

Environmental Policy “Outside-In”: How the EU’s Engagement with International Environmental Law Curtails National Autonomy

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A. Introduction

The EU legal system, with its many hands and complex architecture, in which national and European powers are closely interwoven, requires a particular form of cooperation. This delicately developed cooperation may be influenced by the EU’s ambition to take a state-like role in international relations. Indeed, the basic assumption underlying this Article is that it is not only the EU’s complexity that influences the EU’s external actions—usually seen as limiting the EU’s capacity to speak with one voice—but also that the EU’s external actions influence its internal set-up and cooperation practices. As a result of the EU’s participation in international legal regimes, established organizational principles might come under pressure. Furthermore, within the complexity of the European legal order, the potential consequences could be more disturbing for stability than within the—monolithic, in comparison—structure of states.

The aim of this Article is to shed light on how the EU’s participation in emerging international legal regimes influences the making and interpretation of EU law and, more importantly, whether and how this in turn changes the power division between the EU and its Member States (“outside-in” effects).¹ Part of the EU’s presence as an international actor is its participation in international environmental regimes which, for two reasons, appears particularly prone to have implications for the power division within the EU. First, the European Union has established itself as an independent actor alongside the Member States in the area of environmental policy. It has taken a leading role in global environmental negotiations,² and most recent environmental legal regimes provide for the

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² For instance, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148. For more details on the 2008 EU Climate Change package, see http://ec.europa.eu/clima/policies/package/index_en.htm.

possibility of EU accession.³ Second, in the past fifteen years we can witness an internationalization of environmental law and policy: Environmental law is increasingly constructed through participation in detailed international environmental rule-making, such as the Aarhus Convention or the Kyoto Protocol.

Most scholarly contributions in the field focus on how the EU exports or uploads policies for the protection of the environment,⁴ which is an important issue, raising real implications for policy making and substantive environmental protection. In a similar vein, the recent *Air Transport Association* case,⁵ which is one of the main subjects of this special issue, has raised a fierce debate about the external implications of the European Emission Trading Scheme (ETS). The intention of this Article is to complement the articles of this special issue by exploring the interlinked but reverse question: The above-described influence of the EU's participation in international environmental regimes on the EU's internal workings. The Article explores two specific aspects of how the EU's participation in internationalized environmental policy-making has resulted in a shift of powers from the Member States to the EU: The effects of the choice of legal basis for the division of power between the EU and its Member States and the impact of the Aarhus Convention on national procedural autonomy.

Section B sets the scene by introducing international environmental law as part of the EU legal order and by outlining the nature and content of the Aarhus Convention. Section C turns to the question of how the choice of the legal basis under EU law changes as a result of policies pursued under international law rather than under domestic EU law. Section D examines how the EU's participation in the Aarhus Convention (Europeanization of the Aarhus Convention) has limited the procedural autonomy of the Member States. Section E summarizes the findings and concludes that in environmental law, there are examples of a

³ Prominent examples include Kyoto Protocol, *supra* note 2; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]; Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119 [hereinafter Stockholm Convention]; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000 2226 U.N.T.S. 208; and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, UNEP/CBD/COP/DEC/X/1. For an overview, see <http://treaties.un.org>.

⁴ See Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897 (2009); Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 EUR. J. INT'L L. 469 (2012); Anthony Zito, *The European Union as an Environmental Leader in a Global Environment*, 2 GLOBALIZATIONS 363 (2005); Joana Chiavari, Sirini Withana & Marc Pallemarts, *The Role of the EU in Attempting to 'Green' the ICAO*, ECOLOGICINSTITUTE, EPIGOV PAPER No. 35 (2008). See also, Christina Eckes, *EU Climate Change Policy: Can the Union Be Just (and) Green?*, in EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER (Fabian Amtenbrink & Dimitry Kochenov, eds.) (forthcoming 2013).

⁵ Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change*, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-366/10&td=ALL> (Dec. 21, 2011).

shift of power from the EU to Member States resulting from the fact that the EU participates in internationalized policy-making.

B. Setting the Scene

I. Environmental Law and Its External Dimension Under the EU Treaties

The EU is committed to environmental protection. The EU’s aims, as defined by Article 3(3) TEU, include sustainable development and a high level of protection and improvement of the quality of the environment.⁶ The integration principle in Article 11 TFEU further makes the comprehensive claim that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”⁷ These objectives are encompassing and allow for the adoption of a broad range of measures by the EU. At the same time, environmental protection is a competence shared between the EU and its Member States⁸ and Member States may in principle continue to adopt more stringent national measures. Articles 191, 192, and 193 TFEU set out the details of the Union’s competence.

Articles 191(1) and (4) TFEU address the Union’s competence to take external actions to protect the environment. Already pre-Lisbon, the Treaties stated that the EU could promote environmental protection in the international context. The Treaty of Lisbon added the particular focus of combating climate change.⁹ Article 21 TEU specifically declares environmental preservation as one of the EU’s external objectives. More specifically, Article 21(2)(d) and (f) TEU state that the EU should “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty” 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.*” Article 191(4) TFEU sets out the rules on how the Union and the Member States “[w]ithin their respective spheres of competence” shall cooperate with third countries and with the competent international organizations. It also expresses the Member States’ specific concern that the EU might incrementally preempt them from being able to participate in the international environmental debate. This becomes apparent in the second subparagraph of Article

⁶ See also Treaty on European Union pmb., Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter TEU].

⁷ See also the link between the internal market and environmental matters in TEU, *supra* note 6, at art. 3(3) and Consolidated Version of the Treaty on the Functioning of the European Union art. 114(3)-(5), Sept. 5, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

⁸ See TFEU art. 4(2)(e).

⁹ See TFEU art. 191(1).

191(4) TFEU, which states that the exercise of this external power “shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements.” One aim of this Article is to examine the validity of the concern that the EU’s external action in the field of environmental policy could prejudice Member States’ powers.

II. A Specific Legal Regime: The Aarhus Convention

The 1998 Aarhus Convention is a detailed international environmental regime that determines the procedural protection and participation of individuals. Indeed, it is particularly specific and detailed in its procedural requirements. This is also one of the reasons why the body of case law of the EU Courts dealing with the Aarhus Convention is rapidly growing.¹⁰ The EU Courts have assumed a powerful position interpreting and enforcing the Aarhus Convention, including vis-à-vis Member States. As a result of their interpretations, the rules on the exercise of national procedural autonomy within the EU legal order have changed. On the one hand, the Aarhus Convention is exceptional in its direct and detailed impact on the procedural rights of individuals. This makes it questionable whether the findings in this Article find parallels in other policy areas. On the other hand, we can increasingly observe that international agreements are of a quasi-legislative nature in that they govern in a detailed manner the legal position of

¹⁰ The Court of Justice of the European Union [hereinafter CJEU] has ruled in five cases concerning the Aarhus Convention in the past three years: Case C-182/10, *Marie-Noëlle Solvay & Others v. Région wallonne*, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-182-10&td=ALL> (Feb. 16, 2012); Case C-524/09, *Ville de Lyon v. Caisse des dépôts et consignations*, 2010 E.C.R. I-14115 [hereinafter *Ville de Lyon* case]; Case C-266/09, *Stichting Natuur en Milieu & Others*, 2010 E.C.R. I-13119; Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-240/09&td=ALL> (Mar. 8, 2011) [hereinafter *Slovak Bears* case].

As of 7 September 2012, four more cases are pending before the CJEU: Case C-605/11P, *Fin. v. Liga para Protecção da Natureza (LPN)*, 2012 O.J. (C 58/4); Case C-530/11, *Comm’n v. U.K.*, 2012 O.J. (C 39/7); Case C-260/11, *Reference for a preliminary ruling from Supreme Court of the United Kingdom made on 25 May 2011—Regina, on the application of David Edwards & Another v. Evtl. Agency & Others*, 2011 O.J. (C-226/16); Case C-416/10, *Reference for a preliminary ruling from the Slovak Republic lodged on 23 August 2010—Jozef Križan & Others v. Slovenská inšpekcia životného prostredia*, 2010 O.J. (C 301/11).

The General Court has decided two cases concerning the Aarhus Convention: Case T-396/09, *Vereniging Milieudefensie und Stichting Stop Luchtverontreiniging Utrecht v. Comm’n*, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-396/09&td=ALL> (June 14, 2012); Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Eur. v. Comm’n*, <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-338/08&td=ALL> (June 14, 2012). It also mentions the Aarhus Convention in two previous cases: Case T-264/04, *WWF Eur. Policy Programme v. Council*, 2007 E.C.R. II-00911 [hereinafter *WWF* case]; Case T-37/04, *Região autónoma dos Açores v. Council*, 2008 E.C.R. II-00103.

individuals.¹¹ Hence, there is scope for the argument that the outside-in effect of detailed international agreements will become a broader phenomenon. The Aarhus Convention might be exceptional but it remains one example of how the EU’s external actions influence the power balance between the Member States and the EU.

The Aarhus Convention is a new type of international environmental agreement. It firmly links environmental rights and human rights, clearly acknowledges that we owe an obligation to future generations, connects environmental protection to accountability of governments, and focuses on interactions between the public and public authorities in a democratic context. The Convention is based on the basic assumption that sustainable development can be achieved only through the involvement of all stakeholders. This explains its particular focus on the relationship between people and governments, addressing environmental matters through rules on accountability, transparency, and responsiveness.¹² The Convention contains three broad themes or “pillars”: Access to information, public participation, and access to justice, as well as a number of important general features. The Aarhus Convention further shows deference to national legal culture and is meant to establish minimum standards to be achieved. It does not, however, prevent any Party from adopting measures that go further in the direction of providing access to information, public participation, or access to justice. Since 18 May 2005, the EU has been a Party to the Aarhus Convention,¹³ which means that pursuant to Article 216(2) TFEU, the provisions of the Convention apply to both the EU and to the Member States. On the EU side, this includes the EU institutions, such as the Commission and the Council, but it also includes bodies and agencies, such as the European Environment Agency.

C. External Environmental Policy and its Consequences for the Division of Powers

The choice of the legal basis within the EU legal order is highly relevant. It determines not only the involvement of different institutions but also potential preemption of Member State action. The division of powers for environmental policy is more complex than it appears from the European Treaties, which, as explained above, mention it as a shared

¹¹ See, e.g., Society for Worldwide Interbank Financial Telecommunication, <http://www.swift.com>; Anti-Counterfeiting Trade Agreement, <http://register.consilium.europa.eu/pdf/en/11/st12/st12196.en11.pdf>; Areas of Freedom, Security and Justice, http://europa.eu/legislation_summaries/justice_freedom_security/index_en.htm [hereinafter AFSJ]. As to the AFSJ: Wyn Rees, *Cooperation on Counter-Terrorism and the Internationalisation of Law Enforcement*, in THE EXTERNAL DIMENSION OF THE EUROPEAN UNION’S AREA OF FREEDOM, SECURITY AND JUSTICE 389 (Marise Cremona et al., 2011); Marise Cremona, *Justice and Home Affairs in a Globalised World: Ambitions and Reality in the Tale of the EU-U.S. SWIFT Agreement*, sec. 4 (Inst. for European Integration Research, Working Paper No. 4/2011, 2011); Christina Eckes et al., *International, European and U.S. Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)*, CURRENTS: INT’L TRADE L.J. (forthcoming 2013).

¹² See United Nations Economic Commission for Europe, Introduction to the Aarhus Convention, <http://www.unece.org/env/pp/introduction.html>.

¹³ For the document of ratification, see Council Decision 2005/370, 2005 O.J. (L 124) 1 (EU).

competence in Article 4(2)(e) TFEU. A large part of EU environmental policy consists of minimum standards, rather than maximum harmonization. Article 193 TFEU, for instance, is based on this logic. If no other treaty provisions are involved, stricter national measures are possible without further requirements. National measures do not even have to comply with the European law's principle of proportionality.¹⁴ Member States will, of course, have to comply with the other provisions of the EU Treaties, for example, when they derogate from the free movement provisions. Furthermore, the accepted understanding is that competence to introduce minimum standards internally cannot lead to exclusive competence externally.¹⁵ Member States remain competent to agree on stricter international standards or lower international standards if it is clear from the international agreement that it sets out minimum standards.¹⁶ In areas where the Union has the competence to adopt rules of minimum harmonization, the non-exclusive external competence will result in the adoption of mixed agreements. Indeed, in the field of environmental policy, virtually all conventions to which the Union is a party are mixed agreements, including the Stockholm Convention and the Aarhus Convention.¹⁷ With the extended mandate of the EU institutions to promote multilateral solutions and to work towards international cooperation, the EU institutions have received a broad mandate to pursue policies outside of the EU legal order. The mandate is, of course, not open-ended; rather, it is linked to the Union's competences and EU law principles, such as the principle of conferral and sincere cooperation.

It additionally matters whether the EU is joining Member States in conducting environmental policy on the international plane because the EU is more open towards international law than many of the Member States. The Court of Justice takes its responsibility seriously to ensure that international law is observed.¹⁸ This can change the status and force of international law obligations for Member States when these obligations are interpreted by the CJEU as part of the European legal order.

¹⁴ Case C-6/03, *Deponiezweckverband Eiterköpfe*, 2005 E.C.R. I-2753, paras. 61–64.

¹⁵ JAN H. JANS & HANS H.B. VEDDER, *EUROPEAN ENVIRONMENTAL LAW: AFTER LISBON* 59 (2012).

¹⁶ Opinion 2/91 *Convention No 170 of the Int'l Labour Org. concerning safety in the use of chemicals at work* (1993) ECR I-1061, par. 18.

¹⁷ For an overview of international environmental agreements to which the EU is a Party or a Signatory, see http://ec.europa.eu/environment/international_issues/agreements_en.htm. On the consequences of concluding mixed agreements, see *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* (Christophe Hillion & Panos Koutrakos, eds., 2010).

¹⁸ Christina Eckes, *International Law as Law of the EU: The Role of the ECJ*, in *INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION*, 353 (Enzo Cannizzaro, Paolo Palchetti & Ramses A. Wessel, eds., 2011).

I. Environment and Trade

Many environmental measures also have the joint objective, or at least the consequence, of regulating trade and the internal market. The choice of the correct legal basis within the European legal order depends on objective factors that are subject to judicial review by the EU Courts.¹⁹ In principle, a single legal basis should be chosen, but if a measure pursues several objectives, and if the different components are “indissociably linked,” without having one dominant objective, the measure can be based on a dual legal basis.²⁰ Internally, the dual legal basis would consist of Articles 192 and 114 TFEU for environmental measures with an internal market objective or vice versa. Externally, it would be Articles 192 and 207 TFEU. In practice, both dual legal bases, Articles 192 and 114 TFEU²¹ and Articles 192 and 207 TFEU,²² are used. In the context of the present discussion, it is interesting to analyze the consequences that these two combinations of provisions present. They have different implications for whether Member States are allowed to adopt stricter national measures. Under Article 192 TFEU, the adoption of stricter national measures is possible (Article 193 TFEU). For measures adopted under Article 114 TFEU, the procedure in Article 114(4)-(6) TFEU applies, which allows Member States to derogate from EU law after providing notification of national measures that maintain or introduce a standard that is incompatible with the Union standard. By contrast, the common commercial policy (CCP) under Article 207 TFEU is an exclusive Union competence, which means that Member States are not allowed to adopt any parallel national measures at all. Hence, stricter national measures are in principle possible when the EU adopts environmental law instruments based on Article 192 TFEU—irrespective of whether they concern internal or external measures. The Member States’ scope of action is more limited when the EU instrument is based on a dual legal basis. Yet, while the combination of Articles 192 and 114 TFEU for internal measures still allows for stricter national measures, the combination of Articles 192 and 207 TFEU for external measures excludes stricter measures.

The Court of Justice has ruled several times on the correct legal basis of measures that pursue an environmental objective but also regulate trade between the EU and third

¹⁹ *E.g.*, Case C-411/06, *Comm’n v. Parliament & Council*, 2009 E.C.R. I-7585, para. 46.

²⁰ *See e.g.*, Case C-178/03, *Comm’n v. EP & Council*, 2006 E.C.R. I-00107.

²¹ *See e.g.*, Commission Regulation 842/2006, 2006 O.J. (L 161) 1; Council Directive 2006/66, 2006 O.J. (L 266) 1.

²² The combined legal basis of Articles 192(1) and 207 is possible. *See* Case C-178/03, *Comm’n v. EP & Council*, 2006 E.C.R. I-00107, paras. 58–59. However, it remains rather exceptional, *see e.g.*, Council Regulation 3254/91, 1991 O.J. (L 308) 1.

countries.²³ In *Chernobyl I*, a case concerning the importation of agricultural products that might be radioactively contaminated, the Court ruled that CCP measures that also pursue environmental objectives should be based on now-Article 207 TFEU. In the *Energy Star Agreement* case, the Court equally held that an international agreement with the United States aimed at introducing the US Energy Star Program in the EU should—despite its environmental dimension—be correctly based on now-Article 207 TFEU. It concluded:

It is true that in the long term, depending on how manufacturers and consumers in fact behave, the program should have a positive environmental effect as a result of the reduction in energy consumption which it should achieve. However, that is merely an indirect and distant effect, in contrast to the effect on trade in office equipment which is direct and immediate.²⁴

This distinction between direct and immediate effects on the one hand and long term effects on the other hand appears to introduce a logical bias for a trade legal basis. It will often be the case that measures that have the objective of protecting the environment will have effects only in the long-term, while any such regulation will immediately have an impact on the ongoing trade. In light of the above difference between Articles 114 and 207 TFEU as to the adoption of stricter national measures, it becomes even more relevant whether an EU measure is an internal or external economic measure with environmental objectives.

By contrast, in the later *Rotterdam Convention* case,²⁵ concerning a Prior Informed Consent Procedure for hazardous chemicals and pesticides in international trade, the Court of Justice recognized that a joint legal basis of now-Articles 192(1) and 207 TFEU was necessary. The Court referred to its ruling in *Energy Star Agreement* and used the concept of “direct and immediate effect on trade” but came to the conclusion that “the Convention includes, both as regards the aims pursued and its contents, two indissociably-linked components, neither of which can be regarded as secondary or indirect as compared with the other, one falling within the scope of the common commercial policy and the other within that of protection of human health and the environment.”²⁶ The Court concluded that, in accordance with earlier case-law, “the decision approving that Convention on

²³ Case C-62/88, *EP v. Council*, 1990 E.C.R. I-1527 [hereinafter *Chernobyl I* case]; Opinion 2/00 *Cartagena Protocol*, (2001) E.C.R. I-9713; Case C-281/01, *Comm’n v. Council*, 2002 E.C.R. I-12049 [hereinafter *Energy Star Agreement* case]; Case C-94/03, *Comm’n v. Council*, 2006 E.C.R. I-00001 [hereinafter *Rotterdam Convention* case].

²⁴ *Energy Star Agreement* case paras. 40–41.

²⁵ *Rotterdam Convention* case.

²⁶ *Id.* at para. 50.

behalf of the Community should therefore have been based on the two corresponding legal bases, namely, in this case, Articles 133 EC [207 TFEU] and 175(1) EC [192(1) TFEU], in conjunction with the relevant provisions of Article 300 EC [218 TFEU].²⁷ In its Opinion on the correct legal basis for the conclusion of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity,²⁸ the Court equally applied the center of gravity doctrine but came to the conclusion that Article 192(1) TFEU alone was the correct legal basis. In 2009, in the case of *Commission v. Parliament and Council*,²⁹ concerning Regulation 1013/2006 on shipments of waste, the Court referred to its *Cartagena Protocol* Opinion, applied again the center of gravity doctrine, and equally came to the conclusion that the Commission’s call for a dual legal basis was unfounded and that Article 192 TFEU sufficed.

The mentioned cases concern very different factual situations and it is difficult to draw any conclusions about the position of the CJEU towards the choice of the correct legal basis for measures that at least also aim to protect the environment. However, it is fair to conclude that the CJEU’s approach has become more nuanced over time. It looks carefully into both the intention and the effects of any such measure and does not accept a trade disguise for measures predominantly aimed at protecting the environment. This is relevant for the present argument that external environmental measures that are based on a trade legal basis have a more limiting effect on Member States powers to adopt stricter (parallel) measures. In cases in which the CJEU accepts the environmental legal basis as sufficient for measures that also pursue an economic objective, it is not relevant whether they are internal or external measures: Stricter national measures remain possible in principle. Where the CJEU focuses on the short-term economic effects and accepts a (joint environmental) trade legal basis, Member States cannot adopt stricter measures when the EU adopts external measures.

II. Subsidiarity

Certain environmental concerns, such as climate change, are subject to the presumption that they can only be addressed effectively in the global context. A significant reduction of greenhouse gas in the atmosphere could only be achieved in a collective, if not in a concerted effort. This calls for a multilateral (legal) regime. In the EU context of shared competences for environmental matters, this leads to an inherent presumption that environmental concerns with transnational effects can be better dealt with by the EU.

²⁷ *Id.*

²⁸ Opinion 2/00 Cartagena Protocol, *supra* note 23. The Cartagena Protocol was negotiated under the Convention on Biological Diversity. It governs the trans-boundary movement of living biotechnologically modified organisms that might have adverse effects on the conservation and on biological diversity.

²⁹ Case C-411/06, *Comm’n v. Parliament & Council*, 2009 E.C.R. I-7585.

Indeed, many measures addressing environmental concerns easily satisfy the requirement of subsidiarity based on two different arguments: First, because substantively the environmental concern does not respect borders (climate change and emissions for example), and second, because public international law (increasingly) regulates (part of) the matter. The two are, of course, connected.

The references to subsidiarity in the ETS Directive, with which the EU aims to meet the obligations under the Kyoto Protocol³⁰ and in the Ship-Source Pollution Directive,³¹ are examples for the latter argument. Both refer to the fact that the EU instrument gives effect to international standards as the reason why the subsidiarity requirement is fulfilled and why, therefore, the EU is the right actor to adopt this policy. Action appears justified as soon as there is a transnational aspect. Cross-border effects of environmental pollution were not mentioned in either instrument, even though both greenhouse gas emissions and ship-source pollution have such effects. Unilateral action by the Member States appears less effective than concerted action where the source of pollution is not limited to the territory of one state. The requirements of the subsidiarity principle are hence relatively easily met by many environmental policies. Yet, environmental law might only be an early indication of the vanishing relevance of the principle of subsidiarity in a globalized world where, in many policy areas, external and internal policies blur. Previously separated national spheres are ever more interconnected—be it legally, economically, or culturally.

III. Sincere Cooperation and the Stockholm Convention

Both the EU institutions and Member States must act in accordance with the principle of sincere cooperation in Article 4(3) TEU when they negotiate, conclude, or fulfill obligations under international agreements.³² In the field of environmental policy, the *PFOS* case offered a strict interpretation of the principle of sincere cooperation.³³ The Court ruled in

³⁰ “Since the objective of the proposed action, namely the establishment of a link between the Kyoto project-based mechanisms and the Community scheme, cannot be sufficiently achieved by the Member States acting individually, and can therefore by reason of the scale and effects of this action be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty.” Council Directive 2004/101, para. 19, 2004 O.J. L (338) 18 (amending EC Directive 2003/87).

³¹ “Since the objectives of this Directive, namely the incorporation of the international ship-source pollution standards into Community law and the establishment of penalties—criminal or administrative—for violation of them in order to ensure a high level of safety and environmental protection in maritime transport, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty.” Council Directive 2005/35, para. 15, 2005 O.J. L (255) 11.

³² Opinion 2/91, *supra* note 16.

³³ Case C-246/07, *Comm’n v. Sweden*, 2010 E.C.R. I-3317 [hereinafter *PFOS* case]. Marise Cremona, *Case C-246/07, Commission v. Sweden (PFOS), Judgment of the Court of Justice (Grand Chamber) of 20 April 2010*, 48 COMMON MKT. L. REV. 1639 (2011).

this case that Sweden had breached the principle of sincere cooperation when it unilaterally proposed adding a new substance (perfluorooctane sulfonate) to Annex A of the Stockholm Convention on Persistent Organic Pollutants. The Court ruled that even though the subject matter of the Convention did not fall within the exclusive competence of the Union, Sweden had departed from a concerted EU strategy on the specific matter. The Court’s reasoning in *PFOS* has broader implications for the discussion of managing shared competences, the link and coherence between internal and external environmental competence, and the relationship between environmental policy and other policies. In areas of exclusive EU competence, the Member States may not embark on international actions at all. In areas of shared competence that lead to mixed agreements, Member States are limited by the duty of sincere cooperation as soon as the Union has taken any steps towards a concerted action. The Court’s interpretation of the duty of cooperation brought shared competences very close to exclusive competences.³⁴ Indeed, the Court might be accused of blurring the duty of sincere cooperation and competence.

The ruling is interesting with regard to both the consequences of Sweden’s action on the EU internal decision-making process and the differences in restrictions on Member States’ autonomous actions depending on whether they are internal or external actions. As to the first, AG Maduro focused the second part of his opinion on this matter and concluded that Member States “must refrain from taking individual action, at least for a reasonable period of time, until a conclusion of that process has been reached.”³⁵ He conceded that a Member State should not have to wait indefinitely and that if the Council had actually made a decision not to propose PFOS, Sweden could have proposed it.³⁶ The AG was concerned that a Member State might use its external competence, or at least the threat of it, to influence internal decision-making.³⁷ He was concerned that it might disturb “the internal balance of power of the Community decision-making process.”³⁸ This is in line with the Commission’s argument that Sweden’s action unilaterally preempted further discussion in the Council. It also illustrates the close link between the external and the internal.

With regard to the second point, the *PFOS* case demonstrates how the Union’s participation in international regimes can restrict Member States from exercising powers that they would have been able to exercise internally—at least during the course of the

³⁴ Cremona asks this question. See *supra* note 33, at 1640. See also two cases on transport agreements for inland waterways on the same issue: Case C-519/03, *Comm’n v. Lux.*, 2005 E.C.R. I-3067; Case C-433/03, *Comm’n v. Ger.*, 2005 E.C.R. I-6985.

³⁵ *PFOS* case at para. 49 (opinion of Advocate Gen. Maduro).

³⁶ *Id.* at para. 51.

³⁷ Cremona, *supra* note 33, at 1640.

³⁸ *PFOS* case at para. 56 (opinion of Advocate Gen. Maduro).

decision-making process. The Court further analyzed the external situation after Sweden's proposal. It argued that it was unclear whether the rule disallowing concurrent exercise of rights by the EU and its Member States allowed the EU to opt out from a proposal that was suggested by one of its Member States and possibly supported by several. It concluded that the proposal would give rise to "legal uncertainty" and, therefore, "has consequences for the Union."³⁹ The Court drew the same conclusion with regard to the question of whether Sweden could propose PFOS as a substance under the Stockholm Convention because it is a more stringent measure and Article 193 TFEU specifically allows for more stringent measures. It argued that actions that have no impact on the EU if they are taken under national law, such as the introduction of more stringent standards, will nonetheless have consequences for the EU if they are taken externally, *e.g.*, a proposal of more stringent measures within the context of an international environmental regime such as the Stockholm Convention. Hence, the problem was that Sweden submitted its proposal to the "institutional and procedural framework" of the Stockholm Convention and that this weakened the Union's negotiating power in relation to the other parties to the Convention.⁴⁰ The procedural rules of the multilateral framework or convention are hence relevant to the interpretation of the duty of sincere cooperation.⁴¹ The *PFOS* case is a strong indication that Article 191(4) TFEU cannot change the fact that the duty of sincere cooperation is stronger externally than internally, and this restrains external actions of the Member States more than internal actions. This means that if a particular policy is exercised on the international plane rather than internally, Member States' room for autonomous actions is more restricted. The *de facto* division of power between the Union and its Member States, or at least how these powers can be exercised, changes as a result in favor of the Union. On the one hand, this can be logically supported by the fact that the EU remains an actor that is constituted of and inseparably interlinked with its Member States. For it to be taken seriously as an international actor by the other parties, it must be able to act autonomously from its individual Member States. After Sweden's action, this was no longer ensured in the *PFOS* case. In the words of the Court of Justice in *PFOS*: "The Union could be bound by an amendment to an Annex to the Stockholm Convention whereas it is not bound by national measure."⁴² This would not have been the case if the Union had not been a party to the Stockholm Convention. Hence, the Union's participation has consequences for the division of powers between the Union and its Member States. The Member States are not free to exercise the rights that they have as parties to the international regime. The Commission even concluded that there is a "duty on the part of the Member States and the Union institutions within a mixed agreement only to act

³⁹*PFOS* case at para. 101.

⁴⁰*Id.* para. 103.

⁴¹In *PFOS*, both the Advocate General and the Court paid attention to this, see *id.* para. 93.

⁴²*Id.* para. 102.

through a common strategy.”⁴³ On the other hand, it limits the exercise of powers by the Member States to a point that restrains their capacity to act autonomously under international legal regimes to which the EU has become a party. Indeed, the Court of Justice interprets the obligations of the Member States to act concertedly under the international regime so strictly that it curtails Member States’ autonomy and the advantages of participating individually in the regime.

D. National Procedural Autonomy Under the “Europeanized” Aarhus Convention

This Section discusses the consequence of the EU’s participation in the Aarhus Convention for the EU legal order—in particular, its influence on the procedural autonomy of the EU Member States. This does not imply that the EU did not shape the content of the Aarhus Convention. The very idea of drawing up citizens’ environmental rights within the UN Economic Commission for Europe (UNECE) was strongly influenced by Union regulation in the area of environmental law.⁴⁴ Furthermore, the first pillar of the Aarhus Convention—access to information—was shaped by the experiences of the EU with the EU Directive on Access to Environmental Information.⁴⁵ Moreover, the negotiations were conducted following the example of the Eco-Forum in which environmental groups participated in the EU context.⁴⁶ However, this Article does not further discuss this inside-out effect, focusing exclusively on the outside-in effect instead.

I. Implementation of the Aarhus Convention Under EU Law

Since the Aarhus Convention was adopted and signed in 1998, it has played an important role in the inner-EU debate on environmental rights in particular and on transparency in general. It was implemented under EU law in a number of new instruments, including the 2003 Directive on Public Access to Environmental Information,⁴⁷ the 2003 Directive on Participation in Environmental Regulation,⁴⁸ and the 2006 Regulation on Participation and Access to Justice.⁴⁹

⁴³ Cremona, *supra* note 33, at n. 111. This is Marise Cremona’s reading of the Commission’s comments on the Council’s position.

⁴⁴ See Council Directive 85/337, 1985 O.J. (L 175) 40 (EEC); Council Directive 90/313, 1990 O.J. (L 158) 56 (EEC).

⁴⁵ See Council Directive 90/313, 1990 O.J. (L 158) 56 (EEC). See also Ludwig Krämer, *Access to Environmental Information in an Open European Society—Directive 2003/4/EC*, 4 Y.B. EUR. ENVTL. L. 1, 2 (2004).

⁴⁶ ECKO FORUM, (Nov. 9, 2012), <http://www.ekoforum.org>.

⁴⁷ Council Directive 2003/4, 2003 O.J. (L 41) 26 (EC).

⁴⁸ Council Directive 2003/35, 2003 O.J. (L 156) 17 (EC).

⁴⁹ Council Regulation 1367/2006, 2006 O.J. (L 264) 1 (EC).

The 2003 Directive on Public Access to Environmental Information amended the pre-Aarhus Convention legislation in the EU in light of the Convention, both by including provisions of the Convention that did not exist in EU law and by going beyond the Convention.⁵⁰ The three pillars of the Convention were negotiated successively. The negotiations for the first pillar were hence concluded by the time the Commission started reviewing the 1990 Directive. Indeed, the legislative process was put on hold to wait for the conclusion of the negotiations at the Aarhus Convention.⁵¹

The Directive on Participation in Environmental Regulation regulates access to justice with regard to Member States' decisions on environmental impact assessments and Integrated Pollution and Prevention Control (IPPC) installations.⁵² Its preamble specifically indicates that it is intended to implement Article 9(2) and (4) of the Aarhus Convention. Article 9(3) was implemented by the 2006 Regulation dealing with access to justice against decisions of the European institutions—not Member States.⁵³ Legislative attempts to extend the latter to Member States' decisions were not successful.⁵⁴ As demonstrated in the following section, this failed attempt has not kept the CJEU from adjudicating on the procedural requirements of Article 9(3) with regard to Member States.

Outside of environmental law, the process leading up to the adoption of the Transparency Regulation (Regulation 1049/2001) was largely uninfluenced by the Aarhus Convention.⁵⁵ Many scholars doubt that it is in compliance with the Aarhus Convention.⁵⁶ Since 2005, attempts have been made to amend the transparency regulations—and, at the time of this

⁵⁰ Case C-71/10, *Office of Commc'ns v. Info. Comm'r*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-71/10> (July 28, 2011) [hereinafter *Info Comm'r* case] (opinion of Advocate Gen. Kokott), (“Article 3(1) of the Environmental Information Directive provides that public authorities are required to make available environmental information held by or for them to any applicant at his request and without his having to state an interest. This right was introduced in 1990 by the first Environmental Information Directive. The Aarhus Convention developed it further and it has now been adopted by the Environmental Information Directive currently applicable.”).

⁵¹ Ralph Hallo, *Access to Environmental Information, in THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW* 55, 61 (Marc Pallemmaerts ed., 2011).

⁵² Council Directive 2003/35, 2003 O.J. (L 156) 17 (EC). See also Council Directive 85/337, 1985 O.J. (L 175) 40 (EEC), amended by Council Directive 2009/31, 2009 O.J. (L 140) 114 (EC); Council Directive 2008/1, 2008 O.J. (L 24) 8 (EC), amended by Council Directive 2009/31, 2009 O.J. (L 140) 114 (EC).

⁵³ Council Regulation 1367/2006, 2006 O.J. (L 264) 1 (EC).

⁵⁴ See *Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, COM (2003) 624 final (Oct. 24, 2003). The proposal did not find a majority in the Council.

⁵⁵ Council Regulation 1049/2001, 2001 O.J. 2001 (L 145) 43 (EC).

⁵⁶ Hallo, *supra* note 51, at 63–66.

Article’s drafting, they were of no avail. The 2006 Regulation modifies for environmental matters the general rules of access to documents in the Transparency Regulation. For instance, it extends the personal scope of the EU regime beyond EU citizens to all natural and legal persons. Yet, the precise exceptions remain unclear.⁵⁷

II. The Court of Justice’s Grip on National Procedural Autonomy

The Aarhus Convention has taken an increasingly important role before the Court of Justice in preliminary reference proceedings, in direct actions, and even in one enforcement action.⁵⁸ The cases demonstrate the new and broad contexts for which the Convention’s applicability is at least considered. Cases concerning information about the trading of emission allowances under the ETS,⁵⁹ and cases concerning information on the precise location of mobile phone base stations demonstrate that the potential relevance of the Aarhus Convention extends to information that is relevant for economical transactions and security.⁶⁰ Further, and more interesting in the present context, some of these cases demonstrate how the international legal obligations of the EU and its Member States under the Aarhus Convention become EU law obligations with the result that Member States lose their margin of discretion that other parties to the Aarhus Convention enjoy.

One of the most relevant cases in this context is the recent *Slovak Bears* case.⁶¹ It demonstrated the constraints resulting from the nature of the Aarhus Convention as a so-called mixed agreement which, in the words of AG Kokott, is “a creature of pragmatic forces—a means of resolving the problems posed by the need for international agreements in a multi-layered system.”⁶² However, behind this creative political construction ensuring the continuous presence of Member States on the international plane hides a centralizing force. When concluding a mixed agreement, the Member States are bound to comply with their obligations under international law (here the Aarhus Convention) and to give effect to EU law, including the EU’s international agreements which, pursuant to Article 216 TFEU, become “an integral part of the legal order of the European Union.”⁶³ This leads to a situation in which the Aarhus Convention entails even

⁵⁷ See *Slovak Bears*; WWF.

⁵⁸ See *supra* note 10. In the national context, France sticks out with five cases in 2011 concerning the Aarhus Convention.

⁵⁹ See Council Directive 2003/87, 2003 O.J. (L 275) 32 (EC).

⁶⁰ See *Ville de Lyon* (trading emission allowances); *Info. Comm’r* (mobile phone base).

⁶¹ *Slovak Bears*. See Damian Krawczyk, *Case Note: The Slovak Brown Bear Case: The ECJ Hunts for Jurisdiction and Environmental Plaintiffs Gain the Trophy*, 14 ENVTL. L. REV. 53 (2012).

⁶² *Slovak Bears*, (opinion of Advocate Gen. Kokott), para. 56.

⁶³ *Slovak Bears*, para. 30.

further reaching obligations for the Member States under EU law than under international law. This is the case mainly because, under EU law, not only the international agreement itself is binding, but also its interpretation by the CJEU. This is not a particular phenomenon of the Aarhus Convention, but it becomes apparent and real in the application of this Convention because of its subject matter—procedural rights—and its great detail.

In *Slovak Bears*, the Court of Justice was asked to rule on the direct effect of Article 9(3) of the Aarhus Convention, which obliges “each Party [to] ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” Adhering to the idea of shared competences, the Court examined whether, in the field covered by Article 9(3) of the Aarhus Convention, the EU had exercised its powers.⁶⁴ This was not the case, and the Court concluded that “it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field.” Accordingly, “EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down by the Aarhus Convention or to oblige the courts to apply that rule of their own motion.”⁶⁵ This reflects that, in principle, there is a parallelism between internal and external competences⁶⁶ in which external competences depend on internal competences but not vice versa.

The main proceedings in *Slovak Bears* concerned the question of whether an environmental protection association may be a “party” to administrative proceedings concerning derogations to the system of protection for species such as the brown bear. The brown bear is mentioned in the annex of the Habitats Directive,⁶⁷ and is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in that Directive. Based on this, the Court came to the conclusion that “the dispute in the main proceedings falls within the scope of EU law.”⁶⁸ It continued by pointing to the Union’s Declaration under Article 19 of the Aarhus Convention, which states that

⁶⁴ *Id.* para. 32–52.

⁶⁵ *Id.* para. 32.

⁶⁶ This has been the case ever since the Court’s decision in Case 22/70, *Comm’n v. Council*, 1971 E.C.R. 263. See *id.* para. 19.

⁶⁷ Council Directive 92/43, 1992 O.J. (L 206) 7 (EEC).

⁶⁸ *Slovak Bears*, para. 38.

[T]he legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.⁶⁹

This explicit declaration of competences made by the EU at the time it signed the Aarhus Convention makes clear that the application of Article 9(3) of the Aarhus Convention only falls within the scope of the competence of the EU to the extent that it concerns acts of the EU institutions, while the application of Article 9(3) to national proceedings falls within the competence of the Member States *until the Union implements these obligations*. As explained above, the Union has not yet legislated on administrative or judicial procedures to challenge acts of the Member States. Nonetheless, the Court ruled that “a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it *relates to a field covered in large measure by it*.”⁷⁰ The Court stressed the importance of uniform application of provisions that sometimes apply to the national context and sometimes to the EU law context,⁷¹ and it concluded that it has jurisdiction to determine the direct effect of Article 9(3) of the Aarhus Convention.⁷² The Court further concluded that Article 9(3) of the Aarhus Convention does not have direct effect within the EU legal order and ruled that it is for the domestic legal system of each Member State and its courts to interpret national law in a way that is consistent with Article 9(3) of the Aarhus Convention and makes the exercise of rights under the Habitats directive effective. The Court arguably departs here from the case law in *Merck Genéricos*,⁷³ in which it had made the competence to determine the direct effect of any particular provision of an

⁶⁹ Council Decision 2005/370/EC of 17 February 2005 on the Conclusion, on Behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2005 O.J. (L 124) 1.

⁷⁰ *Slovak Bears*, para. 40 (emphasis added).

⁷¹ *Id.* para. 42.

⁷² *Id.* para. 43.

⁷³ Case C-431/05, *Merck Genéricos Produtos Farmaceuticos v. Merck & Co.*, 2007 E.C.R. I-7001.

international agreement dependent on whether that provision falls within an area in which the EU has legislated. In the context of the Aarhus Convention, this reading that an issue “may fall within the scope of EU law if it *relates to a field covered in large measure by it*,” even if it “has not yet been subject to EU legislation,”⁷⁴ draws Article 9(3) of the Aarhus Convention within the scope of EU law, disregarding the declaration of competences to the Aarhus Convention⁷⁵ and blurring the distinction between substantive environmental protection and procedural rights. The CJEU argued in essence that because EU legislation covered the substantive issue of whether or not to protect the brown bear, the EU had covered the field. However, the main proceedings, just as the content of the Aarhus Convention, concerned procedural protection rather than substantive environmental law. The CJEU arguably blurred the substantive and the procedural and produced a ruling that could allow the Court to enforce the Aarhus Convention in the broad and diverse substantive areas of environmental law, in which the EU has legislated irrespective of whether Member States are in charge of implementing these policies. From the perspective of environmental protection, this blurring might be considered positive because it vests environmental legislation with teeth.⁷⁶ From a standpoint of coherence of law and institutional balance, the Court’s decision is much more doubtful. Indeed, AG Kokott argued that taking into account “downstream” legislation—the listing of the brown bear in the annex of the substantive Habitat Directive—would be “too random and arbitrary” and result in a fragmentation of the interpretation of Article 9(3) of the Aarhus Convention depending on the substantive issue at stake.⁷⁷ In light of the failed attempts to regulate the issue of access to justice against Member States’ decisions with an environmental impact, *Slovak Bears* also means that the Court of Justice is stepping up to act as legislator.⁷⁸

Slovak Bears confirms that the Court of Justice enjoys full jurisdiction to determine which court decides whether a provision has direct effect. It also gave concrete guidelines to the national court that essentially prescribed interpretation of national law consistent with the Aarhus Convention. This leads, in practice, to a change in the application of national law and demonstrates how far the specific provisions of the Aarhus Convention, vested with the additional force of EU law and enforced by the Court of Justice, determine procedural

⁷⁴ *Slovak Bears* para. 40 (emphasis added).

⁷⁵ JANS & VEDDER, *supra* note 15, at 74. Jans and Vedder speak of it rendering the declaration “obsolete and useless.”

⁷⁶ See Christian Walter, *Internationalisierung des deutschen und Europaischen Verwaltungsverfahrens- und Verwaltungsprozessrechts—am Beispiel der Aarhus Konvention*, 40 EUROPARECHT [EUR] 302, 316 (2005) (arguing with regard to the particular example of the Aarhus Convention that substantive and procedural law can no longer be separated).

⁷⁷ *Slovak Bears* (opinion of Advocate Gen. Kokott), para. 70.

⁷⁸ See *id.* para. 77.

protection in national legal orders. While the Aarhus Convention, as well as the implementing EU regulation, refer to national law and account for differences in legal culture, the requirement of consistent interpretation of the CJEU considerably limits Member States’ scope of discretion.

Another series of cases limiting national procedural autonomy concern accession to justice in the form of the *locus standi* conditions for non-government organizations (NGOs). Several Member States have also made declarations and reservations to the Aarhus Convention.⁷⁹ Sweden in particular has limited the scope of Article 9(1) and (2) of the Aarhus Convention “with regard to access by environmental organizations to a review procedure before a court of law concerning such decisions on local plans that require environmental impact assessments.” The value of Sweden’s reservations remains questionable in light of the CJEU’s *Slovak Bears* decision, as well as the *Djurgården* and *Bund fuer Umwelt und Naturschutz* decisions. *Djurgården*,⁸⁰ which concerned the Swedish implementation of an EU Directive⁸¹ giving effect to the Aarhus Convention, granted the right to access justice to environmental NGOs. Both the EU directive and the Aarhus Convention guarantee the right to access justice to NGOs “meeting any requirements under national law.” The CJEU assumes the right to judge whether national conditions regulating access to justice are compatible with both EU law and the Aarhus Convention—Article 9(2) of which was implemented by the EU Directive—and found that Swedish requirements were too restrictive. In *Bund fuer Umwelt und Naturschutz*,⁸² the Court of Justice equally enforced Article 9(2) of the Aarhus Convention, providing for wide access to justice for public concerns. An environmental NGO challenged the partial permit for building a coal-fired power station in Germany. Under German law, the applicant must rely on a rule designed to protect individual interests, rather than one that protects the general public interest.⁸³ This law significantly limits the possible actions by NGOs and the CJEU ruled that the law deprives environmental NGOs of the role that is granted to them not only under EU law, but also under the Aarhus Convention. This CJEU decision opened the door for *Verbandsklagen*—collective actions—in environmental matters.⁸⁴ Similarly,

⁷⁹ Those Member States are Austria, Denmark, Finland, France, Germany, Netherlands, Norway, Sweden, and the UK.

⁸⁰ Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsörening v. Stockholms kommun genom dess marknämnd*, 2009 E.C.R. I-9967.

⁸¹ Council Directive 85/337, 1985 O.J. (L 175) 40 (EEC), amended by Council Directive 2003/35, 2003 O.J. (L 156) 17 (EC).

⁸² Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 2011, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-115/09>.

⁸³ Wolfgang Durner & Martin Paus, *Die erweiterten Klagerechte der Umweltverbände in der verwaltungsgerichtlichen Praxis*, 34 *NATUR UND RECHT* [NUR] 325, 325 (2012).

⁸⁴ *Id.*

the General Court ruled in the *Stichting Natuur en Milieu* case that Article 10(1) of the 2006 Regulation on participation and access to justice, which limits access to the internal review procedure to “measure[s] of individual scope,” is incompatible with the Aarhus Convention.⁸⁵ These standing requirements are highly relevant in the area of environmental protection which often concerns public goods, *e.g.*, clean air, rather than individual rights. At the same time, opening the doors of the judiciary to public pressure groups is also a matter of efficiency and allocation of resources. Judicial proceedings can block the implementation of policies for years.⁸⁶

The discussed case law is particularly interesting in light of the fact that it remains doubtful whether the EU itself meets the access to justice requirements of the Aarhus Convention⁸⁷ and that the CJEU has shown restraint when confronted with questions on the compatibility of EU law with the Aarhus Convention.⁸⁸ So far, the CJEU has refrained from imposing additional procedural requirements on the EU institutions. A preliminary ruling from France presented the Court of Justice with the question of whether the Environmental Information Directive was applicable to trading information of emission allowances under the ETS.⁸⁹ AG Kokott elaborated that, under the Environmental Information Directive, “likely effects [on the environment] are sufficient” to bring information within its scope⁹⁰ and, therefore, information on emission allowance transactions is environmental information within the meaning of the Directive.⁹¹ The AG pointed out that “the explanatory memorandum for the Commission proposal expressly states that [the] directive . . . is intended to be consistent with the Aarhus Convention.”⁹² The AG relied *inter alia* on the Implementation Guide for the Aarhus Convention. The Court did not follow AG Kokott but ruled that the Environmental Information Directive is not applicable to “trading information.”⁹³ The aim here is not to point out whether or not

⁸⁵ Case T-338/08, *Stichting Natuur en Milieu v. Comm’n*, 2012, <http://curia.europa.eu/juris/liste.jsf?num=T-338/08>.

⁸⁶ For a take on the “dark side” of litigation, albeit in a slightly different context, see Case C-427/07, *Comm’n v. Ir.*, 2009 E.C.R. I-6277 (opinion of Advocate Gen. Kokott), para. 69.

⁸⁷ Marc Pallemmaerts, *Access to Environmental Justice at EU Level. Has the “Aarhus Regulation” Improved the Situation?*, in *THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL*, 271 (Marc Pallemmaerts ed., 2011).

⁸⁸ See also the pending case of Case C-605/11P, Appeal brought on 29 November 2011 by Republic of Finland against the judgment delivered on 9 September 2011 in Case T-29/08, *Liga para Protecção da Natureza (LPN) v Comm’n*, O.J. 2012 C 58/4.

⁸⁹ See *Ville de Lyon*.

⁹⁰ See *Ville de Lyon*, (opinion of Advocate Gen. Kokott), para. 37.

⁹¹ *Id.* para. 42.

⁹² *Id.* para. 64.

the Court’s reasoning in substance was convincing, but rather to consider the role that the CJEU gave to the Aarhus Convention. Despite the fact that the EU is a party to the Aarhus Convention which, as an international agreement of the EU, ranks between primary and secondary law and should hence be applied as a yardstick of legality to secondary law,⁹⁴ the CJEU chose not to scrutinize or interpret the Directive in light of the Aarhus Convention. Consistent interpretation with the latter would have arguably required a broad interpretation of “environmental information.” The following section on effects of the Aarhus Convention on the enforcement of Union law and on the decisions of the Aarhus Convention Compliance Committee supports the argument that the CJEU should take a more restrictive approach when it comes to procedural protection from Union law.⁹⁵

III. Procedural Protection from Union Law and the Aarhus Convention Compliance Committee

The Aarhus Convention Compliance Committee (ACCC), which controls parties’ compliance with the Convention, has produced a considerable body of case law interpreting the Aarhus Convention.⁹⁶ However, the ACCC is an “optional arrangement[] of a non-confrontational, non-judicial and consultative nature”⁹⁷ and cannot issue binding decisions.⁹⁸ The situation differs from dispute settlement or enforcement bodies established under international agreements that can adopt decisions with binding legal effects. These become directly part of the Union legal order⁹⁹ and their effect is strongly influenced by the nature and effect of the international agreement establishing them.¹⁰⁰

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Bilun Mueller, *Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law: Judgment of the Court of 12 May 2011, Case C-115/09 Trianel and Judgment of 8 March 2011, Case C-240/09, Lesoochranarske Zoskupenie*, 23 J. ENVTL L. 505 (2011), making a double-standard argument. See also, Silvia Pernice-Warnke, *Der Zugang zu Gericht in Umweltangelegenheiten fuer Individualklaeger und Verbaende gemaess Art. 9 Abs. 3 Aarhus-Konvention und seine Umsetzung durch die europaeische Gemeinschaft*, 43 EUROPARECHT [EUR] 410, 415 (2008).

⁹⁶ CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2008) (Andriy Andrusevych, Thomas Alge & Clemens Konrad eds., 2008).

⁹⁷ United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 15, June 25, 1998, 2161 U.N.T.S. 447.

⁹⁸ U.N. Econ. Comm’n for Eur., Guidance Document on the Aarhus Convention Compliance Mechanism, http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf.

⁹⁹ Case C-192/89, *Sevince v. van Justitie*, 1990 E.C.R. I-3461.

¹⁰⁰ Christina Eckes, *The European Court of Justice and (Quasi-) Judicial Bodies of International Organizations, in THE INFLUENCE OF INTERNATIONAL ORGANIZATIONS IN THE EU* (Ramses A. Wessel & Steven Blockmans, eds.) (forthcoming).

Yet the ACCC's 14 April 2011 ruling is nonetheless interesting in the present context.¹⁰¹ The ACCC was asked to decide whether the standing requirement of "individual concern" before the EU Courts was in compliance with the provisions of the Aarhus Convention. The applicant addressed this as a general point focusing on the CJEU's case law at large rather than the relevant provisions or particular decisions. However, while it included a number of cases in its analysis, such as *EEB*,¹⁰² *Azores*,¹⁰³ and *Stichting Milieu*,¹⁰⁴ the ACCC focused in particular on *WWF-UK*¹⁰⁵ as this was the first decision of the General Court after the Aarhus Convention entered into force for the EU. The ACCC showed great deference to the EU Courts but, at the same time, reached a rather critical conclusion. It deferred considerations of elements that could affect a case pending before the CFI.¹⁰⁶ It refrained from examining whether the Aarhus Regulation or any other relevant EU internal administrative review procedure meet the Aarhus Convention's requirements on access to justice.¹⁰⁷ Further, it did not enter into an analysis of the details of the different cases, but focused on the main allegation that the consistent jurisprudence of the EU Courts on standing for members of the public fails to ensure access to justice with regard to decisions, acts, and omissions by EU institutions and bodies.¹⁰⁸ In essence, the ACCC limited its examination to the *WWF-UK* case and the question of whether the EU Courts accounted for the fact that the Convention had now entered into force for the Party concerned. The ACCC declined to rule on the question of whether the *WWF-UK* case in itself amounts to non-compliance with the Convention or whether the contested regulation on fishery is, as such, a challengeable act under Article 9 of the Aarhus

¹⁰¹ U.N. Econ. Comm'n for Eur., Findings and Recommendations of the Compliance Committee with Regard to Communication ACC/C/2008/32 (Part I) Concerning Compliance by the European Union (Apr. 14, 2011) <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/C32Findings27April2011.pdf> [hereinafter Findings and Recommendations]. See also Charles Poncelet, *Access to Justice in Environmental Matters: Does the European Union Comply with its Obligations?*, 24 J. ENVTL L. 287 (2012); Teresa Weber, *Die Umsetzung der Aarhus-Konvention beim direkten Vollzug von Unionsrecht*, 20 J. FÜR RECHTSPOLITIK [JRP] 137 (2012).

¹⁰² Joined Cases T-236/04 & T-241/04, Eur. Envtl. Bureau & Stichting Natuur en Milieu v. Comm'n, 2005 E.C.R. II-4945.

¹⁰³ See Case T-37/04, Região autónoma dos Açores v. Council, 2008 E.C.R. II-00103; Case C-444/08, Região autónoma dos Açores v. Council, 2009 E.C.R. I-200.

¹⁰⁴ Case T-338/08, Stichting Natuur en Milieu v. Comm'n, 2012, <http://curia.europa.eu/juris/liste.jsf?num=T-338/08>.

¹⁰⁵ See T-91/07, WWF-UK Ltd. v. Council, 2008 E.C.R. II-81; C-355/08, WWF-UK Ltd. v. Council, 2009 E.C.R. I-73.

¹⁰⁶ See Findings and Recommendations, *supra* note 101, para. 7

¹⁰⁷ See *id.* para. 10. See also Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, 2011, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-115/09> (opinion of Advocate Gen. Sharpston), para. 28 (referring to the pending case before the ACCC).

¹⁰⁸ See Findings and Recommendations, *supra* note 101, paras. 59, 63.

Convention. This avoids pitting two quasi-judicial bodies against each other in individual cases. The ACCC also declined to rule directly that the EU is in breach of the Aarhus Convention. However, it found that “with regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the [EU] would fail to comply with Article 9, paragraph 3 and 4, of the [Aarhus] Convention.”¹⁰⁹ The ACCC recommended “that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance” and “that all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.”¹¹⁰

The Union, as a party to the Convention, is obliged under international law to comply with its rules. Beyond this, a consistency argument can be made that the CJEU should submit Union law to the same interpretation of the Aarhus Convention as national law. Such an argument is supported by the prominent role of consistency under both the Lisbon Treaty and by the Court of Justice in *Slovak Bears*.¹¹¹ That is, environmental NGOs should be placed in the same position before the EU Courts as before national courts, with regard to law enforcement by the Union and the national authorities.

E. Conclusion

The internationalization of environmental policy has led to an increase of Union powers and to additional limits on Member States’ autonomy. These particular developments can be explained as the effects of internationalization on the complex architecture of interwoven powers within the EU that rely on a dynamic concept of shared competences, the ordering principle of subsidiarity, the principle of sincere cooperation, mixed agreements, and national autonomy. They do not have parallels in national legal orders. Hence, EU Member States had good reasons to include treaty provisions, such as Article 191(4) TFEU but also Article 207(6) TFEU, that aim to protect Member States’ competences from the expansion of EU competences as a result of internationalization. Yet, as was shown above, these provisions will not be able to avoid the described development.

Because of the intricate interlocking of the powers of the Union and its Member States, which is far more complicated than appears from a straight-forward reading of the TFEU’s provisions on competences, choosing between different legal bases has more far-reaching consequences than is usually the case in a state structure. When policy-making moves

¹⁰⁹ See Findings and Recommendations, *supra* note 101, para. 88.

¹¹⁰ See Findings and Recommendations, *supra* note 101, paras. 97–98.

¹¹¹ See *Slovak Bears*.

from the domestic EU sphere to the international sphere, Member States are more restricted in the exercise of national powers than they would be internally. Their hands are bound either because of the Court of Justice's strict reading of the duty of sincere cooperation or because exclusive external competences, such as the common commercial policy, exclude parallel national action. Furthermore, the increasing amount of international rule-making has led to a near automatic justification of Union action in light of the principle of subsidiarity. The simple fact that the rules implement international agreements is considered sufficient to justify the principle of subsidiarity and hence EU, rather than national, rule-making. It is further argued that environmental law gives us a glimpse of the vanishing relevance of the subsidiarity principle in a more and more globalizing world, both factually and legally.

By assuming jurisdiction, for example, for the interpretation of mixed agreements, the Court of Justice further assumes the monopoly to determine the status and value of public international law, including the Aarhus Convention, not only within the EU legal order but also indirectly—via EU law—within the national legal orders of the Member States. Jurisdiction is relevant because the status and value of international law within the national legal order greatly differs amongst Member States¹¹² and many are less open to international law than the EU legal order. Furthermore, where the Court of Justice has the final say on how to interpret international law in a particular area, it monopolizes participation in cross-jurisdictional discourse. The Court precludes national courts from participating in the cross-jurisdictional discourse and prevents them from influencing the course of discussion. It also entails the Aarhus Convention Compliance Committee considering EU rather than national law.

The Aarhus Convention is a particularly good illustration of the centralizing effect of mixed agreements. As is well known, EU Member States enjoy procedural autonomy and are competent to determine their own national judicial procedures, including when national courts apply EU law. No specific substantive requirements are imposed. The Aarhus Convention, by contrast, imposes specific procedural duties on the signatory parties. Because it is a mixed agreement, the Court of Justice has assumed jurisdiction to control compliance with the Convention within the EU legal order, as well as national legal orders when an issue falls within the scope of EU law. The scope of EU law is interpreted very liberally by the CJEU while the requirements of the Aarhus Convention are interpreted rather strictly. As a result, the CJEU has placed specific procedural requirements on the Member States that the protection from actions of the Union institutions would not necessarily meet. This limits national procedural autonomy.

¹¹² For an account of the different receptions of the ECHR in Germany, the UK and the Netherlands, see Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, Mod. L. R. (forthcoming 2013).

The explored examples are illustrative of a broader phenomenon. In the area of the environment, they show how international law-making influences the internal division of powers between the Union and its Member States. In light of the combined trends of the internationalization of policy-making and the EU’s increasing participation in international relations, more examples of power shifts to the EU context should be expected.

