UCLPRESS

Europe and the World: A law review

Analysing shared competences in EU external action: the case for a politico-legal framework

Ries Kamphof[1,*] and Ramses A Wessel[2]

How to cite: Kamphof, R. and Wessel, R.A., 'Analysing shared competences in EU external action: the case for a politico-legal framework.' *Europe and the World*, 2018, 2 (*2*): 2, pp. 38–64. DOI: https://doi.org/10.14324/111.444.ewlj.2018.02

Published: 20 April 2018

Peer Review:

This article has been peer reviewed through the journal's standard double blind peer-review, where both the reviewers and authors are anonymised during review.

Copyright:

Open Access:

Europe and the World: A law review is a peer-reviewed open access journal.

*Correspondence: a.kamphof@fgga.leidenuniv.nl
[1] Leiden University, Netherlands and Clingendael Institute, Netherlands
[2] University of Twente, Netherlands

 DOI: https://doi.org/10.14324/111.444.ewlj.2018.02.

Analysing shared competences in EU external action: the case for a politico-legal framework

*Ries Kamphof and Ramses A Wessel**

1. Introduction

Over the past decade, the representation and performance of the European Union in international institutions in particular have been on the agenda of academics and practitioners alike.[1] The widespread 'representation battle' about the issuing of statements in 2011 at the United Nations is emblematic. Several dozen EU statements in the UN were blocked for a couple of months over deep disagreement, not on content but on the mere symbolic issue of who 'delivers' the statement: 'the EU' or 'the EU and its Member States' in the United Nations. Internally, this issue was (only partly) solved by agreeing on a guideline

* Ries Kamphof is a PhD candidate, Leiden University, Faculty of Governance and Global Affairs and Associate Fellow, Clingendael Institute; Ramses A Wessel is Professor of International and European Law and Governance, University of Twente.

1 Sebastian Oberthür, Knud Erik Jørgensen and Jamal Shahin, *The Performance of the EU in International Institutions* (1st edn, Routledge 2013); Knud Erik Jørgensen (ed), *The European Union and International Organizations* (Routledge 2009); Joachim A Koops and Gjovalin Macaj (eds), *The European Union as a Diplomatic Actor* (Springer 2014); Edith Drieskens and Louise G Van Schaik (eds), *The EU and Effective Multilateralism: Internal and External Reform Practices* (Routledge 2014); Thomas Gehring, Sebastian Oberthür and Marc Mühleck, 'European Union Actorness in International Institutions: Why the EU is Recognized as an Actor in Some International Institutions, but Not in Others' (2013) 51(5) JCMS 849 and Eugénia da Conceição-Heldt and Sophie Meunier, 'Speaking With a Single Voice: Internal Cohesiveness and External Effectiveness of the EU in Global Governance' (2014) 21(7) JEPP 961. For a legal approach see Christine Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing 2015) and Ramses A. Wessel and Jed Odermatt (eds), *Research Handbook on the EU's Engagement with International Organisations* (Edward Elgar Publishing 2018; forthcoming).

for 'general arrangements for EU statements'.[2] The UN-representation saga is symptomatic of the difficulties that both EU and Member States actors experience more generally in international organizations and at international conferences.

In a similar vein, debates on the conclusion of international agreements show that the post-Lisbon external relations regime has remained unclear as far as the exact competence division is concerned. This often leaves the Court of Justice of the European Union (CJEU) to decide on the line of demarcation between EU and Member State external competences. Recent examples include Opinion 2/15 on the EU–Singapore Free Trade Agreement (related to the scope of foreign direct investment) and Opinion 3/15 on the Marrakesh Treaty (related to the question of EU exclusive competence in the area of the copyright of published works for persons with reading disabilities).[3] In the case of the EU–Singapore Agreement, on 21 December 2016 Advocate General (AG) Sharpston argued that the Agreement can only be concluded by the European Union and the Member States acting jointly.[4] Whereas the Commission argued that the Agreement could be concluded as an 'EU-only' agreement, the AG points to a number of elements in the Agreement in relation to which the EU lacks an exclusive competence. At the same time, it is clear that the choice for 'mixity' is not always purely legal. As openly phrased by EU Trade Commissioner Cecilia Malmström in relation to the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA): 'From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence. However, the political situation in the Council is clear, and we understand the need for proposing it as a "mixed" agreement, in order to allow for a speedy signature.'[5]

These discussions are driven by (legal) competence divisions and (political) power relations. It is no secret that in Member States the idea is gaining momentum that the EU gradually takes over competences

2 Council of the European Union, 'General Arrangements for EU Statements in Multilateral Organizations', 15901/11 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015901%202011%20INIT>.

3 Respectively, Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/15), 3 November 2015, 2015/C 363/22, OJ C 363/18 and Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 3/15), 21 September 2015, 2015/C 311/15, OJ C 311/13.

4 Opinion 2/15 of AG Sharpston, 21 December 2016; ECLI:EU:C:2016:992.

5 European Commission press release, 'European Commission proposes signature and conclusion of EU–Canada trade deal', Strasbourg, 5 July 2016 <http://europa.eu/rapid/press-release_IP-16-2371_en.htm>.

that were originally envisaged to remain with the Member States.[6] The issue of the division of competences between the EU and its Member States is a delicate question, which is often brought back to either diminishing the 'creeping' competences of the EU or – instead – supporting the notion of a 'single voice'.[7] These approaches around the 'single voice mantra' correlating EU unity and EU influence[8] are traditionally popular in political EU studies but do not seem to do justice to the complexities of everything that can be placed under the heading 'shared competences'. After all, most EU external relations are not characterized by 'exclusivity' and the number of areas in which the EU can act without the Member States are in fact limited.[9] A quick look at the international agreements concluded by the EU since the entry into force of the Lisbon Treaty reveals that the large majority of them are constructed as mixed agreements.[10] This implies that in most of its external relations, the EU and its Member States will not only have to find a way to work together, but they will also have to explain to the rest of the world that in most cases the political hassle originates from legal complexities that are part and parcel of the EU's set-up.

Traditionally, this multifaceted problem of political hassle around legal competences is still largely studied from single academic perspectives, leaving both academic disciplines with a number of unanswered questions. While a certain level of attention for policy and politics in legal scholarship is visible in the writings of colleagues,[11] mutual literature references in legal and political research on EU external action remain scarce. The present authors believe that more insight

6 Government of the United Kingdom, 'Review of the Balance of Competences between the United Kingdom and the European Union: Foreign Policy', 22 July 2013, available at <https://www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences>.

7 Mark A Pollack, 'The End of Creeping Competence? EU Policy-making since Maastricht' (2000) 38(3) JCMS 519.

8 Macaj and Nicolaidis, 'Beyond "one voice"? Global Europe's Engagement with its Own Diversity' (2014) 21(7) JEPP 1067, 1067.

9 Bart van Vooren and Ramses A Wessel, *EU External Relations Law: Text, Cases and Materials* (CUP 2014) 99.

10 International agreements can be found in the EU Treaty Database. See more extensively: Guillaume Van der Loo and Ramses A Wessel, 'Legal Effects of the Non-Ratification of Mixed Agreements' (2017) 54(3) CMLR 735.

11 Examples in EU external relations law include Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Asser Press 2012), as well as the prolific writings of Marise Cremona, including her 'A Reticent Court? Policy Objectives and the Court of Justice' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Hart Publishing 2014) and 'External Relations and External Competence: the Emergence of an Integrated Policy', in G de Búrca and P Craig (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).

can be generated when findings in political theory are more clearly combined (and/or confronted) with legal analyses. Over the years, calls for more cross-disciplinary research may be found in both legal and political science contributions on the role and functioning of the EU in international institutions.[12] We believe that empirical insight in the daily practice of the use of shared competences by the EU and its Member States at international institutions[13] such as the United Nations could add to the existing body of knowledge by not only focusing on the formal division of competences but also on the more practical power relations 'on the ground'. Legal rules by themselves do not guarantee a preferred outcome, while political performance often relies on existing legal competences and a subsequent division of powers. A more integrative analytical framework may help us in further combining legal and political considerations.

This paper aims to make the case for such an integrative framework to analyse the use and effect of EU shared competences in international institutions by combining legal and political perspectives. We use the substance of the policy area of climate change to provide relevant practical information. The main question to be answered is 'which factors should form part of an "integrative" legal-political analysis of shared EU and Member State external action?'

This contribution is structured as follows. After exploring the state of the art of legal and political theory on the nexus between the EU and international organizations and shared (external) competences, a preliminary application of both political and legal findings on the well-documented policy area of climate change is shared. The state of the art and first findings lead to the basic elements and building blocks of what could become an 'integrative analytical framework' of EU external action in policy areas of shared competence. We will also point to challenges and limitations of such an integrative approach. The article concludes by suggesting avenues for future research.

12 Knud Erik Jørgensen and Ramses A Wessel, 'The Position of the European Union in (Other) International Organizations: Confronting Legal and Political Approaches' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011), 261; Lisanne Groen and Arne Niemann, 'The European Union at the Copenhagen Climate Negotiations: a Case of Contested EU Actorness and Effectiveness' (2013) 27(3) IR 308, 320 and Sebastian Oberthür and Lisanne Groen, 'The Effectiveness Dimension of the EU's Performance in International Institutions: Towards a More Comprehensive Assessment Framework' (2015) 53(6) JCMS 1319.

13 We use 'international institutions' rather than 'international organizations' so as to be able to include not only formal international organizations (such as the UN) but also related processes such as the UNFCCC (the UN Framework Convention on Climate Change, a Treaty-based process with the Conference of the Parties as a formal Treaty-based body).

2. State of the art: legal and political approaches to EU external performance

To allow us to make a case for a more integrated approach, this section encompasses the state of the art of literature on the connection between formal provisions and (informal) practices in EU policy-making and in EU external relations. After briefly revisiting the categories of shared external competences, the autonomy of the EU and Member State actors is assessed on the basis of the prevailing literature on EU actorness and effectiveness. The main purpose of the present section is to try and highlight a number of themes in the study of both disciplines that are mutually relevant, despite the fact that they are usually not taken into account by the other discipline.

2.1 A clear legal framework?

In legal scholarship on EU external action, the notion of competences is key. The nuanced approach to competences, and in particular to shared competences, as developed in legal doctrine is hardly visible in political science studies on similar topics, irrespective of the explanatory value of this nuanced approach. Among lawyers it is a truism that, as a legal principle, the EU only has the competences conferred upon it by the Treaties.[14] In an 'ever closer union' the EU and its Member States share competences on nearly every issue of European political life, as the competences that are exclusively in the hands of the Union are limited.[15] The Treaties contain a quite precise catalogue of competences spelling out the different types of EU competences:[16]

- exclusive competences, where only the Union has legislative power;[17]
- shared competences, where both the Union and the Member States have legislative power;[18] and

14 Article 5 TEU.
15 Article 3 TFEU, compare with Pollack (n 7) 519.
16 Article 2 TFEU.
17 Article 3 TFEU, e.g. common commercial policy, monetary policy for eurozone Member States, customs union.
18 Article 4 TFEU, e.g. internal market, environment, transport, energy, consumer protection.

- supportive competences, where the Union can support, coordinate or supplement the actions of Member States, but cannot supersede the competence of Member States in that policy area.[19]

Competences in the area of the common foreign, security and defence policy are not further defined, apart from the acknowledgement that the Union does enjoy a competence in that area.[20] Yet, the Treaty context makes clear that competences in this area are shared between the Union and its Member States, allowing them – at least to a certain extent – to act in parallel.[21]

At the same time, practice reveals that, in relation to shared competences in particular, it remains difficult to define the exact division of competences between the EU and its Member States. Part of the problem is that 'shared competences' is a broad category and it is particularly the nuances that may also be helpful for political science studies to allow for a better understanding of the different situations of EU external performance. Four sub-categories of shared competences have been said to provide a more nuanced picture of the possible competence divisions between the EU and its Member States.[22] The first category contains *shared pre-emptive competences*, where Member State action is only excluded if the EU has already taken action on the issue. Second, in the case of *shared non-pre-emptive competences* Member State action is not excluded as long as the EU has not fully deployed a policy field. Third, *shared competences in case of minimum Union standards* are identified, where Member States can adopt more stringent measures. Fourth, as we have seen, *shared competence in the field of foreign and security policy* can perhaps best be categorized as 'parallel' competences. We believe that for an analytical framework it is important to differentiate between these different sub-categories as they may all – in their own way – have an impact on the performance of the EU and its Member States in international institutions, in particular since they restrain Member State action in different ways.

With a view to the present article's aim to assess the functioning of shared competences in the context of international organizations and conferences, it is important to recall that these days, several EU Treaty provisions provide a solid basis for the Union to establish a formal

19 Article 6 TFEU, e.g. industry, culture, civil protection, tourism.
20 Article 2(4) TFEU.
21 Compare with article 24(2) TEU as well as van Vooren and Wessel (n 9) 347.
22 ibid 99, 102.

and substantive presence in international organizations.[23] This has certainly strengthened the EU's 'international actorness' and confirms the separate legal status of the EU alongside its Member States.[24] Whereas in political science scholarship the distinction between the Union and its members is seen as less relevant (references to the 'EU28' or earlier to the 'EU15' often simply intend to point to the 'block' of EU institutions and Member States), from a legal perspective the distinction between the European Union as an international organization of which states can be members, and the (Member) States themselves remains essential.

A consolidation of external policies was clearly foreseen by the Lisbon Treaty, which, as held by some observers, now 'makes Brussels the "key locus" of European external action'.[25] Yet the above-mentioned unclear external division of competences has led legal scholars to regard the external relations codification of the Lisbon Treaty as 'rather unsatisfactory' or they stress its 'fuzziness'.[26] Authors even expressed the opinion that the Lisbon Treaty 'failed in external competences' as there is a need to resort to decades of pre-Lisbon case law from the CJEU to establish whether Member States are 'pre-empted' to act externally, meaning that their traditional international competences are restrained because of EU policies or initiatives.[27] The fluidity of competences in external relations has 'provided a fertile field for ingenious legal argument' over the interpretation of the Treaties before and after the Lisbon Treaty and the extensive case law of the CJEU on external relations only testifies to that.[28] At the same time, a lack of legal clarity offers room for political flexibility.

The final adjudicator of the use of competences in the EU is the CJEU. While for EU external relations lawyers the CJEU has been the central institution, it has often been overlooked by political scientists. In

23 Articles 220 and 221 TFEU *juncto* Articles 3(5) and 21(1) TEU. See, more extensively, Ramses A Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions', in Oberthür, Jørgensen and Shahin (n 1) 23.

24 Article 47 TEU.

25 Sophie Vanhoonacker and Karolina Pomorska, 'The European External Action Service and Agenda-Setting in European Foreign Policy' (2013) 20(9) JEPP 1316, 1322.

26 van Vooren and Wessel (n 9) 99, 110 and Christophe Hillion and Ramses A Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?' (2009) 46(2) CMLR 551, 586.

27 Marcus Klamert, 'New Conferral or Old Confusion? The Perils of Making Implied Competences Explicit and the Example of the External Competence for Environmental Policy' (2011) CLEER Working Paper no 6.

28 John Vogler, 'The European Union as an Actor in International Environmental Politics' (1999) 8(3) EP 24, 30. See also van Vooren and Wessel (n 9).

a way, the CJEU may seem to have been helpful in relation to the participation of the EU in international institutions as a means to exercise its competence.[29]

At the same time, the CJEU's case law also underlines that the division of competences is not clear-cut and that lawyers may not always provide *a priori* answers. Thus, we have seen that there are external effects of an internal use of competences by the EU: Member States may be barred from entering international agreements or international negotiations by themselves as some elements may fall within the (*de facto* exclusive) competences of the Union.[30] And, on more than one occasion, the CJEU has used the 'principle of sincere cooperation' to point out that Member States are no longer completely free to engage in international activities.[31] The controversies reflected in the recent and pending cases on the scope of the EU's external competences, referred to in the Introduction to this paper, only testify to the idea that issues are far from settled, again leaving scope for political interpretations and an influence of findings in political studies.

2.2 A political perspective: EU actorness, cohesiveness and effectiveness

Indeed, the absence of legal clarity often leads to a (perceived) political flexibility. The concepts of actorness, cohesiveness and effectiveness traditionally drive the political theoretical perspective on EU external action, and we will shortly address all three concepts with a view to recent and ongoing debates on this in the relevant literature. There is a vast literature on the EU as an 'effective' actor in international institutions. This strand of literature focuses especially on more clear-cut EU-led or instead Member State-led policy areas, respectively global economic governance and Common Foreign and Security Policy.[32]

29 Jan Wouters, Jed Odermatt and Thomas Ramopoulos, 'The EU in the World of International Organizations: Diplomatic Aspirations, Legal Hurdles and Political Realities' (2013) Leuven Centre of Global Governance Studies Working Paper no 121, 4. See Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741, para 5 and Opinion 1/94 Agreement establishing the World Trade Organization [1994] ECR I-5267.

30 See Case 22/70, *Commission v Council* [1971] ECR 263 (ERTA).

31 Particularly illustrative is Case C-246/07, *Commission v Sweden (PFOS)* [2010] ECR 3317. See more extensively for instance Marise Cremona, 'Case C-246/07, *Commission v Sweden (PFOS)*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2010' (2011) 48(5) CMLR 1639.

32 Andreas Dür and Hubert Zimmerman, 'Introduction: the EU in International Trade Negotiations' (2007) 45(4) JCMS 771. Sophie Meunier, *Trading Voices: the European Union*

This may explain the absence (to a large extent) of approaches dealing with the sharing of competences. This does not mean that the relationship between the Union and its Member States has as such not been the subject of political studies. The debates between scholars that see the Member States as the primary driving force of EU integration (intergovernmentalism) and those that claim that it is in particular supranational agents that are pushing the integration process forward (supranationalism) are well known and remain the source of the 'most important and persistent schism in the EU integration literature'.[33]

The actorness literature is particularly relevant in our context as it shows clear references to legal competences, albeit that the main focus is on more 'informal' strategies and actions and 'effectiveness' of EU external action than on formal competences.[34] A landmark article on actor capacity is written by Jupille and Caporaso, who identify four dimensions of actorness: authority, autonomy, external recognition and internal cohesiveness.[35] Authority refers to the extent of delegated competences from the Member States to the EU, which 'can take many different shapes and varies greatly by policy area'.[36] The delegation of authority can be formal, resulting from Treaty articles, or it can be informal, resulting from spill-over in practice. This way of seeing authority operating 'beyond competences' is echoed by more scholars. Vanhoonacker and Pomorska argue that important sources of authority are 'not only the legal competences of an actor but also the expertise in a particular issue'.[37]

---

in International Commercial Negotiations (Princeton UP 2005). Alasdair R Young, 'The Rise (and Fall?) of the EU's Performance in the Multilateral Trading System' (2011) 33(6) JoEI 715. Karen E Smith, *European Union Foreign Policy in a Changing World* (2nd edn, Polity Press 2013).

33 Stijn Billiet, 'Principal-agent Analysis and the Study of the EU: What about the EC's External Relations?' (2009) 7(4) CEP 435.

34 A recent overview of the actorness concept from 1970–2015: Edith Drieskens, 'Golden or Gilded Jubilee? A Research Agenda for Actorness' (2016) 24 JEPP.

35 Joseph Jupille and James A Caporaso, 'States, Agency and Rules: the European Union in Global Environment Politics' in Carolyn Rhodes (ed), *The European Union in the World Community* (Lynne Rienner 1998), 213. Charlotte Bretherton and John Vogler in 'Conceptualizing Actors and Actorness' in *The European Union as a Global Actor* (Routledge 2006), see that the EU's ability to act on the world stage depends on the notions of presence, opportunity and capability (internal context of EU action) but these broad concepts are 'rather vague' and operationalization is difficult according to da Conceição-Heldt and Meunier (n 1) 964. That is why we specifically focus on Jupille and Caporaso's 1998 article.

36 da Conceição-Heldt and Meunier (n 1) 961 and Jupille and Caporaso (ibid) 213.

37 Vanhoonacker and Pomorska (n 25) 1319.

The second dimension of actor capacity is 'autonomy', which refers to the institutional distinctiveness and independence of an actor from other actors.[38] An international organization like the EU should have 'a distinctive institutional apparatus, even if it is grounded in, or intermingles with, domestic political institutions'.[39] The 'autonomy' concept, which is also visible in many legal studies,[40] is also evident in the principal-agent theory in which the 'agent' (mostly the European Commission) is able to make decisions and negotiate on behalf of the principal(s), the Member States. Therefore, in the principal-agent institutionalist theory approach, the EU is recognized as a separate, (partly) autonomous actor and could also pursue its own interests in world politics.[41] Until now, principal-agent theory has been essentially used in policy domains with exclusive EU competences such as trade policy.[42] Furthermore, principal-agent theory seems more oriented towards internal control mechanisms than enabling cooperation towards external actors. Opportunities are especially seen in the external context, not internally.[43]

The third dimension of actorness is the recognition by others. It is seen as 'the *sine qua non* of global actorhood', understood as acceptance of and interaction with the entity by others.[44] The legal dimension is clear because recognition can be *de jure* and *de facto*. *De jure* recognition is seen as diplomatic recognition under diplomatic law and formal membership of international organizations. *De facto* recognition of the EU is given whenever third parties decide to interact with the EU and thus implicitly recognize it as an international actor.[45] Similar to 'authority', recognition is thus based on both formal and informal notions.

---

38 Jupille and Caporaso (n 35) 213. See also Labinot Greiçevci, 'EU Actorness in International Affairs: the Case of EULEX Mission in Kosovo' (2011) 12(3) PoEPaS 283.

39 ibid 217.

40 See recently and for references to earlier literature Tamas Molnár, 'The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States' (2015) 3 HYILEL 433.

41 Stephen A Ross, 'The Economic Theory of Agency: the Principal's Problem' (1973) 63(2) TAER 134. Darren Hawkins, David A Lake, Daniel L Nielson and Michael J Tierney, 'Delegation under Anarchy: States, International Organizations, and Principal-agent Theory' (2006) 3 DAIO 27 and Xi Jin and Madeleine O Hosli, 'Pre and Post Lisbon: European Union Voting in the United Nations General Assembly' (2013) 36(6) WEP 1274.

42 Andreas Dür and Manfred Elsig, 'Principals, Agents and the European Union's Foreign Economic Policies' (2011) 18(3) JEPP 323.

43 Bretherton and Vogler (n 35). Bretherton and Vogler also point out that 'opportunity denotes the external environment of ideas and events – the context which frames and shapes EU action or inaction' (p 24).

44 Jupille and Caporaso (n 35) 213, 214–15.

45 ibid, and da Conceição-Heldt and Meunier (n 1) 965.

The fourth dimension of actor capacity, internal cohesiveness, is related to the well-known debate on a 'single voice' of the EU and the Member States and the related effectiveness. It entails that Member States neither undermine nor overrule the collective position to be defended with a single voice, even if they disagree with it.[46] Cohesiveness is an even more demanding concept than 'one voice' because it requires the authority of such voice, external recognition and autonomy from Member States[47] and follows a logical sequential order with these other dimensions.[48] Recently, however, this has become subject to debate in political science. Some even ask the question whether a common position is necessary at all for the EU to be an effective actor.[49] With this in mind, cohesiveness might even 'diminish the EU's bargaining power, efficiency and flexibility'.[50] Earlier political literature already suggests that a certain disunity can occasionally be a source of strength, used as a bargaining chip in international negotiations.[51] For the purpose of the present article, it is worthwhile to note that the operationalization of the concept of cohesiveness is very much driven by formal competences. Da Conceição-Heldt and Meunier, for example, choose to simply use the formal rules of decision-making to operationalize the concept of internal cohesiveness, which means that internal cohesiveness is highest in the case of 'exclusive competences' and 'medium' in case of shared competences.

The 'single voice' debate is also visible in the growing literature on *effectiveness* where the EU is seen as a (collective) actor. 'Common wisdom' suggests that the higher the cohesiveness the higher the effectiveness, but a variety of policy areas suggests that the relationship, if it exists, is more complex.[52] External effectiveness refers to the actors' ability to realize the goals they set for themselves.[53] The concept of effectiveness traditionally assumes a positive and direct correlation between the degree of internal cohesiveness and the EU's external effectiveness.[54]

---

46 da Conceição-Heldt and Meunier (n 1) 966.
47 Macaj and Nicolaidis (n 8) 1069.
48 Jupille and Caporaso (n 35) 213.
49 Macaj and Nicolaidis (n 8) 1070.
50 da Conceição-Heldt and Meunier (n 1) 970.
51 Thomas C Schelling, *The Strategy of Conflict* (Harvard UP 1960/1980); Robert D Putnam, 'Diplomacy and Domestic Politics: the Logic of Two-level Games' (1988) 42(3) IO 427.
52 da Conceição-Heldt and Meunier (n 1) 969.
53 Amitav Acharya and Alastair Iain Johnston (eds), *Crafting Cooperation: Regional International Institutions in Comparative Perspective* (CUP 2007).
54 Katie Verlin Laatikainen and Karen E Smith (eds), *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave 2006). Louise van Schaik, *EU Effectiveness*

Recently, however, a second wave of scholarship has actively started to question the causal link between actorness, cohesiveness and effectiveness, most likely due to the ineffectiveness of EU external action since the Lisbon Treaty.[55]

Like cohesiveness, effectiveness is increasingly seen not as a binary measure but as a continuum. As held by Niemann and Bretherton, effectiveness has historically been 'notoriously difficult to analyse and assess'.[56] This has largely to do with the fact that the concept of effectiveness has traditionally been equated with goal achievement. Recent contributions have been looking more closely at the input and process side instead of 'only' the outcomes.[57] Oberthür and Groen already see a scope for further investigating their assessment framework of effectiveness components by embedding it in a broader explanatory framework including 'additional' internal factors such as mixity of competences, coordination arrangements under the Lisbon Treaty and the external institutional context.[58] This conceptual framework could also serve as a basis for a broader comparative research programme across policy fields.[59] Earlier, also Van Schaik (2013) expected EU competence to substantially affect the Union's actorness and effectiveness in negotiations, while paying attention to the international negotiating context.[60]

2.3 Confronting legal and political theories

Our brief overview of the prevailing legal and political insights into the EU's potential to act globally alongside its Member States underlines what some others have found before: while legal and political theories on EU and Member State actors in international negotiations contain insights that are mutually helpful for both disciplines, they are hardly

and Unity in Multilateral Negotiations: More than the Sum of its Parts (Palgrave Macmillan 2013).

55 Daniel C Thomas, 'Still Punching Below its Weight? Coherence and Effectiveness in European Union Foreign Policy' (2012) 50(3) JCMS 457; Arne Niemann and Charlotte Bretherton, 'EU External Policy at the Crossroads: the Challenge of Actorness and Effectiveness' (2013) 27(3) IR 261; Tom Delreux, 'EU Actorness, Cohesiveness and Effectiveness in Environmental Affairs' (2014) 21(3) JEPP 1017.

56 Niemann and Bretherton (n 55) 261.

57 Iulian Romanyshyn, 'Explaining EU Effectiveness in Multilateral Institutions: the Case of the Arms Trade Treaty Negotiations' (2015) 53(4) JCMS 875.

58 Oberthür and Groen (n 12).

59 Sebastian Oberthür and Lisanne Groen, 'Explaining Goal Achievement in International Negotiations: the EU and the Paris Agreement on Climate Change' (2017) 24 JEPP.

60 van Schaik (n 54).

confronted or combined.[61] While this generalization does not do justice to studies using a more 'law in context' approach, mainstream legal scholars do have a tendency to focus on 'formal' Treaty provisions and on case law with a view of establishing the correct division of competences between the EU and its Member States or between the institutions.[62] Political theories, while even less generalizable, are more oriented towards power and less towards the legal competence behind this power. And, as we all occasionally experience, it is indeed difficult for one academic discipline to contribute to debates in the other. Interdisciplinary academic workshops not infrequently underline that lawyers and political scientists simply raise and study different questions, despite the fact that the overall answer they are looking for may be similar.

Indeed, as underlined by our short literature overview, the different disciplinary perspectives remain obvious. Where formalities are a key element in legal studies, they are far less important in a political perspective. The essence of an empirical analysis is more on 'informal' strategies and action. In addition to the formal rules on decision-making and representation, analysts 'need to consider the informal behaviour of actors when determining the degree of internal cohesiveness of the EU in a particular external setting'.[63] Some even state in this regard that the formal status 'plays an inferior role' in actor capability.[64]

At the same time, our short analysis of the debates on actorness, cohesiveness and effectiveness reveals the sometimes invisible links between the various approaches, especially in more 'institutionalist' political theories. In analysing EU actorness and cohesiveness, the competence division is often part of and sometimes even driving the empirical analysis. As a result, policy areas characterized by shared competences almost automatically fall into 'medium' categories with moderate and impractical recommendations. Empirical analyses related to the concept of actorness often do not 'allow to separate EU and Member State action'.[65] Admittedly, also from a legal perspective the 'in-between' category of shared competences is often overlooked; the

61 Tom Delreux, 'The European Union in International Environmental Negotiations: a Legal Perspective on the Internal Decision-Making Process' (2006) 6(3) IEA:PLaE 231; Jørgensen and Wessel (n 12) 261.
62 Jørgensen and Wessel (n 12) 285.
63 da Conceição-Heldt and Meunier (n 1) 967.
64 Gehring, Oberthür and Mühleck (n 1) 849.
65 Drieskens (n 34) 6; Gehring, Oberthür and Mühleck (n 1) 849.

focus is often on exclusivity. Yet it is the broad category of shared powers where legal factual answers increasingly fall short in explaining what happens in practice. In these policy areas a combination of analysing formalities, case law *and* informal strategies would add to both new academic insights, and perhaps even to more effective diplomacy. It is especially in these policy areas that the current academic silos are problematic and a confrontation of legal and political perspectives would be helpful. The practical and well-documented example of EU climate negotiations in the next section points to the necessity of an integrative analytical framework.

A final bridge between legal and political studies on EU external relations may be found in the attention both disciplines pay to 'institutions' and 'institutionalization'. The notion that 'institutions matter' is fundamental to the approach in both many political science and legal approaches. Indeed, this may very well be one of the 'nodal points' where law and politics are closely intertwined.[66] One clear example is formed by institutionalist explanations of the existence of external powers. The idea that the 'modes and effects of external governance are shaped by internal EU modes of governance'[67] is echoed in more legalistic contributions, where – in a way and perhaps ironically – EU *external* relations law is largely about an *intra*-EU competence division.

3. An empirical starting point: political and legal perspectives on EU climate negotiations

This third section aims to assess the above introductory mapping exercise on potential areas of mutual interest from a practice perspective. On the basis of a combination of existing literature, treaty provisions, case law and some findings from semi-structured interviews, we will focus on one particular policy area of EU external action which is defined by a shared competence: climate change. Using findings from both political and legal perspectives on EU external action at the United Nations Framework Convention on Climate Change (UNFCCC), we aim to formulate the basis for an integrative politico-legal analytical framework on the use of EU shared competences at international institutions.

66 Jørgensen and Wessel (n 12) 275.

67 Sandra Lavenex and Frank Schimmelfennig, 'EU Rules beyond EU Borders: Theorizing External Governance in European Politics' (2009) 16(6) JEPP 791.

International discussions on climate change take place in various international forums throughout the year. The most important forum is the annual Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC). 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 as are all EU Member States in their own right. Following Articles 4 and 191 TFEU, Member States and the EU share their competence in the area of environmental policy. Within their respective spheres of competence the Union and Member States 'shall co-operate' with third countries and with the competent international organizations.[68] The policy field of environment and climate change is a typical example of a *shared pre-emptive competence* in the classification of shared competences as described in the previous section.[69] This implies that both EU and Member State actors may engage in diplomatic relations with third (state) partners and international organizations, as long as EU action has not led to a pre-emption of Member State initiatives and the principle of sincere cooperation is taken into account. We analyse the enabling/restraining effect of the legal competence framework on EU and Member State actions as compared to other possible approaches and variables.

The findings are based on multiple sources of information, which are brought together through triangulation. Primary research has been conducted on written academic expert sources. Besides, Treaty provisions and EU case law on environmental and climate issues, dealing with (external) shared competences and the 'duty of sincere cooperation', have been analysed. Moreover, to deepen the analysis, eight semi-structured in-depth interviews[70] have been conducted, with (leading) negotiators from both the EU and Member States and (content-wise) experts having a more 'external perspective'.

As regards the timeframe, this analysis focuses on the process from the Copenhagen climate change conference (2009) and the 'pre-Lisbon Treaty phase' until the UNFCCC COP21 in Paris (2015). The main

68 Article 191(4) TFEU.

69 However, one should take into account that the EU's legislative intervention is limited to *minimum* harmonization of environmental policy. The Member States can lay down more strict legal norms to protect their public goods. As such 'the pre-emptive effect mentioned in article 4 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'; see Adam Lazowski and Steven Blockmans, *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 58.

70 The interviews have been conducted by one of the authors.

focus is on the large international climate change conferences, but also environmental day-to-day diplomacy is part of the analysis and the questions in semi-structured interviews. The main outcomes of this study are presented here.

3.1 Effects of shared competences in practice

We found that the 'shared competences' legal framework has an effect on power relations in international climate negotiations in at least three ways. First, as a general basis, the nature of (external) competences is fixed by the Treaties. This is already an important step. As argued above, for the actual analysis of external power relations, it makes quite a difference whether a competence is exclusive, shared or supportive. Our case study reveals that this is recognized by the actors. Thus, for instance, the European Commission is (generally) the actor to contact in the World Trade Organization as trade is an 'exclusive' EU competence,[71] irrespective of the fact that the Member States are still present. In international institutions where the EU and Member States 'share competences', such as the UNFCCC, the mentioned 'nuanced' nature of shared competences is indeed acknowledged and more fine-tuning is necessary. As one of the diplomats put it: sharing competences does not implicate a 'fifty–fifty' relationship.[72]

Second, it is not only the Treaty that legally defines the conduct of power relations in international organizations; the CJEU's case law is also to be used as guidance as it may provide further explanation of the often quite general Treaty rules and principles. Above, we have referred to the link between internal and external EU competences: whenever the European Union has elaborated measures in a particular policy area internally, it is generally allowed to conduct external relations in that domain. In that way, one of the Member State foreign services seems to be right on their website by expressing the opinion that the EU external competence framework is more of a dynamic than a static process.[73] Again, it is clear that political actors become aware of the dynamic changes in the division of competences once they are confronted with them in practice.

71 Article 2 TFEU on common commercial policy.
72 Interview, 2 April 2014.
73 Original text: 'de bevoegdheidsverdeling op het terrein van de externe betrekkingen is niet statisch, maar dynamisch' <http://www.minbuza.nl/ecer/dossiers/externe-betrekkingen/exclusieve-en-gedeelde-externe-bevoegdheden-van-de-eu.html>.

Third, there is a more specific delegation process derived from the sharing of competences in the policy area of climate change. The EU and its Member States have invented specific types of 'actors' in the multilateral climate negotiations, so-called 'lead negotiators' and 'issue leaders'. These negotiators and issue leaders are chosen among the EU and Member State representatives, independent of their institutional origin. This inventive arrangement is an indirect consequence of the 'shared competences' in the environmental field and is recognized by the political actors.

A key question in the context of the present contribution is to what extent shared competences *enable or restrain* EU and Member State actors in the specific case of UNFCCC negotiations. Our case study revealed that shared external competences *enable* the European Commission to keep EU Member States as part of the negotiating team as there would be legal consequences when they would negotiate separately from the EU. Furthermore, internal legislation enables the European Commission as an EU actor to increase its coordinating role. However, it has also become clear that shared external competences *restrain* the European Commission as it is unable to side-line the Member States – something it can more easily do in external trade negotiations. As a mirror-image of this situation, shared external competences *enable* the EU Member State actors (large and small) to play a significant role in climate change negotiations. This sometimes leads to deep disagreement between Member States.[74] Poland, for example, could threaten with a CO_2 veto until the last moment of climate change negotiations.[75] Shared external competences also *restrain* Member State actors. In the UNFCCC setting, Member State actors were looking for the 'margins' of what was agreed upon collectively to define a more detailed Member State profile, but there is a general settlement that it is not appropriate to 'colour outside the lines' – hence, to stay within the limits set by the legal competences.[76]

Occasionally – and obviously – Member States consider an EU competence to be a 'legal straitjacket' that 'forces them to coordinate'; they suspect it to be merely used by the Commission to expand its powers.[77] However, it is only when issues are getting 'really political'

74 Jakob Skovgaard, 'EU Climate Policy after the Crisis' (2014) 23(1) EP 15.
75 Andrew Rettman, 'Poland Vetoes CO_2 Targets on the Eve of Paris Visit' *EU Observer* (Brussels, 28 October 2015) <https://euobserver.com/environment/130867>.
76 Interview, 3 April 2015.
77 van Schaik (n 54).

that rules, procedures and other legal issues become less relevant than political considerations. Prior to this situation, legal rules are indeed the main driver of the division of powers between EU and Member State actors, and in that sense they do define the conduct of international negotiations. Thus, one may tend to conclude that legal competences are the starting point, but that they are put into perspective once issues become very political (which is often the case in international negotiations).

Indeed, climate change is often portrayed as a very political, conflict-driven policy area because of the Copenhagen failure (2009). In that sense it is interesting to note that the interviews sketch a quite friendly internal EU policy negotiating environment during the negotiation of a common EU and Member States' position. Our finding supports the idea that this more friendly environment is enabled by the legal competence framework which already sets the stage and renders some debates obsolete. The European Commission could start an infringement procedure when it is overruled by Member States in representation at climate change negotiations. However, it may choose not to do so purely on *political* grounds. As one of the interviewees puts it: the issue of climate change is too treacherous to bring a case to the CJEU.[78] This example makes clear that the Commission is hesitant in confronting Member States on their diplomatic behaviour when the stakes are higher at the international scene and, moreover, the topic itself is considered as 'high politics' for the EU. This, in turn, is a clear example of political influence on the use of legal rules and principles (and the other way around).

3.2 Other explanatory causes and theories

Apart from the formal rules on shared competences, other, more informal, possible explanatory causes and effects are also identified, including external incentives. Most theories focus particularly on the balance of power between (large) Member States, 'socialization' of representatives from Member States, and voting power of Member States and EU representatives.[79] For example, EU socialization means that EU Member

78 Interview, 7 October 2015. See for a case where the Commission did initiate legal proceedings: Geert De Braere, 'Mercury Rising: the European Union and the International Negotiations for a Globally Binding Instrument on Mercury' (2012) 37(5) ELR 640.

79 Respectively, Katie Verlin Laatikainen and Karen E Smith (eds) *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave 2006), Martijn LP Groenleer and

States' representatives involved in deciding on and negotiating the EU position in international institutions first and foremost adapt a European orientation.[80] Social norms cannot be put aside, but legal–institutional norms and the procedure derived from the legal competence framework may very well accelerate these social norms.

As indicated by the existing literature, 'preference heterogeneity' – in the sense of (the absence of) aligning interests – and (large) Member State power are also considered primary causes of EU and Member State negotiation behaviour. However, environment and climate change are 'typical EU policy' fields, where of course preference heterogeneity exists, but where there is a general tendency towards cooperation. The Commission would therefore be less inclined to start legal conflicts in this policy field. Furthermore, large Member States, such as the United Kingdom, see the overall added value of EU cooperation and EU competence in multilateral climate change negotiations which might also help.[81] The EU's engagement with strategic partners seems to be driven by a preference for an ambitious international climate deal. In that case, it could also help to analyse the use of other common instruments, such as trade, as leverage for a climate deal.[82] Furthermore, the academic, professional or national background of the negotiator itself could have an effect on the conduct of negotiations. In the run-up to the large UNFCCC COP climate change conference, we found that more environmentally oriented policy officers prepared the negotiations, sharing not only competences but also background and knowledge. Only in the final phase of the conference did political leaders set the stage, which could lead to more (political) conflict.[83] Lastly, the statute of the international organization (and the question of whether the EU itself is a member of the organization, or whether it has to rely on its Member States to present the Union's position) could lead negotiators to work together towards a common EU stance.

Louise G Van Schaik, 'United We Stand? The European Union's International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol' (2007) 45(5) JCMS 969; Jin and Hosli (n 41).

80 van Schaik (n 54) 75.

81 Government of the United Kingdom, 'Environment and Climate Change: Review of Balance of Competences', 13 February 2014 <https://www.gov.uk/government/consultations/eu-and-uk-action-on-environment-and-climate-change-review>.

82 Louise van Schaik and Ries Kamphof, 'Using the EU's Trade Power as Leverage for a Climate Deal in Paris' (2015) *Clingendael Policy Brief*.

83 Interview, 21 November 2014.

4. Building blocks for an integrative legal–political analysis of shared competences

The mutually relevant notions in legal and political scholarship, together with the practical example of shared EU and Member State action in UNFCCC COP negotiations underlines the usefulness of analysing EU external action in political and legal conjunction. This section aims to provide the building blocks and factors that should be taken into account when building such an integrative legal–political analytical framework. This section first assembles arguments why such an integrative framework is useful. Thereafter some methodological and issue-based considerations for empirical application are shared. Limitations of this approach are also discussed. Obviously, the scope of the present contribution merely allows us to, indeed, provide building blocks. Further studies are needed to construct the framework.

4.1 Why should legal and political perspectives be combined in shared policy areas?

There are at least six reasons why legal and political perspectives could and should be combined in an analysis of EU external action and why this combination would be particularly helpful to better understand areas defined by *shared* competences. First, in a combined approach many (implicit or explicit) assumptions in both approaches and theories can be tested more extensively and possible myths can be checked. For example, it is often stated that if only the EU would 'speak with one voice' its performance in a given international organization would be significantly improved[84] while others state that the 'legal division of labour is seldom strictly followed in practice'.[85]

Second, by combining legal and political insights, the conduct of EU external relations can be evaluated from (formal) input and process to (formal/informal) outcome and (informal) impact, thereby contributing to the evaluation of EU diplomacy as well as of the effects of treaty modifications or new case law on EU external relations.[86]

Third, as has been visible in the UNFCCC example, sometimes competences do *not* explain the behaviour of EU and Member State

84 Jørgensen and Wessel (n 12) 285.
85 Tom Delreux, 'Cooperation and Control in the European Union: the Case of the European Union as International Environmental Negotiator' (2009) 44(2)2 CC 189, 190.
86 Compare with Yvonne Kleistra and Niels van Willigen, 'Evaluating the Impact of EU Diplomacy: Pitfalls and Challenges' in Koops and Macaj (n 1) 52.

actors, mostly due to political reasons. An integrative analysis contributes to finding this 'breaking point'.

Fourth, as has been made clear in political contributions in particular, legal competences are only part of the authority of actors. There are other important sources of authority, including expertise, or the link with other policy dossiers.[87]

Fifth, information on the usage of strategies, their effectiveness, as well as the response of third actors cannot be obtained from official documents and formal issues alone. Instead, this information needs to be gathered from interviews or process-tracing, which is part of the tool box of political scientists.[88] As regards these strategies, probably the diversity prevailing among EU Member States is also the 'most precious asset' when acting externally.[89]

Sixth, the way competences are used as an intervening variable in political analyses and as guiding many legal analyses is problematic in case of shared competences. The recent attempt by da Conceição-Heldt and Meunier, for example, categorizes all policy areas of shared competences as 'medium internal cohesiveness' and concurrently 'medium external effectiveness', which does not reveal the specificities per policy area. It is questionable whether the EU and its Member States are indeed in the same vein 'internally cohesive' as well as 'externally effective' in contradicting policies such as 'European Neighbourhood Policy' and multilateral environment negotiations. The limitation of this focus on 'internal cohesiveness' based on competences is also visible in the article by Panke, who found that there is very low internal cohesion of EU actors in the UN General Assembly (UNGA) 'since there is no exclusive or shared competence for EU action in the UNGA'. Yet, it is 'remarkable' that the EU succeeds in developing a common negotiating position most of the time, that is for about 95 per cent of all resolutions.[90] This is symptomatic of a political perspective on competences, in which it is not acknowledged that the policy areas as discussed in the UNGA are indeed already defined by legal competences and a related division of labour. Similarly, legal analyses often merely look for guidance to the Treaties and the CJEU, without

87 Vanhoonacker and Pomorska (n 25) 1322.
88 Diana Panke, 'The European Union in the United Nations: an Effective External Actor?' (2014) 21(7) JEPP 1051, 1054.
89 Macaj and Nicolaidis (n 8) 1067.
90 Panke (n 88) 1052 also citing Diana Panke, 'Regional Power Revisited: How to Explain Differences in Coherency and Success of Regional Organisations in the United Nations General Assembly' (2013) 18 IN 265.

any thorough analysis of the practical consequences in EU external action or its effectiveness.

4.2 Methodological and substantive considerations

While there thus are many good reasons to develop an integrative analytical framework, at least three considerations need to be addressed. First, as we have seen, shared competences are a broad category encompassing at least four different types.[91] For a step-by-step analysis of shared competences at international institutions, it is helpful to differentiate between these sub-categories. Action on the basis of the sub-categories of shared competences can be assessed in case studies where different empirical findings and settings are combined.

Second, the methodologies used for political and legal perspectives are complementary but also difficult to combine in practice. Political scientists would normally use empirical evidence, backed up by secondary literature, and document analysis,[92] while legal scholars would have a tendency to focus on legal texts and support their analysis mainly by what others have found as well. Despite the potential that is offered by combining empirical and conceptual/analytical methods in this particular issue area, prioritizing the information sources will be a challenge.

Third, diplomacy has traditionally been perceived as the prerogative of states and their representatives.[93] However, exclusivity of diplomacy as a state domain is challenged on several fronts, including the variety of areas that go beyond the immediate military and political dimensions of traditional diplomacy (e.g environmental diplomacy), the extension of involved actors, even parliaments.[94] For some, the ability to act externally as a state-like unit is indispensable to the very existence of the EU, and we have seen that the European External Action Service (EEAS) was created as an attempt to do exactly that.

91 van Vooren and Wessel (n 9) 99.
92 Vanhoonacker and Pomorska (n 25) 1329.
93 Jan Melissen, *The New Public Diplomacy: Soft Power in International Relations* (Palgrave Macmillan 2005); Andrew F Cooper, Jorge Heine and Ramesh Thakur, *The Oxford Handbook of Modern Diplomacy* (OUP 2013).
94 Stelios Stavridis and Davor Jančić, 'Introduction: the Rise of Parliamentary Diplomacy in International Politics' (2016) 11 THJOD 105.

4.3 Current limitations

The combination of legal and political insights could help in assessing shared external competences in practice and in particular their enabling or restraining effect on EU and Member State actors in international institutions. The present authors do, however, recognize some important limitations. First, while legal approaches, despite their variety, often share a focus on interpretations of the Treaties, decisions and case law, political science approaches are even more diverse. In fact, part of political science is characterized by debates on which theories and concepts are more fit to explain reality. In the absence of a generalizable approach it is difficult to bring 'political theory' in general closer to the legal approach and it is needed to pinpoint specific, more institutionalist, theories or concepts such as actorness or effectiveness to allow for a sensible connection. Second, the question of competences is 'fundamentally also one of national constitutional norms'.[95] Therefore, some Member State actors or entities might be more oriented on the division of competences than others. For example, federal states such as Germany have experience with a clear-cut division of competences in their own constitution, while the United Kingdom does not have a single constitutional document. This can be pre-empted by taking into consideration 'other explanatory variables' in the analysis framework. Third, EU negotiations at, for instance, the United Nations tend to be multi-issue in scope, either because multiple issues are formally under discussion at the same time and thus subject to explicit trade-offs or because actors' preferences with regard to upcoming issues can be leveraged against present concessions.[96] Such 'multi-issue negotiation' complicates the assessment of competences in practice and combining approaches as both approaches would not analyse the whole chain of negotiations in international organizations such as the UN. Nevertheless, we would argue, this would be much easier recognized when political and legal insights are combined, rather than taking a single academic perspective.

Additional methodological challenges with regard to a politico-legal analysis of shared competences in international negotiations relate to the fact that the work of the preferred study objects (EU and

95 Joseph HH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999), 322.
96 Andreas Dür, Gemma Mateo and Daniel C Thomas, 'Negotiation Theory and the EU: the State of the Art' (2010) 17(5) JEPP 613, 615.

Member State diplomats) is surrounded by 'secrecy' and anonymity.[97] It is necessary to hear different sides and also keep the interviews confidential. By combining multiple interview sources (diplomatic/academic) and studies (expert sources/case law), the analysis allows for a triangulation of findings.

As already observed by Macaj and Nicolaidis, 'to assess whether a desirable outcome in the world has anything to do with some action taken by the EU or its member states, let alone with the fact of unity itself, is at best an exercise in probability. Correlation does not imply causation and even careful process tracing gives us at best a sense of likelihood of impact.'[98] The preliminary findings can thus best be characterized as 'plausibility probes' only, providing interesting avenues for future research. These plausibility probes would need further testing in other cases to become more robust.[99] They make conditions under which the EU can turn into an effective external actor more clear, even in contexts in which its (formal) actor capacities are very limited.[100] Yet, the in-depth interviews and 'plausibility probes' might be a very relevant addition to the literature as most studies focus only on voting outcomes and/or representation statements, which merely reflect the outcome of a 'longer chain of decision-making and cannot capture the essence of the process before this final decision'.[101] Voting outcomes 'do not provide insight into the extent that different actors actually managed to influence the content of resolutions', but only give an indication of which states are not satisfied with the negotiation outcome.[102] Case studies are better equipped to answer 'how and why questions', as Yin puts it.[103] However, as Blatter and Haverland contemplate, case-study research has also been an excuse for 'methodologically unreflective research' in recent academic history.[104] A reflection on the commonalities and differences in the cases and the difficulties in practice should thus be included.

97 Sanderijn Duquet and Jan Wouters, 'Diplomacy, Secrecy and the Law' (2015) Leuven Working Paper no 151.
98 Macaj and Nicolaidis (n 8) 1070.
99 Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005).
100 Panke (n 88) 1054.
101 Jin and Hosli (n 41) 1274.
102 Panke (n 88) 1054 also citing Robert O Keohane, 'The Study of Political Influence in the General Assembly' (1967) 21 IO 221.
103 Robert K Yin, *Case Study Research: Design and Methods* (5th edn, SAGE 2013).
104 Joachim Blatter and Markus Haverland, 'Case Studies and (Causal-) Process Tracing' in Isabelle Engeli and Christine Rothmayr Allison (eds), *Comparative Policy Studies: Conceptual and Methodological Challenges* (Palgrave Macmillan 2014) 59, 63.

5. Conclusion

The division of legal competences between the EU and Member States and its effects on EU external action has been raised as one of the top priority EU existential questions. Political elites and analysts often narrow this discussion down to either retreating the 'creeping' competences[105] of the EU or supporting the 'single voice mantra'[106] to be a more effective external actor. By combining legal and political perspectives, formal rules and informal practices, practical effects of 'shared competences' could be analysed in more detail. The main brief of this contribution has therefore been to map factors that should form part of an 'integrative' legal–political analysis of shared EU and Member State external action. The findings from the well-documented 'shared competences' policy area of EU climate negotiations in the UN Framework Convention on Climate Change (UNFCCC), combined with a more general analysis of useful links between legal and political perspectives, serve as a first answer.

We argue that in a combined approach many implicit assumptions in both approaches and theories can be tested more extensively. By looking at formal rules and informal provisions, EU external action could be evaluated from (formal) input and process to (more informal) outcome and impact. Information such as the effectiveness of strategies as well as the response of third actors (think of the perceived problems third countries have with the complex division of EU and Member State competences) cannot be obtained from formal provisions alone. At the same time, informalities are often restricted by acknowledged formal rules on a division of competences.

The practical example of shared EU and Member State action in our case study on the UNFCCC COP negotiations supports the usefulness of analysing EU external action in a combined political and legal manner. The legal rules on 'shared competences' prove to enable or restrain EU and Member State actors in climate change negotiations in three ways. First, via the fixed Treaty provisions on environment. Second, through the case law of the CJEU that can be considered to have an impact, in particular through the development of principles such as the 'duty of sincere cooperation' and 'implied powers'. Third, through the more specific delegation process as part of day-to-day politics in the EU via working arrangements. In addition to these

105 Pollack (n 7) 519.
106 Macaj and Nicolaidis (n 8) 1067.

key variables, other, more informal, factors explain EU and Member State action, such as EU socialization and expertise of the negotiators. Interestingly, when issues become more conflictual and 'political', legal issues seem to be less prescriptive in the conduct of negotiations at the UNFCCC by EU and Member State actors.

In 'shared' policy areas, a combination of analysing formalities, case law and informal strategies would provide new insights into the actual functioning and the effects of shared competences. We pointed to a number of factors to be taken into account in setting up a legal–political analysis in this area. First, it is important to acknowledge the different forms of shared competences as they may each define political behaviour in their own way. Further, there is a methodological complexity in combining political and legal perspectives, which results in the difficulty of prioritizing methods and findings on the basis of objective criteria. The (empirical) findings should therefore be based on multiple sources of information, which are brought together through triangulation. A reflection on the commonalities and differences in the cases and the difficulties in practice should also be included.

The results from our study on climate change can only be valued as so-called 'plausibility probes', providing interesting avenues for future research, but it is acknowledged that they need further testing in other cases to become more robust.[107] While research on the effects of the Treaty-based division of competences may be the most obvious candidate, further research could in particular look at the role of the CJEU in EU external relations and the effects of case law on political practice.[108] The CJEU is still one of the more overlooked actors in more political studies on EU external relations. The role of the CJEU and the effect of its judgments on the role of actors in areas such as environmental policy or foreign and security policy are hardly acknowledged in political analyses.[109] The Treaty merely provides a starting point, but the actual competences of both the EU and its Member States depend on an ongoing process of new policy initiatives on the side of the Union and an interpretation by the CJEU. In turn, an emerging question is to what extent the actual use of legal competences is influenced by (pragmatic) political choice.

---

107 George and Bennett (n 99).

108 Compare with Christophe Hillion and Ramses A Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?' (2009) 46(2) CMLR 551.

109 Cremona and Thies (n 11).

To become more robust, findings of larger comparative case studies are also needed. Policy areas at other international institutions in which the EU operates on the basis of different forms of shared external competences (and where different case law applies) can then be added, including for example development aid (shared non-pre-emptive competence), social policies (International Labour Organization, shared competences in case of minimum Union standards), or military issues (NATO and UN organs, shared competences in the field of foreign and security policy). Furthermore, it will also be relevant to assess the effects of the separate legal status of the EU in particular international organizations on the influence of the EU in that particular policy area. And, finally, we hardly know anything about the effects of the complexities surrounding shared competences on third parties during international negotiations.

Overall, our analysis is to be understood as a plea to combine existing and new political and legal insights to better understand the effects of legal choices on political practice (and *vice versa*). The present contribution has provided a number of reasons to further develop this new area of research.