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978-1-107-02382-6 - The External Environmental Policy of the European Union: EU and International Law Perspectives

Edited by Elisa Morgera

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## Introduction

ELISA MORGERA

The external relations of the European Union (EU)<sup>1</sup> increasingly engage academics and policy-makers within and outside the EU due to the growing role played by the EU on the international scene, its aspiration to become an even more assertive global player, and the legal complexities emerging from that ambition and stemming from the unique and evolving nature of the Union as a global actor. While the EU's aspirations in this connection are clearly reflected in the Lisbon Treaty, in the environmental sphere as elsewhere key legal implications (in EU and international law) remain to be clarified.

Even before being attributed an express competence over environmental matters by the Single European Act in 1986,<sup>2</sup> the EU had started to develop an environmental policy with a marked external dimension, and since the Act it has increasingly engaged in shaping and applying international environmental regimes in a variety of ways and at different levels.<sup>3</sup> With the Treaty of Lisbon, environmental protection and sustainable development figure prominently among the key objectives of the EU's external action, which include a commitment to help in developing international measures to preserve and improve the quality of the

<sup>1</sup> For purposes of simplification, throughout this book the term 'European Union' (EU) will generally be used, as the EU has superseded the old European Community (EC) since the entry into force of the Lisbon Treaty. In purely legalistic terms, it should be clarified that most of the measures examined in this book were adopted by the EC during the pre-Lisbon period, although the EU/EC distinction had become increasingly fictitious in practice and largely irrelevant in non-legal literature.

<sup>2</sup> Council of the European Communities and Representatives of the Governments of the Member States meeting in the Council, 'Declaration on the Programme of Action for the European Communities on the Environment' [1973] OJ C112/1, at 11 and 47–8, where it was highlighted that the EC had already established a 'very active cooperation' in the environmental field with relevant international bodies.

<sup>3</sup> For an overview, G. Marín Durán and E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford: Hart, 2012) ch. 1.

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environment and the sustainable management of natural resources,<sup>4</sup> foster the sustainable, *environmental* development of developing countries with the primary aim of eradicating poverty;<sup>5</sup> and promote an international system based on stronger multilateral environmental cooperation and good global environmental governance.<sup>6</sup> In addition, the EU is under a general obligation to ‘promote multilateral solutions to common problems, in particular in the framework of the United Nations’,<sup>7</sup> including multilateral solutions to common environmental problems devised through relevant UN environmental initiatives and instruments.<sup>8</sup> In many respects, these provisions reflect the long-standing and ever-increasing practice of the Union in the international environmental scene.

Yet the external environmental law and practice of the EU and its complex interaction with international environmental law have been explored only to a limited extent. Scholarly reflection on the multifaceted legal dimensions of the Union’s external environmental policy has only recently focused on the EU’s participation in multilateral environmental negotiations,<sup>9</sup> and selected areas of interaction between EU and international environmental law,<sup>10</sup> in particular EU climate change policy.<sup>11</sup> Several unexplored legal questions remain, however, and more emerge from a systematic analysis of the various approaches, instruments and thematic areas through which the EU is forging its external environmental policy.

This collection aims to spur a comprehensive and in-depth dialogue between experts in EU external relations law, EU environmental law, international environmental law and international relations, both from academia and practice, with a view to examining the significant legal experimentation linked to EU external environmental action, its

<sup>4</sup> Art 21(2)(f) TEU.    <sup>5</sup> Art 21(2)(d) TEU (emphasis added).

<sup>6</sup> Art 21(2)(h) TEU, read in conjunction with Art 11 TFEU on environmental integration.

<sup>7</sup> Art 21(1) TEU, second sentence.    <sup>8</sup> Arts 3(5) and 21(2) TEU.

<sup>9</sup> T. Delreux, *The EU as an International Environmental Negotiator* (Aldershot: Ashgate, 2011).

<sup>10</sup> M. Pallemarts (ed.), *The EU and Sustainable Development: Internal and External Dimensions* (Brussels: VUB Press, 2010); M. Pallemarts (ed.), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing, 2011); V. Heyvaert, ‘Globalizing regulation: reaching beyond the borders of chemical safety’, *Journal of Law and Society* 36 (2009), 110.

<sup>11</sup> S. Oberthür and M. Pallemarts (eds), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (Brussels: VUB Press, 2010).

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relevance to the understanding of EU external relations more generally and its reciprocal influences with international environmental law, from a three-fold perspective. First, it appears both timely and critical to account for the innovations in the legal and institutional framework of EU external environmental action as brought about by the Lisbon Treaty in order to identify any new opportunities or challenges for the coherence and effectiveness of the EU as a global environmental actor. Second, it appears useful to take stock of the wide-ranging practice of EU external environmental action in different areas of environmental protection and sustainable development (not only climate change – which is undoubtedly the priority area of EU external environmental action – but also sustainable forest management, biodiversity and chemicals management), and through different instruments (trade and aid) to illustrate the variety and evolution of the legal tools and approaches adopted by the EU externally (but also – increasingly – internally)<sup>12</sup> to define and implement its external environmental policy. Third, it is then necessary to assess the reciprocal influences (and tensions) between the development and operation of EU environmental law and international environmental law. This collection is thus divided into three parts, following these lines of enquiry.

In the first part, an analysis is offered of the changes introduced (or the existing practice codified) by the Lisbon Treaty as regards the legal and institutional framework of EU external environmental action, ranging from constitutional questions relating to competence and coherence, to institutional questions and legal issues relating to the external representation of the EU. Vedder (Chapter 1) discusses the long-standing question of competence in EU external environmental action, offering a fresh perspective on the amendments made by the Treaty of Lisbon, as well as recent case law concerning the duty of loyal cooperation and its impact on Member States' ability to act externally in environmental matters that, in principle, constitute a shared competence. In doing so, he emphasises that 'the exact definition of competences is not set at the constitutional level, but rather in the implementation of policy . . . and in the substance of fairly technical pieces of legislation'. Accordingly, he uses the external dimension of EU

<sup>12</sup> H. Vedder, 'Diplomacy by Directive? An analysis of the international context of the Emissions Trading Scheme Directive', in M. Evans and P. Koutrakos (eds), *Beyond the Established Legal Orders* (Oxford: Hart, 2011), 105; K. Kulovesi, E. Morgera and M. Muñoz, 'Environmental integration and multi-faceted international dimensions of EU law: unpacking the EU's 2009 Climate and Energy Package', *CMLR*, (2011) 48, 829.

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energy and climate change policies as a case study, and explores how competitiveness considerations at both EU and Member State levels have a bearing on environmental competence.

Cremona (Chapter 2) then explores the rules and principles underpinning the concept of coherence in EU external policy in the specific context of external environmental policy. Returning to the extensive interpretation of the duty of loyal cooperation in the context of mixed agreements such as multilateral environmental agreements (MEAs), and drawing attention to how the appropriate legal basis is determined for international agreements with an environmental dimension, Cremona illustrates the legal and policy challenges of ensuring coherence between environmental protection and other equally significant (but possibly conflicting) EU priorities for external action, and spillover effects on coherence between the external action of the Union and its Member States.

Continuing the reflection on coherence from an institutional perspective, Damro (Chapter 3) investigates the implications of two new institutions created by the Lisbon Treaty for external environmental policy: the new High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service. While the practice of these institutions is still limited at the time of writing, Damro assesses their potential to play a central or even a leading role in ensuring consistency and environmental integration in EU external relations, in particular at the bilateral level, through a more comprehensive and effective political dialogue with third countries.

The two chapters that follow concentrate on the interpretation of new Treaty rules on EU external representation, offering different views on the significance of the Lisbon Treaty for the practice of mixed delegations (led by the Member State holding the presidency of the Council) representing the EU in the context of multilateral environmental negotiations. These questions were surrounded by uncertainty in early 2010 due to a divergence in interpretation between the Commission, on one hand, and several Member States on the other, which occasionally prevented the EU's engaging in international negotiations.<sup>13</sup> Buck (Chapter 4) provides an insider's perspective on the Commission's interpretation of the post-Lisbon arrangements, while Thomson (Chapter 5) provides a Member State perspective on these arrangements and their practical relevance.

<sup>13</sup> J. Rankin, 'Dispute leaves Europe without voice in mercury talks', *European Voice*, 10 June 2010.

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Against this background, the second part of the book explores legal questions emerging from the practice in different thematic areas and across different instruments of EU external environmental action. Kulovesi (Chapter 6) illustrates the development of the EU's external climate change policy as the most prominent area of EU external action in the sphere of environmental protection. She systematically analyses the legal tools that, since its inception, the EU has used both internally and externally to influence the development of a global regime on climate change, highlighting the relevance both of internal factors related to European integration, and of external factors (most notably the changing role of the USA in international climate policy) for the Union's climate action.

Not only is EU climate change action the symbolic front runner in EU external environmental policy, it also significantly influences other areas of international EU action related to environmental protection. Its impacts are becoming increasingly visible on, for instance, the EU's long-standing international stance on forests. Accordingly, Savaresi (Chapter 7) explores the Union's evolving approach to supporting the (so far unattainable) adoption of a global forest convention. To that end, she analyses the innovative framework developed by the EU to promote the verification of the legality of timber in third countries through its Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. She also examines the Plan's incipient linkages with the EU negotiating position on the role of forests in the fight against climate change at the multilateral level, developed in a bid to stimulate action to achieve climate change mitigation, biodiversity conservation and sustainable development in third countries.

The next two chapters focus on environmental integration through different EU external relations tools. Žvelc (Chapter 8) offers an insider's perspective on the evolution of, and interactions between, the bilateral and unilateral legal instruments adopted by the EU in the context of its external trade policy with a view to contributing to sustainable development and integrating environmental concerns. He explains the conceptual and practical challenges in using the EU General System of Preferences, carrying out sustainability impact assessments during trade negotiations, and incorporating trade and sustainable development clauses in bilateral agreements to contribute to the implementation of MEAs and EU environmental objectives.

As the EU is not only a major trade player but also the world's largest provider of development assistance, Marín Durán (Chapter 9) provides a

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legal and quantitative analysis of the EU's use of development cooperation for environmental protection beyond the Union's borders. She illustrates the evolution of the legal framework for EU external assistance, underscoring the tension that exists between unilateralism and partnership with third countries in determining the overall importance of EU environment-related funding and the nature of its priorities.

In the following chapter (Chapter 10), I aim to pull together some of the observations emerging from the preceding analysis of practice by conceptualising how the EU increasingly uses its external action through different instruments (unilateral, bilateral, inter-regional and multilateral) to actively support the development and implementation of international environmental law in a three-fold way: to support the implementation of *existing* MEAs politically, technically and financially; to build alliances with third countries with a view to influencing *ongoing* international environmental negotiations; and to make progress on environmental issues in the *absence* of multilateral negotiations for an international, legally binding agreement. To this end, I explore another thematic area of environmental cooperation, biodiversity, which also allows me to return to the question of the influence of climate cooperation on other areas of EU external action.

The complex picture emerging from the analysis of practice thus paves the way for the third part of the book, in which more theoretical questions on the EU and international law are approached. Augenstein (Chapter 11) offers an initial reflection on the human rights dimension of environmental protection in EU external relations after Lisbon. Drawing on the case law of the European Court of Human Rights concerning the link between human rights and the environment, he seeks to clarify whether existing human rights obligations in the environmental sphere within the EU legal order may extend to EU foreign policy, in particular when the EU adopts legal instruments that aim to influence environmental protection in third countries.

Ali (Chapter 12) looks in turn at another area of interaction between EU and international law, focusing on the questions arising in the context of the Aarhus Convention Compliance Committee, which he considers 'an authentic laboratory for the analysis of legal issues arising from the dual participation of the EU and its Member States in MEAs'. Ali selects four cases that allow him to explore questions related to the joint/shared responsibility of the EU and its Member States *vis-à-vis* MEAs; the Union's responsibility with regard to the implementation of MEAs at EU and national levels; the effects of MEAs on the jurisdiction

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of the Court of Justice of the EU (Court of Justice); and EU responsibility for actions by Member States that are not parties to an MEA.

Questions of joint/shared responsibility are then explored in depth across different MEAs, as well as in general international law, by Nollkaemper (Chapter 13). He investigates the notion of ‘joint responsibility’, both as a response to the need to protect third states from the external implications of any unclear division of competence between the EU and its Member States, and as an incentive for the EU and its Member States to clarify *ex ante* or *ex post* who is responsible for what under MEAs. The lens of joint responsibility further magnifies how shared competence translates into an obligation on EU institutions and Member States to cooperate internally to ensure that joint external obligations are implemented.

In the final chapter, Pavoni appraises the problematic implications of recent case law on EU external relations for the strict observance of international law within the Union’s legal system. He focuses on two issues: the growing vindication of the autonomy of the EU legal order in the context of the doctrine of direct effect, which is used in an inconsistent manner to determine the circumstances under which international environmental rules may be applied internally; and the stigmatising of Member States’ environmental ‘unilateralism’ at both the substantive and the dispute settlement levels, leading to disregard for subsidiarity and the undue restriction of flexibility in adopting stricter environmental protection measures within the Union or internationally.

My conclusions will pull together a few of the insightful findings of the preceding chapters with a view to highlighting the need for further research and debate between academia and practice on the EU’s external environmental action to enhance understanding of its implications for EU and international law.<sup>14</sup>

<sup>14</sup> The law and policy developments discussed in this book are reflected as they were on 30 October 2011.

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PART I

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The EU Legal and Institutional Framework  
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