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Protecting Environmental Rights through the Bilateral Agreements of the European Union: mapping the field

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Abstract

The present paper aims to map existing and future opportunities for utilizing EU bilateral agreements to promote the protection of environmental rights, as well as available legal avenues to address missed opportunities and possible risks that EU environmental action abroad may negatively impact on environmental rights in third countries. It starts with a brief overview of the external environmental policy of the EU, including constitutional requirements to couple human rights and environmental protection in external relations and an introduction to the practice of EU bilateral agreements. The chapter will then provide a snapshot of the environment-and-human-rights connection in EU law from an internal perspective, to demonstrate the political sensitivity of the issue. Against this background, the central part of the paper will identify six thematic areas in which entry points for the protection of environmental rights exist in the framework of EU bilateral agreements. The final section will offer a preliminary reflection of the human rights risks of current environmental external relations of the Union and possible avenues to tackle these risks in EU and international law.

Keywords

EU external relations, EU environmental policy, environmental rights, EU agreements, climate change, biodiversity, forest, traditional knowledge, corporate accountability

Protecting environmental rights through the bilateral agreements of the European Union: mapping the field

Elisa Morgera*

The EU has used its external relations tools, in particular its bilateral agreements, to ensure the protection of human rights in third countries, notably through human rights conditionalities.¹ It has not, however, addressed environmental rights² in that context. And while it has developed a significant and increasingly convergent practice of integrating environmental concerns in its external relations tools, in particular its bilateral agreements,³ it has not systematically used environmental cooperation provisions to contribute to the protection of environmental rights⁴ abroad. Nevertheless, opportunities to contribute the protection of environmental rights through the EU's external relations exist.

As international and EU legal scholars have started relatively recently to study the environmental dimension of the EU's external relations,⁵ however, it comes as no surprise that little attention has yet been paid to the potential of EU bilateral agreements to contribute to environmental rights protection. The present paper aims to map the field, identifying existing and future opportunities for utilizing EU bilateral agreements to promote the protection of environmental rights, as well as available legal avenues to address missed opportunities and possible risks that EU environmental action abroad may negatively impact on environmental rights in third countries. It starts with a brief overview of the external environmental policy of the EU, including constitutional requirements to couple human rights and environmental

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¹ L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford, Oxford University Press, 2005).

² Environmental rights can be defined as "rights understood to be related to environmental protection": Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, UN Doc. A/HRC/22/43 (2012), para. 7.

³ G Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart, 2012), partic. ch. 2.

⁴ Academic literature on the linkages between the environment and human rights in international law is abundant: see A Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (1998); F. Francioni, 'International Human Rights in an Environmental Horizon', (2010) 21 *European Journal of International Law* 41; A. Boyle, 'Human Rights or Environmental Rights: A Reassessment?' (2007) 18 *Fordham Environmental Law Review* 471; D.K. Anton and D. Shelton, *Environmental Protection and Human Rights* (CUP, 2012); and A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

⁵ M Pallemerts (ed), *The EU and Sustainable Development: Internal and External Dimensions* (VUB, 2006); Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (CUP, 2012); and, to a lesser extent, M Pallemerts (ed), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Publishing, 2011). The EU's climate action has received far more attention, although generally with reference to internal legislation with external effects or implications: S Oberthür and M Pallemerts (Eds.), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB, 2010); J Scott, 'The Multi-level Governance of Climate Change' (2011) 4 *Carbon and Climate Law Review* 25; J Scott and L Rajamani, 'EU Climate Change Unilateralism: International Aviation in the European Emissions Trading Scheme', (2012) 23 *European Journal of International Law* 469 and K Kulovesi, "'Make Your Own Special Song, Even if Nobody Else Sings Along": International Aviation Emissions and the EU Emissions Trading Scheme', 2 *Climate Law* (2011) 535.

protection in external relations and an introduction to the practice of EU bilateral agreements. The chapter will then provide a snapshot of the environment-and-human-rights connection in EU law from an internal perspective, to demonstrate the political sensitivity of the issue. Against this background, the central part of the paper will identify six thematic areas in which entry points for the protection of environmental rights exist in the framework of EU bilateral agreements. The final section will offer a preliminary reflection of the human rights risks of current environmental external relations of the Union and possible avenues to tackle these risks in EU and international law.

The EU's external environmental action

Following the entry into force of the Treaty of Lisbon, it has become explicit that the EU's external environmental action is expected to support human rights in fostering the sustainable environmental development of developing countries, with the primary aim of eradicating poverty, and helping develop international environmental measures. Equally, all EU external action (notably in non-environmental policy areas, such as trade, development and human rights) is expected to contribute, *inter alia*, to the development of international environmental measures and developing countries' sustainable environmental development.⁶ The implication of these specific dimensions of the principle of coherence in the EU external action is that there are indeed several ways in which the EU could use its external policies to tackle the linkage between environmental protection and human rights.

The above-mentioned Treaty provisions reflect the general principle of environmental integration in all EU policies and activities,⁷ most likely sharing its unlikely justiciability at EU level.⁸ It remains unclear whether and to what extent, following the entry into force of the Lisbon Treaty, the accession of the EU to the European Convention on Human Rights⁹ and the legally binding force recognized to the European Charter on Fundamental Rights¹⁰ (which also includes a provision on environmental integration¹¹) would have an impact on access to courts in relation to any shortcomings of EU bilateral agreements from the viewpoint of environmental rights. Nonetheless, relevant references in the EU Treaties, the Charter and the case law of the European Court of Human Rights (ECtHR)¹² can still be very influential in the development and implementation of EU bilateral agreements in practice.¹³

⁶ Art. 21(2)(b) read in conjunction with Art. 21(2)(d) and (f) TEU. For a discussion of coherence in the EU's external relations and environmental integration, see Cremona, 'Coherence and EU External Environmental Policy' in E Morgera (ed.), *The External Environmental Policy of the European Union*, *op.cit.*, 33.

⁷ Article 11 TFEU.

⁸ For a discussion, Cremona, 'Coherence and EU External Environmental Policy', *op.cit.*, at 39-40, and Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, at 32-34.

⁹ Art. 6(2) TEU.

¹⁰ Art. 6(1) TEU.

¹¹ Charter art. 37. For a discussion of its legal relevance, see G Marín Durán and E Morgera, 'Commentary on Article 37 – Environmental Protection' in S Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart, forth. 2013).

¹² N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 *Nordic Journal of International Law* 81.

¹³ Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, at 285-288.

EU bilateral agreements have been concluded with a significant number of third countries that enjoy different types of relationships with the EU. While the name and overall aim of the agreement may change (Partnership and Cooperation Agreement, Association Agreements, etc.),¹⁴ all these agreements tend to cover a variety of policy areas and generally include environmental provisions aimed both at pursuing environmental cooperation and at integrating environmental concerns in other policy areas, based on a cooperative and consultative approach. Earlier bilateral agreements tended to take a varied approach in terms of the legal strength and detail of environmental clauses, the selection of priorities for environmental cooperation, the specific cooperation areas in which the environmental concerns were integrated, and supporting institutional mechanisms.¹⁵ More recent bilateral agreements, however, reflect a more coherent approach, whereby sophisticated clauses on environmental cooperation increasingly rely on international environmental standards. Since 2005 we can in fact identify a new wave of ‘post-Global Europe agreements’¹⁶ establishing obligations to effectively implement and enforce key multilateral environmental agreements (MEAs) in the context of trade and sustainable development chapters.¹⁷ In addition, environment-specific cooperative monitoring and dispute-resolution mechanisms are set up in that context, requiring the involvement of environmental experts and allowing also for advice to be sought from Secretariats of multilateral environmental agreements (MEA).¹⁸

While bilateral agreements will be the focus of this chapter, it should be borne in mind that these agreements are implemented in the context of other tools of a legal and non-legal nature that the EU deploys in its bilateral relations to pursue environmental objectives. The negotiations of bilateral agreements are preceded by Sustainability Impact Assessments (SIAs), which contribute to identify trade-offs between the trade component of the agreement under negotiation and environmental protection in the EU and in the partner country.¹⁹ SIAs thus often serve to address global environmental issues or instruments.²⁰ SIAs are mainly to feed into the negotiations of bilateral agreements, but their outcomes should also be taken into account in the implementation of these agreements, particularly because some of the recommendations emerging from SIAs may be addressed through other EU external relations tools, such as financial and technical assistance. For the vast majority of

¹⁴ For a discussion of the various types of agreements and their rationales, see Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, at 59-64.

¹⁵ *Ibid.*, at 134.

¹⁶ As their negotiations were launched by the Commission, ‘Communication – Global Europe: Competing in the world: A contribution to the EU's Growth and Jobs Strategy’, COM (2006) 567 final, 4 October 2006.

¹⁷ Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, at 133-142, and for an insider's perspective, R. Zvelc, ‘Environmental integration in the EU trade policy: the examples of the GSP+, trade sustainability impact assessments and free trade agreements’, in Morgera (ed.), *The External Environmental Policy of the European Union*, *op.cit.*, 174.

¹⁸ This is the case of association agreements (Art. 217 TFEU), partnership and cooperation agreements, as well as free trade agreements between the EU and individual third countries or groups of third countries. For a comprehensive assessment, see Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, ch. 2.

¹⁹ See Commission's website on SIAs at <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/>.

²⁰ Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, ch. 6.

bilateral agreements, a different legal framework applies to EU external assistance,²¹ which is composed of a series of unilateral EU legal instruments, whereby environment-related financial and technical support to third countries is provided on a thematic or geographic basis and is mostly sourced from the EU budget. EU's external assistance is increasingly targeting the implementation of key MEAs, as well as contributions to the reform of global environmental governance with the explicit objective of shaping it by the external dimensions of the EU's own environment and climate change policies.²² In addition, the EU institutionalizes a plethora of policy dialogues with various individual developed and developing countries, and with various groups of third countries, for the periodic exchange of views on environmental priorities and respective negotiating positions. These exercises, which are mainly organized at the initiative of the EU, serve to develop specific action plans that also address global environmental issues.²³ They usually are carried out in addition to the meetings of the institutions created by EU bilateral agreements, as a means to follow up on, and facilitate implementation of, environmental cooperation clauses of bilateral agreements. Dialogues are expected to be informed by SIAs. They may also be used by the EU to support the understanding beyond its borders of certain pieces of EU internal environmental legislation with extraterritorial implications.²⁴

While this contribution focuses on a textual analysis of EU bilateral agreements, future research on environmental rights in this context should also encompass their operation in practice through other external relations instruments. This will be particularly significant as the environmental provisions of EU bilateral agreements have been criticised for their open-ended nature, often avoiding details as regards the procedures and timeframes for implementation.²⁵ It has also been reported that formal differences in the wording of environmental clauses in bilateral agreements do not necessarily have an impact on their actual implementation, which instead rests with the provision of funding and the continued momentum provided by policy dialogue between the parties.²⁶ Opportunities for protecting environmental rights through the EU bilateral agreements thus need to be verified also in the context of other external relations tools.²⁷

²¹ *Ibid.*, Chapter 4.

²² Commission, 'Environment and natural resources thematic programme - 2011-2013 strategy paper and multiannual indicative programme', 29 October 2010, at 25. For a discussion, See, also, G. Marín Durán, 'Environmental Integration in EU Development Cooperation: Responding to International Commitments or its Own Policy Priorities?', in E. Morgera (ed.), *The External Environmental Policy of the European Union*, *op.cit.*, 204.

²³ Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, ch 5.

²⁴ For a discussion of the complex relationships between these various external relations tools, and implications for transparency and effectiveness, see E Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' in Van Vooren, Blockmans and Wouters, *The EU's Role in Global Governance: The Legal Dimension* (OUP, 2013) 194.

²⁵ B Chaytor, 'Environmental Issues in Economic Partnership Agreements: Implications for Developing Countries' *ICTSD Issue Paper 1* (September 2009), 34-35.

²⁶ T Greven, A Leopold, and E Molinari, 'An analysis of the Relative Effectiveness of Social and Environmental Norms in Free Trade Agreements' (2009 Study, European Parliament), 25-26.

²⁷ This argument was developed in Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op.cit.*, at 142-143.

Setting the scene: Environmental rights within the EU

Before turning to the identification of specific entry-points for environmental rights in EU bilateral agreements, it is instructive to take stock of the limited extent to which environmental rights are recognised and protected within the EU. At the outset, it is clear that the EU internally has not embraced the protection and promotion of environmental rights to a significant extent. First of all, while environmental protection is included in the EU Charter of Fundamental Rights, the provision is not framed in human rights terms and is specifically qualified as a “principle”²⁸ that “shall be judicially cognizable only in the interpretation of [acts that implement it] and in the ruling on their legality.”²⁹ In practice, in light of the case law on the environmental integration principle³⁰ after which the environmental provision of the Charter is modelled,³¹ it is likely that the exercise of judicial review on the basis of the environmental provision of the Charter will be “restricted to verifying that the competent institution did not clearly exceed the bounds of its discretion or misuse its powers.”³² In addition, the Charter excludes that principles such as environmental integration can be used for direct claims for positive action by the Union institutions or Member States authorities.³³ Realistically, therefore, the value of the environmental provision of the Charter may only be that of an interpretative tool.

Ultimately, the environmental provision of the Charter signals that the EU is currently unable to uphold a substantive right to a decent environment, as is still ambivalent with respect to procedural environmental rights.³⁴ And the latter is more surprising when one considers the EU’s international obligations under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,³⁵ and those emerging from the case law of the European Court of Human Rights,³⁶ that has gradually but steadily developed an environmental dimension to certain rights protected under the European Convention on Human Rights.³⁷

Not only have the EU and its Member States missed an ‘exceptional occasion’³⁸ to recognise any environmental right in the Charter, but the continued poor practice in

²⁸ Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17 (Charter Explanatory Notes), at 33.

²⁹ Charter, Article 52(5).

³⁰ Art. 11 TFEU.

³¹ Charter Explanatory Notes, at 33.

³² Marín Durán and E Morgera, ‘Commentary on Article 37’, *op.cit.*

³³ Charter Article 52(5).

³⁴ Marín Durán and E Morgera, ‘Commentary on Article 37’, *op.cit.*

³⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 (Aarhus Convention), to which the EU and almost all of its Member States are parties. Although it should be noted that in light of Charter Article 53, the procedural environmental rights recognized under the Aarhus Convention may not be restricted or adversely affected by the interpretation of the Charter.

³⁶ The Charter rights that correspond to the rights protected under the ECHR must be given the same meaning and scope than under the ECHR: Charter Article 52(3). There are several rights of that kind that have been interpreted as environmental rights by the ECtHR: see discussion in Marín Durán and E Morgera, ‘Commentary on Article 37’, *op.cit.*

³⁷ Council of Europe, *Manual on Human Rights and the Environment – Principles derived from the Case law of the European Court of Human Rights* (2nd edition, Council of Europe Publishing, 2012).

³⁸ A. Kiss, ‘Environmental and Consumer Protection’ in S. Peers and A. Ward (eds.), *The EU Charter of Fundamental Rights* (Hart, 2004), at 268.

relation to access to justice in environmental matters both at Member State and at EU level contributes to project a shadow on the situation of environmental rights in the Union from an internal perspective. Member States still struggle to put in place and implement appropriate national procedures on access to courts for environmental matters,³⁹ partly due to the lack of progress on the Commission's legislative proposal for a directive in this area.⁴⁰ The ECJ has, therefore, had opportunity to stress that national regulations on access to justice in environmental matters must avoid making the exercise of the right impossible, or excessively difficult, in practice.⁴¹

At EU level, on the other hand, the ECJ has 'obstinately clung to its rigid [Plaumann] doctrine' on standing, and 'practically barred' environmental NGOs and individuals from bringing cases to EU courts to review the legitimacy of EU environmental acts.⁴² The practice has continued after the adoption of the Charter, and does not seem to be set to change notwithstanding the amendments introduced by the Lisbon Treaty,⁴³ or the censure of the Compliance Committee of the Aarhus Convention.⁴⁴ This regrettable situation is compounded by the extremely narrow scope for administrative review of EU acts under the regulation implementing the Aarhus Convention at the level of the EU institutions,⁴⁵ and its 'extremely restrictive' interpretation.⁴⁶ And notwithstanding a host of compelling legal arguments for the ECJ to depart from its (excessively) restrictive approach to standing in environmental matters at EU level,⁴⁷ the reluctance of the 'EU institutions to be challenged by environmental organisations' persists.⁴⁸

³⁹ N. de Sadeleer, G. Roller and M. Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law Publishing, 2005).

⁴⁰ Commission, 'Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters' COM(2003) 624final, Brussels 24 October 2003. Levels of implementation at national level remain unsatisfactory also with regards to specific provisions on access to justice in existing EU environmental law: Poncelet, 'Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?' (2012) 24 *Journal of Environmental Law* 287, at 289-295; and J. Jans and H. Vedder, *European Environmental Law* (3rd ed, Europa Law Publishing, 2012), at 228-237.

⁴¹ Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011], not yet reported, paras 46-51.

⁴² Poncelet, *op.cit.*, at 298. See also L. Kramer, 'Environmental Justice in the European Court of Justice' in J. Ebbesson and P. Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press, 2009).

⁴³ See new provision in Article 263(4) TFEU and pessimistic views on whether it can have any impact on access to justice for environmental matters at EU level by Jans and Vedder, *op.cit.*, at 250.

⁴⁴ Communication to the Aarhus Convention Compliance Committee ACCC/C/2008/32, 2008; in particular, the Compliance Committee's Findings and Recommendations (2011) UN Doc. ECE/MP.PP/C.1/2011/4/Add.1, para 88, which reads: "...if the [relevant] jurisprudence of the EU Courts on access to justice, were to continue, unless fully compensated for by adequate administrative review procedures, the [EU] would fail to comply with Article 9(3) of the Aarhus Convention."

⁴⁵ Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies [2006] OJ L264/13, Articles 10-11.

⁴⁶ J. Jans and G. Harryvan, 'Internal Review of EU Environmental Matters: It's True. Baron Van Munchausen Doesn't Exist! Some Remarks on the Application of the So-called Aarhus Regulation' (2010) 3 *Review of European and Administrative Law* 53. Indeed, the General Court has explicitly affirmed that this provision is 'not compatible' with the relevant provision of the Aarhus Convention: Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission*, judgment of 14 June 2012, paras. 76-83.

⁴⁷ Notably a consistent interpretation of Articles 37 and 47 of the Charter with the Aarhus Convention, as well as with the relevant ECtHR case law: Jans and Vedder, *op.cit.*, at 244; Poncelet, *op.cit.*, at 302; M. Pallemmaerts, 'Access to Justice at EU Level' in M. Pallemmaerts (ed), *The Aarhus Convention at Ten:*

Opportunities

Possibly because of the political sensitivity attached to environmental rights within the EU, the Union has not used its bilateral agreements with third countries to contribute to the protection of environmental rights. Nevertheless, several existing areas of environmental cooperation provide fertile ground for promoting environmental rights through EU bilateral agreements, including: environmental assessments, traditional knowledge, corporate environmental accountability, forest protection, and climate change. While these have not yet led to an actual practice of the Union to actively promote or at least protect environmental rights beyond its borders, they still represent concrete opportunities that could be readily seized, should the Union consider itself ready to do so.

a) Environmental Impact Assessment

Several agreements concluded by the EU with third countries include cooperation clauses specifically targeting environmental impact assessments (EIA).⁴⁹ Under these clauses, the EU could engage partner countries in utilizing EIAs for assessing also impacts on environmental rights. EIAs under EU environmental law, in fact, inherently target human health protection,⁵⁰ and in particular the EIA Directive already includes impacts on “human beings” among those to be assessed.⁵¹ In addition, the existing legal obligation for consultations with potentially affected individuals and communities may provide for possible consideration of human rights implications of proposed developments that may not be specifically covered by the text of the Directive.⁵²

Interactions and Tensions between Conventional International Law and EU Environmental Law (Europa Law Publishing, 2011), 273-312, at 311.

⁴⁸ Poncelet, *op.cit.*, at 307.

⁴⁹ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3 (Montenegro, Stabilization and Association Agreement), art. 111; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, 29 April 2008, www.ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf (Serbia, Association Agreement), art. 111; Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3, art. 50; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2, art. 45; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3, art. 62; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3, art. 50(2); Cooperation Agreement between the European Community and the People's Republic of Bangladesh on partnership and development [2001] OJ L118/48, art. 5(1); Cooperation Agreement between the European Community and the Kingdom of Cambodia [1999] OJ L269/18, art. 5; Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part, 10 May 2010, www.eeas.europa.eu/korea_south/docs/framework_agreement_final_en.pdf...63, art. 5.

⁵⁰ Art. 191 TFEU.

⁵¹ Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175 (EIA Directive), art. 3.

⁵² As also highlighted by E Orlando, ‘Italy report’, for the European Commission-funded project on Study of the Legal Framework on Human Rights and the Environment Applicable to European Union Companies Operating Outside the EU’ undertaken by the University of Edinburgh (2010).

Furthermore, the EU could use cooperation clauses on EIA to operationalize jointly with third countries relevant international guidelines adopted under the Convention on Biological Diversity (CBD) that have a human rights dimension. These would be the case of the CBD Guidelines on the incorporation of biodiversity-related issues into EIAs,⁵³ which call within EIAs for an assessment of several human rights-related issues. These include: inter-related “socio-economic, cultural and human-health” impacts; changes to access to and rights over biological resources; social change processes as a result of a proposed project; sensitive species that may be important for local livelihoods and cultures; activities leading to displacement of people; and impacts on societal benefits and values related to land-use functions. In addition, the CBD Akwé: Kon Guidelines provide specific suggestions to assess cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.⁵⁴

The EU’s own experience, however, in using EIAs internally in a biodiversity-inclusive manner (thereby also considering human rights impacts on indigenous and local communities) has so far been quite limited.⁵⁵ As a consequence, a future attempt by the Union to use environmental assessments so as to protect environmental rights abroad may not be considered very credible unless internal regulation and practices improve.

b) Traditional knowledge

There are only a couple of examples of EU bilateral agreements⁵⁶ that expressly include as an area for cooperation the protection of traditional knowledge of indigenous peoples and local communities. That is the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles that are relevant for the conservation and sustainable use of biodiversity.⁵⁷ For instance, the Economic Partnership Agreement with CARIFORUM incorporates the relevant provision of the CBD on traditional knowledge,⁵⁸ but significantly goes beyond its

⁵³ CBD COP Decision VI/7 (27 May 2002) UN Doc. UNEP/CBD/COP/6/20, Annex.

⁵⁴ Notably, the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, in Article 8(j) and related provisions (CBD COP 7 Decision VII/16F, 13 April 2004).

⁵⁵ Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (COM/2009/0378 final), at 9.

⁵⁶ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other [2008] OJ L289/3 (EU-CARIFORUM EPA), Article 150(1); Free Trade Agreement between the EU and its Member States, on one side, and Colombia and Peru, on the other, 23 and 24 March 2011, www.trade.ec.europa.eu/doclib/press/index.cfm?id=691...63 (EU-Colombia and Peru FTA), Article 272.

⁵⁷ CBD Art. 8(j).

⁵⁸ *Ibid.*, which reads: ‘Each Contracting Party shall, as far as possible and as appropriate: ... Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices’.

letter by making reference to the need for “prior informed consent” of relevant indigenous peoples and local communities before access to traditional knowledge can be granted. It thus uses language that is more in line with relevant human rights instruments,⁵⁹ but which remains controversial in the CBD context.⁶⁰

Cooperation on traditional knowledge sits at the intersection between international biodiversity law and the protection of the human rights, but is so far circumscribed to EU cooperation in Latin America and the Caribbean. It has, however, the potential to become much more prominent in the near future with partners in other regions. This is due to the adoption in late 2010 of a new international instrument under the CBD framework - the Nagoya Protocol on Access and Benefit-sharing (ABS)⁶¹ from genetic resources and traditional knowledge, which has significant implications from a human rights perspective.⁶² Despite its often ambiguous language, the Protocol requires parties to take appropriate measures to ensure that traditional knowledge associated with genetic resources is accessed with the PIC of local and indigenous communities or with their approval and involvement.⁶³ It also requires that benefits arising from the utilization of such knowledge, as well as benefits arising from the use of genetic resources held by communities, are shared in a fair and equitable way and on mutually agreed terms with them.⁶⁴ These requirements are complemented by several other legal obligations of procedural nature that reflect both the recognition of communities’ customary laws and procedures by domestic legal systems and to the establishment of mechanisms to facilitate implementation of ABS-related regulations with regard to traditional knowledge.⁶⁵ In addition, the future parties to the Nagoya Protocol are to proactively support communities’ implementation of national ABS regulations, by empowering and preparing them to develop ABS arrangements.⁶⁶ The implementation of all these provisions will be particularly challenging, in developed and developing countries alike,⁶⁷ thus providing a fertile group for cooperation both on legislative development and on institutional and stakeholder capacity-building. As

⁵⁹ Notably, the UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007).

⁶⁰ Note that reference to ‘prior informed consent’, one of the key tenets of the UN Declaration on the Rights of Indigenous Peoples cannot be found in the text of the CBD, but rather in a decision adopted by its governing body, namely the Work Programme on Article 8(j), where general principle 4 refers to ‘prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices’ (CBD Decision V/16, *Article 8(j) and related provisions*, UN Doc.

UNEP/CBD/COP/5/23 (2000)). Nonetheless, evidence of CBD parties’ inability to unequivocally adopt the concept of ‘prior informed consent’ can be found in the text of the Nagoya Protocol, where reference is made throughout to ‘prior informed consent or the approval and involvement of indigenous and local communities.’ For a discussion, E Morgera and E Tsioumani, ‘Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity’ 21 (2011) *YbIEL* 3-40.

⁶¹ For a discussion of the Nagoya Protocol from an EU perspective, M. Buck and C. Hamilton, ‘The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity’ (2011) 20 *RECIEL* 47.

⁶² A Savaresi, ‘The International Human Rights Law Implications of the Nagoya Protocol’ in E Morgera, M Buck and E Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Martinus Nijhoff, 2013) and E Morgera, M Buck and E Tsioumani (eds), *Commentary on the 2010 Nagoya Protocol on Access and Benefit-sharing* (Martinus Nijhoff, forth. 2013).

⁶³ Nagoya Protocol, Article 7.

⁶⁴ *Ibid.*, Article 5(1)-(2).

⁶⁵ *Ibid.*, Article 12.

⁶⁶ *Ibid.*, Articles 21-22.

⁶⁷ See the review of implementation challenges in different regions in Part II of Morgera, Buck and Tsioumani (eds), *Commentary on the 2010 Nagoya Protocol on Access and Benefit-sharing*, *op.cit.*

the prompt ratification of the Protocol is considered essential for the EU “to continue to lead international biodiversity policy,”⁶⁸ the Union’s role in supporting developing countries in facing the implementation challenges of the Protocol,⁶⁹ including at the bilateral level,⁷⁰ can be expected to be equally relevant for EU’s leadership in this area.

c) Corporate Environmental Accountability

Corporate environmental accountability, a term endorsed by the international community at the 2002 World Summit on Sustainable Development (WSSD),⁷¹ can be understood as the legitimate expectation that reasonable efforts will be put in place, according to international standards, by private companies and foreign investors for the protection of a certain global interest or the attainment of a certain internationally agreed environmental objective.⁷² This is another area in which environmental protection and human rights intersect, in particular with respect to natural resource development by private companies and the rights of indigenous peoples and local communities.⁷³

The EU external and internal action on corporate environmental accountability has been through different phases due to both the uncertain fate of multilateral efforts in this area and also changes in direction of EU policies. In parallel, integration of corporate environmental accountability in the EU external relations has been subject to an evolution.⁷⁴ As early as in 1999 the European Parliament called on the Commission and the Council to develop a legal basis for establishing a European multilateral framework governing companies operating worldwide.⁷⁵ EU ‘domestic’ regulation, however, was not enacted to that end, although, at the multilateral level, the EU presented itself as a global leader on corporate accountability issues.⁷⁶ The EU thus appears more willing to address these issues externally than internally.

⁶⁸ Commission, ‘Communication on our life insurance, our natural capital: an EU biodiversity strategy to 2020’ COM (2011) 244 final, at 7.

⁶⁹ The various implementation challenges that will be faced by developing countries are outlined in detail at Art. 22 of the Nagoya Protocol (“Capacity”).

⁷⁰ E Morgera, ‘The Trajectory of EU Biodiversity Cooperation: Supporting Environmental Multilateralism Through EU External Action’ in Morgera (ed), *The External Environmental Policy of the EU, op.cit.*, 235. On the usefulness of bilateral approaches to support the implementation of the Nagoya Protocol, see T. Young, ‘An international cooperation perspective on the Implementation of the Nagoya Protocol’, in Morgera, Buck and Tsioumani, *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective, op.cit.*, 451.

⁷¹ Paragraph 49 of the WSSD Plan of Implementation, UN. Doc. A/CONF.199/20, Resolution 2, Annex, 4 September 2002.

⁷² E Morgera, *Corporate Accountability in International Environmental Law* (OUP, 2009), chapter 2.

⁷³ See in particular the Reports of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc A/HRC/12/34 (2009), Section E and UN Doc. A/HRC/15/37 (2010), Section III. For a discussion, E Morgera, ‘From Corporate Social Responsibility to Accountability Mechanisms’ in PM Dupuy and J Vinuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (CUP, 2013) 321.

⁷⁴ Marín Durán and E Morgera, *Environmental Integration in the EU’s External Relations*, 277-279.

⁷⁵ European Parliament, Resolution on EU standards for European enterprises operating in developing countries: towards a European code of conduct’ (A4-0508/98) [1999] OJ C104/180, particularly para 23, as discussed in D Augenstein et al, ‘Study of the Legal Framework on Human Rights and the Environment Applicable to European Union Companies Operating Outside the EU’ (Edinburgh, University of Edinburgh, 2010) para 12.

⁷⁶ A Gatto, ‘Corporate Social Responsibility in the External Relations of the EU’ (2005) 24 *Yearbook of European Law* 423, at 436.

Indeed, several EU bilateral agreements include cooperation provisions on “strengthening the private sector under conditions ensuring environmental protection”,⁷⁷ which may provide a basis for addressing the links between corporate environmental degradation and human rights violations.⁷⁸ This possibility appears to find confirmation in the EU Foreign Affairs Council’s support⁷⁹ for the operationalization of the UN Framework on Business and Human Rights.⁸⁰ It also underlies indications by the European Commission of the possibility to report on EU companies’ compliance with initiatives for promoting corporate environmental accountability in the mining, oil and gas sectors and promote the adoption of criteria for EU companies investing in third countries.⁸¹ In this light, existing cooperation clauses in EU bilateral agreements could allow for a transparent and participatory process through which the EU, its Member States, the third country or region governments and relevant stakeholders agree upon specific procedures to monitor the environmental impacts of European companies operating outside of the EU, in the framework of ongoing political dialogues and EU’s external funding opportunities.⁸²

d) Deforestation

Sustainable forest management has been a long-standing international concern for the EU who supported the development of a legally binding agreement on forests⁸³ both

⁷⁷ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3, art 86(1); Montenegro Stabilization and Association Agreement (2007), art. 94, Serbia Stabilization and Association Agreement (2008), art. 94, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Bosnia and Herzegovina, 16 June 2008, www.delbih.ec.europa.eu/files/docs/publications/en/SAP_eng.pdf, art. 92, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/166, art. 92; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13, art. 85(1); Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/3, art. 51.

⁷⁸ See generally, Morgera, *Corporate Accountability in International Environmental Law*, *op. cit.*

⁷⁹ Council, ‘Conclusions on human rights and democratisation in third countries’ 8 December 2009.

⁸⁰ J Ruggie, ‘Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights’ (2008) UN Doc A/HRC/8/35. Endorsed by the Human Rights Council, Resolution 8/7 ‘Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (2008) UN Doc A/HRC/8/52.

⁸¹ European Commission, ‘Position Paper of the Sustainability Impact Assessment of the EU-Andean Community Association Agreement’ November 2010, at 7 and 9. See also D Augenstein et al, ‘Study of the Legal Framework on Human Rights and the Environment Applicable to European Union Companies Operating Outside the EU’, *op. cit.*

⁸² E Morgera ‘Expert Report on CSR to Respect Human Rights in the Environmental Sphere’ for the European Commission-funded project on Study of the Legal Framework on Human Rights and the Environment Applicable to European Union Companies Operating Outside the EU’ undertaken by the University of Edinburgh (2010).

⁸³ G Reischel, ‘The EU and the UN Forest Negotiations: A Case of Failed International Environmental Governance?’ (Paper presented to Marie Curie European Summer School on Earth System Governance, Vrije Universiteit, Amsterdam, 24 May-6 June 2007) at www.2007amsterdamconference.org/Downloads/07SummerSchool%20-%20Reischl.pdf.

at the global⁸⁴ and regional level.⁸⁵ Its linkages with human rights are well established in international legal instruments, once again with a particular focus on indigenous peoples.⁸⁶

Recently the EU has developed a sectoral bilateral approach to forest-related cooperation, though the conclusion of specialized bilateral agreements called “voluntary partnerships agreements” (VPA) under its Forest Law Enforcement, Governance and Trade (FLEGT) initiative.⁸⁷ FLEGT already provides opportunities for addressing environmental rights: the relevant Action Plan foresees that the Commission will “work to address ...local and indigenous peoples’ rights to the forests they depend on for a living.”⁸⁸ The VPA signed with Ghana,⁸⁹ for instance, includes in the definition of legal harvest, reference to national legal norms with social, cultural and labour dimensions.⁹⁰ This is then coupled with a commitment from the third country to review its national legal framework where it does not support *sustainable* forest management.⁹¹ This could be interpreted as including also the interactions between forest protection and human rights, thereby opening the door for a bilateral dialogue on the definition of this concept using the national legislation of the third country as a departure point. This understanding seems to be confirmed by the explicit reference in relevant EU instruments on external thematic funding to the “promotion on the ground of community-based forest management and respect for local and indigenous peoples’ rights over forestland.”⁹²

The other human right-related dimension of the FLEGT initiative concerns procedural environmental rights. FLEGT provides systematic support for involvement of third-

⁸⁴ The EU advocated the development of a global, legally binding instrument on forests at the United Nations Forum on Forests (eg, A Baldwin et al, ‘Summary of the fifth session of the United Nations Forum on Forests’ (2005) 13(133) *Earth Negotiations Bulletin* 4).

⁸⁵ During the Forest Europe Ministerial Conference, held in Oslo, Norway, from 14-16 June 2011, ministers of European countries and representatives of the EU adopted a mandate for negotiating a legally binding agreement on forests in Europe by 2013: see Oslo Ministerial Mandate for Negotiating a Legally Binding Agreement on Forests in Europe, 16 June 2011, at www.foresteuropa2011.org/pop.cfm?FuseAction=Doc&pAction=View&pDocumentId=29800.

⁸⁶ Eg, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (Rio Forest Principles), 31 ILM 881 (1992), para 5(a) which reads: “Forest policies should support the identity, culture and rights of indigenous people and forest dwellers. Their knowledge of conservation and sustainable forest use should be respected and used in developing forestry programs. They should be offered forms of economic activity and land tenure that encourage sustainable forest use and provide them with an adequate livelihood and level of well-being.”

⁸⁷ Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, [2005] OJ L 347/1.

⁸⁸ Commission, ‘Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an Action Plan’ COM (2003) 251 final, 3 (FLEGT Action Plan), at 21.

⁸⁹ Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community (20 November 2009) <<http://www.illegal-logging.info/uploads/SignedAgreementECGhanaFLEGTEEN.pdf>> accessed 19 April 2010 (hereinafter, Ghana VPA).

⁹⁰ *Ibid.*, Annex II.

⁹¹ FLEGT Action Plan, at 5.

⁹² European Commission, ‘Thematic strategy for the environment and sustainable management of natural resources, including energy’, 14 May 2007, at 18; European Commission, ‘Environment and natural resources thematic programme—2011–2013 strategy paper and multiannual indicative programme’, 29 October 2010, at 24.

country stakeholders in the definition of the legality of timber: the annex to the VPA includes the provision that the definition of legal harvest needs to be agreed with local stakeholders.⁹³ And the participation of various stakeholders, including human rights-holders, in forest-related decision-making is indeed considered an essential element of sustainable forest management in relevant international instruments.⁹⁴ An NGO report, however, underscored that EU external assistance programming documents provided insufficient information on the involvement of local communities in the VPA negotiating process or on the impacts of the FLEGT initiatives on legal and institutional coherence in the partner country.⁹⁵ So while this is probably the only thematic areas of EU bilateral external relations where work is already ongoing on environmental rights, it is still too early to determine whether it is operating effectively or even whether it can serve as a model for other areas of EU bilateral cooperation.

e) Climate change

Climate change is undoubtedly the environmental issue that has received the highest priority and has been most systematically integrated into EU external relations. This may be explained by the ascent of climate change at the international level from an environmental issue to a development and global security challenge.⁹⁶ At the EU level, climate change had already been singled out by the European Council as a key challenge in the late 1990s and followed up by various policy proposals.⁹⁷ Several other policy initiatives followed, such as the launch in 2007 of the Global Climate Change Alliance,⁹⁸ and the issuance in 2009 of a White Paper on Adaptation encouraging the systematic inclusion of climate change adaptation into all EU external policies, particularly in the area of trade, development cooperation and security.⁹⁹ In parallel, EU legislation on climate change has been increasingly refined, reflecting the evolution of the international climate change regime.¹⁰⁰

The treatment of the international climate change regime in the EU external relations has accordingly been characterised by a significant evolution. Initially, the inclusion of climate change in the EU external action tools was very generic¹⁰¹ or specifically geared towards encouraging the ratification and implementation of the Kyoto

⁹³ E.g., Ghana VPA.

⁹⁴ Rio Forest Principles, para. 2(d).

⁹⁵ WWF, FERN and Birdlife, 'Environmental Tools in EC Development Cooperation: An Analysis of Country and Regional Environmental Profiles' (2009), at 19.

⁹⁶ F Sindico, 'Climate Change: A Security (Council) Issue?' (2007) 1 *Carbon and Climate Law Review* 26; E Morgera, 'The 2005 UN World Summit and the Environment: The Proverbial Half-Full Glass?' (2006) 15 *Italian Yearbook of International Law* 53.

⁹⁷ Commission, 'Communication – Climate change in the context of development cooperation' COM (2003) 85 final and Council, 'Conclusions on Climate Change in the Context of Development Policy', 24 November 2004 (Annex 'Action Plan to accompany the EU Strategy on Climate Change in the Context of Development Cooperation').

⁹⁸ Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations*, *op. cit.*, at 229.

⁹⁹ Commission, 'White Paper – Adapting to Climate Change: Toward a European Framework for Action' COM (2009) 147 final, 15-16.

¹⁰⁰ K Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You To)' in Morgera (ed.), *The External Environmental Policy of the European Union*, *op.cit.*, 115.

¹⁰¹ References to climate change as an area for cooperation can be found, eg, in several PCAs with CIS countries (see Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations*, *op. cit.*, at 130-132).

Protocol, as reflected in certain bilateral agreements.¹⁰² This was linked to the EU international efforts to ensure the Kyoto Protocol entry into force notwithstanding the declaration by the United States of their intention not to ratify it.¹⁰³ More recently, the EU has prioritised climate change through all its external relations tools, focusing in particular on the creation of a global carbon market and carbon finance. This has occurred in tandem with developments in EU environmental legislation, the implementation of which will intertwine with the Union's external action at all levels.¹⁰⁴ Notable linkages between internal and external action include the support for the establishment of carbon trading schemes in other regions with a view to expanding the global carbon market first in countries belonging to the OECD, and later in emerging economies, including in sub-federal or regional entities.¹⁰⁵ They also include a non-binding provision on climate finance for developing countries,¹⁰⁶ and the opportunity to establish joint projects between EU Member States and third countries on renewable energy.¹⁰⁷

This sophistication in the EU approach to climate change has become increasingly visible in all external relations tools. Notably, post-Global Europe agreements include unprecedented cooperation clauses wholly devoted to climate change or significantly detailed language on cooperation on trade and climate change. Recent agreements therefore contain operative provisions focusing on specific aspects of climate change cooperation, such as: mainstreaming climate change in all policy areas, supporting both mitigation and adaptation, supporting trade measures and/or removing trade obstacles to facilitate the implementation of the international climate change regime, facilitating technology transfer and supporting the international carbon market.¹⁰⁸ Climate change has also become the number-one priority for EU external funding. This is true for its funding on a geographic basis,¹⁰⁹ including for cooperation with

¹⁰² Eg, Bosnia AA, art 108; Montenegro AA, art 111; Serbia AA, Art 111 (Ch 2, s 2.4).

¹⁰³ K Kulovesi, 'How to Prevent Babies from Being Thrown Away with the Bathwater: Perspectives on the International Climate Regime from Buenos Aires to the Future' in E Morgera and F Francioni (eds), *The Future of Environmental Law: International and European Perspectives* (The Working Group on Environmental Law: Collected Reports 2004 – 2005) *EUI Working Papers Law*, Law No. 2006/01, 23.

¹⁰⁴ Directive (EC) 2009/29 of the European Parliament and the Council amending Directive (EC) 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63 (EU ETS Directive). See generally K Kulovesi, E Morgera and M Muñoz, 'Environmental Integration and Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) 48 *Common Market Law Review* 829.

¹⁰⁵ *Ibid*, art 25.1(a): this went beyond an earlier formulation that limited linking the ETS only to industrialized countries having ratified the Kyoto Protocol (Kulovesi et al, 'Environmental Integration and Multi-faceted International Dimensions of EU Law', *op. cit.*, at 862).

¹⁰⁶ EU ETS Directive, art 10(3): see comments by Kulovesi et al, 'Environmental Integration and Multi-faceted International Dimensions of EU Law', *op. cit.*, at 856.

¹⁰⁷ EU ETS Directive, art 9(1).

¹⁰⁸ In particular, Cotonou Agreement (Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part and the European Community and its Member States of the other [2000] OJ L317/3)- Second Revision of the Cotonou Partnership Agreement – Agreed Consolidated Text (11 March 2010) at www.ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf, arts 1, 8, 11 and 32bis; COPE FTA, art 275; South Korea FA, art 24; Agreement establishing an Association between the EU and its Member States, on the one hand, and Central America on the other, 22 March 2011, www.trade.ec.europa.eu/doclib/press/index.cfm?id=689, art 63.

¹⁰⁹ Regulation (EC) 1905/2006 of the European Parliament and of the Council establishing the financing instrument for development cooperation [2006] OJ L378/41 (DCI Regulation), art 2(2).

industrialised countries.¹¹⁰ It is equally true in the context of the the Union's thematic funding for the environment, a portion of which is reserved to specific initiatives related to climate change and renewable energy.¹¹¹

Overall, climate change certainly represents a frontrunner area for environmental integration in EU external relations. So far, however, it has not included notable human rights dimensions. This is surprising as increasingly questions are being raised internationally as to potential and actual negative impacts on human rights of climate change response measures.¹¹² These questions should be particularly relevant for the EU, including from the viewpoint of a coherent application of the international climate change regime and the Convention on Biological Diversity.¹¹³

Against this background, the European Parliament commissioned a study exploring opportunities of integrating climate change within EU human rights diplomacy or including human rights concerns in EU external climate change action.¹¹⁴ The study pointed to the possibility to integrate human rights criteria (such as participation, non-discrimination, equality and attention to vulnerable groups) into impact assessments of mitigation policies supported by the EU externally,¹¹⁵ and to include climate change concerns in human rights dialogues.¹¹⁶ Notably, the study stresses the importance of favouring better access to courts.¹¹⁷ It also recommends the creation of a "bottom-up accountability and recourse mechanism" to check that EU external climate change assistance is not used for projects that negatively impact on human rights.¹¹⁸ It remains to be seen whether any of these proposals will be taken up by the EU.

Risks and Avenues

The above-outlined opportunities for using the EU's bilateral agreements to support environmental rights to a great extent represent a potential that has not yet been realized. On the other hand, as Daniel Augenstein has aptly pointed out, the more the EU engages in environmental protection initiatives beyond its borders, the more it incurs in the risk of violating or contributing to violations of human rights of third-country residents affected by the extraterritorial implications of EU environmental

¹¹⁰ Council Regulation (EC) 1934/2006 of establishing a financing instrument for cooperation with industrialised and other high-income countries and territories [2006] OJ L405/41, art 4.

¹¹¹ Such as the Global Climate Policy Alliance (ENRTP Thematic Strategy 2007-2010, 3).

¹¹² See, eg, Human Rights Council, Resolution on Human Rights and Climate Change: 7/23 of 2008; 10/4 of 2009; and 18/22 of 2011; Cameron, "Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach", 38 *Georgia Journal of International and Comparative Law* (2009-2010), 673; and L Rajamani, "The Increasing Currency and Relevance of Rights-based Perspectives in the International Negotiations on Climate Change", 22 *Journal of Environmental Law* (2010), 391.

¹¹³ E Morgera 'No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law' in E Hollo, K Kulovesi and M Mehling (eds) *Climate Change and the Law* (Springer, 2013) 350.

¹¹⁴ C. Cournil et al, *Human Rights and Climate Change: EU policy options* (European Parliament, August 2012).

¹¹⁵ *Ibid.*, at 26.

¹¹⁶ *Ibid.*, at 43.

¹¹⁷ *Ibid.*, at 11.

¹¹⁸ *Ibid.*, at 59.

measures.¹¹⁹ Several avenues are arguably available to address missed opportunities in relation to the promotion of environmental rights, or at least violations of environmental rights, both within and outside the EU.

Within the EU,¹²⁰ the European Parliament could use (or threat to use) its veto power on the conclusions of EU bilateral agreements¹²¹ to push for explicit consideration of environmental rights implications in the Sustainability Impact Assessments that are carried out during the negotiations of EU bilateral agreements.¹²² The European Parliament could also use its budgetary powers to ensure that environmental impact assessments or strategic environmental assessments undertaken in the context of the EU's external assistance planning¹²³ include environmental rights implications. In addition, the European Ombudsman may provide an avenue for individuals and NGOs to raise failures to respect procedural environmental rights in the development and implementation of EU bilateral agreements as instances of maladministration.¹²⁴ This concept has been interpreted quite extensively, and could include, for instance, departures by the European Commission from its own guidelines on stakeholder consultations. As this avenue is limited to EU citizens and any natural or legal person residing or having its registered office in a Member State,¹²⁵ one could imagine that EU-based environmental NGOs may take this opportunity with regard to EU external action.

Under EU agreements (in particular, the post-Global Europe agreements), another option would be to use the bilateral cooperation bodies that have a clear responsibility for monitoring and following up on certain environmental cooperation clauses. These joint institutions, however, have been developed specifically in connection with new "trade and sustainable development chapters" of the bilateral agreements, so it remains uncertain whether in practice they will at all affect non-trade-related areas of environmental cooperation.¹²⁶ Nonetheless, the separate, multi-stakeholder advisory bodies that are also established under the post-Global Europe agreements can submit findings and opinions to the parties on the sustainable development aspects of the bilateral agreement's implementation.¹²⁷ In that respect, it cannot be excluded that these multistakeholder fora could bring to the attention of the parties to bilateral agreements questions related to environmental rights.

Beyond the EU legal system, the EU could find itself brought before the European Court of Human Rights for failing to ensure that its external environmental policies do not contribute to human rights violations in third countries, particularly when

¹¹⁹ D Augenstein, 'The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon' in E Morgera (ed), *The External Environmental Policy of the EU*, *op cit.*

¹²⁰ This paragraph builds on Marín Durán and Morgera, *Environmental Integration in the EU's External Relations* 263, at 285-288.

¹²¹ Art. 218(6)(a) TFEU.

¹²² Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op. cit.*, Ch. 6.

¹²³ *Ibid.*, Ch. 5.

¹²⁴ The argument has been put forward (albeit in an internal context) by A Alemanno, 'The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?' (2009) 15 *European Law Journal* 381, 388.

¹²⁵ Art. 228 TFEU and Charter, art 44.

¹²⁶ Marín Durán and Morgera, *Environmental Integration in the EU's External Relations*, *op. cit.*, at 286.

¹²⁷ EU-Central America AA, Art. 294(4)(5) and EU-COPE FTA, Arts 281-282.

external action is linked to internal regulation with extraterritorial effects. And, as access to justice at the EU level continues to be very challenging on environmental matters,¹²⁸ the EU could also be brought before the European Court of Human Rights for failing to provide access to justice and effective remedies to third-country victims in Union courts.¹²⁹

In addition, the institutional structure underpinning the Aarhus Convention could foster increased transparency in the EU external relations, as recently called for by a coalition of environmental NGOs.¹³⁰ The Aarhus Convention includes an obligation for its parties to “promote the application of the principles of this Convention in international environmental decision-making processes,”¹³¹ which could arguably extend to decision-making processes under EU bilateral agreements dealing with environmental matters. The relevant guidelines of the Aarhus Convention on this provision, however, appear limited to “multilateral” processes.¹³² In all events, this may be quite a theoretical option at this stage: the Convention Compliance Committee has yet to receive its first submission related to parties’ obligation in international fora. On the other hand, it would not be too far-fetched to imagine that certain cases could be at least brought to the attention of the Meeting of the Parties to the Convention, for naming and shaming purposes, if bringing them before the Compliance Committee is not an option.

Preliminary conclusions

Environmental rights are a sensitive topic for the EU, as clearly demonstrated by the limited development of the linkage between the environment and human rights in the framework of the EU’s internal legal system. This, however, does not mean that the EU will not take initiatives in this regard externally. In fact, without entering into the merit of whether this could be considered a double standard, the EU should systematically consider how (rather than whether) its bilateral agreements could promote environmental rights in third countries. This is called for both by its constitutional objective of ensuring coherence between human rights and environmental protection in its external relations, and by the Union’s ambition to play a leadership role in environmental affairs. There are indeed several opportunities for the EU to contribute to environmental rights on the basis of bilateral agreements’ clauses on environmental impact assessment, corporate environmental accountability, traditional knowledge, forest protection and climate change.

While seizing existing opportunities for promoting environmental rights through

¹²⁸ Aarhus Convention Compliance Committee, Findings and recommendations on the ClientEarth case (part I), UN Doc. ECE/MP.PP/C.1/2011/4/Add.1 (2011), para. 92.

¹²⁹ Augenstein, ‘The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon’, *op. cit.*

¹³⁰ European ECO Forum stressed the need to “apply the Aarhus principles in the context of the EU’s European Neighbourhood Policy, Eastern Partnership and related negotiations of bilateral agreements”: see Summary of the fourth session of the Meeting of the Parties to the Aarhus Convention: 29 June-1 July 2011 in Chisinau, Moldova, <http://www.iisd.ca/yimb/aarhus/mop4/html/yimbvol190num1e.html>.

¹³¹ Aarhus Convention, Article 3.7.

¹³² Almaty Guidelines on promoting the application of the principles of the Aarhus Convention in International Forums (2005) UN Doc. ECE/MP.PP/2005/2/Add.5, para. 9.

bilateral agreements may depend also on the willingness of third countries, at the very least the EU should ensure that its bilateral agreements and related external relations tools do not lead to negative impacts on environmental rights beyond its borders. To that end, the present mapping exercise has preliminary identified a few avenues to hold the EU accountable. There remains, however, much scope for policy and academic debate as to the suitability and accessibility of these and other possible venues to counterbalance the increasing reach of EU external environmental action and inherent risks of negative impacts on environmental rights.