TRANSWORLD

THE TRANSATLANTIC RELATIONSHIP AND THE FUTURE GLOBAL GOVERNANCE

ISSN 2281-5252 WORKING PAPER 17 | MARCH 2013

The Evolution of EU Competences in the Field of External Relations and its Impact on Environmental Governance Policies

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While the European Union (EU) seeks to play an active role in global environmental governance, its special nature as an international actor has important implications for its external environmental policies and its participation in international environmental cooperation. The Union may act only when there is a legal basis for such action in its founding Treaties. The Union's external competence is therefore affected by the internal division of powers between the EU and its member states in a particular field. Under most multilateral environmental agreements (MEAs), the Union participates alongside its member states, with complex implications for both EU and international law. The duty of loyal cooperation and the principle of unity of the Union's international representation have important implications for the EU and its member states, requiring the formation of common positions in decision-making structures established by MEAs and limiting the scope of the member states' independent international action. The issue of who speaks for the EU and its member states has also become a matter of contention. This sometimes difficult legal and political internal dynamic, while arising out of obligations of unity, can have negative consequences for the EU's international environmental action.

Transworld is supported by the Seventh Framework Programme

SEVENTH FRAMEWORK PROGRAMME

The Evolution of EU Competences in the Field of External Relations and its Impact on Environmental Governance Policies

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European Union Environmental policy Legal basis EU law

Introduction

The European Union (EU) participates in various multilateral environmental agreements (MEAs) and international organizations concerned with environmental matters. It also seeks to promote environmental policies through its bilateral and regional relations with third countries (Marín Durán and Morgera 2012). While the EU seeks to play an active role in global environmental governance, its special nature as an international actor has important implications for its external environmental policies. The Union may act only when there is a legal basis for such action in its founding Treaties. The Union's external competence is therefore affected by the internal division of powers between the EU and its member states in a particular field. There is rich case law concerning the Union's external competences especially where - as in the case of environmental policy - the EU and its member states are both internationally active. The complex nature of the EU as an international actor has also raised questions concerning the effectiveness of its external policies (Van Elsuwege and Merket 2012). The Treaty of Lisbon (2007), which entered into force in 2009, had significant implications for the Union's external policies, attempting, *inter alia*, to clarify questions concerning competence and representation.

This paper discusses the evolution of EU competences in the field of external relations with the objective of analyzing how questions of competence impact the Union's policies on environmental governance. The paper begins with an overview of the evolution of EU competences in the fields of environmental protection in general, and external environmental policies in particular (section 1). It also discusses the implications of the Treaty of Lisbon for the EU external relations in environmental matters. The paper then turns (section 2) to analyzing the ways in which questions concerning competence affect the Union's environmental policies and its participation in international environmental cooperation, and provides an overview of the post-Lisbon debate concerning EU representation in multilateral environmental negotiations. It also reviews the recent debate concerning the legal basis and decision-making method for adopting the Union's positions in multilateral environmental negotiations. The paper concludes that questions concerning competence are crucial for the

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Union's engagement in international environmental cooperation. Under most MEAs, the Union participates alongside its member states, with complex implications for both EU and international law. For EU member states, the duty of loyal cooperation and the principle of the unity of the Union's international representation have important implications for the scope of their independent international action.

1. EU Competences in the Field of External Relations: Focus on Environmental Issues

1.1. Evolution of EU Competences in Environmental Matters

The origins of the European Union can be traced to the Treaty of Rome (1957), concluded in the 1950s. Environmental protection was not a priority for countries hoping to reinforce peace and security in the aftermath of World War II. It is therefore hardly surprising that the Treaty of Rome included no provisions on environmental matters (Lee 2005:1). Moreover, the Treaty only contained "meagre provisions" concerning the power to conclude international agreements (Marín Durán and Morgera 2012:9). Environmental consciousness began to evolve in Europe and elsewhere in the 1960s. The first major international gathering to discuss the state of the global environment, the Stockholm Conference on the Human Environment, took place in 1972. It gave important impetus for the development of international environmental law. In Europe, it coincided with the adoption of the First Programme of Action of the European Communities on the Environment for 1973-76. The Programme had the impact of placing the environment firmly on the European political agenda (Lee 2005:1). Concerning external environmental cooperation, the Programme required the Community to continue its active cooperation with other international bodies (Marín Durán and Morgera 2012:10).

While the competence of the European Economic Community (EEC) in the area of environmental policy remained a matter of controversy in the absence of explicit treaty basis, "numerous directives and regulations have been adopted on almost every conceivable aspect of environment policy since 1971" (Jans and Vedder 2012:4). Decision-making regarding environmental policy in the period was based on unanimous decision-making under Articles 100 and 235 of the EEC Treaty (1957), often using a dual legal basis (Jans and Vedder 2012). Article 100 of the EEC Treaty referred to situations where differences in national environmental legislation had detrimental effect on the common market, while Article 235 covered instances where Community action "should prove necessary to attain, in the course of the operation of the common market" one of the Community's objectives and the "Treaty has not provided the necessary powers." By virtue of extensive interpretation, environmental protection was considered an objective of the Community, as confirmed by the Court in 1985 in the *ADBHU* case concerning the validity of a directive on the disposal of waste oils (ECJ 1985, Jans and Vedder 2012).

Significant novelties were introduced with the Single European Act (1986), which entered into force in June 1987. From the environmental perspective this reform was important as the founding Treaty now included specific competences on environmental matters and introduced a new Title on the Environment. The Title laid down a set of objectives and principles to underpin EEC action in the environmental field (Marín Durán and Morgera 2012:11). As a consequence of these reforms, Article 235 (which is now, in amended form, Art. 352 Treaty on the Functioning of the European Union, TFEU) was now hardly ever invoked as a legal basis for environmental measures (Jans and Vedder 2012), as the new Title provided explicit powers.

Since the 1986 Single European Act, environmental provisions in the founding Treaties have evolved "through an almost continual process of treaty reform" (Lee 2005:1). The Treaty of Maastricht (1992b) was seminal for the European integration process, as it created the European Union with a three-pillar structure and changed the name of the EEC to the European Community (EC). With the Maastricht Treaty, environmental protection was included among the objectives of the Community. References were added to the precautionary principle and to the objective of "promoting international measures to deal with regional or worldwide environmental problems" (Marín Durán and Morgera 2012). From the procedural perspective, decisions under the Environment Title could now be taken by a qualified majority.

The 1997 Treaty of Amsterdam further strengthened the status of environmental protection as a constitutional objective, including by introducing a new task to promote "a high level of protection and improvement of the quality of the environment" (Treaties 1997b:Art. 2). It also enhanced the role of the European Parliament (EP) by introducing the co-decision procedure as the general decision-making procedure in environmental matters. In other words, the decision-making procedure had evolved significantly from unanimous decision-making by the Council to majority voting and participation by the Parliament (Jans and Vedder 2012).

The most recent set of treaty reforms was introduced by the Treaty of Lisbon which entered into force in 2009. While the Treaty of Lisbon is significant in many ways, in terms of its explicitly environmental provisions it largely maintained the *status quo* (Lee 2008). The main innovation in the environmental field is the explicit mention of climate change among the objectives of EU environmental policy (Lee 2008). More specifically, EU environmental policy seeks to promote "measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change" (Art. 191.1 TFEU). This addition has the effect of affirming the EU's goal of playing a global leadership role in the battle against climate change, which became a political objective for the EU already in the 1990s during the early days of international climate change cooperation (Kulovesi 2012b). It has also been argued that defining the objectives for EU external relations and embedding them as binding obligations in EU primary law was a major innovation of the Treaty of Lisbon (Van Vooren and Wessel 2012). The most relevant objectives for the Union's participation in international environmental governance include the objective that "in its relations with the wider world, the Union […] shall contribute to […] the sustainable development of the Earth" (Art. 3.5 TEU); and the requirement that the Union foster "the sustainable economic, social and environmental development of developing countries" 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 development" (Art. 21.1(d) and (f) TEU).

This evolution of an environmental policy competence and explicit environmental objectives for the EU is important because it implies that EU's external environmental policy may be furthered not only through international agreements but also through autonomous measures (Jans and Vedder 2012). While some have questioned the desirability and even the legality of the Union's autonomous international environmental measures (Scott and Rajamani 2012, Dhar and Das 2009), it has also been argued that some of these measures should be characterized as "minilateral" actions that seek to advance multilaterally-agreed environmental objectives, rather than being examples of unilateralism (Kulovesi 2012a). In any event we may note that internal EU legislation can have important implications in the field of EU external environmental policy, as for instance where the EU sets internal environmental standards which have an international impact by regulating access to the large and influential EU market.

Key examples in this respect include Regulation 1907/2006 on Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), which requires companies to provide data about the health and environmental impacts of chemicals placed on the EU market (Scott 2009). Foreign companies operating in the EU market are

under an obligation to comply with these requirements. According to Scott, the size and importance of the EU market for American manufacturers "creates a strong incentive for comparable standards to be introduced at home" (Scott 2009:908). In this sense, REACH represents "a striking and vivid example of law's migration" whereby state legislatures and private actors in the United States "have used it as a source of inspiration, ideas, and information in pursuing and promoting regulatory and market-place reform at home" (Scott 2009:941-942). The Timber Regulation 995/2010 prohibits the placing on the EU market of illegally harvested timber and timber products, and introduces a requirement for operators to exercise due diligence and to keep records of their suppliers and customers. In the absence of an internationally agreed definition of illegal logging, Article 2.1(g) of the Timber Regulation refers to legislation of the country where the timber was harvested as the basis for defining illegal logging. In the field of climate change, the EU has also attempted to include in its Emissions Trading Scheme (ETS) greenhouse gas emissions from foreign airlines (Kulovesi 2011, Scott and Rajamani 2012). Furthermore, the Union's 2009 Climate and Energy Package contains several elements that seek to influence climate policy outside the EU (Kulovesi, Morgera and Muñoz 2009).

At the time of the Single European Act, the question of the extent to which the Union's environmental objectives were limited in a territorial sense "was a matter of discussion" (Jans and Vedder 2012:37). Although the implied nature of early environmental competence might suggest that it was limited to action within the EU, in fact the European Court of Justice (ECJ) has always recognised the close link between internal and external measures. The possibility of extraterritorial action (in conformity with international law) found support in the Court's 1976 *Kramer* decision concerning the extent to which the Community's authority applied to fishing on the high seas. In its decision, the Court established that the Community had internal competence for the conservation of marine biological resources and ruled that "it follows […] from the very nature of things that the rule-making authority of the Community *ratione materiae* also extends - in so far as the Member States have similar authority under public international law - to fishing on the high seas" (ECJ 1976; Jans and Vedder 2012).

As will be discussed below, the external dimension of EU environmental policy has gradually gained prominence (Marín Durán and Morgera 2012). The Court has recently made an interesting contribution to the discussion on extraterritorial environmental measures in the *ATAA* case, concerning the compatibility with international law of the inclusion into the EU Emissions Trading Scheme of greenhouse gas emissions by flights to and from EU airports by non-European airlines (ECJ 2011, Kulovesi 2012a). As the Court pointed out, "The European Union must respect international law in the exercise of its powers" and therefore EU legislation "must be interpreted, and its scope delimited, in the light of the relevant rules of the international law of the sea and international law of the air" (ECJ 2011:para 123). However according to the Court the legislation did not infringe the principle of territoriality since the basis of its application was the fact that the aircraft started or finished their flight within EU member state territory: "the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question […] the full applicability of European Union law in that territory" (ECJ 2011:para 125-129).

1.2. EU External Environmental Competence

As we saw above, the Union's environmental policy has evolved gradually since the 1970s, initially in the absence of an explicit legal basis. Regardless of this, European countries have sought to act in a coordinated manner internationally, including through the EU, since the early days of international environmental cooperation (Oberthür 1999). By pooling their efforts, they have been able to shape and influence various environmental regimes and institutions, including those addressing biodiversity, the ozone layer, biotechnology and climate

change (Oberthür and Roche Kelly 2008). In more specific terms, the EEC participated in four MEAs before the 1986 Single European Act (Marín Durán and Morgera 2012).

From the point of view of competences, the Community's early participation in MEAs was made possible through the doctrine of implied treaty-making powers developed by the ECJ in decisions such as *AETR* and *Kramer* (ECJ 1971 and 1976). According to this case law, the adoption of common rules by the EU institutions may enable the EU to exercise external competence, and even - to the extent that such action would affect those rules or alter their scope - preclude the member states from independent external action (ECJ 1971, Van Elsuwege and Merket 2012). External EU competence may thus be implied from the existence of internal legislation. Implied external competences have also been found to exist where competence is explicitly provided for in an internal legislative act and even - though rarely - prior to the adoption of secondary legislation by implication from the simple existence of internal powers, if the participation by the Community in an envisaged international agreement is necessary for the achievement of the objectives contemplated by the Treaty (Marín Durán and Morgera 2012).

Since the Single European Act, the EEC/EC has concluded several key MEAs on the basis of the Title on the Environment. These include: the Vienna Convention for the Protection of the Ozone Layer (1985) and its Montreal Protocol on Substances that Deplete the Ozone Layer (1987); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989); the United Nations Framework Convention on Climate Change (UNFCCC, 1992c) and its Kyoto Protocol (1997a); the Convention on Biological Diversity (1992a) and its Cartagena Protocol (2000); the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991); and the United Nations Convention on the Law of the Sea (UNCLOS, 1982)[1] (Jans and Vedder 2012).

In some instances questions have been raised concerning the appropriate treaty competence for international environmental agreements. Specific international initiatives may arguably fall under trade policy competence (which is exclusive to the EU) as well as, or instead of, environmental policy powers, giving rise to some difficult boundary questions. Identification of the appropriate legal basis is important both because the principle of conferral requires the EU to act only on the basis of powers derived either expressly or impliedly from the Treaty and because the legal basis will determine the nature and scope of the EU power and the applicable procedural rules. The ECJ's case law reflects a preference for a single legal basis, identified according to the "predominant purpose" of the instrument (Cremona 2012a). For example, in the context of the Cartagena Protocol on Biosafety, which regulates transboundary movements of living modified organisms, a question arose whether the trade-related elements in the treaty required a trade as well as an environmental legal basis. The Court ruled that the Community's conclusion of the Cartagena Protocol must be based on a single legal basis related to environmental policy (ECJ 2001). A similar conclusion was reached with respect to the Basel Convention on movements of hazardous waste (ECJ 1994 and 2009c), the Court emphasising the need for coherence between the legal basis for the conclusion of the Convention and that for the implementing internal regulation. However in other cases a dual trade and environment legal basis has been approved both for the conclusion of an MEA and the implementing legislation (ECJ 2006a and 2006b).

The EU's environmental policy powers are shared with the member states (Art. 4 TFEU), and as a result the member states may continue to exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence (Art. 2.2 TFEU). In addition, the EU has an exclusive competence to conclude an international agreement "when its conclusion is provided for in a legislative act of the Union or

1 UNCLOS came into force in 1994; the EC acceded in 1998.

is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope" (Art.3.2 TFEU).

The relative scope of EU and member state competence thus depends on the extent of the measures the EU institutions have taken - internally or externally. In these provisions the Treaty of Lisbon has sought to codify complex case law (ECJ 1971, 1977, 1993 and 2006c, Cremona 2008b). In practice, most MEAs are mixed agreements - that is, agreements to which both the EU and its member states are parties - and MEA ratifications are accompanied by a declaration of competence on the part of the EU (Delgado Casteleiro 2012). From the perspective of both EU and international law, the respective obligations and responsibilities of the EU and its Member States under mixed agreements are not straightforward (Hillion and Koutrakos 2010, Cremona 2012b).

For example, in the *MOX Plant* ruling (ECJ 2006c) the Court found that Ireland had breached EU law by launching dispute proceedings against the United Kingdom (UK) under the UNCLOS. The dispute concerned international transfer of radioactive substances and the protection of the marine environment of the Irish Sea, an issue falling under the shared competence of the EU and its member states. As the subject matter of the dispute fell within the scope of EU law, the Court held that it had exclusive jurisdiction and by launching proceedings under the UNCLOS without first having consulted the European Commission, Ireland had failed to comply with its EU law obligations (ECJ 2006c). It has been argued that this ruling contributes towards clarifying the extent of the duty of cooperation in the international arena (Casolari 2012) although it can also be argued that the Court did not make a clear enough distinction between the competence to conclude an agreement creating international obligations, and the scope of (internal) EU law creating compliance and cooperation obligations within the EU legal order (Cremona 2008a).

The duty of loyal or sincere cooperation, developed through case law, has also played a role in shaping the external environmental action of both Union and member states. It has been argued that this duty "mitigate[s] the complexities following from the internal allocation of competences for the external representation of the Union" (Van Elsuwege and Merket 2012). It is certainly one of the principles underpinning the working of joint EU and member state participation in mixed agreements (ECJ 1993). The legal basis for the duty of cooperation may now be found in the principle of sincere cooperation (Art. 4.3 TEU) which is a key constitutional principle of the EU legal order (Hillion 2010, Van Elsuwege and Merket 2012). As currently formulated the duty applies to both the member states and EU institutions (Van Elsuwege and Merket 2012) although it is not fully reciprocal in the sense that a dereliction by one party does not justify a dereliction by another (ECJ 2009b).

The strength of the duty in the context of mixed MEAs may be seen from the case *Commission v. Sweden* (ECJ 2010), the dispute arising out of Sweden's unilateral submission of a proposal to list a new substance in Annex A of the Stockholm Convention on Persistent Organic Pollutants (POPs Convention, 2001) while work on the matter was on-going within the EU at the Council level (ECJ 2010, Cremona 2011). According to the Court, by acting unilaterally Sweden violated its duty of cooperation and compromised the unity of the international representation of the EU and its member states, weakening their negotiating power with respect to other parties (ECJ 2010, Casolari 2012). The duty of cooperation thus implies that member states' actions at the international level, even in a field of shared competence such as environmental policy, must not be allowed to disrupt the EU's internal decision-making process (Van Elsuwege and Merket 2012, Delgado Casteleiro and Larik 2011).

In *Commission v. Greece*, the Court ruled that EU competence also affects the adoption of positions by member states within international organizations (ECJ 2009b, Van Elsuwege and Merket 2012). The dispute concerned a submission by Greece to the International Maritime Organization (IMO) relating to the implementation of the 1974 International Convention for the Safety of Life at Sea, was found to breach the duty of loyal cooperation.

Although the EU is not a member of the IMO, subject matters dealt with by the IMO fall within the ambit of EU law; indeed this particular issue is regulated by EU legislation and the member states can act externally only via EU authorisation. According to the Court, "the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest" (ECJ 2009b:para 31).

2. The Impact of Competences on Environmental Governance Policies: EU Participation in International Environmental Cooperation

The previous section shed light on the reasons why questions concerning competence play an important role in shaping the Union's role in the global arena. This section provides examples of the ways in which questions concerning competence, representation and legal basis influence the external environmental policies of the EU. It focuses on ongoing debates concerning the implications of the Treaty of Lisbon for the EU representation in MEA negotiations, and the legal basis and voting method applicable to the adoption of Council conclusions establishing the Union's position in MEA negotiations.

2.1. The EU in MEA Negotiations

The implications of the Treaty of Lisbon for EU representation in multilateral environmental negotiations have given rise to divergent interpretations. While accepting that the Lisbon Treaty changed very little for EU internal environmental law and policy, Buick argues that the new context for EU external policymaking "fundamentally challenges the pre-Lisbon practice" for EU representation in environmental affairs (Buick 2012:80). Traditionally, the Commission has represented the Union in some aspects of MEA negotiations; for instance, it has played an important role in negotiations on the protection of the ozone layer (Oberthür 1999). Under other mixed agreements, including the UNFCCC, the Commission and the member states have tended to represent the Union jointly. A flexible system had been developed for coordinating the EU's negotiating positions and strategies through a working group of the Council (Working Party on International Environmental Issues), chaired by the rotating Presidency and assisted by the Commission and the incoming Presidency (Oberthür and Roche Kelly 2008). As we saw in the previous section, the ECJ has on several occasions addressed issues of "unity of international representation" and the constraints that this imposes on independent international action by the member states. Importantly for the adoption of the Union's negotiating positions, the dispute underlying *Commission v. Sweden* arose when Sweden submitted a unilateral proposal to amend Annex A of the POPs Convention. As we saw above, the Court found that it had violated the duty of loyal cooperation (ECJ 2010, Cremona 2011). Internal difficulties to coordinate and come up with common negotiating positions have sometimes also had important external implications, as illustrated, for example, by the current debate (discussed below) on whether the Union's negotiating positions in the UNFCCC negotiations should be adopted by unanimity or qualified majority.

The climate change process is useful in terms of illustrating the different approaches that the EU has used to coordinate its position and improve its participation in the process. Given the technical complexity of the UNFCCC negotiations, the EU has created several expert groups to support the work of the Council's Working Party on International Environmental Issues and delegated to such expert groups the authority to develop negotiating positions (Oberthür and Roche Kelly 2008). Furthermore, to enhance continuity in its participation in the UNFCCC process, a system of "issue leaders" and "lead negotiators" has also been used since 2004, whereby individuals from different member states and the Commission have been assigned to represent the

EU in informal negotiating groups on behalf of the rotating Presidency (Oberthür and Roche Kelly 2008). Thus, in formal negotiating settings, EU statements have been commonly made by the country holding the rotating Presidency from behind its own flag and speaking on behalf of the EU and its member states (Buick 2012). In informal settings, however, the EU has mostly been represented by the lead negotiators and assisted by the issue leaders.

The entry into force of the Treaty of Lisbon has given rise to a debate as to whether its provisions on external representation leave room for continuing these practices. On the one hand it is argued that the Treaty of Lisbon provided the Commission with an explicit mandate to represent the Union externally on all matters except for the Common Foreign and Security Policy (CSFP) where the task falls to the High Representative (Buick 2012, Art. 27(2) TEU). Thus, the argument goes, it is now for the Commission to ensure the Union's external representation in the field of environmental policy, whether or not competence is shared; the Treaty of Lisbon no longer gives a role to the rotating Presidency in representing the Union externally (Buick 2012). Where environmental policy issues are addressed in the framework of an international organization, such as the UN General Assembly or UN Commission on Sustainable Development, the EU should be represented by the Union Delegation to this organization (Buick 2012). If the EU does not have full membership status in an international organization, the member states are obliged to act jointly in the Union's interest on the basis of the duty of loyal cooperation (Art. 4(3) TEU, ECJ 2010, Cremona 2009, Casolari 2012). Not surprisingly, an interpretation of the Treaty of Lisbon which emphasizes the external representation role of the Commission at the expense of the rotating Presidency has met with strong opposition from some member states. The second line of argument in the debate thus stresses the usefulness of the pre-Lisbon practices and the need for "continued collaboration between Member States and the European institutions representing the EU externally" (Thomson 2012:96). A way needs to be found to achieve "unity in the international representation of the Union and its Member States" without denying their separate identities (Cremona 2011).

The divergent views by the Commission and the member states were apparent in the failure by the EU to agree on its representation at the first session of the International Negotiating Committee for the adoption of an International Agreement on Mercury, held in June 2010 (Baere 2012). Subsequently, the Commission and the member states have sought to establish working arrangements to allow the EU to continue its engagement in MEA negotiations (Council 2011). In this document, the term "EU actor" is used "to denote those actors competent to represent the Union as provided in the Treaties, i.e. the President of the European Council, the Commission, the High Representative and EU Delegations" (Council 2011); thus the rotating Presidency is not regarded as an "EU actor" in this external context. Nevertheless, the member states may decide how to coordinate their position and be represented externally, and "may request EU actors or a member state, notably the member state holding the rotating Presidency of the Council, to do so on their behalf." (Council 2011) Meanwhile, several Court applications by the Commission are pending that, although not directly concerning environmental policy, are expected by some to provide legal clarity to the situation (Notaro 2012, van Elsuwege and Merket 2012).

2.2. Legal Basis for Adopting EU Negotiating Positions

Another interesting current debate concerns the legal basis for adopting Council conclusions containing the Union's position in the UN climate change negotiations. In practice, Council conclusions on the Union's negotiating position have been adopted by unanimous decision, regardless of the fact that Article 218.8 TFEU specifies qualified majority as the normally applicable voting rule, but reflecting the fact that the Union's position will in fact also be a common position of the EU and its member states. Questioning the practice, World Wildlife Fund for Nature (WWF) requested information from the Council concerning the legal basis for the adoption

of Council conclusions (unsuccessfully; for analysis, see Leino-Sandberg 2013). Also the European Parliament adopted in November 2012 a resolution on the UNFCCC negotiations that recalls provisions in the Treaty of Lisbon which indicate that the Council "shall act by a qualified majority both for general measures (Article 16 TEU) and throughout the procedure when negotiating and entering into new international agreements (Article 218 TFEU)" (European Parliament 2012:para 13). The motivating factor for both the WWF and the European Parliament is partly that in 2012, Poland vetoed Council conclusions on both the Commission's energy roadmap and the low-carbon roadmap (Keating 2012). Given that its economy relies heavily on domestic coal, Poland fears the economic implications of climate policies and has also blocked Council conclusions on certain "progressive" aspects of the Union's proposed negotiating position on climate change (Nielsen 2012, Hassi 2012). The choice of unanimity as a decision-making procedure has therefore had the practical effect of watering down some of the EU's objectives in this policy area (Leino-Sandberg 2013).

Where an EU negotiating position relates to the position to be adopted within an institutional framework established by a MEA, the legal position can be complex (Heliskoski 2010, Cremona 2011). Where a body established by an international agreement (such as a Conference of the Parties) will adopt acts having legal effects, Article 218.9 TFEU establishes procedural requirements: there must be a decision adopted by the Council, on a proposal from the Commission; this is a "decision" as defined in Article 288 TFEU and as such it requires a legal basis (ECJ 2009a). These decisions establish a Union position; where the agreement is mixed there may also be the need for the adoption of a common position of the member states and a variety of instruments have been used for this purpose including Council decisions, decisions of the Representatives of the Governments of the Member States meeting in Council, and inter-institutional arrangements (Heliskoski 2010). In *Commission v. Sweden*, discussed above, it was held that an agreed "common strategy", even where not in the form of a Council decision and without a formal legal basis, could create a binding duty of cooperation for the member states based not on Article 218.9 TFEU but on Article 4.3 TEU (ECJ 2010).

Conclusions

This paper has analysed the evolution of EU competences and its impact on the EU's external environmental policies. At the dawn of international environmental cooperation in the early 1970s, the EEC lacked explicit competence on environmental matters and its participation in international environmental agreements relied on the implied powers doctrine developed through the ECJ's complex case law. Following the 1986 Single European Act, the Title on the Environment has been used as the legal basis for most MEAs to which the Union is a party. For some MEAs, however, the Court has been engaged in determining whether the environmental provisions are the appropriate legal basis for the Union's competence, or whether certain trade-related MEAs fall (also) under the common commercial policy. While the Cartagena Protocol on Biosafety and Basel Convention were concluded on a single legal basis related to the environment, the Rotterdam Convention used a dual trade and environment legal basis. Determining the appropriate legal basis is important as the EU's environmental policy powers are shared with the member states, while its competence on trade issues is exclusive.

Most MEAs are mixed agreements to which both the Union and its member states are parties. This is a complex legal construction and the respective obligations and responsibilities of the Union and its member states both internally and externally are not straightforward. This is illustrated by the Court's case law, which also emphasizes the duty of loyal or sincere cooperation. In the *Mox Plant* case the Court found that Ireland violated EU law by launching dispute settlement proceedings against the UK under the UNCLOS without first consulting the European Commission. In *Commission v. Sweden*, the Court found that Sweden violated EU law by unilaterally

proposing the addition of a new substance to Annex A of the POPs Convention. The duty of loyal cooperation also affects the scope for member states to adopt positions within international organizations. The Court has emphasized "the unity of international representation" and the constraints that this imposes on independent actions in MEA negotiations by the member states.

Following the Treaty of Lisbon, EU representation in MEA negotiations and other relevant international organizations has been subject to debate. While some argue that the new context of EU external policymaking "fundamentally changes the pre-Lisbon practice" and the Commission now has the mandate to represent the Union externally in MEA negotiations, others stress the need for continuing the pre-Lisbon practices and for continued collaboration between EU institutions and member states in representing the EU externally (Thomson 2012). After divergent interpretations of the Treaty of Lisbon lead to the failure by the EU to agree on its representation in the Mercury Convention negotiations, the Commission and the member states have sought to establish working arrangements to allow the EU to continue its engagement in MEA negotiations.

In the global context, the EU has sought to play an active role in environmental matters. In addition to participating actively in various MEAs and other relevant international institutions, and promoting environmental protection through its bilateral and regional relations, the EU uses its internal legislation to address global environmental problems, such as climate change, illegal logging and chemical safety. From the perspective of EU law, there were initially some questions concerning the extraterritorial reach of the Union's environmental competence. The Treaty of Lisbon has arguably emphasized the global dimension of the Union's environmental policy. In its recent *ATAA* decision, the Court held that EU legislation did not violate the principle of territoriality even if "certain matters contributing to the pollution of the air, sea or land territory of the member states originate in an event which occurs partly outside that territory". From the legal perspective, there is thus scope for the EU to engage in protecting the global environment both under MEAs and through its internal legislation.

The above analysis shows that questions concerning competence are salient for the EU's external environmental policies. Given that the EU may only act when it has competence to do so, the legal basis for its engagement in international environmental cooperation is a crucial issue from the perspective of EU law. Under most MEAs, the Union participates alongside its member states, with complex implications for both EU and international law. For the EU member states, the duty of loyal cooperation and the unity of the Union's international representation have important implications, limiting the scope of their independent international action. The unique nature of the EU as a complex international actor has important implications for its participation in international environmental cooperation.

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The Project

In an era of global flux, emerging powers and growing interconnectedness, transatlantic relations appear to have lost their bearings. As the international system fragments into different constellations of state and non-state powers across different policy domains, the US and the EU can no longer claim exclusive leadership in global governance. Traditional paradigms to understand the transatlantic relationship are thus wanting. A new approach is needed to pinpoint the direction transatlantic relations are taking. TRANSWORLD provides such an approach by a) ascertaining, differentiating among four policy domains (economic, security, environment, and human rights/democracy), whether transatlantic relations are drifting apart, adapting along an ad hoc cooperation-based pattern, or evolving into a different but resilient special partnership; b) assessing the role of a re-defined transatlantic relationship in the global governance architecture; c) providing tested policy recommendations on how the US and the EU could best cooperate to enhance the viability, effectiveness, and accountability of governance structures.

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