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EU as a Global Actor in Shaping Action for International Environmental Protection

by

Karolis Jonuška*

Abstract

The European Union (EU) has come a long way in establishing its presence in global environmental law and policy since 1972 when the first Environmental Action Programme was adopted. The EU environmental policy is one of the most successful Union policies both on domestic and international levels. However, the EU's leadership in shaping global environmental agenda emerged only recently, marking different periods where there was no leadership presence. EU environmental law and policy is subject to institutional and legal complexities both internally and externally. In facing these complexities, the question arises on how the EU developed into a prominent player in global climate change negotiations, and how the unique qualities of the EU have played out in its favor?

This Article aims at analyzing the EU's leadership in global environmental policy and law through the case of climate change. This Article argues that the EU's leadership could be understood by tracing legal, institutional and policy developments both internally and externally. The Article also provides a preliminary investigation into the EU as a model for international climate change protection..

Keywords: EU environmental policy; Climate change; EU law; EU ETS Emissions

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EU as a Global Actor in Shaping Action for International Environmental Protection

I. EU's actorness in environmental protection

A. Grasping the issue of climate change leadership

It is a generally accepted fact that European Union's (hereinafter EU) Environmental Policy is one of the most successful Union policies both within the Union and internationally. However, this leadership should not be taken for granted. The EU's leadership in shaping global environmental agenda has had its twists and turns in the past, and had to adapt to the ever changing environmental trends. This chapter will focus on the issue of climate change leadership and examine the EU's internal as well as external competence in Environment protection.

It is important to stress that neither EU (or European Economic Community at the time), nor its Member States have been traditionally viewed as leaders in setting International Environmental Policy goals. According to Kelemen¹, when global environmental issues began to emerge in 1970s², the United States was at the forefront of International Environmental debate on at least two major occasions: the 1972 UN Conference on the Human Environment and the 1987 Montreal Protocol on Ozone Depleting Substances, which was a major diplomatic, legal and environmental achievement at that time. Although the United States' position in External Environmental Policy shifted from an early adopter to an obstructionist in 1990s and 2000s thus improving the EU's image as an environmental leader³.

According to Gunningham, modern Environmental laws date back to 1970, when the first United States federal environmental legislation was adopted, the United States Environmental Protection Agency was created and Earth Day was celebrated⁴. Despite the constant evolution of existing environmental laws and enforcement of new ones, on both national

¹ Kelemen, R. Daniel. *Globalizing European Union environmental policy*, Journal of European Public Policy 17:3 April 2010, p. 335.

Although ideas about environment protection could be traced back to 19th century, major awareness and interest from the public is usually associated with 20th century.

² Kelemen, R. Daniel, *op. cit.*, p. 336.

³ Gunningham, Neil. *Environment law, regulation and governance: shifting architectures*. Journal of Environmental law, Volume 21:2, 2009, Oxford University Press, p. 182.

⁴ World economic forum, *The Risks-Trends Interconnections Map 2017*, available at <http://reports.weforum.org/global-risks-2017/global-risks-landscape-2017/#trends///> (last accessed on May 1, 2017).

and international levels, the effectiveness and the enforcement of agreements on climate change remain the key legal and political issues. The most recent example of this is the fact that climate change was identified as a risk-trend by World Economic forum in the 2017 Global Risks Report⁵. The risks spanning from climate change have been, and continue to be identified⁶. More importantly, climate change risks such as man-made environmental disasters, biodiversity loss and ecosystem collapse, natural disasters, extreme weather events and failure of climate-change mitigation and adaption are interconnected with other global risks such as, *inter alia*, water and food crises, large-scale involuntary migration and failure of regional or global governance..

Why global climate change and EU leadership are important? Climate change is a global problem, with the grassroots at the local emissions level. Although issues related to environment are interconnected, the impacts of climate change are witnessed differently depending on geographical location. Moreover, the geographical dimension of climate change gives rise to issues such as governance, responsibility, coordination and enforcement. It cannot be stressed enough how much climate change requires a reconsideration of international governance options available, especially in the wake of failure of conventional framework⁷. In particular, climate change requires innovative response to an environmental problem that is very heterogenous⁸. Such challenges are apparent in the context of International climate change legislation enforcement. Undoubtedly, a solution of global emissions control is required. However, as it will be shown further, negotiating a binding International agreement on emissions control is nothing short of easy. Besides the previously mentioned issue of governance, such agreements are met with “political turbulence” or lack of political will, or even put to a halt⁹.

Although climate change is an international problem affecting the entire globe (albeit differently), the effective solution to tackling this problem is not necessarily found through the signing of treaties that are binding to different International Actors. In some cases, the

⁵ *Ibid.*

⁶ Cha, D. Victor, *Collective Action at Local and Global Scales: The Next Collaborative Agenda*, 13 Aug. 2011, available at: <http://ssrn.com/abstract51910816> (last accessed on May 1, 2017).

⁷ *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Cambridge University Press, 2007), at p. 6, available at <http://www.ipcc-wg2.gov/AR4/website/intro.pdf> (last accessed on May 1, 2017).

⁸ The issue of governing global climate change and national emissions levels is closely interlinked with states competitiveness which in turn rests on the price of energy consumed. For climate change agreement's requirement to lower national emission levels to work, all major global emitters must comply. Otherwise, the possibility of some countries “freeriding” climate change agreement creates political and economic obstacles thus putting complying states industries into global competitive disadvantage.

⁹ Editorial, *Transnational Dimensions of Climate Governance*, *Transnational Environmental Law* 1:2 (2012), Cambridge University Press. p. 2-3; available at <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S2047102512000155> (last accessed on May 1, 2017).

latter step forward in showing initiative and thus leading the charge in global climate change debate through effective enforcement. Such is the case with the EU¹⁰.

B. Brief summary of EU environmental competences

The Treaty of Rome laid the groundwork for the Common Market, based on free movement of goods, people, services and capital. Signed in 1957, effective as of 1 January 1958, the Treaty of Rome (or Treaty establishing the European Economic Community) did not set out an exclusive competence in environmental matters to the EEC. Moreover, it didn't contain any specific provisions regarding environment protection. According to Kulolesi and Cremona¹¹, the absence of an explicit Treaty basis did not limit the EEC in paving the ground for the development of the Environmental policy through the enforcement of Directives and Regulations. Decisions were reached by employing Articles 100 and 235 EEC, which draw on harmonizing the differences between national environmental legislations in order to secure the functioning of the Common Market, in areas not explicitly set out in the Treaty provisions¹². The Court of Justice of the European Union (hereinafter ECJ) case law followed quickly and on 7th of February, 1985 in the case *Procureur de la République v Association de défense des brûleurs d'huiles*¹³, it was confirmed that environment protection is one of the objectives pursued by the EEC. In this context, it is important to note that the EEC competence was limited to areas where it was expressly provided so by the Treaty of Rome. However, issues emerged in cases dealing with EEC legislation that was not in perfect compliance with some external agreements signed by the Member states. A question therefore arose on whether an exclusive competence of the EEC in conducting its Internal Policies by which Member States are bound, automatically translated to an exclusive competence in external policy matters. The solution was offered by the ECJ in *ERTA* judgement¹⁴. In this case, the ECJ established few key elements regarding EEC's competence in external policy matters. First, the Court stated that the EEC had explicit powers to conclude International Agreements in cases explicitly set out in the Treaties' provisions¹⁵. The Court further considered that the EEC authority to enter into International Agreements arose not only from the Treaty provisions, but could also be drawn "from other provisions of the treaty (...) within the framework of those provisions by the Community institutions"¹⁶.

¹⁰ Kulolesi, Kati, Cremona, Marise. *The Evolution of EU Competences in the Field of External Relations and its Impact on Environmental Governance Policies*, Transworld working paper 17, March, 2013, p. 3, available at http://www.transworld-fp7.eu/wp-content/uploads/2013/04/TW_WP_17.pdf (last accessed on July 1, 2017).

¹¹ *Ibid.* 11, p. 3.

¹² ECJ, Case *Procureur de la République v Association de défense des brûleurs d'huiles*, C-240/83, EU:C:1985:59, 7 February 1985.

¹³ ECJ, Case *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport*, 22/70, EU:C:1971:32, 31 March 1971.

¹⁴ *Ibid.* paragraph 71.

¹⁵ *Ibid.* paragraph 16.

¹⁶ *Ibid.* paragraphs 16, 28, 30, 90.

Second, ECJ considered that the EEC treaty making powers could also result from secondary law¹⁷. The Court further developed its position, previously set out in Case 240/83 and in *Opinion 1/76*¹⁸. In the latter, the ECJ stated that under certain conditions, the Community can achieve its objectives only if it also has the ability to conclude international agreements¹⁹. According to Bartlik²⁰, this meant that EEC could potentially exercise treaty-making powers if such powers were required to conclude an International Agreement in order to reach the objectives set out by the Treaty of Rome²¹. The main difference between the Case 240/83 and *Opinion 1/76* is the fact that the “existence of treaty-making powers pursuant to ECJ Opinion 1/76 require the previous adoption of secondary law”²². The ECJ case law therefore established an important link between environment protection, as an objective of the EEC and the EEC’s powers to exercise its competence in external policy matters as well as to conclude International Agreements. In essence, this ECJ case law paved the ground for what is commonly referred to as the “potential competence”²³. Such potential competence extended to many areas where EEC legislation was affected or altered by an International Agreement concluded by at least one EEC Member state. Moreover, as stated earlier, the EEC’s potential competence could arise if the conclusion of an International Agreement was necessary for the attaining of an objective set out in the Treaty.

The doctrine of potential competence or “parallelism of competence” had serious implications for the future conducting of the environmental policy within and outside the EEC. This doctrine translated to the fact that the Commission could exercise these rights in order to be involved and represent the EEC in International negotiations on environment. However, as Vogler puts it, all the possible competences cannot be precisely listed and each new international negotiation presents the risk of raising a question of competence and resulting in unexpected outcome within the Member states²⁴.

Before the revision of the Treaty of Rome, the first EU environmental framework for an overall environmental policy development in the Union (Environment Action Programme or EAP), was adopted in 1972. The initiative was in part influenced by the UN Conference on Environment, held in Stockholm in 1972. To date, the EU Environment Action Programme is in its 7th iteration and will apply until 31 December 2020²⁵. It should be noted

¹⁷ Opinion of the ECJ, *Opinion given pursuant to Article 228 (1) of the EEC Treaty. - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion 1/76, ECLI:EU:C:1977:63, 26 April 1977.

¹⁸ *Ibid.* paragraph 3.

¹⁹ Cullen, Peter, The Impact of EU Law on the Regulation of International Air Transportation by M. Bartlik. JCMS: Journal of Common Market Studies, Vol. 46, Issue 2, pp. 483-484, March 2008. Available at: <http://dx.doi.org/10.1111/j.1468-5965.2007.00787.7.x> (last accessed on July 1, 2017).

²⁰ *Ibid.*

²¹ *Ibid.*

²² Vogler, John. *The European Union as an actor in international environmental politics*, Environmental Politics, 8:3, 24-48, 2007, p. 30.

²³ *Ibid.* 16, p. 30.

²⁴ Decision No 1386/2013 of the European Parliament and of the Council of 20 November 2013 on a *General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'*; OJ L 354 Article 1.

²⁵ Withana, Sirini, et. al., *Strategic Orientations of EU Environmental Policy under the Sixth Environment Action Programme and Implications for the Future*, Report for the IBGE-BIM, IEEP, London, May, 2010, p. 17 available at: <https://www.researchgate.net/>

that, as was the case with the 6th Environment Action Programme²⁶, the 7th iteration lacks precision towards the Union (and its institutions) and/or Member states. Due to its vague provisions, that resemble a political declaration, the EAPs (as well as 7th EAP) may be assessed as non-legally binding for the Member States²⁷. Although not binding, the EAPs set out the EU's priorities in the area of environmental policy, both internally and externally, thus providing a level of consistency in the said policy. Finally, around the 1973 Environment Directorate-General of the European Commission was set up to propose policies and legislation in the area of environment.

The Single European Act (hereinafter SEA) was a major amendment of the Treaty of Rome and a breakthrough in the area of environment protection. Entered into force on 1 July, 1987, the SEA contained a specific Title VII dedicated to environment. Considering that the Treaty of Rome did not contain any specific provisions, the EEC environmental legislation was based on Articles 100 or 235 EEC. Accordingly, Article 130r of the SEA built on the previously established ECJ case law and Community practice. It not only set out specific environmental objectives of the Community²⁸, but it also set out environmental principles²⁹ and EEC competences regarding internal³⁰ and external affairs³¹. Regarding the external dimension of the environment protection policy, paragraph 4 of the Article 130r explicitly provided that the Community had the power to take action in an area of environment where the EEC's environmental objectives, provided that the objectives related to this policy could be better attained by the EEC level and not by the Member States³². Finally, Paragraph 5 of the Article 130r refers to the Community's and its Member States' cooperation with third countries and International Organisations. It also refers to the possibility of agreements between third countries and the EEC.

These amendments to the Treaty of Rome were of great importance since they incorporated the environmental policy into the EEC treaty structure and gave the EEC specific legal basis to rely on in International Environmental agreements.

Another step forward was the signing of the Maastricht treaty. Entered into force on 1 November 1993, this treaty created a three pillar EU system, the first pillar being the European Community (EC). The Maastricht treaty set out "sustainable and non-inflationary

[profile/Sonia_Gantioler/publication/265145491_Strategic_Orientations_of_EU_Environmental_Policy_under_the_Sixth_Environment_Action_Programme_and_Implications_for_the_Future_Final_Report/links/544f94f70cf26dda08920515/Strategic-Orientations-of-EU-Environmental-Policy-under-the-Sixth-Environment-Action-Programme-and-Implications-for-the-Future-Final-Report.pdf?origin=publication_list](https://ec.europa.eu/environment/profile/Sonia_Gantioler/publication/265145491_Strategic_Orientations_of_EU_Environmental_Policy_under_the_Sixth_Environment_Action_Programme_and_Implications_for_the_Future_Final_Report/links/544f94f70cf26dda08920515/Strategic-Orientations-of-EU-Environmental-Policy-under-the-Sixth-Environment-Action-Programme-and-Implications-for-the-Future-Final-Report.pdf?origin=publication_list) (last accessed on July 1, 2017).

²⁶ *Ibid.* 25, Article 3.

²⁷ Article 130r, para 1, Single European Act, OJ [2013] L 169, 29 June 1987.

²⁸ *Ibid.* paragraph 2.

²⁹ *Ibid.* paragraph 4.

³⁰ *Ibid.* paragraph 5.

³¹ *Ibid.* paragraph 4.

³² Article 2, Maastricht Treaty, 7 February 1992, OJ C 325/5.

growth respecting the environment”³³, “preserving, protecting and improving the quality of the environment”³⁴ as goals of the EC. Joint policy “in the sphere of environment”³⁵ followed. However, the most important addition in this context was the 4th added objective set out in Article 130r. According to this provision, the EC policy in the area of environment shall contribute in pursuing the promotion of measures at international level, aimed at dealing with regional or worldwide environmental problems³⁶. In essence, the treaty established the Union competence for the purpose of concluding International environmental agreements.

The Amsterdam treaty further reformed the area of environment, in accordance with the developments in International Environmental law. Entered into force on 1st May, 1999, it marked EC’s shift towards an ever pertaining principles in a global arena that resulted after the Rio Conference³⁷. Some of the key amendments were the principle of sustainable development³⁸ and the requirement for a high-level environment protection, which was first referred to in Article 100a, paragraph 3, SEA³⁹. Mahmoudi argues that putting sustainable development and high level environment protection among other general principles of the Community, the latter should consider these principles more frequently and presumably, “in all stages of Community activities and decisions”⁴⁰.

One addition that should be stressed in this context was the introduction of the co-decision in environmental matters, replacing the unanimous decision previously used for the enforcement of secondary legislation in the field of environment protection⁴¹.

Finally, the Lisbon treaty had some major implications in the field of environment. Entered into force on 1 December 2009, the Lisbon treaty introduced significant changes both in the EU’s structure and in the field of environmental and energy policy. The Treaty on the functioning of the EU (hereinafter TFEU) contains an explicit reference to climate change⁴². This particular amendment follows closely the EU’s initiative on being a leader in climate change in the International environmental arena. Particular emphasis must be put on the fact that the Lisbon treaty had introduced specific provisions in the TFEU on the EU’s competence in developing energy policy. Under title XXI, Article 194 TFEU sets out

³³ Article 130r, paragraph 1 Maastricht Treaty.

³⁴ *Ibid.* 33, Article 3, paragraph k.

³⁵ *Ibid.* Article 130r, paragraph 1, point 4.

³⁶ United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, 14 June 1992, available at <http://www.un-documents.net/rio-dec.htm> (last accessed on 25 July 2017).

³⁷ Article 2, paragraph 4; Article 1, paragraph 5, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997 (Amsterdam treaty).

³⁸ *Ibid.* Article 73q, paragraph 17.

³⁹ Mahmoudi, Said. *Protection of the European environment after the Amsterdam treaty*, Stockholm Institute for Scandinavian law, 2009, p. 127 available at: <http://www.scandinavianlaw.se/pdf/39-8.pdf> (last accessed on 1 July, 2017).

⁴⁰ *Ibid.* 12, p. 4.

⁴¹ Art. 191, paragraph 1, subparagraph 4, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, OJ (2008) C 115/01 (TFEU).

⁴² *Ibid.*, Article 194, paragraph 1, subparagraph c.

four key EU energy policy goals. The objective “to promote energy efficiency and energy saving and the development of new and renewable forms of energy”⁴³ closely relates to aforementioned environmental goals. However, both environment and energy fall in the scope of application of the shared competence between the EU and Member States⁴⁴. Finally, the EU’s overall aim, set out in Article 3 TEU, has been amended in such a way as to include “sustainable development of the Earth”, thus linking this objective that of the EU’s external policy to “foster the sustainable economic, social and environmental development of developing countries”⁴⁵ 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”⁴⁶.

C. EU external environmental policy

Due to internal developments described above, the EU has managed to pave its ground into global environmental politics. However, the prominence in national environmental policy does not automatically translate to a leadership or unity in external environmental affairs. The EU has come a long way in external environmental policy from the adoption of the first Environmental Action Programme in 1972 to the 7th edition of this Programme.

The question therefore arises on who shall represent the EU in external environmental affairs?. According to Kulolesi and Cremona⁴⁷, despite the absence of explicit treaty provisions, the EU Member States have continuously sought, and have successfully achieved, to act in a coordinated manner, thus influencing various multilateral environmental agreements, even before the SEA came into force.

The EU exercises its competence on three different levels. Areas such as environment and energy fall under the EU’s shared competence, meaning that both the EU and the Member States may adopt legal acts in those areas. However, the Member States are limited in the exercise of their competence to the extent that the EU has not exercised its competence in this area⁴⁸. Article 4, paragraph 1, TEU clearly states that the “competences not conferred upon the Union in the Treaties remain with the Member States”.

Exclusive EU competence is thus set out in Article 3, paragraph 1, TFEU. Article 216 TFEU reflects an established ECJ case law, in so far as internal competence is transformed into external one. Such is the case with EU environmental objectives set out in Article 191

⁴³ Article 4, paragraph 2, subparagraphs e and i, TFEU.

⁴⁴ Article 21, paragraph 2, subparagraph d Consolidated version of the Treaty on European Union, 13 December 2007, OJ (2008) C 115/01 (TEU).

⁴⁵ Article 21, paragraph 2, subparagraph f TEU.

⁴⁶ *Ibid.* 11, p. 5.

⁴⁷ Article 2, paragraph 2, TFEU.

⁴⁸ Article 191 TFEU, paragraph 1 “*promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change*”.

TFEU, by virtue of which, certain objectives are interlinked with external actions⁴⁹. According to Vedder⁵⁰ the same should be applied with the Article 194 TFEU as regards the energy policy. Moreover, the EU's aim in the field of energy to "ensure security of energy supply in the Union"⁵¹ is viewed in the context of environment protection. This is supported by the fact that Kyoto Protocol allows various flexible mechanisms for emissions reduction to be achieved by implementing projects in third countries⁵².

The EU's legislation can have a considerable impact on the EU's external environmental policy. This is evident in cases where certain standards, set by the EU, concern access to the Internal Market. One can cite the example of the EU Regulation⁵³ establishing CO₂ emissions performance requirements for new passenger cars, whereas specific emissions target of 130 g CO₂/km as average are upheld for the new car fleet. Other examples include the EU Directives on vehicles⁵⁴ as well as electronic equipment⁵⁵ that restrict the use of certain heavy metals and chemicals in cars and electrical equipment. All these restrictions are applicable to products that are placed in the EU Internal Market. One of the most significant examples in this area is the EU Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals⁵⁶. This Regulation requires companies to provide data about the health and environmental impacts of chemicals placed in the Internal Market, which is one of the clearest examples of EU law's influence in international climate policy.

The EU has concluded at least several key MEAs as early as SEA came into force. Key among them were the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer as well as the Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and Their Disposal together with the UN Convention on the Law of the Sea⁵⁷. However, these MEAs were not concluded without the questions raised previously. Multiple parties have raised questions regarding the appropriate competence of the EU as regards MEAs. In the EU, the principle of attribution requires a correct legal basis for every legal act. This principle

⁴⁹ Vedder, Hans H. B., *Stuck between Climate Change and Competitiveness* (February 22, 2012). The External Environment policy of the EU: EU And International Law perspectives, E. Morgera, ed., Cambridge University Press (2012) p. 6.

⁵⁰ Article 194, paragraph 1, subparagraph b, TFEU.

⁵¹ *Ibid.* 50, p. 7.

⁵² Regulation No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO₂ emissions from light-duty vehicles, OJ [2009] L 140, Article 1.

⁵³ Directive 2000/53 on end-of-life vehicles, OJ 2000, L 269 p. 34.

⁵⁴ Directive 2011/65 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ 2011, L 174 p. 88; this Directive replaced Directive 2002/95, OJ 2003, L 37 p. 19.

⁵⁵ Regulation No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45 and repealing Council Regulation No 793/93 and Commission Regulation No 1488/94 as well as Council Directive 76/769 and Commission Directives 91/155, 93/67, 93/105 and 2000/21 OJ L 136 [2007].

⁵⁶ *Ibid.* 11, p. 6.

⁵⁷ *Ibid.* 50, p.4.

in turn “serves a procedural, substantive and constitutional function that is supervised by the ECJ”⁵⁸.

D. EU leadership in climate change

What is climate change?

As observed by Aufenanger⁵⁹, climate change is a highly politicized topic, even though it depends heavily on scientific knowledge and research available. According to the Intergovernmental panel on climate change (hereinafter IPCC) research⁶⁰, the first scientific data, evidencing the effect of human activities on the changing of the composition of the atmosphere go back to 1958 measurements initiated by Charles David Keeling⁶¹. In the context of these measurements, in order to compare the magnitude of the anthropogenic increase with natural cycles in the past, scientists compared the available data to the air enclosed in bubbles found in ice cores from Greenland and Antarctica. According to Aufenanger, the analysis’ results demonstrated that CO₂ levels were significantly lower during the last ice age than over the last ten thousand years. Moreover, direct atmospheric measurements performed since 1970s have detected an increase of other greenhouse gases such as methane and nitrous oxide, thus pointing to the negative human impact on the atmosphere⁶². Other greenhouse gases such as halocarbons are linked to the chemical industry, since i) these chemicals did not exist in ancient air and ii) a significant drop of percentage of these chemicals has been observed since they were phased out under the Montreal Protocol. Finally, the realisation that planet Earth is sensitive to greenhouse gases has evolved since Edme Mariotte’s 1681 observation that “Sun’s light and heat easily pass through glass and other transparent materials, heat from other sources (*chaleur de feu*) does not”⁶³, to John Tyndall’s 1859 research on the absorption of thermal radiation by complex molecules⁶⁴.

IPCC therefore agrees that one third of solar energy that reaches the Earth’s atmosphere is reflected back to space, whereas the remaining amount is absorbed by the surface and the atmosphere. In order to balance the incoming energy, the Earth radiates the same amount back into space, where much of the reradiated energy is absorbed back to Earth. This is a natural greenhouse effect⁶⁵.

⁵⁸ Aufenanger Vanessa, *Challenges of a common climate policy. An analysis of the development of the EU Emissions Trading Directive in Interdisciplinary Research on Climate Change Mitigation and Adaptation*. Kassel university press, 2012, p. 86.

⁵⁹ Cubasch Ulrich, Ding Yihui, Mauritzen Cecilie, Mokssit Abdalah, Peterson Thomas, Prather Michael, et. al. 2007: *Historical Overview of Climate Change*. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 95-100.

⁶⁰ *Ibid.* p. 8.

⁶¹ *Ibid.*

⁶² *Ibid.* p. 11.

⁶³ *Ibid.*

⁶⁴ *Ibid.* p. 23.

⁶⁵ *Ibid.* 1, p. 68.

Because of the natural greenhouse effect, Earth provides living conditions for life as we know it. The negative greenhouse effect comes from molecules which increase the amount of reradiated energy back to Earth, thus causing excessive heat which is not dispersed. These molecules absorb and emit radiation within thermal infrared range and are referred to as “greenhouse gases”. Whereas so called “greenhouse effect” is the cycle by which these gases become trapped in the atmosphere and heat the planet, “climate change” is understood as a change in the usual weather conditions (rain, temperature, time variation of weather, where snow or rain falls, etc.) on Earth. More generally, climate change has a significant impact on economy as well, leading to a loss of GDP.

International efforts regarding climate change have thus far focused on limiting the human impact on climate change by limiting or eliminating the output of greenhouse gases that cause negative greenhouse effect on the atmosphere. Majority of scientists agree that Earth could cope with an increase of 2 degrees Celcius in temperature⁶⁶. This number is now used as a political dogma, as can be seen in the case of the Paris agreement pledge. In order for the atmospheric concentrations to stabilize, the amount of CO₂ emitted to the atmosphere has to be equal to the amount taken up by the oceans⁶⁷.

II. EU environmental leadership

A. US position

Over the years, the EU and the US have shifted their positions over MEAs triggering an interest amongst scholars. Although as there is a prevailing general consensus that the EU is (amongst) the leading player(s) in global environmental law and policy, it is important to analyse how this leadership was taken over from US and whether the US commitment to International Environmental law is connected to it. According to Kelemen and Klievel, such shift in positions can be better explained by the different levels of commitment to Environmental Policy goals, and not by the commitment to International law⁶⁸. Indeed, the US signed and ratified almost every considerable MEA between 1960s and 1990s. However, in the early 1990s, the US has failed to ratify a large number of MEAs, the Kyoto Protocol being one of them⁶⁹. This can be explained by four reasons. First, it became a common practice to qualify such agreements through the extensive use of reservations, understandings and declarations. This instrument provides an insight into what the “US would have

⁶⁶ Barrett, Scott, *Climate treaties and the imperative of enforcement*, Oxford review of economic policy, vol. 24, n. 2, 2008, Oxford University Press, p. 240.

⁶⁷ Kelemen, R. Daniel, Knievel, Tim. *The United States, the European Union and international environmental law: The domestic dimensions of green diplomacy*, International Journal of Constitutional law, Oxford University Press, 2016, p. 947.

⁶⁸ *Ibid.* 69, p. 949.

⁶⁹ *Ibid.* 70, p. 950.

demanding if it had agreed to ratify the agreements in question”⁷⁰. Second, according to Kelemen and Klievel, the US has historically complied with the duties and obligations it undertook by signing MEAs, although the level of compliance is a subject of dispute. On the one hand, President G. W. Bush’s administration proposed a climate change action plan. The goals of this plan, considering the rejection of the Kyoto Protocol, could be best described as “ambiguous”, not effective and most importantly, not mandatory⁷¹. On the other hand, the effort made under President Obama’s, such as the 2013 Climate Action Plan, are cited as the most comprehensive as regards the slowing of the effects of climate change. The taking of the lead in international efforts addressing global climate change, point in the other direction⁷². It is important to stress that the US national initiatives having an overall positive impact did not stop there. Shortly after the Paris⁷³ conference, President Obama’s administration issued a Clean Power Plan, intended to facilitate the US’ transition to clean power economy⁷⁴. The aforementioned plan is a major step forward in changing the US energy and environmental paradigm, while making new energy technologies more cautious towards environmental consequences and more committed to “a wider range of energy resources, markets, and participants on both the supply and demand sides of the meter”⁷⁵.

Third, Kelemen and Klievel suggest that the US has had issues in implementing the provisions laid down in new MEAs, even when such implementation would translate to minor changes in already applicable laws⁷⁶.

Fourth, the US has been an open opponent to at least several key MEAs, such as the Kyoto Protocol, whereas on March 13, 2001, President G. W. Bush declared a policy turnaround, thus repudiating his presidential campaign pledge⁷⁷.

B. Requirements for an effective climate agreement

As it will be further evidenced, the EU has taken ownership of the issue of climate change in recent years. According to Barrett, the first emissions target ever to be proposed and

⁷⁰ Carlarne, Cinnamon Piñon. *Climate change policies an ocean apart: EU & US Climate change policies compared*, Pennsylvania State Environmental Law Review, Vol. 14, No. 3, 2006, pp.106-107.

⁷¹ Percival, Robert V. *Presidential Power to Address Climate Change in an Era of Legislative Gridlock*, Virginia Journal of Environmental Law, Vol. 32, 2014, p. 148; the Obama administration has made a numerous efforts in addressing Climate Change. Only six days after assuming his role as a new President he issued a memorandum on stronger fuel efficiency standards (*ibid.* p. 143). Moreover, the administration made an effort to include cap and trade system of greenhouse gas emissions into the 2010 budget. Similar actions were introduced by the Executive order number 13514, requiring federal agencies to establish and control their greenhouse gas emissions.

⁷² 21st Conference of the Parties, Paris: United Nations

⁷³ Tomain, Joseph P. *Clean Power Policy in the United States*, University of Cincinnati Public Law Research Paper No. 16-13, 2016, p. 2.

⁷⁴ *Ibid.* p. 22.

⁷⁵ *Ibid.* p. 952.

⁷⁶ *Ibid.* 72, p. 141.

⁷⁷ *Ibid.*

failed was at the Toronto conference. In spite of all the efforts to decrease the emissions and two climate treaties being in force, global emissions grew in numbers⁷⁸.

According to Barrett, in order for an international climate change mitigation agreement to work, it should have at least three essential components - participation, compliance and actual reduction⁷⁹.

Participation means that a broad coalition of countries has to be brought to the table in order to keep the balance of competitive advantage. If some countries make an effort to reduce their emissions, and other competing countries are not members of the agreement, the participating countries would be at a significant economic disadvantage. This is a case with major polluters such as the US, China, India and Russia. Compliance on the other hand ensures that countries' commitment is backed by sanctions, whereas not reaching the designated target would not be an option. Finally, the emission goals should be set in a manner that would ensure a significant and continuing actual reduction of emissions in the short term and in the long term.

The Kyoto Protocol to the UNFCCC was flawed on all three points whereas the Montreal Protocol could be considered a success story. First, it limits not only the production but also the consumption of certain chemicals. Second, there is no major differentiation between developed and developing countries, at least in the long run, in terms of the limits. Third, the Kyoto Protocol sets out temporary targets, whereas the Montreal Protocol bans certain substances, meaning that there is no increase in pollution after certain compliance period ends. It should be noted that EU ETS, found under the Kyoto Protocol, suffers from enforcement issues⁸⁰.

Barrett further argues that an effective climate treaty system must push forward a technological transformation⁸¹.

First, for the climate agreement to be fully effective, all three previously mentioned conditions should apply. According to Bang and Skodvin, it is evident from the Kyoto Protocol compliance case that any failure to uphold at least one of the three requirements will result in "free riding" of other states⁸². This conclusion is drawn from the fact that Annex B coun-

⁷⁸ *Ibid.* pp. 67, p. 242.

⁷⁹ According to Fleurke and Verschuuren, despite the additional rules and regulations adopted after the third EU ETS phase, "achieving full compliance with the EU ETS still largely depends on the efforts of national competent authorities of the participating countries". They conclude that criminal and administrative enforcement in EU Member States is not effective, lacking an overall harmonization of enforcement practice of national competent authorities. Fleurke Floor and Verschuuren Jonathan, *Enforcing the European Emissions Trading System within the EU Member States: a Procrustean bed?* Chapter in Spapens, Toine and White, Rob (eds.) *Environmental Crime and the World*, Ashgate, 2015, p. 20.

⁸⁰ *Ibid.* 67, p. 249.

⁸¹ Bang Guri, Hovi Jon and Skodvin Tara, *The Paris Agreement: short-term and long-term effectiveness*, Politics and Governance, 2016, volume 4, issue 3, p. 210.

⁸² Pavese Carolina B. and Torney Diarmuid, *The contribution of the European Union to global climate change governance: explaining the conditions for EU actorness*. *Revista brasileira de Política Internacional*, volume 55 (special edition), 2012, p. 133.

tries of the Kyoto Protocol achieved or even exceeded all their compliance levels. Nevertheless, after the end of the 1st commitment period, overall emissions were 50 % higher than they were during Kyoto's baseline year - 1990. Increase of overall emissions is, *inter alia*, the result of the US' failure to ratify, Canada's last minute withdrawal and low targets that did not encourage the progress.

C. EU taking over

The EU's actorness in international policy making has evolved over time and can be divided in four periods. According to Pavese and Torney, for the most of 1990s its policymaking could be described as lacking cohesion⁸³. The EU was a major player in setting the outcome of negotiations on the UN Framework Convention on Climate Change (hereinafter UNFCCC), thus securing US participation in the agreement⁸⁴. Nevertheless, the success of UNFCCC should not be attributed to EU, since the "crucial compromise" with the US was struck not by the EU's president country at the time *i.e.* Portugal, but by the United Kingdom, acting independently from the rest of the EU⁸⁵. The Next major step in building the EU's influence on the issue of international climate change is the Kyoto Protocol. According to Pavese and Torney, in the course of the preparations for the upcoming Kyoto Protocol conference, the EU's Heads of State and Government considered that industrialized countries should reduce their emissions of the three main greenhouse gases by 15% relative to 1990 levels by 2010⁸⁶. The agreement to divide an overall EU target between the Member States was struck as well. Nonetheless, the sum of Member States targets under this proposal have added up to only 9.2 % reduction. There still existed a superficial EU cohesion regarding these pre-Kyoto Protocol targets, the "EU effort was not underpinned by a deeper cohesion on how the EU and its Member States would achieve this target"⁸⁷. This fact shows how deeply divided the Member States were as regards the priority of combating international climate change. However, the EU achieved a considerable success in shaping the results of the Kyoto negotiations. The EU's main priority during the negotiations was to secure the participation of other industrialized countries in an all-reaching legally binding agreement with specific targets to be reached by each country. As history has shown, the EU was highly successful in reaching those goals. Not only did the Kyoto Protocol set out binding emission reduction or limitation targets for each country, but these goals were attained by employing economically and politically acceptable market tools such as emission trading scheme. A common critique towards Kyoto Protocol is usually associated with 2 of the 3 Kyoto Protocol flexible mechanisms, such as the Clean Development Mechanism and Joint Implementation which were the result of the compromise with the US. According to

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* 37.

Pavese and Torney, the EU has faced significant issues while operationalizing the Kyoto Protocol, especially with the aforementioned flexible mechanisms and the compliance procedures. In 2000, during the 6th Conference of the parties in Hague, the EU encountered a significant conflict with the US. Moreover, there was a notable lack of EU cohesion at the time. Pavese and Torney note that the UK and French ministers have agreed on a provisional deal with the US representatives, which was later rejected by a larger EU group.

The creation of the international greenhouse gas reduction regime is a particularly important example of the EU's ability to shape international law and politics. Since the importance of global climate change is undeniable, the EU has strategically positioned itself as a leading player in global debate on lowering greenhouse gas emissions. Its presence in leadership was evident between the 1992 UN Conference on Environment and Development⁸⁸ and the 1997 Kyoto Protocol to UNFCCC. It should be noted that the EU participates as a Regional Economic Integration Organisation under the UNFCCC, category specifically created for the EU and later transferred to other multilateral environmental agreements. This means, in more practical terms, it translates to the Member States' right to cast their vote individually or surrender it to the EU.

One of the most controversial points surrounding multilateral environmental agreements was raised during the Kyoto Protocol negotiation process *i.e.* the issue of differentiation. The Kyoto Protocol applies the principle of Common but Differentiated Responsibilities and Respective Capabilities (CDRRC) under Article 3 UNFCCC. This principle allows a privileged treatment for developing countries, whereas emission reduction commitments are set only for developed, industrialized countries and countries with economies in transition. Eckes argues that the EU had a great contribution in setting up the Kyoto Protocol, which relies on methods that made the EU successful *i.e.* "governing through technocratic market regulation"⁸⁹.

The 2 degrees Celsius threshold was taken seriously both on a scientific and on a political levels by the EU Member States. The author argues that even though the EU lacked clear leadership in 1990s, the Kyoto Protocol would not have been possible without the EU. During the Kyoto Protocol negotiations, the EU "led by example, offered carrots and threatened the stick to convince other countries to follow"⁹⁰.

Lastly, the EU managed to lead in regulatory competition, whereas the Kyoto Protocol's elements mirror the EU's model of governance through targets, timetables, action plans and compliance mechanisms.

⁸⁸ Eckes Christina, *EU climate change policy: can the Union be just (and) green?* in Kochenov Dimitry and Amtenbrink Fabian, *The European Union's shaping of the international legal order*, Cambridge University Press, 2013, p. 196.

⁸⁹ *Ibid.* p. 197.

⁹⁰ *Ibid.* p. 134.

According to Pavese and Torney, the EU's internal cohesion took a turn around 2001 when the Bush administration failed to submit the Kyoto Protocol for ratification to US Congress⁹¹. It opened a new window of opportunity for the EU, which the EU was keen to use. Not only did the EU proceed with the ratification of the agreement, it also transformed climate change from a sectorial policy to a core element of the EU's identity⁹². This shift strengthened the Member States' position within the EU, increasing the political appeal to combat climate change. Around this time, climate change action began to be framed in terms of economic opportunities that could be generated. This led to the decision to move forward with EU Emissions Trading Scheme by adopting Directive 2003/87 in 2003. At this stage, the EU began to approach international climate change with market-based mechanism, thus focusing on the bigger picture of the global carbon market. The US' withdrawal from the Protocol opened the scene for the EU to focus on making the Kyoto Protocol operational. At the 7th conference of the parties in Marrakech, the EU managed to agree on actual reduction targets and thus increase its actorness in this regard. Finally, the US' withdrawal meant that the Protocol was facing a difficulty as regards its entry into force, since at least 55 % of Annex I parties had to ratify the agreement for it to enter into force. The latter was made possible by the EU's deal with the Russian federation, in return for the EU's support for Russian membership at the World Trade Organisation.

The EU's leadership has proven unsuccessful in gathering support for the agreement at the 15th Conference of the Parties. In spite of the ambitious commitments set out in the Europe 2020 action plan, EU did not succeed to get others to accept binding targets and timetables. According to Parker, Karlsson and Hjerpe, during the Conference, the three most recognised leaders had different goals and competing visions for the future vision of combating international climate change⁹³. On the one hand, the EU urged for a top-down binding deal, whereas the US urged for a nationally determined emission reduction pledges made by all countries, including emerging economies. Another major emitter - China envisioned that no commitment from itself should be necessary to reach those goals. The outcome was the Copenhagen accord – a substantial EU failure, where parties came to a twofold agreement: firstly - a bottom-up pledge and secondly - a review of the previously established structure. Moreover parties have acknowledged the 2 per cent Celsius goal for the first time.

⁹¹ *Ibid.*

⁹² Parker Charles F., Karlsson Christer, Hjerpe Mattias (2017) *Assessing the European Union's global climate change leadership: from Copenhagen to the Paris Agreement*, Journal of European Integration, 39:2, p. 247.

⁹³ Since the UN climate conference in Durban in 2011, EU was able to build up a coalition of developed and developing countries from Africa, the Caribbean, the Pacific and Latin America sharing the highest level of ambition in the international climate talks, so-called "Durban coalition" EU Press release, *UN climate conference: EU-led ambition coalition growing stronger*, 09/12/2015 https://ec.europa.eu/clima/news/articles/news_2015120902_en (last accessed on July 5, 2017).

D. Road to Paris

In contrast to the Copenhagen summit, key points of the Paris Agreement were pre-determined before the conference took place. An ambitious policy goal adopted therein could be firstly attributed to the Durban coalition⁹⁴ consisting of the EU together with Small island developing states (hereinafter SIDS) and Least developed countries (LDC). According to authors, “ambition coalition” took in all major groups except for Like-minded developing countries (hereinafter LMDC)⁹⁵.

A big part of EU’s success in Paris could be attributed to its instrumental leadership in building the aforementioned ambition coalition of different countries aiming at the pursuit of a common goal. This coalition set out for an ambitious agreement : 5 year reviews, common and robust set of transparency and accountability rules and an adequate climate and finance support⁹⁶. Moreover, this so-called ambition coalition travelled the world to gather support and recruit new members. According to Parker, Karsson and Hjerpe by the time the negotiations began. The coalition had grown to 80 members. On 8 December 2015, the EU and 79 African, Caribbean and Pacific countries jointly supported the ambitious Paris goal⁹⁷. The US has joined the group on the following day⁹⁸. Throughout the entire negotiation process, the EU has managed to coordinate its Member States’ positions by naming lead negotiators who worked together with the Commission. According to Oberthur and Groen, the EU downscaled its ambitions to mitigation commitments⁹⁹. It gave up on urging for detailed rules for transparency and accountability in Paris. Its positions, therefore, became moderately reformist and moved much closer to those of the US, China, Russia and other major emitters. The EU essentially implemented a climate diplomacy action plan in 2015 with the help of the EU External Action Service and the Green Diplomacy Network.

The EU complimented its ambitious coalition through bridge-building with other least developed countries and small island states by exploring a common ground on adaption and loss and damage together with finance¹⁰⁰. Nonetheless, the EU explored possible legal forms of the Agreement together with the US, later allowing for a compromise during the last day of conference. According to Oberthur and Groen, the EU relied on two types of incentives to support its coalition and bridge building. First, it made increasing financial

⁹⁴ Obergassel By Wolfgang , Arens Christof, Hermwille Lukas, Kreibich Nico, Mersmann Florian, Ott Hermann E., And Wang-Helmreich Hanna, *Phoenix from the Ashes - An Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change*, p. 9 available at: https://wupperinst.org/fa/redaktion/downloads/publications/Paris_Results.pdf (last accessed on July 1, 2017).

⁹⁵ *Ibid.* 93, p. 248.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Oberthur Sebastian, Groen Lisanne, *Explaining goal achievement in international negotiations: the EU and the Paris Agreement on climate change*, *Journal of European Public Policy*, 2017, p. 13.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* 101.

commitments in 2014 and 2015¹⁰¹. Moreover, the EU was the most active amongst developed countries in providing assistance for elaborating climate action plans, thus ensuring that those countries submitted their plans prior to the Paris conference.

III. EU as model for international climate change protection

A. High level of protection

Kelemen and Klievel conclude that up to 1990s, when the US has exerted a clear leadership on MEUs and International Environmental law in general, the EU followed. Post 1990s the contrary trend could be seen, in so far as the EU exerts leadership and the US refuses to follow¹⁰².

To find the reason behind the major turnaround in International Environmental law and policy debate, one must not limit itself with the decline of US leadership, but look back into the EU's environmental objectives set out in the Treaties, one of the key principles being high level of environmental protection, first referred to in SEA, later found in the Amsterdam Treaties as well as in following treaties¹⁰³. According to Misonne, reference to "high level of protection" in EU law is directly linked to "possible detrimental effects of European integration" and the negotiations of SEA, whereas the default voting quorum for the adoption of EU legislation directed at the establishment and functioning of the Internal Market have been amended from unanimity to qualified majority¹⁰⁴.

Some Member States such as Denmark and Germany, had expressed their concerns over the adoption of common standards, which at the beginning of negotiations, were of lower threshold than the already existing national ones. A guarantee in the form of Treaty amendment was secured, which expressly provided that the Commission, "in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection"¹⁰⁵. Misonne states that this guarantee has not reassured Member States. A safeguard clause was, therefore, inserted, allowing for national measures to be adopted. This had "a detrimental side effect: instead of focusing attention on the level of ambition of the Commission proposals, disgruntled States needed only to activate the safeguard provision in order to try to maintain their own standards"¹⁰⁶.

¹⁰¹ *Ibid.* p. 954.

¹⁰² *Ibid.* 33.

¹⁰³ Misonne, Delphine. *The importance of setting a target: the EU ambition of a high level of protection*, Transnational environmental law, Volume 4:1, 2015, Cambridge University Press, p. 13.

¹⁰⁴ Single European Act, OJ (1987) L 169/1, Article 100, paragraph 3.

¹⁰⁵ *Ibid.* 104, p. 14.

¹⁰⁶ Article 3, paragraph 3 TEU.

Since the entry into force of the Lisbon Treaty, “high level of protection and improvement of the quality of the environment”¹⁰⁷ is one of the common principles of the EU. Moreover, high level of protection serves as the key aim of the EU environmental policy, supported by the precautionary principle, together with preventive action, priority of rectifying environmental damage at source and polluter-should-pay principles¹⁰⁸. The target of high level environment protection became relevant where there was a need for guidance in upholding EU law, either in the field of law or in that of policy. In essence, these principles both guide and limit the EU in its legislative proposals and policy goals. On the one hand, they provide guidance in cases where environmental interests are justified, despite the substantial economic consequences¹⁰⁹. On the other hand, they limit the EU’s executive decision making margin of discretion towards the delegated mandate in the area of environment. As it was stated, Article 193 TFEU allows for more stringent protective measures to be introduced by Member States¹¹⁰. This mechanism allows that the EU reach its ambition of high level of environment protection by combining two set of tools – minimum universally applicable environmental protection threshold applicable to all Member States laid down by EU laws and the possibility for Member States to introduce stricter measures¹¹¹. The EU’s high environmental ambitions are achieved through a continuous cycle of stringent and self-conscious environmental policy which has the ability to quickly adapt to new international environmental obligations.

B. Leading by example

The EU’s credibility as a leading player in global environmental debates rests heavily on its ability to meet the obligations it has undertaken. Such is the case with international climate change. In 1997, at the 3rd Conference of the Parties (hereinafter COP) to the UN Framework Convention on Climate change¹¹² (hereinafter Convention), the Kyoto Protocol to the Convention was adopted. Entered into force on 16 February 2005, it set out binding quantified national emissions target for Annex I Parties¹¹³. The overall goal of the Kyoto Protocol was to reduce an overall emission of greenhouse gases by at least 5% below 1990 levels in the first commitment period (2008 - 2012).

On 8 December, 2012 in Doha, Qatar, at the eighth session of the COP, the Parties to the Protocol adopted new binding emission commitments for a second Kyoto commitment

¹⁰⁷ Article 191, paragraph 2 TFEU.

¹⁰⁸ *Ibid.* 104, p. 32.

¹⁰⁹ Article 193 TFEU, reads “The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.”

¹¹⁰ *Ibid.* 104, p. 34.

¹¹¹ United Nations framework Convention on climate change, 1992.

¹¹² 1997 Kyoto Protocol to the UN Framework Convention on Climate Change, 11 December 1997, Annex I.

¹¹³ Directive 2003/87 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (Text with EEA relevance), OJ [2003] L, p. 32-46.

period (years 2013-2020). Other key amendments to the Kyoto Protocol were: i) revised list of greenhouse gases ; ii) aim to reduce the overall emissions of greenhouse gases by 18% below 1990 levels during the second commitment period. The Kyoto Protocol was a key breakthrough international environmental policy both in its design and its implementation. The genius of the Kyoto Protocol resided in the establishment of a new commodity *i.e.* carbon, which could be traded among the Annex I Parties of the protocol. Although the Kyoto Protocol covered greenhouse gases other than carbon dioxide, carbon being the principal pollutant, it was later referred to simply as carbon. The EU Emission Trading Scheme (hereinafter EU ETS) was established in view of reaching goals set forward by the EU, thus allowing greenhouse gas trading between any natural or legal persons within the EU¹¹⁴. Under the EU ETS, one allowance is equal to the right to emit one ton of carbon dioxide equivalent.

The EU ETS is devised out of total of 4 “Phases”. Each Phase refers to a particular timeline. Phase 1 ran from 2005 to 2007, Phase 2 from 2008 to 2012. The EU is presently in Phase 3 (2013-2020). It should be noted that in the context of international environmental leadership, the EU put forward a higher threshold than that initially required by the Kyoto Protocol. Whereas the EU ETS Phase 1 was successful in establishing primary and secondary EU ETS markets, the EU environmental ambitions began to show in its 2nd and 3rd Phase. In the first Kyoto Protocol commitment period or EU ETS Phase 2, the EU pledged to reach 8% greenhouse gas emissions reduction below 1990 levels, 3% more than the threshold required by the Kyoto Protocol. Moreover, for the second Kyoto Protocol commitment period, or EU ETS Phase 3, the EU has pledged a 20 % reduction of greenhouse gases below 1990 levels, 2% more than the threshold required by the Kyoto Protocol second commitment period.

As regards the results, the EU and its Member States met all their commitments and are fully compliant under the Kyoto Protocol’s first commitment period (2008-2012). According to data, the EU has achieved an overall cut of 11.7% domestically, without counting other Kyoto mechanisms¹¹⁵. According to the most recent data, the EU is on track to over-achieve the second Kyoto commitment period greenhouse gas emissions targets¹¹⁶.

Under the Convention, Parties to the Convention are divided in two groups: Annex I countries and Annex 2 countries. Annex I countries under Article 4, paragraph 2 of the Convention are listed as developed or industrialised countries, which should take the lead by

¹¹⁴ Report From The Commission to The European Parliament and the Council, Progress Towards Achieving The Kyoto and Eu 2020 Objectives, Brussels, 9.10.2013 COM(2013) 698 final.

¹¹⁵ Report from the Commission to the European Parliament and the Council Implementing the Paris Agreement - Progress of the EU towards the at least -40% target (required under Article 21 of Regulation EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC) COM/2016/0707 final.

¹¹⁶ Huggins, Anna, Karim, Saiful, Md., *Shifting traction: differential treatment and substantive and procedural regard in the international climate change regime*, Transnational Environmental Law, Volume 5:2, 2016, Cambridge University Press, p. 428.

developing national policies which would contribute to the limiting of greenhouse gases to 1990 levels. These Annex I parties are allowed to implement such policies and measures jointly or individually, and may assist other Parties to the Convention. It should be stressed that the principle of common but differentiated responsibilities was first established in the Convention and later carried on in the Kyoto Protocol. According to this principle, all Parties to the Convention have “common environmental responsibilities, but the manner in which each state meets its responsibilities should vary according to country-specific economic, historical, social and ecological variables”¹¹⁷. It should be stressed that under the Paris Agreement, developing countries do not have a differential treatment in terms of the collective general obligation to “hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels”¹¹⁸.

IV. Concluding thoughts

Over the last few decades, global climate change became a pressing issue from both policy and legal points of view. As shown in the present study, climate change is a unique environmental problem considering the size and tools employed to tackle it. The US began to recognise it on an international level and had employed tools such as emissions trading which were later taken over internationally. However as serious as the issue is, tackling climate change requires global leadership and strong unity, since for the climate change agreement to work it has to be, not only universally acceptable in its form and in the commitments it sets out, but it has to be enforceable upon the States too. It could be said that it was a matter of time before the EU used this opportunity to establish itself as a global environmental leader. This was due not only because of early aspirations to environmental goals enshrined in Treaty of Rome and early ECJ case law, but was also due to the EU’s institutional structure, allowing it to exercise influence on all fronts, as evidenced during the Paris negotiations. The EU’s taking over of the leadership from the US and its success in Paris were possible due to the fact that the EU’s internal competences in the area of environment protection were transformed into external ones at an early stage of treaty development.

The EU’s global environmental leadership and narrative for a model in international climate change protection rests heavily on its ability to lead by example – namely the Kyoto targets and national environmental policy success, together with high level of environmental protection and wellbeing of people narratives.

¹¹⁷ *Ibid.* p. 438.

Future research into this area will focus on technicalities of enforcing and complying with the Paris agreement together with the EU's innovation in area of environmental market tools. Since the topic of global climate change is politically sensitive, we should observe an ongoing trend of preferring soft law over hard law instruments when implementing and concluding such agreements in the future. The fact that China, the US and the EU are three largest and most polluting economies, means that another iteration of post-Paris agreement is more than possible. In this regard, the EU seems to be off to a good start.

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