

# European Environmental Law

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## Abstract

This chapter explores the development of EU environmental law with a view to stressing its unique characteristics, and their relevance, from an international environmental law perspective. After outlining the objectives of Union action in the area of environmental protection and the division of competences, the chapter focuses on how a key component of EU environmental law, the environmental integration principle, has affected other EU policy areas of relevance from an international perspective: the EU Common Agricultural Policy and environmental management in Europe's regional seas. The conclusions reflect on the extent to which the strengths and weaknesses of the Union's approach to integrated environmental management allow for mutual learning in an international context, including with regard to matters at the intersection of international human rights and environmental law.

## Introduction

The European Union (EU) makes an interesting topic for international environmental lawyers, for several reasons. The EU is a prominent international actor, proactively engaged in the development and implementation of international environmental law. It is a party to over 45 multilateral environmental agreements (MEAs).<sup>1</sup> This has required changes in the process of international law-making and implementation, to enable the EU to participate more effectively in international fora,<sup>2</sup> possibly paving the way for other regional organizations to do so in the future. In addition, EU environmental law itself is the most sophisticated example of a regional environmental regime, comprising over 200 secondary legislative instruments on a wide range of environmental topics.<sup>3</sup> As such, it can be of inspiration – in its successes and shortcomings – to other regions undergoing processes of economic integration.<sup>4</sup> Within MEAs and related international processes, the EU makes a powerful negotiating block, speaking on behalf of its 27

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<sup>1</sup> European Commission, 'International Issues. Multilateral Environmental Agreements' <[https://ec.europa.eu/environment/international\\_issues/agreements\\_en.htm](https://ec.europa.eu/environment/international_issues/agreements_en.htm)> accessed November 2019.

<sup>2</sup> Ludwig Krämer, 'Regional Economic International Organizations: The European Union as an Example' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007).

<sup>3</sup> Elisa Morgera and Kati Kulovesi, 'Environmental Law' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP forthcoming).

<sup>4</sup> Philippe Sands, *Principles of International Environmental Law* (CUP 2003) 733.

member states and other associated countries. Thus, the EU uses its external policies at the multilateral level to increase its influence over international law- and policy-making.<sup>5</sup> 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.<sup>6</sup>

Significantly, attempts to influence international environmental law by the EU are not confined to its external action. The EU is also increasingly using its 'domestic' law-making powers to inspire the development of international environmental law in areas as diverse as climate change,<sup>7</sup> chemicals, ocean governance, and biodiversity conservation.<sup>8</sup> Furthermore, as a 'new legal order of international law' that imposes obligations and confers rights not only on states, but also on their nationals,<sup>9</sup> 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 often referred to as 'Europeanization of international law').<sup>10</sup> By becoming part of the EU legal order, international environmental law acquires primacy over conflicting provisions of national law. In addition, national courts are obliged to interpret provisions of national law, and EU law itself is to be interpreted, in conformity with Europeanized international environmental norms. This means that, in principle, international environmental instruments and norms can be used to control the validity of EU norms, but the practice of EU adjudication bodies has been quite inconsistent in

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<sup>5</sup> Jan Wouters, André Nollkaemper and Erika de Wet, 'Introduction: The "Europeanisation" of International Law' in Jan Wouters, André Nollkaemper and Erika de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and Its Member States* (TMC Asser Press 2008) 7; Antonio Cardesa-Salzmann and Elisa Morgera, 'The EU's External Action after Lisbon: Competences, Policy Consistency and Participation in International Environmental Negotiations' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar forthcoming).

<sup>6</sup> Gracia Marín Durán and Elisa Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012).

<sup>7</sup> Kati Kulovesi, Elisa Morgera and Miquel Muñoz, 'Environmental Integration and the Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) 48 *Common Market L. Rev.* 829; and Kati Kulovesi and Elisa Morgera, 'The Role of the EU in Promoting International Climate Change Standards' in Inge Govaere and Sara Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill 2014).

<sup>8</sup> Elisa Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013); and Elisa Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' (2014) 16 *Cambridge Yearbook of European Legal Studies* 109.

<sup>9</sup> Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1; Sands (n **Error! Bookmark not defined.**) 734. Note that the Court has no longer used that expression, but rather referred to the EU as a *sui generis* legal system: Markus Puder, 'The Rise of Regional Integration Law: Good News for International Environmental Law' (2011) 23 *Geo. Int'l Envtl. L. Rev.* 165, 172.

<sup>10</sup> Wouters and others (n 5) 7–11.

this connection.<sup>11</sup> In addition, once included in the EU legal order, international environmental law can be enforced through EU-level procedures against member states that have failed to transpose – or to actually apply and enforce – international treaties concluded by the EU. Action for damages brought by individuals against the EU or against member state authorities for breaches of Europeanized international environmental norms is also, in principle, possible.<sup>12</sup> From a comparative perspective, EU environmental law is significantly influencing the development of national environmental law not only in the member states,<sup>13</sup> but also in third countries. Countries in the process of acceding to the EU, those aspiring to EU membership,<sup>14</sup> and those interested in a closer political and economic relationship with the Union, have concluded international treaties providing for the approximation of their environmental laws to those of the EU.<sup>15</sup>

Against this background, this chapter explores the development of EU environmental law with a view to stressing its unique characteristics, and their relevance, from an international environmental law perspective. It begins by outlining the objectives of Union action in the area of environmental protection and the division of competences under the Treaty of Lisbon. It then focuses on how a key component of EU environmental law, the environmental integration principle, has affected other EU policy areas of relevance from an international perspective: the EU Common Agricultural Policy and the management of Europe's regional seas. The conclusions will reflect on the extent to which the strengths and weaknesses of the Union's approach to integrated environmental management allow for mutual learning in an international context, including with regard to matters at the intersection of international human rights and environmental law.

## **Fifty years of evolution: EU environmental law between 1958–2008**

Traditionally, the evolution of EU environmental law is illustrated by successive phases characterized by the entry into force of the treaties that instituted and regulate the EU (the Treaties).<sup>16</sup> 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).<sup>17</sup>

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<sup>11</sup> Aarhus Convention Compliance Committee, Findings and Recommendations with regard to Communication ACCC/C/2008/32 (Part II) concerning Compliance by the European Union (17 March 2017) para 83.

<sup>12</sup> Wouters and others (n 5) 9–10. On the special legal protection afforded to EU environmental law, Jan H. Jans and Hans H.B. Vedder, *European Environmental Law* (4th edn, Europa Law Publishing 2012) ch 5.

<sup>13</sup> It has been calculated that around 70–80% of national environmental legislation within the EU member states is adopted as a consequence of EU environmental law: Krämer (n **Error! Bookmark not defined.**) 860.

<sup>14</sup> Kirstyn Inglis, 'Enlargement and the Environment *Acquis*' (2004) 13 Rev. Eur., Comp. & Int'l Env'tl. L. 135.

<sup>15</sup> Marín Durán and Morgera (n 6); Wouters and others (n 5) 7.

<sup>16</sup> Jans and Vedder (n **Error! Bookmark not defined.**) 3–9; Sands (n **Error! Bookmark not defined.**) 740–749. 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.

<sup>17</sup> TEU, art 5.

Rather than introducing radically new elements, treaty amendments have often endorsed developments that had already appeared and crystallized in the practice of the EU. In addition, although 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.<sup>18</sup>

### ***First phase (1958–1972): birth of the EEC and ‘incidental’ environmental action***

The founding Treaty of the European Economic Community (EEC) (Treaty of Rome) provided for the creation of a common European market, with a view to preserving and strengthening peace and stability.<sup>19</sup> The common market was based on a customs union, a competition policy and a common commercial policy, as well as common policies on agriculture and transport. The 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 Energy Community in 1958. Taken together, these European Communities created a ‘single, unrestricted Western European market in potential pollutants – steel, iron, coal and nuclear materials, as well as other goods’.<sup>20</sup> 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.<sup>21</sup> Nonetheless, the EEC took action that can be described as ‘incidentally environmental’.<sup>22</sup> That is, legislative developments occurred which held relevance for environmental protection but had the explicit aim of promoting economic integration.

### ***Second phase (1972–1987): emergence of EEC environmental policy***

With the convening of the first global summit on environmental protection, the 1972 Stockholm Conference on the Human Environment, the EEC, as part of the wider international community, identified environmental protection as an issue requiring urgent action.<sup>23</sup> That 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

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<sup>18</sup> Ingmar von Homeyer, ‘The Evolution of EU Environmental Governance’ in Joanne Scott (ed), *Environmental Protection: European Law and Governance* (OUP 2009).

<sup>19</sup> Lorna Woods, Philippa Watson and Marios Costa, *Steiner & Woods EU Law* (13th edn, OUP 2017) 4.

<sup>20</sup> Jane Holder and Maria Lee, *Environmental Protection, Law and Policy: Text and Materials* (2nd edn, CUP 2007) 156.

<sup>21</sup> Maria Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Hart Publishing 2005) 1.

<sup>22</sup> Jans and Vedder (n 12) 3.

<sup>23</sup> Von Homeyer (n 18) 2; Sands (n **Error! Bookmark not defined.**) 741. McGillivray and Holder argue that this influence explains the anthropocentric approach of EU environmental law: Donald McGillivray and Jane Holder, ‘Locating EC Environmental Law’ (2001) 20 Y.B. Eur. Envtl. L. 139, 144.

help attenuate disparities in living standards and quality of life. This led to the consideration of ‘non-material’ values, such as environmental protection, as 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.<sup>24</sup>

The First Programme of Action of the European Communities on the Environment was a policy declaration setting broad-ranging environmental objectives for the EEC, notably including the search of common solutions to environmental problems with States outside the EEC and international organizations.<sup>25</sup> The environmental policy and legislation enacted during this phase were, however, not backed by a Treaty-based explicit competence for the EEC. Rather, they were based on an extensive interpretation of the provisions of the Treaty of Rome.<sup>26</sup> 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.<sup>27</sup> This was used in cases where differences in national environmental legislation were considered to have (or were likely to have) a detrimental effect on intra-Community trade and competition.<sup>28</sup> Yet, this practice allowed environmental law to develop only to the extent permitted by economic considerations. Another legal basis for environmental legislation was the so-called flexibility clause.<sup>29</sup> This empowered the EEC to take the action necessary to attain the objectives of the Community where the Treaty itself had not provided the requisite powers. In addition, a judicially made doctrine of implied treaty-making powers<sup>30</sup> allowed for broader leeway in environmental law-making by the EEC,<sup>31</sup> while at the same time enabling the EEC to become a party to multilateral and regional environmental agreements.<sup>32</sup>

In 1985, the Court of Justice declared for the first time that environmental protection was one of the Community’s ‘essential objectives’.<sup>33</sup> In doing so, it sanctioned the possibility of an autonomous environmental policy of the EEC independent of the establishment of the common market.<sup>34</sup>

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<sup>24</sup> Bulletin EC 1972, No. 10.

<sup>25</sup> 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.

<sup>26</sup> Jans and Vedder (n 12) 4; Holder and Lee (n 20) 157–158.

<sup>27</sup> EEC Treaty art 100, later EC Treaty art 94, now TFEU art 115; see also Case 92–79 *Commission v Italy* [1980] ECR 1115.

<sup>28</sup> Jans and Vedder (n **Error! Bookmark not defined.**) 4. To this day, the approximation of laws (now TFEU art 114) provides the legal basis for legislation with an inherently environmental character, such as regulations for the authorisation of potentially harmful products like genetically modified organisms (GMOs): Miranda Geelhoed, ‘Divided in Diversity: Reforming the EU’s GMO Regime’ (2016) 18 *The Cambridge Yearbook of European Legal Studies* 20.

<sup>29</sup> EEC Treaty art 235, later EC Treaty art 308, now TFEU art 352.

<sup>30</sup> Case C-22/70 *Commission v Council* [1971] ECR 263; *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 (n 6) ch 1.

<sup>31</sup> Jans and Vedder (n 12) 5.

<sup>32</sup> *Ibid.* 58–60.

<sup>33</sup> Case 240/83 *Procureur de la République v ADBHU* [1983] ECR 531.

<sup>34</sup> Lee (n **Error! Bookmark not defined.**) 16.

### ***Third phase (1987–1993): an explicit legal basis for EEC environmental policy***

The entry into force of the Single European Act (SEA) in 1987 marks the beginning of the third phase in the evolution of EU environmental policy. The SEA aimed to eliminate remaining barriers to the creation of the internal market and introduced procedural changes to accelerate decision-making by the EEC.<sup>35</sup> It also introduced an explicit legal basis for environmental legislation by setting the objectives, principles, and criteria of EEC environmental policy.<sup>36</sup> Accordingly, the objectives of EEC action in the 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 utilization 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 Spain and Portugal joining the EEC in 1986, Germany and Denmark – countries with traditionally higher environmental standards – insisted on introducing into the Treaty a provision allowing member states to maintain or introduce more stringent environmental protection measures than those pursued at EEC level,<sup>37</sup> thereby creating the possibility for a ‘two-speed environmental Europe’.<sup>38</sup> Such ‘minimum harmonization’ was, however, only provided for legislation adopted on the basis of the EEC’s explicit environmental competence. Other legislation seeking to protect both environmental and prevailing economic interests would still require an approximation of laws.<sup>39</sup>

### ***Fourth phase (1993–1997): 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 as the ‘European Community’ (EC) to reflect a wider purpose than just economic integration, moving into further integration in social and political areas, and providing for a separate Treaty for a new entity – the European Union (EU). The EU was built upon three pillars: the first pillar embodied the European Community and its supra-national decision-making modalities, while the second and third pillars represented cooperation among the member states based on intergovernmental modalities rather than transfer of sovereign powers.

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<sup>35</sup> Woods, Watson and Costa (n 19) 6.

<sup>36</sup> Post-SEA, EEC Treaty art 130r.

<sup>37</sup> Marie Soveroski, ‘EC Enlargement and the Development of European Environmental Policy: Parallel Histories, Divergent Paths?’ (2004) 13 Rev. Eur., Comp. & Int’l Env’tl. L. 127.

<sup>38</sup> Holder and Lee (n 20) 154.

<sup>39</sup> See, nowadays, Geelhoed (n 28).

The Treaty of Maastricht is noteworthy for having included among the very objectives of the EC the ‘promotion, throughout the Community, of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment’.<sup>40</sup> Although 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.<sup>41</sup>

The Treaty of Maastricht also significantly amended the legal basis on environmental policy, by adding a reference to the precautionary principle and the objective of promoting international measures to deal with regional or global environmental problems.<sup>42</sup> In addition, it established that the general rule for decision-making on environmental policy was qualified majority with certain matters remaining subject to unanimity. These have since remained unaltered.

### ***Fifth phase (1997–2008): 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 organization to a more political one founded on fundamental rights and principles of liberty, democracy, and the rule of law.<sup>43</sup> 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 the objectives of the EC as the ‘harmonious, balanced and sustainable development of economic activities’ and included there explicit reference to a ‘high level of protection and improvement of the quality of the environment’.<sup>44</sup> It also upgraded a requirement for environmental mainstreaming in non-environmental policy areas (‘environmental integration’) to a general principle of EU law.<sup>45</sup> 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.<sup>46</sup> This procedure, which the Treaty of Lisbon renamed as the ‘ordinary legislative procedure’,<sup>47</sup> remains relevant for present-day environmental policy.

This phase was punctuated by the so-called big-bang enlargement of 2004, which saw ten Central and South-Eastern European countries join the EU. 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 policy of new member states with that of the EU.<sup>48</sup> Crucially, the increased diversity

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<sup>40</sup> Post-Maastricht, EC Treaty arts 2 and 3(k). See Jans and Vedder (n **Error! Bookmark not defined.**) 6–7.

<sup>41</sup> Jans and Vedder (n 12) 7.

<sup>42</sup> Post-Maastricht, EC Treaty art 130r(1). See Sands (n **Error! Bookmark not defined.**) 746.

<sup>43</sup> Woods, Watson and Costa (n 19) 8–10.

<sup>44</sup> Post-Amsterdam, EC Treaty art 2.

<sup>45</sup> Post-Amsterdam, EC Treaty art 6.

<sup>46</sup> Post-Amsterdam, EC Treaty art 175. See Jans and Vedder (n 12) 8–9.

<sup>47</sup> TFEU art 294.

<sup>48</sup> Soveroski (n 37) 129.

across the 27 EU member states progressively led to more general environmental law-making at the supranational level.<sup>49</sup>

## **The Treaty of Lisbon: competences, objectives, and international relevance**

The 2009 Treaty of Lisbon amended the Treaty of the European Union (TEU), and also significantly amended the EC Treaty, which it renamed as the ‘Treaty on the Functioning of the European Union’ (TFEU). This reflected the fact that the EC had been merged with the EU, with the latter having been given international legal personality.<sup>50</sup> The TEU and TFEU are of equal value.<sup>51</sup> In addition, the Treaty of Lisbon established that the Charter of Fundamental Rights of the European Union, which includes a provision on environmental integration (see further later), would have the same legal value as the Treaties.<sup>52</sup>

### ***Environmental competences and Treaty objectives***

From an environmental perspective,<sup>53</sup> 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.<sup>54</sup> Furthermore, in exercising its environmental competence, the EU is bound by the objectives, principles, and policy considerations set out in the TFEU.<sup>55</sup> The objectives are:

preserving, protecting and improving the quality of the environment; protecting human health; ensuring the prudent and rational utilization of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.<sup>56</sup>

Given that these objectives are quite broadly defined, there is generally sufficient flexibility for this provision to be interpreted in a non-restrictive way and for the EU to adapt its environmental policy to new developments and emerging environmental

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<sup>49</sup> Krämer (n **Error! Bookmark not defined.**) 859.

<sup>50</sup> TEU art 47. Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 38–46.

<sup>51</sup> TFEU art 1(2) and TEU art 1(3).

<sup>52</sup> TEU art 6(1). See also Eloise Scotford, ‘Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights’ in Sanja Bogojevi and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018); and Sanja Bogojević, ‘EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?’ in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017).

<sup>53</sup> Maria Lee, ‘The Environmental Implications of the Lisbon Treaty’ (2008) 10 *Envtl. L. Rev.* 131; and Hans Vedder, ‘The Treaty of Lisbon and European Environmental Law and Policy’ (2008) 22 *J. Envntl. L.* 285.

<sup>54</sup> TFEU arts 4(2)(e) and 3(1)(d) respectively.

<sup>55</sup> TFEU art 191(3).

<sup>56</sup> TFEU art 191(1).

issues.<sup>57</sup> In addition, it has been argued that this provision allows the adoption of measures which result directly or indirectly in an improvement of the environment, such as conservation, restoration, and repressive, precautionary, preventive, and eminently procedural environmental measures.<sup>58</sup>

Ultimately, the substantive limits of the EU competence in the area of environmental protection are ‘determined on the case-by-case by the EU political institutions as they adopt measures in pursuance of the broadly-framed Treaty objectives, whether unilaterally or by concluding international agreements’.<sup>59</sup> The substantive limits of the Union’s environmental competence are thus reflected, as they evolve, in the EU ‘*acquis*’. That is, the body of rights and obligations arising from the content, principles, and political objectives of the Treaties; the legislation adopted in implementation of the Treaties; the case law of the European courts; and international agreements concluded by the EU – in other words, from the ‘growing legal universe’ produced by the EU governance system since the launch of the integration process.<sup>60</sup>

Though there are no clear substantive limits to the exercise of the Union’s environmental competence, this is still subject to the general principles of proportionality and subsidiarity. Under the latter principle, the EU will act only if and in so far as 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.<sup>61</sup>

### ***The EU’s external environmental policy***

Possibly the most significant environmental feature of the Treaty of Lisbon is the emphasis on the external dimension of EU environmental policy. Building on EU ambition to lead international environmental diplomacy that was already evident in the early 2000s,<sup>62</sup> the Treaty introduced 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’.<sup>63</sup> Furthermore, the Treaty of Lisbon underscored the explicit link between environmental protection and external action, clarifying that the EU environmental objectives should guide both the general external relations of the EU, as well as specifically common

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<sup>57</sup> It is, nevertheless, worth noting that the Treaty of Lisbon gave legal formulation to the Union’s aspiration towards global leadership in the fight against climate change. The EU elevated climate change into one of the priorities of its overarching agenda on sustainable development and international cooperation: Morgera and Marín Durán (n 6).

<sup>58</sup> Jans and Vedder (n 12) 26–35.

<sup>59</sup> Marín Durán and Morgera (n 6).

<sup>60</sup> Puder (n 9) 179.

<sup>61</sup> 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, Davies and Monti (n 50) 363–366.

<sup>62</sup> Charlotte Burns and Paul Tobin, ‘The Limits of Ambitious Environmental Policy in Times of Crisis’ in Camilla Adelle, Katja Biedenkopf and Diarmuid Torney (eds), *European Union External Environmental Policy* (Springer International 2018), which refers to the USA’s withdrawal from the Kyoto Protocol as a trigger point for the EU’s ambitions.

<sup>63</sup> TEU art 3(5).

foreign and security policy.<sup>64</sup> A new explicit legal basis on EU external action 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.<sup>65</sup> That said, the EU's financial crisis, the lowering of development aid commitments and Brexit have negatively affected the credibility of the EU's global environmental leadership efforts.<sup>66</sup>

As indicated previously, the environmental competence of the EU is shared with member states,<sup>67</sup> who can exercise their competence only as long as the EU has not exercised its competence or has decided to cease to exercise it. The scope of the EU competence vis-à-vis that of the member states, however, is difficult to determine, as EU environmental policy is subject to continuous evolution.<sup>68</sup> On the international scene, if the EU adopts environmental measures internally, the member states will no longer be competent to undertake international obligations that would affect the relevant EU rules.<sup>69</sup> It is, however, common for EU environmental legislation to allow member states to adopt more stringent measures.<sup>70</sup> In principle, this includes the possibility of undertaking tougher international obligations. This flexibility is, nevertheless, 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.<sup>71</sup> As a result, great efforts are needed in coordination of external action between the EU and its member states, leading to the identification of pragmatic solutions.<sup>72</sup>

## **The principle of environmental integration: two case studies**

The TFEU identifies the principles that should guide EU internal and external environmental policy,<sup>73</sup> both in terms of law-making and interpretation. These include the principle of a high level of protection,<sup>74</sup> the precautionary principle,<sup>75</sup> the prevention

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<sup>64</sup> Vedder (n 53) 3.

<sup>65</sup> TEU art 21(2)(d) and (f). For an in-depth discussion, Elisa Morgera (ed), *The External Environmental Action of the European Union: EU and International Law Perspectives* (CUP 2012).

<sup>66</sup> Burns & Tobin (n 62) 328 and 330.

<sup>67</sup> TFEU art 4(2)(e).

<sup>68</sup> Jans and Vedder (n 12) 61–64.

<sup>69</sup> TFEU art 191(4).

<sup>70</sup> Jans and Vedder (n 12) 62–63.

<sup>71</sup> Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para 60 and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 66; Case C-246/07 *Commission v Sweden* [2010] ECR I-03317, para 104. For a discussion, Marín Durán and Morgera (n 6).

<sup>72</sup> Cardesa Salzmann and Morgera (n 5) – original footnotes omitted.

<sup>73</sup> TFEU art 191(2).

<sup>74</sup> TEU art 3(3); Vedder (n 53) 36.

<sup>75</sup> TFEU art 191(2); Commission, 'Guidelines on the Precautionary Principle' COM(2000)1.

principle,<sup>76</sup> the rectification at source principle,<sup>77</sup> the polluter pays principle,<sup>78</sup> the principle of sustainable development,<sup>79</sup> and the principle of environmental integration.<sup>80</sup> The EU legislator, however, has a significant margin of discretion in implementing the principles: the Court has in fact clarified that an EU measure could be annulled for insufficient regard to these principles only under exceptional circumstances; that is, in cases of manifest error of appraisal by the EU legislature. This was justified on the need to strike a balance between, on the one hand, environmental objectives and principles, and, on the other, the complexity of implementing environmental policy criteria.<sup>81</sup>

### ***Environmental integration***

Environmental integration is included among the general principles of EU law and framed in clearly mandatory wording. According to Article 11 TFEU, '[e]nvironmental 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' are those included in Articles 2 and 191 TFEU, namely the objectives, principles, and criteria of EU environmental policy discussed earlier.<sup>82</sup> The principle can, therefore, be said to perform an *enabling* function, empowering the EU institutions to pursue environmental objectives in the context of other policy areas, including the Union's common commercial policy and policies associated with the internal market.<sup>83</sup>

The principle's broad scope is further illustrated by the fact that environmental integration is to occur both at the policy-framing stage ('definition' therefore includes every stage of the EU legislative processes: definition of policy objectives, preparation, proposal, and adoption of policies and legislation, as well as their revision); and at the stage of policy 'implementation' (which includes the adoption of further implementing acts, uptake of decisions outside the legislative process, and enforcement).<sup>84</sup>

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),<sup>85</sup> which requires that environmental objectives, principles, and criteria are 'applied' in other policy areas in the same way as in EU 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 set out in Article 191 TFEU.<sup>86</sup> Environmental integration further requires that EU environmental law itself be

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<sup>76</sup> TFEU art 191(2); Jans and Vedder (n 12) 40–42.

<sup>77</sup> TFEU art 191(2); Jans and Vedder (n 12) 42–43.

<sup>78</sup> TFEU art 191(2).

<sup>79</sup> TEU art 3(3); TFEU art 11 (also TEU art 21); Geert van Calster and Leonie Reins, *EU Environmental Law* (Edward Elgar 2017) 24.

<sup>80</sup> TFEU art 11.

<sup>81</sup> Case C-284/95 *Safety Hi-Tech v S. & T.* [1998] ECR I-4301, para 37; Jans and Vedder (n 12) 36.

<sup>82</sup> Jans and Vedder (n 12) 17.

<sup>83</sup> Jan H. Jans, 'Stop the Integration Principle?' (2011) 33 *Fordham Int'l L.J.* 1533, 1540.

<sup>84</sup> Nele Dhondt, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law 2003) 45–53.

<sup>85</sup> Jans and Vedder (n 12) 17.

<sup>86</sup> Dhondt (n 84) 84.

interpreted in light of the environmental objectives, principles, and criteria of Article 191 TFEU, even when these are not explicitly incorporated in the specific piece of secondary legislation at stake (internal integration).<sup>87</sup>

Notwithstanding the preceding, there is a need to clarify what practical demands the environmental integration requirement – to the extent that it is enforceable or justiciable – makes upon policy-makers. It has been posited<sup>88</sup> that these practical demands can be inferred from the combined normative content of the fundamental right of access to environmental information, set out in the Aarhus Convention<sup>89</sup> and secondary EU legislation; Article 296(2) TFEU, which requires that ‘legal acts shall state the reasons on which they are based’; and Article 37 of the EU Charter of Fundamental Rights, which mainly reiterates the need for environmental integration in a manner similar to Article 11 TFEU.<sup>90</sup> Taken together, these provisions arguably amount to an obligation on the part of EU institutions

to inform, when they make proposals for legislation, adopt legislative or other acts, or take decisions which are capable of affecting the environment, how they complied with the obligation to ensure a high level of protection or to improve the quality of the environment.<sup>91</sup>

Overall, the environmental integration requirement has an amplifying effect on EU environmental policy, as it requires the systematic pursuance of environmental objectives, principles, and criteria in all EU policies and actions.<sup>92</sup> Moreover, the principle has progressively led to a holistic, ‘integrationist’ approach to the development of environmental law-making (relying, for instance, on environmental impact assessment, strategic environmental assessment, and integrated pollution prevention and control).<sup>93</sup> As will be further discussed later, this approach is increasingly centred around the integrative concept of the ‘ecosystem’.<sup>94</sup> In addition, the environmental integration requirement has had a palpable impact on the Union’s external relations.

It should, however, be noted that the fact that environmental integration is included in the EU Charter of Fundamental Rights but is not framed in rights-based language, provides evidence of the ambivalent approach within the EU to the relevance of this requirement from the perspective of the inter-dependence of human rights and the

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<sup>87</sup> Ibid. 179.

<sup>88</sup> Ludwig Krämer, ‘Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements Into Other EU Policies’ in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2013).

<sup>89</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

<sup>90</sup> Elisa Morgera and Gracia Marín Durán, ‘Article 37 – Environmental Protection’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart Publishing forthcoming).

<sup>91</sup> Krämer (n **Error! Bookmark not defined.**) 92.

<sup>92</sup> Ibid. 109.

<sup>93</sup> McGillivray and Holder (n 23) 154.

<sup>94</sup> A characteristic example is provided by Directive 2000/60 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1 (the Water Framework Directive). See also Ángel Borja and others, ‘Marine Management – Towards an Integrated Implementation of the European Marine Strategy Framework and the Water Framework Directives’ (2010) 60 *Marine Pollution Bull.* 2175.

environment.<sup>95</sup> This is reflected in the following two case studies as well as in relevant EU external action.<sup>96</sup>

It is finally worth observing that, following the adoption of the Treaty of Lisbon, the integration principle is not the only mainstreaming requirement. Two new provisions call for integrating animal welfare requirements into certain policy areas,<sup>97</sup> and for preserving and improving the environment in the context of EU energy policy, including with a view to promoting energy efficiency, energy saving, and the development of new and renewable forms of energy.<sup>98</sup>

### ***Greening of the Common Agricultural Policy – and beyond?***

The EU's Common Agricultural Policy (CAP) is often provided as a key example in the context of environmental integration. This may be explained by the fact that the agricultural sector has a complex relationship with the environment, being dependent on its health for sustained food production and having the potential to be both a positive and a negative influence.<sup>99</sup> Originally, economic interests were often favoured in the pursuit of the CAP's objective 'to increase agricultural productivity by promoting technical progress and ensuring the optimum use of the factors of production'.<sup>100</sup> Although this objective remained unchanged under the Lisbon Treaty, environmental integration has allowed for a more comprehensive approach which seeks to ensure 'a sustainable way of farming by avoiding environmentally harmful agricultural activity' and provide 'incentives for environmentally beneficial public goods and services'.<sup>101</sup>

The CAP consists of two pillars. Pillar I provides for a scheme for direct payments financed through the EU's general budget: the European Agricultural Guarantee Fund. Pillar II provides for rural development funding, co-financed by member states and the European Agricultural Fund for Rural Development. For the CAP 2014–2020, environmental integration takes place with regard to both pillars. Direct payments are conditioned on 'cross-compliance' with EU regulations on public, animal and plant health, animal welfare and the environment, such as the Habitats, Birds and Nitrates Directives.<sup>102</sup> Furthermore, 30% of the budget goes to mandatory greening payments linked to environmental practices, such as crop rotation, the upkeep of permanent grassland and instalment of buffer strips.<sup>103</sup> Under Pillar II, agri-environmental-climate

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<sup>95</sup> Morgera and Gracia Marín Durán (n 90).

<sup>96</sup> Elisa Morgera, 'The Promotion of Environmental Rights through EU Bilateral Agreements: Mapping the Field' in Federico Lenzerini and Ana Vrdoljak (eds), *International Law for Common Goods* (Hart Publishing 2014).

<sup>97</sup> Namely, in the areas of agriculture, fisheries, transport, internal market, research and technological development and space policies (TFEU art 14).

<sup>98</sup> TFEU art 194(1).

<sup>99</sup> Dhondt (n 84) 201–204.

<sup>100</sup> EC Treaty art 33(a) (now TFEU art 39(1)(a)).

<sup>101</sup> 'Environmental Sustainability in the CAP' (European Commission) <[https://ec.europa.eu/agriculture/envir/cap\\_en](https://ec.europa.eu/agriculture/envir/cap_en)> accessed November 2019.

<sup>102</sup> Regulation (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy [2013] OJ L 347/549, Annex II.

<sup>103</sup> *Ibid.*

schemes are to be enacted at national level ‘in accordance with their national, regional or local specific needs and priorities’.<sup>104</sup>

From an international human rights and environmental law perspective, however, it has been questioned, for instance, why EU agricultural law does not specifically recognize and support small-scale and traditional farmers, in line with human rights to food and culture, and international biodiversity law.<sup>105</sup> Moreover, EU agricultural law does not represent a truly integrated approach focused on the functioning of the agro-ecosystem, such as agroecology, which has been considered preferable from the perspective of human rights to food and health.<sup>106</sup> Although proposals for a CAP 2021–2027 do for the first time recognise a specific objective to ‘[c]ontribute to the protection of biodiversity [and] enhance ecosystem services’,<sup>107</sup> they place a lot of faith in the large discretionary power of member states to prioritise environmental and climate action and do not make reference to the importance of climate change and ecosystem services for basic human rights.<sup>108</sup> Against the backdrop of international efforts on environmental integration into the agricultural sector,<sup>109</sup> the EU’s current internal efforts are unlikely to provide an inspirational example beyond its borders.

### ***Ecosystem-based approach to Europe’s regional seas***

Ecosystem-based marine management is one of the principal normative approaches to the various tasks undertaken within modern ocean governance. Its key tenet is that maritime activities must be managed in a comprehensive and integrated manner, with a view to achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.<sup>110</sup> The very geography of Europe requires a collaborative, regionally differentiated, and integrated approach to marine management.<sup>111</sup> In this

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<sup>104</sup> Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2013] OJ L 347/487.

<sup>105</sup> Maria Gaglia Bareli and others, ‘The Unintended Consequences of the Common Agricultural Policy for Local Communities – Reading EU Law and Politics in Ikaria, Greece’ in Paul Cardwell and Marie-Pierre Granger, M (eds), *Research Handbook on the Politics of EU Law* (Edward Elgar forth).

<sup>106</sup> UN Special Rapporteur on the Right to Food, Olivier De Schutter, Report on agroecology and the right to food (2011) UN Doc A/HRC/16/49; and UN Special Rapporteur on the Right to Food Hilal Elver (in collaboration with UN Special Rapporteur on Toxics), Report on the Effects of pesticides on the right to food (2017) UN Doc A/HRC/34/48.

<sup>107</sup> Commission, ‘Proposal for a regulation establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy’ COM(2018) 392, 11.

<sup>108</sup> UN Special Rapporteur on Human Rights and the Environment John Knox, 2006 report on climate change of former (2006) UN Doc A/HRC/31/52; and Report of the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity (2017) UN Doc A/HRC/34/49.

<sup>109</sup> Conference of the Parties to the Convention on Biological Diversity, ‘Strategic Actions to Enhance the Implementation of the Strategic Plan for Biodiversity 2011–2020 and the Achievement of the Aichi Biodiversity Targets, Including with Respect to Mainstreaming and the Integration of Biodiversity within and across Sectors’ (2016) CBD/COP/DEC/XIII/3.

<sup>110</sup> First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions, ‘Statement on the Ecosystem Approach to the Management of Human Activities’ (Bremen, 25–26 June 2003), Annex 5 (Ref. § 6.1).

<sup>111</sup> Lawrence Juda, ‘The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy’ (2007) 38 *Ocean Dev. & Int’l L.* 259.

context, integration is understood both as the need to reconcile competing uses of marine space, and to ensure that these uses are consistent with the carrying capacity of marine ecosystems. In turn, this requires a high degree of normative and institutional coherence across the sectoral and environmental instruments applicable within Europe's marine regions.<sup>112</sup>

For much of the Union's history the relevant laws, policies, and institutional structures were developed in a fragmented, piecemeal fashion. However, starting with the adoption of the Water Framework Directive in 2000, a new generation of instruments has promoted a more holistic and regionally coordinated approach.<sup>113</sup> This approach is aligned with the normative construction of the ecosystem approach under international marine environmental law, which highlights the significance of area-based management measures, transnational cooperation, precaution, and integration.<sup>114</sup> Indeed, the ecosystem approach is now widely regarded as the 'cornerstone' of the Union's policy on the seas.<sup>115</sup> Key among this new generation of instruments is the Marine Strategy Framework Directive (MSFD),<sup>116</sup> which lays down a legislative framework for achieving good marine environmental governance, determined on the basis of hydrological, oceanographic, and biogeographic features. In addition, the Maritime Spatial Planning Directive (MSPD)<sup>117</sup> clarifies how space should be allocated to different marine and maritime uses, with a view to preventing and mitigating conflicts, and promoting the sustainable development of marine and maritime sectors. The latter instrument includes a number of obligations of relevance to environmental integration, such as to: take into account land-sea interactions;<sup>118</sup> ensure that maritime spatial plans are coherent and coordinated across the marine region;<sup>119</sup> and subject maritime spatial plans that are likely to have significant effects on the environment to a strategic environmental assessment.<sup>120</sup> Finally, both Directives include provisions relating to environmental democracy, with the latter instrument calling upon member states to inform all interested parties and to consult relevant stakeholders, authorities, and the public concerned at an early stage in the development of maritime spatial plans.<sup>121</sup>

Also in this case, however, the EU's approach to environmental integration has failed to take into explicit account traditional communities' knowledge and practices, as well

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<sup>112</sup> Froukje Maria Platjouw, *Environmental Law and the Ecosystem Approach: Maintaining Ecological Integrity Through Consistency in Law* (Routledge 2016).

<sup>113</sup> Ellen Hey, 'Multi-Dimensional Public Governance Arrangements for the Protection of the Transboundary Aquatic Environment in the European Union: The Changing Interplay between European and Public International Law' (2009) 6 *Int'l Organizations L. Rev.* 191.

<sup>114</sup> Ronán Long, 'Legal Aspects of Ecosystem-Based Marine Management in Europe' (2012) 26 *Ocean Y.B.* 417.

<sup>115</sup> Luc van Hoof, 'Fisheries Management, the Ecosystem Approach, Regionalisation and the Elephants in the Room' (2015) 60 *Marine Pol'y* 20.

<sup>116</sup> Directive 2008/56/EC of the European Parliament and of the Council Establishing a Framework for Community Action in the Field of Marine Environmental Policy [2008] OJ L164/19 (MSFD).

<sup>117</sup> Directive 2014/89/EU of the European Parliament and of the Council Establishing a Framework for Maritime Spatial Planning [2014] OJ L 257/135 (MSPD).

<sup>118</sup> MSPD, art 4(2).

<sup>119</sup> MSPD, arts 11, 12.

<sup>120</sup> MSPD, preambular para 23.

<sup>121</sup> MSPD, art 9.

as the relevance of the international human rights to food and to culture.<sup>122</sup> This is symptomatic of wider trends within international marine environmental law. The pertinent instruments are grounded in a managerial, technocratic ethos, and remain rather indifferent to concerns over linked socio-ecological well-being, which are instead central concerns to a human rights-based ecosystem approach.<sup>123</sup> Although both the MSFD and the MSPD note the role that ecosystem-based management can play in ensuring that marine ecosystem goods and services are sustainably used by present and future generations,<sup>124</sup> they stop short of overtly recognizing key social dimensions of the ecosystem approach and their importance for the full enjoyment of various human rights.

## Conclusion

EU environmental law is an interesting object of study both as a possible source of inspiration, in its strengths and weaknesses, for other States and regional organizations, and for its impacts on the development and implementation of international environmental law. EU environmental law 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.<sup>125</sup> At the same time, significant challenges face EU environmental law. Although 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 have yielded positive results. A 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.<sup>126</sup>

Internal shortcomings thus undermine the credibility of the EU as a model and global actor. This is also the case with the EU’s limited efforts to ensure environmental

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<sup>122</sup> FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (adopted at the 31st Session of the FAO Committee on Fisheries, held in Rome, 9–13 June 2014); and UN Special Rapporteur on the Right to Food, De Schutter’s 2012 report on right to food and fisheries (A/67/268). Note also that the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UN General Assembly, Resolution 73/165 (2019)) also applies to small-scale fishing communities: art 1(2)(3), although EU Member States have voted against or abstained from endorsing the Declaration: UN General Assembly, 55<sup>th</sup> Plenary Meeting, 17 December 2018, UN Doc. A/73/PV.55, [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/73/PV.55](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/73/PV.55).

<sup>123</sup> Conference of the Parties to the Convention on Biological Diversity, ‘Ecosystem Approach’ (2000) UNEP/CBD/COP/5/23, para 1. Elisa Morgera, ‘The Ecosystem Approach and the Precautionary Principle’ in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017); Mara Ntona and Elisa Morgera, ‘Connecting SDG 14 with the other Sustainable Development Goals Through Marine Spatial Planning’ (2018) 93 *Marine Pol’y* 295.

<sup>124</sup> MSFD, art 1(3); MSPD, preambular paras 13–14.

<sup>125</sup> Joanne Scott and Jane Holder, ‘Law and New Environmental Governance in the European Union’ in Joanne Scott and Gráinne de Búrca (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006); and Ingmar von Homeyer, ‘Emerging Experimentalism in EU Environmental Governance’ in Charles F. Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture?* (OUP 2010).

<sup>126</sup> Lee (n 21) ch 3; Jans and Vedder (n 12) ch 4.

integration with a view to contributing to basic human rights that are inter-dependent upon a healthy environment. This is compounded by the ‘structural imbalance concerning access to courts’ in environmental matters both at the national and regional level, particularly for environmental NGOs,<sup>127</sup> and further demonstrates the EU’s half-hearted approach to international obligations at the nexus between human rights and the environment.<sup>128</sup> This attitude may also be explained by the EU’s efforts to manage and mitigate the impact of its economic activities on the environment, while promoting the conditions for economic development in the EU, therefore upholding a specific understanding of sustainable development as a transition towards a low-carbon economy that does not question present neo-liberal modes of capitalism for its past and present socio-environmental equity deficits.<sup>129</sup> Whether the EU will succeed in gradually transforming these challenges into opportunities for change is yet another reason to continue to study the evolution of EU environmental law.

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<sup>127</sup> Ibid. 209–210. This is based on a restrictive interpretation of the criteria for standing by the European courts (see Aarhus Convention Compliance Committee (n 11)).

<sup>128</sup> Morgera and Marín Durán (n 90).

<sup>129</sup> Charlotte Burns and Neil Carter, ‘Environmental Policy’, in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012); and Cardesa Salzmann and Morgera (n 5).