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The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test

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Abstract

This chapter discusses the need for a good-faith test for assessing the legitimacy of ongoing and future EU initiatives aimed at contributing to the development and implementation of international environmental law. A test that is based on the international legal principle of good faith may serve to better understand when the EU is effectively supporting environmental multilateralism to the benefit of the international community, rather than seeking to unduly influence it purely for its own advantage. The test is developed mostly on the basis of EU efforts of contributing to climate change multilateralism, and is applied to a much less studied case: the adoption and implementation of the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing under the Convention on Biological Diversity.

THE EUROPEAN UNION (EU) is well known for its prolific environmental law-making activities,[1] and for the multi-faceted environmental dimensions of its external relations.[2] It has also attracted scholarly attention for increasingly establishing explicit linkages

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[1] The classic textbooks are: M Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Oxford, Hart Publishing, 2014); L Kramer, *EU Environmental Law*, 7th edn (London, Sweet and Maxwell, 2011); J Jans and H Vedder, *European Environmental Law* (Gröningen, Europa Law Publishing, 2012). For an introduction, see also E Morgera, 'Environmental Law' in C Barnard and S Peers (eds), *EU Law* (Oxford, Oxford University Press, 2014) 651.

[2] E Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge, Cambridge University Press, 2012).

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between its internal environmental regulation and its external environmental or environment-related action.[3] This can be in great part explained by the EU's ambitious efforts to support environmental multilateralism. According to its own constitutional objectives,[4] the EU has set for itself the aim of helping develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources;[5] and of promoting an international system based on stronger multilateral environmental cooperation and good global environmental governance, with a view to promoting multilateral solutions to common environmental problems, in particular in the framework of the United Nations.[6] To these ends the EU has put in place a diversity of approaches[7] based on complex interactions between internal regulation, sometimes with extraterritorial implications,[8] on the one hand, and unilateral and bilateral external action, on the other.[9] The lion's share of EU activity in that regard, and of academic reflection, has certainly been taken by climate change.[10]

[3] M Pallemaerts (ed), *The EU and Sustainable Development: Internal and External Dimensions* (Brussels, VUB Press, 2006); H Vedder, 'Diplomacy by Directive: an Analysis of the International Context of the Emissions Trading Directive' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders—Policy Interconnections Between the EU and the Rest of the World* (Oxford, Hart Publishing, 2011) 105; G Marín Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Oxford, Hart Publishing, 2012); and, to a lesser extent, M Pallemaerts (ed), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen, Europa Law Publishing, 2011).

[4] J Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught between a Sanguine World View and a Daunting Reality' in B Van Vooren, S Blockmans and J Wouters, *The EU's Role in Global Governance: The Legal Dimension* (Oxford, Oxford University Press, 2013) 7.

[5] Art 21(2)(d) TEU.

[6] Arts 21(2)(h) and 21(1), second sentence TEU, read in conjunction with Article 11 TFEU on environmental integration ('Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'). On environmental integration in the EU, see Dhondt, *Integration of Environmental Protection into Other EC Policies* (Groningen, Europa Law Publishing, 2003) at 84; and discussion in Marín Durán and Morgera (n 3 above) ch 1.

[7] E Morgera, 'Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action' in Van Vooren, Blockmans and Wouters (n 4 above) 194.

[8] As opposed to measures with an extraterritorial 'effect': see distinction drawn by AG Kokott with regards to EU internal measure that do not embody a concrete rule of conduct for subjects beyond the territory of the EU, but still create an indirect incentive for them: Opinion, C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, 6 October 2011, paras 145–47.

[9] Marín Durán and Morgera (n 3 above) ch 7.

[10] S Oberthür and M Pallemaerts (eds), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (Brussels, VUB Press, 2010); K Kulovesi, E Morgera and M Munoz, 'Environmental Integration and the Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) 48 *Common Market Law Review* 829; J Scott, 'The Multi-level Governance of Climate Change' (2011) *Carbon and Climate Law Review* 25; and E Morgera and K Kulovesi, 'The Role

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These efforts are particularly interesting from an international environmental perspective, as the development and successful implementation of this area of international law is in dire need of leadership.[11] On the other hand, they have raised mounting concerns about the legitimacy and legality of EU action,[12] particularly since the 'aviation' case before the Court of Justice of the EU.[13] To a significant extent, concerns have focused on the alleged extraterritoriality and/or unilateral nature of EU measures, their potential infringement of other States' sovereignty and/or their compatibility with the law of the World Trade Organization (WTO). This contribution, however, intends to take a different angle: it seeks to assess to what extent EU measures effectively contribute to the development and implementation of international environmental law in the interest of the whole international community. In other words, this contribution is written from the viewpoint of international environmental law and general international law. To that end, WTO law will be set aside for present purposes, although the proposed assessment in part overlaps with the consideration of unilateralism under WTO law.[14] In relation to extraterritoriality, it suffices to recall that the question as to whether extraterritorial measures are allowed under WTO law has not been settled,[15] and this question may in all events not be relevant for present purposes. This is because, in the words of Joanne Scott, the EU engages in 'territorial extension' rather than extraterritorialism—that is, EU measures are aimed at enabling the EU to influence international law

of the EU in Promoting International Climate Change Standards' in S Poli et al (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill Nijhoff, 2014) 304.

[11] E Morgera, 'Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law' (2012) 23 *European Journal of International Law* 743.

[12] C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755.

[13] J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *European Journal of International Law* 469; J Scott and L Rajamani, 'Contingent Unilateralism—International Aviation in the European Emissions Trading Scheme' in B Van Vooren, S Blockmans and J Wouters, *The EU's Role in Global Governance: The Legal Dimension* (Oxford, Oxford University Press, 2013) and K Kulovesi, '"Make Your Own Special Song, Even if Nobody Else Sings Along": International Aviation Emissions and the EU Emissions Trading Scheme' (2011) 2 *Climate Law* 535. See also L Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012) 23 *European Journal of International Law* 429.

[14] United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body (adopted 6 November 1998) WT/DS58/AB/R; and United States—Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5—Malaysia), Report of the Appellate Body (adopted 21 November 2001), WT/DS58/AB/RW. For a discussion, see Kulovesi (n 13 above) and K Kulovesi, 'Addressing Sectoral Emissions outside the UN Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) 21 *RECIEL* 193.

[15] P van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge, Cambridge University Press, 2013) 551.

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on the basis of internationally agreed objectives, rather than to export its own norms.[16]

Instead, two other aspects to the debate will be emphasized. First, this assessment will be grounded in the understanding that most EU *environmental* action guided by international environmental law is inevitably and inherently *global* (that is, it has implications for and it responds to developments outside EU borders).[17] In other words, EU environmental action is developed in the context of an overarching system that already provides for significant limitations to national sovereignty and sophisticated approaches to international cooperation that may justify the adoption of measures with extraterritorial implications. Secondly, it will seek to explore the extent to which the EU engages in *mini-lateralism*[18] as a path towards strengthened or more effective environmental multilateralism. This may be seen as another facet of global (environmental) law: as consensus has become increasingly difficult to reach in certain areas of multilateral (environmental) negotiations, 'more decentralised forms of implementation and more iterative and reflexive styles of policy-making' are relied upon in the further development or implementation of international (environmental) law.[19]

Against this background, the objective of this chapter is to discuss the need for a test to assess the legitimacy of ongoing and future EU initiatives aimed at contributing to the development and implementation of international environmental law that is based on good faith.[20] Such a test may serve to better understand when the EU is effectively *supporting* environmental multilateralism to the benefit of the international community, rather than seeking to *unduly influence* it purely for its own advantage. Clearly the distinction is not easily drawn in practice: relevant EU initiatives (as well as those of any other powerful global player) involve an inevitably mixed agenda that should then be evaluated on the basis of the balance achieved

[16] J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87.

[17] In other words, these efforts can be characterised by their 'global reach' (that is, being 'present across and between a range of [legal] sites and purport[ing] to cover all actors and activities relevant to its remit across the globe') and their 'global justification' ('an endorsement or commitment to a shared purpose or common political morality that may be explicitly invoked or implied'): N Walker, *The Intimations of Global Law* (forthcoming 2014), at 18. This idea is to some extent touched upon by Kokott (n 8 above) para 154.

[18] S Barrett, *Why Cooperate? The Incentives to Supply Global Public Goods* (Oxford, Oxford University Press, 2007).

[19] Walker (n 17 above) 108, making reference to the specific case of climate change and marine protection as areas 'where there is increasing failure to deliver grand settlements across significant interest divisions and across the broader set of sovereign States who assert a significant stake in these settlements', and hence a reliance on 'less unified and settled institutional structures with wider forms of participation and accountability, more decentralised forms of implementation and more iterative and reflexive styles of policy-making, so emphasis on dispersed influence and incremental policy development'.

[20] The need to resort to the notion of good faith in this connection was first underscored in Morgera and Kulovesi (n 10 above).

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between the protection of the interests of the international community and the interests of the EU.[21] A possible test will be developed mostly on the basis of EU efforts contributing to climate change multilateralism, and will then be applied to a much less studied case: the adoption and implementation of the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing,[22] adopted in 2010 under the Convention on Biological Diversity (CBD).[23]

I. THE EU'S KALEIDOSCOPIC TOOLKIT FOR INFLUENCING ENVIRONMENTAL MULTILATERALISM

Before discussing the need for a good-faith test and what such a test may look like, an introduction to the plethora of internal and external, legal and quasi-legal tools utilised by the EU to support and influence environmental multilateralism appears necessary to set the scene.

At the multilateral level, the EU, together with its Member States, is a powerful negotiating block in environmental negotiations.[24] In addition, the EU and its Member States make up one of the world's largest providers of funding for multilateral environmental protection initiatives and instruments.[25] This certainly provides the foundations for the EU's approach to global environmental leadership. But it has increasingly been seen as insufficient to fulfil the EU's ambition, particularly since the 2009 Copenhagen Climate Change Conference.[26] In light of limitations and challenges at the multilateral level, the EU has increasingly coupled its multilateral tools with systematic use of external relations tools of a unilateral, bilateral and inter-regional nature.

Bilateral and inter-regional trade-related instruments have thus increasingly included sophisticated clauses on environmental cooperation linked to international environmental standards.[27] In particular, the bilateral agreements

[21] See similar comments in a more general context by S Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 *European Journal of International Law* 387, at 415 and 418–19.

[22] Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79.

[23] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010) UN Doc UNEP/CBD/COP/10/27, in force 12 October 2014.

[24] T Delreux, *The EU as an International Environmental Negotiator* (Aldershot, Ashgate, 2011).

[25] European Commission, 'Communication on external action: thematic programme for environment and sustainable management of natural resources including energy' COM(2006) 20 final, 24.

[26] Eg, N Fujiwara, 'Reinvigorating the EU's Role in the post-Copenhagen Landscape' (2010) Climate Change, CEPS Commentaries, at: www.ceps.be/book/ reinvigorating-eu%E2%80%99s-role-post-copenhagen-landscape; J Curtin, The Copenhagen Conference: How Should the EU Respond? (Dublin, IIEA, 2010).

[27] While these agreements have different denominations and objectives, their environmental clauses are notably similar: for a discussion, Marín Durán and Morgera (n 3 above) 57–63.

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concluded by the EU since 2005 ('post-Global Europe agreements')[28] have established obligations to effectively implement and enforce key multilateral environmental agreements (MEAs) in the context of trade and sustainable development. In addition, environment-specific mechanisms for cooperative monitoring and dispute resolution have been set up in that context, requiring the involvement of environmental experts and allowing also for advice to be sought from MEA Secretariats.[29] The negotiations of these agreements have been preceded by Sustainability Impact Assessments (SIAs), which contribute to identify trade-offs between the trade component of the agreement under negotiation and environmental protection in the EU and in the partner country. For present purposes, it should be pointed out that SIAs often serve to address global environmental issues or instruments.[30] For countries that have no trade agreement in place with the EU, the Union's Generalised System of Preferences unilaterally offers developing and least-developed countries trade incentives that are made conditional upon the ratification and effective implementation of key MEAs.[31]

In terms of development aid, the EU practice of integrating environmental concerns in external assistance is also increasingly targeting the implementation of key MEAs, as well as contributions to the reform of global environmental governance.[32] Notably, the Commission clarified that this has the explicit objective of *shaping* global environmental governance by the external dimensions of the EU's *own* environment and climate change policies.[33] In addition, the EU has institutionalised a plethora of policy dialogues with various individual developed and developing countries, and with various groups of third countries, for the periodic exchange of views on environmental priorities and respective negotiating positions. These exercises, which are mainly organised at the initiative of the EU, serve to develop specific action plans that also address global environmental issues,

[28] As their negotiations were launched by the Commission, '*Communication—Global Europe: Competing in the world: A contribution to the EU's Growth and Jobs Strategy*', COM(2006) 567 final of 4 October 2006. See Marín Durán and Morgera (n 3 above) 133–42, and for an insider's perspective, R Zvelc, 'Environmental integration in the EU trade policy: the examples of the GSP+, trade sustainability impact assessments and free trade agreements' in Morgera (n 2 above) 174.

[29] See Marín Durán and Morgera (n 3 above) 140.

[30] Ibid, ch 6.

[31] Ibid, ch 3. This is the 'Special Incentive Arrangement for Sustainable Development and Good Governance' in Regulation (EU) 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, [2012] OJ L303/1, Arts 9–16 and Annex VIII. Note that Article 9(1)(b) makes reference to the condition that 'the most recent available conclusions of the monitoring bodies under those conventions … do not identify a serious failure to effectively implement any of those conventions.'

[32] For a discussion, see Marín Durán and Morgera (n 3 above) ch 4 and G Marín Durán, 'Environmental Integration in EU Development Cooperation: Responding to International Commitments or Its Own Policy Priorities?' in Morgera (n 2 above) 204.

[33] Commission, '*Environment and natural resources thematic programme—2011–2013 strategy paper and multiannual indicative programme*', 29 October 2010, at 25.

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including specific common objectives to support the successful conclusion of ongoing multilateral environmental negotiations.[34]

These external relations instruments are inter-linked in a complex and somewhat obscure manner. SIAs feed into the negotiations of bilateral agreements, but their outcomes should also be taken into account in the implementation of these agreements, particularly because some of the recommendations emerging from SIAs may be addressed through other EU external relations tools, such as financial and technical assistance.[35] The implementation of bilateral agreements is followed up on through policy dialogues, which produce action plans to attract funding on certain priority activities falling under the broad scope of the environmental cooperation clauses included in bilateral agreements.[36] The allocation of EU external funding, however, remains separate from these dialogue processes and in the vast majority of cases, also from bilateral agreements: generally it is up to the EU's own regulations on each funding instrument to set the principles and procedures for integrating environmental requirements in EU external funding, although even under these unilateral instruments there is provision for some form of dialogue with the third party concerned in relation to the allocation of funding.[37] Enhanced dialogue is, in turn, seen as an objective of the Union's external funding, as well as a means to increase the visibility of EU financial and technical assistance supporting environmental protection in partner countries. Furthermore, dialogues are expected to be informed by SIAs and ex-post SIAs, and are used by the EU to support the understanding beyond its borders of certain pieces of EU internal environmental legislation with extraterritorial implications.

These complex interactions are increasingly reflected and explicitly cross-referenced in EU internal legislation: recent pieces of EU environmental law refer or reflect the Union's multilateral negotiating positions,[38] as well as its reliance on other external relations tools supporting environmental multilateralism.[39] In parallel, the EU relies more and more on its own legislation as well as on its unilateral and bilateral external relations tools in the context of its interventions in multilateral fora. In some instances, as Joanne Scott has aptly explained, EU internal legislation (and the EU's market power) are designed to have certain extraterritorial implications and influence multilateral negotiations in an effort that combines 'structural leadership' and 'contingent unilateralism'.[40]

[34] Marín Durán and Morgera (n 3 above) ch 5.
[35] Ibid, 249.
[36] Ibid, 231.
[37] See references in n 32 above, and in particular Marín Durán and Morgera (n 3 above) 176.
[38] Vedder (n 3 above) 105.
[39] Kulovesi, Morgera and Munoz (n 10 above).
[40] Scott (n 10 above) 28 and 32.

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On the face of it, through creative combinations of the above instruments, the Union has put in place three modalities to support environmental multilateralism through the development and implementation of international environmental law. First, the EU seeks to use its external action to support politically, technically and financially the implementation of *existing* multilateral environmental agreements beyond its borders, particularly in developing countries. Secondly, the EU is using its external action tools to build alliances with third countries, regions or groups of countries with a view to influencing *ongoing* international environmental negotiations. Thirdly, the EU is using these tools to make progress on environmental issues on which the international community has been unable to launch negotiations towards the development of an international legally binding agreement: in the *absence* of multilateral environmental negotiations, the EU wishes to pursue certain environmental goals with other willing countries with a view to building international consensus from the bottom up.[41] This strategy has a demonstrated potential to promptly respond to the changing multilateral landscape: EU external environmental action has switched from one of the above-outlined modalities to the other, depending on progress or lack thereof at the multilateral level.

II. CRITICISMS AND CONCERNS

While their effectiveness is difficult to prove, the EU's combined efforts to affect environmental, and particularly climate change, multilateralism have been the target of criticism. As already discussed above, legality questions have been raised with respect to the extraterritoriality of certain EU measures and their compatibility with WTO law.[42] Other concerns have also been raised from the viewpoint of legitimacy and compatibility with general international law. It has been argued, for instance, that through these efforts the EU seeks unilaterally to impose its own view of international law upon third countries.[43] This may spark unhealthy regulatory competition among other (powerful) countries equally wishing to impose their own regulatory preferences.[44] In addition, it has led to allegations about the EU's failure to respect principles of international environmental law of essential importance in North/South relations, such as the principle of common but differentiated responsibilities and respective capabilities:[45] in this connection, the EU is seen as imposing high standards that are beyond the reach of developing countries. Furthermore, it has been argued that rather

[41] Marín Durán and Morgera (n 3 above) ch 7.
[42] See references in n 13.
[43] Scott and Rajamani (n 13 above); Marín Durán (n 32 above).
[44] Kulovesi (n 14 above).
[45] Scott and Rajamani (n 13 above) 469.

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than (only) contributing to environmental multilateralism, such measures also (or mainly) pursue the EU's own competitiveness agenda.[46] Finally, they have also raised human rights concerns.[47]

All of the above criticisms appear crucial to better understand the extent to which the EU supports, rather than unduly influences, environmental multilateralism. Such concerns can and should be addressed from a dual perspective. From an EU law standpoint, it appears necessary to ascertain whether and under which conditions the Union's significant resources devoted to unilateral, bilateral and inter-regional environmental action are effectively used for the pursuit of multilateral environmental objectives as required by the Treaty. From an international law standpoint, it seems necessary to consider whether these EU initiatives comply with general principles of international law.

One principle of international environmental law has already been invoked: as mentioned above, this is the case of common but differentiated responsibility.[48] The principle essentially justifies the design of different international obligations on the basis of differences in the current socio-economic situations of countries and their historical contribution to a specific environmental problem, thus 'reconcil[ing] the tensions between the need for universalism in taking action to combat global environmental problems and the need to be sensitive to individual countries' relevant circumstances' and thereby responding to concerns of legitimacy, equity and effectiveness.[49] It calls on developed countries (and may therefore justify the EU) to take the lead in addressing global environmental issues.[50] At the same time, it has resulted in the allocation of less burdensome obligations on developing countries.[51] Thus, in the context of the EU unilateral and bilateral external relations tools, it can be argued that respect for common but differentiated responsibility prevents the Union from subverting globally determined allocation of international responsibility, particularly through trade-related instruments.[52] Third, in terms of development aid,

[46] Marín Durán (n 32 above) 224–40.

[47] On these concerns, D Augenstein, 'The Human Rights Dimension of Environmental Protection in EU External Relations Post-Lisbon' in Morgera (n 2 above) 263. On limited practice specifically related to environmental rights, see E Morgera, 'The Promotion of Environmental Rights through EU Bilateral Agreements: Mapping the Field' in F Lenzerini and A Vrdoljak (eds), *International Law for Common Goods* (Oxford, Hart Publishing, 2014) 421.

[48] Scott and Rajamani (n 13 above); Morgera (n 7 above).

[49] T Honkonen, 'The Principle of Common but Differentiated Responsibility in Post-2012 Climate Negotiations' (2009) 18 *RECIEL* 257, at 259.

[50] United Nations Framework Convention on Climate Change, 4 June 1992, 1771 UNTS 107 (UNFCCC), Art 3.

[51] There are various examples in MEAs of differentiated responsibilities: the most notable is the Kyoto Protocol, which provides for quantified and time-bound obligations to mitigate climate change only for so-called 'Annex-I countries', ie developed countries.

[52] Morgera (n 11 above) 759.

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the principle is usually translated in developed countries' obligations to transfer technology and 'new and additional' financial means to developing countries, to enable them to implement international environmental obligations.[53] Overall, therefore, this principle serves to ascertain whether in EU efforts to contribute to environmental multilateralism the different circumstances of developing countries are fully taken into account, and in particular whether appropriate assistance is provided to facilitate developing countries' compliance with international environmental law.

While common but differentiated responsibility certainly touches on key issues to ensure the legitimacy of EU efforts to contribute to environmental multilateralism, it may not necessarily factor in other critical questions for multilateral environmental processes. Namely, the legitimacy question also needs to take into account circumstances where at the multilateral level an impasse is reached and multilateral determinations related to common but differentiated responsibilities have not been made or are the very reason of the impasse. In these situations, the EU's reliance on unilateralism, bilateralism and minilateralism[54] needs to be assessed as a constructive and complementary path that will eventually lead to environmental multilateralism.[55]

A. A Good-faith Test

For these reasons, it is proposed that the general principle in international law of good faith provides a more rounded approach to the question at hand, for its implications in terms of duty to cooperate, duty to negotiate, a duty to perform international obligations and as a cardinal principle of treaty interpretation.[56] With regard to the duty to cooperate, good faith entails the need to show third countries individually and the international

[53] This is a common obligation across MEAs, although it is most clearly expressed in CBD Art 20(4).

[54] Morgera (n 2 above), and for a specific reply to the concerns raised by Scott and Rajamani (n 13 above) and Kulovesi (n 14 above).

[55] AG Kokott, Opinion, C-366/10 *Air Transport Association of America and Others*, 6 October 2011, paras 185–86, noted that the EU 'could not reasonably be required to give … [multilateral] bodies unlimited time in which to develop a multilateral solution'. The salience of the timing of unilateral measures is discussed by B Jansen, 'The Limits of Unilateralism from a European Perspective' (2000) 11 *European Journal of International Law* 309, at 313; and L Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11 *European Journal of International Law* 315, at 332; and D Bodansky, 'What's so Bad about Unilateral Action to Protect the Environment?' (2000) 11 *European Journal of International Law* 339, at 347.

[56] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc A/RES/25/2625 and VCLT Arts 26 and 31. For an overview, see generally M Kotzur, 'Good Faith' in R Wolfrum (ed), *Max Planck Encyclopedia of International Law* (Oxford, Oxford University Press, 2012, online edition).

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community as a whole that the EU respects the international legal order.[57] This means protecting reasonable interests of other States that arise from the appearances created by bilateral or minilateral efforts of the EU.[58] In other words, it implies the need for the EU to show trustworthiness and predictability[59] in how it develops and uses its unilateral, bilateral and minilateral approaches to support environmental multilateralism by taking the legitimate expectations of the other members of the international community into account.[60] Demonstrating good faith, thus, necessitates systematic respect for multilateral norms as well as reliance on multilateral institutions that are essential to the effective, objective and even-handed promotion and protection of the international community's interests.[61] It also necessitates the creation of opportunities for, and the pursuance of, genuine negotiations with other countries with a 'genuine intention to achieve a positive result'.[62] With regard to the duty to perform international obligations, good faith translates into mutual supportiveness—that is, an obligation at the interpretative level to 'disqualify solutions to tensions between competing regimes involving the subordination of one regime to the other', and at the law-making level exerting efforts to negotiate and conclude instruments that clarify the relationship between competing regimes, when interpretative reconciliation efforts have been exhausted.[63] With regard to treaty interpretation (and its implications for supporting the effective implementation of international environmental law), good faith also requires that excessive interpretations of multilateral environmental treaties will be avoided when they would allow the EU and its Member States to obtain an unfair advantage, disregard legitimate expectations, or exercise rights in a way that would be damaging to other states.[64]

On these bases, a four-pronged test of the legitimacy of EU efforts to genuinely contribute, rather than unduly influence, environmental multilateralism can be put forward.

[57] Ibid, para 4.

[58] M Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 *American Journal of International Law* 130.

[59] S Litvinoff, 'Good Faith' (1997) 71 *Tulane Law Review* 1645, 1664.

[60] Kotzur (n 56 above) para 26.

[61] B Simma, 'From Bilateralism to Community Interests in International Law' (1994) IV (250) *Recueil des Cours* 217, 319.

[62] ICJ, *Gulf of Maine case*, [1984] ICJ Rep 246, para 87.

[63] R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the WTO-and-Competing-Regimes Debate?' (2010) 21 *European Journal of International Law* 649, particularly 661–69.

[64] M Villiger, '1969 Vienna Convention on the Law of Treaties: Forty Years After' (2009) 344 *Recueil Des Cours* 1, 1116–17.

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i. Respect for the Objective of Multilateral Environmental Agreements

First, the EU's efforts should respect and clearly contribute to the realisation of the objective of the multilateral environmental agreements to which the EU and its Member States are parties and to the development or implementation of which the EU unilateral, bilateral and inter-regional measures are explicitly geared towards.[65] There is, of course, a certain room for interpretation in referring to the objective of a treaty,[66] but efforts must be made to rely on a largely shared view, as for instance documented in consensus-based soft law.[67] This is something that the EU has already done, occasionally. For instance, the EU has clearly articulated its strategy for gradually building international consensus on sustainable forest management from the bottom up: it has developed an action plan and then enacted a series of regulations to tackle this global problem in the immediate term, in the face of limited progress at the multilateral level.[68] In so doing, it has explicitly drawn on global soft-law commitments,[69] and made its efforts compatible with ongoing, albeit partial, multilateral efforts.[70]

ii. Responsiveness to Intervening Multilateral Developments

The second step in the good-faith test is assessing whether EU measures ensure *responsiveness* to intervening developments in global fora. The launch or continuation of multilateral negotiations may not be a sufficient trigger in this regard, in my view, as multilateral negotiations could be very protracted and/or of uncertain outcome, and therefore genuine environmental leadership by the EU on its own may still be needed in the meantime. On the other hand, multilateral determinations, where consensus has been reached, concerning the interpretation or preferred implementation of multilateral environmental treaties, including when they are expressed through

[65] This was first put forward in Morgera (n 7 above). Joanne Scott appears to think along the same lines in her recent piece on EU territorial extension (n 16 above), when she refers to the need to 'pursuing internationally agreed objectives rather than its own autonomous objectives ("promoting fidelity to international law")'.

[66] D Jonas and T Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 *Vanderbilt Journal of Transnational Law* 565.

[67] In that regard, note that Principle 12 of the Rio Declaration on Environment and Development (1992) UN Doc A/CONF.151/26, vol 1, Annex 1) reads: '…Environmental measures addressing transboundary or global environmental problems should, as far as possible, be *based on international consensus*' (emphasis added).

[68] Commission, '*Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an Action Plan*' COM(2003) 251 final, 3; endorsed by the Council, '*Conclusions—Forest Law Enforcement, Governance and Trade (FLEGT)*' [2003] OJ C268/1 ('FLEGT Action Plan').

[69] Ibid, at 5; World Summit on Sustainable Development Plan of Implementation, (2002) UN Doc A/CONF.199/20, Resolution 2, para 45(c).

[70] Namely, timber species listed under Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243: FLEGT Action Plan, 20, 9 and 11.

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soft-law instruments, should lead to a clear and prompt response from the EU. This is the case of determinations by multilateral environmental agreements' governing and compliance bodies relating to the link between financial solidarity, capacity building, and compliance.[71] The EU should thus avoid 'upsetting' multilateral determinations of common but differentiated responsibilities through bilateral or unilateral routes.[72] This is particularly relevant when the specific EU measure has extraterritorial implications.[73] In either case, EU measures can provide specific guarantees such as review clauses expressly triggered by developments at the multilateral level and inputs from third countries at the bilateral level.

The 2009 EU Climate and Energy Package, for instance, contains review clauses linked to the *outcome* of ongoing international negotiations.[74] In addition, the FLEGT initiative provides an example of EU responsiveness to changed international landscapes. As deforestation issues were increasingly addressed in the context of the negotiations on a post-2012 climate change regime under the so-called REDD-plus item[75] and eventually some *consensus* was reached in 2010 in that regard,[76] the EU proposed to use FLEGT to influence forest-related negotiations in the international climate change regime.[77] Specifically, it aimed at capitalising on agreement on key concepts related to forest governance emerging from FLEGT, as well as the lessons learnt in related multi-stakeholder processes, as concrete inputs into

[71] The idea of responsiveness was first put forward in Morgera (n 7 above) 207–8.

[72] Morgera (n 2 above).

[73] Scott (n 16 above) 116. See n 8 for an explanation of 'extraterritorial implications'.

[74] See, for example, Arts 10b(1) and 11a of 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 ('EU ETS Directive'), [2009] OJ L140/63, and Arts 5.2, 5.3, 8 and 9 of 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, [2009] OJ L140/136.

[75] REDD-plus means 'reducing emissions from deforestation and forest degradation, conservation of forest-carbon stocks, sustainable management of forests, and enhancement of forest-carbon stocks'. For a discussion, see H van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regime' (2014) *NYU Journal of International Law and Politics*; A Savaresi, 'Reducing Emissions from Deforestation in Developing Countries under the UNFCCC. Caveats and Opportunities for Biodiversity' (2011) 21 *Yearbook of International Environmental Law* 41.

[76] Cancun Agreements, Decision adopted by the Conference of the Parties to the UN Framework Convention on Climate Change on its sixteenth session (2011) UN Doc FCCC/CP/2010/7/Add.1, 70–73.

[77] Commission, '*Proposal laying down the obligations of operators who place timber and timber products on the market*', COM(2008) 644/3 final, 5; and Agreement establishing an Association between the EU and its Member States, on the one hand, and Central America on the other, [2012] OJ L346/3, Art 20; Free Trade Agreement between the EU and its Member States, on one side, and Colombia and Peru, on the other side, [2012] OJ L354/3, Art 286; Second Revision of the Cotonou Partnership Agreement—Agreed Consolidated Text (11 March 2010), Art 32 bis.

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multilateral negotiations on REDD-plus.[78] This was a particularly useful contribution to multilateralism, as negotiations on REDD-plus have proven particularly complex in ensuring mutual supportiveness between climate change mitigation objectives, on the one hand, and biodiversity conservation and respect for the rights of forest-dwelling communities on the other hand.[79] These two examples can be usefully contrasted with the decision in late 2012 to 'stop the clock' on the implementation of the inclusion of non-EU flights under the EU Emission Trading Scheme, which was linked to a desire to create a positive atmosphere for international negotiations at the International Civil Aviation Organization, rather than the intervening of an actual multilateral outcome in that regard.[80]

iii. Dialogue

The third step in the good-faith test is assessing whether there is *genuine* dialogue with third countries (and stakeholders).[81] Dialogue is an essential ingredient for genuine cooperation, within and beyond multilateral frameworks, based on the respect for sovereign equality among partner countries.[82] This is particularly important when partnering countries have differentiated responsibilities. Some examples of EU action to support multilateralism have specifically provided for such dialogue, although to differing extents.

The 2009 EU Climate and Energy Package cross-references EU bilateral external tools used for dialogue and cooperation with third countries in relation to climate funding and the expansion of the global carbon market,[83] capacity building and collaborative research,[84] joint projects with third

[78] For a more detailed discussion, see A Savaresi, 'FLEGT and REDD: Interactions between EU Bilateral Cooperation and the Development of International Law' in Morgera (n 2 above) 149.

[79] This relates to the international debate on the so-called 'safeguards' for REDD-plus concerning biodiversity and forest-dependent communities. See Environmental Council Conclusions of 20 December 2010 on the Nagoya Conference of the Parties to the CBD, where Member States and the Commission are invited to 'actively contribute to the preparation of advice on the application of relevant safeguards for biodiversity in relation to REDD+, in line with the CBD COP 10 decision, and facilitate the development and implementation of such safeguards under REDD+'. This was reflected in the EU-Africa partnership: Third EU-Africa Summit, 'Joint Africa-EU Strategy Action Plan (2011–2013)' Tripoli, 30 November 2010.

[80] Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council, MEMO/12/854, 12 November 2012.

[81] Morgera (n 11 above) 765–66; and Scott (n 16 above) 117–18.

[82] P-M Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law' (2000) 11 *European Journal of International Law* 19, 22–23.

[83] EU ETS Directive, Arts 10(3) and 25.

[84] 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, [2009] OJ L140/114, preambular para 7.

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countries,[85] and cooperation in monitoring.[86] Other interesting examples are provided by the joint activities under the FLEGT process, which is coupled with structured stakeholder involvement in third countries. In this framework, the EU and its partner countries acted as 'co-generators of norms', jointly identifying solutions to multilateral impasses, based on their respective internal frameworks and relevant international instruments,[87] as well as joint monitoring. Voluntary Partnership Agreements (VPAs) between the EU and timber-exporting third countries are designed to be concluded to this end. They provide a reference, based on a joint evaluation by the third country and the EU of the alignment of third-country national forest law with relevant multilateral standards,[88] for the verification of the legality of harvests of timber imported into the EU. On that basis, reform of national forest law and governance structure in the third country is usually undertaken.

Dialogue may also involve relevant bodies under multilateral environmental agreements, particularly compliance committees, or relevant international organisations. Such dialogue may thus contribute to dispelling the 'danger of abuse' by individual states or groups of states based on lack of objectivity and even-handedness in the pursuit of community interests.[89] Once again the FLEGT process provides an interesting example: support is provided by an independent, specialised international organisation, namely the Food and Agriculture Organization of the UN (FAO), which is managing a global project funded by the EU to support African, Caribbean and Pacific countries in the review of their legislation and upgrading of their forest governance and law enforcement capacities.[90] FAO has a long-standing and well-respected tradition of providing expert and independent advice on the reform of national forest laws.[91]

[85] 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 ('Renewables Directive'), [2009] OJ L140/16, Art 9(1).

[86] In relation to the biofuels sustainability criteria: Renewables Directive, Arts 18(4) and 23(2).

[87] Morgera (n 7 above).

[88] Recitals 3–4, EU-Ghana VPA, [2010] OJ L70/3 point to the multilateral instruments of reference.

[89] Morgera (n 2 above), building on Simma (n 61 above) 319.

[90] See www.fao.org/forestry/acp-flegt/en. Note that while there is no formal link between the FAO FLEGT Programme and the VPAs, FAO assistance specifically targets countries depending on 'their level of interest in the FLEGT Action Plan and in negotiating a VPA' through support for national and regional FLEGT/VPA workshops to share information, knowledge and lessons learnt, feasibility studies on VPA-related issues; and support for national multi-stakeholder committees in charge of VPA negotiations and for the participation of local stakeholders: FAO, Improving Forest Governance in Africa, the Caribbean and the Pacific (FAO, undated) 6 and 9, at: foris.fao.org/static/data/acpflegt/4087Forestgovernance_en.pdf.

[91] See FAO Legal Office, 'Legal Advisory Services: Forestry and Wildlife', at: www.fao.org/legal/advserv/forest-e.htm.

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iv. Mutual Supportiveness

The fourth step in the good-faith test is assessing whether the EU measures support a holistic interpretation of relevant obligations deriving from different international treaties. In this connection, one should bear in mind that EU primary law similarly requires overall policy coherence, and specifically environmental and climate change mainstreaming,[92] as well as support for human rights in helping to develop international environmental measures.[93] Thus, both in accordance with general international law and EU primary law, the EU's contribution to environmental multilateralism needs to be based on mutual supportiveness.[94]

Clear examples of mutual supportiveness can be found in EU climate change efforts, in particular in relation to the need to ensure that climate change response measures be environmentally sustainable also from a broader environmental, including biodiversity, perspective. The sustainability criteria for the production of biofuels, under the Renewables Directive, for instance, have specifically provided for protection of land with high biodiversity value and relied on multilateral definitions to that end.[95] The support for human rights in EU climate measures, however, remains a matter for debate.[96]

III. APPLYING THE TEST: THE CASE OF THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

This section will apply the test to a more unusual case study: the negotiations and implementation of the Nagoya Protocol on Access and Benefit-Sharing. EU efforts to influence multilateral biodiversity standard-setting will first be introduced, and then some of the specific features of the Nagoya Protocol will be illustrated.

[92] Arts 7 and 11 TFEU. Climate change mainstreaming has become an explicit Treaty requirement, based on a combined reading of Article 11 TFEU and Article 191(1), where climate change is for the first time explicitly mentioned as a result of the amendment introduced by the Lisbon Treaty.

[93] Article 21(2)(b) read in conjunction with Article 21(2)(d) and (f) TEU. For a discussion of coherence in the EU's external relations and environmental integration, see M Cremona, 'Coherence and EU External Environmental Policy' in Morgera (n 2 above) 33.

[94] Morgera (n 7 above) 207.

[95] Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources, [2009] OJ L 140/16, Art 17(3). For a discussion, see Kulovesi, Morgera and Muñoz (n 10 above) 877–82.

[96] Morgera (n 47 above) 435–38.

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A. The EU and Multilateral Biodiversity Cooperation

The EU is party to several biodiversity-related conventions.[97] One notable exception[98] is the Convention on International Trade in Endangered Species (CITES),[99] because the latter did not originally allow membership of regional economic integration organisations, untill its Gaborone Amendment (adopted in 1983), which permits membership by regional economic integration organisations of CITES, entered into force.[100] Nonetheless, the EU has adopted unilateral and more stringent domestic legislation on trade in endangered species.[101]

International biodiversity law[102] has increasingly expanded its reach and ambition, through decisions adopted by governing bodies (Conferences of the Parties) of the above-mentioned treaties. They periodically set wide-ranging targets and guidelines that, albeit non-binding, aim to influence national legislation and practice in innovative and pervasive ways in a variety of sectors. Nowadays, international biodiversity law challenges states to adopt a holistic and people-centred approach to nature conservation, with the full participation of and respect for the rights of indigenous peoples and local communities.[103] It requires states to prevent continued biodiversity loss and thereby its implications for current and future human well-being, including the provision of food, fibre, medicines, and fresh water, the pollination of crops, the filtration of pollutants, and protection from natural disasters.[104] As it is becoming increasingly clear that biodiversity loss is accelerated by climate change, states are further expected to ensure

[97] In addition to the CBD, it is also party to the: Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, 1651 UNTS 333; International Treaty on Plant Genetic Resources for Food and Agriculture, 3 November 2001, 2400 UNTS 303; Cartagena Protocol on Biosafety, 29 January 2000, 2226 UNTS 208.

[98] Other key biodiversity agreements to which the EU is not a party are the Convention on Wetlands of International Importance, 2 February 1971, 996 UNTS 245; and the Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

[99] Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243.

[100] CITES, 'Gaborone Amendment': www.cites.org/eng/disc/gaborone.shtml.

[101] Regulation (EC) No 338/97, [1997] OJ L61/1.

[102] M Bowman, P Davies and C Redgwell, *Lyster's International Wildlife Law*, 2nd edn (Cambridge, Cambridge University Press, 2010).

[103] E Morgera and E Tsioumani, 'Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2011) 21 *Yearbook of International Environmental Law* 3; and E Morgera, 'Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law' in Alland et al (eds), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff, 2014) 983.

[104] In mid-2010, official scientific evidence was released, stating that the global target for reducing the rate of biodiversity loss had not been met: CBD and UNEP-World Conservation Monitoring Centre, *Global Biodiversity Outlook-3* (Montreal, Secretariat of the CBD, 2010).

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biodiversity conservation and ecosystem restoration as essential tools for climate change mitigation and adaptation.[105]

In parallel with these international developments, EU biodiversity law has developed in a 'patchy' manner, resulting in a system that is complex, ambiguous and in part overlapping.[106] It remains mainly focused on 'traditional' conservation measures (protected areas and species) that developed in the late 1970s and early 1990s.[107] While it has been considered 'highly influential …[in] affecting for the first time Member States' use of land'[108] and equipped to accommodate climate change adaptation concerns,[109] it remains 'structurally weak' and affected by poor enforcement.[110] Besides continuing difficulties in implementation, significant gaps remain in the EU regulatory framework on biodiversity, which are also acknowledged by the Commission itself, such as a lack of EU legislation on invasive alien species and on soil protection.[111] These shortcomings are considered significant also from an external relations perspective, as they undermine the credibility of the EU as a global player in multilateral biodiversity processes.[112] There is therefore nothing comparable to the comprehensive and ambitious 2009 Climate and Energy Package,[113] which has been often highlighted by the EU in the context of multilateral climate negotiations and in bilateral dialogues with third countries with a view to encouraging adoption of similar measures.[114]

While the EU is generally a vocal negotiator at the multilateral level, its efforts to contribute to biodiversity multilateralism through unilateral,

[105] Ibid, 75 and 83.

[106] N Sadeleer, 'EC Law and Biodiversity' in R Macrory (ed), *Reflections on 30 Years of EU Environmental Law—a High Level Protection?* (Groningen, Europa Law Publishing, 2005) 351, 368–69.

[107] Notably, the Birds and Habitats Directives: Directive 2009/147/EC on the conservation of wild birds, [2010] OJ L20/7 (codified version) and Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L206/7.

[108] J Holder and M Lee, *Environmental Protection, Law and Policy* (Cambridge, Cambridge University Press, 2007) 627.

[109] A Trouwborst, 'Conserving European Biodiversity in a Changing Climate: The Bern Convention, the European Union Birds and Habitats Directives and the Adaptation of Nature to Climate Change' (2011) 20 *RECIEL* 62.

[110] Kramer (n 1 above) 196; and European Parliament, Resolution on the implementation of EU legislation aiming at the conservation of biodiversity (2009/2108(INI)), 21 September 2010.

[111] Commission, 'Communication—Our Life Insurance, Our Natural Capital: An EU Biodiversity Strategy to 2020' COM(2011) 244, 6–7 ('2020 Biodiversity Strategy'); and endorsement by Council, 'Conclusions—EU Biodiversity Strategy to 2020', 23 June 2011.

[112] The EU 2020 headline target reads: 'halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, and restoring them in so far as feasible, while stepping up the EU contribution to averting global biodiversity loss' (COM(2011) 244 (n 111 above), 2).

[113] For comprehensive analysis, see Kulovesi, Morgera and Muñoz (n 10 above).

[114] Eg, UNFCCC, Views related to carbon dioxide capture and storage in geological formations as a possible mitigation technology, Submission from Parties (2010) UN Doc FCCC/SBSTA/2010/MISC.2, 32–42.

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bilateral and inter-regional measures have so far been exerted in an ad hoc fashion,[115] particularly when compared with similar efforts in the area of climate change.[116] While the EU has prominently mainstreamed climate change into the unilateral and bilateral tools of its external relations, with specific climate change cooperation clauses in recent bilateral/inter-regional agreements,[117] specific references to biodiversity cooperation can be found only in some inter-regional and bilateral treaties, such as Partnership and Cooperation Agreements between the EU and countries from the Commonwealth of Independent States.[118] Furthermore, the trade and sustainable development chapters of certain post-Global Europe agreements limit themselves to supporting the implementation of the Convention on Biological Diversity, its Biosafety Protocol and the Convention on International Trade in Endangered Species.[119] Only in two notable exceptions[120] is the protection of traditional knowledge of indigenous peoples and local communities identified as an area for cooperation.

Traditional knowledge refers to knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity, according to the CBD.[121] Cooperation on traditional knowledge sits at the intersection between international biodiversity law and the protection of human rights: it would thus appear as an ideal area in which the EU can pursue its external relations goals of supporting human rights, and fostering the

[115] E Morgera, 'The Trajectory of EU Biodiversity Cooperation: Supporting Environmental Multilateralism through EU External Action' in Morgera (n 2 above) 235.

[116] K Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You to)' in Morgera (n 2 above) 115.

[117] Eg Free Trade Agreement between the EU and its Member States, of the first part, and Colombia and Peru, of the other, [2012] OJ L354/3 (COPE FTA), Art 63; Free Trade Agreement between the European Union and its Member States, of the first part, and the Republic of Korea, of the other part, [2011] OJ L127/4 (South Korea FTA), Art 13.5(3).

[118] Which feature the same, detailed article on cooperation on the conservation of biodiversity, protected areas and the sustainable use and management of biological resources: eg, Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, [1999] OJ L239/3, Art 55(2).

[119] COPE FTA, Art 267(2)(b) and 270(2); South Korea FTA, Art 13.11.

[120] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other [2008] OJ L289/3 (EU-CARIFORUM EPA), Art 150(1); (COPE FTA), Art 272.

[121] CBD Article 8(j) reads: 'Each Contracting Party shall, as far as possible and as appropriate: … Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices'.

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sustainable development of developing countries, with the primary aim of eradicating poverty.[122] Following the adoption of the Nagoya Protocol,[123] the significant implications from a human rights perspective of the protection of traditional knowledge in the biodiversity context have become more evident.[124]

Policy dialogues have also served to review the outcomes of ongoing multilateral negotiations sessions, to discuss and better understand respective negotiating positions, and in the case of the most cooperative partners (Africa, Mexico and Japan, for instance) formally commit to prepare joint negotiating positions, including in the case of the Nagoya Protocol.[125] But the EU has not institutionalised biodiversity-specific cooperation and dialogue initiatives in a way comparable to the Global Climate Change Alliance.[126]

With regards to external funding, the Commission concluded in 2011 that 'biodiversity is … a relatively low priority for EU external aid, as it gets less than 1/50 of EU and Member States' total annual development aid budgets'.[127] This is certainly in stark contrast with the significant financial and technical assistance targeted by the EU to various issues related to ongoing multilateral climate negotiations, such as the reform of the Kyoto Protocol's Clean Development Mechanism (CDM), adaptation, low-emissions development strategies and new market mechanisms.[128] The Commission thus proposed increased emphasis for the period 2011–13 on the protection of biodiversity and ecosystems in its thematic funding, including in relation to access and benefit-sharing (ABS).[129]

As emerges from this brief overview of internal, as well as bilateral and inter-regional external relations instruments adopted by the EU in relation to biodiversity, the adoption of the Nagoya Protocol represents a significant

[122] Art 21(b) and (d) TEU.

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

[124] A Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in E Morgera, M Buck and E Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Leiden/Boston MA, Martinus Nijhoff, 2013) 53; and E Morgera, E Tsioumani and M Buck, *Unraveling the Nagoya Protocol: A Commentary on the 2010 Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Leiden/Boston MA, Brill Nijhoff, 2014).

[125] 18th Japan-EU Summit, 'Joint Press Statement' (9454/09 (Presse 113) 2009) para 15.

[126] See: www.gcca.eu. For a discussion, Marín Durán and Morgera (n 3 above) 229.

[127] Commission, 'Impact Assessment Accompanying the Communication—Our Life Insurance, Our Natural Capital: an EU Biodiversity Strategy to 2020', SEC(2011) 540, 16.

[128] Commission, 'Environment and Natural Resources Thematic Programme—2011–2013 Strategy Paper and Multiannual Indicative Programme' (ENRTP Strategy 2011–13), 29 October 2010, 9 and 13.

[129] ENRTP Strategy 2011–2013, 7, 17 and 23.

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opportunity for the EU to step up its efforts to contribute to environmental multilateralism in as far as biodiversity cooperation is concerned.

B. A Primer on the Nagoya Protocol: Opportunities for the EU and Risks Arising from Vested Interests

The Nagoya Protocol on Access and Benefit-Sharing is an innovative environmental treaty that has significantly developed the international biodiversity regime. It details new international obligations to ensure equity between countries that provide access to genetic resources and traditional knowledge, and countries that use them for commercial research and development (R&D) purposes.[130] The Protocol envisages a *bilateral*[131] inter-state arrangement for sharing with the country providing genetic resources the monetary and non-monetary benefits arising from R&D conducted by the country that sought access to these resources. In the specific context of these transactions, benefit-sharing is expected to operationalise equity in relation to the uneven natural distribution of genetic resources across different countries and the unevenly distributed capacities to develop these resources. It thus aims at striking a fair balance between the claims of a user country (and of its individual users) to obtain vital and unique material for scientific research and to protect resulting inventions that require considerable risk, time and effort in being developed, on the one hand, and the rights of provider countries (and of their indigenous peoples and local communities) to obtain equitable rewards for the genetic resources and traditional knowledge that they have conserved, on the other.[132] The continued political tension between the two sides (access and benefit-sharing respectively) of the transnational relation of exchange regulated by the Protocol, however, has led to compromise language and frequent interpretative ambiguities in the Protocol.

Nonetheless, the Nagoya Protocol is notable for spelling out the rights of indigenous peoples and local communities to their traditional knowledge and to genetic resources held by them.[133] The Protocol requires state parties to take the appropriate measures to ensure that these genetic resources and traditional knowledge are accessed with the prior informed consent

[130] Morgera, Tsioumani and Buck (n 124 above) on Article 1, 48–52.

[131] Although note the possibility for a multilateral benefit-sharing mechanism to be established under Nagoya Protocol, Article 10: see Morgera, Tsioumani and Buck (n 124 above) 197–208.

[132] Francesco Francioni, *Genetic Resources, Biotechnology and Human Rights: The International Legal Framework*, Working Paper (Florence, European University Institute, 2006): cadmus.eui.eu/handle/1814/6070, at 20–21.

[133] Morgera, Tsioumani and Buck (n 124 above), 382–84.

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(or approval and involvement) of indigenous and local communities.[134] It also requires that benefits arising from the utilisation of these resources and knowledge are shared in a fair and equitable way and on mutually agreed terms with them.[135] Other relevant obligations are of a procedural nature and reflect both the recognition of communities' customary laws and procedures by domestic legal systems and the establishment of mechanisms to facilitate implementation of ABS-related regulations with regard to traditional knowledge.[136] In addition, parties to the Nagoya Protocol are to proactively support communities' implementation of national ABS regulations, by empowering and preparing them to develop ABS arrangements.[137] The implementation of all these provisions will be particularly challenging, in developed and developing countries alike,[138] thus providing a fertile ground for cooperation both on legislative development and on institutional and stakeholder capacity-building. As already highlighted, this in principle provides a golden opportunity for the EU to pursue its objectives related to human rights and sustainable development in its external relations.

Another novel and challenging aspect of the Protocol is compliance, which fundamentally rests on bilateral cooperation between provider and user countries. The Protocol requires parties to take 'appropriate, effective and proportionate legislative, administrative or policy measures' to ensure that genetic resources and traditional knowledge utilised within their jurisdiction have been accessed in accordance with the legislation and requirements of the party that provided them.[139] This provision makes national legislation of both the provider and the user country indispensable for implementing the Nagoya Protocol's requirements. Implementation of such provisions would require the establishment of some kind of mechanism in countries with users in their jurisdiction that would ensure that these users receive information on, and respect, the legislation of the countries that have provided the genetic resources or traditional knowledge. Parties have thus to ensure inter-operability[140] among their respective domestic measures on ABS, compliance, as well as inter-operability with compliance-related multilateral tools established by the Protocol, namely an

[134] Nagoya Protocol, Arts 6(2) and 7. Morgera, Tsioumani and Buck (n 124 above) 145–56 and 170–77.

[135] Nagoya Protocol, Art 5(1)–(2) and (5). Morgera, Tsioumani and Buck (n 124 above) 117–30.

[136] Nagoya Protocol, Art 12. Morgera, Tsioumani and Buck (n 124 above) 216–28.

[137] Nagoya Protocol, Arts 21–22. Morgera, Tsioumani and Buck (n 124 above) 301–13.

[138] See the review of implementation challenges in different regions in Part II of Morgera, Buck and Tsioumani (n 124 above).

[139] Nagoya Protocol, Arts 15 and 16. Morgera, Tsioumani and Buck (n 124 above) 249–70.

[140] T Young, 'An international cooperation perspective on the Implementation of the Nagoya Protocol' in Morgera, Buck and Tsioumani (n 124 above) 451.

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international clearing-house,[141] an internationally recognised certificate of compliance,[142] and multilateral compliance mechanisms and procedures.[143] This provides in principle an ideal background for the EU to further experiment in the co-generation of norms with third countries in support of environmental multilateralism. It would be particularly useful in identifying specific and inter-operable mechanisms for the implementation of the Nagoya Protocol, which—due to unresolved issues between the access and benefit-sharing sides of its negotiations—leaves considerable discretion at the national level.

Overall, the implementation of the Protocol entails complex and creative links between different areas of international law, such as (but not limited to) international environmental and human rights law (which are key priorities for EU external relations), a dynamic web of national laws of provider and user countries[144] and contractual arrangements between private parties feeding into a system of internationally recognised certificates, and the respect for the customary laws of local and indigenous communities at all these regulatory levels.[145] In the face of this complexity, genuine cooperation is needed among parties to the Protocol at the bilateral, regional and multilateral levels.[146] This multi-level cooperative effort, however, may be in conflict with the vested interests of user countries interested in obtaining access to the genetic resources and traditional knowledge found in developing provider countries.

Such vested interests may likely play out when user countries such as EU Member States legislate to implement the Nagoya Protocol, as there is a risk that the open-ended or unclear provisions of the Protocol are interpreted to unduly favour European biotech interests rather than the international community's interest in effective implementation of the Protocol. Good faith[147] is therefore key to interpreting and implementing the Nagoya Protocol when developing EU and its Member States' own frameworks on benefit-sharing,[148] access,[149] and on ensuring individual users' compliance[150] with a view to ensuring inter-operability. These measures are to be *reasonably*

[141] Nagoya Protocol, Art 14. Morgera, Tsioumani and Buck (n 124 above) 237–48.

[142] Nagoya Protocol, Art 17(3)–(4). Morgera, Tsioumani and Buck (n 124 above) 279–82.

[143] Nagoya Protocol Art 30. Morgera, Tsioumani and Buck (n 124 above) 346–62.

[144] Although CBD developed-country parties have mostly characterised themselves as user countries and developing ones as provider countries, '[p]arties that are countries of origin of genetic resources may be both users and providers and that parties that have acquired these genetic resources in accordance with the Convention on Biological Diversity may also be both users and providers' (CBD Decision VII/19 D, Recital 16).

[145] S Vermeylen, 'The Nagoya Protocol and Customary Law: The Paradox of Narratives in the Law' (2013) 9 *Law Environment and Development Journal* 185.

[146] See generally Young (n 140 above).

[147] Morgera, Tsioumani and Buck (n 124 above) 377–81.

[148] Morgera, Tsioumani and Buck (n 124 above) 110–35.

[149] Nagoya Protocol, Arts 6–7.

[150] Nagoya Protocol, Arts 15–16.

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appropriate in embodying Parties' *best possible efforts* to reach the objective of the Protocol—the fair and equitable benefit-sharing among states and towards indigenous peoples and local communities, with a view to contributing to the conservation and sustainable use of biodiversity.[151]

Vested interests may also play out when user countries act as providers of financial and technological assistance,[152] as well as capacity-building[153] that are badly needed by developing provider countries. User countries could use such assistance to create conditions in provider countries that unduly favour the access side of the exchange. Specific approaches to funding, capacity-building, and technology transfer may unduly favour the interests of user countries when provider countries find themselves dependent on external support or are offered ready-made solutions that may not respond to their particular circumstances. Good faith is thus critical in assessing whether the EU and its Member States' implementation of their solidarity obligations is in the interest of the international community in the effective implementation of the Protocol (on the basis of respect for provider countries' exercise of their national sovereignty over their genetic resources and on the human rights of indigenous peoples and local communities), or in their own interest to ensure predictability and expediency for their own users.

In addition, vested interests may undermine the bilateral cooperation that is needed for the detection and follow-up in user countries of possible breaches of provider countries' domestic measures implementing the Protocol.[154] User countries may create unnecessary obstacles or devote insufficient resources to the detection of violators in their jurisdictions, rather than effectively responding to the expectations and reasonable requests from other parties. Good faith efforts are thus required in the establishment of effective administrative control systems and the exercise of an appropriate level of vigilance in enforcement[155]—by relying on all tools provided to that end by the Protocol at the multilateral and national

[151] Note that the EU argued in the negotiations of the Protocol that 'access' should have been included on an equal footing with 'benefit-sharing' in the objective of the Protocol: EU proposal to this end in Report of the first part of the ninth meeting of the CBD Working Group on Access and Benefit-sharing, (2010) UN Doc UNEP/CBD/WG-ABS/9/3, p 19.

[152] Nagoya Protocol, Arts 23 and 25. Morgera, Tsioumani and Buck (n 124 above) 314–21 and 325–32.

[153] Ibid, Art 22.

[154] Ibid, Arts 15–16. Morgera, Tsioumani and Buck (n 124 above), 249–70.

[155] ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 197 ('*Pulp Mills* case'); ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion (1 February 2011), [2011] *ITLOS Rep* 10, paras 115–16 ('*Sea Bed* Advisory Opinion').

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levels[156]—as well as in the context of bilateral cooperation in addressing alleged cases of users' non-compliance with provider countries' laws.[157]

It can be preliminarily concluded that the delicate balance of international obligations enshrined in the Nagoya Protocol creates for the EU both opportunities to contribute to effective environmental multilateralism, and risks[158] that unilateral and bilateral initiatives tainted by vested interests may undermine the partnership between user and provider countries that is essential for the implementation and further development[159] of the Protocol.

C. Applying the Good-Faith Test to the EU's Contribution to the Development and Implementation of the Nagoya Protocol

The Nagoya Protocol, therefore, provides ideal ground to apply the proposed good-faith test. To that end, this section will first discuss the role of the EU in the negotiations of the Nagoya Protocol, and then examine the EU's efforts in implementing the Protocol, considering the fact that the EU represents half of the utilisation of genetic resources to be regulated under the Protocol.[160] In particular, attention will be drawn to the European Commission's proposal[161] on how to implement the Protocol at EU level, which reveals specific views about the Protocol that had already emerged during the negotiations, which were for a great part led by the Commission.[162] The shortcomings in the Commission proposal identified by the European Parliament[163] and NGOs[164] will be drawn upon to apply

[156] This is particularly the case of the obligation to establish 'effective' checkpoints: Nagoya Protocol, Art 17(1)–(2); and Morgera, Tsioumani and Buck (n 124 above), 274–78.

[157] Nagoya Protocol, Arts 15(3) and 16(3).

[158] Morgera (n 2 above).

[159] Several issues under the Nagoya Protocol have not yet been fully resolved and in some cases the Protocol itself calls for further multilateral negotiations: for example, the determination of the need for and modalities of a global multilateral benefit-sharing mechanism (Art 10) and the establishment of the compliance procedures and mechanisms (Art 30).

[160] This is due to the non-participation of the US: see S Oberthür and F Rabitz, 'The Role of the European Union in the Nagoya Protocol Negotiations: Self-interested Bridge Building' in S Oberthür and K Rosendal (eds), *Global Governance of Genetic Resources: Access and Benefit Sharing After the Nagoya Protocol* (London, Routledge, 2013) 79.

[161] European Commission, Proposal for a Regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, COM(2012) 576 ('Commission proposal').

[162] Oberthür and F Rabitz (n 160 above), 90–91.

[163] Amendments adopted by the European Parliament on 12 December 2013 on the proposal for a regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union ('European Parliament amendments').

[164] Natural Justice and Berne Declaration, 'Access or Utilization—What Triggers User Obligations? A Comment on the Draft Proposal of the European Commission on the Implementation of the Nagoya Protocol on Access and Benefit-sharing' (2013): http://naturaljustice.

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the good-faith test to these initial implementation efforts, as well as to provide an assessment of the final text of the Regulation.[165]

According to research conducted by Oberthür and Rabitz, the EU was certainly a key actor in the negotiations of the Nagoya Protocol, and has effectively enabled final agreement on its text,[166] by ensuring that a significant portion of the global biotech industry is going to be subject to a new international instrument. In so doing, the EU 'achieved most of its political objectives'.[167] This was particularly significant at the end of 2010 given that less than one year earlier the EU had failed in its leadership efforts at the Copenhagen Climate Change Conference.[168] That being said, the EU is not considered a global environmental leader in the case of the Nagoya Protocol, as 'its policy objectives were not in line with 'recognised collective international goals' and its position was 'quite conservative' and displaying 'little ambition'.[169] Rather, the EU engaged in what has been termed 'self-interested bridge building': with the US not participating in the negotiations, the EU, representing the second-largest industry in the global biotech sector, was seen as protecting biotech interests and fending off developing countries' efforts to make more substantive progress towards benefit-sharing,[170] which is one of the three objectives of the Convention on Biological Diversity.

As the prompt ratification of the Protocol is considered essential for the EU 'to continue to lead international biodiversity policy',[171] the European Commission moved quickly to develop proposed legislation to implement the Protocol. The proposal, however, equally quickly became the target of criticism from civil society and the European Parliament. In many respects the sticking points can be seen as an expression of the EU's disregard of its commitment to supporting environmental multilateralism. This is particularly significant, as the draft regulation has been seen as a 'de facto global standard',[172] giving not only the EU an opportunity to take the lead in the

org/wp-content/uploads/pdf/Submission-EU-ABS-Regulation.pdf; and United Nations University (UNU), Natural Justice and Berne Declaration, 'The Ambiguous March to Equity: A Commentary on the Limitations of the European Union Regulation on Access and Benefit-sharing' (2014): www.evb.ch/fileadmin/files/documents/Biodiversitaet/KORR_The_Ambiguous_March_to_Equity.pdf.

[165] Regulation (EU) No 511/2014 of the European Parliament and the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union, [2014] OJ L150/59—('Final Regulation')—which entered into force on 9 June 2014 and applies after the Nagoya Protocol itself entered into force.

[166] Oberthur and Rabitz (n 160 above) 84–85.

[167] Ibid, 79.

[168] Ibid, 80.

[169] Ibid.

[170] Ibid, 84.

[171] 2020 Biodiversity Strategy (n 111 above), 7.

[172] G Burton and E Evans-Illidge, 'Emerging R & D Law: The Nagoya Protocol and Its Implications for Researchers' (2014) 9 *ACS Chemical Biology* 588, 589.

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Protocol implementation, but also to impose a certain interpretation of the open-ended provisions of the Protocol. The shortcomings of the Regulation will thus be analysed against the proposed good-faith test.

i. Respect for the Objective of Multilateral Environmental Agreements

First of all, the draft regulation proposed by the Commission had the objective to minimise risk that illegally obtained genetic resources and traditional knowledge are used in the Union and to *support* fair and equitable benefit-sharing upon mutually agreed terms (MAT).[173] The draft regulation's objective thus appeared not only more modest than the objective of the Nagoya Protocol, but also qualified it significantly. The objective of the Protocol is unambiguous in requiring the *achievement* of fair and equitable benefit-sharing.[174] In addition the objective of the Protocol is not qualified by reference to MAT, which are private-law contracts.[175] Furthermore, the Protocol stressed in its objective and in several of its provisions the need to ensure that access and benefit-sharing contribute to conservation and sustainable use of biodiversity[176]—an aspect that was completely omitted in the Commission's proposal.[177] In framing the objective of the draft regulation in that way, the Commission thus seemed to give more prominence than intended in the Protocol to contractual freedom and so de-emphasise the responsibility of its Member States to exercise due diligence in ensuring that their private operators effectively share benefits. It is true that the Nagoya Protocol does not contain an explicit determination of or mechanism to assess the extent to which benefit-sharing is indeed fair and equitable in the context of specific ABS transactions. But nothing prevents individual parties from establishing substantive rules on the content of MAT in their domestic ABS frameworks, as regards fair and equitable benefit-sharing.[178] The EU could thus have taken a bolder approach in pursuing the objective of the Protocol, including in light of relevant international human rights law implications of obligations concerning equitable benefit-sharing arising from the use of genetic resources held by indigenous peoples and local communities and their traditional knowledge.[179] These departures from a good-faith interpretation of the objective of the Protocol

[173] Commission proposal, draft preambular paras 8, 28. Compare with European Parliament amendment 35; and final text of the Regulation, preambular para 35.

[174] Morgera, Tsioumani and Buck (n 124 above) 49–52.

[175] MAT are instead referred to in the operative provision on benefit-sharing of the Nagoya Protocol: Article 5. For a discussion on the role of MAT in the Nagoya Protocol, see Morgera, Tsioumani and Buck (n 124 above) 131–32.

[176] Nagoya Protocol, Art 1.

[177] But an omission that was promptly underlined by the European Parliament amendment 24, and has been remedied in the Final Regulation preambular paras 9, 22 and 32 and Art 1.

[178] Morgera, Tsioumani and Buck (n 124 above) 376.

[179] See also European Parliament amendments 8 and 14–15.

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have to a great extent been remedied in the final version of the Regulation, which rather makes reference to *achieving* the benefit-sharing objective of the Protocol,[180] as well as reiterating other relevant preambular references in the Protocol on the expected contribution of benefit-sharing to poverty reduction, biodiversity conservation and sustainable use.[181] The remaining reference to benefit-sharing in accordance with MAT is linked to the need for effective implementation.[182]

Two other problematic aspects of the draft regulation relate to the effective pursuance of the objective of the Protocol. One concerned the temporal scope: this was one of the most contentious issues in the negotiations of the Protocol, as many genetic resources have already been accessed before the entry into force of the Protocol. The Commission proposed, and the final text of the Regulation confirms, the explicit exclusion from the ambit of application of the EU Regulation of new ex-situ access from collections or third party transfers if the original transfer occurred before the entry into force of the Nagoya Protocol.[183] This, however, is not a point that is clearly or explicitly addressed in the Protocol, so the Commission is advancing a unilateral interpretation to the advantage of its own biotech companies, instead of supporting future determinations at the multilateral level.[184] This unilateral approach has the practical result of significantly limiting the amount of benefits to be shared under the Protocol, arguably 'undermining [its] spirit'.[185]

The second problem is the light-touch approach to state due diligence in achieving the objective of the Protocol. The draft regulation proposed by the Commission placed 'strangely light' administrative burdens upon Member States,[186] limiting the establishment of checkpoints required by the Nagoya Protocol to a case-by-case verification of users' declaration when receiving research funding or at the final stage of product development.[187] Checkpoints under the Nagoya Protocol have the responsibility to monitor the utilisation[188] of genetic resources, in order to support the possible detection

[180] Final Regulation, preambular paras 32 and 35.

[181] Final Regulation, preambular paras 7, 32 and 35, and Art 1.

[182] Final Regulation, preambular para 9.

[183] Commission proposal, draft art 2 (and Final Regulation, Art 2). See European Parliament amendment 21.

[184] Clarifications in this regard could be achieved in the context of negotiations on the Nagoya Protocol Art 10 (n 159 above). For a more in-depth discussion of open questions on the temporal scope of the Protocol, see Morgera, Tsioumani and Buck (n 124 above) 77–80.

[185] UNU, Natural Justice and Berne Declaration (n 164 above), 6–7; and Natural Justice and Berne Declaration (n 164 above), 3 noting that the interpretation is debatable and relying on V Koester, 'The Nagoya Protocol on ABS: Ratification by the EU and its Member States and Implementation Challenges' (Rskilde University, Study 3/12, 2012).

[186] UNU, Natural Justice and Berne Declaration (n 164 above), 8.

[187] Commission proposal draft art 7. UNU, Natural Justice and Berne Declaration (n 164 above), 8.

[188] Nagoya Protocol Art 2(c). See Morgera, Tsioumani and Buck (n 124 above) 274–76.

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of users' violations of domestic ABS frameworks in other countries and to ensure the realisation of the benefit-sharing objective of the Protocol. The general assumption in favour of users' due diligence unless proven to the contrary that transpires from the Regulation, instead, combined with the 'outsourcing' of monitoring responsibilities to 'trusted collections' and 'user-driven remedial action' in case of violations,[189] may not be able to meet a good-faith reading of the due diligence requirements embodied in the Protocol. These comprise the need for all reasonably appropriate domestic measures embodying Parties' best possible efforts to reach the objective of the Protocol through the establishment of administrative control systems to effectively monitor activities and the exercise of an appropriate level of vigilance in enforcement. According to general international law, due diligence in this context would rather entail the exercise by states of effective administrative control over private operators,[190] so that reliance on private users' due diligence[191] and voluntary, industry-led instruments,[192] would be merely additional, but not an alternative, to states' due diligence. Overall, it appears unlikely that the *minimalist* approach proposed by the Commission,[193] which has been generally retained in the final text of the Regulation,[194] can be considered effective in achieving the objective of Article 17 of the Protocol and ultimately effectively contributing to the Protocol's objective.

ii. Responsiveness to Intervening Multilateral Developments

Another troubling aspect in the (proposed and final) Regulation when seen from a multilateralism perspective is the definition of traditional knowledge, which once again is made subject to contractual negotiations among private parties.[195] This provision is problematic because while the Protocol

[189] UNU, Natural Justice and Berne Declaration (n 164 above), 8 referring to Commission proposal, draft arts 4–6. See also European Parliament amendments 55 (proposing deletion of the draft provision on Union trusted collections), 60–61 and 63 (significantly strengthening the provision on checkpoints) and 62 (proposing deletion of the draft provision on users' best practices).

[190] *Pulp Mills* case, para 197; *Sea Bed* Advisory Opinion, paras 115–16.

[191] Commission proposal, draft art 4(1).

[192] The EU draft regulation would encourage users' associations to seek recognition of a combination of procedures, tools or mechanisms (eg, on the deployment of data-sharing tools for tracking) developed for the purpose of implementing their obligations under the regulation as 'best practice', by subjecting users implementing such recognised best practice to less intense compliance checks (Commission proposal, draft Arts 8–9).

[193] Commission proposal, draft preambular Recital 14 noted the need for 'only minimum features of due diligence' due to the diversity of users; the European Parliament proposed to delete this reference: amendment 14, which has disappeared from the Final Regulation.

[194] Final Regulation, Arts 4–10.

[195] Traditional knowledge is defined as that 'held by indigenous and local communities that is relevant for the use of genetic resources and *that is as such described in the mutually agreed terms* applying to the use of genetic resources': Commission proposal, draft art 3(8).

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does not provide a definition of traditional knowledge, said definition is likely to be worked out multilaterally either under the Protocol or the CBD, or in parallel negotiations under the World Intellectual Property Organization (WIPO).[196] The EU approach therefore does not appear to support the development of a multilateral definition nor to propose an alternative that may constructively contribute to such multilateral efforts. It rather chooses to leave private parties with conflicting interests to find on an *ad hoc* basis a solution that may or may not be in line with the Protocol objective.

Furthermore, no review clause expressly triggered by other relevant multilateral developments had been inserted in the Commission's proposal,[197] even if several open questions are subject to further multilateral negotiations.[198] Instead, the European Parliament not only noted the need for the EU to 'act in a proactive manner' in relation to ongoing negotiations supporting the objective of the Protocol,[199] but also the need for 5-year reviews 'in light of developments in other relevant international organisations' with regard to traditional knowledge.[200] The final text of the Regulation provides for an initial assessment of implementation by the Commission in 2018,[201] and thereafter a 10-year review that will also take into account 'developments in other relevant international organisations'.[202] These, however, seem unduly long time-spans, if one considers the fervent and multi-faceted intergovernmental negotiations that have been ongoing even before the Protocol's entry into force and that will likely continue in the near future. While this approach does not send the right message in terms of responsiveness to multilateral developments, it remains true that should the EU commit itself to an international legally binding instrument (for instance, under WIPO), it would still be required to change the Regulation regardless of the trigger clause. In the case of the ongoing negotiations under the Nagoya Protocol, however, consensus-based solutions to open questions will be rather embodied in formally non-binding decisions, which may nevertheless be interpreted as 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'[203] So a manifestation

See comments by UNU, Natural Justice and Berne Declaration, 10 and European Parliament amendment 8. The Final Regulation makes reference to the relevant provision of the CBD (preambular para 5), but otherwise retains the reference to MAT without any mention of relevant international human rights standards (preambular para 20 and Art 3(7)).

[196] Morgera, Tsioumani and Buck (n 124 above) 24–30.

[197] Commission proposal, draft art 16(3), which provided for a review every 10 years.

[198] Which will be addressed on a periodic basis by the governing body of the Protocol: Nagoya Protocol Art 26, and comments by Morgera, Tsioumani and Buck (n 124 above) 333–36.

[199] European Parliament amendment 31.

[200] European Parliament amendment 76.

[201] Final Regulation, Art 16(2).

[202] Final Regulation, Art 16(3).

[203] Vienna Convention on the Law of Treaties, Art 31(3)(b).

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of willingness to take those expressions of shared interpretation on the part of the EU in the form of a trigger clause is an important indication of good-faith support for environmental multilateralism.

iii. Dialogue

Contrary to recent EU legislation on climate change, the draft regulation on the Nagoya Protocol proposed by the Commission did not contain references to the use of bilateral external relations tools to support implementation of the Protocol.[204] It only provided a minimal and non-committal preambular reference whereby 'in order to take into account the inherently international character of ABS activities, the Commission should also consider whether cooperation with third countries or regions should support an effective application of the system created to implement the Protocol'.[205] It then established a general obligation for Member States' national authorities to cooperate with administrative authorities in third countries to ensure compliance.[206] This limited approach is particularly striking, as there is much scope and need for bilateral approaches to support the multilateral process for the implementation of the Protocol.[207] In fact, the European Parliament proposed supporting regional cooperation on benefit-sharing arrangements concerning transboundary genetic resources and traditional knowledge[208]—as provided by the Nagoya Protocol[209]—and support to research and development in third countries.[210] Neither was included, however, in the final text of the Regulation. The final Regulation only adds to the obligation to cooperate with third-country authorities in compliance matters, that 'special consideration shall be given to [compliance] concerns raised by provider countries'.[211] It remains to be ascertained in the practice of the EU's relations with third countries whether dialogue will be pursued systematically to ensure inter-operability in the setting up of domestic and regional ABS frameworks, and effective cooperation in relation to compliance.

In addition, the Commission proposal did not contain any reference to possible dialogue with relevant international organisations. Instead the European Parliament underscored the need to involve relevant international organisations and representatives of indigenous and local communities

[204] European Parliament amendment 66.

[205] Commission proposal, preambular para 25; and Final Regulation, preambular para 31.

[206] Commission proposal, draft art 12(1).

[207] On the usefulness of bilateral approaches to support the implementation of the Nagoya Protocol, see Young (n 140) 496–98.

[208] European Parliament amendment 73.

[209] Nagoya Protocol Art 11; Morgera, Tsioumani and Buck (n 124 above) 209–15.

[210] European Parliament amendment 73.

[211] Final Regulation, Art 9(3)(b).

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in the cooperation concerning implementation among Member States' national authorities, the Commission and third countries, as well as in a EU-level Consultation Forum.[212] The European Parliament also proposed mandating the Commission to seek arrangements with the European Patent Office and WIPO to ensure compliance with the Protocol in the context of patent applications.[213] None of these proposals can be found in the final text of the Regulation, which limits itself to calling for the inclusion of 'other interested parties' in the Consultation Forum focusing on issues related the implementation of the Regulation.[214] It remains to be ascertained in the practice of the EU whether relevant international organisations and representatives of indigenous and local communities will be involved in implementation.

iv. Mutual Supportiveness

It has already been noted with regard to the objective of the Protocol, that the EU could have taken a bolder approach in light of relevant international human rights law. In effect, the EU does not seem to have seized other opportunities offered by the Protocol to realise its own objective to ensure the respect for human rights in its external relations, and in so doing ensuring mutual supportiveness between international environmental and human rights law. The definition of traditional knowledge under the Regulation (discussed above) further proves this point. By making the definition subject to contractual negotiations among private parties, the EU opens the door for interpretations at the contractual level that may go against international human rights involved. In other words, the EU could have rather built upon the duty of states to protect indigenous peoples' rights also when granting permits to private parties relating to indigenous peoples' resources.[215] Such duty includes the obligation to provide business with clarity on the right of indigenous peoples in that regard, including when indigenous peoples do not have a state-recognised title to the resources affected.[216] As user countries and home states of transnational biotech corporations operating in

[212] European Parliament amendment 66 and 75.

[213] European Parliament amendment 68.

[214] Final Regulation, Art 15.

[215] ILO Convention No 169, Art 15(1); Inter-American Commission on Human Rights, *Maya Indigenous Community of the Toledo District v Belize, Merits, Case No 12.053* (IACHR, 12 October 2004) 194–95; and, more generally, Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System' (2010) 35 *American Indian Law Review* 386.

[216] Follow-up report of the Special Rapporteur on the rights of indigenous peoples (2012) UN Doc A/HRC/21/47, paras 32–35; and Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya—Extractive industries and indigenous peoples (2013) UN Doc A/HRC/24/41, paras 26–40.

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territories used or inhabited by indigenous peoples,[217] EU Member States are expected under international human rights law to consider ways to ensure that indigenous peoples affected by the operations of their biotech multinationals abroad have access to effective remedies,[218] taking into account the specificities of indigenous peoples and ensuring that any barriers in this regard are addressed and removed.[219]

Overall, the draft regulation and in significant part also the final text of the Regulation reveal the half-hearted intention of the EU to support biodiversity multilateralism in relation to benefit-sharing. Even if on the face of it the Regulation aims to implement international environmental law in a timely fashion, it remains doubtful whether the legitimate concerns raised both by the European Parliament and international civil society have been taken on board in the final text of the Regulation. In effect, the Regulation appears poorly equipped to respond to the changing multilateral landscape and to lay the foundations for mutual supportiveness between international biodiversity and human rights law. In addition, it does not lay the ground for engaging in genuine dialogue with third countries or relevant international organisations to ensure that the implementation of the Protocol in the EU contributes to effective biodiversity cooperation in the interest of the international community.

IV. CONCLUSIONS

The Nagoya Protocol provides an unsettling case study with regard to the EU's ambition to pursue environmental multilateralism. It proves the need for a good-faith test to ensure that the EU not only effectively complies with its own constitutional obligations, but also with basic tenets of general international law in supporting environmental multilateralism to the benefit of the international community, rather than unduly influencing it to its own advantage. Given the variety of approaches in EU external and internal environmental action, and the importance of the EU as a global actor, bilateral or inter-regional partner and/or unilateral decision-maker that can utilise access to its significant market as leverage, further studies appear necessary to assess EU's initiatives in different areas of environmental law against their alignment to the objectives of environmental treaties, their responsiveness to the changing multilateral landscape, their reliance on genuine dialogue with third countries and relevant international organisations, and their mutual supportiveness with other relevant international regimes, particularly in the area of human rights. These aspects can provide useful pointers to assess whether genuine efforts are put in place by the

[217] Ibid, para 55(a).
[218] Ibid, para 55(j).
[219] Ibid, para 37.

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EU to ensure good faith in the interpretation of multilateral environmental agreements and in their implementation through the duty of cooperation. From an international environmental law perspective, this remains a vital question even when EU measures do not necessarily raise obvious extraterritoriality or unilateralism concerns.

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