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A Safeguarded 'Green Deal-Aquis'?

Environmental and Climate Political Non-Regression as a Justiciable Principle of European Constitutional Law

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1. Introduction

As the world witnessed its first year with an average temperature exceeding 1,5°C above pre-industrial levels in 2024, Europe remains the continent heating the fastest.[1] Temperature records continue to tumble this year and will continue to do so in the years to come.[2] Recent weather extremes like the heavy rainfalls in Valencia provide stark warning signs, how such rising temperatures may translate into grave risks for the livelihood of European citizens.[3] It seems to get easier by the minute to spot the hints in everyday life, that climate change and biodiversity loss pose intertwined and cross-cutting challenges to the ecological foundations of our current economies and societies.

While the political response to these challenges has dramatically lagged behind scientific evidence and warnings of tipping points for decades, the European Union (EU) seemed to find a considerably more ambitious approach, (partially) tackling the prevailing ambition and implementation gap plaguing existing policies, starting in the late 2010s. In light of the 2015 Paris Agreement, widespread student protest throughout the continent and a perceivable shift in public awareness leading up to the 2019 EU parliamentary election, the new Commission under *Ursula von der Leyen* announced the so-called 'European Green Deal', a hitherto unmatched political and legislative agenda tackling the multiple facets of the ecological crises.[4] Crucially, as a framework to the efforts, the new 'European Climate Law' obliges the Union to be climate-neutral by 2050.[5]

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[1] Copernicus Climate Change Service and World Meteorological Organization, 'European State of the Climate 2024' (2025), <doi.org/10.24381/14j9-s541>.
[2] Copernicus Climate Change Service, Monthly Climate Bulletin of April 2025, available at: <https://climate.copernicus.eu/second-warmest-march-globally-large-wet-and-dry-anomalies-europe>.
[3] Davide Faranda et al., 'Heavy precipitations in October 2024 South-Eastern Spain DANA mostly strengthened by human-driven climate change' (2024), ClimaMeter, <https://doi.org/10.5281/zenodo.14052042>.
[4] European Commission, 'The European Green Deal', COM(2019) 640 final; findings of the European Environmental Agency, however, highlight a persisting implementation gap: European Environmental Agency (EEA), 'Progress towards achieving climate targets in the EU-27', <https://www.eea.europa.eu/en/analysis/maps-and-charts/figure-1-historical-trends-and-2>.
[5] Art. 2 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

Since then, however, political tides have shifted. Other topics marked the 2024 election of the European Parliament and there was a significant turn to right wing and populist parties. The buzzwords of the current political discourse and the priorities of the second term of *Ursula von der Leyen* as Commission President seem to be 'competitiveness' and 'cutting red tape', mirroring a political trend seen in various Member States and around the globe.[6] This has sparked fears that the new composition of the European Parliament and the notion of 'cutting red tape' may enable watering down of achievements of the Green Deal.[7]

A first taste of the Commission's new priorities can be seen in the announcement of a simplification agenda, consisting of various so-called 'Omnibus packages', the first of which has already been proposed by the Commission and partly accepted by the European Parliament.[8] As previously promised by *Ursula von der Leyen,* the 'Omnibus I' package seeks to streamline certain reporting and sustainability requirements for European companies, which had been introduced through Green Deal legislation. More precisely the package would *inter alia* relieve companies falling under the Corporate Sustainable Due Diligence Directive (CSDDD) from the strict obligation to 'put into effect' a climate transition plan, adapting their business model to climate goals set out in the Paris Agreement and the EU Climate Law.[9] However, the proposal has been criticized as not lowering administrative burdens substantially, while risking to hamper green investment and the management of climate related risks.[10]

[6] From the general press, Jennifer Rankin, 'EU launches 'simplification' agenda in effort to keep up with US and China' (*The Guardian*, 29 January 2025) <https://www.theguardian.com/world/2025/jan/29/eu-launches-simplification-agenda-in-effort-to-keep-up-with-us-and-china>.

[7] cf. Christian Calliess, 'Ist der Green Deal der EU nach der Wahl des Europaparlaments verzichtbar?: Eine Skizze im Lichte der strukturellen Koppelung von Politik, Wissenschaft und Recht' (*Verfassungsblog*, 20 June 2024) <https://verfassungsblog.de/ist-der-green-deal-der-eu-nach-der-wahl-des-europaparlaments-verzichtbar/>; Sebastian Mack, 'Don't throw it under the Omnibus –The EU needs to make sustainability reporting more effective' (2025) Jacques Delors Centre Policy Brief <https://www.delorscentre.eu/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20250424_Policy_Brief_Omnibus_Sebastian_Mack.pdf>; Klaas H Eller and Antoine Duval, 'Im Sog der Bürokratierhetorik: Lieferketten- und Nachhaltigkeitsregulierung zwischen Bürokratie und Good Private Governance' (*Verfassungsblog*, 10 January 2025) <https://verfassungsblog.de/im-sog-der-burokratierhetorik/>; moreover this 'de-regulatory turn' is not solely perceived in environmental matters, see e.g. Hannah Ruschemeier, 'The De-Regulatory Turn of the EU Commission' (*Verfassungsblog*, 18 February 2025) <https://verfassungsblog.de/the-de-regulatory-turn-of-the-eu-commission/>.

[8] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements**,** COM(2025) 80 final, (already adopted as Directive (EU) 2025/794); Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM(2025) 81 final; Proposal for a Directive of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism, COM(2025) 87 final.

[9] see art. 4(10) of COM(2025) 81 final.

[10] Mack (n 7).

Another of many[11] examples for this trend can be found in the recent softening of emission targets for European car makers[12] and the continued poise of the European Peoples Party to revoke the requirement for new passenger cars to run emission free starting 2035 – effectively banning combustion engines.[13]

Against this backdrop scholarly debate has started, whether there might be European constitutional safeguards preventing backsliding of previous environmental and climate political achievements.[14] Similar debates are starting to emerge at Member State level as well.[15] These debates are inextricably linked to broader questions of judicial protection against climate political inaction and backsliding, especially the increasingly delicate question of the 'right' inter-institutional balance between the judiciary and the legislator in matters of climate change. Adding to the emerging debate, this contribution will explore the following research question:

> *'Should the current European constitutional framework be interpreted as containing a general principle of environmental and climate-political non-regression?'*

Such a *constitutional* principle of environmental and climate political non-regression could limit legislative discretion and entail stricter criteria of judicial review, allowing the Court of Justice of the European Union (CJEU or Court) to substantially assess whether a certain measure regresses to lower environmental standards compared to a normative level of protection previously reached, thus rendering it incompatible with primary law. Although the

[11] Other examples include: the postponement of the Deforestation Regulation through Regulation (EU) 2024/3234 of the European Parliament and of the Council of 19 December 2024 amending Regulation (EU) 2023/1115 as regards provisions relating to the date of application OJ L 2024/3234; various simplification packages on the Common Agricultural Policy partly decoupling it from Green Deal ambitions, see for an analysis Sophia Caiati and Andrea Pratelli, 'The EU's simplification package on the Common Agricultural Policy: Simplification or Deregulation?' (*Europe Jacques Delors*, 26 May 2025) <https://www.europejacquesdelors.eu/news/the-eus-simplification-package-on-the-common-agricultural-policy-simplification-or-deregulation>; the Commission's voiced intend to revoke its proposal for a Green Claims Directive, see Marianne Gros and Elena Giordano 'Commission to kill EU anti-greenwashing rules' (*Politico*, 20 June 2025) <https://www.politico.eu/article/commission-to-kill-eu-anti-greenwashing-rules/>.

[12] Regulation (EU) 2025/1214 of the European Parliament and of the Council of 17 June 2025 amending Regulation (EU) 2019/631 to include an additional flexibility as regards the calculation of manufacturers' compliance with CO2 emission performance standards for new passenger cars and new light commercial vehicles for the calendar years 2025 to 2027, OJ L, 2025/1214.

[13] Andy Bounds and Alice Hancock, 'Europe's centre-right calls for softening of 2035 green car target' (*Financial Times*, 16 April 2025) <https://www.ft.com/content/7131c15d-66fe-497a-9a22-ce4502289c30>; Jordyn Dahl et al., 'The EU ban on combustion car engines is in trouble' (*Politico*, 11 March 2025) <https://pro.politico.eu/news/195274>.

[14] This idea has e.g. been voiced by Clemens Kaupa at a recent Seminar at the University of Amsterdam, <https://climatelitigation.uva.nl/event/how-to-challenge-insufficient-eu-climate-action/>.

[15] see eg. Jan-Louis Wiedmann, 'Klimaschutz ohne Sektorenziele' (2024) Neue Zeitschrift für Verwaltungsrecht 876, 878 et seq.

notion of non-regression is not new to European law (as will be shown *infra*), the concept's potential in the realm of European *constitutional* law, serving as a judicially enforceable emergency break against environmental backsliding, remains terribly underexplored. While some scholars have already made timid steps towards the exploration of such a principle – arguing that arts. 11 and 191 TFEU contain a (in principle legally binding) 'prohibition of environmental deterioration'[16] – they seem reluctant to consider true judicial oversight in that regard by the simultaneous finding that the legislator enjoys a wide (essentially non-justiciable) margin of discretion.[17] Other scholars, which may seem more open to the emergence of a *justiciable* non-regression principle, have either not yet thoroughly explored the variety of potential roots, possible scope or operationalization of such principle.[18] Combining both a doctrinal and evaluative approach, this contribution is trying to fill that void.

The argumentation will be structured as follows: First, it will be explored, whether one can distinguish a principle of environmental (containing climate-political) non-regression, in international law, European legislation and Member States' (constitutional) law, (Section 2.). Building on this, and simultaneously drawing on an interpretation of arts. 11 and 191 TFEU read in conjunction with art. 37 Charter of Fundamental Rights (CFR), it will be outlined whether the notion of environmental non-regression could be conceptualized as a general principle of European law, (Section 3.). Next, preemptively addressing likely critics of such principle, it will be discussed whether anchoring the principle in the European constitution would disrupt the institutional balance established in the Treaties, unduly limiting the discretion of the legislator, (Section 4.). Then, it will be asked how such a general principle, if found to be anchored in the EU constitution, would be judicially enforceable given the current hurdles for climate litigation on EU level, (Section 5.). Lastly, a conclusion will summarize and connect the findings to answer the overarching research question, (Section 6.).

Before delving into the proliferation of the concept in national, supranational and international

[16] Christian Calliess in *idem* and Matthias Ruffert (eds), *EUV•AEUV: Kommentar* (6edn, C.H.Beck 2022), Art. 11 AEUV para 8 and Art. 191 AEUV para 12.
[17] ibid, Art. 191 para 90; Sebastian Heselhaus, 'Art. 11 AEUV' in Matthias Pechstein, Carsten Nowak and Ulrich Häde (eds) *Frankfurter Kommentar EUV/AEUV/GrCH,* (2edn Mohr Siebeck 2023), para. 18.
[18] see in that regard only: Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4 Transnational Environmental Law 11; Delphine Misonne and Isabelle Hachez, 'Simplifier le Droit Européen de l'Environment: Un Processus Liberé de Toute Exigence de Non-Regression?' in Isabelle Doussan (ed), *Les futurs du droit de l'environnement* (Bruyant 2016) 135; Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014), 45; Tuvana Aras and Nathan de Arriba-Sellier, 'Awakening a Sleeping Giant: Article 11 TFEU as a General Principle of EU Law', forthcoming; Alicja Sikora, 'The Principle of a High Level of Environmental Protection as a Source of Enforceable Rights' (2016) 52 Cahiers de droit européen 399, 407.

law, some further remarks on the used methodology and terminology are warranted.
As briefly mentioned above, this contribution combines both doctrinal and evaluative research methods. It is relied upon the former in *Sections 2, 3 and 6 – i.e.* by 'identifying, understanding and systematizing the positive legal material'[19] – to trace the concept's distribution on the various levels of environmental regulation and analyze its potential anchorage and enforcement in the EU constitutional framework. The latter will be relied upon, when turning to likely critique of such concept and its implications in light of the principle of separation of powers in *Section 4*. Here, a normative-evaluative approach will complement doctrinal findings, drawing on previous scholarly theory on institutional balance, legitimacy of judicial review and limits of judicial capacity.

Regarding the terminology, this contribution will often simply use the term 'environmental non-regression' when referring to the concept this contribution examines. Without wanting to weigh in on the debate whether 'environmental law' and 'climate law' should be regarded as separate fields of study,[20] for the purpose of this contribution this term should always be understood as equally containing what could be called 'a concept of climate political non-regression'. Notwithstanding diverging facets of the biodiversity and climate crises, their interwovenness allows for the simple use of the concept of 'environmental non-regression' within this contribution.

2. Tracing environmental non-regression in national, supranational and international law

To introduce the notion of environmental non-regression and provide the necessary foundation for analyzing whether it may be regarded as a principle of European constitutional law, it is pivotal to first trace the concept's origins and proliferation in international law (2.1), Member States's (constitutional) law (2.2) and in European legislation (2.3). The following brief sketch of origin and proliferation of the concept will show that it is already established – although too varying degrees – at every stage of the multilevel governance framework on the environmental and climate crises, but that its legal status and scope of application remain contested.

[19] Martijn van den Brink, *Legislative Authority and Interpretation in the European Union* (OUP 2024), 9.
[20] Elif Naz Němec and Milan Damohorský, 'Climate Litigation in Europe: A Discussion About Emerging Trends in the Context of Principle of Non-Regression' (2024) 70 Acta Universitatis Carolinae. Iuridica 111, 114 et seq.

2.1. Environmental non-regression in international law

A principle of environmental non-regression is slowly emerging in a variety of international law instruments to which the EU or its Member States are a party. The emergence is taking place at various speeds in different fields of international law and is driven by varying rationales.[21] While one might expect the principle to be most firmly established in international environmental law, it is here that the concept has emerged only recently and its legal status is most contested.[22] Hence, before going into more detail on the concept's proliferation in international environmental law, I want to briefly outline its uptake in two different fields of international law: international investment law and international trade law.

2.1.1. Environmental non-regression in international investment and trade law

Predominantly inspired by the fear of competitive disadvantages caused by environmental regulation and aiming to prevent 'pollution havens'[23], non-regression clauses were introduced to a large number of international investment agreements starting with the North America Free Trade Agreement (NAFTA) signed in 1992.[24] Its 'prototype non-regression clause'[25] states[26]:

> *The Parties recognize that it is inappropriate to encourage investment by relaxing […] environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. […]*

Drawing on this example the EU and its Member States started to include similar non-regression clauses in their international investment treaties around a decade and a half later.[27]

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[21] Andrew D Mitchell and James Munro, 'An International Law Principle of Non-Regression from Environmental Protections' (2023) 72 ICLQ 35, 36 and 70.
[22] ibid 70.
[23] US Congress (Office of Technology Assessment), *Trade and Environment: Conflicts and Opportunities* (Report No. OTA-BP-ITE-94, US Government Printing Office, May 1992) at 17 et seq. and 99; Michael Scott Feeley and Elizabeth Knier, 'Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement' (1992) 2 Duke Journal of Comparative & International Law 259.
[24] North American Free Trade Agreement (NAFTA), signed 17 December 1992, entered into force 1 January 1994, superseded on the 1. July 2020 through the United States-Mexico-Canada Agreement; see generally on this development: Andrew D Mitchell and James Munro, 'No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law' (2019) 50 Georgetown Journal of International Law 625.
[25] Mitchell/Munro, 'An International Law Principle' (n 21) 39.
[26] Art. 1114(2) NAFTA.
[27] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 15. October 2008, entered into force 29 December

While similarly inspired by questions of competitiveness, the EU's pursuit of non-regression clauses can also be seen as part of its larger aim to further sustainable development and global environmental governance through its investment policies.[28] An express linkage of the notion of sustainable development and the pursuit of non-regression can e.g. be seen in the Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America.[29]

In international trade law, non-regression clauses started to emerge slightly later, with the US once more being the forerunner and the EU following suit.[30] Again, the notion of safeguarding a level playing field was the decisive driver for the inclusion of those clauses, this time aiming to prevent the slashing of environmental regulations to enhance the competitiveness of certain products on export markets.[31]

Given their similar origins in considerations of competitiveness, both trade and investment related non-regression clauses are now often unified in one single provision. Recent examples for such (environmental) non-regression clauses in EU investment and trade agreements can be found in the post-Brexit 'Trade and Cooperation Agreement' between the EU and the UK[32] and the EU-MERCOSUR Association Agreement, which is envisaged to be ratified later this year.[33]

Depending on the design of the specific investment and trade treaty, non-regression clauses might be invoked in investor-State dispute settlements or State-State dispute settlements if a party lowers their environmental protection standards.[34] How the argumentation in such cases

2008, [2008] OJ L 289/I/3.

[28] cf. The New European Consensus on Development 'Our World, Our Dignity Our Future', Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission [2017] OJ C 210/1; Mitchell/Munro, 'No Retreat' (n 24) 651.

[29] Council of the European Union, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (Doc. ST 11103/13) <https://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>, para. 8.

[30] see for one of the first such clauses: art 5.1 of the Agreement between the United States of America and Jordan on the Establishment of a Free Trade Area, signed 24 October 2000, entered into force 17 December 2001.

[31] Mitchell/Munro, 'An International Law Principle' (n 21) 53 et seq.

[32] Art. 391(2) Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, signed 30 December 2020, entered into force 1 May 2021, [2021] OJ L 149/10.

[33] The text of the agreement as concluded in December 2024 can be found on the website of the Commission: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en>; for the non-regression clause see art. 2(3) of Chapter: Trade and Sustainable Development; for ratification scenarios see Gisela Grieger, 'Ratification scenarios for the EU-Mercosur agreement' (EP Thinktank, 20 December 2024) <https://epthinktank.eu/2024/12/20/ratification-scenarios-for-the-eu%E2%80%91mercosur-agreement/>.

[34] Mitchell/Munro, 'An International Law Principle' (n 21) 42 and 56.

might be constructed, can be observed in various cases against Spain (often brought by investors from other EU Member States) regarding its modification of the regulatory and economic regime of renewable energy projects.[35] However, those cases were not directly based on a non-regression clause but rather on the contested 'fair and equitable treatment' standard and similar intra-EU arbitration cases are less likely to be raised after the CJEU's 2018 *Achmea* ruling.[36]

2.1.2. Non-regression in international environmental law

In international environmental law the concept of non-regression developed later and with a different (*i.e.*, more ecocentric) rationale. Driven by fears of environmental backtracking arising against the backdrop of widespread austerity measures, which threatened both social and environmental protection following the financial crises of the early 2000s, legal advocacy for a principle of non-regression gained traction in the runup to and during the aftermath of the 2012 United Nations Conference on Sustainable Development ('Rio+20').[37] Proposed and substantiated by scholars like *Michel Prieur,*[38] the idea was supported by the European Parliament[39] and was included in a first draft of the conference outcome document.[40] However, lacking unanimous support, the final outcome document did not expressly establish a 'principle of non-regression', but only contains a watered down reference to the notion.[41]

When it comes to binding international law, signed by the EU and its Member States, the instrument cited most often to postulate the existence of a principle of environmental non-regression is the Paris Agreement.[42] Although neither containing a express reference to such a principle, the Agreement is said to implicitly do so by being based on the notion of constant

[35] 9Ren v Spain, ICSID Case No. ARB/15/15, Award (31 May 2019); Stadtwerke München et al. v Spain, ICSID Case No. ARB/15/1, (2 December 2019); RWE Innogy v Spain, ICSID Case No. ARB/14/34 (30 December 2019).
[36] Case C-284/16, *Slovak Republic v Achmea BV* [2018], ECLI:EU:C:2018:158.
[37] Eckard Rehbinder, 'Contribution to the Development of Environmental Law' (2012) 42 EnvPol&L 210, 213; Nicholas A. Robinson, 'Reflecting on Measured Deliberations' (2012) 42 EnvPol&L 219, 223 et seq.; Markus Vordermayer-Riemer, *Non-Regression in International Environmental Law* (Intersentia 2020) 2; Mitchell/Munro, 'An International Law Principle' (n 21) 61.
[38] Michel Prieur, 'De l'urgente nécessité de reconnaître le principe de non régression en droit de l'environnement' (2011) 1 *IUCN Acad. Env. L. E-Journal* 26; Michel Prieur, 'Vers la reconnaissance du principe du non-régression' (2012) 37 *Revue juridique de l'environnement* 615; Michel Prieur, 'Non-regression in Environmental Law' (2012) 5 *S.A.P.I.EN.S* <https://journals.openedition.org/sapiens/1405>; Michel Prieur 'The Principle of non-regression' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing, 2023) <https://doi.org/10.4337/9781785369520>.
[39] European Parliament Resolution P7_TA-PROV(2011)0430 (29 September 2011), para. 97.
[40] Rehbinder (n 37) 213.
[41] *Outcome Document: The Future We Want* (2012) UN Doc. A/CONF.216/L1, para. 20.
[42] Paris Agreement of 12 December 2015, Annex to Decision 1/CP.21, Doc. FCCC/CP/2015/10/Add.1 (29 January 2016), entered into force 4 November 2016, 2016 EU OJ (L 282) 4.

progression, essentially being the flip-side to non-regression.[43] This can *inter alia* be seen in the parties' obligation to continuously update their nationally determined contributions requiring a 'progression beyond the Party's then current nationally determined contribution'.[44] However, there have also been skeptical voices regarding this interpretation, merely attributing the inclusion of the 'progression-topos' to the 'bottom-up approach'[45] of the Agreement allowing for increasing ambition over time.[46]

Lastly, even those skeptical whether the concept of non-regression might be already considered a general principle of international environmental law recognize that such a principle might gain further traction in the future due to the increasing interlinkage of environmental and human rights concerns. This interlinkage – as *inter alia* seen in last year's *KlimaSeniorinnen* case of the European Court of Human Rights (ECtHR)[47] – might bring the principle further to the forefront, given that the notion of progression/non-regression is already more firmly rooted in human rights instruments and discourse.[48]

2.2. Non-regression in national (constitutional) law

The concept of environmental non-regression is not exclusive to international law. On the contrary it is firmly rooted in various national jurisdictions and respective scholarly debate.[49] However, legal status and contours of the principle vary from state to state. The following section outlines the concept's proliferation in some of the Member States of the EU.

The Member State where the principle seems to be most developed in case law and legal debate is Belgium.[50] In 1994 the Belgian constitution saw the inclusion of the right to the protection

[43] Laurence Boisson de Chazournes, 'One Swallow Does Not a Summer Make, but Might the Paris Agreement on Climate Change a Better Future Create?' (2016) 27 EJIL 253, 254 et seq.; Prieur, 'The Principle of non-regression' (n 38) 257; Němec/Damohorský (n 20) 119 et seq.
[44] Art. 4(3) Paris Agreement.
[45] On the bottom-up approach of the Paris Agreement see eg.: Harro van Asselt, 'International Climate Change Law in a Bottom Up World' (2016) 26 QIL 5.
[46] Mitchell/Munro, 'An International Law Principle' (n 21) 63 et seq.
[47] *KlimaSeniorinnen Schweiz et al. v Switzerland* App no. 53600/20, (ECtHR, 9 April 2024), ECLI:CE:ECHR:2024:0409JUD005360020.
[48] Vordermayer-Riemer (n 37) 463 et seqq., Mitchell/Munro, 'An International Law Principle' (n 21) 65 et seqq.; for EU realm (especially art. 53 of the EU Charter of Fundamental Rights) see: Koen Lenaerts, 'Die EU-Grundrechtecharta: Anwendung und Auslegung' (2012) Europarecht 3, 17; Dora Kostakopoulou, 'Justice, individual empowerment and the principle of non-regression in the European Union' (2021) 46 ELRev 92.
[49] For a short overview see David R Boyd, 'Constitutions, human rights, and the environment: national approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing 2015) 170, 189 et seq.; Vordermayer-Riemer (n 37) 439 et seqq.
[50] see eg. Jan Theunis, 'Green Constitutionalism in Belgium: the right to a healthy environment as a principle of non-regression' in Hendrik Schoukens and Farah Bouquelle (eds) *The Right to a Healthy Environment in and*

of a healthy environment as part of the economic, social and cultural rights contained in its art. 23.[51] An ongoing legal debate whether art. 23 had to be interpreted as containing a rule of non-regression or 'une obligation de *standstill*' was resolved when the Belgian Constitutional Court expressly acknowledged such principle in successive rulings in 2006.[52] Since then, the Court handed down dozens of rulings on questions of non-regression in environmental matters, outlining this constitutional principle more clearly.[53] Looking at the jurisprudence of the Constitutional Court the principle has to be considered as both '*relative* and *dynamic*', meaning that the reference point for the determination of a regression is the current legislative framework (as opposed to the one in 1994 when art. 23 was introduced), but that a regression (if identified) may be justified by other reasons of the general public interest.[54] The Belgian context may be seen as another example how the interlinkage of environmental questions and fundamental rights may bring the principle of non-regression to the forefront; a legal development that is also gaining more traction in the area of international law as identified *supra*.

In Germany the outlines of the debate around a principle of environmental non-regression seem more blurred. Legal starting point of the debate is art. 20a *Grundgesetz (GG)* – equally introduced by constitutional reform in 1994 in light of environmental concerns – obliging the German state to 'protect the natural foundations of life and animals'.[55] While scholars seem to agree in principle that the norm's telos includes a notion of non-regression or non-deterioration, scope and implications of such a concept are contested.[56]
It is *inter alia* debated whether (a) such a concept should preclude normative regression of the

Beyond the Anthropocene (Edward Elgar Publishing 2024) 285; Marc Martens, 'Constitutional Right to a Healthy Environment in Belgium' (2007) 16 RECIEL 287; Luc Lavrysen, 'Presentation of Aarhus-Related Cases of the Belgian Constitutional Court' (2007) 2/07 Environmental Law Network International Review 5; Luc Lavrysen and Jan Theunis, 'The Right to the Protection of a Healthy Environment in the Belgian Constitution: Retrospect and International Perspective' in Isabelle Larmuseau (ed.), *Constitutional Rights to an Ecologically Balanced Environment* (VVOR, 2007) 9, 14 et seqq.

[51] *Belgian Official Gazette* 12 February 1994; for an overview of the environmental dimensions of art. 23 see Martens (n 50).

[52] Belgian Constitutional Court, Arrêt no. 135/2006 of the 14 September 2006, ECLI:BE:GHCC:2006:ARR.135, B.10; Belgian Constitutional Court, Arrêt no. 137/2006 of 14 September 20006, ECLI:BE:GHCC:2006:ARR.137, B.7.1; Belgian Constitutional Court, Arrêt no. 145/2006 of the 28 September 2006, ECLI:BE:GHCC:2006:ARR.145, B.5.1.

[53] For an overview of the Courts case law see e.g. Theunis (n 50).

[54] ibid 290.

[55] Introduced through: Gesetz zur Änderung des Grundgesetzes of the 27.10.1994, Bundesgesetzblatt I S. 3146; for an overview of the norms' genisis see eg.: Astrid Epiney in: Peter M Huber and Andreas Voßkuhle, *Grundgesetz.Kommentar* (8th edn, C.H.Beck 2024), Art. 20a para. 1 et seqq; Helmuth Schulze-Fielitz in: Horst Dreier (ed), *Grundgesetz-Kommentar* (3rd edn, Mohr Siebeck 2015) Art. 20a para. 4 et seqq.

[56] For an overview of the timely discussion whether eliminating sector specific emission reduction goals contravenes art. 20a GG: Wiedmann (n 15); Juliane Willert and Lea Nesselhauf, 'Dürfte die Bundesregierung die Sektorziele abschaffen?' (2023) Klima und Recht 135.

environmental law *aquis* (normative level)[57] or only factual degradation of the environment (material level),[58] (b) whether the principle would have to be considered absolute[59] or relative[60] and (c) whether the reference point for determining a regression should be static (hence referring to the level of protection in 1994 when art. 20a GG was first introduced)[61] or dynamic (referring to the latest state of the environmental *aquis*).[62] The German Federal Constitutional Court so far has not expressly weighed in on the matter, most probably due to the fact that art. 20a GG is widely regarded as not conveying 'subjective rights', making it harder to invoke in front of the Court.[63] However, in an *obiter dictum* included in its famous 'climate decision' from 2021 the Court seemed to hint that any regression in the level of climate political ambition would at least have to be justified in light of art. 20a GG.[64]

Lastly, in France a '*principe de non-régression*' has been expressly introduced more recently. However, not through constitutional amendment but on the legislative pathway.[65] This might in part be a response to a rather hesitant handling of the pre-existing *Charter of the Environment* (an attachment to the French constitutional text) on part of the Conseil Constitutionelle.[66] Conversely, this raised the question whether the parliament could limit its own discretion through the legislative pathway. The Conseil Constitutionelle, weighing in on the matter, declared the principle of environmental non-regression compatible with the French constitution while however finding simultaneously that Parliament could not limit its own competences, thus limiting the principles applicability to executive acts.[67]

[57] Schulze-Fielitz (n 55) para. 44.
[58] Dietrich Murswiek in Michael Sachs (founder) *Grundgesetz.Kommentar* (10th edn, C.H.Beck 2024) Art. 20a, para 44; acknowledging both a normative and material dimension: Epiney (n 55) paras 108 and 111; Christian Calliess in Theodor Maunz and Günter Dürig (founders), *Grundgesetz.Kommentar* (105. Ergänzungslieferung, C.H.Beck, 2024) Art. 20a, para 128.
[59] Norbert Bernsdorff, 'Positivierung des Umweltschutzes im Grundgesetz (Art. 20a GG)' (1997) 19 Natur und Recht 328, 332.
[60] Karl-Peter Sommermann in Ingo von Münch and Philip Kunig (founders), *Grundgesetz.Kommentar* (7th edn, C.H.Beck 2021) Art. 20a, para. 44; Calliess, 'Art. 20a GG' (n 58).
[61] Calliess, 'Art 20a GG' (n 58) para 127; Willert and Nesselhauf (n 56) 137; Schulze-Fielitz (n 55) para 44.
[62] Wiedmann (n 15) 879; pointing towards this understanding (German) Federal Constitutional Court, Order of the 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, para. 212.
[63] Calliess, 'Art. 20a GG' (n 58) 30; Schulze-Fielitz (n 55) para 24; Federal Constitutional Court, Order of the 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, para. 112.
[64] Federal Constitutional Court, Order of the 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618, para. 212.
[65] Article L. 110-1(II)(9) of the Environmental Code (code de l'environnement), as amended by Loi no. 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages.
[66] cf Vordermeyer-Riemer (n 37) 440 et seq.
[67] French Constitutional Council, Decision n° 2016-737DC of the 4. August 2016; for a discussion of the judgement see: Julien Dellaux, 'La validation du principe de non-régression en matière environnementale par le Conseil constitutionnel au prix d'une redéfinition a *minima* de sa portée' (2017) Revue Juridique de l'Environnement 693.

2.3. Non-regression in EU legislative files

The concept of non-regression, including in the ambits of environmental and climate protection, is not new to European law either. Providing a basis for the question whether a principle of environmental non-regression can be anchored in EU *constitutional* law, this section outlines to what degree the notion is already taken up by the European legislator.

For decades already, the EU legislator has been intent on highlighting, that the introduction of minimum harmonization through legislation should not necessarily serve as a reason to lower preexisting national levels of social or environmental protection.[68] That is why a wide array of legislative files include 'non-regression clauses', a late example of which can be seen in art. 1(2) CSDDD stipulating that the 'Directive shall not constitute grounds for reducing the level of protection of […] the environment or of protection of the climate provided for the by national law of the Member States […].' However, theses clauses only bind the national legislator when implementing the respective piece of EU legislation and it remains contested to what extend the discretion of national legislators is actually limited by them.[69] While some scholars seem to believe that these provisions should be interpreted as what could be called a 'absolute *material* non-regression clause', essentially obliging Member States to maintain higher standards,[70] others posit that such clauses merely prohibit the Member States to blame any regression on the EU legislator, thus rendering it a transparency clause.[71] In his jurisprudence on the matter – developed since the cases *Mangold*[72] and *Angelidaki*[73] – the CJEU seems to occupy some sort of middle ground, granting such clauses a material dimension (exceeding the idea of a transparency clause) but interpreting them as only prohibiting such regressions in the national level of protection that are 'connected to the implementation' of Union law and relate to the 'general level of protection' provided in a certain Member State.[74]

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[68] Jakob Dürr and Johanna Stark, 'Unionsrechtliche Regressionsverbote: Transparenzgebote oder Pflicht zur überschießende Umsetzung?. Auslegungsoptionen und Implikationen für die CSDDD-Umsetzung im Wege einer LkSG- Reform' (2025) Europäische Zeitschrift für Wirtschaftsrecht 156, 157.

[69] For the the recent debate in light of the German transposition efforts regarding the CSDDD see: Ulrich Hagel and Michael Wiedmann, 'Wie muss das LkSG aufgrund der CS3D angepasst werden?', Corporate Compliance Zeitschrift (2024) 185.; Anne-Christin Mittwoch, 'Möglichkeiten und Grenzen der Gestaltung des Anwendungsbereichs des *Lieferketten- sorgfaltspflichtengesetzes* (LkSG) bei der Umsetzung der *Corporate Sustainability Due Diligence Directive* (CSDDD)', available at < www.germanwatch.org/de/91189>; Dürr/Stark (n 68); Uwe H Schneider and Tobias Brouwer 'Das europarechtliche Verschlechterungsverbot' (2024) Europäische Zeitschrift für Wirtschaftsrecht 889; Simon Simanovski, 'Ein Schritt vorwärts, keiner zurück: Zur Rolle des Lieferkettengesetzes nach Inkrafttreten der Corporate Sustainability Due Diligence Directive' (*Verfassungsblog*, 13 June 2024) <https://verfassungsblog.de/ein-schritt-vorwarts-keiner-zuruck/>.

[70] Hagel/Wiedmann (n 69) 187; Mittwoch (n 69) 13.

[71] Dürr/Stark (n 68).

[72] Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005], ECLI:EU:C:2005:709.

[73] Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009], ECLI:EU:C:2009:250**.**

[74] Case C-246/09, *Susanne Bulicke v Deutsche Büro Service GmbH* [2010], ECLI:EU:C:2010:418, para 43 et

Other legislative files contain what can equally be dubbed 'non-regression clauses', which are however not exclusively directed at Member States in the process of transposing the legislation into national law, but rather seek to endurably embed a minimum level of protection for certain natural assets into respective governance frameworks. Two examples can be found in art. 6(2) of the Habitats Directive[75] and art. 4(1)(a)(i) Water Framework Directive.[76]

Moreover, central pieces of the EU's environmental and climate legislation (updated or enacted as part of the EU Green Deal), which frame the policy discretion with which its Member States then *inter alia* develop their respective energy policies, contain a notion of non-regression, thus dovetailing the 'bottom-up' and 'progressive' regulatory approach already distinguished in the Paris Agreement.[77] In this regard one has to mention art. 3(4) of the updated Renewable Energy Directive (RED III)[78] prescribing that the share of renewable energy in each Member State's consumption cannot regress behind 2020 levels. Furthermore, under the framework of the Governance Regulation[79] the Member States have to commit updated 'integrated national energy and climate plans' every ten years, which have to reflect 'an *increased* ambition as compared to that set out in its latest notified integrated national energy and climate plan'.[80]

Finally, the overarching European Climate Law proclaims to establish a 'framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions'.[81] The topos of irreversibility has been rightly identified as resonating with the notion of non-regression.[82] That

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seq.

[75] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (1992) OJ L 206/7 (Habitats Directive); for a discussion of its non-regression clause see Hendrik Schoukens, 'Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the EU Habitats Directive as an unusual ally to restore Natura 2000?' (2017) 13 Utrecht Law Review 124.

[76] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327/1.

[77] cf. Damian Chalmers, Gareth Davies, Giorgio Monti and Veerle Heyvaert, *European Union Law* (5th edn, CUP 2024) 1011.

[78] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources OJ L 328/82 as last amended by Directive (EU) 2024/1711 of the European Parliament and of the Council of 13 June 2024 amending Directives (EU) 2018/2001 and (EU) 2019/944 as regards improving the Union's electricity market design OJ L 158/125.

[79] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council OJ L 328/1 (Governance Regulation).

[80] Art. 14(3) Governance Regulation; highlighting added by author.

[81] Art. 1 European Climate Law.

[82] Theunis (n 50) 301.

the concept of non-regression – although sometimes only indirectly – shapes these key legislative files, serving as the overarching structure of the EU's climate policies, is commendable and shows that it is already firmly entrenched in the law of the Union.

2.4. Sub-Conclusion

This chapter has shown that the concept of non-regression is already firmly rooted in every level of the multi-level governance framework on the environmental and climate crises. Crucially, it can be identified – although sometimes only indirectly – in those legal instruments serving as the overarching pillars of the respective policy structures like the Paris Agreement or the European Climate Law. However, nature, scope and legal consequences of such concept remain contested at various levels. Recurring debates concern the questions whether such principle works on a normative or material level, whether it should be absolute or relative and whether it is time-bound or rather dynamic. Some of these antagonisms, as well as other findings of this chapter, will be revisited in the following, when analyzing whether non-regression should be regarded as a general principle of EU law.

3. Anchoring Environmental Non-Regression in the EU Constitution

Argumentation will now turn to the question, to what extend legal interpretation supports the hypotheses that the European constitutional framework must be regarded as containing a general principle of environmental non-regression. To this end, it is indispensable to first give a short overview over the role of general principles in the EU legal order, sketching their genesis, functions and limitations, (3.1.). This will provide the basis on which to assess whether 'environmental non-regression' can be regarded as such general principle, (3.2.).

3.1. General Principles of European Union Law

The concept of general principles of EU law has been steadily developed in the CJEU's case law since the very beginnings of the Union in the European Coal and Steal Community.[83] Since then it evolved most prominently and forcefully in the realm of fundamental rights.[84]

[83] Paul Craig, 'General principles of law: treaty, historical, and normative foundations' in Katja S. Ziegler, Päivi J. Neuvonen, and Violeta Moreno-Lax (eds) *Research Handbook on General Principles in EU Law* (Edward Elgar Publishing 2022) 25.
[84] Starting with Case 29/69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECLI:EU:C:1969:57 and Case

Simultaneously a growing body of scholarly literature has debated the concepts foundations, functions and limitations.[85] The concept has been found to defy pre-existing analytic frameworks in legal theory[86] and many aspects thereof remain contested.[87] Without diving deeply into these theoretical and doctrinal debates, it is nevertheless possible to discern certain pertinent characteristics of general principles in the case law of the CJEU and in legal literature, sufficing for the purpose of this argumentation.

General principles of European law are usually just found to exist by the CJEU.[88] However, the sometimes eclectic case law of the Court does not allow the distillation of a clearcut scheme for their genesis. To justify the existence of a general principle the CJEU typically adopts a comparative approach, analyzing whether a certain principle is common to the constitutional traditions of the Member States or discernable in international law obligations of the Union and its Member States.[89] However, a principle does not have to be anchored in every Member State's constitution to qualify as a general principle of the Union. Rather than seeking the smallest 'common denominator', the CJEU is intent on finding the 'solution' best fitting the objectives of the Treaties.[90] An example for this is the general principle of non-discrimination on the basis of age, which the CJEU established in its (in)famous *Mangold* ruling, and which had previously only been established in two national constitutions and had not found clear expression in applicable international law. However, given the particular low previous proliferation of the principle, the *Mangold* case awakened national sensitivities and sparked considerable scholarly criticism regarding the extend and method of judicial lawmaking.[91] While some of the more general concerns regarding the Courts use of general principles of EU law will be further

11/70, *Internationale Handelsgesellschaft* [1970], ECLI:EU:C:1970:114.

[85] Katja S. Ziegler, Päivi J. Neuvonen, and Violeta Moreno-Lax (eds) *Research Handbook on General Principles in EU Law* (Edward Elgar Publishing 2022); Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds), *General Principles of EC Law in a Process of Development* (Wolters Kluwer 2008); Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006); Koen Lenaerts and José A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CML Rev. 1629; Constanze Semmelmann, 'General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification' (2013) 2 Pittsburgh Papers on the European Union 1; Michael Wimmer, 'The Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality' (2014) 20 *European Public Law* 331; Armin von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 ELJ 100.

[86] Semmelmann (n 85) 4 et seqq. with further references;

[87] see e.g. for contesting views on the question whether general principles have to be explicitly recognized by the CJEU or can also exist without such explicit recognition: Wimmer (n 85) 334 and Sacha Prechal and Magdalena E de Leeuw, 'Transparency: A General Principle of EU Law?' in Bernitz/Nergelius/Cardner (n 85) 201, 203.

[88] Päivi J. Neuvonen and Katja S. Ziegler, 'General principles in the EU legal order: past, present and future directions' in Ziegler/Neuvonen/Moreno-Lax (n 85) 7, 11.

[89] Case C-4/73 *Nold v Commission* [1974] ECR 491, para 13.

[90] Lenaerts/Gutiérrez-Fons, 'General Principles' (n 85) 1654.

[91] see e.g. Matthias Herdegen, 'General Principles of EU Law – the Methodological Challenge' in Bernitz/Nergelius/Cardner (n 85) 343, 348 et seq.

addressed in *Chapter 4*, it suffices here to discern that the Court – seemingly responsive to some of its critics – has hence posited towards a more positivist and deliberate approach in establishing general principles.[92] As *Semmelmann* demonstrates the CJEU thus seems more intent on reflecting its method of deriving general principles and keeping principles more closely connected to the Treaties and EU legislation instead of relying on 'incremental' legal concepts.[93] This can *inter alia* be seen in the *ex post* attempts to justify the *Mangold* judgement through reference to art. 21(1) CFR – notwithstanding that the CFR had not yet been binding at the time of the decision.[94] Thus, Union law itself emerges as an important source of general principles, where common constitutional traditions are less established or only just emerging.[95] In this regard the establishment of the precautionary principle as a general principle serves as an example of the Court relying on what the *pouvoir constituant* had agreed upon, but extending the constitutional role of the principle beyond its sectoral scope.[96] In a similar vein, when primarily based on Union law itself, general principles may serve to cohesively bring together various stipulations of a principle scattered over primary law.[97]

Once established, general principles are regarded as an autonomous source of EU law on the same rank as primary law.[98] From this 'constitutional status' three main functions of general principles are derived. They serve to guide interpretation of Union law, to fill normative gaps within the Treaties or EU legislation, and lastly as grounds for judicial review.[99] Crucially, this third function enables the CJEU to declare void any EU legislation (or set aside national legislation falling within the scope of EU law) that contravenes a general principle.[100]

Hence, the establishment and operation of general principles comes with important implications for both the horizontal and vertical division of powers within the Union.[101] While principally justified by both the broad mandate of the CJEU as outlined in arts. 19(1) and 263(2) TFEU[102]

[92] Semmelmann (n 85) 28 et seq.
[93] ibid.
[94] Lenaerts/Gutiérrez-Fons, 'General Principles' (n 85) 1654 et seq.
[95] Neuvonen/Ziegler (n 88) 16; Wimmer (n 85) fn 9.
[96] Joined Cases T-74/00, T76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan GmbH et al. v Commission* [2002], ECLI:EU:T:2002:283, paras. 181 et seqq.
[97] Wimmer (n 85) 343.
[98] The CJEU talks of a 'constitutional status' in Case 101/08, *Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Others* [2009], ECLI:EU:C:2009:626, para. 63; Wimmer (n 85) 333 et seq.; Lenaerts/Gutiérrez-Fons, 'General Principles' (n 85) 1647.
[99] Lenaerts/Gutiérrez-Fons, 'General Principles' (n 85) 1629; including 'grounds for claims of liability' as a fourth function: Neuvonen/Ziegler (n 88) 19; Wimmer (n 85) 337.
[100] Lenaerts/Gutiérrez-Fons, 'General Principles' (n 85) 1629.
[101] ibid 1631; Semmelmann (n 85) 16 et seq.
[102] cf Craig, 'General Principles' (n 83); Takis Tridimas, 'The General Principles of EU Law and the Europeanisation of National Laws' (2020) 13 REALaw 5, 17 et seq.

and by the implicit acceptance of the CJEU's case law through the *pouvoir constituant* in the latest Treaty changes (see arts. 6(3) TEU and 340 TFEU), the role of general principles thus finds an important limitation within the structural principle of separation of powers.[103] Therefore, determining whether a matter is of constitutional character (limiting legislative leeway) or rather remains within legislative discretion, emerges as crucial for the establishment of any general principle of EU law.[104] This also entails – as will be discussed in the following section and in *Chapter 4* – that the application of general principles shall not result in the CJEU replacing legislative choices by its own preferences.[105]

3.2. Environmental Non-Regression as a General Principle?

Starting from this understanding of general principles of EU law, it will now be explored whether environmental non-regression can be qualified as such, drawing from the comparative analysis already undertaken in *Chapter 2,* (3.2.1.), and from an interpretation of primary law itself, (3.2.2.).

3.2.1. The merit of the comparative argument

As has been shown *supra,* a principle of environmental non-regression is already rooted in every level of the multi-level governance framework on the environmental and climate crises. It is firmly anchored within various international Treaties binding the EU or its Member States, as well as in various national legal orders. Hence, the comparative case for the recognition as a general principle may already appear more convincing than it was for some of the other general principles of EU law – remember e.g. the *Mangold* case outlined above. However, it has equally been pointed out *supra*, that the CJEU has recently been more cautious to base general principles on merely emerging national concepts and tried to stick more closely to Union law itself. In this vein, some readers may still doubt whether the current proliferation of environmental non-regression in international and Member States' law is already sufficient to provide the sole basis for its recognition as a general principle of EU law. After all, is the concept not embedded rather implicitly rather than expressly within the Paris Agreement? And is its proliferation on Member State level not far away from constituting a critical mass or even providing clear contours of such potential principle?

Thus, additionally, a general principle of environmental non-regression could need a clear

[103] Lenaerts/Gutiérrez-Fons, 'General Principles' (n 85) 1667.
[104] ibid.
[105] ibid.

'supporting column' within (primary) EU law itself, bolstering the comparative arguments and providing clearer contours to the potential principle.

3.2.2. A supporting column within primary law

In this section it will be analyzed whether arts. 11 and 191 TFEU read in conjunction with art. 37 CFR may serve as such supporting column. To this end – following the established modes of interpreting EU law[106] – wording, both systematic and historic context, and *telos* of the norms will be examined. Where possible, it will also be drawn on case law of the CJEU on the application of the respective norms.

3.2.2.1. Wording of arts. 11, 191 TFEU and art. 37 CFR

Starting point of the interpretation will be the wording of the norms in question. Art. 11 TFEU stipulates that '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. First, it is important to note, that the use of the word *must* (instead of *shall aim to*) clearly indicates an obligatory and justiciable character of the norm.[107] As highlighted by *Aras* and de *Arriba-Sellier,* this finding is equally supported by the wording used in the different language versions of the Treaties.[108] The fact that environmental protection requirements must be *integrated* – instead of merely having to be taken into account – equally highlights the binding character of the norm and points towards a substantial, not merely procedural, obligation, indented to partially limit legislative discretion.[109] Furthermore, it is important to note, that the integration requirement applies to all *Union policies and activities*. This wording reveals the crosscutting nature and broad scope of application of art. 11 TFEU, applying not only to every singular (legislative) activity of the Union,[110] but also to its Member

[106] Koen Lenaerts and José A. Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2014) 20 Columbia Journal of European Law 3; Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 European Journal of Legal Studies 137.
[107] Calliess, 'Art. 11 AEUV' (n 16) para 24.
[108] Aras/de Arriba-Sellier (n 18).
[109] Martin Wasmeier, 'The Integration of Environemtal Protection as a General Rule for Interpreting Community Law' (2001) 38 CMLRev 159, 164; Elisa Morgera and Gracia Marín Durán 'Article 37' in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2021), para 37.35; cf. Calliess 'Art. 11 AEUV' (n 16) para. 24; cf. Heselhaus, 'Art. 11 AEUV' (n 17) 14.
[110] Calliess, 'Art. 11 AEUV' (n 16) para 10; supported e.g. by Joined Cases C-541/20 to C-555/20, *Lithuania et al. v Parliament and Council (Mobility Package)* [2024], ECLI:EU:C:2024:818; a different view is taken by Ludwig Krämer 'AEUV Art. 11' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds) *Europäisches Unionsrecht* (7th edn, Nomos 2015), Art. 11 AEUV para 28.

States when acting within the realm of EU law.[111] Crucially, these characteristics of the integration clause point towards the norm's capacity to serve as an anchor for a general principle of EU law.[112]

Given that art. 11 TFEU itself does not further specify the *environmental protection requirements* which have to be integrated, the provision must be read in conjunction with the other provisions of EU law outlining the Union's environmental policy objectives, notably art. 191 TFEU and art. 37 CFR.[113] Art. 191 TFEU *inter alia* demands that environmental policy should contribute to 'preserving, protecting and *improving* the quality of the environment'.[114] Similarly, art. 37 CFR requires the integration of a 'high level of environmental protection and the *improvement* of the quality of the environment' into the policies of the Union.[115] The idea of improvement, firmly rooted in both these norms, is incompatible with environmental backsliding, or even with mere standstill.[116] Hence, textual interpretation supports the anchoring of a general principle of environmental non-regression in arts. 11, 191 TFEU and art. 37 CFR.

Lastly, while supporting the concept of non-regression in principle, the wording of the norms in question may hint that such principle could not be regarded as absolute. Both art. 11 TFEU and art. 37 CFR (although each with slightly different wording) connect the prescribed environmental protection efforts to the concept of 'sustainable development', which is widely interpreted as requiring a balancing exercise between environmental concerns and economic development.[117] Thus a *relative* reading of non-regression seems indicated on EU level, (see for indications of this relative character and for potential standards of review regarding the

[111] Calliess, 'Art. 11 AEUV' (n 16) para 12.
[112] cf those contributions qualifying art. 11 TFEU itself as a general principle: Heselhaus, 'Art. 11 AEUV' (n 17) para 4; Aras/de Arriba-Sellier (n 18); cf. also some of the jurisprudence of the CJEU: Although the Courts case law on art. 11 TFEU has not been entirely consistent, it has e.g. used art. 11 TFEU as a ground for legality review in the recent Joined Cases C-541/20 to C-555/20, *Lithuania et al. v Parliament and Council (Mobility Package)* [2024], ECLI:EU:C:2024:818; for a comprehensive overview of the Courts case law see Aras/de Arriba-Sellier (n 18).
[113] Wolfgang Kahl in Rudolf Streinz (ed), *EUV/AEUV* (3rd edn, C.H.BECK 2018), Art. 11 AEUV para 16; Calliess, 'Art. 11 AEUV' (n 16) para 6; Morgera/Durán (n 109) para 37.25 and 37.30; cf Sikora (n 18) 405.
[114] Art. 191(1) TFEU, highlighting added by the author.
[115] Art. 37 CFR, highlighting added by the author.
[116] Morgera/Durán (n 109) para 37.24; Sikora (n 18) 407; Sebastian Heselhaus, 'Art. 191 AEUV' in Pechstein/Nowak/Häde (n 17) para 36; cf Aras/de Arriba-Sellier (n 18).
[117] Morgera/Durán (n 109) para 37.28 et seq.; however, such interpretation of the words '*with a view to promoting sustainable development*' does not seem set in stone. Especially with regards to climate change, the traditionally assumed tension between decarbonization efforts and economic development is challenged by recent economic research and unmasked as being based on a fossil-driven understanding of 'development'. See in this regard e.g. evidence of the cost-advantages of swift decarbonization efforts: Spyros Alogoskoufis et al., 'ECB economy-wide climate stress test' (2021) ECB Occasional Paper Series No 281, 5.

justifiability of potential regressions: *Chapter 4*).

3.2.2.2. Systematic Context

Two aspects of the systematic context in which the respective norms are placed, further support their potential status as basis of a general principle of environmental non-regression.

First, even though the TFEU is nowadays endowed with various 'integration clauses', art. 11 TFEU sticks out as the most stringent one. While some authors like to point out that environmental concerns are just one of the many interests the Union has to balance in its policies nowadays,[118] a comparison of the different integration clauses shows that art. 11 TFEU is equipped with the most precise and demanding wording.[119] The unique level of commitment and urgency expressed in art. 11 TFEU, thus corroborates its potential as a linking point for a general principle of European law.

Second, the objective of improving the environment as expressed in arts. 191 TFEU and 37 CFR finds further resonance in art. 3(3) TEU, which includes the 'improvement of the quality of the environment' within the list of aims pursued by the Union. It remains highly questionable, whether the loftily formulated values and aims of the Union alone suffice to derive justiciable principles.[120] However, it is less contested, that they may guide interpretation of primary law and be operationalized through more precise Treaty norms.[121] Here, the uptake of the notion within the aims of the Union shows that the idea of 'environmental improvement' has reached considerable weight and prevalence in the system of the Treaties. This strengthens a potential interpretation of arts. 11 and 191 TFEU read in conjunction with art. 37 CFR, as being a supporting column for a general principle of environmental non-regression.

3.2.2.3. Historic Context and Telos

Turning to the historic development and purpose of these norms, it catches the eye that while

[118] Jan H. Jans, 'Stop the Integration Principle' (2010) 33 Fordham Int'l LJ 1533, 1544.
[119] Other clauses contain more aspirational language like 'the Union shall aim to'; see also Aras/de Arriba-Sellier (n 18).
[120] See e.g. on the recent debate whether the values of art. 2 TEU are justiciable in a selfstanding manner see notably: Case C-769/22 *Commission v Hungary* [2025] Opinion of AG Capeta, ECLI:EU:C:2025:408, para 188 et seqq.
[121] See e.g. the role of art. 2 TEU in the CJEU's previous rule of law jurisprudence: Case-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117**,** para 32.

the initial Treaty of Rome[122] was still lacking any mentioning of the 'environment', ecological concerns increasingly developed an integrational momentum and recognition within primary law.[123]

While – as in many instances before – it was the CJEU delivering a first constitutional impulse in its *ADBHU* ruling, classifying environmental protection as an 'essential objective' of the Community, the contracting parties were quick to follow suit.[124] The precursor of arts. 11 and 191 TFEU – by then still united in one Treaty provision – was introduced through the Single European Act in 1987.[125] Only five years later, when signing the Treaty of Maastricht,[126] the *Masters of the Treaties* sought to further strengthen the environmental integration clause, following a proposal of the Commission advocating for a stricter wording of the provision.[127] Thus the wording was changed from *shall* to *must*, clarifying its binding character.[128]

Despite this clear upgrade of the integration clause with the Treaty of Maastricht, by the time of the next Treaty amendment the contracting parties again saw the need to further valorize environmental protection in the Treaties.[129] The Treaty of Amsterdam hence relocated the integration clause, including it into the general provisions preceding the operational part of the Treaty and thus highlighting its crosscutting nature.[130] With the last Treaty revision in Lisbon art. 11 TFEU maintained this position in the Treaties.

Furthermore, the Lisbon Treaty saw the elevation of the Charter, making it binding primary law. Although the genesis of art. 37 CFR offers few reference points for its potential interpretation as anchor of a general principle, with some authors describing its drafting as hastily 'piecing together' concepts already contained in arts. 11 and 191 TFEU,[131] others identify an important reiteration of the notion of environmental improvement and a 'tendency towards

[122] Treaty Establishing the European Economic Community [1957], signed on the 25th of March 1957, hereafter EEC Treaty or Treaty of Rome.
[123] de Sadeleer (n 18) 8 et seqq.; Jans (n 118) 1534 et seqq.; cf Wasmeier (n 109) 160.
[124] Case 240/83, *Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECLI:EU:C:1985:59, para 13.
[125] Art. 130r EEC Treaty as amended by the Single European Act [1987], signed on 28 February 1986, entered into force on 1 July 1987 OJ L 169/1.
[126] Treaty on European Union [1992] signed at Maastricht on 7 February 1992, entered into force on 1 Novemeber 1993 OJ C 191/1.
[127] European Commission, *Intergovernmental Conferences: Contributions by the Commission* (Publications Office of the EU, 1991).
[128] Wasmeier (n 109) 160; Jans (n 118) 1537.
[129] Heselhaus 'Art. 11 AEUV' (n 17) para 4.
[130] cf Calliess 'Art. 11 AEUV' (n 16) para 3.
[131] Christian Calliess, 'Art. 37 EU-GRCharta' in Calliess/Ruffert (n 16), para 1.

subjectivization' of environmental matters.[132] Importantly, the elevation of art. 37 CFR brings a renewed emphasis of the notion of 'environmental improvement', years after its first inclusion into primary law with the Single European Act. This successive reiteration of the notion may indicate that a general principle of non-regression could not be understood as cementing the *status quo* at a specific point of time, but rather reveals the dynamic and progressive character of such principle on EU level, safeguarding the latest level of environmental protection.[133]

Interpretation of the historical context and *telos* thus shows that the Member States as *pouvoir constituant* have tried to continuously upgrade the recognition of environmental concerns in primary law, most notably seen in the development of today's art. 11 TFEU. The repeated efforts to clarify and strengthen the binding nature of the provision corroborate its constitutional character and ability to limit legislative discretion, therefore serving as a potential linking point for a general principle of EU law. Additionally, the historic genesis of the norms points towards a *dynamic* understanding of the concept of non-regression on the EU level, given the successive reiteration of the notion of environmental improvement by the 'Masters of the Treaties'.

3.3. Sub-Conclusion

This chapter has tried to briefly sketch the relevant characteristics of general principles of EU law and their role within the Union's constitutional order. It was then found that considering 'environmental non-regression' as such general principle would likely require an anchor within primary law, supporting the findings of the comparative analysis undertaken in *Chapter 2*. Textual, systematic, historical and teleological interpretation of the pertinent treaty provisions has subsequently shown that arts. 11, 191 TFEU read in conjunction with art. 37 CFR may serve as supporting column for such a general principle. Importantly, these provisions also provide further contours to a potential principle of EU law, that could not be drawn from the diverging interpretations of the concept on Member State level, indicating that on the EU level such principle would have to be regarded as relative rather than absolute, and dynamic rather than static.

[132] Sebastian Heselhaus, 'Art. 37 GRC' in Pechstein/Nowak/Häde (n 17) para 11.
[133] cf de Sadeleer (n 18) 45.

4. The Shadow of Judicial Activism

Having established that it might be possible to anchor a general principle of environmental non-regression in the European constitution – based on arts. 11, 191 TFEU read in conjunction with art. 37 CFR and complemented by emerging legal comparative arguments – the following section will now turn to the normative-evaluative plane, looking at the desirability of the establishment of such general principle in light of its possible implications for the inter-institutional balance within the Union. To approach this question, this section will address likely critics of a general principle of environmental non-regression. Some criticism may more generally regard the role of general principles of EU law within the Union's constitutional order, while other reservations may stem from the more specific challenges of adjudication in complex environmental matters. Dealing with these likely critics will allow to further refine the potential operationalization and standard of judicial review attached to a general principle of non-regression.

4.1. An undemocratic overconstitutionalization?

Principle-based judicial review of legislative decisions has always had to justify itself against legitimacy concerns,[134] and a new general principle of environmental non-regression would likely not be spared from similar objections.[135] According to this critique any constitutional principle limiting legislative discretion deserves a healthy dose of skepticism, given that it is the legislator that enjoys the most demo(i)cratic legitimacy within the *trias politica*.[136] On the European level this legitimacy concern develops a further twist by containing both a horizontal and vertical dimension. Hence, by taking the balancing off issues from the (national or European) political agenda and placing it in the hands of 'activist' judges, the reliance on general principles of EU law might lead to an 'overconstitutionalization'[137] of Union law. Thus, any *new* general principle would have to be eyed as a potentially counter-majoritarian obstacle; as further succumbing to the undemocratic 'lure of technocracy'.[138]

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[134] See for an historical account of the discussion Matthias Eberl, *Verfassung und Richterspruch* (de Gruyter 2006) 207 et seq.
[135] cf already critique on a potential strengthened role of art. 11 TFEU: Martin Nettesheim in Eberhard Grabitz (founder), Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (C.H. Beck, as last updated July 2024) Art. 11 AEUV, para 24.
[136] M van den Brink (n 19).
[137] Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case'(2015) 21 European Law Journal 460.
[138] Theorizing the 'lure of technocracy' albeit within a different context: Jürgen Habermas, 'Im Sog der Technokratie. Ein Plädoyer für europäische Solidarität' in: idem (ed), *Im Sog der Technokratie. Kleine Politische Schriften XII* (Suhrkamp 2013) 82.

While in previous decades such concerns could be more easily overlooked because of the equally shaky democratic credentials of the European legislator, they cannot be brushed aside lightly since the legislator has gained in legitimacy and clout with the latest Treaty revisions.[139] Nevertheless, it is purported here that these objections do not provide a knockout-blow to a principle of environmental non-regression. Starting from the general assumption that constitutional adjudication has a legitimate – albeit not limitless – role to play within the Union's institutional setup, a closer look at the concept of environmental non-regression *in concreto* reveals that some of these objections would be misguided or at least do not develop the same force as in other instances, if levied against the recognition of such principle.

The question of the democratic legitimacy of constitutional review *at large* has produced a veritable wealth of scholarly literature.[140] This contribution is not the place to settle the question for the ages. Therefore, it must suffice to acknowledge, that the following argumentation starts from the hypothesis, that merely majoritarian models of democratic legitimacy may be too narrow to describe the merits of constitutional checks and balances.[141] After the horrors of the last century, the *pouvoirs constituants* of most post World War II democracies on the continent embraced the counter-majoritarian 'check' of constitutional review to some degree, not least to provide efficient safeguards for minority rights. Consequently, the nascent Union was equally deemed to require certain guardrails to its powers and its institutional setup saw the creation of a Court equipped with a broad mandate,[142] expressly required to review the compliance of Union measures with primary law.[143] In the same vein, the inception of general principles by the Court is broadly seen as justified *in principle,* both formally (based on arts. 19(1) and 263(2) TFEU) and substantively (not least because of the acceptance of the Court's role through subsequent Treaty amendments).[144] Thus, neither the legitimacy of constitutional review at large, nor the general reliance on principles of EU law, but their intensity and boundaries – as *inter alia* provided through the structural principle of separation of powers (see *supra*) – are assumed to be the decisive conundrums here. Starting from this vantage point, two

[139] Craig, 'General Principles' (n 83) 38; Paul Craig*, The Lisbon Treaty* (OUP 2010) 245; on the legislative coming of age see also Ton van den Brink, *European legislative freedom* (Uitgeverij Paris 2024).
[140] see e.g. Jeremy Waldron, 'The Core Case against Judicial Review' (2006) 115 Yale LJ 1346; Ronald M Dworkin, *Freedom's Law: The Moral Reading of the American Constituion* (OUP 1996); Richard Bellamy, *Political constitutionalism: a republican defence of the constitutionality of democracy* (CUP 2007); Eberl (n 134).
[141] Dworkin (n 140) 15 et seqq.; Eberl (n 134).
[142] cf Lenaerts, 'To say what the law of the EU is' (n 106) 35 et seq.
[143] Art. 263(2) TFEU, cf. Craig, *The Lisbon Treaty* 228 et seq.
[144] Craig, 'General Principles' (n 83) 37 et seq.

considerations may alleviate the concerns, that a principle of environmental non-regression *in concreto* could illegitimately exceed those boundaries of constitutional review and upset the institutional balance laid down in the Treaties.

First, it is important to note that the recognition of a principle of environmental non-regression would *not* take environmental issues off the political agenda, (emphasis added!). It would not be the CJEU drawing up environmental policies, rather discretion (and responsibility) remains firmly within the hands of the legislator on both national and Union level. Importantly, the Court would not replace legislative choices with its own considerations – thus respecting the outer boundaries for the use of general principles identified *supra,* (section 3.1.) – but would merely set a baseline for legislative discretion. The recognition of a general principle of non-regression thus only provides a 'emergency break' in the hands of the CJEU for the most shortsighted legislative miscarriages. Or put differently, it is still the 'tandem bicycle' of the national and European legislator (with all its democratic legitimacy) drawing up every detail of environmental policy along its way. The tandem is just forced to cycle up a slightly inclined road, stripped of the possibility to freewheel down the next decline.[145]

Second, the '*trias politica* concerns' are further alleviated by the fact that the principle's basis in the Treaties indicates its relative rather than absolute character, (see section 3.2.2.1.). Hence, the Court would not have to strike down every possible regression as unconstitutional but could rather develop a more nuanced way of assessing the justifiability of occurring regressions, accommodating the concerns of judicial overreach while upholding the core notion of the principle. In this regard a fluid standard of justification shall be proposed here. Whenever the Union seems principally on track to meet its environmental obligations and climate goals – as *inter alia* laid down in its own EU Climate Law and in the international treaties it is a party to – the legislator should enjoy a rather broad level of discretion. A regression from previous environmental standards through new legislation could for example be justified, if it serves a competing general interest of the Union in a proportionate manner. However, legislative leeway would have to be more limited, if the scientific evidence clearly indicates that the current normative framework adopted does not suffice to meet the Union's environmental obligations. In this case judicial review would have to be more stringent, only allowing regressions for *exceptional* reasons of overriding public interest, obliging the legislator to overcome a presumption of disproportionality. Without this more stringent end of the fluent 'justifiability

[145] Inspiration for the cycling analogy has been drawn from T van den Brink (n 139) 14.

scale' the non-regression principle would risk losing its core, because environmental policy could become a victim of a 'death by a thousand cuts' – meaning slow but steady backtracking, because of a (too) low threshold for justifying regressions.[146]

While this is only one of many potential proposals for the adjudication of the principle, the idea of a fluent yardstick should clearly highlight that a recognition of the principle could not be easily categorized as evidence of an activist Court incautiously sidelining legislative choices. It rather shows the potential role as a *responsive* emergency baseline, that would not disproportionately imbalance the inter-institutional power dynamics but refine the constitutional frame in which the legislator operates.

4.2. A lack of judicial capacity?

A second discernable line of attack against a potential principle of non-regression regards the judicial *capacity* to adjudicate complex environmental issues. While the lack of institutional capacity is an argument levied against constitutional adjudication and 'judge made law' generally,[147] the objection has seemingly gained a special popularity amongst those skeptical about judicial engagement with questions of climate change.[148] Regarding the latter, it is doubted whether the judiciary has the ability to navigate an area in which scientific knowledge may be volatile and difficult to assess for someone trained as a lawyer. Critics highlight the epistemic qualities inherent in the legislative process and their superiority in comparison to the well-known drawbacks of judge made law.[149] In the same vein, it may be questioned whether the CJEU has the institutional capacity to identify an environmental regression in a legislative file, that has been carefully considered by the Parliament and the Council.

Again, it will be shown, that some of these concerns are in fact misdirected if brought against the recognition of a general principle of environmental non-regression. Other aspects of the critique can be attenuated by refining the standard of judicial review attached to the principle.

First, it must be reiterated, that a recognition of a general principle of non-regression would not amount to the CJEU designing environmental policy, nor is it a tool for the Court to broadly

[146] The same reasons also disqualify a *de minimis* exception as a convincing way to accommodate *trias politica* concerns; on the death by a thousand cuts phenomenon see e.g. Schoukens, 'Non-Regression Clauses in Times of Ecological Restoration Law' (n 75) 141.
[147] M van den Brink (n 19) 50.
[148] Bernhard W Wegener, 'Urgenda – Weltrettung per Gerichtsbeschluss?'(2019) Zeitschrift für Umweltrecht 3, 11; cf Martin Spitzer and Bernhard Burtscher, 'Liability for Climate Change: Cases, Challenges and Concepts' (2017) 8 JETL 137, 162.
[149] cf M van den Brink (n 19) 52 et seqq.

shape environmental law according to its own considerations. If the Court finds an unjustifiable regression, it will annul the norm in question, giving the floor right back to the legislator, who would be forced to revise the legislative file. It would not be the CJEU setting targets for the reduction of greenhouse gases or for the restauration of lost habitats, but still the (epistemically better equipped) legislator. Hence, concerns regarding the drawbacks of judge made law, however convincing they may principally be, seem to miss their target when it comes to a principle of non-regression.

The more pressing question the critique raises is thus whether the CJEU has the epistemic capacity to review the *occurrence* of environmental regressions. Here, it seems fruitful to revisit two different understandings of the notion of non-regression, that have been identified previously: a material understanding of non-regression on the one hand, and a normative one on the other, (see section 2.2.). If one understands a principle of non-regression as prohibiting material or factual degradation of environmental assets, one might actually run into certain epistemic hurdles. Previous scholarly work casts doubt on the image of environmental assets like ecosystems resting in a natural equilibrium from which progress or regress is easily discernable.[150] It may thus be rightfully questioned to what extend the judges of the CJEU would be capable of identifying material environmental regressions. However, normative regressions may be far easier to identify.[151] It is purported here that it is well within the capacity of the CJEU to assess whether *legal* backtracking occurs, *inter alia* through any reduction in scope, stringency, or level of enforcement of the previous normative framework protecting the environment. That the Court itself seems comfortable to assess whether a regression from previous *normative* levels of protection occurs can be seen when drawing a parallel to the Courts rule of law jurisprudence and its *Repubblika* ruling in concreto.[152] Here the Court had to decide, whether the previously modified system for the appointment of judges in Malta violated the judicial independence as protected under EU law.[153] Crucially, the Court seemed to start from the premise that the prior system must have been in accordance with EU law, because it had been the system in place at the time of Malta's accession to the Union – a point at which adherence to the rule of law standards of the Union is assumed, (see art. 49 TEU in

[150] A Dan Tarlock, 'The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law' (1994) 27 Loyola of Los Angeles LRev 1121, 1128 et seqq; William Howarth, 'The Progression Towards Ecological Quality Standards' (2006) 18 JEnvL 3, 25.
[151] Vordermayer-Riemer (n 37) 29.
[152] Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] ECLI:EU:C:2021:311.
[153] For the protection of judicial independence under EU law see Case-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

conjunction with art. 2 TEU).[154] In the following the Court thus made the question whether the modification of the Maltese appointment system constituted a *regression* in the protection of the value of the rule of law the central element of its review, stating *inter alia*:[155]

> *A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU […]. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented […].*

The *Repubblika* case hence shows that adjudicating regressions of the normative level of protection provided by a certain legal framework would be neither new in the jurisprudence of the CJEU, nor epistemically impossible.

In addition, the relative character of the principle outlined earlier would help surmount another potential epistemic hurdle: establishing a regression in cases where legislation progresses on one facet of the ecologic crises while regressing on another. A prime example might be the RED III mentioned earlier, declaring certain renewable energy projects to be of overriding public interest to essentially circumvent certain environmental law requirements as *inter alia* stemming from the Habitats Directive.[156] Given the relative character of non-regression such cases can simply be treated as a regression and the competing ecological interest can be weighed within the assessment of its justifiability.

Lastly, while the legislator is better equipped to regulate the details of environmental issues, its own institutional capacity is not limitless. The (relative) short-term election cycles effectuate what can be dubbed a 'tragedy of the horizon'.[157] Current institutional structures favor political thinking within a limited horizon.[158] However, many facets of the ongoing environmental crises

[154] Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] ECLI:EU:C:2021:311, para 60 et seq.
[155] ibid para 63 et seq.
[156] See art. 16(f) RED III; see for a discussion of this provision Alessio Davies, 'Change of paradigm in EU environmental law: does the climate crisis now "override" the biodiversity crisis?' (*European Law Blog*, 21 November 2024) <https://doi.org/10.21428/9885764c.eaa4248f>.
[157] On the term see Mark Carney, 'Breaking the tragedy of the horizon: Climate change and financial stability', speech at Lloyd's of London (29 Sept. 2015), available at <https://www.bankofengland.co.uk/speech/2015/breaking-the-tragedy-of-the-horizon-climate-change-and-financial-stability>.
[158] cf Richard J. Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 Cornell L Rev 1153, 1184 et seqq.

– with climate change being the most prominent example – materialize over a larger time span. The worst consequences of these crises will only be visible within decades. Once they become apparent however, it is already too late to properly address their causes. The institutionalized disincentives for political actors involved in the legislative process to advocate for decisive environmental action, which address 'distant' dangers while often coming with short-term costs, therefore hamper sufficient ambition of environmental policies. Conversely, these inherent *institutional heuristics* might often favor the weakening of previous environmental protection standards in the face of seemingly more pressing, short-term challenges. Importantly, some of the (inter-)institutional arrangements on evidence-based law making do not seem to suffice as a counterweight to this tragedy of the horizon.[159] A telling example from the recent past in that regard is the launch of an inquiry by the European Ombudswoman concerning the inception of the already mentioned 'Omnibus I' package,[160] after allegations that the Commission has blatantly ignored its own Better Regulation Guidelines *inter alia* by not even assessing the environmental impacts of the proposal.[161]

The look through the lens of institutional capacity could thus be said to support rather than negate the role of a *constitutional baseline* framing legislative discretion.

4.3. A drop in the bucket?

Finally, a different kind of critique seems equally imaginable. Some readers may question whether non-regression would not just be a drop in the bucket, unable to provide proper judicial protection of citizens' rights affected by the worsening consequences of multiple ecological crises. After all, the principle could not prevent the Union from progressing way too slowly, thence still neglecting common goals of the EU Climate Law and not adequately heeding potential positive obligations stemming from climate-relevant fundamental rights.[162] Could not effective judicial protection emerge as the decisive yardstick,[163] consequently obliging Courts

[159] Generally on the inadequacy of the current legislative framework to reach the Union's climate ambitions EEA (n 4).
[160] European Ombudswoman, Case 983/2025/MAS, available at <https://europa.eu/!YQvRnH>; from the general press see: Leonie Cater, EU Ombudsman to probe Commission's approach to slashing green rules (*Politico*, 23 May 2025) <https://pro.politico.eu/news/199158>.
[161] For the allegations see ClientEarth et al. 'Maladministration of the Commission in the preparation of the 2025 proposal to amend the CSDDD as part of the Omnibus I package' (2025), <https://www.clientearth.org/media/ymfjdfkc/20250418-complaint-omnibus.pdf>.
[162] See in this regard *KlimaSeniorinnen Schweiz et al. v Switzerland* App no. 53600/20, (ECtHR, 9 April 2024), ECLI:CE:ECHR:2024:0409JUD005360020.
[163] Hendrik Schoukens, 'Climate change litigation and the separation of powers: effective legal protection as the ultimate yardstick?' in Francesco Sindico et al (eds) *Research handbook on climate change litigation* (Edward Elgar Publishing Limited 2024) available at:

to an even more progressive role, for instance by setting concrete goals of greenhouse gas reduction, as *inter alia* seen in the Dutch *Urgenda* case?[164]

It has to be ceded in this regard that the aim of this contribution is not to provide a juridical panacea to crosscutting environmental issues – such panacea is unlikely to exist at all – and that non-regression indeed would not prevent the Union from acting too slowly. Nevertheless, such principle would not be without its merits. The EU Green Deal has shown again that, in principle, the legislative arena is the right place for tackling complex environmental issues. It provides grounds for optimism that legislation can indeed provide the pathway for more ambitious and more adequate environmental regulation, at least in times of heightened public awareness. Setting a constitutional baseline would prevent the legislator to 'freewheel down the next decline', once the institutionalized heuristic of the short horizon makes opposing interests appear more pressing. It could thus impede the pendulum of environmental policy from swinging back and forth too erratically and provide continuity needed in times of fundamental economical and societal adaptation. By dodging some of the concerns traditionally levied against adjudication of complex environmental issues (see *supra* 4.1. and 4.2.), the principle could well serve as a first steppingstone on the way towards the '*right'* inter-institutional balance in such matters. Besides, its recognition would not rule out that fundamental rights driven jurisprudence could further narrow down legislative leeway, once the consequences of climate change and biodiversity loss become more pronounced. Not least in light of last year's *KlimaSeniorinnen* judgement from Strasbourg, future research, exploring whether the baseline of non-regression should be accompanied by further constitutional guardrails induced from fundamental rights, is worth particular attention.

4.4. Sub-Conclusion

It has been shown that a general principle of environmental non-regression is likely to face some criticism. While some of the concerns should not be brushed aside lightly, they can be attenuated by refining the standard of judicial review attached to the principle. Environmental non-regression should thus be regarded as relative rather than absolute. Concretely, it should be reviewed against a fluent yardstick of justification, adaptable to the previous ambition of

<https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=3962490>.

[164] *Urgenda Foundation v. The State of the Netherlands*, Judgment (24 June 2015), The Hague District Court (Rechtbank), ECLI:NL:RBDHA:2015:7196; Judgment (9 October 2018), The Hague Court of Appeals (Gerechtshof), ECLI:NL:GHDHA:2018:2610; Judgment (20 December 2019), Supreme Court (Hoge Raad), ECLI:NL:HR:2019:2007.

environmental regulation. Furthermore, in light of the limits of judicial capacity, the review of non-regression should focus on the normative rather than the material level. The principle, refined in this way, may not serve as a panacea for environmental issues, but provide a first steppingstone on the way to an inter-institutional balance apt for the current challenges.

5. Judicial Pathways for the Review of an Environmental Non-Regression Principle

The previous chapters have shown that there might be a good case to be made for the recognition of *environmental non-regression* as a general principle of EU law. However, such principle would only live up to its potential as a *constitutional baseline* if it was enforceable in an effective manner. Therefore, this chapter will explore some of the potential pathways of judicial enforcement for such principle. This means revisiting some of the much-decried hurdles for environmental cases on their way to Luxembourg and engaging with recent scholarly debate on how to overcome them.

5.1. The 'direct' way to Luxembourg and its pitfalls (art. 263 TFEU)

The way to directly challenge regressions occurring on the European level would be through an action for annulment, Art. 263 TFEU.

5.1.1. Actions brought by privileged applicants

Under art. 263(2) TFEU the Member States, the European Parliament, the Council and the Commission are always allowed to challenge the legality of Union acts, without having to meet further standing requirements. However, environmental regressions, at least those occurring through European legislation, will most likely not be challenged by the Commission proposing such legislation or the co-legislator adopting it. Similarly, it is seen rather rarely that single Member States decide to challenge the compromise reached by the co-legislator. Although it might not be discarded that an 'environmental-friendly' governed Member State challenges an environmental regression in a certain instance, the inherent power dynamics of the institutional set-up seem to disincentivize Member States to regularly challenge majoritarian compromise.

5.1.2. Actions brought by non-privileged applicants

Thorough enforcement of the principle might therefore only be expected if an individual person or environmental organization could seek to directly annul any EU act, which regresses from previous normative standards. However, under Art. 263(4) TFEU natural and legal persons must meet strict conditions to enjoy *locus standi*.

5.1.2.1. Severely concerned, but not individually so?: The Plaumann Hurdle

Crucially, given that environmental policy is most likely to be amended trough legislative acts of general application, applicants claiming a regression from previous standards would have to demonstrate to be directly and individually concerned. This last requirement has been interpreted narrowly by the Court almost since its inception. In 1963, in its (in)famous *Plaumann* decision, the Court held [165] that:

> *Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguish them individually just as in the case of the person addressed.*

Just how onerous it is to meet these requirements in environmental cases was then seen in the *Greenpeace* case for the first time.[166] The CJEU denied Greenpeace and sixteen residents of the Canary Islands standing, in a case that revolved around the construction of two power plants on the islands, which had been granted financial assistance from EU funds without having met the relevant requirement of conducting an environmental impact assessment. More precisely, the Court of Justice upheld the prior judgment of the General Court, which had ruled that the claimants could not be differentiated from any other local resident and hence could not be found to be individually concerned.[167]

Both the General Court and the Court of Justice recently upheld the *Plaumann*-doctrine in the first major climate case to reach Luxembourg.[168] In the *Carvalho* case ten families and an

[165] Case C-25/62 *Plaumann v Commission* [1963], ECLI:EU:C:1963:17.
[166] Case T-585/93, *Greenpeace v. Commission* [1995], ECLI:EU:T:1995:147, upheld on appeal by Case C-321/95, *Greenpeace v. Commission* [1998], ECLI:EU:C:1998:153.
[167] Case T-585/93, *Greenpeace v. Commission* [1995], ECLI:EU:T:1995:147, para 55 et seq.
[168] Case T-330/18, *Carvalho and Others v EP and Council* [2019], ECLI:EU:T:2019:324; upheld on appeal by

association had claimed that they were already suffering serious economic and health related damages due to climate change, which they saw as insufficiently combated by the EU. The claimants had previously pursued different economic activities, such as agriculture or adapted tourism, and were living in different parts of the EU or in especially vulnerable third countries such as Fiji. Both Courts rejected the reasoning brought forward by the claimants that they should be regarded as individually concerned given the potential infringement of fundamental rights coming with climate change, which by reason of circumstances materialize differently for each of them.[169]

5.1.2.2 Critique of Plaumann and looking ahead

The narrow *Plaumann*-doctrine has been subject of intense debate over the years. It has come under-fire from scholars, not least from those with a background in environmental law,[170] and some of the Court's own Advocate Generals.[171] Once there even was an attempt by the General Court to overturn the doctrine,[172] however to no avail.[173] This section wants to briefly recap some of the arguments levied against it and engage with recent proposals to overcome this long standing hurdle for access to justice in environmental cases.

First, the *Plaumann*-doctrine has been criticized for leading to the rather paradoxical result of making standing harder to achieve the more far-reaching the potential harm of an EU act is.[174] Especially in areas of collective interest (such as environmental protection), potential impacts are diffuse, making the criterion of 'distinctive concern' set by the *Plaumann*-doctrine near impossible to meet.[175] Effective judicial protection, as guaranteed under art. 47 CFR and arts. 6 and 13 ECHR, could thus be hindered. As will be shown in more detail below, the Courts counterargument, that despite the narrow interpretation of art. 263(4) TFEU a complete system

Case C-565/19, *Carvalho v EP and Council* [2021], ECLI:EU:C:2021:252.

[169] Case T-330/18, *Carvalho and Others v EP and Council* [2019], EU:T:2019:324, para 50; Case C-565/19, *Carvalho v EP and Council* [2021], EU:C:2021:252, para 49.

[170] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (8th edn, OUP 2024) 547-568.

[171] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] Opinion of AG Jacobs, ECLI:EU:C:2002:197.

[172] Case T-177/01 *Jégo-Quére v. Commission* [2002] ECLI:EU:T:2002:112, para. 49: 'There is no compelling reason to read into the notion of individual concern [...] a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee'.

[173] Case C-263/02 P *Commission v. Jégo-Quére* [2004] ECLI:EU:C:2004:210.

[174] Gerd Winter, 'Plaumann Withering: Standing Before the EU General Court Underway from Distinctive to Substantial Concern' (2023) 15 EJLS 85, 91; Craig/de Búrca (n 170) 567.

[175] Giulia Claudia Leonelli, 'Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending' (2021) 40 Yearbook of European Law 230, 239.

of legal protection is guaranteed via national courts and art. 267 TFEU, has rightfully been equipped with several question marks.[176]

In addition, the *prima facie* clearcut requirement of 'distinctive concern' established by *Plaumann* does not come without conceptual difficulties and has led to sometimes inconsistent case law.[177] It has *inter alia* been raised that the Court seems to show more flexibility when claimants bring forward economic interests in areas such as competition or state aid law.[178]

Furthermore, with regard to environmental cases, the jurisprudence of the Court has continuously led to a certain dissonance with the Union's obligations stemming from the *Aarhus Convention*.[179] The Aarhus Compliance Committee repeatedly found the EU in breach of its obligations as a signatory.[180] More precisely, as long as not fully compensated by adequate administrative review procedures, the CJEU's narrow interpretation of art 263(4) TFEU was found to be incompatible with art. 9(3) of the Convention, which requires the parties to guarantee access to administrative or judicial procedures to challenge acts which contravene environmental law.[181] The EU legislator has tried to remedy the breach through timid changes to the Aarhus *Regulation,* broadening the possibilities to initiate intra-administrative review of Union acts.[182] However, this review procedure remains closed for legislative acts, which are not covered by art. 9(3) Aarhus Convention. Moreover, administrative acts are only reviewed against the yardstick of EU *legislation* – arts. 10(1), 2(1)(f) Aarhus Regulation – excluding review against primary law.[183] The CJEU on its part, seems unwilling to address the root cause of the tensions by overthinking its *Plaumann* doctrine. Rather, it defyingly declared that

[176] AG Jacobs (n 171) para 102; Craig/de Búrca (n 170) 566 et seq; Winter (n 174) 98 et seqq.; Piet Eeckhout, 'From Strasbourg to Luxembourg?: The KlimaSeniorinnen judgment and EU remedies' (*Verfassungsblog*, 5 June 2024) <https://verfassungsblog.de/from-strasbourg-to-luxembourg/>.
[177] Craig/de Búrca (n 170) 550 et seq.; Winter (n 174) 89.
[178] Ludwig Krämer, 'The Environment before the European Court of Justice' in Christina Voigt (ed) *International Judicial Practice on the Environment: Questions of Legitimacy* (CUP, 2019) 25, 31 et seq.; Craig/de Búrca (n 170) 551 et seq.
[179] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('Aarhus Convention') signed 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447.
[180] Communication ACCC/C/2008/32 (Part I) (European Union), adopted on 14 April 2011; Communication ACCC/C/2008/32 (Part II) (European Union), adopted on 17 March 2017.
[181] ACCC, Part II (n 180) para 121.
[182] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264 as amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 [2021] OJ L 356/1.
[183] see also Niklas Täuber, 'Admissibility Revisited: EU climate litigation between Plaumann, Aarhus, and KlimaSeniorinnen' (*Verfassungsblog* 16 October 2024) <https://verfassungsblog.de/admissibility-revisited/>.

although international law is binding on the Union's institutions, it could not prevail over primary law.[184] Thus, the CJEU seemed to suggest that its current reading of the standing requirements is the only fathomable meaning attributable to the wording of art. 263(4) TFEU within the boundaries of accepted Treaty interpretation. This is – as *Craig* and *de Búrca* put it – 'with respect unconvincing.'[185] Additionally, the continuing reluctance to reconsider its own approach to standing in light of the Aarhus Convention seems even more puzzling when juxtaposed with the Court's case law on standing in national courts. It repeatedly urged national courts to 'interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.'[186] While thus often asking national judges to set aside their traditional approaches to standing, the CJEU seemed to apply a different standard to itself.[187] Although glossed over by the mentioned changes to the Aarhus Regulation for the moment, the episode therefore underlines the precariousness of the access to justice in matters of *general* interest (such as environmental protection) and the Court's continued unwillingness to acknowledge their repercussions for the principle of effective judicial protection.

The Courts apparent reluctance to abandon its case law has been pointed out to be especially startling, given that a few decades ago the Court did just the same.[188] Overcoming the arguably even more pronounced textual hurdles of art. 173 EEC Treaty at the time, it established standing for the European Parliament,[189] heavily relying on teleological interpretation and reversing its previous line of reasoning.[190] While the methodological soundness of that ruling has been debated since,[191] it could be held that a reversal of *Plaumann* might be easier to achieve within the confines of the Treaties[192] and it is the inconsistency in the Courts approach to interpreting standing rules that sticks out.

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[184] Case C-352/19 P *Région de Brussels-Capital v Commission* [2020] ECLI:EU:C:2020:978, paras 25 and 26.
[185] Craig/de Búrca (n 170) 567; similar Hendrik Schoukens, 'Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?' in Voigt (n 178) 74, 109; apparently more susceptible to the Courts position is Leonelli (n 175) 255.
[186] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECLI:EU:C:2011:125 para. 50.
[187] Krämer, 'The Environment before the European Court of Justice' (n 178) 34 et seq.; Schoukens, Access to Justice (n 185) 110 et seq.; ACCC Part II (n 180) para 81.
[188] Krämer 'The Environment before the European Court of Justice' (n 178) 30 et seq.
[189] Case C-70/88, *Parliament* v *Council* (Chernobyl) [1990] ECLI:EU:C:1990:217.
[190] reversing previous its previous position as e.g. outlined in Case-302/87 *European Parliament v Council of the European Communities* [1988] ECLI:EU:C:1988:461.
[191] see e.g. Henri de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6 HanseLR 3, 5.
[192] see e.g. the proposals discussed *infra.*

Against this backdrop, scholars have repeatedly proposed a reinterpretation of the condition of 'individual concern'. In light of the *Carvalho* judgement and based on an analysis of the principles guiding judicial protection, *Winter* has recently proposed that individual concern should be understood 'not as distinct but as personal and severe concern.'[193] Importantly, he argues that such interpretation would not surmount to creating an *actio popularis,* doomed to cause a flood of actions in front of the CJEU, the fear of which is often speculated to underlie the Court's restrictive attitude.[194] Substantively, case law could concretize the requirement of severe concern. Procedurally, the liberalization of the requirements of art. 263(4) TFEU would mean a shift from cases back to direct challenge and hence (in first instance) to the General Court.[195] Given that the Court of Justice has currently little control over the indirect challenges reaching it through art. 267 TFEU, the initial shift of cases to the recently reinforced General Court – equipped with procedural means such as the possibility to join similar cases – would likely prevent the CJEU from drowning in a flood of cases.

With his proposal *Winter* joins a chorus of scholars, essentially asking the Court to move on from a mere formal approach and allow standing for those who have suffered substantial adverse impacts.[196]

Other scholars – maybe having given up hope regarding a wholesale reversal of *Plaumann* – have recently argued for a more limited widening of standing. Considering the recent *KlimaSeniorinnen* judgement of the European Court of Human Rights, they advocate for a 'specific and tailored remedy' in cases regarding climate change.[197] In its ruling the Strasbourg court interpreted art. 34 ECHR as containing such remedy, drawing from the specific characteristics of climate change[198] and the objectives of the Aarhus Convention.[199] It thus allowed associations, subject to certain requirements, to bring challenges against climate policies.[200] Although the ECtHR's judgement is not binding on European Courts it might serve as a precedent to reconsider *locus standi.*

However, it remains to be seen whether the CJEU would really be willing to change its stance on standing in climate cases. As seen earlier, the Court appears to deem a wider interpretation

[193] Winter (n 174) 105.
[194] ibid 112 et seq.
[195] Art. 256(1) TFEU.
[196] Craig/de Búrca (n 170) 567; AG Jacobs (n 171) para 60 and 103; Wolfram Cremer, 'Art. 263 AEUV' in Calliess/Ruffert (n 16) para 53.
[197] Eeckhout (n 176); Täuber (n 183).
[198] *KlimaSeniorinnen Schweiz et al. v Switzerland* App no. 53600/20, (ECtHR, 9 April 2024), ECLI:CE:ECHR:2024:0409JUD005360020, paras 422, 434 and 498.
[199] ibid para 490 et seq.
[200] ibid para 502 et seq.

of art. 263(4) TFEU *contra legem*[201] and it has revalidated restrictive elements of the *Carvalho* judgement even after the ruling in *KlimaSeniorinnen*.[202]

For potential attempts to enforce a general principle of environmental non-regression this entails substantial uncertainty. As seen above, individuals or environmental organizations questioning the CJEU's restrictive approach to standing have various compelling arguments on their side. If the Court nevertheless sticks to its guns, the direct way to Luxembourg remains an onerous, near impossible endeavor.

5.2. Indirect challenges to legality through art. 267 TFEU

As already mentioned, the CJEU has often defended its restrictive interpretation of art. 263(4) TFEU by pointing to the possibility for individuals and legal persons to challenge the legality of EU acts in national courts, which could then in turn refer the question of legality to the CJEU via preliminary reference.[203] However, this indirect pathway to Luxembourg comes with various well-known drawbacks.

First, national law might not always provide effective remedies for this indirect challenge of general measures, thus causing a risk of denial of justice.[204] In addition, even if access to national courts is guaranteed, it is not within the hands of the claimants whether a national court decides to make a referral to the CJEU or how it phrases its preliminary questions.[205] Furthermore, the 'detour' through national courts will usually come with considerable delays and additional costs.[206]

Lastly, the example of previous climate litigation underlines that art. 267 TFEU is not a sufficient patch to fix the hole in the 'system of legal remedies', which the CJEU still claims to be 'complete'.[207] The search through the Courts case law reveals not a single preliminary reference in which a potential illegality of European climate legislation due to alleged

[201] cf Case C-565/19, *Carvalho v EP and Council* [2021], ECLI:EU:C:2021:252, para 78.
[202] Case C-29/22 P *KS and KD v. Council of the European Union and Others* [2024] ECLI:EU:C:2024:725 para 73.
[203] If no judicial remedy against the decision of that court is available in national law, the court is even obliged to refer the matter, art. 267(3) TFEU.
[204] AG Jacobs (n 171) para 102; Winter (n 174) 98 et seq.; Schoukens, Access to Justice (n 185) 112.
[205] Eeckhout (n 176).
[206] Winter (n 174) 100; AG Jacobs (n 171).
[207] Case 294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166, para 23; for a more recent reiteration see Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECLI:EU:C:2002:462, para 40.

insufficiency has been brought up. Hence, the restrictive handling of art. 263(4) TFEU upheld in *Carvalho* seems to have banished the material questions of legality, raised by the claimants in that case, from Luxembourg for the moment.

Therefore, the effectiveness of a principle of environmental non-regression could only partly be guaranteed through art. 267 TFEU. It could be expected that savvy environmental organizations challenge regressions in those national courts, which are deemed most likely to refer the case to Luxembourg.[208] Nevertheless, this would remain a burdensome way, unfit to quickly provide certainty about the legality of potential regressions.

5.3. Judicial protection against regressions on national level

If a regression occurs on national level, but within the realm of Union law, an infringement of the general principle of environmental non-regression would require the national norm to be set aside. Additionally, many national environmental regressions within the realm of EU law are likely to infringe more precise obligations deriving from Union legislation, which would equally require the regressive, national norm to be disapplied. In this regard proceedings in front of national courts should regularly offer redress. If questions on the principles implication for national legislative discretion remain, national courts would be authorized (or even obliged) to issue a preliminary reference, (see *supra*). If Member States' courts would not set aside national legislation, infringement proceedings could be lodged, either by the Commission (art. 258 TFEU) or by another Member State (art. 259 TFEU).

5.4. Sub-Conclusion

This chapter has briefly sketched potential pathways for the judicial enforcement of a general principle of environmental non-regression. Effective enforcement is likely to be dependent on an active civil society. However, as long as the CJEU does not reconsider its restrictive approach to standing, individuals and environmental organizations would face the well-known hurdles for environmental cases on their way to Luxembourg. A lack of legal arguments or scholarly proposals does not stand in the way of such reconsideration.

[208] *Winter* names the Netherlands and Ireland in that regard, (n 174) 104.

6. Conclusion and Outlook

Will the EU Green Deal remain a rare surge in environmental and climate-political ambition? A wave in the sea, destined to break once it hits rocky shores? Or will it rather resemble a river, carving its way through the continent, constantly moving *forward*? The answer to these questions may well lie in the way the European constitutional framework is interpreted.

This contribution has shown that there is a serious case to be made for the recognition of 'environmental non-regression' as a general principle of EU law. As such it could most notably serve to review the legality of Union acts (and Member States' acts within the realm of European law), preventing unjustified backtracking. Furthermore, it could guide the interpretation of legislation, meaning, that in case of various potential interpretations, preference should be given to the reading that does not constitute an environmental regression. The argument for such general principle presented here rests on two pillars. First, it has been shown that the principle is already firmly rooted in every level of the multi-level governance framework on the environmental and climate crises, (*see Chapter 2.*). Its proliferation in international law (binding the Union and its Member States) as well as in various national constitutional orders thus already provides a considerable comparative argument for its recognition. However, it was also found that it might still be questioned whether the concept's proliferation on national and international level already provides the clear contours or critical mass to be considered the *sole* basis for a general principle. The comparative argument might thus need a supporting column within EU (primary) law itself to be truly compelling, (*see 3.2.1.*). Interpretation of the relevant Treaty provisions revealed that arts. 11, 191 TFEU read in conjunction with art. 37 CFR serve as such a second pillar, supporting the comparative argument and anchoring non-regression in primary law, (*see 3.2.2.*).

Next, after engaging with likely criticism, it has been purported that the principle would not unduly imbalance the division of powers between the judiciary and the legislator, at least if the standard of judicial review attached to it is properly refined, (*see Chapter 4.*). In this regard it was held that the principle should be seen as relative rather than absolute, hence still allowing certain regressions, as long as they are justified. A fluent yardstick of justifiability was proposed, adapting to the pre-existing level of environmental and climate-political ambition. Furthermore, review should focus on the normative instead of the material plane.

Lastly, *Chapter 5* has shown that the judicial enforcement of the principle would likely face some of the well-known hurdles for environmental cases on their way to Luxembourg, but equally highlighted recent scholarly proposals on how to overcome them. As long as judicial recognition and enforcement of the principle remains insufficient, it continues to be the duty of the institutions involved in the legislative process to uphold non-regression. Including the findings of this contribution into the Commission's Better Regulation Guidelines (e.g. in the form of a 'non-regression-checklist') or into an interinstitutional agreement on environmental non-regression might be some of the many options deserving consideration. However, given the institutionalized 'tragedy of the horizon' and the legislators mixed track record regarding the adherence to 'Better law making' and 'Better Regulation' tools, those options would most likely not fully compensate for a lack of judicial enforcement. It will thus remain a shared responsibility to breathe life into a principle of environmental non-regression and keep the river moving *forward*.

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