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EU Member States' voting requirements in international environmental conventions

Questions:

1. Is it legally justified to require EU Member States who are signatories to international environmental agreements to abstain from a vote on a decision in a meeting of the parties of the international conventions because of the EU law principle of sincere cooperation or otherwise?
2. Do EU Member States' voting rights/duties change if:
 - a. there is no EU Common Position: or
 - b. there is an EU Common Position, but a minority of Member States object to it;or
 - c. there is an EU Common Position, which is not adopted by the meeting of the parties of the international convention, and subsequently a different/amended decision is required; or the decision required does not in any case directly align with what is agreed in the EU Common Position (i.e. the subject matter is different)?
3. Do these answers change if the EU is not itself a signatory of the convention in question?
4. Do the answers change if the international agreement relates to different areas of EU law, e.g. fisheries management or environmental protection?
5. How do the conclusions to be drawn from answering the questions above affect the recent votes for additional whaling quotas for Greenland in the context of International Whaling Convention (IWC) negotiations¹ and the vote to ban Atlantic bluefin tuna trade in the context of CITES² negotiations?

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¹ International Whaling Convention 1946: in the meeting of the International Whaling Commission on 4 March 2010: vote for increased aboriginal subsistence whaling quota n Greenland by 10 humpback whales.

² Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973: vote to add blue fin tuna to Annex I of CITES on 18th March during 15th Conference of the Parties.

Summary of main points

Introduction:

- If the subject matter of an international convention falls within the EU's competence to legislate (either exclusive or shared), then EU law applies whether or not the EU is a signatory of the agreement.
- The extent of Member States' rights in such cases depends primarily on the issue of competence and Treaty law regarding the conclusion of international conventions.

The principle of sincere cooperation:

- The principle of sincere cooperation is an obligation of conduct, not an obligation of result and cannot override obligations flowing from basic Treaty law, for example as regards shared/exclusive competence or voting rules. Nonetheless, the principle of sincere cooperation applies in the context of international negotiations, and is further underpinned by the principle of unity in the international representation, which requires Member States to consider the EU's interests when acting at international level.
- In relation to environmental agreements, in areas subject to Member State competence (e.g. if there is no Common Position or otherwise agreed EU position³, and the subject matter is not governed by EU law – see below), Member States' duties of international cooperation must be without prejudice to their competence to negotiate in international bodies and to conclude international agreements – see Article 191(4), TFEU.

Competence:

- Where the EU has competence (shared or exclusive) in a particular field in relation to any international agreement, and it has exercised that competence (e.g. in the shape of a Common Position or otherwise agreed EU position), then all Member States must vote in support of the EU Common Position (or otherwise agreed EU position) whether or not they agree with the content of that Common Position or otherwise agreed EU position (subject to Article 193, TFEU – see below).
- When there is no Common Position (or otherwise agreed EU position), Member States' rights depend on whether the subject matter in question is one of shared or exclusive EU competence.
- In the case of EU exclusive competence, Member States have no right to engage in international decisions and must abstain from voting in the absence of an EU Common Position (or otherwise agreed EU position).
- In the case of shared competence, Member States can vote independently in the absence of a Common Position or otherwise agreed EU position, subject to complying with EU law and their duty of sincere cooperation.

³ Case C-246/07 *Commission v Sweden* [2010] ECR I-03317 para 77. In this case, the CJEU found minutes of the discussion in the Council's Working Party on International Environmental Issues to be sufficient to establish that a common strategy on the topic in question existed (at para 89) and sufficient to mark 'the point of departure for concerted Community action' (ibid. para 89). For the purpose of this briefing, we will use the term 'otherwise agreed EU position' to mean such an 'other' less formally agreed position whose content establishes the requisite legal standard.

- Due to the principle of unity in the international representation of the EU, Member States cannot vote independently in an area of shared competence if for a subject matter governed by EU law a Common Position (or other less formally agreed EU position) exists but this position was rejected at the vote in the international body.⁴

Voting rules:

- Article 218, TFEU requires most EU decision-making in relation to international agreements to be by qualified majority voting, not by unanimity.
- This means that most Common Positions (or otherwise agreed EU position) including in relation to fisheries and the environment, must be agreed by qualified majority voting.

The purpose of the agreement:

- To determine whether the conclusion of an international agreement or any change in the rules of the agreement is subject to shared or exclusive competence, it is necessary to examine the purpose of the agreement/proposed measure.
- If the purpose is environmental, for example, then competence between the EU and Member States is shared, with the consequences already described above.
- If the purpose of the agreement is to conserve fish stocks for fishing purposes, for example, this would be an area of exclusive competence.
- In order to determine the purpose of a particular agreement/rule change, it is useful to look at both the international agreement itself and the EU laws implementing that agreement to determine what EU policy the agreement would fall under.

Conclusion:

- A rule which would require EU Member States to abstain from voting on decisions in international agreements where a minority of states does not agree with the majority's opinion, has no basis in EU law.
- A rule which would require EU Member States to abstain from voting on decisions in international agreements in areas subject to shared competence where there is neither a Common Position (or otherwise agreed EU position) nor EU legislation governing the subject matter is also without basis in EU law.
- However, all Member States, whether they agree or disagree, are always obliged to vote in line with a Common Position or otherwise agreed EU position (which is usually agreed by qualified majority voting).
- Where Member States have no competence to act (e.g. in areas of exclusive competence in the absence of a Common Position or otherwise agreed EU position), Member States are required to abstain from voting in decisions relating to international agreements.

NB: In areas of uncertainty and lack of clarity, Member States (and the Commission) should consider asking the Court of Justice of the European Union for an opinion.

⁴ Krämer, L. (2015). 'EU Negotiating and Voting under the Amended CITES Convention' *Journal for European Environmental & Planning Law* 12, 3 (17 et seq.).

Detailed analysis

1. Background

If the EU itself is not a party to an international convention, as is the case in relation to both the IWC and CITES, the relevant convention itself is not automatically a part of EU law (which it would otherwise be under Article 216(2), TFEU). However, this does not mean that Member States are free of the requirements of EU law in their actions regarding the relevant agreement. If the subject-matter of the convention falls within an area of EU competence, then EU rules and principles apply in relation to the application of that convention and in relation to international negotiations regarding the convention, irrespective of whether or not the EU is a signatory to the convention in question.

This briefing focuses particularly on environmental and fisheries related international agreements because of recent international votes (or proposed votes) relating to whaling under the IWC and Atlantic bluefin tuna under CITES, in response to which this briefing has been prepared. Indeed, in the last section of the briefing, the conclusions of the general discussion are applied to these two real-life cases.

However, the briefing also has wider application.

2. The question of competence

Before considering any other issues, such as the principle of sincere cooperation or the voting rights and requirements of EU Member States in international agreements, it is important to examine the issue of competence as this crucially determines the extent of Member States' rights in this context.

2.1. The meaning of shares and exclusive competence

First of all it is helpful to examine what exactly shared and exclusive competence mean. The Lisbon Treaty has clarified this by inserting definitions in the Treaty on the Functioning of the European Union (TFEU, formerly the Treaty establishing the European Community, TEC).

Thus, according to Article 2(2), TFEU, *shared* competence applies in areas where **the Union and Member States can both legislate and adopt legally binding acts**. However Member States can only exercise their competence to the extent

'that the Union has not exercised its competence ... [or] that the Union has decided to cease exercising its competence'.

Exclusive competence means **only the Union can legislate and adopt legally binding acts**. Member States can only legislate in areas of exclusive competence if they are empowered to do so by the Union, or for the implementation of Union acts (see Article 2(1), TFEU).

Examples of exclusive EU competence which might be relevant in the context of international agreements include:

- the Customs Union (Article 3(1)(a), TFEU);
- **the conservation of marine biological resources under the CFP** (Article 3(1)(d), TFEU);
- the Common Commercial Policy (Article 3(1)(e), TFEU);
- the conclusion of international agreements when it is provided for in legislative acts of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope (Article 3(2), TFEU).

Agriculture and fisheries (excluding the conservation of marine biological resources - (Article 4(2)(d), TFEU)) and the environment (see Article 4(2)(e), TFEU) are both areas of EU policy that are subject to **shared competence** between the EU and its Member States.

2.2. Environmental agreements and shared competence

Where an international agreement deals with a field that is subject to shared competence between the EU and Member States, e.g. environmental policy, then according to Article 2(2), TFEU Member States can adopt binding legal acts where the EU has not exercised its competence or has decided to cease to exercise its competence (see above).

If there is an EU Common Position or otherwise agreed EU position,⁵ this means that the EU has exercised its competence and Member States must vote according to that Common Position (as a consequence of Article 2(2)). Where there is no Common Position (or otherwise agreed EU position) and EU law does not govern the subject matter, then the EU has either not exercised its competence or has decided to cease exercising its competence. In this case, the Member States are free to vote independently. The voting rights and requirements in relation to Common Positions and more generally are discussed in the next section below.

It should be noted that Member States cannot use their vote to weaken EU (environmental) law in general (even in the absence of a Common Position).

Conclusion 1:

In areas of shared competence, there is no requirement for Member States to abstain from voting in international agreements in the absence of a Common Position or otherwise agreed EU position, subject to complying with EU law and their duty of sincere cooperation.

⁵ See caselaw cited in Fn 3.

2.3. Agreements in a field subject to exclusive competence

Where an international agreement deals with a field that is subject to the exclusive competence of the EU, e.g. the conservation of marine biological resources under the CFP, only the EU has the power to adopt legally binding acts. Member States can only act as they have been instructed or empowered to act by the EU (even in relation to agreements to which the EU is not a signatory). Therefore, Member States can only act/vote if there is a Common Position or otherwise agreed EU position which empowers Member States to act in the international context.

Conclusion 2:

In areas of exclusive EU competence, Member States only have competence to act if they have been empowered to do so by the EU (in the form of a Common Position or otherwise agreed EU position). Therefore, in the absence of a Common Position (or otherwise agreed EU position), they must abstain from voting in international agreements as they have no competence to act.

3. Voting rules in the EU in relation to international agreements

Article 218, TFEU sets out the procedures through which the Union concludes agreements with third countries or international organisations. Usually this involves the Commission, the Council and the European Parliament, but most importantly for the purposes of this briefing, Article 218(8), TFEU states that the Council is to act by qualified majority throughout the entire procedure unless the agreement covers a field for which unanimity is required.

Both the EU policies on the environment and on fisheries require the Council to vote by qualified majority, any votes/decisions in the context of environmental or fisheries related agreements are therefore subject to qualified majority voting and unanimity is not required. This voting procedure applies when Common Positions and other informal positions are adopted. It also applies when changes are being made to existing international conventions in the same way as when new agreements are being concluded.

Therefore, in all but a limited number of policy areas that are subject to unanimity under EU law, Article 218, TFEU requires decisions to be made by qualified majority voting.

There is no legal basis in the Treaty for a rule which requires Member States to abstain in a decision in an international agreement if there is no unanimity regarding the EU's Common Position (or other agreed EU position).

The only other exception to this rule is set out in Article 31, TEU as regards decisions in relation to the Common Foreign and Security Policy. Even under Article 31, TEU there are derogations (see Article 31(2), TEU) but in any case, the Common Foreign and Security Policy does not apply to environmental or fisheries policy.

Conclusion 3:

There is no legal basis in the Treaty for a rule which requires Member States to abstain in a decision in an international agreement if there is no unanimity regarding the EU's Common Position (or otherwise agreed EU position).

On the contrary, the opposing minority is under a duty to vote in line with the Common Position (or otherwise agreed EU position) under rules of competence and pursuant to the principle of sincere cooperation (see above and below).

4. The purpose of proposed international Conventions or of changes to rules under international Conventions

4.1. The purpose of international agreements

As explained above, the extent of Member States' voting rights and powers is crucially dependent on whether an agreement is in a field that is subject to shared or exclusive competence. In the context of this briefing we have focused particularly on environmental agreements (shared competence) and agreements regarding the conservation of marine biological resources under the CFP (exclusive competence).

To determine which EU policy a particular international convention (or proposed changes to a convention) falls under, it is necessary to examine the nature and purpose of the agreement and/or the proposed measures, as well as the nature of the underlying EU policy. If the agreement aims to protect biodiversity or nature or the environment, then it is clearly an environmental policy issue and subject to shared competence.

If the purpose of an agreement is fish stock management and fish stock conservation measures to secure future fishing, rather than for the purposes of biodiversity conservation and the protection of the species in general, then this would be an area subject to exclusive competence.

Relevant considerations could be, for example:

- Is the international agreement an environmental agreement or a fish stock management agreement for the purposes of fisheries management?
- Do the environmental protection objectives and principles set out in Articles 191 and 192, TFEU apply (particularly for example in relation to the preservation and protection of the quality of the environment, the prudent and rational utilisation of natural resources, the promotion of measures at international level to deal with regional or worldwide environmental problems (all Article 191(1), TFEU)) or the application of the precautionary and prevention principles (Article 191(2), TFEU)?
- In EU law, is the relevant field subject to the provisions of EU laws such as the

- Habitats⁶, Birds Directives⁷ or the Wildlife Trade Regulations⁸ or the Marine Strategy Framework Directive⁹?
- Does the obligation under the Treaty to ensure a high level of environmental protection need to be applied in the context of the agreement (Article 3(3), TEU and Article 37 of the Charter of Fundamental Rights)?
- Is the duty under Article 13, TFEU relevant which requires Member States to pay full regard to the welfare requirements of animals (while respecting the legislative or administrative provisions and customs, including cultural traditions and regional heritage)?

Conclusion 4:

Whether the conclusion of an international agreement, or any change in the rules of the agreement, is subject to shared or exclusive competence is determined by the purpose of the agreement/proposed measure. By examining both the international agreement itself and the EU laws implementing that agreement, it can be established what EU policy the agreement falls under (if any).

4.2. The principle of sincere/loyal cooperation

The principle of sincere or loyal cooperation is expressed repeatedly in a number of EU Treaty provisions.

Under Article 4(3), TEU Member States must 'pursuant to the principle of sincere cooperation' 'assist each other in carrying out tasks which flow from' EU law. They must

- take appropriate measures to ensure fulfilment of EU law obligations;
- take appropriate measures to ensure fulfilment of obligations resulting from acts of EU institutions;
- facilitate the achievement of the Union's tasks;
- refrain from any measures which could jeopardise the attainment of the Union's objectives.

Similarly, under Article 24(3), TEU Article 24(3), TEU, Member States and the EU institutions must

'support the Union's external ... policy actively and unreservedly and in a spirit of loyalty and mutual solidarity and ... comply with the Union's action in this area.'

⁶ Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).

⁷ Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds.

⁸ Council Regulation 338/97/EC of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, as amended (implementing the provisions of CITES in the EU).

⁹ Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

Member States must also

'work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.'

The Council and the High Representative are to ensure compliance with these principles.

Moreover, under Article 21(3), the Union itself is under a duty to

'ensure consistency between the different areas of its external action and between these and its other policies.'

Under Article 21(2)(f), TEU the Union's 'external action' covers international environmental measures, including in relation to the sustainable management of global natural resources.

In relation to EU common foreign policy, an even higher level of cooperation is required (with consultation duties in order to determine a common approach – see Article 32, TEU), and there is a duty on Member States to coordinate their action in international organisations and at international conferences, and to uphold the Union's position in such forums. However, it should be noted that although both environmental and fisheries policy can be part of the Union's external policy (see below), they are not covered by its Common Foreign and Security Policy (CFSP), even when applied in an international context.

In addition to the Treaty articles already set out above, both the **principle of sincere cooperation and the requirement of unity in the international representation of the EU are general principles of EU law**¹⁰.

Therefore, the principle of sincere cooperation undoubtedly applies in the context of international agreements. However, it should be noted that the principle of sincere cooperation is 'an obligation of conduct, not an obligation of result'¹¹. It cannot override obligations flowing from basic Treaty law, for example as regards shared/exclusive competence, or the voting rules set out in Article 218, TFEU. Thus, it cannot be used to require Member States to abstain on a vote that is subject to shared competence and has been decided by qualified majority voting.

However the principle is important in the general conduct of an EU Member State's foreign relations, and also, for example, in a situation where there is no Common Position or otherwise agreed EU position on an issue that is subject to shared competence, and **EU law does not regulate the subject**

¹⁰ (i.e. they are confirmed by settled case law, e.g. ECJ Ruling 1/78, paragraphs 34, 35 and 36, Opinion 2/91, paragraph 36, and Opinion 1/94, paragraph 108, Opinion 2/00, paragraph 18).

¹¹ See para 28, p. 6 of George-Dian Balan, *The Common Commercial Policy under the Lisbon Treaty*, Jean Monnet seminar, Advanced Issues of European Law, 6th Session, April 20-27, 2007, Dubrovnik, Re-thinking the European Constitution in an Enlarged European Union.

matter, when the principle of sincere cooperation will need to be taken into account in a Member States' decision how to act.

In such a case, the principle of sincere cooperation helps to ensure the fulfilment of EU law obligations, to facilitate the achievement of the Union's tasks and to avoid jeopardising the attainment of the Union's objectives or acting contrary to its interests or its effectiveness as a cohesive force in international relations. If the proposed agreement/changes support EU law policies, then Member States should support them (subject to what has already been stated in relation to exclusive competence).

Conclusion 5:

The principle of sincere cooperation applies in relation to completing international agreements or making decisions in relation to them. However, the principle of sincere cooperation cannot override obligations flowing from basic Treaty law, for example as regards shared/exclusive competence or voting rules.

In addition, in relation to environmental agreements, in their own area of competence (e.g. if there is no Common Position or otherwise agreed position and EU law does not regulate the subject matter), Member States' duties of international cooperation must be without prejudice to their competence to negotiate in international bodies and to conclude international agreements – see Article 191(4), TFEU.

4.3. The right to obtain the opinion of the Court of Justice of the European Union

It should also be noted that it is open to Member States (as well as the Commission, the European Parliament and, indeed, the Council) to obtain the opinion of the Court of Justice of the European Union as to whether an agreement envisaged is compatible with the Treaties.

Where the opinion of the Court of Justice of the European Union is adverse, the agreement may not enter into force unless it is amended or the Treaties are revised (see Article 218(11), TFEU). By extension, this article should also be available in relation to changes/amendments to rules of international conventions, where a Member State considers, for example, that the change will lead to a breach of EU environmental law and policy.

Case Studies: Recent (proposed) votes on whaling and Atlantic bluefin tuna in international agreements

CASE STUDY 1

The proposed vote in negotiations under the International Whaling Convention in March 2010 over an additional humpback whale quota for Greenland for aboriginal subsistence whaling.

Background

On 4th/5th March 2010 an inter-sessional meeting of the International Whaling commission took place with the intention to vote on a proposal from Denmark to allow Greenland to expand its aboriginal subsistence whaling quota by ten humpback whales.

In March 2009, the EU Environment Council reached a Common Position on this issue which applies to the following three annual meetings (and the related inter-sessional meetings of the International Whaling Commission). In the Common Position, the EU agrees to support proposals for the management of aboriginal subsistence whaling, but subject to the condition that:

- the conservation of the relevant stocks is not compromised, having due regard
- to the precautionary principle and the advice of the Scientific Committee, and whaling operations are properly regulated, and
- all whaling catches remain sustainable within the scope of subsistence for local use.¹²

Other than supporting aboriginal subsistence whaling under the specified conditions, the Common Position supports the maintenance of the moratorium on commercial whaling¹³ and opposes all other forms of whaling.¹⁴

According to ClientEarth's understanding, the proposal on 3rd/4th March did not satisfy the conditions stipulated in the Common Position for supporting the relevant quota increase, or, indeed, the criteria of the International Whaling Commission with regard to the allocation of quotas for aboriginal subsistence whaling.

Furthermore, ClientEarth understands that EU Member States were advised that because they could not reach a unanimous position to either support or oppose the proposed quota increase, all Member States would have to abstain in the relevant vote due to the principle of sincere cooperation. In the event, the vote was postponed because the Commission was not quorate.

¹² EU Council Decision 7146/09 of 3 March 2009, Annex to Annex I, para (2)(d).

¹³ Id. see para (2)(a).

¹⁴ Id. see para (2)(b) and (e).

Analysis

In the EU, the protection of whales is an issue of environmental policy, not of the protection of whale stocks for fishing purposes. Whaling and the ban on whaling, as well as restrictions on trade in whale products in the EU, are therefore dealt with under the Environmental Chapter of the Treaty (now Article 192, TFEU), and in environmental regulations and directives, for example in Article 12 (and Annex IV) of the Habitats Directive 1992, in the Wildlife Regulations¹⁵ and in Regulation 348/81 establishing common rules for imports of whale products for non-commercial purposes.¹⁶ The Common Position referred to above, for example, was reached by the Environment Council, not the Agricultural/Fisheries Council.

All this shows clearly that under EU law the purpose of the rules on whaling is environmental, rather than related to the conservation of a harvestable resource (i.e. whale stock conservation purely for commercial fishing purposes).

This then means that, as seen above, decisions on whaling are subject to shared competence between the Member States and the Union, so Member States would be free to vote independently on any matter in relation to which there was no Common Position (or otherwise agreed EU position) or EU law regulating the subject matter.

However, in this particular case there is a robust Common Position which effectively obliges EU Member States to reject all whaling except whaling for local consumption and aboriginal subsistence whaling in restricted circumstances, both under a number of specific conditions. If these conditions are not met by a proposal for aboriginal subsistence whaling, as we understand they were not in the proposed vote on 3rd/4th March, then the Common Position requires Member States to reject such a proposal (because all other whaling is rejected). Member States opposing this position would be obliged to vote with the majority. There would be absolutely no foundation for requiring Member States to abstain just because a minority of Member States disagreed with the Common Position.

Moreover, even if the proposal being considered in the International Whaling Commission meeting went beyond the EU's Common Position, we understand that in this case a majority of Member States would have agreed that the proposal should be rejected, in which case the new position reached should be seen as the new EU agreed policy and all Member States would be obliged to comply with that position (under the rules on competence, voting and under the principle of sincere cooperation).

Abstaining in this situation would arguably be contrary to EU law because it would breach the objectives of the Treaty and subordinate legislation. It would therefore also conflict with Member

¹⁵ Council Regulation 338/97/EC of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (implementing CITES in the EU).

¹⁶ Regulation 348/81 was passed under Article 235 of the Treaty (now Article 352, TFEU) before there was a separate legal basis for environmental policy. At that time environmental laws were generally passed under Article 235. Now, this Regulation would be passed under Article 192, TFEU. The Regulation itself provides for qualified majority voting in the Council in relation to matters covered by it.

States' duties of sincere cooperation which require compliance with the EU's policy goals and objectives (and of course with EU law).

Therefore, in future negotiations on this issue, for example during the next meeting of the International Whaling Commission in June 2010, unless the EU's Common Position changes, Member States will not be entitled to vote for an increased aboriginal subsistence whaling quota for Greenland if this is contrary to the Common Position (as ClientEarth understands it is).

Note on Denmark's special position

It should be noted in this context that Denmark's justification which previously exempted it from having to comply with the EU Common Position (see Annex II of Common Position), is no longer valid. This justification was based on Declaration no. 25 annexed to the Final Act of the Maastricht Treaty which is no longer annexed to the Lisbon Treaty and therefore is no longer valid. Denmark is therefore now under a duty to vote in accordance with the Common Position on whaling.

CASE STUDY 2

The March 2010 vote in relation to the inclusion of bluefin tuna in Appendix I of CITES.

Background

On 18th March 2010, two proposals were made at the 15th Conference of the Parties of CITES in relation to Atlantic bluefin tuna. The first proposal was made by Monaco, which applied for the inclusion of Atlantic bluefin tuna in Appendix I of CITES. The second proposal was made by Spain on behalf of the European Union, which also applied for the inclusion of Atlantic bluefin tuna in Appendix I of CITES, but with a delay of the final inclusion until May 2011 to allow time for the International Commission for the Conservation of Atlantic Tunas (ICCAT) to comply with recovery plans and to adopt total allowable catches in line with advice of the ICCAT Scientific Committee (and other conditions). If ICCAT complied with all the conditions, then it was proposed that Atlantic bluefin tuna would not, after all, need to be listed in Appendix I.¹⁷

The EU's proposal was rejected by the Conference of the Parties in a secret ballot. In the second vote on the original Monaco proposal for an outright listing of Atlantic bluefin tuna in Appendix I (also a secret ballot), we understand that EU Member States were asked to abstain from voting due to the principle of sincere cooperation, and that the majority of EU Member States complied with this requirement.

¹⁷ According to EU press releases before the Conference of the Parties there was to be an additional exception in relation to artisanal fishing (but there is no record of such a proposal in the relevant CITES records).

Analysis

As already seen, the principle of sincere cooperation is not a good reason to require Member States to abstain from a vote, particularly if there is a Common Position (or otherwise agreed position).

However, in an area subject to EU exclusive competence, and in the absence of a Common Position (or otherwise agreed EU position), Member States would be required to abstain in any vote, because they would have no competence to make decisions in that area. However, as set out above, the same is not necessarily true for areas of shared competence.

Therefore, in this case, it is crucial to establish whether the listing of Atlantic bluefin tuna in Appendix I of CITES is part of the EU's environmental policy (and therefore subject to shared competence and Article 193, TFEU) or of fisheries conservation under the CFP (and therefore subject to exclusive competence).

CITES is not a fisheries conservation or fisheries management agreement. CITES is very clearly an international environmental agreement with (biodiversity) conservation goals. In the EU, CITES is implemented in the form of the Wildlife Regulations (see above), which are based on environmental policy and have the Environment Chapter as their legal base. Clearly, CITES is not at all concerned with fisheries or conserving the ability to **fish** bluefin tuna in future. CITES is concerned with protecting endangered species from extinction by banning or restricting the trade in such species, in this case bluefin tuna. The fact that this is a fish species also subject to fisheries conservation measures is co-incident and does not affect the underlying environmental purpose of CITES.

Therefore, this not being an area of exclusive EU competence, the requirement for Member States to abstain from a vote is not justified in any case. As the EU has implemented CITES by a number of Regulations, and has introduced provisions aiming at the protection and conservation of bluefin tuna, it has 'activated' its shared competence on the subject matter. Under EU law, it was the Member States' duty in the first vote to support the EU proposal in relation to which there was a Common Position¹⁸. Once the EU's proposal, as agreed in the Common Position, was rejected, it would have been necessary to agree on a new Common Position or otherwise agreed EU position. In absence of such either, the Member States were required to abstain from any other proposal unless the EU had explicitly authorised its Member States to vote unilaterally in order not to jeopardise the EU's interest of **unity in its international representation**.¹⁹

¹⁸ The Common Position in this case was agreed by neither the Environment nor the Fisheries/Agriculture Council because of time pressure. However, both the Commissioners for Fisheries and for the Environment made a joint statement in relation to the Common Position.

¹⁹ Krämer, L. (2015). 'EU Negotiating and Voting under the Amended CITES Convention' *Journal for European Environmental & Planning Law* 12, 3 (17 et seq.).