The Principle of Environmental Integration in the European Union: From a Discursive Constructivism

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Introduction

The remarkable development of EU environmental law since the 1970s indicates that the EU is an arena of normative evolution (Usui 2003). However, EU environmental law has also faced the so-called implementation deficits (Demmke 2001; Krämer 1997: 7-19). Although it is difficult to single out a specific reason for this problem owing to the labyrinthine relationship between EU legal system and national and international laws, the incompatibility between environmental protection requirements and other policy orientations towards the building of common markets is noteworthy[1]. In general, environmental protection requirements affect almost all policy areas, thereby leading to the contestation between environmental and other norms. This can be observed to a greater extent in the multi-dimensional legal system of the EU, which was originally orientated towards economic integration. Certainly, common market building permitted the adoption of environmental secondary legislation during the early stages of European integration. This is because environmental regulations need to be harmonized with a view to the functioning of common markets.[2] Nevertheless, this also meant that environmental law was undoubtedly parasitic on common market law (Usui 2003). This situation continues even after the Single European Act established a legal base for

[1] In the other paper, the author deals with the other dimensions of problems in implementation and enforcement of EU environmental law, such as the institutional weaknesses of both sanctions and civic legal actions. See Usui 2004.

[2] The Court of Justice confirmed that Article 94 EC was a legal base for environmental legislation in order to harmonise environmental regulations. For example, the Council adopted the General Programme for the elimination of technical barriers to trade as early as in 1969, which was referred to by the Court of Justice with a view to validating the adoption of detergents directives on the basis of Article 94 EC. See Case 91/79 *Commission* v. *Italy*, para.8.

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environmental legislation. Hence, the so-called Cardiff process, through which the EU institutions have attempted to mould the principle of environmental integration (hereinafter PEI) since the late 1990s, can be considered as remarkable. The paper focuses on the need of the PEI to integrate environmental protection requirements into the definition and implementation of the common actions of EU Member States.

The basic concern of the paper is the significance of the PEI in terms of environmental normative evolution in the institutional context of the EU. As will be discussed later, the legal effect of the PEI is so uncertain that it is difficult to specify the roles of the PEI in the EU legal order. This uncertainty of the PEI in legal terms may urge us to query whether or not the PEI is merely a political rhetoric or a hollow bureaucratic statement. In the light of this dubiousness of the PEI as a legal principle, the paper proposes a discourse approach based on social constructivism. Some hypothetical viewpoints will be presented referring to this discursive constructivism: the PEI is expected to bridge a discursive gap between the political and the legal and thereby activate normative discourses of environmental protection. These viewpoints also cast light upon the features of the EU as an emerging polity, which needs to be distinguished from both a federal state and an international organisation in traditional senses. In this *sui generis* institutional structure, we can come across normative discourses not only in highly legalised processes but also in politically orientated intergovernmental processes. In other words, the legal and the political interact around normative evolution, and it is soft law that mediates this interaction, which may lead to constitute the signification structure on the basis of which norms evolve. In this way, the paper highlights that the research strategy based on the discursive constructivism is expected to be fruitful if non-hierarchical spheres of normative communication in evolving EU institutional complexes are taken into consideration.

The paper is divided into three sections. Section 1 presents a discursive constructivism by reviewing the arguments of some commentators on the concept of discourse in the light of social constructivism. This section sets out the theoretical viewpoints that discursive interactions construct a signification structure and political and legal discourses can contribute together to the evolution of environmental norms through the mediation of soft law. Section 2

examines the relationship between the institutional development of the EU as a polity and the evolution of EU environmental norms therein. This section suggests the viewpoint that methods to understand the process of evolving environmental norms in the EU depend on the manner in which EU polity-building is characterised, into which the institutional arrangement for environmental protection is embedded. On the basis of this viewpoint, this section lays emphasis on the non-hierarchical, multi-dimensional and continually changing nature of the institutional complexes of the EU. In such institutional complexes, we can observe crucial roles of soft law in terms of bridging the gap between supranational legal processes and intergovernmental political processes. Thus, the paper claims that discursive constructivism is suggestive in terms of grasping normative dynamics between the legal and the political. On the basis of the theoretical arguments put forth in Sections 1 and 2, Section 3 scrutinises the PEI with a view to clarifying its discursive power in normative evolution. To this end, this section points out the dubiousness of the PEI as a legal principle as well as explores how the PEI brings about inter-institutional communication and contributes to bridging the gap between the legal and the political by catalysing normative discourses and then constructing a signification structure in environmental issue-areas.

1 A Discursive Constructivism

Social Constructivism

Primarily, social constructivism provides a theoretical perspective for the manner in which social realities can be constituted and transformed. It posits that any social entity is that which is socially constructed through a large variety of social interactions, and the process of change requires to be taken into consideration. It is therefore easy to understand that social constructivism has pushed the frontier of European integration studies on account of the evolving nature of its process. The special edition of the *Journal of European Public Policy* (Vol.6 1999) is a remarkable, epoch-making contribution to the studies that adopt social constructivist perspectives. While constructivist research agendas have been largely driven by International Relations scholarship (Zehfuss 2002), these broad-ranging theoretical perspectives

also include within their scope environmental sociology (Burningham and Cooper 1999; Eder 1996; Hajer 1995), the sociology of science/knowledge (Strydom 2000 and Sismondo 1993), and cultural and gender studies (Burr 1995). In addition, new social movement theory, Bourdieu's structuralism and Luhmann's autopoetic theory can also be understood as one of constructivist research agendas (Delanty 1997: 110). Arguably, social constructivism can thus be viewed as one of the basic theories across various disciplines of social sciences. The intellectual origins of social constructivism are philosophical idealisms and the interpretative sociology of subjective meanings (Weber) and the sociology of knowledge (Mannheim), and Delanty regards both Weber and Mannheim as 'the great exponents of modern constructivism in social science' (*Ibid.,* 113). On account of this diversity, establishing a common definition of the exact nature of social constructivism is difficult, and there even exists a discrepancy in selecting between the two terms, constructivism and 'constructionism'. Burningham and Cooper report that '[s]ome authors use the terms social constructivism, or simply constructivism or constructionism. Debate about the terms at a conference (Constructing the Social, University of Durham, April 1994) revealed no clear rationale for preferring one term over another' (Burningham and Cooper 1999: 313, note 1). The current paper uses 'social constructivism', following the terminology that has been used in International Relations and European integration studies on account of the thematic area of empirical materials covered in this paper.

Notwithstanding this diversity, it appears that common basic views can be found in constructivist research strategies. Social realities are constructed through infinite interactions between countless actors at numerous levels. In this construction, a signification structure is also constituted. The social realities become comprehensible on the basis of this structure, in the absence of which communication regarding the social realities is not feasible. Accordingly, physical materials, by themselves, are unable to convey meanings. Rather, the physical materials become meaningful through the construction of a signification structure. Thus, it can be said that the construction of social realities and the meanings of physical materials therein are grounded on the constitution of a signification structure, and therefore the transformation of societies implies the modification of signification structures. In this context, what matters is the

manner in which a signification structure is constituted, and at this juncture, it can be assumed from social constructivist viewpoints that there exists no single actor capable of entirely controlling the constitution of signification structures, irrespective of the individual such as a high-profile politician or of the collective such as a hegemonic state. Although a particular actor sometimes appears to succeed in exerting his or her influences for constituting a signification structure, this is merely because previously constituted signification structures enable the recognition of the new signification structure by other actors. One should note the fact that signification structures can be modified through the process of infinite interactions between countless actors at numerous levels. The (re)constitution of signification structures thus becomes a crucial research topic. In International Relations scholarship, this research perspective leads to, for instance, the study of how the identity of a state is (trans)formed, thereby leading to a modification in national interests (Zehfuss 2001). In environmental sociology, this perspective promotes the study of how environmental issues are socially constructed and how the social structure of enabling ecological modernisation is constituted (Yearley 2002; Eder 1996; Hajer 1995). An implication that is crucial to the current paper is that the notion of environmental protection has a certain signification structure to allow people to comprehend what should be protected and how it should be protected, and furthermore that this structure is in a continuously changing process (cf. for instances of the notion of the nation state, see Koslowski 2001 and Onuf 1998).

Discourse

How can the (re)constitution of signification structures and the contestation/conflicts therein be approached? To this end, discourse approaches have offered good insights. The concept of discourse has been drawn on in social constructivist studies (Yearley 2002; Diez 2001; Strydom 2000; Larsen 1999; Milliken 1999; Eder 1996). Reviewing Austinian, Foucauldian and Derridarean moves of discourse approaches, Diez comments that discourse approaches add '. . . an important dimension to the predominant focus on ideas and institutions within social constructivist studies of European integration, arguing that they cannot exist apart from discourse' (Diez 2001: 86). In the light of discourse approaches, the so-called Euro-speak

becomes a significant research target, the study of which attempts at understanding the political implications of unique vocabularies of the EU as a *sui generis* political system. On the other hand, Larsen casts light upon the differences in the understanding of the concepts of nation/state between the UK and Denmark, approaching '. . . the question of the nature of the broad domestic constraints in terms of meaning structures within which the European policies of the two countries have taken place in the 1990s' (Larsen 1999: 453). Larsen's study explores the reasons for which these two countries have become Euro-sceptic in their own ways by investigating how a way of understanding the concepts of nation/state affects their diplomatic orientations.

In general, the concept of discourse in social constructivist research agendas is regarded as comprising cognitively and normatively reflexive statements, which bring us closer to a crucial facet of social realities (Howarth 2000 and Burr 1995). From the viewpoint of a discursive constructivism which the current paper attempts to offer, it is assumed that one can experience a social reality with a shared set of meanings, without which it is impossible to live through the same social reality. And it is the discourse that weaves a mesh of meanings. This discursive practice may lead to the (re)constitution of a signification structure. In other words, this is also the structuration of discursive interaction, which associates one particular meaning with others. This way of understanding the role of discourse is owing to a linguistic turn in modern philosophical studies. Torfing characterises discourses as follows: '. . . our cognitions and speech-acts only become meaningful within certain pre-established discourses, which have different structurations that change over time' (Torfing 1999: 84-85), and he continues, '[a] discourse is a differential ensemble of signifying sequences in which meaning is constantly renegotiated' (*ibid.*, 85). Paying attention to this role of discourse constituting a signification structure, the studies of discourse in social sciences take into consideration the following facets: 'discourses as structures of signification which construct social realities' (Milliken 1999: 229); 'discourses as being productive (or reproductive) of things defined by the discourse' (*ibid.*); and dynamics between the dominating discourse 'to fix the regime of truth' and the 'subjugated knowledges' to provoke 'alternative discourses' (*ibid.*, 230-1, 242; cf. Keeley 1990: 92).

Discourse and Policy-making

These viewpoints of a discursive constructivism lead to suggestions regarding a way of understanding policy-making. First, policy-making is carried out with the adoption of a political statement and/or a legal text. Second, a political statement as well as a legal text can be regarded as types of discourses due to their functions of establishing shared meanings of concepts, norms and principles, whereas each discourse has its own distinctive properties in terms of catalysing dynamics in normative evolution (Usui 2003: 70-72). Third, policy-making can accordingly be a discursive practice that constitutes a signification structure, referring to which individual discourses around policy-making are comprehended as being meaningful or unmeaningful, correct or incorrect and normal or abnormal (cf. Keeley 1990: 91). Put it differently, policy-making implies issue framing in a policy sector and/or a legal field by specifying the following elements: concepts that define problems that should be dealt with; norms that indicate what is wrong doing; and principles that prescribe the manner in which problems can be addressed[3]. It can be assumed that, when the meaning of each of these elements is shared, the system of meanings becomes stable, and then discursive interactions lead to structuration. In this way, policy-making can be perceived as the constitution of a signification structure through discursive interactions, and in this sense policy-making can be precisely described as 'a politics of discourse' (Diez 2001: 97) in which the struggle over framing the manner of viewing and acting in a social reality is carried out. This way of understanding policy-making conveys that normative evolution should be addressed in the light of the (re)constitution of signification structures. In short, the evolution of norms in an issue-area is part of the dynamics of policy-making, into which the former is embedded. Thus, a research theme based on a discursive constructivism aims at grasping the (re)constitution of signification structures and the contestation therein by examining various discourses and interactions thereof around policy-making.

[3] From a much broader perspective, it can be assumed that policy-making is carried out along with regime formation in an issue-area, which supports discursive interactions in procedural terms and promotes issue framing in substantive terms. This conceptual framework appears to be useful with a view to grasping evolving environmental norms in the EU. See Usui 2003. The current paper focuses on one dimension of this formation of EU environmental regime in terms of grasping roles of the PEI for reducing implementation deficits and thereby strengthening the regime.

To this end, the concept of discourse needs to be examined in greater detail in terms of uncovering a crucial facet of normative evolution. It should be borne in mind that all types of discourses do not posses equal power of discourse. The distinguished nature of law as a discourse requires clarification. For instance, Tans suggests the discursive understanding of constitutionalism by highlighting the fact that, '. . . constitutionalism is best understood as an instantiation of the concept of discourse, that is to say as involving communication about cognitions, by using language, and in a social situation' (Tans 2002: 242), and '[t]he constitution is basically a construction of meaning, a web of beliefs, woven in countless moments of discourse in which statements are accepted as warranted' (*ibid.*, 244). This nature of constitutional law as discourses in general implicates that it is, in a fundamental rationale, not always enclosed within a border of national entities; rather, some aspects of national constitutional laws might transcend the nation state insofar as discursive spheres are transitionally opened and discursive practices therein unceasingly (re)construct shared meanings. In other words, the transnational (re)constitution of a signification structure around constitutionalism is not entirely impossible in principle because discourses have within themselves an intrinsic orientation towards weaving a web of meanings.

Furthermore, law bears a distinguished property in terms of constituting a signification structure. On the one hand, a discourse becomes the formal discourse of law when it is authorised as such through a certain procedure. Legal texts are, in the first place, not an individual's personal discourses but collectively endorsed discourses, which are produced in due course through a formally established procedure (Tamanaha 2001). On the other hand, the existence of law depends on the continuous interpretation of legal instruments. What matters in this context is the attitudes of lawyers or legal experts. Their working spheres extend from judicial/legislative/executive bodies to particular types of civil associations, which implies that it is impossible to conceive any institutional practice completely free of legal ways of thinking. At least in principle, they should posses the vocational ethos that attempts to defy arbitrary methods of interpreting legal texts and pursues coherence and precision in legal reasoning. Accordingly, in legal discourses, the coherence of interpretation and the precision of definition

are pursued to the very end. Thus, law can be regarded as the discourse that contributes to the clear and stable common understanding of a social relation (Cotterrell 1995: 4-8).

Despite this remarkable property of law as a discourse, we also need to arrive at another type of discourse with a view to understanding how signification structures are transformed through discursive interactions in policy-making. While legal discourses arguably play the role of stabilising an emerging signification structure in an issue-area in the process of seeking coherence with other signification structures in other issue-areas, such type of legal discourses are never bound within the legal[4]; rather, legal discourses require to be perceived as being open towards other types of discourses, particularly political discourses. On the one hand, political discourses may distort legal discourses, and the breach of commitment in political discourses may escape judicial scrutiny. On the other hand, both discourses together can play the essential roles of constituting signification structures, even though both may sometimes be incoherent and involve a time-consuming adaptation process. In order to understand how signification structures are (re)constituted in policy-making, we are not permitted to separate political and legal discourses, and this is precisely what discursive constructivism suggests. Political discourses may provide legal discourses with a context in which the latter develops; simultaneously, legal discourses may constrain the orientation of political discourses. Thus, a discursive constructivism suggests the need for exploring how legal and political discourses mutually interact in terms of (re)constituting signification structures.

Soft law

Drawing on this theoretical frame of reference, we can understand how norms evolve without separating the legal and the political. In short, the evolution of norms is accompanied by the (re)constitution of signification structures, and legal and political discourses together contribute to this (re)constitution. Therefore, intermediate discourses need to be discovered with a view to addressing the collaboration of political and legal discourses. To this end, the concept of soft law becomes crucial. With reference to the discursive constructivism, we can come across

[4] The socio-legal viewpoints by Cotterrell provide valuable insights on this well-known topic. See Cotterrell 1995.

politics-law interfaces in soft law.

Thuerer highlights that there are various types of norms in society ranging from morals and political commitments to legal norms and adds that '[b]etween these two categories of norms exist others, the legally binding character of which has been deliberately and sometimes explicitly denied by their authors, but which nevertheless cannot be considered as being merely morally or politically binding' (Thuerer 1998: 452). These types of norms should be referred to as soft law. Thuerer defines soft law as 'a complex of norms lacking binding force but, nevertheless, producing significant legal effects' (*ibid.*, 459-460). Building on his view, soft law can be considered in terms of its *betweeness.*

First, soft law is an intermediary station between non-legal and legal norms. Before legislation, we often come across political commitments, declarations, common positions, resolutions, opinions, recommendations and so on around the concerned legislation. These are legally non-binding, but may be socially binding. The failure to fulfil their obligations is not justiciable, and the infringement to them may occasionally prevail, but these may eventually be accepted and lead to formal enactment. On several occasions, the words in new legislation, and even the basic concepts in the legal text concerned, are presented from the preceding soft instruments. Thus, soft law is indicative of the process of normative evolution (*ibid.*, 458). In discursive constructivist terms, soft law contributes to the (re)constitution of signification structures by establishing a connection between legal and political discourses.

Second, soft law mediates between mutually exclusive norms. In a polity, law-making is not always coherent. Legislation in an issue-area is occasionally inconsistent with the others, and even a change in the social situation may cause this inconsistency. At this point, Reisman suggests that soft law 'serves a very important homeostatic function' for contradictory and incompatible legislation in a single political system (Reisman 1988: 376). In discursive constructivist terms, a signification structure is in a state of flux and, if inconsistency appears in this structure, it becomes a new discursive subject, which may lead to the adjustment or transformation of this structure in itself. On this view, it can be said that the homeostatic

function of soft law is particularly important in environmental law-making because of its wide-ranging scope.

Third, soft law secures consents between opposing sides. In a politically sensitive issue, soft law can be an effective tool for compromise (Abbott and Snidal 2000). Reisman comments in the following manner:

> 'Soft law can overcome deadlocks in the relations of states that result from economic or political differences among them, when efforts at firmer solutions have been unavailing. A substantial amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as opposed to developing, countries' (*ibid.*, 375).

This view is undoubtedly applicable to the political landscape of the EU and the history thereof. In discursive constructivist terms, soft law can be regarded as the discourse of reconciliation in plural communities.

Notwithstanding these advantageous points, the *problematique* of soft law also needs to be kept in mind. Soft law may easily become an expedient instrument for hegemonic political actors because it can be produced only within executive bodies and is not challengeable before courts. As such, soft law may contribute to the strengthening of 'a regime of truth' provided by dominant/hegemonic discourses (Keeley 1990: 92) and may cause the latter to become extremely rigid, thereby making deconstruction difficult.

Taking these features of soft law into consideration, the current paper regards the concept of soft law as an intermediate discourse between the legal and the political. While soft law is a legal discourse in the sense that it is not someone's individual will, but an outcome of the collective decision-making processes, soft law is also created, applied and interpreted not only in supranational legal processes but also in intergovernmental political processes, occasionally only by the latter. Therefore, soft law is also a political discourse confined by law, or a legally contextualised political discourse. As such, soft law becomes an important instrument for

normative evolution on transnational open arenas of discursive practices, which is exactly what the EU has brought about in the process of European integration.

This way of understanding soft law on the basis of the discursive constructivism casts light upon a crucial facet of the PEI, which bridges the gap between the legal and the political, thereby catalysing the evolution of environmental norms. In the institutional context of the EU, there are some typical instruments of soft law, such as recommendations, opinions, resolutions, common positions and so on. As will be discussed later, environmental action programmes and presidency conclusions can also be regarded as certain types of soft instruments, which orientate policy-making through the institutional framework of the EU. They are not mere political discourses, but legally contextualised political discourses, and they establish the shared understanding of policy orientation in intergovernmental political processes. What should follow is the specification of the institutional context of the EU, in which such type of soft legal practices mediate between supranational legal processes and intergovernmental political processes.

2 Euro-polity and EU Environmental Law

EU environmental law has developed remarkably since the 1st Environmental Action Programme (hereinafter EAP) (OJ 1973 C112/3). Even before the legal base for environmental secondary legislation was provided by the Single European Act, the legal discourses of the Court of Justice and the political discourses of other Community institutions had, in general terms, been supportive and occasionally even proactive towards the establishment of Community environmental norms. The instances of former legal discourses are found in several cases such as *Cornelis Kramer* (Cases 3, 4 and 6/76), *Bier* (Case 21/76), *Commission* v *Italy* (Case 91/79) and *ADBHU* (Case 240/83). In *ADBHU*, the Court of Justice mentioned the following:

> 'In the first it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of

> general interest pursued by the Community provided that the rights in question are not substantively impaired' (Case 240/83, para.12)[5].

In this case, the Court of Justice regarded environmental protection as 'the objectives of general interest pursued by the Community'. The example of environment-friendly political discourses can be found in the following statement made at the 1972 Paris Summit:

> '. . . economic expansion is not an end in itself . . . As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind' (quoted from the 1st EAP, OJ 1973 C112/3).

While the development of EU environmental law has been based on the cause of building common markets, the aforementioned proactive environmental discourses since the 1970s have also brought about the process of establishing the normative frame independent of market orientations and the cognitive frame of ecosystem approaches (Usui 2003).

Similar to other legal fields, despite this noteworthy way of framing environmental issues, EU environmental law has suffered from implementation deficits (Demmke 2001; Krämer 1997: 7-19). For instance, Member States often do not notify the national measures of implementing directives to the Commission, and formal notice letters and even reasoned opinions have often been sent from the Commission to Member States (e.g. COM (2001) 309: 21-26). In the ongoing 6th EAP, the Commission mentions that:

> 'Implementation of existing environmental legislation needs to be improved. Vigorous legal action through the European Court of Justice should be combined with support for best practices and a policy of public information to name, fame and shame' (COM (2001) 31: 3).

Thus, constructing the EU environmental law, which is not only fit for Member States'

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[5] However, for the different conclusions from *ADBHU*, which demonstrated the still persistent market orientations, consider Case 172/82 *Inter-Huiles;* Case 295/82 *Rhône-Alpes Huiles*, and Case 173/83 *Commission* v *France*.

domestic legal/political contexts but also enforceable against non-compliant Member States, is a challenge.

Implementation deficits in environmental legal fields cannot be attributed exclusively to the negligence of Member States. They are also ascribable to the features of environmental law in itself on the one hand and of the EU legal order on the other. In general, environmental law is ubiquitous in the sense that it is related to almost all legal fields of the EU such as internal markets, agriculture, fishery, transport, energy, commercial policies, health and safety at work and so on. As a parallel, environmental policy-making has the possible wide influence over other policy sectors because it needs to strike a balance between environmental protection requirements and other normative imperatives. Adding to this difficulty in adjusting environmental actions with others, another attention must to be paid to the fact that the EU is an arena in which national and international laws intersect with EU law. In this multi-level legal system, the implementation of a sectoral law in the EU has, to a certain extent, an impact not only on the implementation of other sectoral laws in the EU but also on the legal practices in environmental or even other legal fields at Member States and international levels. Environmental law enforcement in the EU is thus much more difficult to carry out. At this point, we can observe the significance of the PEI in EU policy-making. This principle requires both the Council and the Commission to take environmental protection into consideration while undertaking new policy-making concerning non-environmental issue-areas.

Prior to examining how the PEI operates in the EU, theoretical concerns need to be specified in terms of the theoretical framework set up in Section 1.

The discursive constructivism adopted by the paper suggests casting light upon normative evolution through discursive interactions between different social sub-systems such as law and politics. It posits that the accumulation of discourses through day-to-day institutional practices leads to the (re)constitution of signification structures, with reference to which institutional actors comprehend individual concepts, norms and principles in a shared manner. Even in conflicting situations between institutional actors, the signification structure operates by

identifying moot points, because conflicts in institutional practices can occur first and foremost in the process of specifying the meanings of individual concepts, norms and principles in issue-areas. In other words, the signification structure enables conflicts to be based on a certain shared understanding of the arguments of others and their points of disagreement. Conflicts cannot occur without the signification structure, which is constructed on the basis of a discursive interaction. Any material fact can be said to be grounded on this social fact. Drawing on the theoretical implication of the discursive interactions, the current paper argues that, in the context of institutional complexes of the EU, attention must to be paid to the relationship between discourses concerning sectoral law development and polity building. This is due to the specific nature of an emerging Euro-polity, which may be referred to as being *sui generis*.

On the one hand, EU secondary legislation is distinguished from international treaties in the sense that, while the latter is separately concluded in each issue-area, the former is enacted on a legal base provided by the EC/EU Treaties and is prescribed with the basic legal principles of the Treaties in such a way that the coherence with other legislation is maintained. In international legal practices, the consistency between individual treaties is not obligatory, but ideally ambitious. In contrast, this is exactly what ought to be achieved in EU legal practices and in this context, we can come across one of features of the EU legal order (Pescatore 1970). It is noteworthy that such type of EU secondary legislation designs the common actions of Member States. To put this differently, the common actions of Member States preserve, at least normatively, the durable orientation towards legal systematisation at the EU level. On the other hand, the institutional complexes of the EU have witnessed continuous changes. The frequent amendments of basic treaties are indicative of the evolving nature of the EU. It has widened the areas of common actions of Member States from steel and coal sectors through the common markets of several possible sectors to single currency. In the meanwhile, the EU also constructed the three pillars: European Communities, the Common Foreign and Security Policies and the Police and Justice Cooperation in Criminal Matters. This pillar-structure will now be modified with the Constitutional Treaties of 2004. In this ongoing evolutionary process, the EU has reformed legislative and judicial procedures, occasionally by widening the scope of

application of the Community method or by strengthening intergovernmental cooperation. Thus, the EU is orientated towards legal systematisation, which appears to be close-ended; simultaneously, the EU can also be perceived as an emerging polity, which appears to be open-ended. It needs to be considered that EU environmental policy-making is embedded into such evolving institutional complexes. Accordingly, it can be assumed that the way of evolution of environmental norms in the EU depends on the institutional features of the EU as an emerging polity.

At this point, attention needs to be paid to the *sui generis* nature of the EU, in which one can observe the coexistence of two processes in policy-making: supranational legal processes and intergovernmental political processes. In order to address environmental normative evolution in the EU, the relationship between these two processes must be examined with a view to overcoming the dichotomy between a federalised and an intergovernmental Europe in terms of the finality of European integration. To this end, the discursive constructivism discussed by the current paper, which attempts to grasp the discursive interactions of (re)constituting signification structures, can be referred to as suggestive. As far as this (re)constitution is concerned, there exist no differences between legal and political discourses in functional terms; additionally, it can be assumed that normative evolution is based on this (re)constitution of signification structures that has been previously argued. With a view to approaching the dual process of supranational legal practices and intergovernmental political cooperation, the institutional features of the EU should be paid attention to in greater detail for the reason that the discursive interactions around environmental policy-making are embedded into the institutional complexes of the EU. What requires to be highlighted in this context is the fact that the EU is a multi-level legal system that involves the interaction between national, international and EU laws. In this legal pluralistic system, it is difficult to come across a single territorial area in which policy-making is self-contained. Any functional regime in socio-economic issue-areas is, to some degree, an open political arena, which is accessed by various actors, such as EU institutional actors, Member States' governmental actors, other international/transnational actors and so on. In this dimension, we can discover a non-hierarchical way of discursive

interactions, which implies that the national governments of Member States are no longer only effective political access points. In other words, it becomes difficult to clearly identify who has the competence of competences. In this post-national context, the roles of soft law become crucial. As discussed above, soft law functions as an intermediate discourse between the legal and the political and thereby allows for normative evolution in the institutional context of the EU. Policy-making in the EU may be influenced by international legal processes, and it often conflicts with national legal processes. Therefore, the function of soft law as a buffer is indispensable in terms of maintaining a balance between them; this balancing, in turn, prepares for future normative evolution.

Drawing on these theoretical viewpoints, the next section addresses the PEI in order to delineate its roles in discursive interactions around EU environmental policy-making.

3 The Principle of Environmental Integration

A holistic approach is essential for enhancing environmental law enforcement, which implies that the impact of almost all policies on the environment is taken into consideration at an early stage of policy-making. This exactly signifies what the PEI stands for. The PEI was originally laid down in the environmental clauses of the Single European Act of 1986. Later, the Amsterdam Treaty of 1997 enhanced the status of the PEI from a principle of environmental law to the basic principle of EU law by transferring the clause of the PEI from Articles 174-6 EC to Article 6 EC (Grimeaud 2000). Now Article III-119 of the European Constitutional Treaty establishes the PEI as follows:

> 'Environmental protection requirements must be integrated into the definition and implementation of the policies and activities referred to in this Part, in particular with a view to promoting sustainable development' (CIG 87/1/04: 87).

While, at first sight, the PEI serves as guidance for policy-making, it is also impossible to defy any legal effect of the PEI, since the manner of policy-making can undoubtedly be regulated

with the PEI. As will be discussed below, the EU has attempted to establish the linkage between common policies and the PEI. However, in this context certain difficult questions arise regarding the effectiveness of the PEI in legal terms (Nollkaemper 2002). Can the PEI be considered as a legal principle? If so, does it imply that any secondary legislation that demonstrates anti-environmental effects can be challenged before the Court of Justice and can be declared to be invalid? A case may be assumed in which a Member State brings an action against the Council before the Court of Justice for the annulment of legislation adopted by the qualified majority voting (QMV) in the Council by claiming that the legislation may lead to the destruction of the environment. In addition, does the PEI provide the governments of the Member States with a legal obligation to integrate environmental protection requirements into the definition and implementation of all national policy sectors to a certain degree? Further, can the Commission bring a case before the Court of Justice against the Member State that fails to fulfil this legal obligation? In the same vein, does the PEI implicate that a national court can submit a question to the Court of Justice with regard to the illegality of an EU measure if the measure is clearly inconsistent with a national law for the environmental protection? A case based on preliminary reference procedures may also be assumed, in which a proceeding is concerned with the failure of a Member State government or a legal/natural person to fulfil the obligation of the national measure into which the EU measure concerned is transposed. Furthermore, on the basis of Article 230 (4) EC, does the PEI enable a natural person to bring a case before the Court of Justice for annulment of the EU measure that has an anti-environmental effect and with which he or she is directly and individually concerned? Answers to all the above questions will be in the negative.

Therefore, it might be said that the discursive power of the PEI as a legal principle is not highly promising at the current stage of the evolving EU. As a weak legal principle, it might be a mere political rhetoric and/or a black letter principle. If the EU is evolving towards a vertical legal order, this weakness of the PEI as a legal principle solicits serious attention in terms of strengthening the implementation of EU environmental law. However, the current paper claims that the significance of the PEI also needs to be considered in the light of non-hierarchical and

multi-level discursive practices. For this, the policy-learning viewpoints of Hertin and Berkhout provide some insight. They comment that:

> '. . . the main objective of environmental policy integration is to enable environmental policy-making to shift from a traditional antagonistic model to a new co-operative model' (Hertin and Berkhout 2001: 6).

When the implementation of the PEI is considered in the light of this policy learning, what matters is the procedural significance of the PEI. At this point, Nollkaemper suggests the following:

> 'With regard to the procedural function, the principle requires, at a very minimum, that interests of environmental protection are considered in decision-making procedures. . . . It can . . . have a procedural significance in those cases where these requirements do not apply. Whereas the question to what extent such interests should be given protection generally lies beyond judicial scrutiny . . . , the requirement that such interest should be considered in a procedural sense is a requirement that can be applied by courts and other supervisory mechanisms' (Nollkaemper 2002: 30).

In terms of the discursive constructivism, the process of policy learning involves the weaving of normative discourses on the environment, and the procedures required with regard to the PEI enable environmental protection requirements to assume the status of significant topics in other policy sectors. In other words, the PEI changes the discursive context of each policy sector and then enables the occurrence of 'normative resonance' (cf. Schwellnus 2001). In this context, important is not to assess whether or not the PEI becomes implemented in a vertical arrangement of institutions, but to find discursive interactions that are catalysed by the PEI. A point is accordingly the role of the PEI that contextualises non-environmental legal/political discourses in terms of environmental protection requirements. At present, the PEI has certainly become one of the core concepts in political discourses around environmental law and policy in the EU. It has undeniably catalysed pro-environmental discourses and contributed to the evolution of EU environmental norms as will be argued in the succeeding paragraphs.

It can be originally retraced to the 1st EAP of 1973 (OJ 1973 C112/3), which called for the consideration of environmental protection in the planning of regional development. However, it was not activated in the environmental discourses in general at this early stage of the European integration. As mentioned above, this all-but-dead letter revived in the Single European Act of 1987, in which the PEI was reconceptualised for involvement with all policy sectors in the EC and was assigned the status of one of principles of EC environmental law. This implies that the soft treatment of the PEI in EAPs has gradually changed such that a topic in political discourses is included in legal discourses. The PEI has catalysed a new normative discourse through this process.

The legal discourses of the Court of Justice have contributed to this discursive development of the PEI in its own way. The Court of Justice has provided judgments that allow for environmental secondary legislation on non-environmental legal bases. For instance, the Court of Justice in *Chernobyl* (Case C-62/88) allowed the legislation for the protection of public health from radioactive contamination (Reg 3955/87) to be based on common commercial policy. The rationale of the Court of Justice to validate the environmental legislation based on common commercial policy is as follows:

> '[Article 6 EC], which reflects the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements' (Case C-62/88, para.20).

This rationale of validating environmental legislation on non-environmental legal bases was handed over in identical wordings to *Titanium Dioxide* (Case C-300/89, para.22), in which a valid legal base was disputed between Article 175 EC (the environment) and Article 95 EC (internal markets). These legal discourses of the Court of Justice are in themselves not environmental discourses; rather, these are concerned with the choice of the legal base, which is involved with competent contestation. However, these legal discourses also have an impact on the day-to-day administration at Member States level. In *Concordia* (Case C-513/99), the public

procurement policy of the city of Helsinki was scrutinised in terms of both equal treatment and environmental protection requirements. The city of Helsinki decided to award a procurement contract of urban buses to a commercial undertaking belonging to the city rather than the plaintiff in this case owing to the level of nitrogen oxide emissions and the noise level of buses. However, a public procurement directive (Dir 92/50/EEC) provides no environmental criteria in public tender. It is described as 'the economically most advantageous tender' (*Ibid.*, Art.36). Furthermore, the environmental criteria adopted by the city of Helsinki could in fact be satisfied only by a small number of undertakings, one of which was the undertaking belonging to the city. This appears to be problematic in terms of the principle of equal treatment. In this context, the Court of Justice referred to the principle of environmental integration. The judgment stated that:

> 'In the light of that objective and also of the wording of Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that [the contested directive] does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender' (Case C-513/99, para.57).

In this way, the legal discourses of the Court of Justice have contributed to the implementation of the PEI. Though not visibly, it operates steadily.

On the basis of these legal discourses, other types of discourses have also contributed to construct the meanings of the PEI. The first is the opinions of the Advocate General, which can be referred to as the legal discourse around law. The opinion delivered by AG Cosmas on the well-known *Greenpeace* case (Case C-321/95P) is noteworthy. The topic of dispute in this case was the direct actions of societal actors before the Court of Justice and the illegality of the financial support from the Community regional funds to the development plan that failed to fulfil the obligations of the environmental impact assessment directive (Dir 85/337/EEC). While the judgment dismissed societal actors' direct actions before the Court of Justice, AG

Cosmas also ambitiously stated the following:

> '. . . the Treaty provisions concerning the environment are not mere proclamations of principle. . . . [the PEI] appears to impose on the Community institutions a specific and clear obligation which could be deemed to produce *direct effect* in the Community legal order (emphasis added)' (Case C-321/95P, Opinion, para.62).

It is open to dispute whether the PEI is sufficiently clear and unconditional to fulfil the criteria of applying the doctrine of direct effect. In addition, the judgment attached with this opinion dismissed the direct actions of societal actors before the Court of Justice. However, the following statement made by AG Cosmas is noteworthy: 'that obligation has not remained a dead letter' (*Ibid.*, para.63). This claim has gradually come into practice, and the discourses around the PEI have been activated in policy-making processes on the basis of the outcomes of judicial processes.

A clear example is the Cardiff process. In response to newly established Article 6 EC in the Treaty of Amsterdam, the European Council since 1997 has been requesting the Commission and the Council to establish the strategies of making the principle functional. Undoubtedly, the Cardiff process has contextualised the Commission's environmental discourses and this is evident in several COM documents and EAPs, in which the PEI has become one of the most important principles (Grimeaud 2000). In terms of the discursive constructivism, statements in these documents can be referred to as the political discourse around law. The purpose of the 6th EAP (Dec 1600/2002/EC) is to activate the PEI, and the previous communication papers[6] under the Cardiff process are compiled into this new programme, Article 1 of which reads as follows:

> 'This programme should promote the integration of environmental concerns in all Community policies and contribute to the achievement of sustainable development

[6] For example, Partnership for Integration, COM (98) 333; Mainstreaming of environmental policy, SEC (99) 777; From Cardiff to Helsinki and beyond, SEC (99) 1941 final; Special Report No.14/2000 on 'Greening the CAP' together with the Commission's replies, OJ 2000 C353/1-56; Bringing our needs and responsibilities together, COM (2000) 576 final; Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy, COM (2001) 143 final; A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM (2001) 264 final; Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (01) 274 final.

throughout the current and future enlarged Community.'

This latest EAP is to provide the core strategy of the EU Sustainable Development Strategy (hereinafter SDS) (Göteborg Conclusion, Chapter II.A), which is also the outcome of the Cardiff process. It appears that the Cardiff process has led to a change in the mode of governance from the Community method to the Council-led cooperative style or an intergovernmental method. As the next step to the construction of the SDS, the rules for organising the proceedings of the European Council and the Council were reformed in the Seville European Council of 2002 (Conclusion, Annex 1 and 2). Presently, the General Affairs and External Relations Council (the GAER) have taken charge of preparing and coordinating with the European Council and even adopting the definitive agenda on the eve of the European Council (*Ibid.*, Annex 1, point.5). The Council Conclusions of 2002 on the SDS call upon this GAER Council 'on the basis of the work of the different formations of the Council, to take into account sustainable development in the triannual strategic programme and in the annual operating programme of Council activities. . .' (2457th Council meeting, 12976/02: 10-16, point. 8). This reformation appears to empower intergovernmental cooperation and, in turn, to reduce the Commission's presence in the Cardiff process.

However, we can also observe in the Cardiff process the institutionalisation of routine environmental communication between supranational bodies, including Member States' governments and, in part, environmental NGOs. The European Council, as a coordinator between the Commission and the Council, invites them to draw up the plans for integrating environmental protection requirements into policy-making and to submit progress reports so that the European Council can review the state of affairs at annual Spring meetings (Göteborg Conclusion, point. 22-25). The Commission, as a promoter of mobilising civil society, has set up platforms for organising the dialogue between stakeholders, including environmental NGOs (e.g. Dec 97/150/EC and Dec 97/872/EC), which can be seen to extend the range of communicative interactions around the PEI. In this way, the PEI has certainly become a significant principle around which institutionalised environmental communication is carried out.

Last but not the least, the role of international law should be mentioned. In the first place, the Cardiff process can be traced to the Rio process, which was initiated since the Rio summit of 1992, and the SDS is the policy programme to follow the Rio process (COM (98) 333 and COM (2001) 53). It is evident that the Rio process has promoted normative communication between the Commission, the Council and the European Council. The PEI is enshrined in the Rio Declaration as follows:

> 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it' (Principle 4 of the Rio Declaration).

Since the 5th EAP (OJ 1993 C138/5) the Commission's environmental strategies have been orientated towards the promotion of the Rio process. The Commission often refers to international environmental law in order to supplement its own political power, which has been constrained by the Council. The climate change is among the major targets under the 6th EAP, and the PEI has originally been enshrined in the UN Framework Convention on Climate Change, of which the EC is a party. Article 3(4) of the Convention reads as follows:

> '. . . Policies and measures to protect the climate system against human-induced change . . . should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change' (Dec 94/69/EC).

International commitments of the EU for the Kyoto Protocol have framed the institutionalised environmental communication in the Cardiff process and the SDS, and thus the reference to international norms has become much more indispensable in these communicative interactions between EU institutions. However, it needs to be kept in mind that such a communicative context based on environment-oriented discourses is also the outcome of the long-standing accumulations of the PEI discourses through the internal EU institutional practices.

The PEI is not likely to assume the status of a strict legal obligation; however, it procedurally

monitors legislative actions at the EU level and may contribute to constituting the normative context of national policy-making. Through multi-dimensional discursive practices in the EU, the PEI has been constituted as a central regulative principle to which all environmental discourses have to refer. The PEI will continue to constrain the political discourse of national policy-makers in such a manner that their actions are taken into account in terms of the PEI.

Concluding Remarks

As discussed above, the PEI has certainly been operative in environmental normative communication between the EU institutions, such as the Court of Justice, the Commission, the Council and the European Council. The arguments of this paper can be summed up as follows. On the one hand, the PEI is dubious as a legal principle because it involves some ambiguity regarding those obligations that stem from it, and hence it cannot be referred to for legal actions before courts. On the other hand, the Court of Justice has applied the PEI to legal base disputes in EU legislation and has even used the PEI to interpret non-environmental directives in an environment-oriented manner. These can be cited as instances of the procedural implementation of the PEI. On the basis of these legal practices of the Court of Justice, the status of the PEI in EC Treaties has been enhanced and the Commission has steadily contributed towards accumulating environmental secondary legislation through six environmental action programmes, in which the PEI has gradually been enhanced as a central principle. Alongside these supranational legal processes, the Cardiff process has opened up intergovernmental processes of environmental normative politics in the EU. With the beginning of this process, it appears that the mode of EU environmental actions seems to set to move from the Community method to intergovernmental cooperation; however, it also requires to be borne in mind that the PEI has affected day to day normative communication between the EU institutions, in which the PEI becomes the major principle that orientates various EU common actions towards environmental protection at least normatively. Last but not the least, environmental normative communication in intergovernmental spheres, such as the Council and the European Council, has also been contextualised with evolving international environmental law in which the PEI is one of major principles. In this sphere, the PEI has become the rationale of interlocking

normative discourses between EU and international levels. Through these intersections between supranational legal processes and intergovernmental political processes, the PEI has contributed to the constitution of a signification structure in the environmental issue-areas of the EU. This structure now prescribes the practice of normative discourses to assure that non-environmental norms are interconnected with environmental norms; that is to say, *environmental mainstreaming* in the EU.

Finally, one remark needs to be made regarding a future research. The current paper sets aside the roles of the European Parliament, which is arguably the arena on which the political and the legal interact against a background of the institutional context of the EU. With regard to normative evolution in environmental issue-areas of the EU, European party politics based on the European Parliament has constructed another discursive sphere in which we can observe the interactions between supranational legal processes and domestic political processes. The soft legal practices of the European Parliament require to be addressed in a future research with a view to understanding the institutional nature of an emerging Euro-polity as an arena of normative evolution.

In any event, it can be said that the discursive constructivism casts light upon a crucial facet of the EU institutional practices towards normative evolution by suggesting the discursive power of a principle; in the current paper, this refers to the PEI.

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