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## **Play by the rules? : coordination of EU sustainable development policies and the importance of the politico-legal context**

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## Chapter 5: 'Team EU' in UNFCCC Climate Negotiations

### 5.1 Introduction

*"The Paris Agreement is the first of its kind and it would not have been possible were it not for the European Union. Today we continued to show leadership and prove that, together, the European Union can deliver." (President of the European Commission, Jean Claude Juncker, State of the Union Speech, 14 September 2016<sup>385</sup>)*

The European Union (EU) and its Member States have been leading actors in constructing the international climate policy framework since the early 1990s.<sup>386</sup> The topic of climate change has been identified as a 'saviour issue' for the success of the EU integration project.<sup>387</sup> Internationally, the recent emissions of greenhouse gases were the largest in history; the atmosphere and oceans have warmed, the amount of snow and ice has diminished and the sea level has risen.<sup>388</sup> With that institutional importance and climatological urgency in mind, the EU has been committed to a multilateral response to combat climate change.<sup>389</sup> After the 'failure'<sup>390</sup> of the Copenhagen conference (2009), both from a multilateral perspective and in terms of EU conduct, the Paris Agreement has been hailed as a success of (EU) climate diplomacy.<sup>391</sup>

Research on the EU and Member States in international climate change negotiations tends to focus on EU actorness and effectiveness, respectively the EU's ability to function 'actively and deliberately in relation to other actors in the international system'<sup>392</sup> and its 'goal-attainment' in these international negotiations.<sup>393</sup> As such, the 'leadership' of the EU in the framework of the United Nations Framework Convention on Climate Change (UNFCCC) is evaluated more positive or negative depending on the goals set.<sup>394</sup> The empirical studies that analyse internal coordination structures of the EU and Member States (in climate negotiations) focus primarily on the balance of power between (large) Member States in the

<sup>385</sup> European Commission, 'Paris Agreement to enter into force as EU agrees ratification' [2016], press release, Strasbourg, 4 October 2016, accessed << [http://europa.eu/rapid/press-release\\_IP-16-3284\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3284_en.htm)>> 14 June 2017.

<sup>386</sup> Lefevere, J., Runge-Metzger, A. and Werksman, J. (2015) 'The EU and international climate change policy' in Jos Delbeke, Peter Vis (eds), *EU Climate Policy Explained* (Routledge), p. 109.

<sup>387</sup> Van Schaik, L. and Schunz, S. (2012) 'Explaining EU Activism and Impact in Global Climate Politics: Is the Union a Norm-or Interest-Driven Actor?'. *JCMS: Journal of Common Market Studies*, Vol. 50, No. 1, p. 169.

<sup>388</sup> Pachauri, R.K. (2014) *Climate Change 2014 Synthesis Report* (The Intergovernmental Panel on Climate Change 2014) <[https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf)> accessed 16 December 2016.

<sup>389</sup> Kamphof, R. (2018, forthcoming) 'UN Environment Programme (UN Environment) and UN Framework Convention on Climate Change (UNFCCC): EU Action Between Legal Competences and Political Power' in Odermatt, J. and Wessel, R.A. (eds) *Research Handbook on the EU's Engagement with International Organisations* (Edward Elgar Publishing).

<sup>390</sup> Falkner, R., Stephan, H. and Vogler, J. (2010) 'International climate policy after Copenhagen: Towards a 'building blocks' approach'. *Global Policy*, Vol. 1, No. 3, pp. 252-262.

<sup>391</sup> Oberthür, S. (2016) 'Where to go from Paris? The European Union in climate geopolitics'. *Global Affairs*, Vol. 2, No. 2, pp. 119-130.

<sup>392</sup> Sjöstedt, G. (1977) *The external role of the European Community* (Farnborough, Saxon House), p. 16.

<sup>393</sup> Groen, L. and Niemann, A. (2013) 'The European Union at the Copenhagen climate negotiations: A case of contested EU actorness and effectiveness'. *International Relations*, Vol. 27, No. 3, pp. 308-324. Oberthür, S. and Groen, L. (2015) 'The Effectiveness Dimension of the EU's Performance in International Institutions: Toward a More Comprehensive Assessment Framework'. *JCMS: Journal of Common Market Studies*, Vol. 53, No. 6, pp. 1319-1335. Oberthür, S. and Groen, L. (2017) 'Explaining goal achievement in international negotiations: the EU and the Paris Agreement on climate change'. *Journal of European Public Policy*, pp. 1-20 (published online). Delreux, T. (2014) 'EU actorness, cohesiveness and effectiveness in environmental affairs'. *Journal of European Public Policy*, Vol. 21, No. 7, pp. 1017-1032. Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan).

<sup>394</sup> Oberthür, S. and Roche Kelly, C. (2008) 'EU leadership in international climate policy: achievements and challenges'. *The International Spectator*, Vol. 43, No. 3, pp. 35-50. Bäckstrand, K., and Elgström, O. (2013) 'The EU's role in climate change negotiations: from leader to 'lead'iator'. *Journal of European Public Policy*, Vol. 20, No. 10, pp. 1369-1386. Parker, C. F. and Karlsson, C. (2010) 'Climate change and the European Union's leadership moment: an inconvenient truth?'. *JCMS: Journal of Common Market Studies*, Vol. 48, No. 4, pp. 923-943.

Council and the Commission<sup>395</sup>, 'socialisation' of representatives from Member States<sup>396</sup>, the EU position in the international negotiations concerning the environment and preference heterogeneity in the sense of (absence of) aligning interests.<sup>397</sup>

The EU and its Member States are often considered as an unitary actor. It is in fact not common to see the European Union sharing competences and legal competences with Member States when acting in international climate negotiations. As a result, little is known about the *political* effect of these legal competences despite calls for more cross-disciplinary research in both legal and political science contributions on the role and functioning of the EU within international institutions.<sup>398</sup> The division of competences between the EU and its Member States is one of the crucial issues in institutional discussions.<sup>399</sup> It is a delicate question, which often results in either diminishing the 'creeping' competences of the EU or supporting the idea of a 'single voice'.<sup>400</sup> Climate change is, however, a multifaceted issue as it includes shared, exclusive and supportive competences. By combining legal and political perspectives, i.e. formal rules and informal practices, the practical effects of 'mixed competences' could be analysed in more detail.

The present chapter identifies whether legal competences enable or impede coordination of the EU and Member State actors at UNFCCC negotiations. The main question addressed in this chapter has been the following: *How do legal competences affect EU and Member State coordination in negotiations at the UNFCCC?* As such, the effect of legal competences (independent variables) is compared and assessed alongside other more common issues (and 'intervening variables'), such as supranational versus intergovernmental dominance, the EU's position within the international constellation of power, and preference heterogeneity. Socialisation practices are seen as part of the (dependent variable) coordination of 'team EU'. This chapter also addresses 'other explanations' raised in the semi-structured interviews that could hinder or enable coordination in the negotiations of 'Team EU' at the UNFCCC.

The findings in this chapter are based on multiple sources of information, which are considered together through the triangulation technique. The case study makes use of a step-by-step process tracing approach, revising legal documents (Treaty provisions, cases before the Court of Justice of the EU, regulations and directives), additional policy documents and academic literature. The qualitative part of this study additionally relies on

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<sup>395</sup> Laatikainen, K. and Smith, K. (eds) (2006) *The European Union at the United Nations: Intersecting Multilateralisms* (Basingstoke: Palgrave). Cf Dykstra, H. (2009) 'Commission versus Council Secretariat: an analysis of bureaucratic rivalry in European foreign policy.' *European Foreign Affairs. Review* Vol. 14, No. 3, pp. 431-450.

<sup>396</sup> Groenleer, M. L. and Van Schaik, L. G. (2007) 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol'. *JCMS: Journal of Common Market Studies*, Vol. 45, No. 5, pp. 969-998. EU socialization means that EU Member States' representatives involved in deciding on and negotiating the EU position in international institutions first and foremost adopt a European orientation, see Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan), p. 75.

<sup>397</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan). Groen, L. and Niemann, A. (2013) 'The European Union at the Copenhagen climate negotiations: A case of contested EU actorness and effectiveness'. *International Relations*, Vol. 27, No. 3, pp. 308-324.

<sup>398</sup> Jørgensen, K. E. and Wessel, R. A. (2011) 'The position of the European Union in (other) international organizations: confronting legal and political approaches'. In Koutrakos, P. (ed) *European Foreign Policy: Legal and Political Perspectives*. (Cheltenham: Edward Elgar), pp. 261-286. Groen, L. and Niemann, A. (2013) 'The European Union at the Copenhagen climate negotiations: A case of contested EU actorness and effectiveness'. *International Relations*, Vol. 27, No. 3, p. 320 and Oberthür, S. and Groen, L. (2015) 'The Effectiveness Dimension of the EU's Performance in International Institutions: Toward a More Comprehensive Assessment Framework'. *JCMS: Journal of Common Market Studies*, Vol. 53, No. 6, pp. 1319-1335.

<sup>399</sup> Cf Benz, A. (2010) 'The EU's competences: The 'vertical' perspective on the multilevel system'. *Living Reviews in European Governance – LERG*.

<sup>400</sup> Pollack, M. A. (2000) 'The end of creeping competence? EU policy-making since Maastricht'. *JCMS: Journal of Common Market Studies*, Vol. 38, No. 3, pp. 519-538.

twenty semi-structured interviews with (leading) negotiators, EU and Member State officials, (former) ministers as well as other societal stakeholders (see Table 5.1).<sup>401</sup> These interviewees were approached after a stakeholder analysis and found on the basis of organigrams/websites ('own initiative') and/or referral (snowball sampling technique). As previously mentioned, the findings are brought together through triangulation. With regards to the timeframe, this analysis focuses on the process starting with the Copenhagen Climate Change Conference (2009) until July 2017, and it includes the UNFCCC COP21 in Paris (2015). The main emphasis is on the large international climate change conferences (COP), but environmental day-to-day diplomacy is also part of the analysis and the questions in the semi-structured interviews. The process tracing approach leads to an overall assessment of the potential influence of legal competences, and of the interaction with/autonomy from other intervening variables and other explanations for this specific case. The results from this study can only be considered as 'plausibility probes', providing interesting avenues for future research, but it is acknowledged that they need further testing in other cases to become more robust.<sup>402</sup>

Category	No of interviews
<i>EU official</i>	7
<i>Member State official</i>	10
<i>Other societal stakeholder</i>	3

*Table 5. 1 No of semi-structured interviews for case study EU in UNFCCC negotiations*

The plan of this chapter is as follows. Section 5.2 describes the multilateral negotiation processes at the UNFCCC from 2009 to 2017 more extensively. After a broader UN overview, the coordination procedures of the 'Team EU' approach with EU and Member State officials is introduced in section 5.3. The following section (5.4) introduces the 'legal' issues and powers, including also the division of competences related to the climate agreement and the role of the case law and principles established by the Court of Justice of the European Union. The fifth section considers more 'political' issues and intervening variables, which might have a different effect than the legal division of competences would prescribe. This section focuses on the supranational versus intergovernmental dominance, the external negotiating context and preference heterogeneity. Other explanations that might disproportionately affect EU and Member State coordination and were raised in the interviews are identified. In the final section it is evaluated whether the EU and its Member States are legally enabled or restrained by the division of competences or whether 'political' issues play a more prominent role. The chapter ends with the suggestion of some avenues for future research.

## **5.2 Multilateral environment UNFCCC (2009-2017)**

### *5.2.1 UNFCCC 1992-2017*

The United Nations Framework Convention on Climate Change (UNFCCC), adopted during the 1992 Earth Summit in Rio, is the principal framework where discussions on global climate efforts take place. The most important forum is the annual Conference of the Parties (COP).

<sup>401</sup> See also appendix, as nine interviews have been semi-structured but exploratory.

<sup>402</sup> George, A. L. and Bennett, A. (2005) *Case studies and theory development in the social sciences* (Cambridge, Massachusetts: MIT Press).

The COP is the supreme decision-making body of the UNFCCC and all 195 members are invited to participate in these meetings. The EU is a party to the UNFCCC and so also are all the EU Member States individually.<sup>403</sup> The COPs have been described as 'incredibly gigantic' events and are the culmination of a year of time-consuming, difficult preparations and missions by officials and Ministers. EU Member States have taken part in the organisation of recent COPs, such as COP15 (Copenhagen, Denmark), COP19 (Warsaw, Poland) and COP21 (Paris, France).

The EU has been involved since the very start and has been one of the leading actors in saving the international climate regime by adhering to the Kyoto Protocol when the United States declared their opposition to such Protocol in 2001.<sup>404</sup> The EU has the most far-reaching emission reduction commitment of all big economies. The goal is to reduce emissions by 40 percent before 2030, when compared to 1990 levels. However, there have been rounds of failed negotiations to define a universal climate framework. The most outspoken failure for the EU in this regard was probably the Copenhagen conference in 2009.<sup>405</sup>

The subsequent COPs led, however, to the successful COP21 in Paris (2015). The interviews show that in 2009 there was not much hope for a renewed alignment to international climate change commitments.<sup>406</sup> The Mexican Presidency in Cancun (COP16) in 2010 has however been successful in starting a bottom-up process involving both developing and developed nations and asking them to come up with climate pledges. This process continued with nationally determined contributions in the years after. The Paris Agreement marks the success of a universal multilateral agreement on climate change mitigation. During COP21, the 'Team EU' delegation of the EU and its Member States built a coalition of both developed and developing nations, which resulted in securing a successful international climate agreement.<sup>407</sup> As stipulated in the Paris Agreement, climate pledges now need to be tracked to 'make emission pathways consistent with holding the increase in the global average temperature to well below 2 °C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above preindustrial levels'.<sup>408</sup> This 'stocktake' process will begin end of 2018. The EU and all twenty-eight Member States have ratified the Paris Agreement by November 2017.<sup>409</sup>

### 5.2.2 Paris Agreement: legally binding?

The UNFCCC negotiations are very technical and have a large scope, including climate change mitigation, adaptation and the means of implementation (a.o. finance and capacity building). Substantive legal issues such as the legal form or character of a UNFCCC

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<sup>403</sup> UNFCCC website (2017) Parties to the Convention and Observer States' [http://unfccc.int/parties\\_and\\_observers/parties/items/2352.php](http://unfccc.int/parties_and_observers/parties/items/2352.php)

<sup>404</sup> Oberthür, S. and Roche Kelly, C. (2008) 'EU leadership in international climate policy: achievements and challenges'. *The International Spectator*, Vol. 43, No. 3, p. 36.

<sup>405</sup> See footnote 4. For a popular exposé see Meilstrup, P. (2010) 'The runaway summit: the background story of the Danish presidency of COP15, the UN Climate Change Conference'. *Danish Foreign Policy Yearbook 2010*, pp. 113-135.

<sup>406</sup> Interview EU official, 9-4-2014. Interview MS official, 7-10-2015.

<sup>407</sup> Oberthür, S. (2016) 'Where to go from Paris? The European Union in climate geopolitics'. *Global Affairs*, Vol. 2, No. 2, pp. 119-130 and 'How the EU helped build the ambition coalition' (EUClimateAction Storify, January 2016) <<https://storify.com/EUClimateAction/how-the-eu-helped-build-the-coalition-ambition>> accessed 30 November 2016.

<sup>408</sup> United Nations Framework Convention on Climate Change (2015) Paris Agreement, [https://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english\\_.pdf](https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf), Accessed 13 December 2016.

<sup>409</sup> The case study was conducted until July 2017 when 26 EU Member States ratified the Paris Agreement. In August 2017 (The Netherlands) and November 2017 (Czech Republic) the remaining EU Member States ratified the agreement, cf [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php), Accessed 15 November 2017.

agreement are therefore central issues to the COP negotiations.<sup>410</sup> The Paris Agreement is a Treaty that falls under the definition of the Vienna Convention on the Law of the Treaties. However, not every provision of the agreement creates legal obligations. The Paris Agreement is composed of both a 'binding' part, as well as of voluntary, non-binding commitments. The run-up to the Paris Agreement has been a 'bottom-up' process including 'intended' or voluntary nationally determined contributions which focus on transparency, accountability and precision. As demonstrated in a recent UNFCCC synthesis report, these aggregated INDCs will not prevent a temperature rise of more than 2°C, the overall objective for the climate deal.<sup>411</sup> They are, moreover, essentially voluntary and some of the commitments made by developing countries are conditional on the availability of climate finance. Therefore, a structural 'stocktake' is required to update commitments and meet the overarching goal to stay within a maximum of 1,5 to 2 degrees' temperature rise.

The bottom-up process of the Paris Agreement differs from the more 'legally binding' Kyoto Protocol, which included for instance a carbon budget and a maximum of tonnes of CO<sub>2</sub> emissions per (EU) Member State. From a legal perspective, the Paris Agreement could be considered as a step backwards when compared to the Kyoto Protocol. However, in contrast to the Paris Agreement, the Kyoto Protocol was not a 'universal' agreement.<sup>412</sup> The 'political' significance of the Paris Agreement is therefore higher than the one of the Kyoto Protocol, despite its 'softer' measures. As indicated by Bodansky (2016: 142), the issue of the legal character "though important, is only one factor in assessing the significance of the Paris outcome".

### 5.3 'Team EU' coordination

Coordination is the process of contacts between diplomats and officials from EU institutions (especially the European Commission) and Member States with the purpose of discussing an issue of common interest and working towards a common position.. These coordination processes can be internal (within the EU) or external (international) and include the discussion of the 'management' of the coordination.

The EU and its Member States have invented a very specific institutional arrangement of coordination in their UNFCCC climate diplomacy. Within the 'Team EU', composed of representatives from the EU institutions and the Member States, one can identify 'lead negotiators' and 'issue leaders'. Lead negotiators are appointed by the Council Working Party on International Environment Issues (WPIEI). Lead negotiators have their institutional affiliation in either Member States or the European Commission and have an important 'external' representation role during COPs. In practice, most lead negotiators are from large Member States (Germany, France, and United Kingdom) or Member States with a specific interest (e.g. Sweden). The Commission lead negotiator originates from the Directorate

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<sup>410</sup> Bodansky, D. (2016) 'The legal character of the Paris Agreement'. *Review of European, Comparative & International Environmental Law*, Vol. 25, No. 2, p. 142.

<sup>411</sup> UNFCCC (2015) 'Synthesis report on the aggregate effect of the intended nationally determined contributions', <<https://unfccc.int/resource/docs/2015/cop21/eng/07.pdf>> Accessed 26 July 2017.

<sup>412</sup> Cf Kamphof, R. (2018, forthcoming) UN Environment Programme (UN Environment) and UN Framework Convention on Climate Change (UNFCCC): EU Action Between Legal Competences and Political Power' in Odermatt, J, and Wessel, R.A. (eds) *Research Handbook on the EU's Engagement with International Organisations* (Edward Elgar Publishing). For an overview of how the EU evolved from an actor focused on 'legally binding' international agreements towards an actor aiming for universal agreements. The 'universality' of the Agreement is nevertheless currently under pressure seeing the announced withdrawal by the United States President Donald Trump. Cf <<https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-agreement>> accessed 26 July 2017.

General Climate Action (DG CLIMA). During the Paris COP21 Team EU had four 'lead negotiators'.

Apart from the lead negotiators, Team EU has many 'issue leaders' assisting lead negotiators on specific issues. Their main task is not to represent the EU internationally, but to assist lead negotiators. Additionally, there are expert groups supporting the Council working group WPIEI gaining more and more authority to develop negotiating positions.<sup>413</sup> Importantly, the six-month Presidency of the Council of the European Union also plays a large role in coordination of WPIEI and in representing 'The EU and the Member States' externally. The Commission, with over 80 percent representation by DG CLIMA, plays an important role in substantive expertise and continuity. While the European External Action Service (EEAS) has an important informative role in preparing the negotiations and collaborating with third countries, the thematic expertise is limited. The Members of European Parliament also have an interest in these issues and keep informed, but the UNFCCC negotiations remain an intergovernmental process.

The interviews portray the Team EU daily agenda during the COPs as very time-consuming, starting with a Presidency chaired coordination meeting of EU and Member States in the morning, and followed by the plenary. During lunch breaks, multiple bilateral meetings take place, especially with third countries or regional blocs. In the late afternoon and evening, Team EU evaluates the day and lead negotiators are usually still active with bilateral meetings.<sup>414</sup> This system allows for the 'pooling of expertise' of the Commission and Member States, which results in the Team being "among the best-prepared negotiators in the world at diplomatic and administrative level" according to Kaczyński (2016: 267).<sup>415</sup> The representatives are 'blended' into the negotiation team. Nevertheless, if one is not part of the 'core' team EU, it might prove difficult to have access to all the information. There is still some Member State autonomy when it comes to nominations to certain bodies, substantive financial questions (see later), or the organisation of the COP in the territory of the Member State.

UNFCCC negotiations could be perceived as a process of 'socialisation' in the way EU and Member State actors coordinate. Socialisation means that EU Member States' representatives involved in deciding on and negotiating the EU position in international institutions first and foremost adopt a European orientation, leading to the 'socialisation' in EU practices.<sup>416</sup> The interviews show that the 'Team EU' approach, with all its preparatory work before and after the COP negotiations, unequivocally affects the EU unity, cooperation and expertise in climate negotiations.<sup>417</sup> Lead negotiators meet in many occasions. 'Issue leaders' and other support staff have also frequent contact.<sup>418</sup> The European (and global) 'UNFCCC crowd' has been fairly stable up to the Paris Agreement, with many diplomats being active in this policy area for at least 5 to 10 years. This seems to contribute to a pragmatic decision-making process. One could argue that the legal 'duty of loyal cooperation' is a key driver of this process, but that would be far-fetched, as legal powers are

<sup>413</sup> Oberthür, S. and Roche Kelly, C. (2008) 'EU leadership in international climate policy: achievements and challenges'. *The International Spectator*, Vol. 43, No. 3, p. 38.

<sup>414</sup> Interview EU official, 30-5-2017, Interview MS official, 24-1-2014, Interview EU official, 13-6-2017.

<sup>415</sup> Kaczyński, P. M. (2012) 'A Gordian Knot or Not? EU Representation in UN Climate Negotiations' in Laursen, F. (ed) *The EU's Lisbon Treaty: Institutional Choices and Implementation* (Routledge), pp. 265-284.

<sup>416</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan), p. 75.

<sup>417</sup> Interview MS official, 24-1-2014, Interview EU official, 30-5-2017, Interview MS official, 13-6-2017.

<sup>418</sup> Interview MS official, 3-4-2015, Interview MS official, 8-6-2017, Interview MS official, 14-6-2017.

in general not used so often (at least directly) . The ones directly involved often hail the 'Team EU' method, but there are some disadvantages. As some authors state, socialisation can lead to 'groupthink', which could have a negative impact on effectiveness.<sup>419</sup> Moreover, the process depends on individual characteristics and relationships, leaving it vulnerable to different preferences.

## 5.4 The division of competences, legal issues and EU negotiation

How does the division of competences in the Treaty affect the conduct of UNFCCC climate negotiations by Team EU? This section focuses on internal aspects and gives an historical overview of how the role of competences on environment and climate change evolved, especially after 2009. Furthermore, the 'negotiation mandate' of the EU and the Member States is discussed, as well as the effects of case law of the Court of Justice of the European Union and regulations and directives.

### 5.4.1 UN(FCCC) Statutes and (legal) documents

As the previous section indicated, the UN multilateral context and Statutes have a strong effect on coordination between the EU and Member State actors. The UNFCCC arrangement is described as a peculiar arrangement within the UN system, as it differs from all other UN processes.<sup>420</sup> Given the large scope of the UNFCCC negotiations, numerous substantive legal questions can be raised.<sup>421</sup> The Kyoto Protocol is considered more legally stringent<sup>422</sup>, but many legal questions remain. The whole process becomes very technical and legal, especially during the final stages of the negotiation of agreements and texts.<sup>423</sup>

### 5.4.2 Competences EU: historical overview and practice 2009-2017

A simple search of 'climate change' or 'climate action' in the Treaties of the European Union<sup>424</sup> leads to one result only: Article 191 TFEU (environment) where it is stated that (1) 'Union policy on the environment shall contribute to pursuit of the following objectives' (...) - 'promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'. This international level is apparent in Art 191(4) TFEU: 'within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations'. Article 192 TFEU clarifies that some policy areas fall outside this scope, including provisions 'primarily of a fiscal nature', measures affecting land use and measures affecting a Member State's "choice between different energy sources and the general structure of its energy supply'. Apart from this, the 'environment' policy area is falls under the area of shared competences according to a combined reading of articles 4 and 191 TFEU.

The wording of the Treaty suggests that climate action is part of the 'environmental policy'. The environmental policy received particular attention in the Treaties starting from the entry

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<sup>419</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan), p. 76.

<sup>420</sup> Interview MS official, 13-6-2017.

<sup>421</sup> Interview MS official, 13-6-2017, Interview EU official, 7-6-2017.

<sup>422</sup> Interview MS official, 10-5-2017, Interview MS official, 7-10-2015.

<sup>423</sup> Interview EU official, 7-6-2017, Interview EU official, 13-6-2017, Interview MS official, 7-10-2015, Interview other societal stakeholder, 26-8-2015, Interview EU official, 9-4-2014.

<sup>424</sup> Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ 2012 C 83 and C 326/47).

into force of the Single European Act (1986) which introduced the idea of the Single Market. Some Member States were hesitant, as they feared that supranational environmental policies would result in the weakening of their own agendas in this area. However, the environmental powers were increasingly necessary and received significant attention in the 'slipstream' of trade policies<sup>425</sup>. The Union, or better the Community at that time, used the international attention for this topic from the Brundtland Commission and the concept of 'sustainable development' (1987) to become a part of the preparatory works for an international (UNFCCC) framework in 1992. It thus 'quickly developed an external dimension'<sup>426</sup> and 'considerably improved its leadership record' since then.<sup>427</sup> In parallel, the Maastricht Treaty (1992) introduced the principle of subsidiarity in the Treaties.<sup>428</sup> The international negotiations are clearly, 'by reason of scale', a shared competence area in which Member States are represented in UNFCCC separately, alongside the European Commission.

The absence of a clear reference to 'climate' in the catalogue of competences and the multi-faceted and all-encompassing international climate negotiations leave some room for (legal) arguments and manoeuvring. Some say that the policy field of environment and climate change constitutes a typical example of a *shared pre-emptive competence* within the sub-classification of shared competences.<sup>429</sup> This implies that both EU and Member State actors may engage in diplomatic relations with third (state) partners and international organisations, as long as EU action does not lead to a pre-emption of Member State initiatives and the principle of sincere cooperation (see next paragraph) is taken into account. Some are even of the opinion that climate change could be regarded as an 'exclusive' competence of the Commission.<sup>430</sup> The mere fact that the Commission does not conduct the negotiations by itself makes the latter claim far-fetched. Delreux (2006:236) is probably right in holding that 'In the field of EC external environmental policy, EC competences are 'most of the time shared'<sup>431</sup> and primarily mixed. This is evident from the signing of the climate agreements as a 'mixed agreement'.

The issue of competences in climate change negotiations could potentially spark political debate (and conflict). However, the interviews show that competences are not a primary issue during (internal and external) negotiations.<sup>432</sup> This 'silence on competences' is especially the case after 2011, when a major conflict on external representation was solved.<sup>433</sup> Sometimes competences would seem to be back on the table, especially when

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<sup>425</sup> Russo, E. (2017) 'Towards an Exclusive Competence of the EU to Conclude Climate Agreements?'. *European Foreign Affairs Review*, Vol. 22, No. 2, p. 203 even states that 'before the entry into force of the Single European Act the European Community concluded its international environmental agreements on the basis of an implicit external competence'.

<sup>426</sup> Lavenex, S. (2004) 'EU external governance in 'wider Europe''. *Journal of European Public Policy*, Vol. 11, No. 4, p. 691.

<sup>427</sup> Oberthür, S. and Roche Kelly, C. (2008) 'EU leadership in international climate policy: achievements and challenges'. *The International Spectator*, Vol. 43, No. 3, pp. 35-50.

<sup>428</sup> Art 5(3) TEU. Cf section 2.3.

<sup>429</sup> However, one could argue that the EU's legislative intervention is limited to *minimum* harmonization of environmental policy. Member States can lay down stricter legal norms to protect their public goods. Consequently, "the pre-emptive effect mentioned in Art. 4 (TFEU) does not actually take place, since the Member States can continue to legislate even in the domains covered by EU legislation, as long as they comply with the minimum norms laid down by the Union", Cf Claes, M. and De Wite, B. (2016) 'Competences: codification and contestation' in: Lazowski, A. and Blockmans, S. (Eds.) (2016) *Research Handbook on EU Institutional Law* (Edward Elgar Publishing), p. 58.

<sup>430</sup> Russo, E. (2017) 'Towards an Exclusive Competence of the EU to Conclude Climate Agreements?'. *European Foreign Affairs Review*, Vol. 22, No. 2, pp. 197-212.

<sup>431</sup> Delreux, T. (2006) 'The European Union in international environmental negotiations: a legal perspective on the internal decision-making process'. *International Environmental Agreements: Politics, Law and Economics*, Vol. 6, No. 3, pp. 231-248 DOI 10.1007/s10784-006-9015-1.

<sup>432</sup> Interview EU official, 30-5-2017, Interview MS official, 8-6-2017, Interview MS official, 14-6-2017.

<sup>433</sup> Council of the European Union (2011) General Arrangements for EU Statements in Multilateral Organizations, 16901/11, 24 October 2011. Available at << <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015901%202011%20INIT>>>. Accessed 19 November 2015.

there is an issue of giving 'support' to other (developing) countries by means of e.g. finance or capacity building, as these areas are not part of shared environmental competences.<sup>434</sup> The habit of leaving competences aside is consequently challenged every so often, but it is not a primary issue, and Member States and the EU work together *ad-hoc* in Team EU on the highly technical and complex UNFCCC texts. While some argue that the working arrangements with 'issue leaders' and 'lead negotiators' derive from the Treaty,<sup>435</sup> they are so peculiar/specific for climate change that the legal origins are then not so clear anymore.

#### 5.4.3 Negotiation mandate and external representation

While competences are not integral part of the internal discussion, the negotiation mandate for Team EU in climate negotiations could still be seen as the legal 'elephant in the room'. The Treaty is quite clear about the division of responsibilities in external representation. Article 17(1) ensures that the *European Commission* is responsible for external representation, with the exception of the Common Foreign and Security Policy (CFSP). The Council of the European Union and the Commission assisted by the High Representative of the Union for Foreign Affairs and Security Policy 'shall ensure the consistency' of EU's foreign policies and 'shall cooperate to that effect'.<sup>436</sup> One would thus expect the following steps to be followed in the scenario of a mixed agreement: a Recommendation by the Commission, followed by a Council Decision with negotiating directives and then European Commission (and Member State) representation.

The current 'negotiation mandate', however, does not strictly adhere to the rationale of the Treaty and differs, as a matter of fact, from all other policy areas, as there is not even an explicit mandate, besides that for European Council conclusions where unanimity is required. The European Council conclusions and strategies then form the basis for meetings of the Council of Ministers, such as the Environment Council or ECOFIN (economic and financial affairs). The Council Working Group WPIEI plays a considerable role by leading negotiations. The most 'atypical' feature of 'Team EU' in climate negotiations is probably the important external role attributed to the six-month Presidency of the Council of the European Union. As a result, one of the smallest Member States, Luxembourg, was coordinating and representing the EU in bilateral meetings with e.g. China and the United States during COP21 in Paris, France. While the 'pooling of expertise' argument (see section 5.2) is indeed strong, there are also disadvantages related to this peculiar arrangement. For instance, the (European) Council conclusions, i.e. the so called the 'negotiation mandate', freely circulate after adoption, which makes it easier for third parties to negotiate with the EU. Some hold that the Copenhagen conference failed due to the 'transparency' of the EU negotiation mandate and differences among Member States.<sup>437</sup> The peculiar negotiation mandate and the upgraded role of the Presidency are symptomatic of the fact that the rationale of the Treaty is not being followed. This may cause the use of infringement proceedings, which would logically start from the desks of the European Commission. However, infringement proceedings are often considered as politically risky, since they would lead to a standstill on the arrangement in question.

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<sup>434</sup> Development cooperation is a 'parallel' competence and a specific shared competence in which Member States keep autonomy. Finance is also covered in Art 192 TFEU (see above).

<sup>435</sup> Interview EU official, 9-4-2014.

<sup>436</sup> Art 21(3) TEU.

<sup>437</sup> See Russo, E. (2017) 'Towards an Exclusive Competence of the EU to Conclude Climate Agreements?'. *European Foreign Affairs Review*, Vol. 22, No. 2, pp. 197-212 and Meilstrup, P. (2010) 'The runaway summit: the background story of the Danish presidency of COP15, the UN Climate Change Conference'. *Danish Foreign Policy Yearbook 2010*, pp. 113-135.

#### 5.4.4 Court of Justice, regulations and directives: implied powers and the duty of sincere cooperation

The judge of the use of competences and legal competences within the EU is the Court of Justice of the European Union. While the internal division of competences is delineated in the Treaty, the *external* competences are not clearly established therein. Such identification is therefore largely based on decades of (pre-Lisbon) case law of the Court of Justice of the European Union. The Court favours the participation of the EU in international organisations as a way to exercise its competence, and the fluidity of competences in external relations has 'provided a fertile field for ingenious legal argument' over the interpretation of the Treaties.<sup>438</sup> With regards to climate change negotiations, the case law is relevant in relation to at least three aspects: implied powers, the principle of loyal cooperation and mixed agreements.

First, the case law on 'implied powers' provides that EU external competences exist because there are internal rules which form a legal basis to imply external competence.<sup>439</sup> Given the large amount of regulatory climate (and energy) packages adopted in recent years, one could infer that the Commission has the competence to represent the Union *and Member States* more substantially than in UNFCCC negotiations. For instance, the 2030 Energy and Climate package created targets in three key areas to achieve the above-mentioned goals: (1) a 40% cut in greenhouse gas emissions compared to 1990 levels; (2) at least a 27% share of renewable energy consumption and (3) at least 27% energy savings compared to the business-as-usual scenario.<sup>440</sup>

Secondly, even when Member States are not excluded from acting on an individual basis in international organisations due to their 'implied powers', they are still not entirely free to act as they see fit, since they have obligations, stemming from EU Law, such as the principle of loyal cooperation.<sup>441</sup> There is a feeling among Member State actors that they cannot 'colour outside the lines', as they have to work within the remit of Team EU in climate negotiations and cannot go below the level agreed in previous EU arrangements including the EU Climate and Energy Package.<sup>442</sup> Accordingly, one could argue that they use the principle of loyal cooperation, although they do not directly refer to case-law, but more to the cooperation code of conduct in Team EU.

The current procedure is definitely not following the logic of the Treaty and there are many reasons why a case could be initiated before the Court. However, the Commission may be of the opinion that the Member States in Team EU have so far been acting according to the principle of loyal cooperation and that the current (positive) cooperation in Team EU works better than the negative 'checks' of Member States in the WTO trade regime, where the EU has exclusive competences. Furthermore, climate change itself might be evaluated as too

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<sup>438</sup> Wouters, J., Odematt, J. and Ramopoulos, T. (2013) 'The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities. Legal Hurdles and Political Realities.' Leuven Centre for Global Governance Studies Working Paper, No. 121, p. 4.

<sup>439</sup> See Case 22/70, *Commission v. Council*, [1971] ECR 263 (ERTA) and Van Vooren, B. and Wessel, R. A. (2014) *EU external relations law: text, cases and materials* (Cambridge: Cambridge University Press), p. 105. Case C-246/07, *Commission v. Sweden (PFOS)* [2010] ECR 3317. See also Cremona, M. (2011). 'Case C-246/07, *Commission v. Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010'. *Common Market Law Review*, Vol. 48, No. 5, pp. 1639-1665.

<sup>440</sup> European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030' (Communication) COM (2014) 15 final.

<sup>441</sup> Art 4(3) TEU.

<sup>442</sup> Interview MS official, 3-4-2015, Interview EU official, 13-6-2017.

treacherous and too prominent of a topic to start an infringement procedure when compared to 'lighter' topics such as mercury, where the Commission dared to bring the conflict to the Court of Justice.<sup>443</sup> Alongside these legal reasons, there is the pragmatic argument that the procedure itself will take months of inter-service consultations. Despite having legally attributed competence to do so both in the Treaty and in case law, as suggested before there are often 'political' reasons why the Commission (or Member State(s) and the Council) do not start infringement proceedings against the atypical institutional arrangement of Team EU in climate negotiations or the use of mixed agreement. These 'political' reasons are evaluated in the following section.

## 5.5 Political issues and EU negotiation

The Team EU climate change regime is different from what one would expect when looking at legal competences. Indeed, the absence of legal clarity may lead to (perceived) political flexibility. Therefore, 'political' reasons might explain the conduct of EU and Member States negotiations at UNFCCC. As indicated before, the literature on actorness, cohesiveness and effectiveness points to intervening variables including the 'supranational versus intergovernmental dominance', 'preference heterogeneity' and the 'EU's position in the international constellation of power'. These explanations have been tested in the twenty interviews. The section ends with an exploration of alternative explanations such as the influence of other societal actors (e.g. private sector, CSOs), the influence of politicians and the legal background of the negotiators.

### 5.5.1 *Supranational versus intergovernmental dominance*

In the traditional institutional discussions between the Council and Commission the issue of competences and legal competences does not have a pivotal role, as indicated above. While many officials see the current state of play as 'unique' and 'peculiar', questioning the procedure from a legal perspective would be seen as a hostile act.<sup>444</sup> The many preparatory meetings in the Council working group WPIEI are time-consuming and lead to internal political discussions and extensive position papers, especially *before* the COP. These positions are adopted as a result of the work of lead negotiators and their institutional affiliation is, due to the 'Team EU' constellation, not questioned. The role of the Presidency within the Council is however difficult at times. However, the institutional 'turf battles' come together in Working Groups as large Member States expect a Member State-oriented Presidency while the Commission expects the Presidency to coordinate and not to be too interfering on substantial and technical UNFCCC-related issues covered by DG CLIMA. Interviews show that during the negotiations an enormous 'esprit de corps' takes place and almost every meeting is attended by both Member State and Commission representatives working together, or to be more negative, checking one another.<sup>445</sup> The European Parliament is less influential during the negotiations, as these are intergovernmental processes. However, in the preparatory phase the EP demands ambitious policies especially within the (leading) ENVI committee.

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<sup>443</sup> On this case, see De Baere, G. (2012) 'Mercury Rising: The European Union and the International Negotiations for a Globally Binding Instrument on Mercury'. *European Law Review*, Vol. 37, No. 5, pp. 640-655. Interview MS official, 7-10-2015, Interview EU official, 13-6-2017.

<sup>444</sup> Interview EU official, 13-6-2017, Interview MS official, 13-6-2017.

<sup>445</sup> Interview EU official, 13-6-2017, Interview MS official, 24-1-2014.

### 5.5.2 EU vs the rest of the world: the international negotiating environment

As it has been held by Van Schaik (2013), among others, the international negotiating context plays a large role in the EU and Member State 'Team EU' conduct at international climate negotiations.<sup>446</sup> This finding is consolidated by the interviews.<sup>447</sup> In general, after Copenhagen, the EU and Member States can be considered a cohesive team from an external perspective, both before and during the negotiations. During the UNFCCC COP meetings, these external negotiations (with third states) are conducted mostly by lead negotiators, and at times in parallel by bilateral Member State-third country meetings. When the Ministers and Commissioners enter the final stages of negotiations, this process is sometimes a bit less structured, but they remain part of a unitary team. Since the introduction of the 'Climate Diplomacy Action Plan',<sup>448</sup> the EEAS, Commission and Member States are coordinating their climate diplomacy in third countries in the preparatory phase. The EU and Member States have four general instruments they use to influence others: persuasion and diplomacy, issue linkage, financial assistance (aid) and trade benefits or (the threat of) trade measures and sanctions.<sup>449</sup>

As argued by Oberthür and Groen (2015:1326), the EU adopted an overall centric, moderately conservative position (as compared to the outlier ambitious position in Copenhagen) which helped to team up with other countries.<sup>450</sup> Nevertheless, the EU's engagement with strategic partners seems to be driven by a preference for an ambitious international climate deal. The EU worked together with the 'environmental integrity group' (e.g. Mexico, Switzerland, Korea), Small Island and Developing States, (parts of) the Umbrella Group (e.g. New Zealand, United States), AILAC (Latin American countries) and (in Paris) the former colonies of EU Member States, the African, Caribbean and Pacific (ACP) countries to form a 'High Ambition Coalition'.<sup>451</sup> In spite of these coalitions, some argue that the China-United States climate statement was more influential than EU diplomacy as a reason why the Paris Agreement was adopted. The EU is the third largest emitter and is therefore less influential than these two countries. Moreover, critics argue that the EU has more difficulties with the topics of climate adaptation and finance issues/means of implementation than mitigation, which is making the cooperation with the G77 (developing countries) more difficult.<sup>452</sup> Notwithstanding the fact that the EU played a role in the adoption of the Paris Agreement, the upcoming challenge of large economies such as the United States weakening the global climate deal could change the international negotiating environment, testing EU unity.

### 5.5.3 Preference heterogeneity

As indicated by the existing literature, 'preference heterogeneity' – in the sense of (the absence of) aligning interests – is considered a primary cause of EU and Member State

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<sup>446</sup> Van Schaik, L.G. (2013) *EU Effectiveness and Unity in Multilateral Negotiations: More Than the Sum of Its Parts?* (Basingstoke: Palgrave Macmillan).

<sup>447</sup> A.o. Interview EU official, 7-6-2017, Interview MS official, 14-6-2017.

<sup>448</sup> [http://ec.europa.eu/clima/news/articles/news\\_2016021601\\_en](http://ec.europa.eu/clima/news/articles/news_2016021601_en), accessed 23 December 2016.

<sup>449</sup> Van Schaik, L. and Kamphof, R. (2015) 'Now or never: using the EU's trade power as leverage for a climate deal in Paris'. Clingendael Policy Brief, November 2015.

<sup>450</sup> Oberthür, S. and Groen, L. (2015) 'The Effectiveness Dimension of the EU's Performance in International Institutions: Toward a More Comprehensive Assessment Framework'. *JCMS: Journal of Common Market Studies*, Vol. 53, No. 6, p. 1326.

<sup>451</sup> This High Ambition Coalition was started by a small group of developed and developing countries, but at the end of COP21 was 'ultimately more than 100 developing and developed member states strong' according to Christoff (2016: 774) in Christoff, P. (2016) 'The promissory note: COP 21 and the Paris Climate Agreement'. *Environmental Politics*, Vol. 25, No. 5, pp. 765-787. Interview EU official, 31-5-2017, Interview EU official, 7-6-2017, Interview MS official, 24-1-2014.

<sup>452</sup> Interview EU official, 14-10-2015.

negotiation behaviour. The interviews portray an environment where there is a general convergence on the topic of climate change, especially on the necessity to tackle climate change internationally.<sup>453</sup> On sub-issues, there are often one or two outliers, which makes it sometimes difficult to come to a unanimous decision. Most notably Poland had been critical about the (ambitious) EU position before COP21,<sup>454</sup> but in the end ranks were closed during the negotiations. One of the often-used explanations for the general (external) tendency towards cooperation is that the EU itself has the most ambitious climate policies, which makes it in the interest of all EU Member States to aim for a global ambitious climate deal.

While preference homogeneity was clear in the run-up to the negotiation of the Paris Agreement, there are at least two upcoming challenges. First, the new UNFCCC 'stocktake'<sup>455</sup> monitoring and reporting mechanisms on mitigation, adaptation and finance will most likely encourage the EU and its Member States to upgrade their NDC ambitions in the coming years to contribute to the global goal to stay within the 1.5 to 2 degrees temperature rise. Secondly, Brexit might have an effect on EU unity. When compared to many other policy areas, the British were fairly positive about EU climate policies and diplomacy and contributed with ambitious policies and many seconded national experts.<sup>456</sup> In addition, France and Germany were positive about EU action on this topic, but the balance might be shifted with a British exit from the EU. The question is whether the 'unanimity' requirement in this peculiar institutional arrangement would then not feel as a procedural milestone. Moreover, as indicated before, there is much more preference *heterogeneity* as well as procedural autonomy for Member States on related and more actual topics, such as climate finance, land-use, effort sharing and other means of implementation.

#### 5.5.4 Alternative explanations

While the issues analysed above definitely affect EU and Member State cooperation in climate change negotiations alongside (or beyond) legal considerations, the interviews t raised some additional factors . This section considers three of these factors.<sup>457</sup> First, as indicated in the literature there are many 'other societal stakeholders' that have been active in climate negotiations and EU decision-making and diplomacy in general. Among these, it is particularly relevant to mention private sector organisations and companies<sup>458</sup>, Civil Society Organisations (CSOs) and local authorities<sup>459</sup>. Many interviews indeed stress the growing importance of these stakeholders for example since the 2014 Lima Paris Action Agenda<sup>460</sup> or the large 'parallel' process of the 'Open Tent Zone' in which companies, CSOs and

<sup>453</sup> Interview EU official, 7-6-2017, Interview EU official, 30-5-2017, Interview MS official, 14-6-2017.

<sup>454</sup> Rettman, A. (2015) 'Poland vetoes CO2 targets on the eve of Paris visit' EU Observer, 28 October 2015. Available at <<https://euobserver.com/environment/130867>>> Accessed 10 December 2015.

<sup>455</sup> Article 14 of the Paris Agreement refers to this 'global stocktake' as follows: "The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake")." While the first 'stocktake' is scheduled for 2023 there will be an 'initial stocktake' known as the 'facilitative dialogue' already in 2018. United Nations Framework Convention on Climate Change (2015) Paris Agreement, [https://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_english.pdf](https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english.pdf), Accessed 13 December 2016.

<sup>456</sup> Government of the United Kingdom, 'Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change', 13 February 2014. Available at <<https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>> Accessed 12 May 2016.

<sup>457</sup> See also 'further research' for alternative paths.

<sup>458</sup> Andrade, J. C. S. and de Oliveira, J. A. P. (2015) 'The role of the private sector in global climate and energy governance'. *Journal of Business Ethics*, Vol. 130, No. 2, pp. 375-387.

<sup>459</sup> Kern, K. and Bulkeley, H. (2009) 'Cities, Europeanization and multi-level governance: governing climate change through transnational municipal networks'. *JCMS: Journal of Common Market Studies*, Vol. 47, No. 2, pp. 309-332.

<sup>460</sup> See e.g. UNFCCC website <<http://newsroom.unfccc.int/media/509508/lpaa-primer.pdf>> accessed 27 July 2017. Interview EU official, 14-10-2015, Interview MS official, 3-4-2015, Interview EU official, 30-5-2017, Interview MS official, 14-6-2017.

governments present their climate commitments and deliverables. Nevertheless, while this process helps to raise ambitions and awareness, the real UNFCCC negotiations still keep being an intergovernmental process following the UNFCCC rulebook.<sup>461</sup>

Secondly, the role of politicians becomes important especially during the UNFCCC COP negotiations. The Heads of State and their overwhelming presence during the negotiations in Copenhagen has been pinpointed as one of the explanations for its failure.<sup>462</sup> 'Team EU' has been falling apart despite a common negotiation mandate. In Paris (2015), the Heads of State were not active during the last days of the conference, but were instead mostly represented by environment ministers, aspect that to some has contributed to the result. There is considerable debate as to whether foreign affairs ministers and finance ministers could conduct the climate negotiations, but the practice is that environment ministers (and 'climate change' Commissioners) still take the lead during COP negotiations. The involvement of politicians in the final phase of the negotiations could explain why less attention is paid to legal processes.

Thirdly, while DG CLIMA is in the lead for the UNFCCC negotiations, other DGs are also interested and present. Additionally, Member States' Ministries of Foreign Affairs and Ministries of the Environment are active in UNFCCC negotiations. Interestingly, finance ministers and finance ministries are absent. These findings point to some divergence between the DGs/ministries, which seems to be more relevant than the preference heterogeneity between EU and Member States.<sup>463</sup>

## 5.6 Conclusion/Discussion

The main question addressed in this chapter has been the following: *How do legal competences affect EU and Member State coordination in negotiations at the UNFCCC?* As the objective of this study is to combine political and legal perspectives, the effect stemming from the division of legal competences is compared with recurrent 'political' issues, such as the 'supranational versus intergovernmental dominance', the EU's position within the international constellation of power and preference heterogeneity. This research is substantiated by a combination on the one hand of a review and analysis of literature, case law, legislation and additional policy documents and, on the other hand, of twenty semi-structured interviews with primarily EU and Member State officials at ranks ranging from (former) Ministers, lead negotiators and Heads of Delegation to policy officers and support staff. In addition, some other stakeholders were interviewed to add an external perspective.<sup>464</sup> The study focuses on the period from the adoption of the Lisbon Treaty (December 2009) to July 2017 including important UNFCCC Conferences of the Parties (COPs) such as Copenhagen (2009) and Paris (2015).

The coordination of the EU and Member State actors can be seen as a process of 'socialisation'. Team EU works a way that means that Member State officials are 'socialised' in a European manner due to the structure of cooperation with 'lead negotiators' and 'issue leaders'. This specific coordination is however not what one would expect on the basis of legal competences. The Treaties' division of competences would make one expect a large

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<sup>461</sup> Interview EU official, 30-5-2017, Interview MS official, 8-6-2017, Interview EU official, 13-6-2017.

<sup>462</sup> Interview MS official, 7-10-2015, Interview MS official, 3-4-2015, Interview other societal stakeholder, 14-11-2014.

<sup>463</sup> Interview EU official, 14-10-2015, Interview MS official, 8-6-2017, Interview EU official, 13-6-2017.

<sup>464</sup> See the annex for an (anonymised) overview of the interviews and chapter 3 for the methodological justification.

coordinating role for the European Commission in mixed competence external climate negotiations. However, the 'Team EU' approach in climate negotiations portrays a different picture that is contrary to the logic of the Treaty in multiple aspects. These include the disproportionate external relations impact of the six-month Presidency of the Council of the European Union, the peculiar 'negotiation mandate' based on (unanimous) Council conclusions, as well as the inadequate use of 'implied powers' in external representation, or limited external impacts of internal policies and legislation, contradictory to ERTA case law. There are thus ample grounds to start legal procedures against the current unique but unwieldy institutional arrangement of 'Team EU' in international climate change negotiations.

Despite the procedural arrangements that have the tendency to contravene legal practice and principles, 'political' considerations prevail allow these practices to continue the 'high politics' arena of climate action. The explanations often offered in other studies indeed could explain this situation. The institutional 'turf battles' seem to be restricted to the (internal) negotiation phase before the mass COP negotiations start. Further, within the international negotiating environment, the EU and its Member States have a fairly convergent preference for binding international climate deals on mitigation. The (legal) 'duty of loyal cooperation' has been mostly used in the conduct of international negotiations from 2011 and there is a *modus vivendi* not to discuss internal legal competences alongside the already very complex technical substantive UNFCCC texts.<sup>465</sup> The effect of the variables and explanations is visualised below in Figure 5.1.

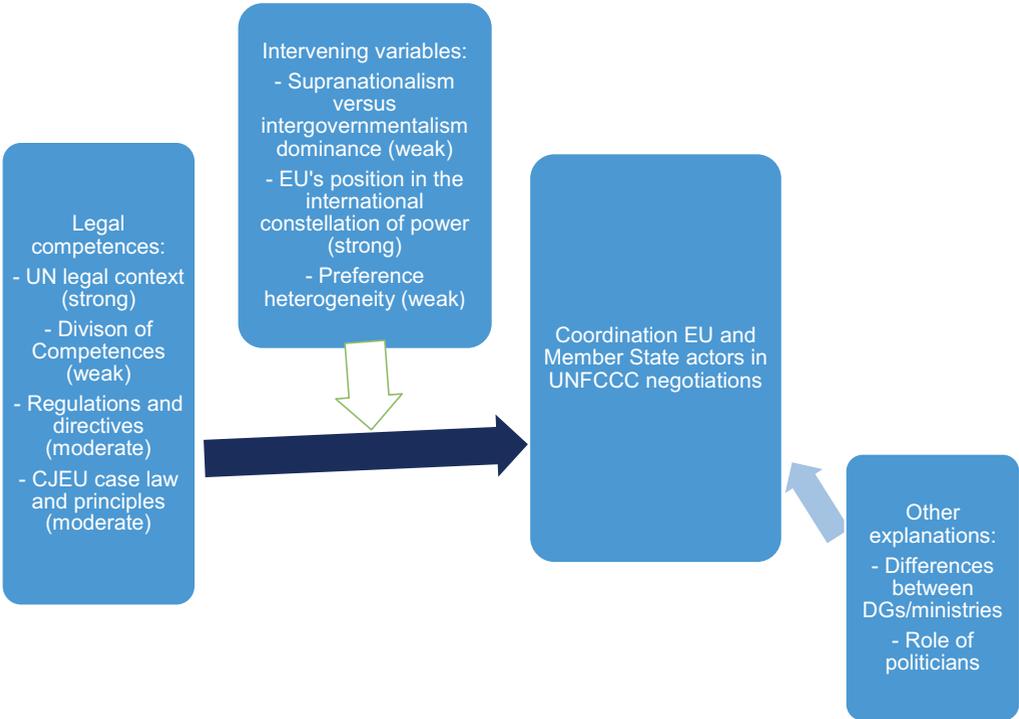


Figure 5. 1 Variables and effects on 'Team EU' coordination in UNFCCC negotiations

<sup>465</sup> Interview EU official, 30-5-2017, Interview MS official, 8-6-2017, Interview MS official, 14-6-2017.

With the adoption and ratification of the Paris Agreement there are many upcoming challenges that could spark the legal and political debate whether it is not more effective, efficient and closer to the Treaty logic and case law to grant the Commission a bigger role in this field. These upcoming challenges might change the status quo of the political factors that are now supportive of the Team EU process. These challenges include the upcoming UNFCCC 'global stocktake' of climate pledges, which most likely encourages the EU and Member States to raise their ambition on mitigation, adaptation and finance. Other challenges constitute the announced withdrawal from the Paris Agreement by the United States, which will likely change the international negotiating environment and probably affects internal EU unity. Furthermore, the British exit from the EU might have considerable effect on 'Team EU', due the UK's disproportionate input of expertise and the (almost unique) substantive convergence with other leading Member States on this specific topic. This balance of power might change with a British exit. Furthermore, the 'post-ratification' issues such as climate finance, effort sharing, energy mix and financial aid are more in the discretionary autonomy of the Member States than earlier top priorities like climate change mitigation, where the EU and Member States have a track record of collective goal-setting. That might affect the legal competence discussions in the future.

#### *Further research*

The results from this study can only be valued as 'plausibility probes' due to the experimental and pioneering nature of a combined legal-political study and the amount of semi-structured interviews. In that way this study provides interesting avenues for future research as it is acknowledged that the results and methodology needs further testing in other cases to become more robust.<sup>466</sup> As indicated, climate change negotiations are unique in the UN structure and the 'Team EU' approach with the large role of the Presidency is distinct from the approaches in other policy areas where the EU and Member States work together.<sup>467</sup> The officials and experts working on UNFCCC issues are rather isolated from other issues, working predominantly on climate action for at least five to ten years.<sup>468</sup> As such, this method could nevertheless be extrapolated to other policy areas. The idea of assessing the effect of the legal competences and to compare that with (other) 'political' factors such as (the absence of) institutional turf battles, the EU's position in the international constellation of power and preference heterogeneity could indeed lead to relevant cross-disciplinary findings that are largely absent in the literature.

With regards to the methodology, one could use other tools like surveys to assess the effect of legal competences. In addition, it could help to better integrate the 'external/international' dimension by involving officials from 'third countries' and discovering how they perceive the EU and the Member States' behaviour in 'Team EU' negotiations.<sup>469</sup> EU climate diplomacy currently appears to be dominated by 'inward-looking' scholars focused on internal EU procedures and rules. Delreux (2006) rightly states that "key to understand the negotiation

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<sup>466</sup> George, A. L. and Bennett, A. (2005) *Case studies and theory development in the social sciences* (Cambridge, Massachusetts: MIT Press).

<sup>467</sup> Interview MS official, 13-6-2017.

<sup>468</sup> Interview EU official, 31-5-2017, Interview MS official, 14-6-2017.

<sup>469</sup> Cf Parker, C. F., Karlsson, C. and Hjerpe, M. (2017) 'Assessing the European Union's global climate change leadership: from Copenhagen to the Paris Agreement'. *Journal of European Integration*, Vol. 39, No. 2, pp. 239-252. This survey "was principally focused on obtaining a strategic sample of the two largest and most important categories of COP participants, namely members of party delegations, such as negotiators and representatives of government agencies, and NGO representatives and researchers" to understand whether the EU was being perceived as a leader in climate change negotiations, p. 243.

behaviour of the EU on the international environmental scene is the domestic (EU) decision-making process'.<sup>470</sup> However, views and preferences of third parties such as BRICS or other Regional Integration Organisations might reveal relevant insights into the actual effects of EU and Member State negotiation behaviour during climate change negotiations.

In addition, one could conduct a more thorough assessment of other explaining factors that this study mentioned. The increasing standing of other societal stakeholders including the private sector, CSOs and local authorities is apparent during the UNFCCC COPs, but the effect on the traditional intergovernmental process, especially since the Paris Agreement and the Sustainable Development Goals (SDGs) is still under-theorised. Apart from this, the background of negotiators themselves might have an effect on the relevance of legal competences, as one would expect more attention to be paid to the division of competences by legally trained experts from federal Member States. One could in addition study the European External Action Service (EEAS), which seems to have garnered more thematic expertise after the adoption of the Global Strategy in 2016. Furthermore, 'high politics' events such as Trump's announced withdrawal from the Paris Agreement, the upcoming Brexit and President Juncker's "Scenarios on the Future of Europe"<sup>471</sup> might have a considerable impact, but it is most likely too early to investigate these issues.

#### SUMMARY CHAPTER 5

*The chapter identified how the allocation of competences, i.e. legal competences, affect EU and Member State actors in international UNFCCC climate change negotiations. This study, based on the review of documents, case law and twenty semi-structured interviews finds that the 'Team EU' approach in climate change negotiations does not coincide with the logic of the Treaty and the Court's case law in many aspects. The large role of the Presidency, a 'negotiation mandate' based on unanimous Council conclusions, and inadequate parallel external powers when compared to internal competences for the European Commission give the impression that legal competences are considered less important and that the Treaty and the Court's case law is often not used. In contrast, the UN legal context and UNFCCC statutes are having a strong effect on coordination alongside issues often-cited in the literature such as the EU's position in the international constellation of power and socialisation (here identified as part of the dependent variable, coordination). The Commission seems hesitant to criticise the current coordination process, because of the importance of unified EU external action on climate change for the EU's future. However, there are many upcoming challenges that could upgrade the relevance of (internal) legal competences.*

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<sup>470</sup> Delreux, T. (2006) 'The European Union in international environmental negotiations: a legal perspective on the internal decision-making process'. *International Environmental Agreements: Politics, Law and Economics*, Vol. 6, No. 3, p. 232.

<sup>471</sup> European Commission, 'White Paper on the Future of Europe: reflections and scenarios for the EU27 by 2025' [2017].