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**PASSING THROUGH THE (LEGAL) EYE OF
THE NEEDLE
LEGAL OBSTACLES TO EU LEADERSHIP ON CLIMATE
CHANGE**

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Summary

Climate change is one of the greatest challenges of our time. Human activities all over the world from a multitude of different sectors are contributing to global warming. Therefore, climate change law exists on many different levels, creating a complex web of interacting legislation. In this multi-levelled legal landscape the European Union is attempting green leadership.

The purpose of this thesis is to investigate what legal difficulties the European Union may encounter when exercising its leadership. The thesis focuses on issues with the United Nations Framework Convention on Climate Change, customary international law and the principle of non-intervention, the Most Favoured Nation and National Treatment principles in World Trade Organization law and issues that might result from the European Unions institutional structure.

In order investigate the leadership, its nature must first be explored. The European Union has taken many measures to reduce its greenhouse gas emissions. By showing concrete action the European Union wishes to lead by example. It is also the expressed ambition of the European Union to inspire others to act. This leadership type is classified as *directional leadership*.

However, the European Union has also taken some measures that can be classified as unilateral. Unilateral in the sense that they are intended to create incentives for, or impose, a certain behaviour of countries outside the European Union. The European Union has included aviation in the European Union Emission Trading System, banned certain Clean Development Mechanism credits, put a sustainability requirement on biofuels and is considering including imported products with high carbon emission during their production process in the European Union Emission Trading System. With these measures, the European Union is trying to take on a more aggressive leadership style, using the proverbial stick and carrot. This leadership style is called *structural leadership*.

These two different types of leadership that the European Union is attempting encounters different legal obstacles. A directional leadership needs a strong and united leader. The European Union, constituting of 27 different Member States, might not always be perceived as united or effective. A structural leadership might encounter problems with World Trade Organization law both because it differentiates between products based on production processes, and because it is according advantages only to countries that have a similar system to the European Union Emission Trading System. Furthermore, it could also have difficulties respecting the common but differentiated and respective capabilities principle in the United Nation Framework Convention Climate Change because of not differentiating between developed and developing countries. A possible way

to justify its measures under World Trade Organization law would be to fall under the exceptions for environmental measures that can be found in article XX General Agreement on Tariffs and Trade.

This thesis finds that the European Union has to be cautious when creating its measures to respect the requirements that exist on different levels. The holistic approach of the European Union to legislate across sectors is a good way to approach the problem but problematic from a legal perspective. However, considering the gravity of the issue of climate change it is conceivable that World Trade Organization law and international law will develop to give greater room for climate change measures.

Sammanfattning

En av vår tids största utmaningar är frågan om klimatförändringar. Mänsklig aktivitet över hela världen, från en mängd olika källor, bidrar till den globala uppvärmningen. Därför återfinns klimatlagstiftning på många olika nivåer vilket leder till regelverk som samverkar med varandra på olika plan. I detta komplexa juridiska landskap försöker Europeiska Unionen etablera ett grönt ledarskap.

Syftet med denna uppsats är att undersöka vilka juridiska svårigheter Europeiska Unionens ledarskap kan stöta på. Uppsatsens fokus är Förenta Nationernas Klimatkonvention, internationell sedvanerätt och non-interventionsprincipen, Most Favoured Nation och National Treatment principerna i Världshandelsorganisationsrätten och problem som kan uppstå med Europeiska Unionens institutionella struktur. För att undersöka de rättsliga förutsättningarna för Europeiska Unionens ledarskap måste det först klargöras vilket ledarskap Europeiska Unionen utövar.

Europeiska Unionen har vidtagit flera åtgärder för att minska sitt utsläpp av växthusgaser. Genom att visa på konkreta åtgärder vill Europeiska Unionen föregå med gott exempel. Det är också en av Europeiska Unionen uttalad ambition att inspirera andra till handling. Denna ledarskapstyp klassificeras som '*directional leadership*'.

Europeiska Unionen har också vidtagit åtgärder som kan klassificeras som *unilateral*. Unilaterala i den mening att de är avsedda att skapa incitament, eller tvång, för länder utanför Europeiska Unionen att ändra sitt beteende. Europeiska Unionen har inkluderat internationellt flyg i Europeiska Unionens utsläppshandelssystem, förbjudit vissa Clean Development Mechanism krediter, satt ett hållbarhetskrav på biobränslen och överväger att inkludera import av produkter vars produktion innebär höga utsläpp i Europeiska Unionens utsläppshandelssystem. Med de åtgärderna försöker sig Europeiska Unionen på en mer aggressiv ledarstil, med hjälp av piska och morot. Denna ledarskapstyp kallas för '*structural leadership*'.

De två olika ledarskapsstilar som Europeiska Unionen utövar möter olika rättsliga hinder. Ett *directional leadership* kräver en stark och enad ledare. Europeiska Unionen, som utgörs av 27 olika medlemsstater, uppfattas inte alltid som enat och effektivt. Ett *structural leadership* kan få problem med Världshandelsorganisationsrätten, eftersom åtgärderna skiljer mellan produkter enbart på grund av hur de producerats, samt enbart ger fördelar till länder som har ett system som liknar Europeiska Unionens utsläppshandelssystem. Dessutom uppstår svårigheter med att respektera gemensamma men differentierade och respektive kapaciteter principen i Förenta Nationernas Klimatkonvention eftersom åtgärderna inte gör skillnad på utvecklade länder och utvecklingsländer. Ett möjligt sätt att försvara Europeiska Unionens åtgärder i Världshandelsorganisationsrätten vore om

de föll under de undantag för miljöåtgärder som finns i artikel XX General Agreement on Tariffs and Trade.

Denna avhandling konstaterar att Europeiska Unionen måste vara försiktig när det skapar sina åtgärder för att respektera den lagstiftning som återfinns på flera olika nivåer. Det holistiska synsättet som Europeiska Unionen representerar genom att lagstifta flera olika branscher är ett bra sätt att närma sig klimatfrågan, men problematiskt sett ur ett juridiskt perspektiv. Med tanke på faran av klimatförändringar är det möjligt att Världshandelsorganisationsrätten och internationell rätt kommer att utvecklas för att ge större utrymme för klimatåtgärder.

Preface

This being the final thing I do at Juristprogrammet before graduating at Lunds University, I wish to take the opportunity to thank some of the people whom have helped me. First, I would like to thank Sanja Bogojevic for all her help with this thesis. Second, I must thank my partner Johannes for his patience with me these months.

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Elin Simonsson

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DIRECTIVE 1999/94/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 1999 relating to the availability of consumer information on fuel economy and CO₂ emissions in respect of the marketing of new passenger cars

DIRECTIVE 2003/87/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC

DECISION No 280/2004/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol

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The Treaty on the European Union| [2007], OJ C115/13

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Abbreviations

| | |
|--------|---|
| AB | Appellate Body |
| AG | Advocate General |
| CDM | Clean Development Mechanism |
| DG | Directorat General |
| ECCP | European Climate Change Program |
| ECJ | European Court of Justice |
| ETS | Emission Trade System |
| EU | European Union |
| GATT | General Agreement on Tariffs and Trade |
| ICAO | International Civil Aviation Organization |
| IMO | International Maritime Organization |
| JI | Joint Implementation |
| MFN | Most Favoured Nation |
| NT | National Treatment |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UN | United Nations |
| UNFCCC | United Nations Framework Convention on Climate Change |
| U.S. | United States of America |
| WTO | World Trade Organization |
| COP | Conference of the Parties |

1 Introduction

One of the greatest challenges of our time is the issue of climate change. The exact consequences of an increase in temperature are hard to predict, but it is clear that there will be consequences. A rise of the sea-level threatens as the polar icecaps are melting, many places on earth are in danger of becoming inundated. Difficult weather and ravaging storms will increase. Heat waves and drought resulting in water shortage is a likely scenario.¹ According to an overwhelming majority of researchers, the increase in temperature and the climate change that will follow is caused by human activities. Our emissions of so-called greenhouse gases, such as carbon dioxide, are identified as the major reason behind the problem.² It is clear that the issue must be addressed or else we will have to suffer the consequences.

Due to the multitude of emission sources, across several sectors, a holistic approach is needed when searching for a solution. Finding a solution most likely means reconsidering the way we act and live today. A part of the challenge is finding new ways to live on the planet, living in a manner that is sustainable.

Adding to the complexity is the fact that the damage created by emissions does not stay local. Emissions in one part of the world have consequences for the entire globe. Emission reductions have a positive effect, not only for the reducer but for everyone else as well, making it difficult for sovereign States to see the economic benefit of acting.

The problem has been created collectively and the solution resides with collective action. Since the origin of the issue lies in the industrial revolution, it is the developed part of the world that is responsible for the historic emissions. Still, the issue has to be resolved collectively which create a difficult situation with the need to balance the rightful demand of less-developed nations to develop and the necessity of acting together.

All these issues are expressed in laws governing climate change. Climate law exist on the multilateral and transnational level, as well as on the regional and local level. The multi-sectoral approach that is necessary

¹ IPCC, 2007: Summary for Policymakers. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M.Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, p 8.

² IPCC, 2007: Summary for Policymakers. In: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M.Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, p 2.

sometimes makes other fields of law, such as international trade law, collide with measures against climate change.

Collective action amongst nations is not easy to achieve. Often a leader is needed to show the way, and to push and encourage others to follow. The EU as a *sui generis* organisation is attempting a very needed climate leadership. A successful leadership by the EU could help provide a global solution to this pressing issue.

However, is it legally possible for the EU to manoeuvre in the complex legal setting that is climate law? It is in this context I have posed my questions. My aim is to take a closer look at the EU leadership and identify some of the most important legal obstacles that the EU's leadership faces. In order to answer my questions I must first identify what kind of leadership the EU has taken on, and in order to understand the leadership the reasons behind it must also be clarified. Then it is possible to answer my question: What are the legal obstacles in international law, WTO law and EU law to the exercise of the EU's green leadership on climate mitigation?

My hope is that this thesis and the answer to my question will give an indication on how the issue is being addressed today and what role the EU may play. It will identify some of the most pressing legal obstacles that exists for the EU taking an effective leadership role in the battle against climate change.

1.1 Research Question

The key question is what are the legal obstacles to the EU's climate change leadership. In order to answer this question I will also have to answer the questions: Which are the limits in the EU's institutional structure and law to leadership? What are the legal obstacles to leadership in the UNFCCC, international law, in particular with the principle of state sovereignty, the non-intervention principle and the duty to cooperate as expressed in the Rio declaration and WTO law in particular with the Most Favoured Nation principle and the National Treatment principle in the GATT. In order to answer these questions an examination of what kind of leadership in mitigating climate change the EU seeking is also necessary.

1.2 Method

Rules concerning climate change exist not only on the regional and national level but also in international and transnational law.³ As pointed out by Kati Kulovesi, the transboundary nature of climate change forces different legal

³ Kati Kulovesi, 'Exploring the Landscape of Climate Law and Scholarship: Two Emerging Trends', *University of Eastern Finland Department of Law, Legal Studies Research Papers*, Paper No 5 (2012), p 2.

systems to interact when addressing the problem.⁴ This is my starting point; how the EU is managing an international leadership in a landscape of legal pluralism, and in particular how this puts restraints on the EU's capacity to act.

This thesis does not aspire to give an in-depth analysis of a specific case or legal regime, but rather to paint a broader picture of the obstacles to EU leadership that can be found in the legal landscape. How different regimes interact and depend on each other and affect the possibilities of the EU as a leader. In the light of the identified legal restraints, I hope that the reasons behind the way the EU shapes its climate policies will become clearer, and that it will contribute to a better understanding of how the EU may proceed as a global leader.

I am investigating three legal regimes in the light of the EU's climate change leadership. First, the WTO since it is an organisation working for trade liberalisation and the EU's measures such as the EU ETS affect trade. Second, international law, partly because WTO law is interpreted in light of international law, partly since it could be relevant to the EU's unilateral actions. Third, I am looking at the UNFCCC, which it would have been impossible to exclude since it is the international convention currently governing climate change.

The results from this investigation will be applied to the models for analysing leadership that is used by Charles F. Parker and Christer Karlsson. They identify three different types of leadership: directional which is leading by example, structural which is leading by using the stick and carrot and idea-based which is leading by introducing the best ideas.⁵ These definitions will be the basis for an analysis of the legal obstacles since the different leadership styles will raise different issues.

Environmental law is inherently interdisciplinary.⁶ My thesis, approaching political science, is no exception but I am looking at it from a legal perspective. In doing this my thesis can contribute to political science analyses since it sets the legal frames within which policy can be developed. However, politics and law can never be entirely separated and this is something that I have considered in my research and writing. I have used the traditional method considering the most important sources in each legal regime, but I have also looked at official speeches and articles written by political scientists.

⁴ Kati Kulovesi, 'Exploring the Landscape of Climate Law and Scholarship: Two Emerging Trends', *University of Eastern Finland Department of Law, Legal Studies Research Papers*, Paper No 5 (2012), p 3.

⁵ Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?*', *Journal of Common Market Studies*, Vol 48 No 4, (2010).

⁶ Elizabeth Fisher, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', *Journal of Environmental Law*, 21:2 (2009), p 225.

1.3 Material

Climate change law is a fast developing discipline and the material used needs to be as up-to-date as possible in order to give a just picture of the situation. Therefore, articles from academic journals have been an important source of information. Since some of the issues in my thesis are disputed it has also been important to read different opinions to get a better understanding and to form my own ideas.

As my thesis concerns different legal regimes, each regime has their own primary sources that must be respected. In the EU, the ECJ's cases are important sources. In the WTO, the AB is not bound by its jurisprudence but it remains an important source for understanding the text of the agreements. It is also important to look at international customary law to comprehend how the WTO agreements should be interpreted.

When analysing the leadership of the EU it is the communications from the Commission that I have used. The Commission is often responsible for representing the EU internationally, in international organizations and with third countries.⁷ The Commission is also responsible for initiating legislation, and it shapes the EU's agenda by making yearly plans on the EU's priority legislative projects.⁸ These responsibilities and the fact that the Commission has as its purpose to represent the Union is the reason why I have chosen to look at the Commissions rhetoric when attempting to identify the leadership ambitions of the EU.

1.4 Structure

To give my thesis a context, a short introduction to the current international climate change regime will be given. This part will also pave the way for a greater understanding of how, and why the EU is trying to lead. Since the EU actively pursues a new agreement within the frames of the UNFCCC, its policy is partly inspired by the mechanisms in the UNFCCC and the Kyoto Protocol. The purpose of this introduction is not to fully explain the international climate change regime, but to point to the aspects that are relevant for understanding the EU measures and some of the controversy surrounding them.

After this introduction to the relevant parts of the international climate change regime, it is possible go on to have a closer look at the EU's leadership. In order to answer my question I must first define what kind of leadership the EU is aiming for. It will be argued that it is both directional and structural, which are leadership types used by Charles F. Parker and Christer Karlsson. Structural leadership is connected with more legal obstacles since it involves an attempt to influence behaviour outside the EU.

⁷ The Treaty on the European Union| [2007], OJ C115/13, article 17.

⁸ Paul Craig, Gráinne De Burca, 'EU Law Text, Cases and Materials', 5th edition, *Oxford University Press*, (2011), p 37.

A directional leader is only leading by example, changing its own behaviour in order to inspire others to do the same.

Thereafter, to show how the EU is attempting to achieve its goals an introduction to the legal measures taken by the EU will follow. The focus will be on the measures that could have consequences for parties outside the EU. Since all measures mitigating climate change aim at reducing greenhouse gases, it is true that they all have consequences for parties outside the EU since we all share the same air and atmosphere. The measures that I speak of are however different since they create, directly or indirectly, obligations and incentives for companies or countries outside the EU to change their behaviour or policy. The EU has done this by including international aviation in the EU ETS, banning the use of certain CDM credits, introducing a sustainability requirement for biofuels also by considering including imports in the EU ETS. It is mainly these measures that could be challenged by international and WTO law.

An introduction to the EU's environmental competences and the obstacle to leadership they create will follow. It is only within these competences that the EU may legally act, therefore they are important to understand in order to comprehend how the EU legislates to ensure its leadership. The competences are also important because they help explain why the policy looks the way it does.

Finally, the major legal obstacles that the EU measures could face will be presented. This part will show the boundaries that exist for the effective exercise of the EU's leadership. It will also explain the possible roads that the EU might travel to justify its measures, and it will hopefully answer my question.

1.5 Unilateralism

This section is intended to define the terms 'unilateralism,' and 'unilateral measure/action' that will be used in the thesis. Unilateralism needs to be defined in order to make clear what it implies, and what it does not imply, in this thesis.

Unilateralism can be defined as when a State, or in this case the EU, is pursuing its international goals without cooperating or negotiating with other States.⁹ Unilateral action has negative connotations but it is not true that measures are illegal simply because they are unilateral, nor is unilateralism always the worse choice.¹⁰ Indeed, unilateralism is a broad term which embodies different types of policies, not limited to legal acts. It

⁹ André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 1.

¹⁰ André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 6.

is not the same as unilateral acts of States in international law which consists of declarations that are made for the purpose of creating a legal effect.¹¹ Unilateralism is, simply put, a term for when a State acts on its own in the international arena.

Unilateralism and unilateral action can be used as complements to a multilateral approach, because unilateralism and multilateralism are not mutually exclusive.¹² In fact unilateral action can be, and has historically been, used to induce new energy to slow multilateral negotiations and to contribute to the effective development of international customary law. Concerning environmental issues, trade sanctions as an unilateral action could be used as a way to create incentive for multilateral action.¹³ Unilateral action can at times, particularly concerning pressing issues such as climate change, be preferred to no action. I agree with André Nollkaemper that the legality and the correct use of unilateralism must be judged in the international context for the decision.¹⁴ From my perspective, when the EU is pursuing unilateral actions in order to mitigate climate change it is for the reasons of pushing multilateral negotiations forward, or to solve a problem that can not wait to be solved. My classification of acts as unilateral should not mean that they are inherently illegal.

¹¹ André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 1.

¹² André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 2.

¹³ André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 5.

¹⁴ André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 6.

2 International Climate Change Regime

This section is intended to give a brief overview of the international regime which currently governs collective action on climate change. Focus is on the role of the EU, and on elements which the EU has adopted in its climate change policy.

2.1 UNFCCC

There is currently a single international legal framework for negotiating multilateral climate change mitigation: the UNFCCC. The UNFCCC expresses the need for developed countries to limit their emissions to the 1990's level.¹⁵ From the start there was a multitude of different views on how to approach the problem. This was due to economic, social and cultural issues that needed, and still need, to be addressed in face of such a complex problem as climate change.¹⁶ Even so, the UNFCCC was negotiated and adopted at the United Nations Conference on Environment and Development in Rio de Janeiro, 1992.

The EU is party to the UNFCCC as a Regional Economic Integration Organisation and does not have the right to vote, but it can vote for all its Member States if agreed upon.¹⁷ The fact that the EU is not recognized as a full member to the UNFCCC could be seen as making it more difficult for it to lead. It is necessary for the EU to show a united front if it wishes to gain credibility as a leader, and if its Member States do not always vote the same way it could be interpreted as a sign of weakness.

2.2 Kyoto Protocol

The Kyoto Protocol to the UNFCCC is a negotiated agreement that contains binding emission reduction targets for developed countries in its annex B.¹⁸ In the negotiations for the Kyoto Protocol the EU grabbed the chance of acting as a leader when the U.S., because of domestic political issues, failed to take on a leading role.¹⁹ The first commitment period of the Kyoto

¹⁵ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 38 ILM 849, article 4(2).

¹⁶ Cinnamon P Carlarne, 'Climate Change Law and Policy EU and US Approaches', *Oxford University Press* (2010), p 6.

¹⁷ Christina Eckes, 'EU Climate Change Policy: A Choice between Justice and Environmentalism', *Amsterdam Law School Legal Studies Research Paper*, No. 2012-102, p 8.

¹⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32.

¹⁹ Cinnamon P Carlarne, 'Climate Change Law and Policy EU and US Approaches', *Oxford University Press* (2010), p 8.

Protocol ran until 2012 but it has been prolonged until 2020 by the Doha amendment.²⁰ At the last held Conference of the Parties (COP 18), the EU succeeded in getting through its demand for a roadmap to a new binding reduction agreement by 2015, to reach the 2 C° target.²¹ However, the Kyoto Protocol is at the moment the only binding international agreement on emission reduction.

The Kyoto Protocol does set out binding reduction targets for the developed countries, listed in annex I to the UNFCCC, but it does not state how the signatory States should achieve their reductions. Instead, the Kyoto Protocol provides for three different mechanism that the signatories may use when taking measures against climate change: Clean Development Mechanism (CDM), Joint Implementation (JI) and Emission Trading System (ETS).²² CDM is when an annex I country finance a project reducing emissions in a non-developed country and count the emissions reduced towards its own reduction target.²³ JI is the same as CDM but between two developed countries, and with the additional requirement that the emission reduction must provide an emission reduction by source or an enhancement of removals by sinks.²⁴ ETS makes it possible for countries that reduce more than they have to, to sell emission allowances to other parties, thereby putting a price on carbon and creating a new carbon market. It is also possible for the signatories to create local ETS.²⁵ For the reduction of emissions from maritime bunker fuels and aviation, it is specially provided that the parties should work towards emission reduction through the ICAO and the IMO.²⁶

The international climate change regime is by many considered a failure.²⁷ Important major emitters, such as the U.S., have not signed the Kyoto protocol, and even if the protocol was to be implemented in full the reduction of greenhouse gases would not be enough to stop global warming.²⁸ Since the conclusion of the UNFCCC, except from the agreement on prolonging the Kyoto protocol reached in Doha, no binding

²⁰ Doha amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 8 December 2012).

²¹ http://ec.europa.eu/clima/events/0062/index_en.htm, accessed 2013-03-06.

²² Erich Vranes, 'Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory', *Oxford University Press*, (2009), p 375.

²³ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32, article 12.

²⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32, article 6.

²⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32, article 17.

²⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32, article 2(2).

²⁷ Paul G Harris, 'Collective Action on Climate Change: The Logic of Regime Failure', *National Resources Journal*, Vol 47 (2007), p 195.

²⁸ Paul G Harris, 'Collective Action on Climate Change: The Logic of Regime Failure', *National Resources Journal*, Vol 47 (2007), p 197.

agreement on concrete emission reductions has been concluded.²⁹ The organisations appointed to deal with emissions from bunker fuels, the IMO and the ICAO, have so far not taken concrete action to reduce emission.³⁰ The outcome of the regime so far, in terms of concrete action, is bleak.

²⁹ Daniel C Esty, Anthony L E Moffa, 'Why Climate Change Collective Action has Failed and What Needs to be Done Within and Without the Trade Regime', *Journal of International Economic Law*, Vol 15(3) (2012), p 781.

³⁰ Kati Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?', *Review on European Community & International Environmental Law*, Vol 21(3) (2012), p 195.

3 Leadership of the EU on Climate Change Mitigation

This section will give an introduction to the EU's climate change policy. It will also show which leadership ambition the EU has pronounced, and give the main reasons behind this ambition.

3.1 Climate Change Policy of the EU

Already in the preamble to the Treaty on European Union the environment is mentioned as a subject to promote. Article 3(3) TEU states that the EU should work for sustainable development, and promote scientific and technological advances. In article 3(5) TEU it is stated that the EU should internationally promote the values mentioned in the article, among them sustainable development figures once again.³¹ An addition that came with the Lisbon treaty in article 191(1) TFEU is the inclusion of the obligation to promote measures internationally in order to combat climate change.³² Apparently, the environment and climate change is on the EU's agenda.

The EU's climate and energy policy is based on three pillars. The first is security of energy supply, the second competitiveness of European 'green' technology and the third sustainability through the increased use of renewable energy and greater energy efficiency.³³

The actual commitment of the EU is to reduce greenhouse gas emission to 80-95% compared to the 1990's emissions by 2050 by the developed countries as a group. Furthermore, the EU is committed to a domestic reduction to 80% of the 1990's emissions by the same date, not including carbon market offsets.³⁴ In the Kyoto protocol the EU was committed to a reduction to 92% of the emission level in 1990.³⁵ In the Doha amendment to the Kyoto Protocol the EU is committed to a reduction of 20% from 1990 emission level, and an added 10% reduction if other developed countries follow with similar reduction commitments.³⁶ In fact, the EU committed itself to a 20% reduction from the 1990 levels already in 2008.³⁷ The

³¹ The Treaty on the European Union| [2007], OJ C115/13, article 3.

³² The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 191(2).

³³ http://ec.europa.eu/research/energy/eu/policy/energy-and-climate-policy/index_en.htm, accessed 22 feb -13.

³⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, 'A Roadmap for moving to a competitive low carbon economy in 2050', p 3-4.

³⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32, Annex B.

³⁶ Doha amendment to the Kyoto Protocol, Article 1 amendment to Annex B of the Kyoto Protocol.

³⁷ Communication from the Commission to the European Council and the European

introduction of a conditioned reduction target is a part of the overall aim of the EU to bring other countries to commit to reducing greenhouse gases, both by using the carrot and showing its readiness to contribute.

3.2 Leadership Ambitions of the EU

The EU has since the beginning of its climate change policy aimed for an international, as well as an internal, leadership role. Its ambition to be a leader was pronounced as early as 1980. Already in the beginning, the motivation behind becoming a world leader was partially economic. The EU wished to beat the U.S. in the race for a leading position in green technology.³⁸

The EU has since then taken the lead on reducing greenhouse gas emissions, notably by deciding to take on a 20% reduction on its own in 2008. The sixth Environmental Action Program from 2002, which ran until 2012, established climate change as a priority for the Unions environmental actions.³⁹ In the proposed seventh Environmental Action Program creating a carbon-low economy in Europe is priority objective number two.⁴⁰ It seems as the economic reasoning behind the sought leadership remains. In the words of the Commission:

*This concrete action, sometimes more ambitious than what countries would be ready to commit to internationally, is driven to a significant extent also by other domestic agendas: to accelerate innovation, increase energy security and competitiveness in key growth sectors and reduce air pollution.*⁴¹

The economic gain from reducing air pollution consists of the improved health of EU citizens, which would decrease medical costs.⁴²

What perhaps has changed since the start is that the focus is not only on providing incentives for the industry to gain a competitive edge in climate-friendly technology, but also on the issue of energy security.⁴³ The concern

Parliament, COM(2007) 1 final, 'An Energy Policy for Europe', p 5.

³⁸ Andrew Jordan, 'Environmental Policy in the European Union', *Earthscan*, (2005), p. 260.

³⁹ DECISION No 1600/2002/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 22 July 2002 laying down the Sixth Community Environment Action Programme.

⁴⁰ DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', COM(2012) 710 final, p 16.

⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, 'A Roadmap for moving to a competitive low carbon economy in 2050', p 13.

⁴² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, 'A Roadmap for moving to a competitive low carbon economy in 2050', p 13

⁴³ Communication from the Commission, COM(2010) 2020 final, 'EUROPE 2020 A strategy for smart, sustainable and inclusive growth', p 15.

is that rapidly increasing prices on fossil fuels and political tensions between the oil-producing countries and the west could become an issue.⁴⁴ Referring to political difficulties likely mean Russia and the Middle East.⁴⁵

Another reason for the EU's focus on climate change is the need the EU felt to unite the Union citizens around a new issue to regain legitimacy after the failure of the constitutional treaty in 2005.⁴⁶

Reading these motivations in conjunction with the three pillars of the EU climate policy, the aim of EU's climate action is clear: Energy security, competitive advantages and sustainability. It seems clear the EU's ambitions for a leadership is driven by more than environmental concern. An important part of its motivation is the wish to take the lead of a new green market. A problem that could arise with the economical reason behind its climate change mitigation is compliance issues with WTO law. Protectionist legislation is not allowed, and the EU has to be careful when creating its environmental policy to balance environmental and economic concerns and economy to not be perceived as protectionist.

3.2.1 Leadership Rhetoric of the Commission

When attempting an analysis of the manner in which the EU presents itself as a leader and how it defines its challenges one thing is clear: the EU has the ambition of being an international leader in combating climate change.⁴⁷ Here, three core ideas expressed by the Commission are presented. These three themes are recurrent in the Commissions communications.

3.2.1.1 Leading by Example

According to the Commission the EU should lead by example, bringing other countries on board by showing that effective measures to reduce greenhouse gas emissions are possible.⁴⁸ The EU has leadership on

⁴⁴ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 2 final, 'Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond', p 2-5.

⁴⁵ Sebastian Oberthür & Claire Roche Kelly, EU Leadership in International Climate Policy: Achievements and Challenges, *The International Spectator: Italian Journal of International Affairs*, 43:3, (2008), p 43.

⁴⁶ Erkki J Hollo, Kati Kulovesi, Michael Mehlin (eds), 'Climate Change and the Law', *Springer Netherlands* (2013) p 515-516.

⁴⁷ As formulated in Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 86, 'International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change',

p 8. and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2005) 35 final, 'Winning the Battle Against Global Climate Change', p 11.

⁴⁸ SPEECH/10/468 Europe's view on International Climate Policy, 20 September 2011, p 8.

inventive solutions to climate issues. The way that the EU leads is by taking domestic action to reduce emissions.⁴⁹

The EU is set on becoming the most climate friendly region in the world, in this way the EU intends to show its commitment to concrete action and get others to act.⁵⁰ The “EU example” often refers to the commitment by the EU to a 20% reduction below the 1990 levels that the EU made before the Kyoto Protocol.⁵¹ It also refers to the many legally binding measures that the EU has implemented.⁵²

The way in which the EU is exercising its leadership is by showing *concrete action*, meaning measures that can have an actual effect of reducing emissions.⁵³ Thus, the EU paints a picture of itself as a very active actor and a good example of how reducing emissions could be achieved. The emphasis is on ‘bringing other onboard’ through showing ‘concrete action.’ This image of the EU is justified, the EU has enacted many climate change laws across different fields. An overview of the EU’s climate change legislation which shows its ambition is included in supplement A.

3.2.1.2 Achieving a Legally Binding Deal and Getting Others to Commit

There is a clear idea of the EU that its leadership on climate issues is necessary to move international negotiations on a legally binding deal forward.⁵⁴ Concrete action and a legally binding international climate deal is what the EU wishes to achieve with its leadership.⁵⁵ The role that the EU should take internationally is to continue to work for an international agreement.⁵⁶

⁴⁹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 2 final, ‘Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond’, p 2.

⁵⁰ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 86, ‘International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change’, p 8.

⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2009) 39 final, ‘Towards a comprehensive climate change agreement in Copenhagen’, p 2.

⁵² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, ‘A Roadmap for moving to a competitive low carbon economy in 2050.’

⁵³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 86, ‘International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change’, p 8.

⁵⁴ Communication from the Commission to the European Council and the European Parliament, COM(2007) 1 final, ‘An Energy Policy for Europe’, p 15.

⁵⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, ‘A Roadmap for moving to a competitive low carbon economy in 2050’, p 13.

⁵⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010)

Clearly one of the major purposes of the EU's leadership is to push through a new binding deal after the Kyoto Protocol. This is closely related to the realisation that no real change can be achieved if the EU acts alone.

The EU stresses the importance of global action, the problem of global warming cannot be solved by the EU alone.⁵⁷ The EU needs to continue to motivate third countries to follow the EU example.⁵⁸ Other actors should aim to achieve the EU's level of commitment and it is an important part of the EU's leadership to promote this.⁵⁹

In the attempt to create an incentive for third countries to match the EU measures the EU is also prepared to take the lead by unilaterally putting a price on carbon, for instance by including imports in the EU ETS. This strategy aims to solve the risk of carbon leakage when the EU is the only one taking measures to reduce emissions.⁶⁰

The overall aim of the EU's measures is to persuade other states to implement the same standards as the EU.⁶¹ This is important to the EU since it is the only possible way to reach the goal of only a 2 C° increase in temperature.

Another, not less important, reason is the economic loss the EU would face being the only one mitigating a common problem. The fear of ending up with a competitive disadvantage is pushing the EU to take a more active leadership role, for example by unilaterally putting a price on carbon.

3.2.1.3 Leading the Third Industrial Revolution

Another way that the EU leads is by being a leader of the third industrial revolution.⁶² Already in 2007 the commission claimed that the way forward for the EU was to "set the pace" for the new global industrial revolution.⁶³

86, 'International climate policy post-Copenhagen: Acting now to reinvigorate global action on climate change', p 2.

⁵⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 885 final, 'Energy Roadmap 2050', p 9.

⁵⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, 'A Roadmap for moving to a competitive low carbon economy in 2050', p 13.

⁵⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, 'A Roadmap for moving to a competitive low carbon economy in 2050', p. 9.

⁶⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 265 final, 'Analysis of options to move beyond 20% greenhouse gas emission reductions and assessing the risk of carbon leakage', p 11.

⁶¹ R Daniel Kelemen, 'Globalizing EU Environmental Regulation', Princeton annual Workshop on European Integration, (1 May 2009).

⁶² SPEECH/12/263 Statement by Barroso at the press point with UN Secretary General Ban Ki-moon following the opening ceremony of the EU Sustainable Energy For all Summit 16 April 2012, p 2.

The third industrial revolution refers to a concept developed by Jeremy Rifkin, very simplified the third industrial revolution would mean moving away from carbon energy use towards renewable energy because of the threat of global warming. This would be done by using new green technology and internet technology.⁶⁴

In the reasoning around the third industrial revolution the economic reasons behind being a green leader shines through. If the EU would be the biggest and best at green technology it would have a big economic advantage in a future with increased demands for environmentally-friendly technology, and less access to fossil fuels.

⁶³ Communication from the Commission to the European Council and the European Parliament, COM(2007) 1 final, 'An Energy Policy for Europe', p 20

⁶⁴ Jeremy Rifkin, 'the third industrial revolution', *Engineering & Technology* (26 april - 9 may 2008), p 27.

4 Analysis of the EU's Leadership

In this section an analysis of the EU's leadership will be conducted, which will serve as a base for further discussion about the legal obstacles it may face. As a method for analysing the EU's leadership, I will borrow the models that Charles F. Parker and Christer Karlsson use in their article. They will serve as a good starting point for a discussion about the legal restraints the different leadership styles might entail.

Structural leadership is leading with a stick and carrot. Structural leadership can be used by a strong actor that has the power both to coerce and to create incentives. In order for a structural leadership to be effective, it is necessary that the threats are serious and that the incentives are attractive enough to motivate a change in behaviour.⁶⁵

Directional leadership is the idea of leading by example. Through taking concrete action for others to follow, the directional leader inspires others to act by showing how it can be done. The directional leader takes the first move and needs to make others feel confident that functional action is being taken, so that others may follow without the risk of gaining a competitive disadvantage.⁶⁶

Idea-based leadership is an intellectual leadership whereby the leader tries to set policy agendas and find solutions to common problems. The idea-based leader tries to identify the problem and the solutions. Idea-based leadership depends on the capacity of showing others a new perspective on a certain issue. This new perspective will show the advantages of following the suggestions of the idea-based leader.⁶⁷

A first prerequisite for being able to be a leader is to be able to act, and thus being an actor. The EU, being a *sui generis* institution, could not be categorized as an actor according to any established ideas.⁶⁸ The EU has made attempts of clarifying its role internationally. Amongst other things, the Lisbon treaty accorded the EU with legal personality. New rules on how to negotiate and conclude international agreement should also help clarify

⁶⁵ Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?', *Journal of Common Market Studies*, Vol 48 No 4, (2010), p 926-927.

⁶⁶ Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?', *Journal of Common Market Studies*, Vol 48 No 4, (2010), p 926-927.

⁶⁷ Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?', *Journal of Common Market Studies*, Vol 48 No 4, (2010), p 926-927.

⁶⁸ Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?', *Journal of Common Market Studies*, Vol 48 No 4, (2010), p 925.

the role of the Union. Although the exact nature of the EU's position as an actor is difficult to determine, the EU has in several ways been accepted by the international community as an actor capable of participating in international negotiations.

4.1 Directional Leadership of the EU

Looking at the rhetoric of the Commission described above, directional leadership directly comes to mind. Repeatedly, there is a confirmation that the EU should lead by example and bring other countries to act through showing that concrete domestic measures are taken. The EU has also shown its commitment by taking on ambitious reduction targets. By becoming the most climate friendly region in the world the EU intends to show the way for others. In the spirit of leading by example, the EU has indeed implemented many legally binding measures with an aim of limiting greenhouse gas emissions in Europe.

An ambition of the EU is to be an important player in the design of an international agreement on climate change. Overall, the EU has strived towards shaping international law through taking domestic action.⁶⁹ It seems clear that the EU, in its rhetoric, is attempting a directional leadership.

Many scholars agree that EU is mainly taking on a directional leadership.⁷⁰ As we will see, there was a big legislative boost in 2009. This was the year of the adoption of the ambitious 'Climate and Energy Package', and not coincidentally the year of the UN Climate Change Conference in Copenhagen (COP15). In order to take on a directional leadership it is important to show that concrete measures are being taken domestically, realising this the EU speedily adopted a broad spectrum of measures in order to show its commitment to reducing greenhouse gases. A successful meeting in Copenhagen, resulting in a binding document on emission reductions, was a high priority target for the EU. The failure of the meeting was a great loss of prestige for the Union.⁷¹ For directional leadership to be successful it is imperative to show effective action.

⁶⁹ Kati Kulovesi, 'Climate Change in EU external relations: please follow my example (or I might force you to)', in Elisa Morgera (ed), *The External Environmental Policy of the European Union EU and International Law Perspectives*, (Cambridge University Press, 2012), p 116.

⁷⁰ See among others Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?*', *Journal of Common Market Studies*, Vol 48 No 4, (2010), Sebastian Oberthür, Claire Roche Kelly, 'EU Leadership in International Climate Policy: Achievements and Challenges', *The International Spectator: Italian Journal of International Affairs*, 43:3 (2008), Christina Eckes, 'EU Climate Change Policy: A Choice between Justice and Environmentalism', *Amsterdam Law School Legal Studies Research Paper*, No. 2012-102, Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW: UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *Common Market Law Review*, 48 (2011).

⁷¹ Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW:

The EU continues, despite the relative failure of the Copenhagen meeting, to show that it is serious about a climate friendly Europe. In 2010 a new Directorate General (DG) was created at the Commission. It deals exclusively with climate change, bringing measures that earlier were spread over several DG's under one umbrella.⁷² The EU's continued ambition is to carry on a directional leadership, leading by example.

4.2 Structural Leadership of the EU

It can however be argued that the EU is not only engaging in a directional leadership but also in a structural leadership.⁷³ The rhetoric of the Commission points towards a directional leadership, however it also expresses an ambition to promote 'EU solutions' and 'EU standards', and that incentives should be created to push the EU's perspective on climate change, which points towards structural leadership.

It should be clear that the EU is capable of exercising a structural leadership. By being the largest market in the world, with a significant industry, the EU certainly has muscles to put behind its threats.⁷⁴ However the way the EU's structural leadership can be identified is mainly through looking at the implications for third countries of some of the EU measures against climate change. The main way in which the EU is engaging in a structural leadership is through what could be called unilateral action.

Multilateral action and reaching a common deal on reducing greenhouse gases is a goal for the EU that is enshrined in its constitutional treaty: 'It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.'⁷⁵ International negotiations are important to the EU and, as described above, the EU has shown its commitment to leading by example and to reaching a deal within the framework of the UNFCCC.

However, negotiations are slow and the result of the Copenhagen meeting was a disappointment for the EU that was pushing for a new legally binding deal. It has been argued that at the perspective of failure of international

UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *Common Market Law Review*, 48 (2011), p 184.

⁷² Christina Eckes, 'EU Climate Change Policy: A Choice between Justice and Environmentalism', *Amsterdam Law School Legal Studies Research Paper*, No 2012-102, p 7.

⁷³ Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW: UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *Common Market Law Review*, 48 (2011), p 851.

⁷⁴ Charles F. Parker, Christer Karlsson, 'Climate Change and the European Union's Leadership Moment: An Inconvenient Truth?*', *Journal of Common Market Studies*, Vol 48 No 4, (2010), p 928.

⁷⁵ The Treaty on the European Union| [2007], OJ C115/13, article 21.

negotiations the EU started to enact measures unilaterally to push the negotiations forward, thus engaging in a structural leadership.⁷⁶

Another reason behind this shift towards a structural leadership and unilateral action is the potential risk for the EU of ending up with a competitive disadvantage, being the only one regulating its industry.⁷⁷ The issue is that climate action always benefits everyone, not only the ones paying for the measure. In that way, the ones taking action will be the losers and the others the free-riders.⁷⁸ There are two ways out of this prisoner's dilemma, one would be to reach a legally binding deal, a contract stating each parties obligations. The other would be creating a situation where the free-riders would be forced to pay for the measures taken by others.⁷⁹

The EU is aware of this possibility. In a communication, the Commission discusses the economic risks of a continued lack of action by other industrialised countries, and underlined that the EU needs to continue to 'push and encourage' others to follow.⁸⁰ The Commission has identified the issue as 'carbon leakage,' which in fact consists of two problems. One is that restrictions on the domestic industry, that are unmatched internationally, will make carbon-intensive industries move their production outside the EU, thus limiting the positive effects of the measure since the source of emission would just have moved, not disappeared. The other problem is that the domestic industry will lose their competitive edge, which will have negative effects on European economy and employment.⁸¹

As an answer to the lack of international action the EU is moving towards structural leadership.⁸² For instance, a suggested solution to carbon leakage is including imports in the EU ETS in a similar way that aviation has been included.⁸³ The unilateral decision of banning certain CDM credits, is

⁷⁶ Christina Eckes, 'EU Climate Change Policy: A Choice between Justice and Environmentalism', *Amsterdam Law School Legal Studies Research Paper*, No 2012-102, p 15.

⁷⁷ Christina Eckes, 'EU Climate Change Policy: A Choice between Justice and Environmentalism', *Amsterdam Law School Legal Studies Research Paper*, No 2012-102, p 11.

⁷⁸ Daniel Esty, Maria Ivanova, 'Globalisation and Environmental Protection: A Global Governance Perspective' in Frank Wijen, Kees Zoetman, Jan Pietrs (eds.) *A handbook of Globalisation and Environmental Policy National Government Interventions in a Global Arena*, Edward Elgar Publishing Limited, (2005), p 634.

⁷⁹ For an overview of the prisoner's dilemma see Robert V. Dodge, 'Schelling's Game Theory: How to Make Decisions', chapter 12, *Oxford University Press*, (2012).

⁸⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010) 265 final, 'Analysis of options to move beyond 20% greenhouse gas emission reductions and assessing the risk of carbon leakage', p 13.

⁸¹ Bisjawit Dahr, Kasturi Das, 'The European Union's Proposed Carbon Equalization System: Can it be WTO Compatible?', *Research and Information System for Developing Countries*, Discussion paper #56, (2009), p 4.

⁸² Joanne Scott, 'The Multi-Level Governance of Climate Change', *Carbon and Climate Law Review*, 1 (2011), p 28.

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010)

another decision that is likely to ascertain the structural leadership role of the EU since it will have a real effect on what kind of projects that are pursued internationally in favour of projects accepted by the EU.⁸⁴

Another clear example of structural leadership is the inclusion of aviation in the EU ETS. The EU Commissioner for Climate Action Connie Hedegaard commented in a memo:

*'On the contrary, our regulatory scheme was adopted after having waited many years for ICAO to progress. Now it seems that because of some countries' dislike of our scheme many countries are prepared to move in ICAO, and even to move towards a Market Based Mechanism (MBM) at global level.'*⁸⁵

Her statement acknowledges that the EU is successfully pursuing a structural leadership. In the same memo she continues with another 'threat' in order to push for international change: *'But let me be very clear: if this exercise does not deliver – and I hope it does, then needless to say we are back to where we are today with the EU ETS. Automatically.'*⁸⁶

What we can see here is that the pursuit of an international agreement is not only done through implementing internal measures in order to inspire others to follow, but also through creating real consequences for third countries to push them to negotiate and act. In a way, the EU is pursuing an international agreement, at the same time as it is making sure that it is not alone in paying for emissions. Using a combination of directional and structural leadership may well be an effective way to push the EU agenda forward, but it is legally more difficult to exercise structural leadership that includes regulations which have effects on States outside the Union.

The EU is, traditionally, a directional leader, showing the path for others to follow. However, recent measures, such as the inclusion of international aviation in the EU ETS, the banning of certain CDM credits, the enactment of a sustainability requirement, suggests that the EU is also pursuing structural leadership.

265 final, 'Analysis of options to move beyond 20% greenhouse gas emission reductions and assessing the risk of carbon leakage', p 11.

⁸⁴ Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW: UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *Common Market Law Review*, 48 (2011), p 851.

⁸⁵ Memo from the European Commission, MEMO/12/854, 2012.

⁸⁶ Memo from the European Commission, MEMO/12/854, 2012.

5 EU Measures to Battle Climate Change

In this section the legal measures taken by the EU to mitigate climate change will be presented. It is intended to give an overview of how, and in what areas, the EU legislates. Understanding the legal structure of the measures used by the EU in ensuring its leadership is necessary in order to evaluate what legal obstacles they may encounter. A table of the measures the EU has taken is included in supplement A. It should be used as a quick overview of the many different sectors in which the EU has taken action against climate change.

The framework within which the EU takes measures in the area of climate change is the European Climate Change Program (ECCP). The ECCP was created as a strategy for implementing the Kyoto protocol once signed. The program has different working groups which work on specific themes, for instance transport, in order to deliver a final report.⁸⁷ The final report functions as the basis for the legal and policy measures that the Commission proposes.⁸⁸

The distinction between internal measures and measures with external effects cannot rigidly be upheld since legislative measures might be essentially internal, with only exceptional external effects. The distinction is rather intended to correspond to directional and structural leadership to help the reader.

5.1 Internal Measures

In 2009 the Council adopted the climate-energy legislative package in order to achieve the 2020 goals.⁸⁹ The package was also part of an EU strategy to show concrete action before the Copenhagen (COP15) meeting, and to strengthen its leadership position before the meeting.⁹⁰ Due to the environmental integration principle climate change concerns are also integrated in many legislative acts whose main focus is not the environment.

⁸⁷ Communication from the Commission to the Council and the European Parliament, COM(2000) 88 final, 'on EU policies and measures to reduce greenhouse gas emissions: Towards a European Climate Change Program (ECCP)', Annex 2 p 8.

⁸⁸ Communication from the Commission to the Council and the European Parliament, COM(2000) 88 final, 'on EU policies and measures to reduce greenhouse gas emissions: Towards a European Climate Change Program (ECCP)', Annex 2 p 9.

⁸⁹ The Council of the European Union, 'Council adopts climate-energy legislative package', 8434/09 (Presse 77), Brussels 6 April 2009, p 1.

⁹⁰ Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW: UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *Common Market Law Review*, 48 (2011), p 830.

The EU has regulated both on fuels and on emission standards for new vehicles. Regulating transport is important since it is one of the main contributors to greenhouse gas emissions. In the long run, Europe will only have cars fulfilling a certain environmental standard. Measures also include labelling, so that consumers can take an active choice when buying cars.⁹¹

The construction industry is also facing big changes, by 2020 all new buildings should be nearly-zero buildings. Meaning that they should have almost no energy consumption. Important measures on limiting the use of fluorinated gases, which are very dangerous for the ozone layer, have been enacted as well as a strategy for maintaining good air quality in the Union.⁹²

The measures taken by the EU concerns a wide range of areas from transport to the possibility of geological carbon storage. This suggest that the EU is taking a holistic approach to climate change mitigation, integrating it into different areas. As a response to the complexity of the issue of climate change it is positive, but it opens up for clashes between different legal regimes. For instance the clash between trade law and environmental protection. All the legislative acts are addressed to the Member States and the industry, but looking closely some of them contain elements that also have an external effect.

5.2 Measures with External Effects

Turning to the measures with external effects, that is, measures that have an effect on the behaviour of companies or States outside the Union, the most significant measure is the EU ETS. The EU ETS is often referred to as the “flagship policy”⁹³ or the “key instrument”⁹⁴ for climate change mitigation in the EU. The EU ETS is certainly the most ambitious piece of legislative work the EU has introduced in combating climate change. It is also a legislative piece intended to combat climate change internationally.⁹⁵ The ambition of the EU is for the EU ETS to be “the pillar of the future carbon market”.⁹⁶

The EU ETS is directed to a large number of sectors and several greenhouse

⁹¹ See Table of Measures in Supplement A.

⁹² See Table of Measures in Supplement A.

⁹³ SPEECH/11/527, ‘EU ETS: Our central tool to reduce emissions’, Brussels, 14 July 2011, p 2.

⁹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 112 final, ‘A Roadmap for moving to a competitive low carbon economy in 2050’, p 14.

⁹⁵ Communication from the Commission to the European Council and the European Parliament, COM(2007) 1 final, ‘An Energy Policy for Europe’, p 11.

⁹⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 2 final, ‘Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond’, p 3.

gases, as listed in annexes I and II of the directive.⁹⁷ The EU ETS is a cap-and-trade system which works by putting a price on carbon, and it has created the world's largest carbon market. All emitters in the sectors included must give up allowance corresponding to their yearly emissions. If the emitter has emitted more than its yearly allowances it must purchase more, or pay a penalty sum of 100€ per allowance. If the emitter has emitted less, it can sell its excess allowances on the established carbon market. The allowances are distributed according to a national allocation plan that the Member State decides on individually. Some of the allowances are given away for free and others are auctioned out.⁹⁸

The EU ETS is implemented in phases, the third phase running between 2013-2020. During this phase, there will be an increase in auctioning over free distribution of allowances, and the allocation of allowances will be centralised to a EU wide cap. The EU ETS is linked to the CDM and JI projects under the Kyoto protocol.⁹⁹

Recently, the EU has put higher demands on which CDM credits that can be used in the EU ETS. It no longer accepts carbon credits from projects concerning nuclear energy, afforestation or reforestation, and projects concerning the destruction of industrial gases.¹⁰⁰ Banning the use of these CDM credits is a unilateral measure taken by the EU in order to avoid projects abroad with an undesirable effect on the climate.¹⁰¹ Since the EU constitutes the world's largest carbon market, it is likely that a decreased demand for credits from these projects will have real effects on behaviour outside the EU.¹⁰²

The perhaps most controversial part of the EU ETS, in terms of internal measures with external effects, is the inclusion of international aviation in the EU ETS.¹⁰³ All aircrafts that land in, or depart from, a Member State are included and they have to account for emissions during their entire flight,

⁹⁷ DIRECTIVE 2003/87/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2007], OJ L275/32, article 2.

⁹⁸ The European Commission, 'The EU Emissions Trading System (EU ETS)', European Union, (2013).

⁹⁹ The European Commission, 'The EU Emissions Trading System (EU ETS)', European Union, (2013).

¹⁰⁰ The European Commission, 'The EU Emissions Trading System (EU ETS)', European Union, (2013).

¹⁰¹ Christina Eckes, 'EU Climate Change Policy: A Choice between Justice and Environmentalism', *Amsterdam Law School Legal Studies Research Paper*, No. 2012-102, p 16.

¹⁰² Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW: UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *Common Market Law Review*, 48 (2011), p 851.

¹⁰³ DIRECTIVE 2008/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2008], OJ L8/3.

including emissions in airspace over third states or the high seas.¹⁰⁴ There is a possibility to exempt aircrafts departing from a third country, if the country has taken action similar to the EU ETS to reduce greenhouse gases from flights.

The inclusion of aviation into the EU ETS is not intended to replace or halt an international agreement on aviation emissions, and might be revised in light of such an agreement.¹⁰⁵ However, the EU believes that the EU ETS could serve as a model for an international agreement on emissions from aviations.¹⁰⁶

After strong international reactions to the directive, the EU decided to stop the inclusion of international aviation for a year until the ICAO general conference in September/October 2013 in order to give time for international negotiations on a global agreement.¹⁰⁷ In this way, the EU is trying to push international negotiations forward by taking unilateral action on international aviation emissions. It is clear that the EU ETS is intended as an example for the world to follow, strengthening both structural and directional leadership of the EU. In this case, the EU is using unilateral action both to resolve an issue that needs immediate attention and as a mean to push international negotiations.

Another area that might be included in the EU ETS in the future is maritime shipping, if the IMO does not conclude an agreement on reduction targets for maritime bunker fuels.¹⁰⁸ The usage of market based mechanisms, such as an ETS, is currently under discussion in the IMO. The next meeting discussing it will be held between the 13 and 17 May, 2013.¹⁰⁹ It is likely that the EU will wait for the outcome of the discussion in the IMO before taking action.

The possibility of introducing a carbon equalization system is mentioned as a way of addressing the issue of carbon leakage. A carbon equalization system would make importers surrender allowances for the carbon

¹⁰⁴ DIRECTIVE 2008/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2008], OJ L8/3, article 3a.

¹⁰⁵ DIRECTIVE 2008/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2008], OJ L8/3, article 25a.

¹⁰⁶ DIRECTIVE 2008/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, [2008], OJ L8/3, preamble 17.

¹⁰⁷ Memo from the European Commission, MEMO/12/854, (2012).

¹⁰⁸ DIRECTIVE 2009/26/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 amending directive 2003/87/EC as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, [2009], OJ L140/63, preamble 3.

¹⁰⁹ <https://imo.amsa.gov.au/public/2013/mepc65.html> accessed 03 May -13.

emissions during production, in a similar way to domestic producers. The external implications of such a system are considered by the EU, and there is awareness of the need to comply with both the UNFCCC and WTO rules.¹¹⁰

Another measure taken by the EU that has extraterritorial effects is the sustainability requirement on biofuels included in the Renewable Directive. The criteria requires that biofuels should not be produced in areas that have been deforested or from raw materials from tropical forest, drained peatland, wetland or areas with high biodiversity. In addition, the greenhouse gas savings from new plants must be at least 35% compared to fossil fuels, the percentage will gradually increase to 60% in 2018. Only biofuels that fulfil the sustainability requirement can be counted towards emission targets by European companies, and it is likely that they will have a competitive advantage on the European market because of this.¹¹¹

The reason behind the legislation is the ongoing debate on how environmentally friendly biofuels really are. It has been said that the use of biofuels could result in either a 60% decrease in emissions compared to fossil fuels or at worst a 20% increase.¹¹² Since biofuels grow better in tropical regions, the main production of biofuels occurs outside the EU.¹¹³ The effects of the directive on countries outside the EU is recognised by the EU and considered positive as it implements Union environmental standards internationally.¹¹⁴

While reviewing the EU's legislative work, it is important to remember that even though important legislation is in place, it is still up to the Member States to implement it in order for it to have any effect. The ambition to fight climate change varies between different Member States, and not all share the ambitions of the Commission, especially in a time of economic instability. This could lead to an uneven implementation of the Unions measures.¹¹⁵ The lack of a coherent implementation of the EU's measures against climate change could undermine the sought leadership role of the Union, since it undermines its credibility and capacity to act. It would also make it more difficult for the EU to put demands on other countries to

¹¹⁰ DIRECTIVE 2009/26/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 amending directive 2003/87/EC as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, [2009], OJ L140/63, preamble 25.

¹¹¹ DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, [2009], OJ L140/16, article 17(1)-(6).

¹¹² Enrique Rene de Vera, 'The WTO and biofuels: The Possibility of Unilateral Sustainability Requirements', *Chicago Journal of International Law*, 8 (2008), p 667.

¹¹³ Enrique Rene de Vera, 'The WTO and biofuels: The Possibility of Unilateral Sustainability Requirements', *Chicago Journal of International Law*, 8 (2008), p 666.

¹¹⁴ Information from the Commission, 'Commission sets up system for certifying sustainable biofuels', IP/10/711, (2010), p 1.

¹¹⁵ Erkki J Hollo, Kati Kulovesi, Michael Mehlin (eds.), 'Climate Change and the Law', *Springer Netherlands* (2013) p 514.

comply with EU standards when its own Member States fail to do so.

6 EU Competences and Obstacles to the EU's Leadership

This section attempts to explain what competences the EU possesses to act in the environmental field, and specifically on climate change. This section is important because in order to understand the measures taken by the EU in relation to climate change, it is essential to understand the competences the EU has to create those measures. It is also important in order to understand the obstacles that exist in the treaties to EU green leadership.

The basic rule expressed in article 5 TEU states that the EU can only act within the powers conferred on it by the treaties.¹¹⁶ Therefore, the delimitation of the EU's competences must be made before the legality of the measures can be examined.

The treaties require the promotion of climate change mitigation and sustainable development, domestically and internationally. This puts an obligation on the Commission to formulate an external and internal climate change policy, within its conferred powers.

6.1 Internal Competences

The EU competences on environment and energy are, according to article 4(e)(i) TFEU, shared.¹¹⁷ This means that both the EU and its Member States have the right to legislate on the matter.¹¹⁸ The Member States have the right to legislate as long as the EU has not exercised its right to legislate, thus pre-empting the possibility for Member States to legislate. The Member States can regain the right to legislate, if the EU ceases to exercise its competence.

To define the exact scope of the EU competence to legislate on a particular matter, it is necessary to look at the relevant treaty provision establishing that specific competence.¹¹⁹ In the case of the environment, the relevant treaty provisions are 191-192 TFEU.¹²⁰ Some of the treaty articles that provide the EU with competences to act are broadly formulated and open up

¹¹⁶ The Treaty on the European Union [2007], OJ C115/13, article 5.

¹¹⁷ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 4(e)(i).

¹¹⁸ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 2(2).

¹¹⁹ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 2(6).

¹²⁰ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 191-192.

for interpretation. In these cases, the ECJ has been inclined to allow for a wide interpretation of the competences.¹²¹

Another possibility for the EU to gain more competences is the doctrine of implied powers. Existing powers can imply the existence of another power that is reasonably necessary to be able to exercise the former. A wider understanding of implied powers allows for powers that are reasonably necessary to achieve a given objective.¹²² This opens up for possibilities for the EU to exercise powers beyond what is expressly stated in the treatise.

The competences in the field of the environment are found under Title XX in the TFEU. In article 191(1) TFEU the environmental objectives of the EU are listed. In the Lisbon Treaty a new objective was added in relation to climate change: ‘promoting measures at international level to deal with regional or worldwide environmental problems, *and in particular combating climate change.*’ According to article 191(2) TFEU, the EU should consider the precautionary principle, the preventive principle and the polluter pays principle when creating its policy. When forming its environmental policy, the EU should take into account both scientific environmental data and the possible economic cost of its action or inaction, as stated in article 191(3) TFEU. Finally, in article 191(4) TFEU it is made clear that to achieve its objectives the EU and its Member States, each within their competence, should cooperate with third countries or international organisations. The competence to conclude agreements that the EU is given is however limited as it does not hinder Member States from negotiating and concluding international agreements.¹²³ From an exterior perspective this could create some confusion as to with whom to negotiate, and this lack of clarity could weaken the image of the EU as a strong, united leader.

It is article 192(1) TFEU which is the normal legal basis for legislative acts trying to attain the objectives stated article 191 TFEU.¹²⁴ Article 192(1) TFEU prescribes the ordinary legislative process for measures on the environment. However, there are important exceptions from this rule. According to 192(2) TFEU, the council must unanimously adopt measures affecting fiscal matters, town and country planning, water management, land use minus waste management and the choice of energy sources and supply.¹²⁵

The requirement for unanimity makes it difficult to legislate, and it could explain why the EU’s environmental policy does not contain certain elements, such as a carbon tax. It would also explain why it is difficult for the EU to address the energy sector efficiently, a sector that is an important source of greenhouse gas emissions. This difficulties could affect how the

¹²¹ Paul Craig, ‘EU Administrative Law’, *Oxford University press*, (2012), p 371.

¹²² Paul Craig, ‘EU Administrative Law’, *Oxford University press*, (2012), p 372.

¹²³ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 191(1) emphasis added.

¹²⁴ OPINION 2/00 OF 6. 12. 2001, [43].

¹²⁵ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 192.

EU is perceived internationally. If the EU fails to effectively address the energy sector its image as a directional leader could be weakened.

Another important treaty provision is article 11 TFEU, which contains the environmental integration principle. According to the article, environmental concern should be integrated into all other policies. This article gives the EU the possibility to take policy decisions in areas outside the environmental field which are based on the environmental objectives described in article 191 TFEU.¹²⁶ With the integration principle, the EU has a tool for creating more coherent responses to complex issues such as global warming where measures need to be taken across different fields to be effective. This would strengthen the image of the EU as a strong actor and a directional leader.

Where a competence exists it is limited in its exercise by the principle of subsidiarity, and the principle of proportionality.¹²⁷ The principle of subsidiarity says that action in a field where the EU does not have exclusive competences should be taken at EU level only if the objective is better achieved there. The proportionality principle says that the measure taken should not go beyond, in form or in content, what is necessary to achieve the objectives in the Treaties.¹²⁸ Concerning climate change it would, in most cases, be easy to motivate action at EU level since the nature of the issue is global rather than local. The principle of subsidiarity could however put limits on the EU's leadership, since the EU does not *always* hold the right to act and not on all subjects. Thus weakening its image as an effective actor.

6.2 External Competences

In order to examine the EU's ambition of being an international leader in fighting climate change it is important not only to understand the internal competences it has to act, but also the legal frames within which the EU may act internationally. In the previous section the internal competences of the EU has briefly been described. Here, a description of the external competences of the EU will follow.

In the TFEU external powers are given the EU that allows it to, within its competences, conclude international agreements if provided for in the treaties, as stated in article 216(1) TFEU. As mentioned above, article 191(4) TFEU grants the EU the power to conclude international agreements. Article 216(1) TFEU also says that the EU can enter into an international agreement '... where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act,

¹²⁶ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 11.

¹²⁷ The Treaty on the European Union [2007], OJ C115/13, article 5(3), 5(4).

¹²⁸ Paul Craig, Gráinne De Burca, 'EU Law Text, Cases and Materials', 5th edition, *Oxford University Press*, (2011), p 95.

or is likely to affect common rules or alter their scope.¹²⁹

It is however not solely on the basis of 191(4) TFEU that the EU can enter into international agreements. In Opinion 2/00 on the proper legal basis for concluding the Cartagena Protocol, the ECJ made it clear that the conclusion of international agreements can have 192(1) TFEU as legal basis if they do not merely concern cooperation, since the competence to conclude agreements on cooperation is specifically provided for in article 191(4) TFEU.¹³⁰ The result is that the EU can rely on article 192(1) TFEU when concluding international environmental agreements, if they do not deal exclusively with cooperation. This decision has broadened the EU's competences.

Article 3(2) TFEU determines when the EU has exclusive competence to conclude an international agreement, even if it does not have exclusive internal competences in the area that the agreement concerns.¹³¹ When the conclusion of the agreement is necessary for the EU to exercise its internal competences the EU has the exclusive competences to conclude the agreement even if the internal competences are shared. This is in fact a codification of earlier case law on implied powers.¹³²

Due to the shared competences to conclude international environmental agreements, mixed agreements are often concluded. A mixed agreement is the joint participation of the EU and the Member States to a treaty.¹³³ The conclusion of mixed agreements is not a form provided for in the treaties, it has developed in order for the EU and its Member States to be able to act within their shared competences without having to delimit them. Mixed agreements have been considered a hindrance to a clear and unified EU policy on the environment, standing in the way of the EU exercising its normative power.¹³⁴

With the introduction of the Lisbon treaty the process for negotiating international agreement was codified in article 218 TFEU. This made the negotiation and decision process more clear, and might create a more efficient and predictable image of the EU in international negotiations.¹³⁵ Efficiency and predictability are important qualities for the EU's directional leadership.

¹²⁹ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 216(1).

¹³⁰ Opinion of the Court of 6 December 2001, European Court report 2001 Page I-09713, [43].

¹³¹ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 3(2).

¹³² Piet Eeckhout, 'EU External Relations Law', *Oxford University Press*, (2009), p 124.

¹³³ Paul Craig, Gráinne De Burca, 'EU Law Text, Cases and Materials', 5th edition, *Oxford University Press*, (2011), p 335.

¹³⁴ Teresa Fajardo del Castillo, 'Revisiting the External Dimension of the Environmental Policy of the European Union: Some Challenges Ahead', *Journal for European Environmental & Planning Law*, 7. 4 (2010), p 382.

¹³⁵ Piet Eeckhout, 'EU External Relations Law', *Oxford University Press*, (2009), p 164.

We should remember that article 11 TFEU is relevant also for external policies, meaning that environmental considerations could be taken in an area where the EU has exclusive competences, such as trade. Much of the power the EU has is connected to its position as an important trading partner. The fact the EU may incorporate environmental concerns into its trade policy opens up for the EU to use its economic power to push for environmental change abroad. The article grants the EU power to push its environmental policy internationally. It is also here that the EU risks facing legal problems, when it is integrating environmental concern into trade measures. Trade measures have to be compatible with WTO law, and there is limited room for environmental concerns in the WTO rules.

The institutional frames are important in order to understand the policy decisions of the EU. The limits they put on the EU could affect how the EU is considered internationally, and possibly make it more difficult for the Union to assume directional leadership.

6.2.1 Legal Personality of the EU

With the entry into force of the Lisbon treaty the European Community was replaced by the European Union and gained legal personality.¹³⁶ Article 47 TEU simply states that the EU should have legal personality.¹³⁷

The emergence of legal personality for the EU has as a consequence that only the EU is entitled to conclude international agreements within its competences, the Member States retain the capability of concluding international agreements within their competences.¹³⁸ International agreements that the EU has concluded is binding on the EU and its Member States.¹³⁹

The ECJ has also concluded that the EU is bound by customary international law.¹⁴⁰ When exercising its leadership the EU is therefore not only bound by its establishing treaties, but also by international agreements to which it is signatory *and* international legal norms.

It is within these frames that an analysis of the legal possibilities of the green leadership of the EU on climate change mitigation must be made. As we can see, it is not enough to describe the boundaries for measures that the EU treaties presents, its measures also have to be compatible with international law.

¹³⁶ Augustin Fuerera, 'Legal Personality and Powers of the European Union', *Lex et Scientia International Journal*, No XVII, vol 1/2010, p 205.

¹³⁷ The Treaty on the European Union, [2007], OJ C115/13, article 47.

¹³⁸ Augustin Fuerera, 'Legal Personality and Powers of the European Union', *Lex et Scientia International Journal*, No XVII, vol 1/2010, p 206.

¹³⁹ The Treaty on the Functioning of the European Union, [2007], OJ C115/47, article 216(2).

¹⁴⁰ Piet Eeckhout, 'EU External Relations Law', *Oxford University Press*, (2009), p 327.

7 Legal Restraints on EU Leadership

In the following section the legal boundaries for the EU's leadership will be presented. This presentation will be based on the type of measures that the EU has already taken, or is considering to take, and conflicts that may arise with their legality. Starting with limitations that might be found in EU law, the thesis will go on to investigate obstacles in international law and treaty law.

7.1 Domestically

In the EU it is only the Court that has the right to declare an EU legal act invalid. It is therefore not strange that the internal justification of EU's unilateral actions was pronounced by the ECJ in a case concerning the inclusion of aviation in the EU ETS.¹⁴¹

Regarding the legitimacy of EU action on a matter that should have been addressed by an international agreement, but where no international action has been taken, the ECJ concluded that the mere presence of a pronounced international ambition on resolving the issue is enough to give the EU a right to act on it. Furthermore, the Court made it clear that the exercise of the environmental competences can legitimately put conditions on commercial activities in the Union.¹⁴² The right for the EU to take action on an issue that, according to international agreements, should be resolved multilaterally is based on the failure of the international community to do so. In such a case, according to the opinion of AG Kokott, it is up to the policymakers to decide when it is appropriate to take action.¹⁴³ The EU has the power to act on international issues in the manner it sees fit when there is an international institutional failure to act *and* an international agreement that it should be acted on exists.

Since the EU ETS is an internal regulation, directed to the Member States, it is based on the internal competences found in article 191(2) TFEU. When interpreting 191(2) TFEU, an analysis of the reasoning of AG Kokott suggest that the article permits the EU to regulate emissions that do not occur within its territory, as long as the emissions affect the territory of the

¹⁴¹ Case C-366/10 The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change [2011] OJ C260/9.

¹⁴² Case C-366/10 The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change [2011] OJ C260/9, [128].

¹⁴³ Case C-366/10 The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change [2011], Opinion of AG Kokott [185]

Union.¹⁴⁴ The Court contended itself to declare that a sufficient link exists when the regulated aircrafts are landing in or departing from a Member State, and hence are subjects to the full jurisdiction of that Member State.¹⁴⁵

The ECJ did, in this case, declare it legitimate of the EU to create internal environmental policies, based on internal competences, in order to address emission that occurs outside its territory. From an internal viewpoint, when an international institutional failure is at hand, the EU has the right to take unilateral action to address the issue. The Court thereby made structural leadership legal since it grants the EU active powers to act on behaviour that takes place outside its territory. The jurisdictional connection is the landing or departing of the aviation from EU territory. Another suggested jurisdictional connection is where the damage (the effects of the emissions) occurs, which is inside the EU's territory. In the eyes of the Court, the EU ETS regulates *internal* matters, so the issue of extraterritoriality does not need to be addressed.

The EU should promote international solutions to common problems, especially through the UN.¹⁴⁶ This treaty obligation is probably one of the reasons why the ECJ stressed that the EU should only act when multilateral solutions have failed, and within the ambitions expressed in the UNFCCC. By conditioning the EU's right to act on an internationally pronounced ambition to resolve the issue, the EU can still claim to act in line with the UN and the UNFCCC.

The EU is also under another obligation besides promoting the environment and cooperate to solve common issues. According to article 3(3) TEU the EU is under an obligation to establish a 'highly competitive social market economy'.¹⁴⁷ Although the exact meaning of the obligation is unclear, it could serve as a justification for taking unilateral action in order to push the international community closer to the standards of the EU to safeguard the European economy. As discussed above the EU runs the risk of becoming an economic 'loser,' if it is the only one paying for the solution to a common problem. A more active leadership role, that tries to push and pull instead of only leading by example, could be motivated by economic concerns as well as environmental. Since creating a well functioning economy is an overall aim of the Union, structural environmental leadership could be internally justified for economic reasons. This is of course a bit of a stretch, but nevertheless interesting as it shows how the EU's economic focus could be used as an argument in favour of the environment.

¹⁴⁴ Sanja Bogojevic, 'Legalising Environmental Leadership: A Comment on the CJEU's Ruling in C-366/10 on the Inclusion of Aviation in the EU Emission Trading Scheme', *Journal of Environmental Law*, Vol 24:2 (2012), p 356.

¹⁴⁵ Case C-366/10 The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change [2011] OJ C260/9, [124].

¹⁴⁶ The Treaty on the European Union [2007], OJ C115/13, article 21(1).

¹⁴⁷ The Treaty on the European Union [2007], OJ C115/13, article 3(3).

7.2 International Customary Law

As already mentioned, the EU is bound by international customary law. Therefore, it is relevant to look at the international customary law that might effect the legality of the EU's climate change mitigation. Here, the international principles that sets the boundaries for the EU's right to legislate, or effect behaviour outside its territories, will be presented.

The principal limits to the actions of a State, or the EU, are the respect for State sovereignty, and the principle of non intervention. These are two debated international norms, but the core is the right for each State to determine the law governing its territory without interference from other States.¹⁴⁸

The principle of state sovereignty says that all States are equal, and have the right to govern their own territory and the people living in that territory. The principle relates to jurisdictional competences, and is a part of customary international law.¹⁴⁹ The principle of non-intervention limits a States possibility to exercise jurisdiction where another State has the exclusive jurisdiction according to the principle of State sovereignty.¹⁵⁰

However, a State can have the right to regulate conduct that takes place outside its territory but that have a substantial effect within its territory, if the exercise of jurisdiction is reasonable.¹⁵¹ One way of interfering in other States internal affairs is by creating an economic incentive for them to change their environmental policy by conditioning market access on products having a certain environmental standard.¹⁵² It has been argued that the EU is acting outside its jurisdiction when attempting to take unilateral action on climate change in such a manner.¹⁵³ Clear examples of such

¹⁴⁸ Samantha Besson, 'Sovereignty', *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, (2013), p 2.

¹⁴⁹ Sharizal Mohd Zin, Ashraf U Sarah Kazi, 'An Analysis of Customary International Law and the Improtance of Dispute Settlement: A Study on Environmental Law Exceptions under Article XX', *Maquarie Journal of International and Comparative Environmental Law*, Vol 7(1) (2011), p 42.

¹⁵⁰ Sharizal Mohd Zin, Ashraf U Sarah Kazi, 'An Analysis of Customary International Law and the Improtance of Dispute Settlement: A Study on Environmental Law Exceptions under Article XX', *Maquarie Journal of International and Comparative Environmental Law*, Vol 7(1) (2011), p 48.

¹⁵¹ Sharizal Mohd Zin, Ashraf U Sarah Kazi, 'An Analysis of Customary International Law and the Improtance of Dispute Settlement: A Study on Environmental Law Exceptions under Article XX', *Maquarie Journal of International and Comparative Environmental Law*, Vol 7(1) (2011), p 49-50.

¹⁵² Sharizal Mohd Zin, Ashraf U Sarah Kazi, 'An Analysis of Customary International Law and the Improtance of Dispute Settlement: A Study on Environmental Law Exceptions under Article XX', *Maquarie Journal of International and Comparative Environmental Law*, Vol 7(1) (2011), p 51.

¹⁵³ Sharizal Mohd Zin, Ashraf U Sarah Kazi, 'An Analysis of Customary International Law and the Improtance of Dispute Settlement: A Study on Environmental Law Exceptions under Article XX', *Maquarie Journal of International and Comparative Environmental Law*, Vol 7(1) (2011), p 50.

unilateral measures are the sustainability requirement in biofuels and the inclusion of aviation in the EU ETS.

The principle of territoriality does however only require a sufficient link between the territory of the State and the activity it is addressing.¹⁵⁴ An Hertogen argues that sovereignty could be used to defend the EU's extra territorial measures on climate change. Her understanding of sovereignty is that each State has the right to decide over its domestic affairs, including the quality of the environment within its territory. Using the inclusion of aviation in the EU ETS as an example, aviation emissions cause environmental problems outside the aircraft's home-State, and the right to regulate these emissions does therefore not entirely fall within the home-State. The EU should be able to regulate actions that need to be regulated to control the quality of its environment, especially when aircrafts are landing or taking off within its territory, thus creating a territorial link.¹⁵⁵

It has also been argued that when measures are applied to products that arrive in the EU, the measures should be considered wholly internal. Because the arrival of the products in the EU's territory, thus its jurisdiction, creates a right for the EU to put demands on the way the products are produced. This line of reasoning argues that there are no extraterritorial elements to measures such as including imports to the EU ETS, because the measure is only applied to products within the EU. Thus, there is no jurisdictional conflict to consider.¹⁵⁶ The reasoning is similar to what the ECJ says in the case concerning the EU ETS. The principle of sovereignty and the jurisdictional issue could, as we have seen, be used both as an argument for and against the EU's right to regulate international emissions.

A way to a justified unilateral action is through the duty of cooperation. The duty to cooperate is expressed in the Rio declaration article 12, and in article 1 of the United Nations Charter. Although these instruments are non-binding on the EU, the duty to cooperate is part of international customary law and thereby binding on the Union.¹⁵⁷

Multilateral solutions to international problems should be the rule and unilateral action the exception. Erich Vranes argues that unilateral action has to be balanced in the following way to be allowed:

¹⁵⁴ An Hertogen, 'Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emission Trading System', *Transnational Environmental Law*, No 1, (2012), p 293.

¹⁵⁵ An Hertogen, 'Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emission Trading System', *Transnational Environmental Law*, No 1, (2012), p 282-283.

¹⁵⁶ Kati Kulovesi, "Make your own special song, even if nobody else sings": International aviation emissions and the EU Emissions Trading Scheme', *University of Eastern Finland Department of Law, Legal Studies Research Papers*, Paper No 1 (2011), p 16.

¹⁵⁷ Erich Vranes, 'Trade and the Environment: Fundamental Issues in International Law, WTO law and Legal Theory', *Oxford University Press*, (2009), p 177.

*'In other words, unilateral state actions that address extraterritorial environmental concerns and may affect other countries' legitimate interests have to be suitable to promote a legitimate environmental concern, necessary in the sense of constituting the mildest means of interference with the interests of these countries, and must be proportionate to the end pursued.'*¹⁵⁸

The duty to cooperate and negotiate in good faith before taking unilateral measures, in an *e contrario* interpretation, could lead to the conclusion that when a country refuses to negotiate in good faith on a common environmental issue, unilateral measures are allowed.¹⁵⁹ The ban of certain CDM credits that the EU recently implemented could be seen as interfering with the non-intervention principle in an indirect way, since it regulates how projects in third countries should be constructed. On the other hand, the measure, could be considered allowed since international negotiations on banning certain CDM credits within the framework of UNFCCC has not yielded any results.

By granting a year for international negotiations to move forward concerning regulation of emissions from international aviation, the EU is complying with the duty to cooperate. Since the inclusion of aviation in the EU ETS in the first place was based on inaction of the ICAO, the measure could also be considered justified as a response to other States failure to negotiate.

When looking at the permissibility of a measure, it is necessary to differentiate between illegal coercion and legally creating an incentive. The measure also needs to be proportional and necessary to solve the issue it sets out to solve. As long as the EU stays on the right side of this line, its measures should not conflict with the State sovereignty principle, and the EU should be able to pursue more aggressive leadership alongside directional leadership.

7.3 International Treaty Law

There are two international legal regimes, which the EU is signatory to, that create the most important obstacles for the EU's structural leadership on climate change issues. A presentation of the legal issues that might arise with the regimes because of the EU's measures will follow.

¹⁵⁸ Erich Vranes, 'Trade and the Environment: Fundamental Issues in International Law, WTO law and Legal Theory', *Oxford University Press*, (2009), p 178.

¹⁵⁹ Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 508.

7.3.1 UNFCCC

The first regime is the international regime governing climate change, the UNFCCC. In the Kyoto protocol article 10 and in the UNFCCC article 3 it is clearly stated that all measures taken to combat climate change should respect the common but differentiated responsibilities and respective capabilities principle.¹⁶⁰ Meaning basically that developing countries should not have to shoulder the same responsibility as developed countries because of their lack of historic contribution to the situation today, and because of their lack of economic capability.

It has been argued that parties to the UNFCCC should respect the principle both when interpreting their obligations and when acting unilaterally.¹⁶¹ EU measures, such as the inclusion of aviation and the possible inclusion of imports to the EU ETS, do not differentiate between aircrafts or products originating from developing countries and this could be considered a breach of the common but differentiated principle.¹⁶²

The EU has argued, in its defence, that its measures are directed at businesses and not States, and therefore the principle is not applicable.¹⁶³ However, the EU ETS is in part concerned with the behaviour of States. The EU ETS allows for states who have a similar system to the EU, to be exempted from the EU ETS.¹⁶⁴ So, although *the measure* is not directed at States, it creates incentives that are directed at States.

7.3.2 WTO and GATT

The second regime that is relevant to this analysis is the WTO, which is an organisation governing international trade with the aim of enabling free trade.¹⁶⁵ Traditionally the WTO does not take environmental issues into consideration, it is first and foremost concerned with the promotion of free trade. However, the WTO rules have developed to allow for some environmental concerns.¹⁶⁶

¹⁶⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32, article 10 and United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 38 ILM 849, article 3.

¹⁶¹ Joanne Scott, Lavanya Rajamani, 'EU Climate Change Unilateralism', *The European Journal of International Law*, Vol 23 No 2 (2012), p 477.

¹⁶² Joanne Scott, Lavanya Rajamani, 'EU Climate Change Unilateralism', *The European Journal of International Law*, Vol 23 No 2 (2012), p 481.

¹⁶³ Kati Kulovesi, "'Make your own special song, even if nobody else sings along": International aviation emissions and the EU Emissions Trading Scheme', *University of Eastern Finland Department of Law, Legal Studies Research Papers*, Paper No 1 (2011), p 19.

¹⁶⁴ Joanne Scott, Lavanya Rajamani, 'EU Climate Change Unilateralism', *The European Journal of International Law*, Vol 23 No 2 (2012), p 482.

¹⁶⁵ http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm, accessed 2013-02-27.

¹⁶⁶ Enrique Rene de Vera, 'The WTO and biofuels: The Possibility of Unilateral Sustainability Requirements', *Chicago Journal of International Law*, 8 (2008), p 671.

The most important rules governing trade measures are the Most-Favoured Nation principle, and the National Treatment principle. Article I in GATT expresses the MFN principle, stating that each WTO members 'like' products has the right to the same treatment as that of the most favoured member nation.¹⁶⁷ Article III GATT contains the NT principle, obliging WTO members not to treat foreign products less favourable than domestic 'like' products.¹⁶⁸ There are however exceptions to these obligations which might be applicable to EU measures aimed at combating climate change. The exceptions related to environmental concerns are listed in article XX GATT:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;'

A measure that qualifies under one of the exceptions must also fulfil the criteria in the *chapeau*, and not constitute arbitrary or unjustifiable discrimination in order to be justified.¹⁶⁹

There is another exception to the MFN principle. Differentiated treatment, including lower tariffs, may be given a developing country according to the General System of Preferences. It is also possible to attach conditions to the receiving of the more favourable treatment, for example, a certain environmental standard.¹⁷⁰ However, the EU is according differentiated treatment in the discussed measures based on climate action, not factoring in whether it is a developed or developing country. Therefore, the GSP can be used in the EU's environmental policy but not as a justification of its unilateral measures.

The observant reader has probably noticed the difficult situation in both respecting the principle of common but differentiated, and the MFN principle when using trade measures to address climate change issues. The UNFCCC requires a differentiated treatment based on origin, and the WTO

¹⁶⁷ General Agreement on Tariffs and Trade (1947), article I.

¹⁶⁸ General Agreement on Tariffs and Trade (1947), article III.

¹⁶⁹ General Agreement on Tariffs and Trade (1947), article XX.

¹⁷⁰ Enrique Rene de Vera, 'The WTO and biofuels: The Possibility of Unilateral Sustainability Requirements', *Chicago Journal of International Law*, 8 (2008), p 676.

requires origin-neutral treatment.¹⁷¹ The Kyoto protocol does not allow for any express exceptions from the principle of common but differentiated and respective capabilities, although the exact meaning of the principle is debated. Trade measures respecting the common but differentiated principle would incorporate a differentiated treatment, and thus be in conflict with WTO law. In order to be justified, the measures would have to fall under one of the exceptions in the GATT, and be a measure either necessary to the protection of plant, animal or human life or health *or* relate to the conservation of exhaustible natural resources.

A problem that may arise with the current legislation on biofuels, and with the possible inclusion of imports in the EU ETS based on the carbon emitted during the production process, is that certain products will be treated differently based only on their production method. The question is, if two, otherwise exchangeable products, which only differ in the way they are produced would be considered 'like' products. If the products are not considered like, then differentiated treatment is allowed. To sum up, is difference in greenhouse gas emissions between products production process enough to make them 'unlike'?¹⁷²

In determining likeness the AB has previously, although it is not bound by its jurisprudence, considered the physical properties of the product, the exchangeability of the product on the market, the international classification of the product and the perception of the product by the consumers. The AB will weigh together all factors when deciding upon likeness.¹⁷³ If the consumer perception and preference have been manipulated they will not be considered.¹⁷⁴ In the past, production method has not been accepted as grounds for differentiating products, but the *Shrimp/Turtle* case opened up for differentiation based on production methods, at least in relation to sustainability.¹⁷⁵ However, relying only on production methods and consumer perception of the product does not present a strong case for considering products 'unlike', especially not since the consumer perception might be considered manipulated due to the fact that the Renewable Directive created the demand for biofuels produced with less carbon emissions. Differentiation between imported products and domestic products serving the same purpose, only based on the carbon produced

¹⁷¹ Kati Kulovesi, Elisa Morgera, Miquel Munoz, 'ENVIRONMENTAL INTEGRATION AND MULTI-FACETED INTERNATIONAL DIMENSIONS OF EU LAW: UNPACKING THE EU'S 2009 CLIMATE AND ENERGY PACKAGE', *CommoEri*http://ec.europa.eu/clima/events/0062/index_en.htm *Market Law Review*, 48 (2011), p 861.

¹⁷² Stephanie Switzer, Joseph McMahon, 'EU Biofuels Policy- Raising the Question of WTO Compatiblity', *International & Comparative Law Quarterly*, Vol 60 (2011), p 729.

¹⁷³ Bisjawit Dahr, Kasturi Das, 'The European Union's Proposed Carbon Equalization System: Can it be WTO Compatible?', *Research and Information System for Developing Countries*, Discussion paper #56, (2009), p 19.

¹⁷⁴ Stephanie Switzer, Joseph McMahon, 'EU Biofuels Policy- Raising the Question of WTO Compatiblity', *International & Comparative Law Quarterly*, Vol 60 (2011), p 729.

¹⁷⁵ Robert Ackrill, Adrian Key, 'EU Biofuels Sustainability Standards and Certification Systems – How to Seek WTO-Compatibility', *Journal of Agricultural Economics*, Vol 62 No 3 (2011), p 556.

during their production, which would create an advantage for domestic producers or grant certain nations a more favourable treatment, would most likely not be allowed.

Regarding biofuels it is true that biofuels produced from palm oil, which is found outside the EU, naturally has a lower carbon saving percentage compared to rapeseed, which is grown inside the EU. Therefore, it is easier for European producers to match the requirements, giving them an advantage in the biofuel market. This could amount to a breach of the NT principle, even though domestic and foreign biofuels have to fulfil the same requirement.¹⁷⁶ Including imported goods to the EU ETS could also amount to a breach of the NT principle, because domestic products would not be included since the domestic industry is already a part of the EU ETS, which could be considered an unfair advantage for the European industry.

The inclusion of aviation into the EU ETS could also encounter issues with WTO law. At first sight, it seems to apply to all aircrafts in the same way. The measure does not treat domestic aircrafts different from international. However, it could run into problems with the MFN principle for two reasons. First, because the amount of allowances that an airplane has to give up is based on how far they travel, nations further away from the EU would have a greater cost than nations close by.¹⁷⁷ Second, because countries who have enacted similar measures would be exempted, which would give them an advantage. The MFN principle is based on the concept that all WTO members should be accorded the same advantages.¹⁷⁸

The EU measures would, if found in breach with the WTO rules, have to fall under the exceptions in the GATT article XX in order to be legal. There is evidence that the EU is aware of this. The decision to give the ICAO a year to negotiate a multilateral solution could be interpreted as an attempt by the EU to show its willingness to negotiate, and thereby comply with the conditions in the *chapeau*. It would also be necessary to prove a genuine link between the measure and its protective purpose.

The most important cases concerning the permissibility of unilateral measures with the purpose of preserving the environment are the *Shrimp/Turtle* cases.¹⁷⁹ The background to the cases is the attempt made by

¹⁷⁶ Stephanie Switzer, Joseph McMahon, 'EU Biofuels Policy- Raising the Question of WTO Compatibility', *International & Comparative Law Quarterly*, Vol 60 (2011), p 729.

¹⁷⁷ Lorand Bartels, 'The Inclusion of Aviation in the EU ETS. WTO Law Considerations', *ICTSD Global Platform on Climate Change, Trade and Sustainable Energy*, Issue Paper no 6, (2012), p 12.

¹⁷⁸ Lorand Bartels, 'The Inclusion of Aviation in the EU ETS. WTO Law Considerations', *ICTSD Global Platform on Climate Change, Trade and Sustainable Energy*, Issue Paper no 6, (2012), p 13.

¹⁷⁹ WTO Appellate Body Report on U.S. – Import Prohibition of Certain Shrimp and Shrimp Products (*Shrimp/Turtle I*), WT/DS58/AB/R (October 12, 1998) and Report of the Appellate Body, U.S. - Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia (*Turtle/Shrimp II*), WT/DS58/AB/RW (October 22, 2001).

the U.S. to ban the import of shrimps caught in a way that is harmful to sea-turtles, granting an exception for countries that had a regulatory program to prevent harm to turtles comparable to the United States. This import ban was challenged as a trade restrictive measure, and the U.S. based their defence on GATT article XX(g), since the 'relating to' required in article XX(g) GATT is easier to prove than the 'necessary' required in article XX(b) GATT.¹⁸⁰

In these cases the AB made it clear: unilateral trade measures, taken in order to protect the global environment, which limits the market access of products based on how they are produced are not automatically unjustifiable under the chapeau in GATT article XX. If that was the case, article XX GATT would risk losing its purpose since many measures attempting to protect the environment are of this nature.¹⁸¹ This position was withheld in the two *Shrimp/Turtles* cases, and the AB has made it clear that it should be the guiding approach.¹⁸²

In the cases it is apparent that the measure is not weighed between its gain for the environment and its cost to trade. The AB only considers how well the measure fulfils its protective purpose.¹⁸³

The AB establishes that negotiations are not always required for an unilateral action to be justified, but not negotiating, and thereby not allowing flexibility for countries where different conditions prevail, could amount to unjust discrimination.¹⁸⁴ WTO rules should be interpreted in accordance with prevailing international customary law.¹⁸⁵ In accordance with international law and in particular the duty to cooperate, unilateralism should be avoided to the greatest extent possible, which also indicates that negotiations as an attempt to reach a multilateral conclusion is important in order to avoid failing the requirement in the chapeau.¹⁸⁶ It is acceptable to

¹⁸⁰ Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 495-498.

¹⁸¹ Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 500.

¹⁸² Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 501.

¹⁸³ Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 504.

¹⁸⁴ Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 507.

¹⁸⁵ Sharizal Mohd Zin, Ashraf U Sarah Kazi, 'An Analysis of Customary International Law and the Importance of Dispute Settlement: A Study on Environmental Law Exceptions under Article XX', *Maquarie Journal of International and Comparative Environmental Law*, Vol 7(1) (2011), p 65.

¹⁸⁶ Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate', *Columbia Journal of Environmental Law*, Vol 27 (2002), p 508.

require ‘comparable’ policies for imports, as long as the requirement is reasonable, and gives other countries enough flexibility to solve the issue in the manner best suited to them.¹⁸⁷

The question whether the climate would qualify as an exhaustible natural resource, remains to be answered. Although it has not yet been confirmed, it is likely that it would. In the *US-Gasoline* case, clean air was considered an exhaustible national resource. The leap from clean air to climate is not long.¹⁸⁸ If the climate is not considered an exhaustible natural resource, the measures could still be allowed under GATT article XX(b) as necessary to protect human or plant life or health. It would not be hard to prove that the measure is aimed at protection human or plant life or health since carbon emissions are harmful to nature and humans.

The difficulty would lie in proving the measure necessary. To qualify as necessary, the measure should be the least trade restrictive possible, or otherwise justifiable under article XX GATT. The more important the issue the measure is addressing, the easier it will be for it to pass the necessity test. Since climate change is considered an important issue, it is possible that the EU measures would be able to pass the necessity test.¹⁸⁹ It has also been suggested that the WTO, in face of the complexity of the issue of climate change, would be inclined to give countries a greater leeway on how they wish to regulate it.¹⁹⁰

It is clear that the unilateral measures, recently enacted by the EU, could face legal challenges from the WTO. However, it is not evident that these measures could not be justified under the exceptions in article XX GATT. Even so, the EU’s structural leadership remains limited by the WTO rules.

¹⁸⁷ Robert Howse, ‘The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate’, *Columbia Journal of Environmental Law*, Vol 27 (2002), p 510.

¹⁸⁸ Lorand Bartels, ‘The Inclusion of Aviation in the EU ETS. WTO Law Considerations’, *ICTSD Global Platform on Climate Change, Trade and Sustainable Energy*, Issue Paper no 6, (2012), p 15.

¹⁸⁹ Bisjawit Dahr, Kasturi Das, ‘The European Union’s Proposed Carbon Equalization System: Can it be WTO Compatible?’, *Research and Information System for Developing Countries*, Discussion paper #56, (2009), p 43.

¹⁹⁰ Robert Howse, ‘Commentary: The Political and Legal Underpinnings of Including Aviation in the EU ETS’ (Lorand Bartels ed, ‘The Inclusion of Aviation in the EU ETS. WTO Law Considerations’, *ICTSD Global Platform on Climate Change, Trade and Sustainable Energy*, Issue Paper no 6, 2012), p 30.

8 Conclusion

This thesis has given account of the EU's climate change leadership and the legal obstacles it could encounter. This thesis has shown that the EU's leadership and measures are not only constructed with regards to EU law, but also to be accepted by the international community. Different legal regimes interact and influence the way the EU acts, and how it shapes its policy. The EU's awareness of the requirements in international and WTO law influences the way the EU constructs its measures.

This thesis has given evidence that the EU's leadership to a great extent is directional. In order to uphold a credible leadership role, and to get negotiations going, the EU has enacted a large number of measures to regulate its own contribution to global warming. However, despite the fact that the EU has shown its ambition, the result of international negotiations has so far been disappointing.

In the face of failure of the multilateral negotiations for a new binding agreement on emission cuts, the EU has adopted a more aggressive leadership style – structural leadership. The EU has the power required of a structural leader, mainly due to its strong economic position. The failure of the EU to engage other countries to act on climate change could have both environmental and economic consequences for the Union. Faced with challenges such as carbon leakage and competitive disadvantages, the EU has taken unilateral action.

As a structural leader the EU has enacted measures such as including international aviation in the EU ETS, banning the use of certain CDM credits, creating a sustainability requirement for biofuels and is considering including imports in the EU ETS. These are measures intended to create incentive for more countries to start acting on climate change, and inject new energy to stagnant negotiations. They are also measures that protect the European economy, if European companies have more costly demands on them than companies in other countries the risk is that the European companies will end up with a competitive disadvantage or move abroad. These are all reasons why the EU is taking on structural leadership as well as directional.

As we can see the reasons behind the EU's leadership are not only environmental, indeed economic reasoning plays a big part. However, the EU needs to be careful when taking unilateral action so as not to construct them in a protectionist manner that would conflict with WTO rules.

The possibilities for the EU to exercise leadership are limited not only by international law but also the institutional structure of the EU. Directional leadership mainly encounters issues because of the EU's lack of competences to act in comparison with a State. The EU is also limited by the principle of subsidiarity and proportionality. Furthermore, the unanimity

requirement for decisions concerning fiscal matters, or choice of energy source has the effect of, if not stopping the EU to legislate, at least of slowing down the process significantly. This relates to the issue that the EU consists of 27 Member States, each with an individual perspective on climate change. Internationally, the EU is at risk of being perceived as unclear in its ambitions if the Member States and the EU send mixed messages. Furthermore, if the measures are not being properly implemented by the Member States it is a problem for the credibility of the EU as a directional leader

The EU is also bound by the competences set out in the treaties. This could be considered a limitation of its powers that undermines its leadership, but I believe it rather brings clarity to what the EU is trying to achieve. With the possibility the ECJ has to go beyond the meaning of the words and bestow implied powers on the EU this limitation should not be a great issue for directional leadership.

With the integration article the EU is capable of taking a holistic grasp on the issue, it allows the EU to incorporate environmental concerns in all its policies. This is very important since the nature of the issue requires that it is addressed across different sectors and the EU has the tools to do so. An issue with the multi-sectored approach is that integrating environmental concerns into sectors that traditionally do not include environmental concerns could give rise to legal conflicts. The most clear case of this is of course the trade-environment debate which has been illustrated in this thesis.

However, a holistic approach is a more realistic way of resolving the problem, and integrating environmental concerns to different sectors is probably going to continue and become more common. On the whole the institutional structure of the EU makes it both more complicated and more easy for the EU's directional leadership.

Structural leadership by the EU has been justified by the ECJ. Internal measures that regulate behaviour outside the EU have been accepted, as long as a territorial link exists and multilateral agreements are respected. The ECJ has opened up for the EU to take on a more aggressive leadership role in face of institutional failure of the international climate change regime.

It should be remembered that the EU is under an obligation to safeguard its economy. The unilateral measures, intended to solve the problem of carbon leakage, could from an EU point of view be defended on the grounds that they are necessary in order to create a competitive market.

The EU policy is also guided by the precautionary principle and the prevention principle. When faced with a problem such as climate change where acting now could prevent serious issues in the future the EU should, according to the treaties, act preventively.

It seems that the institutional structure of the EU could create some problems for the exercise of directional leadership since the EU is at risk of seeming inconsistent and unclear due to the shared competences with its Member States. However, the EU has lately been making its position more clear for instance by gaining a legal personality and clarifying how it negotiates. As for a structural leadership it seems as the EU has both the legal competences, and the economic power to successfully exercise such a leadership. The issues that might arise with the exercise of a structural leadership lies not with EU law, but in international law and treaty law.

Legal obstacles in international law arises mainly for measures taken by a structural leader. Conflicts may arise around unilateral actions intended to create economic incentives, or to push negotiations forward. The question is if the EU's unilateral measures that do create economic incentives and at times obligations, as is the case with the inclusion of aviation in the EU ETS, are in breach of the principle of State sovereignty and non-interference in international customary law.

It has been argued that since the measures have a clear territorial link they should not be considered extraterritorial at all. Another argument is that in the principle of State sovereignty lies the right for the State to decide over what environmental quality it wishes to have within its territory, and the right to create regulations to maintain that desired quality. I believe that this argument is particularly strong in relation to climate change which could have devastating effects on a country. Some States risk ending up entirely under water and it seems reasonable that they should be allowed to create legislation in order to protect themselves. Therefore, using the location of the pollution as territorial link, as suggested by AG Kokott, should be sufficient.

The limit to a permissible unilateral measure lies with the duty to cooperate. Before an unilateral action can be permissible there is an obligation to try and find a common solution to the problem. An *e contrario* interpretation of the duty to cooperate could grant a State the right to act unilaterally when others refuse to negotiate a cooperation. However, I believe that such an interpretation would be going to far and invite unwanted consequences. A refusal of other nations to negotiate could however be one argument in favour of the justification of an unilateral action in a situation where no action would have irrevocably negative consequences, as is the case with climate change.

Looking back at the initial discussion on permissible unilateral action we recognize the reasoning. In short, it is possible for the EU to overcome the legal obstacles in international law facing structural leadership and this can be done by seeking directional leadership and multilateral solutions at the same time as exercising structural leadership. The EU seems to recognize this, a clear example is the one year the EU has accorded the ICAO to negotiate a multilateral scheme for the reduction of aviation emissions.

Another legal issue that might face the unilateral measures taken by the EU as a structural leader can be found in the UNFCCC and in the GATT. According to GATT the EU needs to respect the MFN and the NT principles; while UNFCCC requires the respect of the common but differentiated and respective capabilities principle. One of the main issues is that the common but differentiated principle which requires differentiated treatment between developed and less developed countries, and the MFN principle requiring the same treatment of all WTO member nations, seems to be in direct conflict with each other. In order for the EU's measures to be compatible with both at the same time they would either have to comply with the MFN, and then rely on an interpretation of the common but differentiated principle that makes them justified; or the measures could respect the common but differentiated principle, be in breach of the MFN principle, but fall under one of the exceptions in article XX GATT.

So far, the EU seems to be attempting both ways of justifying its measures. A possible, 'EU-friendly,' interpretation of the common but differentiated principle could be that the measures applies to foreign business, and the principle is only directed to States. For a permissible breach of the MFN and NT principles, the EU would have to show that the measures are intended to preserve the climate, and that the climate is an exhaustible natural resource. It is an open discussion whether the EU measures aiming at protecting the climate would fall under the exceptions in article XX GATT.

Considering the gravity of the issue of climate change, and the cross-sector approach that is necessary to address it, the EU might be granted leeway in its search for a solution. The fact that the WTO traditionally is not concerned with the environment could actually be an advantage since the WTO would be reluctant to dictate how a State, or the EU, should create its environmental policy. Until ruled on in court, it is impossible to give a finite answer to whether the measures can be challenged.

The conclusion to draw from this thesis seems to be that the EU faces legal challenges when shaping a leadership that is a combination of directional and structural, but that it is possible to legally pursue climate change leadership.

However, this thesis is limited to the most pressing challenges for the EU's measures. In order to have a full account of the legality of the EU's climate change leadership, other legal sources need to be considered. It is also a fact that no definite answer to the legality of the EU's measures can be given here.

Nevertheless, the issue of climate change is here to stay, and in view of the possibly devastating consequences, solutions needs to be found. Therefore, international and EU climate law is still evolving and most likely evolving to give more room for solutions. Organisations as the WTO is beginning to

realise the necessity of making it possible for States to create climate policies.

The EU is pushing legal boundaries when developing its leadership, and probably participates in the development of new customary international law. As stated in the beginning of this thesis, climate change is an issue that transcends almost the entire society and any response to it needs to do the same. Climate change concerns need to be integrated in all levels of regulation, and traditional jurisdictional limits perhaps need to be reconsidered. The multi-level efforts by the EU is probably the only way forward and therefore it will become, if it is not already, legally justified. The question of whether the EU's efforts will be enough is however a topic for another thesis.

Supplement A

Table of Measures

| Measures | Legislation | Year |
|---|--|--------------------------------------|
| <p>Greenhouse gas Monitoring and Reporting "Monitoring Mechanism Decision" Implementing the Kyoto protocol requirement for reporting And monitoring their progress.</p> | <p>DECISION No 280/2004/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol</p> | <p>2004</p> |
| <p>Emission Trading EU ETS Emission Trading System for industries in the EU. Including international aviation</p> | <p>DIRECTIVE 2003/87/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC</p> <p>Amended by:</p> <p>DIRECTIVE 2004/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms</p> <p>DIRECTIVE 2008/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading</p> | <p>2003, 2004, 2008, 2009</p> |

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|---|---|--------------------|
| | <p>within the Community</p> <p>REGULATION (EC) No 219/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny</p> <p>DIRECTIVE 2009/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community</p> | |
| <p>Effort Sharing Decision "Effort Sharing Decision" Decision on how much each Member State has to reduce its emissions in order to reach the collective reduction target. Also tasking the Commission with including shipping in the EU ETS if no international agreement accounting for international maritime emission in its reduction targets is concluded by 31 December 2011.</p> | <p>DECISION No 406/2009/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020</p> | <p>2009</p> |
| <p>Carbon Capture and Storage "CCS Directive" Directive on site requirement for environmentally safe geological storing of carbon dioxide.</p> | <p>DIRECTIVE 2009/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006</p> | <p>2009</p> |

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|---|---|-------------------|
| <p>Transports and Fuels “Passenger Car Regulation” Regulation setting binding emission targets for new passenger cars.</p> | REGULATION (EC) No 443/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community’s integrated approach to reduce CO2 emissions from light-duty vehicles | 2009 |
| “Regulation on emissions from commercial vehicles”* Regulation setting binding emission targets for new light commercial vehicles. | REGULATION (EU) No 510/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2011 setting emission performance standards for new light commercial vehicles as part of the Union's integrated approach to reduce CO 2 emissions from light-duty vehicles | 2011 |
| “Regulation on CO2 labelling of cars” Regulation requiring Member States to provide information on new cars emission to consumers, including a cars fuel efficiency and its CO2 emissions. | DIRECTIVE 1999/94/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars | 1999 |
| “Fuel Quality Directive” Directive requiring a 10% decrease in greenhouse gas intensity of fuels used in vehicles. Including petrol, gas-oil, diesel and biofuels. | DIRECTIVE 98/70/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC Amended by: DIRECTIVE 2009/30/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to | 1998, 2009 |

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|---|--|-------------|
| | monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC | |
| Ozone Layer Protection “Regulation on Substance that Deplete the Ozone Layer” Regulation requiring licensing for import, export, and production of products for ozone depleting substances. | REGULATION (EC) No 1005/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 on substances that deplete the ozone layer Amended by: COMMISSION REGULATION (EU) No 744/2010 of 18 August 2010 amending Regulation (EC) No 1005/2009 of the European Parliament and of the Council on substances that deplete the ozone layer, with regard to the critical uses of halons | 2009 |
| Fluorinated Gases “MAC directive” Directive that prohibits the use of F-gases with 150 greater potential than CO2 for global warming in all new types of vans and cars from 2011 and in all new vans and cars from 2017. | DIRECTIVE 2006/40/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2006 relating to emissions from air-conditioning systems in motor vehicles and amending Council Directive 70/156/EEC | 2006 |
| “F-gas Regulation” Regulation on preventing risk for leakage of f-gases from equipment and avoidance of the use of f-gases where suitable replacement exists. | REGULATION (EC) No 842/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2006 on certain fluorinated greenhouse gases | 2006 |
| Air Quality “Framework Air Quality Directive” Directive creating a strategy for creating and maintaining good ambient air quality, assessing air quality and establish objectives for air quality. | COUNCIL DIRECTIVE 96/62/EC of 27 September 1996 on ambient air quality assessment and management | 1996 |

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| <p>Energy “Renewable Directive” Directive prescribing an augmentation of 20% of the use of renewable energy in all sectors and a 10% augmentation in the transport sector by 2020.</p> | <p>DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC</p> | <p>2009</p> |
| <p>Buildings “Energy Performance of Buildings Directive” Directive demanding among other things all new buildings to be nearly-zero in energy consumption by 2020.</p> | <p>DIRECTIVE 2010/31/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 May 2010 on the energy performance of buildings (recast)</p> <p>Supplemented by:</p> <p>COMMISSION DELEGATED REGULATION (EU) No 244/2012 of 16 January 2012 supplementing Directive 2010/31/EU of the European Parliament and of the Council on the energy performance of buildings by establishing a comparative methodology framework for calculating cost-optimal levels of minimum energy performance requirements for buildings and building elements</p> | <p>2010</p> |

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