action.[24] The same year, a Summit of Heads of State of the EEC Member States declared that economic expansion was not an end in itself, but rather the priority was to help attenuate disparities in living conditions, such as improved quality and standard of life: this led to the consideration of 'non-material' values such as environmental protection crucial for the EEC economic objectives to be achieved. The Summit consequently requested the drawing up of an action programme for an EEC environmental policy.[25]

The following year the First Programme of Action of the European Communities on the Environment (1973 to 1976) was adopted:[26] it was a policy declaration setting broad-ranging environmental objectives for the EEC, notably including the search for common solutions to environmental problems with states outside the EEC and international organisations. In effect, the EEC environmental policy and the environmental legislation that was enacted during this second phase following the Programme of Action were not backed by a treaty-based explicit competence for the EEC, but rather on the basis of an extensive interpretation of the provisions of the Rome Treaty.[27]

20 D. Chalmers, G. Davies and G. Monti, *European Union Law*, Cambridge: Cambridge University Press, 2010, p. 12.
21 J. Holder and M. Lee, *Environmental Protection, Law and Policy*, Cambridge: Cambridge University Press, 2007, p. 156.
22 M. Lee, *EU Environmental Law: Challenges, Change and Decision-making*, Oxford: Hart, 2005, p. 1.
23 Jans and Vedder, op. cit., p. 3.
24 von Homeyer, op. cit., p. 2; Sands, op. cit., p. 741; D. McGillivray and J. Holder, 'Locating EC Environmental Law', *Yearbook of European Environmental Law* 2, 2001, 139–71, p. 144 argue that this influence explains the anthropocentric approach of EU Environmental law.
25 Bulletin EC 1972, No. 10.
26 Declaration of the Council of the European Communities and of the representatives of the Governments of the member States meeting in the Council of 22 November 1973 on the programme of action for the European Communities on the environment [1973] OJ C112/1.
27 Jans and Vedder, op. cit., p. 4; Holder and Lee, op. cit., pp. 157–8.

Thus, for the adoption of EEC environmental legislation recourse was made to a Treaty provision allowing the EEC to take legislative action to approximate national laws that directly affect the establishment or functioning of the common market:[28] basically, this was used in cases in which differences in national environmental legislation were considered to have (or were likely to have) a detrimental effect on intra-Community trade and competition.[29] While this practice permitted the adoption of EEC legislation on aquatic pollution, air pollution, industrial hazards and toxic waste, it only allowed environmental law development to the extent permitted by economic considerations. Thus, another legal basis was invoked, namely a Treaty Article empowering the EEC to take the action necessary to attain, in the course of the operation of the common market, one of the objectives of the Community where the Treaty itself has not provided necessary powers (the so-called 'flexibility clause').[30] In addition, a judicially made doctrine of implied powers[31] allowed for broader leeway in environmental law-making by the EEC,[32] as well as enabling the EEC to become a party to multilateral and regional environmental agreements.[33]

In 1985, the Court of Justice sanctioned the possibility of an autonomous environmental policy of the EEC independent of the establishment of the common market.[34] The Court, addressing the question of the validity of certain environmental protection measures conflicting with the free movement of goods, affirmed that the directive had to be interpreted from the perspective of environmental protection, which it declared for the first time to be one of the Community's 'essential objectives'. The Court went on to affirm that environmental protection measures, being of general interest, could justify certain restrictions to the free movement of goods as long as they were non-discriminatory and did not go beyond the inevitable restrictions justified by the pursuit of the objective of environmental protection.[35]

Third phase (1987 to 1993): an explicit legal basis for the EEC environmental policy

The entry into force of the Single European Act (SEA) in 1987 marks the beginning of the third phase of the evolution of the EU environmental policy. The SEA aimed to eliminate remaining barriers to the creation of the single internal market and introduced procedural changes to accelerate decision-making by the EEC.[36] It also extended the sphere of competence of the EEC, introducing for the first time, among others, an explicit legal basis for environmental legislation in the Treaty of Rome by setting the objectives, principles and criteria of the EEC environmental policy.[37] Accordingly, the objectives of EEC action in the

28 Article 100 EEC, later 94 EC (now 115 TFEU); see also Case 92-79 *Commission v Italy* [1980] ECR 1115.
29 Jans and Vedder, op. cit., p. 4.
30 Article 235 EEC, later 308 EC (now 352 TFEU).
31 Case C-22/70 *Commission v Council* (AETR) [1971] ECR 263; and *Opinion 1/76 on the Draft Agreement establishing a Laying-up Fund for Inland Waterway Vessels* [1977] ECR 471: for a more detailed explanation, see Marín Durán and Morgera, *Environmental Integration*, op. cit., Ch 1.
32 Jans and Vedder, op. cit., p. 5.
33 Ibid., pp. 58–60.
34 Lee, *EU Environmental Law*, op. cit., p. 16.
35 Case 240/83 *Procureur de la République v Association de Défense des Bruleurs d'huiles usagées* [1983] ECR 531 (ADBHU case).
36 Steiner and Woods, op. cit., p. 6.
37 Post-SEA Art. 130r EEC.

field of the environment were: preserving and improving the quality of the environment, contributing towards the protection of human health, and ensuring a prudent and rational utilisation of natural resources. This was, therefore, a confirmation of the practice of environmental law-making that had developed in the second phase. The powers of the EEC for the protection of the environment were subject to unanimous decision-making by the Council in consultation with the Parliament.

With the joining of the EEC by Spain and Portugal in 1986, Germany and Denmark – countries with traditionally higher environmental standards – insisted on introducing in the Treaty a provision allowing Member States to maintain or introduce more stringent environmental protection measures than might be pursued at EEC level,[38] thereby creating the possibility for a 'two-speed environmental Europe'.[39]

Fourth phase (1993 to 1997): birth of the EU and raising of environmental protection

Following the convening of another major global summit, the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, another phase in the evolution of EU environmental law began. The Treaty of Maastricht, which entered into force in 1993, significantly amended the EEC Treaty, by renaming the EEC the European Community (EC) to reflect a wider purpose than just economic integration, moving into further integration in social and political areas, and providing a separate Treaty for a new entity – the European Union (EU) – representing political cooperation in the areas of foreign and security policy, and justice and home affairs (the so-called second and third pillars). While the distinction between EC and EU became increasingly difficult to draw in practice, the EU was created as an overarching entity that was distinct, but did not formally have a separate legal personality, from the EC. The EU was built upon three pillars: the first pillar embodied by the EC and its supra-national decision-making modalities, while the second and third pillars represented cooperation among the Member States in the EU, based on intergovernmental modalities rather than transfer of sovereign powers. The Treaty of Maastricht also introduced provisions for the creation of a full economic and monetary union.[40]

From an environmental perspective, the Maastricht Treaty for the first time introduced the environment into the overarching provisions of the EC Treaty, by including among the objectives of the EC the 'promotion through the Community of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment'.[41] While the Treaty did not use the expression 'sustainable development', which had been mainstreamed by the Rio Summit, the weaker expressions related to balanced development and sustainable growth were still considered of great political importance.[42]

The Treaty also significantly amended the legal basis on environmental policy, by adding reference to the precautionary principle and the objective of promoting international measures to deal with regional or worldwide environmental problems.[43] In addition, the Treaty of

38 M. Soveroski, 'EC Enlargement and the Development of European Environmental Policy: Parallel Histories, Divergent Paths?', *Review of European Community and International Environmental Law* 13, 2004, 127–34.
39 Holder and Lee, op. cit., p. 154.
40 Steiner and Woods, op. cit., p. 7.
41 Post-Maastricht Arts 2 and 3(k) EC. See Jans and Vedder, op. cit., pp. 6–7.
42 Jans and Vedder, op. cit., p. 7.
43 Post-Maastricht Art. 130r(1) EC. See Sands, op. cit., p. 746.

Maastricht established that the general rule for decision-making on environmental policy was qualified majority with certain matters remaining subject to unanimity (which have remained unaltered since and are discussed below).

It should be noted that Sweden, Finland and Austria – states with higher levels of environmental protection than the existing State Members – joined the EU in 1995. Initially it was hoped that a four-year review period would have allowed the revision of EU standards upwards to bring them in line with those of the new Member States. While certain pieces of EU environmental law were amended as a result of this, overall the 'average' EU environmental standards were not raised significantly.[44]

Fifth phase (1997 to 2008): sustainable development in the EU

With the entry into force of the Treaty of Amsterdam in 1997, the EU is believed to have shifted away from a mainly economic organisation to a more political one founded on fundamental rights and principles of liberty, democracy and the rule of law.[45] The Treaty brought about a streamlining of decision-making, mainly focused on the creation of an Area of Freedom, Security and Justice based on the absence of internal border controls for persons, a common policy on asylum, immigration and external border control, a high level of security and access to justice within the EU.[46]

From an environmental perspective, the Treaty of Amsterdam fine-tuned the inclusion of environmental protection and sustainable development in the general clauses of the EC Treaty. It reformulated references to sustainable development among the objectives of the EC as the 'harmonious, balanced and sustainable development of economic activities' and included explicit reference to a 'high level of protection and improvement of the quality of the environment'.[47] It also upgraded a requirement for environmental mainstreaming in other policy areas of the EU ('environmental integration') to a general principle of EU law, rather than a provision confined within the environmental chapter.[48] Finally, the Treaty of Amsterdam established that co-decision was the normal decision-making procedure for environmental policy, thus ensuring a veto power for the European Parliament.[49] This procedure has remained relevant for environmental policy at present, although it has been renamed 'ordinary legislative procedure' by the Treaty of Lisbon (see below).[50]

During this phase the so-called 'big-bang' enlargement of 2004 took place: ten new countries joined the EU from the East and the South. On that occasion, environmental policy formally became an area to be specifically addressed in pre-accession negotiations, given the need for 'upward pressure' to align the environmental protection policy of new Member States with that of the EU.[51] By 2007, the EU had reached its current membership of 27 States: the increased diversity across the Member States has led to more general environmental law-making by the EU.[52]

44 Inglis, op. cit., pp. 148–9.
45 Steiner and Woods, op. cit., p. 11.
46 Chalmers et al., op. cit., p. 28.
47 Post-Amsterdam, Art. 2 EC.
48 Post-Amsterdam, Art. 6 EC.
49 Post-Amsterdam, Art. 175 EC. See Jans and Vedder, op. cit., pp. 8–9.
50 TFEU, Art. 294.
51 Soveroski, op. cit., p. 129.
52 Kramer, 'Regional Economic Integration Organization', op. cit., p. 859.

The present: the international relevance of EU environmental law

The most recent Treaty development is the entry into force of the Lisbon Treaty in December 2009: this amended the Treaty of the European Union (TEU), which now includes more general provisions on the mission and values of the EU, its democratic principles, the composition and functions of its institutions and detailed provisions on the EU's external action. The Treaty of Lisbon also significantly amended the EC Treaty, which is renamed the Treaty on the Functioning of the European Union (TFEU), owing to the fact that the EC has been merged with the EU, with the latter having been given an international legal personality.[53] The TEU and TFEU are of equal value.[54]

From an environmental perspective,[55] the Treaty of Lisbon confirmed that the EU shares its competence on environmental protection with the Member States, while it retains exclusive competence with regards to the conservation of marine living resources in the context of the Common Fisheries Policy.[56] With regards to the environmental legal basis, the Treaty of Lisbon singles out climate change as one of the global environmental issues in which the EU is expected to play a significant role at the international level;[57] this actually reflects the political priority attached to this specific environmental problem by the EU since the early 2000s.[58]

As a result of the Treaty of Lisbon, environmental integration is no longer the only mainstreaming requirement included among the general principles of EU law. While it can be argued that this may have decreased its visibility,[59] two new provisions further support environmental integration: one requires integrating animal welfare requirements in certain policy areas,[60] and the other has regard to the need to preserve and improve the environment in the context of the EU energy policy, which is to aim, *inter alia*, at promoting energy efficiency and energy saving and the development of new and renewable forms of energy.[61]

It should also be noted that the Treaty of Lisbon established that the EU Charter of Fundamental Rights (which had been unanimously approved by the European Council in December 2000, albeit with uncertain legal status) has the same legal value as the Treaties.[62] The Charter includes an environmental provision that, significantly, is not framed in rights-based language, but rather provides a policy statement on environmental integration (similar in wording to Article 11 TFEU discussed below).[63]

Possibly the most significant environmental feature of the Treaty of Lisbon, particularly for present purposes, is the emphasis placed on the external dimension of EU environmental

53 TEU, Art. 47. Chalmers et al., op. cit., pp. 38–50.
54 TFEU, Art. 1(2); TEU, Art. 1(3).
55 M. Lee, 'The Environmental Implications of the Lisbon Treaty', *Environmental Law Review* 10, 2008, 131–8; H. Vedder, 'The Treaty of Lisbon and European Environmental Policy', Social Science Research Network, 2008.
56 TFEU, Arts 4(2)(e) and 3(1)(d) respectively.
57 Ibid., Art. 191(1).
58 The EU elevated climate change as a priority also in its overall agenda on sustainable development and international cooperation, building upon the UN-driven inclusion of climate change among key threats to global security. Morgera and Marín Durán, 'The 2005 UN Summit', op. cit.
59 Lee, 'The Environmental Integration', op. cit., p. 134; Vedder, 'The Treaty of Lisbon', op. cit., p. 3.
60 Namely in the areas of agriculture, fisheries, transport, internal market, research and technological development and space policies (TFEU, Art. 14).
61 TFEU, Art. 194(1).
62 TEU, Art. 6(1).
63 Charter, [2010] OJ C83/389, Art. 37.

policy. The Treaty introduces an express link between sustainable development and EU external relations, by clarifying that 'in its relations with the wider world, the Union shall . . . contribute to . . . the sustainable development of the Earth'.[64] Furthermore, the Lisbon Treaty underscores the explicit link between environmental protection and external action, clarifying that the EU environmental objectives should guide the general external relations of the EU as well as specifically common foreign and security policy.[65] A new explicit legal basis for the EU external action indeed provides that the EU shall define and pursue common policies and actions, and work for a high degree of cooperation in all fields of international relations, with the specific objective of fostering the sustainable economic, social and environmental development of developing countries, to eradicate poverty; and help to develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.[66]

The objectives of EU environmental law

The Treaty on the Functioning of the EU sets out the objectives of EU environmental policy, its principles and other relevant policy considerations.[67] The objectives are:

> preserving, protecting and improving the quality of the environment; protecting human health; ensuring the prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[68]

Given that these objectives are quite broadly defined, it is almost impossible to clearly define the boundaries of EU environmental policy: there is sufficient flexibility for the EU to adapt its environmental policy to new developments and emerging environmental issues, and generally for this provision to be interpreted in a non-restrictive way. In addition, it has been argued that this provision allows the adoption of measures that result directly or indirectly in an improvement of the environment, such as conservation, restoration and repressive, precautionary, preventive and eminently procedural environmental measures.[69]

Ultimately, the substantive limits of EU competence in the area of environmental protection are 'determined on the case-by-case basis by the EU political institutions as they adopt measures in pursuance of the broadly-framed Treaty objectives, whether unilaterally or by concluding international agreements'.[70] The substantive limits of the EU environmental competence (internally and externally) are thus reflected, as they evolve, in the EU '*acquis*': the body of common rights and obligations binding upon all the EU Member States arising

64 TEU, Art. 3(5).
65 Vedder, 'The Treaty of Lisbon', op. cit., p. 3.
66 TEU, Art. 21(2)(d) and (f). For an in-depth discussion, see E. Morgera (ed.) *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge: Cambridge University Press, 2012.
67 The latter include: available scientific and technical data; environmental conditions in the various regions of the EU; potential benefits and costs of action or lack of action; economic and social development of the EU as a whole; and the balanced development of its regions (TFEU, Art. 191(3)).
68 TFEU, Art. 191(1).
69 Jans and Vedder, op. cit., pp. 26–35.
70 Marín Durán and Morgera, *Environmental Integration* op. cit., p. 285.

from the content, principles and political objectives of the Treaties; legislation adopted in the application of the Treaties; the case law of the European courts; and international agreements concluded by the EU. In a nutshell, it is the 'growing legal universe' produced by the EU governance system since the launch of its integration process.[71]

While there are no clear substantive limits to the exercise of EU environmental competence, this is still subject to the general principles of proportionality and subsidiarity: under the latter principle, the EU will take action if the objectives of the proposed environmental action cannot be sufficiently achieved by Member States and by reason of the scale or effects of the proposed action, these objectives are better achieved at the EU level.[72] Furthermore, environmental competence is exercised under the decision-making procedures set out by the Treaty. Generally, EU environmental law is subject to the agreement between the Council (acting by qualified-majority voting) and the European Parliament (under the ordinary legislative procedure). In certain specific areas, however, the Treaty requires unanimous decision-making by the Council, namely: provisions primarily of a fiscal nature; measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, and land use with the exception of waste management; and measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.[73] These are areas in which Member States wish to retain a higher degree of control because of their politically sensitive nature or concerns about the preservation of national sovereignty.[74]

As indicated above, the environmental competence of the EU is shared with the Member States:[75] thus Member States can exercise their competence only as long as the EU has not exercised its competence, or has decided to cease to exercise it. In this respect, it should be emphasised that the scope of the EU competence vis-à-vis that of the Member States is difficult to determine, as EU environmental policy is subject to continuous evolution.[76] This has important implications on the international scene. As the TFEU states:

> 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.[77]

In broad approximation, if the EU adopted environmental measures internally, Member States no longer have competence to undertake international obligations that would affect those EU rules, unless the EU measures allowed – which is often the case – Member States to adopt more stringent measures,[78] including in principle the possibility of undertaking more

71 Puder, op. cit., p. 179.
72 TEU, Art. 5(3). This principle was initially enshrined in the Treaties with specific regard to environmental policy, and later became a general principle of EU law. See Chalmers et al., op. cit., pp. 363–6.
73 TFEU, Art. 192.
74 Holder and Lee, op. cit., p. 154; McGillivray and Holder, op. cit., p. 145.
75 TFEU, Art. 4(2)(e).
76 Jans and Vedder, op. cit., pp. 61–4.
77 TFEU, Art. 191(4).
78 Jans and Vedder, op. cit., pp. 62–3.

stringent international obligations. This flexibility for Member States, however, is subject to the duty of sincere cooperation enshrined in Article 4(3) TEU, which the Court has interpreted as entailing enforceable substantive and procedural obligations with a view to protecting the unity in the international representation of the EU.[79]

Principles of EU environmental law

The Treaty also identifies the principles that should guide the EU internal and external environmental policy,[80] as a guide both for law-making and for interpretation. The EU legislator, however, has a significant margin of discretion in implementing the principles. The Court has in fact clarified that only in exceptional cases could an EU measure be annulled for insufficient regard to these principles – in cases of manifest error of appraisal by the EU legislature. This was justified on the basis of the need to strike a balance between environmental objectives and principles and of the complexity of the implementation of the environmental policy criteria.[81]

High level of environmental protection

The principle of a 'high' level of protection is considered 'the most important substantive principle of European environmental policy'[82] given its inclusion in the general objectives of the EU.[83]

Nonetheless, the principle is made subject to consideration of the 'diversity of situations in the various regions of the Union'.[84] While a high level of environmental protection cannot be understood as allowing the EU to adopt the lowest common denominator among the Member States' environmental protection measures,[85] the Court of Justice clarified that it does not necessarily have to be the highest that is technically possible.[86] Overall, the principle reflects a moving target – the idea of continuous improvement of the environmental protection standards across the Member States.[87]

Precaution

The precautionary principle has been interpreted by the Commission[88] as a risk management tool that is essential for the achievement of a high level of environmental protection when

79 Case C-266/03 *Commission v Luxembourg (re Inland Waterways Agreement)* [2005] ECR I-4805, para. 60 and Case C-433/03 *Commission v Germany (re Inland Waterways Agreement)* [2005] ECR I-6985, para. 66; Case C-246/07 *Commission v Sweden (re POPs Convention)*, judgment 20 April 2010, para. 104. For a discussion, see Marín Durán and Morgera, *Environmental Integration,* op. cit., pp 18–19.
80 TFEU, Art. 191(2).
81 Case C-284/95 *Safety Hi-Tech Srl v S. & T. Srl* [1998] ECR I-4301, para. 37; Jans and Vedder, op. cit., p. 36.
82 Vedder, op. cit., p. 36.
83 TEU, Art. 3(3).
84 TFEU, Art. 191(2).
85 L. Kramer, *EC Environmental Law*, London: Sweet and Maxwell, 2006, pp. 12–13.
86 Case C-284/95 *Safety Hi-Tech Srl. v S. & T. Srl* [1998] ECR I-4301; Jans and Vedder, op. cit., pp. 36–7.
87 Kramer, *EC Environmental Law*, op. cit., p. 12.
88 European Commission, *Guidelines on the Precautionary Principle*, COM(2000)1.

facing unknown risks.[89] To implement the principle, a risk assessment should be as complete as possible given the particular circumstances of the individual case, with a view to establishing precautionary measures that are:

> proportional to the chosen level of protection, non-discriminatory in their application, consistent with similar measures already taken, based on an examination of the potential benefits and costs of action or lack of action, and subject to review in the light of new scientific data.[90]

The trigger of the precautionary principle is a situation where:

> preliminary objective scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment, human, animal or plant health* may be inconsistent with the high level of protection chosen for the [EU].[91]

The Court of Justice held that in the framework of the Habitats Directive,[92] the requirement of an appropriate assessment of the implications of plans or projects that may have significant effects on protected areas is conditional upon the 'probability or the risk' that the plan or project will have significant effects on the site concerned, and that this should be interpreted in a precautionary manner. So an assessment is considered necessary whenever it cannot be excluded that a certain project or plan will have significant effects on the site on the basis of objective information.[93]

Prevention

This principle calls for taking action to protect the environment at an early stage, with a view to preventing damage from occurring rather than repairing it.[94] The main difference from the precautionary principle lies in the availability of data on the existence of a risk, although such a distinction may be difficult to draw in practice. The Court of Justice, for instance, relied on the prevention principle, as well as that of a high level of protection, to review an export ban on British beef adopted in the context of the Common Agricultural Policy because of a possible – rather than certain – risk related to mad cow disease.[95]

Guidance on the application of the principle can be found in the third Environmental Action Programme, which stressed the need to improve information for decision-makers and the public (for instance through monitoring and surveying requirements), introduce

89 Puder, op. cit.
90 Commission Guidelines, op. cit., para. 6.
91 Ibid., para. 3.
92 Council Directive (EC) 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/7.
93 Case C-6/04 *Commission v UK* [2005] ECR I-9017, para. 54; Jans and Vedder, op. cit., p. 40.
94 Jans and Vedder, op. cit., pp. 40–2.
95 Case C-157/96 *National Farmers Union* [1998] ECR I-2211, para. 64, although it has been convincingly argued that the precautionary principle rather than the prevention principle was relevant in this case given that the risk was a possibility rather than a certainty: see N. Dhondt, *Integration of Environmental Protection into Other EC Policies; Legal Theory and Practice*, Groningen: Europa Law Publishing, 2003, p. 151.

procedures supporting prompt and informed decision-making on the environment such as environmental impact assessment, and monitor implementation of adopted measures to ensure their adaptation in light of new circumstances or knowledge.[96]

Source principle

The principle provides that environmental damage should be rectified at its source as a priority,[97] and has had particular resonance in the area of waste management. The Court of Justice held that local authorities must take measures necessary to ensure the reception, processing and removal of waste so that it can be disposed of as close as possible to its place of production. This interpretation allowed the Court to consider justified measures that discriminated against waste produced in different areas.[98] In another case, the Court specified that the principle could not serve to justify any restriction on waste exports, but only when the waste in question was harmful to the environment.[99]

Polluter pays

The principle has been interpreted in the EU context so that environmental protection should not in principle depend on the granting of state aid or policies placing the burden on society, and that requirements should not target persons or undertakings for the elimination of pollution that they did not contribute to produce.[100] In the *Standley* case, for instance, the Court of Justice indicated that farmers are not obliged to bear all the costs of pollution by nitrates, but only those caused by their activities, so it is up to authorities to take account of the other sources of pollution and, having regard to the circumstances, avoid imposing on farmers unnecessary costs of eliminating pollution.[101]

Sustainable development

Sustainable development is among the 'objectives' of the EU in both its internal and external action.[102] The EU defined it in a few legal instruments in different ways, thus highlighting that the concept plays out differently in different contexts.[103] The Court of Justice has not engaged in defining the legal implications of sustainable development,[104] but the EU has developed a plethora of policy instruments epitomised by the Sustainable Development

96 Dhondt, op. cit., p. 151.
97 Jans and Vedder, op. cit., pp. 42–3.
98 Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.
99 Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743; Jans and Vedder, op. cit., pp. 43–5.
100 Jans and Vedder, op. cit., pp. 43–5.
101 Case C-293/97 *Standley* [1999] ECR I-2603, paras 46–52; L. Kramer, 'Environmental Justice in the European Court of Justice', in J. Ebbesson and P. Okowa (eds) *Environmental Law and Justice in Context*, Cambridge: Cambridge University Press, 2009, 195–210, p. 202.
102 TEU, Arts 3(3) and (5), and 21(2)(f).
103 McGillivray and Holder, op. cit., p. 150.
104 Case C-371/98 *R v Secretary of State for Environment, Transport and the Regions, ex parte First Corporate Shipping* [2000] ECR-I 9235; McGillivray and Holder, op. cit., p. 151.

Strategy.[105] Views on the role of sustainable development in EU environmental law remain divided: Lee underscores the potential of sustainable development to stimulate debate in the EU, privileging participatory processes to allow the balancing of different interests where environmental protection competes with other imperative public interests;[106] while Kramer criticises the inflationary use of sustainable development by the EU as a separate concept from environmental protection.[107]

Environmental integration

Environmental integration is included among the general principles of EU law and framed in clearly mandatory wording. According to Article 11 TFEU, environmental integration demands that 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.' The 'requirements' that are the object of this obligation are those included in Articles 2 and 191 TFEU, namely the objectives, principles and criteria of the EU environmental policy discussed above.[108] Environmental integration is to occur in all policies of the EU,[109] internal and external ones, both at the stage of the framing of these policies ('definition' therefore includes every stage of the EU legislative processes: definition of policy objectives, as well as preparation, proposal and adoption of policies and legislation, and their revision); and at the stage of their 'implementation' (which includes the adoption of further implementing acts, adoption of decisions outside the legislative process, and enforcement).[110]

Environmental integration therefore functions as a requirement for legislative action, as well as an interpretative tool of primary and secondary legislation outside the environmental field (external integration),[111] which requires that the environmental objectives, principles and criteria are 'applied' in other policy areas in the same way as they must be applied in the environmental policy: that is, that other policy areas must 'pursue' the environmental objectives, 'aim at' or 'be based on' the environmental principles, and 'take account of' the environmental criteria.[112] The requirement also entails EU environmental law itself being interpreted broadly, in light of the environmental objectives, principles and criteria of Article (191 TFEU), even when these objectives, principles or criteria are not explicitly incorporated in the specific piece of secondary legislation (internal integration).[113]

Overall, the environmental integration requirement has an *amplifying* effect on EU environmental policy, in that it requires the systematic pursuance of environmental objectives,

105 European Commission, *A Sustainable Europe for a Better World. A European Union Strategy for Sustainable Development*, COM(2001) 264; and Goteborg European Council Conclusions (15–16 June 2001). This was complemented by European Commission, *Towards a Global Partnership for Sustainable Development*, COM(2002) 82, on the external dimension. For a discussion, see L. Kramer, 'Sustainable Development in the EC', in H. Bugge and C. Voigt (eds) *Sustainable Development in International and National Law*, Groningen: Europa Law Publishing, 2008, pp. 377–96.
106 Lee, *EU Environmental Law*, op. cit., p. 47.
107 Kramer, 'Sustainable Development', op. cit., pp. 391–3.
108 Jans and Vedder, op. cit., p. 17.
109 Ibid.
110 Dhondt, op. cit., pp. 45–53.
111 Jans and Vedder, op. cit., p. 17.
112 Dhondt, op. cit., p. 84.
113 Ibid., p. 179.

principles and criteria in all EU policies and actions.[114] The requirement has resulted in significant legislative developments, in terms of 'greening' other areas of EU law (such as the Common Agricultural Policy, Common Fisheries Policy, Common Transport Policy)[115] as well as in the recourse to an 'integrationist' approach in the development of EU environmental law (relying, for instance, on environmental impact assessment, strategic environmental assessment, and integrated pollution prevention and control).[116] Its influence is also significant in relation to EU external relations, as evidenced by the insertion of several environmental integration clauses in cooperation and trade agreements between the EU and third countries, the conduct of sustainability impact assessments before the conclusion of trade agreements, and the consideration of environmental requirements in the definition and implementation of legislation on external funding.[117]

Conclusion

European Union environmental law is an interesting object of study both as a possible source of inspiration for other states and regional organisations, and for its impacts on the development and implementation of international environmental law. The environmental law of the EU has been a testing ground for principles and innovative regulatory techniques, and has been increasingly marked by further experimentalism, harnessing the pluralism across Member States, different levels of government as well as different groups of stakeholders.[118]

Nonetheless, significant challenges face EU environmental law. While the EU continues to use its domestic and external legislative action to support the implementation of international environmental law and influence its development, it is not yet possible to assert that these complex strategies have yielded positive results. The limited success of the EU strategy at the Copenhagen Climate Change Conference in 2009, for instance, has provided a hard lesson for the EU.[119]

Internal shortcomings also undermine the credibility of the EU as a model and global actor. One major challenge is certainly the problematic 'implementation gap', that is the continuous lack of compliance with and enforcement of EU environmental law by the Member States.[120] Another is the 'appalling' lack of data on the environment, in particular the lack of ex-post evaluation of the effectiveness of existing measures, which leads Kramer

114 Ibid., p. 109.
115 For a succinct assessment, see Kramer, *EC Environmental Law*, op. cit.; for a more detailed assessment, see Dhondt, op. cit., Part III.
116 McGillivray and Holder, op. cit., p. 154.
117 Marín Durán and Morgera, *Environmental Integration*,op. cit.
118 J. Scott and J. Holder, 'Law and New Environmental Governance in the European Union', in J. Scott and G. de Búrca (eds) *Law and New Governance in the EU and the US*, Oxford: Hart Publishing, 2006, pp. 215–42; I. von Homeyer, 'Emerging Experimentalism in EU Environmental Governance', in C. Sabel and J. Seitlin (eds) *Experimentalist Governance in the European Union: Towards a New Architecture?*, Oxford: Oxford University Press, 2010, pp. 121–50.
119 European Commission Staff Working Document, 2009 Environment Policy Review, SEC(2010)975, 3, where it is stated that 'the results in Copenhagen fell short of the European Union's goal . . .'.
120 Lee, *EU Environmental Law*, op. cit., Ch. 3; Jans and Vedder, op. cit., Ch. 4.

to conclude that EU environmental policy is based on assumptions rather than hard facts.[121] Finally, the 'structural imbalance concerning access to courts' in environmental matters at the level of both national courts and EU judiciary, particularly for environmental NGOs concerned with environmental damage,[122] does not reflect well on the EU as a self-proclaimed environmental leader. Whether the EU will succeed in gradually transforming these challenges into opportunities for further innovation is yet another reason to continue to study the evolution of EU environmental law.

121 Kramer, 'Sustainable Development', op. cit., p. 393.

122 Kramer, 'EC Environmental Law', op. cit., pp. 209–10. This is based on a restrictive interpretation of the criteria for standing by the European courts (see Communication to the Aarhus Convention Compliance Committee ACCC/C/2008/32, 2008; in particular, the Compliance Committee's Findings and Recommendations (2011) UN Doc. ECE/MP.PP/C.1/2011/4/Add.1) and the lack of progress on a 2003 legislative proposal for ensuring access to justice in environmental matters at the Member State level (European Commission, *Proposal for a Directive on Access to Justice in Environmental Matters*, COM(2003) 624).