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CROSS-BORDER POLLUTION AND ENVIRONMENTAL DISPUTES IN EU LAW AND BEYOND

GLOBAL CHALLENGES AND LOCAL REMEDIES

Edited by
Alicja Sikora-Kalėda, Barbara Iwańska
and Sławomir Dudzik

Cross-Border Pollution and Environmental Disputes in EU Law and Beyond

This book examines the impact of environmental pressure on EU substantive law and principles to determine the adequacy and possible evolution of available remedies in a global context of a rapidly changing political and legal reality of the European Union.

Mapping the global dimension of environmental challenges in both local and cross-border contexts, as well as evaluating the scope and resilience of a current model of EU law remedies, this monograph examines key issues encompassing legal instruments of transboundary pollution such as management of the Natura 2000 sites, Trans-European Networks, cross-border impact assessment and air quality legislation, scarcity of resources in a cross-border context, novel tools of corporate due diligence in EU law, as well as external environmental threats originating from neighboring countries. It explores the rationale of the EU law remedies and compliance system through the prism of environmental challenges, evaluating alternative legal instruments and concepts stemming from international public law and international private law. As cross-border environmental disputes trigger a question of the unity of the EU legal order and respect for the authority of the EU Court of Justice by the Member States, in particular in the case of interim measures, this book analyses key cases such as Czechia against Poland to examine the adequacy of classic remedies of legal protection available under the EU treaties in case of trans-border environmental disputes.

This book will be of interest to students, academics and practitioners with an interest in European Union Law and Environmental Law.

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Barbara Iwańska,
Sławomir Dudzik

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Introduction

This monograph is the result of a deliberate response to the growing prevalence of environmental and climate-related hazards, both within and beyond national borders, as well as the underlying economic and geopolitical tensions affecting the Member States of the EU and the broader international community. These developments provided the impetus for the research initiative undertaken in 2022 at the Jagiellonian University by scholars affiliated with the Chair of European Law and the Department of Environmental Law. Following an international seminar entitled "Cross-border pollution in EU law – searching for remedies" which took place in March 2022 at the Jagiellonian University, a project of the book covering both the substantive and procedural aspects of the inter-States environmental disputes was conceptualized. The project brought together a diverse group of scholars from multiple Member States, each representing distinct areas of legal expertise, including EU constitutional law, EU and national environmental law, EU corporate governance, EU private international law, mediation law, and international investment law within the framework of public international law.

This edited volume is divided into two major parts. Part I, "Addressing pollution and climate change in a transboundary context – EU law perspective and beyond", covers a broad range of substantive instruments of both EU and international law meant to regulate the transboundary dimension of environmental pollution, climate change as well as management of the transnational responsibility for environmental damage, including in case of public and private actors. Part II, titled "Remedies, actors and case-studies", addresses cross-border disputes with an environmental background against the backdrop of the constitutional principles of EU law as well as the rising and classical concepts of international law. Discussed legal instruments reflect the most recent and novel trends under EU law, in particular inter-State litigation under EU treaties and the role played by the principles of unity and loyal cooperation, cross-border tensions governed by the EU private international law, international mediation measures as a new potential out-of-court solution, and the evolution of the ecocentric approach within the international investment treaties.

Part I of the monograph begins with a contribution authored by D. Misonne who outlines, in Chapter 1, "New approaches to the concepts of pollution and transboundary pollution in the European Union". The situations of cross-border pollution within the EU require both necessity and opportunity for fine-tuning the

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understanding of the concept of pollution and related obligations, which are of crucial importance for the protection of human health and ecosystems in Europe. Despite the quite ancient tone of many of the related international or European provisions, a new context, fed by new ambitions and scientific knowledge, tends to promote stricter approaches to situations of cross-border-related environmental issues and considerably lower the acceptability of pollution. The field is still under-explored, however, and might benefit from more strategic litigation. Chapter 2, authored by M. Noll-Ehlers, is entitled "Observations on the approach to cross-border pollution in EU environmental law" and discusses how the applicable EU environmental law rules take account of situations of cross-border pollution. In doing so, it looks at examples from different kinds of rules in the sense that they either address the source of pollution or regulate the overall resulting pollution. Chapter 2 identifies cooperation requirements between the Member States in EU legislation and puts them in relation to the underlying principle of loyal cooperation. It shows how the legal requirements contribute to reducing cross-border pollution and looks at their limits. In Chapter 3, entitled "Nature restoration as a remedy to nature degradation caused by transboundary pollution in international and EU law", A. Aragão invites us to reflect upon the most symbolic biodiversity dimension of EU law, e.g., the Natura 2000 network. Since cross-border pollution is harmful to habitats, species, and ecosystems in the neighboring country, it triggers, on the one hand, the duty to remediate cross-border contamination and degradation. On the other hand, nature restoration contributes to maintaining peaceful relations between neighbors. Chapter 3 shows how recent developments in international and EU law provide answers to questions such as where to restore, who should participate in restoration activities, or how to restore transboundary damage. In Chapter 4, entitled "Corporate accountability for environmental damage in a cross-border context: the promises and pitfalls of the EU Corporate Sustainability Due Diligence Directive", K. Oplustil and A.-M. Weber critically assess the recently enacted EU Corporate Sustainability Due Diligence Directive (CSDDD), which introduces mandatory human rights and environmental due diligence obligations for companies within its scope. Global value chains, integral to the contemporary global economy, are often implicated in significant environmental degradation. However, the mechanisms for holding corporations accountable for these impacts, particularly in transnational contexts, remain inadequate. While the CSDDD represents a substantial advancement in the EU's broader initiative to foster sustainable business practices, its overall efficacy is compromized by several inherent limitations which, however, may be compensated through the implementation process at the national level. Chapter 5, authored by I. Przybojewska, opens an interesting perspective by analyzing the "Scarcity of resources in a cross-border context: A closer look at the EU environmental policy goal of prudent and rational utilisation of natural resources". This contribution ponders elements of EU primary law connected with the challenge in question, such as the principle of sustainable development, the prevention principle, and the principle that environmental damage should, as a priority, be rectified at source, reinforcing the goal of prudent and rational utilization of natural resources. The task is to verify whether the EU is experiencing a paradigm shift in terms of the

general view of environmental protection so that more attention is devoted to challenges (such as scarcity of resources), goals (such as prudent and rational utilization of natural resources), principles (such as the principle of sustainable development), and instruments (such as intended regulations on raw materials) being conducive to taking actions to remedy the root cause (i.e., excessive use of the environment) as early as possible. In Chapter 6, L. Žilinskienė, R. Ragulskytė-Markovienė and G. Česnaitytė offer an opportunity to reach beyond the Union's legal perspective by addressing "Hazardous installations outside the EU: the Espoo Convention's Implementation Committee's proceedings concerning Lithuania and Belarus". As the nature of nuclear energy-related activities involves a potentially wide scope of severe impacts, a great deal of public concern has been raised by this issue, not to mention the potential impact on national interest, in view of which the sound and transparent transboundary EIA procedure is of great importance. The implementation of the transboundary EIA has led to a degree of misunderstanding and disagreement between these neighboring countries, with the issue being escalated to the Espoo Convention's Implementation Committee. Finally, the closing contribution of Part I, authored by M. Stoczkiewicz, discusses "Sharing a common good beyond borders: the global phenomenon of climate change litigation and its irrelevance in cross-border settings". In his chapter, the author highlights the two-fold dimension of the "drop-in-the-ocean problem" revealed in particular following the case-law of the Dutch Supreme Court and German Constitutional Court. Since climate change is a global process caused by many actors, individual responsibility (of a specific state or economic actor) for causing it is excluded. Secondly, since climate change is a global process, even if the individual responsibility of a specific actor were to be accepted, it cannot consist of an obligation to reduce national emissions, as such a reduction would not solve the problem. The Dutch Supreme Court transcended the drop-in-the-ocean problem by pointing to state responsibility arising from the state's contribution to climate change. The German Constitutional Court made this problem (the state's contribution to climate change) irrelevant by pointing to the objective responsibility of the state to protect the rights of individuals threatened by climate change, which is independent of who causes it.

Part II focuses on remedies, actors, and specific case studies coupled with general principles of EU law and inspirations stemming from international law. In Chapter 8, the role of the principle of sincere cooperation in the meaning of Article 4(3) TEU is examined by M. Niedźwiedź in the context of implementation of EU environmental law through the prism of the jurisprudence of the Court of Justice of the European Union (CJEU). In particular, it is argued that the principle of sincere cooperation amounts to a real instrument providing for a more effective implementation of EU environmental law in both internal and external dimensions. In Chapter 9, A. Sikora-Kalėda explores the rise of infringement proceedings between the EU Member States under Article 259 TFEU and its impact on the unity of the EU legal order and the evolving constitutional fabric of EU law. This exploratory chapter is inspired by the rise of litigation between the EU Member States before the CJEU as well as the intensification of resistance of the Member States to comply with EU law, both issues coupled with a delicate question of the limits

of the Union's competences. In this context, unity is viewed as a systemic feature of the EU's legal order, a feature potentially under stress owing to the wider issue of non-compliance with the established rules and agreed policies in the Union, including undermining the authority of the judgments of the CJEU. Chapter 10 authored by M. Baran and B. Iwańska is entitled "The role of interim measures in environmental disputes before the Court of Justice of the European Union". In this chapter, the authors explore the legal basis and grounds under which the Court of Justice of the European Union orders interim measures in environmental cases and the types of such measures as well as discuss periodic penalty payments as an instrument to ensure implementation and compliance with the interim measures ordered illustrated in particular by the cases *Białowieża Forest* (C-441/17 R) and *Turów Mine* (C-121/21 R).

The subsequent chapters introduce the subsection of the monograph devoted more specifically to the intergovernmental and international law standpoint, starting with Chapter 11 authored by M. Kożuch and entitled "Intergovernmental mediation versus classical remedies: towards efficient conflict resolution in cross-border environmental disputes". Against the background of the UN Singapore Convention on the Enforcement of Mediated Settlements and discussion about the EU's and Member States' competence, it is argued that out-of-court protection instruments based on flexible procedures should be developed. A particular regulatory and technological challenge of the energy area is addressed in Chapter 12, entitled "Energy-related cross-border disputes: a future without the Energy Charter Treaty", authored by V. Vomáčka. Against the backdrop of the case law of the CJEU such as *Komstroy* (C-741/19) and *Opinion 1/20*, the chapter outlines the reasons why efforts to modernize the Energy Charter Treaty have failed and provides options for resolving cross-border energy disputes without the Energy Charter. In particular, the author focuses on the principles of protection provided to the legitimate expectations of investors under the regime of EU law and the European Convention on Human Rights (ECHR). In Chapter 13, P. Szwedo discusses "Rebalancing international (investment) law: is there a space for Rights of Nature arguments?" covering thus the evolution of international investment law toward a more ecocentric approach, which may have a significant impact on cases involving cross-border pollution. Whilst the Rights of Nature are still considered revolutionary and are recognized only by a minority of states, it is argued that the concept can have a real influence on investment decisions and proceedings, especially concerning cross-boundary ecosystems and resources. Chapter 14, entitled "Litigating cross-border environmental damages: how to bridge the gap between foreign authorizations and domestic claims", authored by D. Düsterhaus, offers an insightful perspective of EU private international law, in particular Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II). It is argued that Rome II combined with the rules on cross-border participation in environmental matters allows the clash between the domestic administrative legality of certain polluting activities and injunctive or compensatory claims against them under the civil law of a neighboring Member State to be solved. Among the fundamental case studies addressed in this monograph, river-based litigation is illustrated in Chapter 15 authored by H.

Schoukens and N. van der Burgt. In their contribution entitled "Cross-border pollution in the context of the Scheldt Estuary: the complex search for a sustainable level playing field", authors explore the complex legal framework applicable to the Scheldt Estuary, one of Europe's most important ecological estuaries hosting one of Europe's largest ports, the Port of Antwerp.

They consider that a more ecosystem-based approach needs to be integrated into the permitting and planning policies, while proactive communication and consultation when authorizing new and ongoing activities in the Scheldt estuary is also key to ensure sufficient transparency. Part II of the monograph concludes with a dual, Czech and Polish perspectives analysis of the unprecedented case before the EU Court of Justice *Czechia v. Poland* (C-121/21), which was among the concerns central to this monograph. In Chapter 16, entitled "Czechia v. Poland (C-121/21) – legal and political background – Czech perspective", J. Vodicka outlines Czech understanding of the infringement case lodged against Poland before the CJEU over the Turów lignite mine and underscores the challenges of balancing economic interests with environmental protection within the EU framework. While the legal action under Article 259 TFEU was withdrawn after an intergovernmental agreement was reached, the agreement, which offered compensation and environmental safeguards, was criticized for its lack of transparency and failure to address the core environmental concerns. In Chapter 17, entitled "Czechia v. Poland (C-121/21) – legal and political background – Polish perspective", B. Rakoczy concludes that the applicant's claims were well-founded due to violations of Polish law by the national authorities responsible for conducting environmental impact assessment procedures.

In light of the foregoing, there is no single approach to addressing the cross-border implications of environmental harm. On the one hand, the body of relevant national, EU, and international legal provisions is constantly under stress owing to various economic and political realities. Conversely, the complexity of the applicable legal norms may be regarded as an opportunity to facilitate their targeted and effective implementation, including at the judicial stage. The resolution of cross-border environmental disputes should be anchored in the underlying recognition of the environment as a shared responsibility of both States and citizens, and as a common good to be preserved for present and future generations.

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Part 1

Addressing pollution and climate change in a transboundary context – EU law perspective and beyond

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1 New approaches to the concepts of pollution and transboundary pollution in the European Union

Delphine Misonne

1. Cross-border pollution in Europe today: recent cases and stories

The River Scheldt runs from France to Belgium and the Netherlands into the North Sea on a 350-km-long journey. Interestingly, it not only carries water, fish, boats, birds and dragonflies across the borders of EU Member States. It also happens to convey new legal concepts. On a night in April 2020, at a time of the pandemic when people were meant to stay at home, a dam suddenly broke at a sugar factory in the north of France, releasing thousands of gallons of heavily polluted water into the river, black and smelly due to the decomposition of beet pulp, that also invaded the surrounding private gardens and acres. Soon, the dark waters reached the Belgian borders via the river, where fish started to show signs of grave distress due to the lack of oxygen. No alert was given that could have led to preventive measures, as required under international law, especially in a specific convention pertaining to the River Scheldt itself.[1] Tons of fish were lost. The quality of the river ecosystem was impacted for the next seven to ten years, even considering that the biological status of the water was already not very good. When ruling on the case, the correctional tribunal in Lille, France, condemned the sugar company for causing unintentional pollution by negligence and lack of maintenance under criminal law. In the civil dimension of the lawsuit, it admitted the existence of ecological prejudice in favour of the association of fishers and a Belgian Region due to the non-negligible impairment of the elements and functions of an ecosystem. While the company had described the river as a canal dedicated to navigation, the tribunal considered the river as an ecosystem where fish and frogs reproduce. It imposed on the company a fine of several million euros as a reparation for the "ecological prejudice", a notion robustly enshrined under French law[2] but not yet

1 The International Agreement on the River Scheldt, signed in Ghent, Belgium, in 2002 (entered into force in 2005), is between France, Belgium and the Netherlands. Among its main principles for international cooperation are the principles of preventing impairment to the environment at source and polluter-pays. The Agreement was adopted as an implementation tool of the Water Framework Directive (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, 22 December 2000, pp. 1–73).

2 After a landmark ruling by French courts on the Erika shipwreck-related oil spill, the French Civil Code, as modified by the Law on Biodiversity of 2016, now admits "ecological prejudice" (*préjudice*

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firmly admitted under Belgian law,[3] nor even under EU law on a broad and generic basis.[4] The company's appeal is currently pending.

In the Netherlands, concentrations in rivers of persistent pollutants like PFAS[5] are today relatively high in the Western Scheldt, the province located at the estuary of the River Scheldt, according to the Dutch administration.[6] Such substances have entered the living environment through factory emissions and the use of products containing these substances, as they do not occur naturally. In such contexts, a transboundary dimension also arises. For instance, there are concerns about the discharges into the River Scheldt from factories located across the southern border near the city of Antwerp. In May 2023, the Dutch government launched a lawsuit against an American company vested across the border near Antwerp based on civil liability for damage caused to the economy (fisheries, tourism) and the ecosystems of the Schelde in the Netherlands.

In *Poland v. European Parliament*, a case brought before the European Court of Justice (hereinafter, "the CJEU") in 2019,[7] where the annulment of a European Directive on the reduction of national emissions of certain atmospheric pollutants was sought, Poland argued that the impact assessment failed to take proper account of the effects of transboundary pollution from non-member countries, especially since the relevant data provided by Ukraine and the Republic of Belarus were incomplete. Its view was that transboundary pollution risked undoing the efforts made by Poland to comply with its commitments under the contested directive, leading to unequal treatment of Member States bordering non-member countries in comparison with other Member States, and would be at odds with the polluter-pays principle. The CJEU found that the criticism was not substantiated; it was not made clear why transboundary pollution might have decisive consequences for the emissions covered by the contested directive and thus for the determination of the commitments to reduce those emissions,[8] nor why it could lead to a possible breach of the principle of equal treatment.[9]

écologique), defined as "the damage consisting of a significant impairment of the components or functions of ecosystems or the collective benefits derived by man from the environment" (art. 1247), as a specific category of damage that must be remediated.

3 Except by the Court of Appeal of Liège.

4 The definition of environmental damage under Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the ELD) is much narrower (it only applies to protected species and habitats, water and land) and more complex.

5 Per- and polyfluoroalkyl substances (PFAS) are a group of over 4,700 widely used synthetic chemicals that persist in the environment. See European Environment Agency, "Cross-cutting story 3: PFAS" (last modified 13 March 2023) <https://www.eea.europa.eu/publications/zero-pollution/cross-cutting-stories/pfas>.

6 National Institute for Public Health and the Environment, "PFAS levels in drinking water from river water need to be brought down" (24 October 2022) <https://www.rivm.nl/en/news/pfas-levels-in-drinking-water-from-river-water-need-to-be-brought-down>.

7 Case C-128/17, *Poland v. European Parliament and Council*, EU:C:2019:194, para 125.

8 Id., para 115.

9 Id., para 144.

In another case for interim relief brought by the Czech Republic before the Vice President of the CJEU, the Court was asked, pending its judgment in the main action under Article 259 of the Treaty on the Functioning of the European Union (TFEU) lodged by Czechia against Poland, to urgently order that the Republic of Poland immediately cease lignite mining activities at the Turów mine due to the risk of serious and irreparable damage to the environment and human health, including across the border.[10] The Vice President of the Court did rule that activity should immediately cease because weighing up the interests involved favoured the granting of the requested interim measure.[11] The extension of lignite mining activity for up to six years had been allowed without carrying out an environmental impact assessment, raising issues of legality under EU law. One of the potential damages alleged by the claimant Member State was linked to the lowering of the groundwater level and the damage relating to the threat to the drinking water supply of the population dependent on the bodies of water in question. The vice president admitted that the continuation of lignite mining activities was likely to cause serious and irreparable damage to the environment and human health, even in the Czech Republic: "Groundwater in the European Union is a valuable natural resource which should be protected from deterioration, in particular where ecosystems and the water supply for human consumption depend on it".[12] The jurisdiction was also concerned about the fact that "damage to the environment and human health is generally irreversible since, more often than not, damage to such interests cannot, by reason of its nature, be eliminated retroactively".[13] Because Poland did not comply, a second ordinance of the Vice President of the Court ordered Poland to pay the European Commission a penalty of 500,000 euros per day.[14] However, only a few months later, the case was closed with an amicable settlement and the abandonment of the claim, though no details on the content of that settlement were given.[15]

Moving back to Belgium and the Scheldt, when the decision was taken by governmental authorities to extend the electricity production of two nuclear power stations on the banks of the river, close not only to protected areas under the Habitats Directive and the Birds Directive but also to the border with the Netherlands, by ten years, the CJEU found that it was indisputable that the project could have

10 Case C-121/21R, *Czech Republic v. Poland (Turow)*, EU:C:2021:420.

11 Para 95.

12 Para 68.

13 Para 70, by reference to the order of the President of the Court of 2 October 2003, *Commission v. Austria*, Case C-320/03R, EU:C:2003:543, para 92.

14 Order of the Vice-President of the Court of 20 September 2021, *Czech Republic v. Republic of Poland*, EU:C:2021:752.

15 Order of the Court (Grand Chamber) of 4 February 2022, *Czech Republic v. Republic of Poland*, Removal from the Register, Case C-121/21.

significant effects on the environment in the latter Member State, with the consequence that it could be subject to specific information and additional assessment requirements.[16]

These quite routinely observed stories in Europe all show that pollution and damage or impairment to the environment in a cross-border context is a lively issue within the EU today. Such situations are only examples of the need to have a closer look afresh at transboundary environmental concerns within the EU, but such renewed interest is not at all self-evident.

On the contrary, it is the very invisibilisation of borders between Member States within the EU that forms the strength of EU law on the environment due to the legislative capacity to produce a shared core of legal regimes that are applicable in the territory of all 27 Member States, sometimes even directly (through regulations) or after directives are implemented (except where they produce a direct effect), with far-reaching effects in other countries by way of example or influence.

The environmental chapter of the Lisbon Treaty, and Article 191 TFEU in particular, does not specifically refer to possible cross-border issues in the list of elements to be taken into consideration when the Union is preparing its own policy on the environment.[17]

2. The border as a trigger for more international law on the environment

The notion of a border, understood as a line separating countries, was quintessential to the surge of international environmental law before its contemporary move towards more global challenges like climate change and biodiversity loss. The mere possibility that damage or an impact could be created beyond the border of a sovereign State has existed since long before the range of available legal tools to prevent and tackle such situations in a close or long-range transboundary context.

One of the main trophies of such crucial developments is the customary "no-harm principle", according to which a State is bound to prevent, reduce and control the risk of environmental harm to other states and to areas beyond the limits of its national jurisdiction, despite its sovereignty and related powers on its own territory where it is still affirmed that it can make its own choices: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[18] In reaction to various accidents related to industrial risks and activities, the very existence of

16 Case C-411/17, *Inter-Environnement Wallonie*, EU:C:2019:622, para 81.

17 We are not discussing internal market provisions and related restrictions here.

18 Principle 21 of the Stockholm Declaration (1972), as transformed in Rio in 1992 with the addition of the reference to development, inspired by the Trail Smelter arbitration case: "[N]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the

borders in an environmental context also progressively imposed on States a clear and strong duty to cooperate, for instance through procedures of impact assessment and notification or alert processes, either on the influence of case law or due to new conventional frameworks. In the *Pulp Mills* case in 2010,[19] the International Court of Justice recalled that it is now a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular on a shared resource like a river.

The need to address environmental issues beyond borders also made the adoption of multilateral treaties a necessity, especially since the seventies, like with the 1979 Geneva Convention on Long-Range Transboundary Air Pollution[20] in the northern part of the world, and in the early nineties in Europe, marked by the nuclear accident at Chernobyl in April 1986. The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context,[21] the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes,[22] and the 1992 Convention on the Transboundary Effects of Industrial Accidents,[23] among many others, tend to create new conditions for more appropriate transborder governance of shared environmental concerns and responsibilities.

Where a border is involved, issues of private international law can also surge in liability cases, for instance where the polluter and the victim(s) are not located in the same country.[24]

3. The concept of pollution and its evolving definition

The very title of the conference to which this book is linked, "Cross-border pollution in EU law – searching for remedies", invites us to consider the notion of pollution, so central to environmental law regimes but, strangely enough, rarely discussed as such or deconstructed in legal doctrine. Legal definitions of the word

territory of another…when the case is of serious consequence and the injury is established by clear and convincing evidence".

19 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010.

20 Convention on Long-range Transboundary Air Pollution, Geneva, 13 November 1979, United Nations, Treaty Series, vol. 1302, p. 217.

21 Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, United Nations, Treaty Series, vol. 1989, p. 309.

22 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, United Nations, Treaty Series, vol. 1936, p. 269.

23 Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, United Nations, Treaty Series, vol. 2105, p. 457.

24 M. G. Faure and G. Betlem, "Applying national liability law to transboundary pollution: Some lessons from Europe and the United States," in M. G. Faure and S. Ying (eds.), *China and International Environmental Liability: Legal Remedies for Transboundary Pollution* (Edward Elgar 2008) 129–191.

"pollution" are found in international conventions[25] and in several EU legislative acts, all consistent but not unified due to a lack of a generic text on the subject matter that would cover all possible fields.

Under the current version of the Industrial Emissions Directive (IED),[26] pollution means "the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment", to which the introduction of odours has been added, on the occasion of the recast of the Directive in 2024.[27]

In a case concerning the Maritsa Iztok 2 lignite-fired thermal power plant in Bulgaria,[28] on request for a preliminary ruling made, among others, by a Greek association (the plant is located not far from the Greek border), the CJEU decided in 2023 that *any* introduction of SO_2 into the air constitutes pollution.[29] It therefore combined the notion of pollution under the IED, which covers, inter alia, the introduction of substances into the air which may be harmful to human health or the quality of the environment, with the content of Directive 2008/50 (AAQD)[30] on air quality limit values in ambient air, knowing that the directive lays down measures aiming at defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole.[31]

In the *Ilva* case of 25 June 2024,[32] the Grand Chamber decided, with reference to the *Maritsa Iztok 2* case but also to the case law of the European Court of Human Rights, that the concept of pollution includes the harm caused, or which may be caused, both to the environment and to human health. This has a consequence: "[T]hat broad definition confirms the close link which there is, in particular in the

25 Under the Montego Bay Convention on the Law of the Sea Art. 1 (4), "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities.

26 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

27 Directive 2024/1785/EU of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU, OJ L 2024/1775, 15 July 2024.

28 Case C-375/21, *Sdruzhenie 'Za Zemyata – dostap do pravosadie' v. Izpalnitelen director na Izpalnitelna agentsia po okolna sreda (Maritsa iztok 2)*, EU:C:2023:173.

29 Para 48.

30 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

31 Limit values under the directive mean "a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained" (Art. 2 (5)).

32 Case C-626/22*, Cz v. Ilva*, EU:C:2024:542.

context of that directive, between the protection of the quality of the environment and the protection of human health".[33]

Under the Water Framework Directive, pollution means "the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment".

Other definitions can be found in the European policy discourse, even if these are not established in law. To the question "What is pollution?", the European Environmental Agency provides the following answer: "Pollution changes a medium such as air, water or soil in a way that can make it harmful to people or nature. Different types of pollutants include chemicals, dust, noise and radiation".[34]

Pollution is not only an issue for human beings; it also concerns the health of ecosystems. Research has been conducted on the impact of pollution on bird populations, for instance.[35] In the EU, the Birds Directive explicitly refers to the need to avoid pollution that could affect birds and their habitats. It prescribes that "in respect of the protection areas, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats".[36]

4. Is pollution legal under EU law?

With Ursula von der Leyen taking the lead of the European Commission in 2019, a "zero pollution" paradigm started to be actively promoted in the EU through the Green Deal and its various programmatic developments, including the 2021 EU Action Plan, called *Towards Zero Pollution for Air, Water and Soil*,[37] proposing new targets at the 2030 and 2050 horizons.

Even if the legal circumstances that actually enshrine a zero pollution in reality are still very rare, the response to that essential question of whether pollution is to be deemed illegal or legal today must be answered in a dynamic and rapidly evolving context.

33 Para 90.

34 European Environmental Agency, *EEA Signals 2020: Towards Zero Pollution in Europe* (EEA 2020).

35 Y. Liang, I. Rudik, E. Y. Zou, A. Johnston, A. D. Rodewald, and C. L. Kling, "Conservation cobenefits from air pollution regulation: Evidence from birds" (2020) 117/49 *Proceedings of the National Academy of Sciences* 30900.

36 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), Art. 4.

37 EU Action Plan, "Towards a Zero Pollution Ambition for air, water and soil," May 2021, COM (2021).

Of importance in that regard, in order to assess the current mindset, is the recognition in July 2022 by the United Nations General Assembly of the human right to a clean, healthy and sustainable environment,[38] together with newcomers in the global glossary, like the words "neutrality" and "zero", the origin of which can be tracked back to the advances of global climate governance but with a tendency to expand to other fields, like pollution or deforestation. After so many years of so-called pollution control, and due to a much stronger body of evidence showing how pollution affects different aspects of health at even lower concentrations than previously understood, as observed for instance by the World Health Organization (WHO) in its 2021 update of the air quality guidelines in response to the real and continued threat of air pollution to public health,[39] civil society is less keen to accept that a certain level should still be considered acceptable as a price to pay for industrial development.

Under EU primary law, a number of key, horizontal principles enshrined both in the TFEU and the EU Charter of Fundamental Rights (hereinafter, "the Charter") recall the relevance of environmental protection, both through the concepts of environmental integration in Article 11 TFEU (integration principle) and principles guiding EU environmental policy under Article 191 TFEU, such as the prevention principle, the precautionary principle and the polluter-pays principle, but also through the goal of achieving a high level of environmental protection and the improvement of the quality of the environment. A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development, as required by Article 37 of the Charter.[40]

Such an explicit ambition, as being enshrined in primary EU law, explains therefore quite logically the reason why legislative acts of the EU in the field of environmental protection tend also to impose on Member States an obligation to prevent and avoid pollution.

For instance, under the IED, Member States shall take the necessary measures to provide that installations are operated in accordance with the principles that all the appropriate preventive measures are taken against pollution and that "no significant pollution" is caused. However, it was only very recently, in March 2023, in *Maritsa Iztok 2*, that the CJEU investigated the key meaning of "significant pollution" in the specific context of the derogatory clause of the same directive allowing national authorities, in some circumstances, to set less strict emissions limit values than what would normally be required on the condition that the competent authority shall in any case ensure that "no significant pollution" is caused and that a high level of protection of the environment as a whole is achieved (Article 15[4]). After

38 The human right to a clean, healthy and sustainable environment. A/RES/76/300, 28 July 2022.

39 World Health Organization, *WHO Global Air Quality Guidelines: Particulate Matter (PM2.5 and PM10), Ozone, Nitrogen Dioxide, Sulfur Dioxide and Carbon Monoxide* (WHO 2021).

40 Article 37, EU Charter of Fundamental Rights. On that concept, see for instance D. Misonne, "High level of (environmental) protection," in *The Oxford Encyclopedia of EU Law* (Oxford University Press 2023).

highlighting what is meant by "pollution" under the IED, as observed supra, the Court found that the exceedance of air quality limit values for SO_2 must necessarily be held to be "significant pollution" with regard to the objectives pursued by the Ambient Air Quality Directive (AAQD) (avoid, prevent or reduce harmful effects on human health and the environment as a whole),[41] meaning that limit values must not be exceeded and that such limit values were already compulsory by that time. A derogation cannot be granted if it may contribute to the exceedance of air quality limit values set by the AAQD for SO_2. The Court also decided that, under the precautionary principle, where uncertainties remain as to whether less strict emission limit values will lead to "significant pollution", a derogation cannot be granted. The granting of a derogation by the public authority requires a comprehensive assessment taking account of all sources of pollutants and their cumulative effects in order to ensure that even if a derogation is granted for one of the sources, the sum total of their emissions does not cause any exceedance of the air quality limit values.

In the *Ilva* case, the Grand Chamber addressed for the first time the procedure for reconsidering a permit under the same IED, according to which the permit conditions are to be reconsidered if the pollution caused by an installation is of such significance that the existing emission limit values of the permit to operate that installation need to be revised: a permit cannot be limited to setting limit values only for polluting substances, the emission of which was foreseeable and was taken into consideration during the initial authorisation procedure, without also taking account of the emissions actually generated by the installation concerned during its operation and relating to other polluting substances.[42] It is necessary to take into account the experience gained from the operation of the installation concerned as part of the relevant scientific data relating to pollution and, therefore, the emissions actually established. The Court decided that "the competent authority must take into account, in addition to the polluting substances that are foreseeable having regard to the nature and type of industrial activity concerned, all those polluting substances which are the subject of emissions scientifically recognised as harmful which are liable to be emitted from the installation concerned, including those generated by that activity which were not assessed during the initial authorisation procedure for that installation".[43]

5. Pollution, a cause for transboundary consultations

These recent rulings might be useful for gaining clarity on the meaning of another provision of the IED dedicated to transboundary effects that stipulates that where

41 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, now replaced by Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe (recast), OJ L, 2024/2881, 20 November 2024.

42 Para 117.

43 Para 122.

a Member State "is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State which is likely to be significantly affected so requests", the Member State in whose territory the application for a permit was submitted shall forward to the other Member State any information required to be given or made available, as it makes it available to the public. Consultations shall be carried out between the two Member States, while ensuring that the comments from the Member State that could be significantly affected are provided before the competent authority of the Member State in whose territory the application for a permit was submitted reaches its decision.[44]

Strangely enough, Article 26 of the IED does not clearly mention the obligation laid on the home State to avoid any significant transboundary effect, as established under customary law and the no-harm principle. But the recently revised version of the Directive contains new provisions on the impact of incidents and accidents on transboundary resources, with regard to pollution affecting drinking water resources: the competent authority shall inform the drinking water and waste water operators affected of the measures taken to prevent damage being caused, or remedy the damage caused, by that pollution to human health and the environment.[45] And, for all matters, in the event of any incident or accident significantly affecting human health or the environment in another Member State, the Member State in whose territory the accident or incident has occurred shall ensure that the competent authority of the other Member State is immediately informed. Transboundary and multidisciplinary cooperation between the affected Member States shall be aimed at limiting the consequences for the environment and human health and to prevent further possible incidents or accidents.

Under the Environmental Impact Assessment Directive,[46] the competent authority is to take account of the effects on the environment at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.[47] Again, the directive mentions that where a Member State is aware that a project "is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia, a description of the project, together with any available information on its possible transboundary

44 Art. 26.

45 Art. 7.

46 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

47 Case C-201/2, *Wells*, EU:C:2004:12, para 51; Case C-261/18, *Commission v. Ireland* (Derrybrien Wind Farm), EU:C:2019:955, para 73; Case C-535/18, *Land Nordrhein-Westfalen* EU:C:2020:391, para 78.

impact and information on the nature of the decision which may be taken".[48] It also imposes that the Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable timeframe for the duration of the consultation period. Such consultations may be conducted through an appropriate joint body.

Expecting much from negotiations between neighbouring states in similar situations has proven to be inefficient and, in some cases, does not even happen. "Politicians will generally not be rewarded for fights against transboundary pollution since the foreign citizen who would benefit from such action cannot support them with votes. In other words: the fact that national politicians would support legislation allowing firms to externalize harm to their neighbours should, from this economic perspective, not come as a surprise", explain Michael Faure and Gerrit Betlem in their analysis of the effects of such underexplored provisions and their lack of efficiency,[49] also mentioning that "it is easy to find examples of this externalizing behaviour, for example if one simply looks at the siting of noxious and dangerous facilities: in many countries, dangerous activities like e.g. nuclear power plants will not be located next to the capital of a particular country, but preferably close to the borders where risks are primarily felt by their neighbours".

In the Environmental Liability Directive (ELD),[50] pollution is addressed as a cause of environmental damage. The ELD only applies to environmental damage or an imminent threat of such damage caused by pollution of a diffuse character in cases where it is possible to establish a causal link between the damage and the activities of individual operators. There again, a specific provision is also dedicated to cooperation between Member States: "Where environmental damage affects or is likely to affect several Member States, those Member States shall cooperate, including through the appropriate exchange of information, with a view to ensuring that preventive action and, where necessary, remedial action is taken in respect of any such environmental damage. Where environmental damage has occurred, the Member State in whose territory the damage originates shall provide sufficient information to the potentially affected Member States. Where a Member State identifies damage within its borders which has not been caused within them, it may report the issue to the Commission and any other Member State concerned; it may make recommendations for the adoption of preventive or remedial measures and it may seek, in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures".[51]

The adoption of the Wastewater Treatment Directive (WTD) finds one of its roots in the concern that "pollution due to insufficient treatment of wastewater in

48 Art. 7.

49 *Op. cit.*, p. 3.

50 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

51 Art. 15.

one Member State often influences other Member States' waters".[52] The WTD was efficient due to its relatively simple message: all agglomerations must be provided with collecting systems for urban wastewater, where water will be appropriately treated before discharged into freshwater. At the occasion of the recent revision process,[53] an obligation of immediate notification in the event of an accident in a transboundary context has also been added "in order to take account of the Oder River incident" of July and August 2022, considered "one of the largest ecological disasters in Europe in recent memory".[54] Again, the context is transboundary as the river crosses three Member States (Czechia, Poland and Germany). Public authorities were slow to react. The drought was severe at the time. According to a recent report,[55] the cause was related to a toxic algal bloom due to the high salinity of the Oder River, resulting from discharges of industrial wastewater with a high salt content. Less diluted by the lack of water, routine pollution was suddenly more visible and unmasked, demonstrating its danger to ecosystems and its abnormality.

6. Concluding remarks

This exploratory chapter has highlighted situations of (cross-border) pollution inside the EU that raise the necessity of and opportunities for fine-tuning the understanding of the concept of pollution and related obligations, which are of crucial importance for the protection of human health and ecosystems in Europe. Despite the quite ancient tone of many of the related international or European provisions, a new context, fed by new ambitions and scientific knowledge, tends to promote stricter approaches to situations of cross-border-related environmental issues and considerably lower the acceptability of pollution. The field is still underexplored, however, and might benefit from more strategic litigation.

52 Council Directive 01/271/EEC of 21 May 1991 concerning urban wastewater treatment, preamble.

53 Commission proposal for a Directive concerning urban wastewater treatment (recast), 26 October 2022, COM (2022) 541.

54 European Commission, "Zero Pollution: New report draws lessons from the Oder River ecological disaster" (17 February 2023) <https://environment.ec.europa.eu/news/oder-river-report-2023-02-17_en>.

55 G. Free et al., *An EU Analysis of the Ecological Disaster in the Oder River of 2022* (JRC Technical Report EUR 31418 EN, Publications Office of the European Union 2023).

2 Observations on the approach to cross-border pollution in EU environmental law

Magnus Noll-Ehlers[1]

1. Introduction

One of the EU's objectives is to protect the environment, including in view of protecting human health.[2] This has led to the development of an extensive acquis of EU environmental legislation.[3] While these rules do not require a cross-border element to apply in the Member States,[4] environmental effects originating in one Member State can also appear in areas located in another Member State. The fact that pollution does not stop at borders is one of the reasons why there is a need to regulate this topic not only at the national level but also at the EU level and globally.[5] EU environmental law thus applies to domestic and transboundary pollution.

The applicability of EU environmental law to domestic as well as transboundary pollution raises several questions. Should the rules in cross-border situations differ from those applied to pollution that remains within the borders of a Member State? In what way(s) should the responsibilities of the Member States involved in cross-border pollution be split between them? How can the enforcement of EU environmental law be assured if the source of the pollution is located in another Member State?

To identify answers to these questions under EU law, a look at examples of environmental legislation that can have a cross-border dimension is required. A

1 Magnus Noll-Ehlers is a member of the Legal Service of the European Commission. The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission. The author is grateful for the valuable suggestions received from Stephanos Ampatzis, Christoph Hermes and Vanda Jakir during the preparation of this article.

2 Art. 3 (3) TEU and Art. 191 TFEU.

3 For an overview, see S. Garben, "Art. 192 TFEU," in M. Kellerbauer, M. Klamert, and J. Tomkin (eds.), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd ed., Oxford University Press 2024) para. 7 et seq.

4 L. Krämer and C. Badger, *Krämer's EU Environmental Law* (9th ed., Hart Publishing 2024) para. 1–05.

5 For international treaties on environmental protection, see J. Brunnée and C. Campbell-Duruflé, "Environment, multilateral agreements," *Max Planck Encyclopedia of Public International Law* (last updated November 2022), <https://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1760>. See also the overview of environmental cross-border disputes provided by Advocate General Pikamäe in Opinion of 3 February 2022, *Czech Republic/Republic of Poland*, C-121/21, ECLI:EU:C:2022:74 in footnote 2.

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first category of legislation addresses environmental problems at their source. Transboundary aspects of implementing these rules can arise where negative impacts materialize not in the source Member State but in another Member State. An example of this first category is the legislation on environmental impact assessments of infrastructure projects. A second category of environmental legislation focuses more on a certain level of environmental protection to be achieved as an overall result. An illustration of this type is the rules on ambient air quality, which aim to achieve a minimum standard of clean air in a given territory, even though pollutants in the air that humans breathe in one Member State can originate in another Member State.

2. Rules applying at the source of the environmental issue: the example of the Environmental Impact Assessment Directive

There have been EU rules on environmental impact assessments (EIAs) since 1985.[6] This process requires making certain infrastructure projects subject to a prior assessment of their environmental effects and taking that assessment into account when handing out the development consent.[7] In the context of that procedure, the EIA Directive integrates requirements from the Aarhus Convention[8] and the Espoo Convention[9] by providing for the participation of the public[10] and other affected Member States in the decision-making procedures and allowing for access to justice for members of the public concerned.[11]

When carrying out an EIA, there can be two kinds of cross-border situations: either the infrastructure located in the territory of one Member State has

6 Starting with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5 July 1985, p. 40. Currently, the horizontal rules on EIA are provided for in Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28 January 2012, p. 1, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25 April 2014, p. 1.

7 The overall functioning of the EIA Directive is discussed by Krämer and Badger (n. 4) paras. 4–30.

8 Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, OJ 2005 L 124, p. 1.

9 Convention on Environmental Impact Assessment in a Transboundary Context, concluded at Espoo (Finland) on 25 February 1991 and approved on behalf of the European Community by Council Decision of 27 June 1997. See, in particular, Article 2 on general provisions, Article 3 on notifications and Article 5 on consultations.

10 On the requirements of public participation in the Aarhus Convention, see G. Gattinara and M. Noll-Ehlers, "The scope and requirements of public participation," in B. Peters and E. J. Lohse (eds.), *Sustainability through Participation? Perspectives from National, European and International Law* (Brill Nijhoff 2023) chap. 3.

11 On the significance of the Aarhus Convention for access to justice in environmental matters, see Garben (n. 3) para. 22 et seq.

environmental effects in another Member State, or the project itself is of a transboundary nature.

2.1 First cross-border situation: the project is located in one Member State but has effects in another Member State

The EIA Directive provides specific rules for occasions when an infrastructure project located in the territory of one Member State is likely to have environmental effects in another Member State. The Court of Justice has acknowledged that it takes account of the requirements of the Espoo Convention on environmental impact assessments in a transboundary context.[12] According to the Directive, the Member State in which the project is located has to comply with specific EIA requirements to inform, cooperate with and assist other Member States that are affected by the environmental impact of that project.[13]

These requirements include the obligation to inform the affected Member State of the project and its transboundary impacts, share information from the EIA to arrange for public participation in the affected Member State, and enter into consultation with the affected Member State. In the next step, the Member State in which the project is located must take the consultations of the public and the affected Member State into account when handing out the development consent. Following that, the Member State must inform the affected Member State of the development consent and how the transboundary EIA has been taken into account. This last obligation must allow the affected Member State to react, if necessary, in an adequate and timely manner, including the possibility of exercising an effective judicial remedy.[14]

It has been observed that these specific requirements stem from an ideal of solidarity, cooperation and mutual support between the Member States and ultimately seek to protect the environment. Where a Member State does not faithfully comply with these obligations toward a neighboring Member State facing the same environmental risks, this may constitute a breach of the principle of sincere cooperation set out in Art. 4(3) TEU.[15]

12 Regarding the relevance of the Espoo Convention to the EIA Directive, see judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, para. 161.

13 Art. 7 and 9 (2) of the EIA Directive 2011/92.

14 As pointed out in the Opinion of Advocate General Pikamäe of 3 February 2022, supra note 5, paras. 174–176, the relevant pieces of information have to be provided to the affected Member State in a timely and complete manner.

15 Ibid, paras. 215–220.

2.2 Second cross-border situation: the project is located in the territory of several Member States

Transboundary environmental effects from infrastructure projects can occur when the project stretches over the territory of more than one Member State.[16] For example, the Court of Justice had to look into the applicability of the EIA Directive in the case of the construction of an overhead electrical power line between Austria and Italy.[17] The provision in question required an EIA to be carried out if the overhead electrical power lines ran for more than 15 km. While the overall project was more than 45 km long, only around 7 km was located in Austria. The Austrian authorities took the view that they did not have to apply the EIA Directive for that part because fewer than 15 km of the project was located in their territory.

However, the Court of Justice pointed out that the EIA Directive adopts an overall assessment of the effects of projects on the environment, irrespective of whether the project might be transboundary in nature. It followed that projects which extend to the territory of a number of Member States cannot be exempted from the application of the Directive solely on the grounds that it does not contain any express provision in regard to them. In addition, such an exemption would interfere with the objective of that Directive. Its effectiveness would be compromised if the competent authorities of a Member State, when deciding whether a project must be the subject of an EIA, could leave any part of the project located in another Member State out of consideration. The Court of Justice concluded that the Austrian authorities had to carry out an EIA in their own territory that took the specific effects of that project into account.[18]

It follows that the EIA Directive's obligations do not cease to apply in the case of transboundary projects. Where the legislation only applies to projects that are above a certain threshold, the overall size of the project matters, not just the part within the territory of one Member State. To maintain the practical effect of the EIA Directive, the fact that a project stretches over the territory of several Member States does not constitute a valid justification for limiting its application.

Another instance of projects stretching over the territories of several Member States can be found in the framework of the Trans-European Transport Network (TEN-T). That network comprises transport infrastructure for railways and inland waterways as well as for maritime, road, air and multimodal transport.[19] In that context, innovative solutions are available to carry out an EIA for transboundary projects. To coordinate cross-border permit granting procedures, the rules require

16 See also Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects, European Commission, Directorate General Environment, 2013.

17 Judgment of 10 December 2009, *Umweltanwalt von Kärnten*, C-205/08, EU:C:2009:767.

18 Ibid, para. 53.

19 Art. 2 (1) of Regulation (EU) 2024/1679 of the European Parliament and of the Council of 13 June 2024 on Union guidelines for the development of the trans-European transport network, amending Regulations (EU) 2021/1153 and (EU) No 913/2010 and repealing Regulation (EU) No 1315/2013, OJ L, 2024/1679, 28 June 2024.

Member States to ensure that the designated authorities of the Member States concerned cooperate with a view to coordinating their timetables and agreeing on a joint schedule concerning the permit granting procedure, including the EIA procedure. For cross-border projects, Member States may even establish a joint authority.[20]

Apart from this possibility, the rule remains that the competence for assessing and approving transboundary projects remains with the Member States for their respective territory. Still, they must take account of the specific situation.[21] This cannot only affect the interpretation of the legislative requirements but also lead to the need to coordinate the procedures with the other affected Member States.

2.3 Interim conclusion: assessments at source need to integrate transboundary effects

Cross-border pollution from infrastructure projects can arise either because the environmental impacts of a given project affect another Member State or because the project itself is located on two sides of a border. In both cases, the authorities of the two Member States need to integrate transboundary considerations into their decisions. To do so, the EU rules on EIA provide specific obligations of information, consultation and cooperation of the affected Member States. They can be seen as a manifestation of the principle of loyal cooperation, which requires Member States to assist each other and strive to look for legal solutions in applying EU law.[22]

3. Rules focusing on the end result to be achieved: the example of ambient air quality

Since the first directive on air quality limit values was adopted in 1980,[23] the EU has put in place a comprehensive set of clean air requirements to reduce the concentration of the most harmful pollutants. Meanwhile, the rules on ambient air quality establish air quality standards for 12 pollutants.[24]

20 See Recital 3 and Art. 7 (1) and (2) of Directive (EU) 2021/1187 on streamlining measures for advancing the realization of the trans-European transport network (TEN-T), OJ L 258, 20 July 2021, p. 1.

21 Similar to the situation under international law. See N. Craik, "The duty to cooperate in international environmental law: Constraining state discretion through due respect" [2019] 30/1 *Yearbook of International Environmental Law* 22, 33.

22 Marcus Klamert, "Art. 4(3) TEU," in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd ed., Oxford University Press 2024) para. 52.

23 Council Directive of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (80/779/EEC), OJ L 229, 30 August 1980, p. 30.

24 Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, OJ L 23, 26 January 2005, p. 3 and Directive 2008/50/EC of the European Parliament and of the Council

As the latest version of the Directive on Ambient Air Quality from 2024 ("AAQD 2024") puts it, "air pollution has no boundaries and is shared across the Union. In most Member States, a significant share of pollution is generated outside their territory."[25] The legislation thus not only requires Member States to ensure a certain level of air quality in their own territory but also provides specific rules regarding transboundary pollution.

3.1 Limit values as an obligation of result in the territory of the affected Member State

As a starting point, Member States must ensure that the levels of the pollutants in the ambient air in their territory do not exceed certain limit values.[26] In standing case law, the Court of Justice holds that exceeding these limit values is in itself sufficient for a finding to be made that the Member State concerned has infringed that obligation.[27] The requirement to observe these limit values constitutes a clear and precise obligation as to the result to be achieved by Member States.[28]

If, despite that first obligation, exceedances of limit values nevertheless arise, this triggers a second obligation. Member States are required to establish air quality plans setting out appropriate measures so that the exceedance period can be kept as short as possible.[29] The Court of Justice has held that this obligation establishes a direct link between the exceedance of the limit values and the drawing up of air quality plans. It follows from these rules that while Member States have a degree of discretion in deciding which measures to adopt, these measures must ensure that the period during which the limit values are exceeded is as short as possible.[30] The latest update to these rules specifies that, in any case, this period may not be longer

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of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11 June 2008, p. 1. These are to be repealed and replaced by Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe, OJ L 2024/2881, 20 November 2024. Air quality standards are set out in Annex I thereto.

25 Recital 42 of AAQD 2024.

26 Art. 13 (1) in conjunction with Annex XI of Directive 2008/50, Art. 13 (1) in conjunction with Annex I to AAQD 2024.

27 Judgment of 29 June 2023, *Commission v Portugal*, C-220/22, EU:C:2023:521, para. 42 and case law cited.

28 Judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, para. 30, where the Court of Justice found the second subparagraph of Article 13 (1) of Directive 2008/50 to amount to an obligation of result. While the Court of Justice left the question open with regard to the first subparagraph thereof, it has subsequently not differentiated between the two subparagraphs but has accepted an exceedance to be sufficient to find the obligation is breached. The Court of Justice also acknowledged that obligation of result in its judgment of 22 December 2022, *JP v Ministre de la Transition écologique and Premier ministre*, C-61/21, EU:C:2022:1015, para. 54; however, it did not find that the breach of these obligations would be capable of giving rise to a Member State's liability for loss and damage caused to individuals.

29 Art. 23 (1) of Directive 2008/50, Art. 19 (1) of AAQD 2024.

30 Judgment of 23 March 2023, *Commission v Greece*, C-70/21, EU:C:1991:224, paras. 113–115 and case law cited.

than four years from the end of the calendar year in which the first exceedance was recorded.[31]

Both the obligation to keep the level of pollution within the limit value and the requirement to keep exceedances as short as possible focus on the situation that is to be achieved in the territory of a given Member State. As such, these obligations have a general application and do not discriminate according to the origin of air pollution.

3.2 Modifications of the rules in the event of transboundary pollution

However, alongside these two generally applicable obligations, the rules on ambient air quality contain provisions that expressly cater to situations of transboundary air pollution.[32] On the one hand, additional obligations apply. On the other hand, the rules are more lenient with Member States to comply with the obligations.

The additional obligations first consist of additional information obligations. The AAQD 2024 sets out that where transboundary transport of air pollution from one or more Member States contributes significantly to the exceedance of an air quality standard, average exposure reduction obligation or alert threshold in another Member State, that other Member State shall notify the Member State(s) from which the air pollution originated and the Commission thereof.[33] Where the information threshold or alert thresholds are exceeded in areas close to national borders, information shall be provided as soon as possible to the competent authorities in the neighboring Member States concerned.[34]

Second, Member States are required to cooperate. The AAQD 2024 clarifies that the cooperation serves to identify the sources of air pollution, contributions of those sources to exceedances in another Member State, and the measures to be taken individually and in coordination with other Member States to address those sources. Further, the Member States involved are to draw up coordinated activities, such as the coordination of air quality plans, in which each Member State shall address pollution sources located in its territory.[35] Member States have to designate the competent authorities and bodies responsible for cooperating with the other Member States and the Commission on transboundary air pollution.[36]

At the same time, the legislation allows for leniency regarding the requirements for some pollutants particularly subject to cross-border transport. Regarding ozone,

31 Art. 19 (1) of AAQD 2024.

32 In doing so, the EU rules strive for consistency with the Convention on long-range transboundary air pollution, which was approved by Council Decision 81/462/EEC of 11 June 1981, OJ L 171, 27 June 1981, p. 11. See Recital 8 of Directive 2008/50 and Recital 15 of AAQD 2024.

33 Art. 21 (1) and (6) of AAQD 2024.

34 Art. 25 (4) of Directive 2008/50, Art. 21 (5) of AAQD 2024.

35 Art. 21 (2) of Directive AAQD 2024. On joint or coordinated air quality plans, see Art. 25 (1) of Directive 2008/50.

36 Art. 5 lit (g) of AAQD 2024.

which the rules acknowledge to be a transboundary pollutant,[37] Member States are required to maintain levels below long-term objectives only insofar as factors including the transboundary nature of ozone pollution permit.[38] Where conformity with the limit values for certain pollutants cannot be achieved in a given area within the attainment deadline because of, among other factors, transboundary contributions, a postponement of the deadline to apply those limit values can, under certain conditions, be granted to a Member State.[39] However, those exemptions may only be granted if the conditions set out in the Directives are fulfilled, including the temporal limits that they establish.[40] The legislative rules thus acknowledge that due to transboundary contributions, compliance with the limit values for certain pollutants can be harder to achieve than for others or can only be achieved later.

In this context, it has been discussed whether, in addition to the limitation of obligations expressly provided for in the rules of secondary law, transboundary pollution can generally justify an exceedance of the limit values. In infringement proceedings for failure to comply with the obligations of the directives on ambient air quality, some responding Member States invoked the contribution of factors outside their territory before the Court of Justice. They argued that certain areas suffer from a considerable transborder transport of pollutants, which, in their view, could be qualified as *force majeure*.[41]

However, the Court of Justice pointed out that the limit values had the objective of protecting human health and the environment and had taken full account of the fact that air pollutants are produced from multiple sources and activities. Therefore, cross-border pollution could only be invoked within the framework of the derogations set out in the rules and, in particular, the express temporal limits for such exemptions.[42] Arguments based on significant regional background pollution, linked in particular to the transboundary transport of pollutants, could not exempt a Member State from its responsibility for exceeding the PM10 limit values. On the contrary, the Court of Justice held that those particularities constitute elements that must be taken into account in the context of the air quality plans that Member States are required to establish in order to attain the limit value if it is exceeded.[43]

37 Recital 13 of Directive 2008/50, Recital 26 of AAQD 2024.

38 Art. 18 of Directive 2008/50, now Art. 12 (2) of AAQD 2024.

39 Art. 22 (2) of Directive 2008/50 (only for PM10), Art. 18 (1) (a) of AAQD 2024 as regards particulate matter (PM10 and PM2,5), nitrogen dioxide, benzene and benzo(a)pyrene.

40 Regarding Art. 22 (1) of Directive 2008/50 on nitrogen dioxide, judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, para. 33.

41 Judgment of 3 February 2021, *European Commission v Hungary*, C-637/18, EU:C:2021:92, paras. 25, 58, 108, judgment of 9 February 2023, *European Commission v Slovakia*, C-342/21, EU:C:2023:87, para. 35 et seq., 48, 63.

42 Judgment of 3 February 2021, *European Commission v Hungary*, C-637/18, EU:C:2021:92, paras. 71–76.

43 Judgment of 9 February 2023, *European Commission v Slovakia*, C-342/21, EU:C:2023:87, para. 68.

3.3 Interim conclusion: cooperation efforts to meet obligation of result

The EU legislation on ambient air quality thus shows a certain tension. Transboundary pollution justifies granting a limited flexibility in applying the rules. If an exceedance of the limit values results from pollution originating outside a Member State, some of the requirements are less strict than they would be if the situation were only caused by domestic factors. However, apart from the narrowly defined instances in which the secondary law has provided for such specific rules, the Court of Justice has upheld the principle according to which the Member States still have to achieve the obligation of result, even where exceedances may partially result from pollution outside that Member State.

As a consequence, where cross-border pollution contributes to exceedances of the limit values and the conditions for obtaining an exemption as provided for in the legislation are not met, Member States must look for other ways to comply with their obligation of result. Possible ways to do so include cooperating with the emitting neighboring Member State(s) to solve the problem at the source or compensating these contributions by stricter internal measures in the air quality plans.[44]

Where transborder contributions lead to exceedances of limit values, those concerned may not be satisfied with cooperation alone. Indeed, cooperation efforts alone do not guarantee achieving a certain result because Member States still keep the discretion to act in their field of competence.[45] However, cooperation requirements can reduce the discretion of competent authorities on which measures to adopt.[46] The fact that air quality standards across the EU set the same level of ambition and that the guiding principle of loyal cooperation has materialized in more and more concrete rules in the area of ambient air quality shows that EU rules are taking significant steps to improve air quality not only domestically but also in cases of transboundary pollution.

4. Enforcement of EU environmental rules in cases of cross-border pollution

As shown above with examples from two categories of rules, both EU legislation and case law acknowledge transboundary pollution and react by providing for specific rules. While this modifies the legal situation under EU environmental law, it leads to a further question, namely, how it can be ensured that the rules are complied with, i.e., the cross-border enforcement of the rules. Such enforcement can be centralized or decentralized.[47]

44 The need for legal and regulatory coordination in air quality regimes is underlined by A. Lewis, D. Misonne, and E. Scotford, "Harnessing science, policy, and law to deliver clean air" [2024] 385 *Science* 362.

45 Craik (n. 21) 34.

46 Ibid, 43.

47 A. Sikora, *Constitutionalisation of Environmental Protection in EU Law* (Europa Law Publishing 2020) chap. 3.2 highlights the Aarhus Convention and Art. 47 of the Charter as foundations of decentralized enforcement. On sanctions for transboundary pollution in criminal law, see M.

4.1 Centralized enforcement by infringement procedures in front of the Court of Justice in accordance with Arts. 258–259 TFEU

Failure to comply with obligations set out in EU law, including in cases of cross-border pollution, can be the subject matter of infringement procedures.

As guardian of the Treaties, the Commission has the duty to monitor Member States' actions in implementing EU law and to ensure that their legislation and practice comply with it, under the control of the Court of Justice.[48] The Commission enjoys discretionary power as to whether it will initiate an action for failure to fulfill obligations under Art. 258 TFEU,[49] which it uses strategically to focus and prioritize its enforcement efforts on the most important breaches of EU law.[50]

Environmental law is among the areas in which most infringement cases are brought before the Court of Justice.[51] In the area of ambient air quality, the Commission initiated wide-ranging EU policy efforts to support and facilitate the measures necessary for Member States to meet the air quality targets. In parallel, the Commission has stepped up central enforcement through infringement procedures. This has led to a series of judgments that concern systematic and persistent breaches of limit values and the failure to keep the period of exceedance as short as possible. These cases focus on nitrogen dioxide and particulate matter as the two major pollutants.[52]

Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd ed., Routledge 2015) 648.

48 Art. 17 TEU.

49 See, for example, judgment of 6 July 2000, *Commission v Belgium*, C-236/99, EU:C:2000:374, para. 28.

50 Communication from the Commission, "EU law: Better results through better application," C/2016/8600, OJ C 18, 19 January 2017, p. 10. Critical of the Commission in that regard are R. D. Kelemen and T. Pavone, "Where have the guardians gone? Law enforcement and the politics of supranational forbearance in the European Union" (27 December 2021) <https://ssrn.com/abstract=3994918>.

51 *Report from the Commission: Monitoring the Application of European Union Law*, 2021 Annual Report, COM/2022/344 final, chap. 1.

52 Judgment of 5 April 2017, *Commission v Bulgaria*, C-488/15, ECLI:EU:C:2017:267; Judgment of 22 February 2018, *Commission v Poland*, C-336/16, ECLI:EU:C:2018:94; Judgment of 24 October 2019, *Commission v France*, C-636/18, ECLI:EU:C:2019:900; Judgment of 30 April 2020, *Commission v Romania*, C-638/18, ECLI:EU:C:2020:334; Judgment of 10 November 2020, *Commission v Italy*, C-644/18, ECLI:EU:C:2020:895; Judgment of 3 February 2021, *Commission v Hungary*, C-637/18, ECLI:EU:C:2021:92; Judgment of 4 March 2021, *Commission v United Kingdom*, C-664/18, ECLI:EU:C:2021:171; Judgment of 3 June 2021, *Commission v Germany*, C-635/18, ECLI:EU:C:2021:437; Judgment of 12 May 2022, *Commission v Republic of Bulgaria*, C-730/19, ECLI:EU:C:2022:382; Judgment of 22 December 2022, *Commission v Spain*, C-125/20, ECLI:EU:C:2022:1025; Judgment of 28 April 2022, *Commission v France*, C-286/21, ECLI:EU:C:2022:319; Judgment of 23 March 2023, *Commission v Greece*, C-70/21, ECLI:EU:C:2023:237; Judgment of 16 February 2023, *Commission v Greece*, C-633/21, ECLI:EU:C:2023:112; Judgment of 9 February 2023, *Commission v Slovakia*, C-342/21, ECLI:EU:C:2023:87; Judgment of 29 June 2023, *Commission v Portugal*, C-220/22, ECLI:EU:C:2023:521.

Art. 259 TFEU sets out an additional possibility to launch centralized enforcement of EU law.[53] Not only the Commission, but also a Member State can bring infringement proceedings against another Member State before the Court of Justice. In such a procedure, the Member State must first bring the matter before the Commission, which is to deliver a Reasoned Opinion. While Member States did not use the possibility to bring infringement proceedings in the first 20 years after it was introduced,[54] there have since been several cases in which they have brought other Member States to the Court of Justice under Art. 259 TFEU.[55] As these cases often relate to disputes between neighboring Member States, cross-border obligations under environmental law, particularly the EIA Directive,[56] have been invoked repeatedly when initiating a procedure under Art. 259 TFEU.

4.2 Decentralized enforcement before national courts

Civil society, in the form of affected natural or legal persons or non-governmental organizations active in the field of environmental protection, can rely on EU environmental law in national courts acting as ordinary courts of EU law.[57] The strategic litigation of such actors can significantly increase compliance with EU environmental rules.[58] According to settled case law of the Court of Justice, the binding effect conferred by Art. 288 TFEU on a directive leads to the possibility that the obligations it imposes may be relied on by the persons concerned. The effectiveness of the obligation to pursue a particular course of action would be

53 See also Chapter 9 of this edited volume by A. Sikora-Kalėda on the procedure under Art. 259 TFEU.

54 The possibility for Member States to launch infringement proceedings was first provided for in Art. 170 of the Treaty establishing the European Economic Community.

55 Judgment of 4 October 1979, *France v United Kingdom*, C-141/78, EU:C:1979:225; Judgment of 16 May 2000, *Belgium v Spain*, C-388/95, EU:C:2000:244; Judgment of 12 September 2006, *Spain v United Kingdom*, C-145/04, EU:C:2006:543; Judgment of 16 October 2012, *Hungary v Slovak Republic*, C-364/10, EU:C:2012:630; Judgment of 18 June 2019, *Austria v Germany*, C-591/17, EU:C:2019:504; Judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65; Opinion of Advocate General Pikamäe of 3 February 2022, Czech Republic/Republic of Poland, C-121/21, ECLI:EU:C:2022:74; Judgment of 30 April 2024, *Latvia v Sweden*, C-822/21, EU:C:2024:373.

56 On the dispute between Portugal and Spain on the storage of nuclear waste, see Joint Statement of President Juncker, Prime Minister Rajoy and Prime Minister Costa on the amicable settlement concerning the Almaraz case, 21 February 2017 <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_320>. On the dispute between the Czech Republic and Poland on the prolongation of a lignite mine, see Opinion of Advocate General Pikamäe of 3 February 2022, *Czech Republic/Republic of Poland*, C-121/21, ECLI:EU:C:2022:74. On the dispute between Belgium and France regarding an offshore wind farm, see Reasoned opinion of 20 July 2022 in INFR(2022)6000.

57 Communication from the Commission of 28 April 2017 – Commission Notice on access to justice in environmental matters (C(2017) 2616 final), para. 17–21. On the notion of the ordinary courts of EU law, see Opinion 1/09 of the Court of 8 March 2011, *Creation of a Unified Patent Litigation System*, EU:C:2011:123, para. 80.

58 D. Misonne, "The emergence of a right to clean air: Transforming European Union law through litigation and citizen science" [2021] 30 *Review of European, Comparative & International Environmental Law* 34.

weakened if individuals were prevented from relying on it before national courts. Therefore, at least the natural or legal persons directly concerned by an infringement of provisions of an environmental directive must be in a position to require the competent authorities in court to observe such obligations.[59]

Access to justice for members of the public concerned is expressly provided for in the EIA Directive, together with the admissibility requirements that the relevant national legal system can establish in that regard.[60] These rules are to be interpreted in light of the Aarhus Convention, which they transpose into EU law.[61] Art. 3(9) of that Convention sets out that it applies without discrimination as to citizenship, nationality or domicile, and in the case of a legal person, without discrimination as to where it has its registered seat or an effective center of its activities.

The AAQD 2024 introduces a specific provision on access to justice similar to that of the EIA Directive while at the same time codifying case law[62] of the Court of Justice. It requires Member States to allow the members of the public concerned to challenge air quality plans, as well as the location and the number of sampling points. The rules also set out conditions that the Member States must comply with when granting that access in their national system.[63]

In addition, the AAQD 2024 requires Member States to introduce an express provision on compensation for damage to human health. It sets out that if competent authorities intentionally or negligently violate their obligation to establish air quality plans setting out appropriate measures to keep the exceedance of air quality standards as short as possible, natural persons who suffer damage to human health caused by that violation have the right to compensation for that damage. The rules expressly provide that Member States have to ensure that the rules and procedures

59 Judgment of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:391, paras. 121–123, and case law cited.

60 Art. 11 of EIA Directive 2011/92.

61 Judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, C-263/08, EU:C:2009:631, para. 51; Judgment of 15 March 2018, *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others*, C-470/16, EU:C:2018:185, para. 36.

62 Judgment of 25 July 2008, Janecek, C-237/07, EU:C:2008:447, paras. 39 and 46, Judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, para. 56, Judgment of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paras. 44–47. See also Sikora (n. 47) chap. 2.2.3.

63 Art. 27 AAQD 2024. That provision also allows air quality roadmaps referred to in Article 19 and short-term action plans referred to in Article 20 to be challenged. Other express provisions on access to justice in environmental matters can be found in Art. 25 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17 December 2010, pp. 17–119; Art. 13(1) of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30 April 2004, pp. 56–75; Art. 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14 February 2003, pp. 26–32.

relating to such claims are designed and applied in such a way that they do not render it impossible or excessively difficult to exercise that right.[64]

As far as cross-border enforcement is concerned, the rules of the AAQD do not make access to justice or compensation conditional on the place of residence of the applicant being within the territory of the Member State against which such a claim is directed or their nationality. Rather, access to justice is, in principle, awarded to the members of the public concerned, while the right to compensation depends on whether the violation has caused damage to the health of the applicant. Given the transboundary nature of air quality, it can be expected that also natural persons from another Member State will invoke these provisions. In that context, Art. 18 TFEU prohibits discrimination on grounds of nationality within the scope of application of the Treaties.[65]

5. Conclusion

EU environmental law applies not only to pollution remaining within the territory of individual Member States but also to transboundary pollution. In this regard, two categories of environmental rules may be distinguished: those focusing on the origin of an environmental issue and those looking more at the resulting pollution that ultimately affects individuals. Looking at examples from both categories allows us to observe recurring aspects of the legal response of EU law to cross-border pollution. Three elements of that response can be observed. First of all, the setting of common objectives and rules provides an essential starting point. Common EU rules allow Member States to have the same understanding and level of ambition in environmental law. Where pollution is sufficiently addressed at its source, which may be in another Member State, it is prevented from turning into a cross-border problem. However, if it does arise, the fact that pollution is transboundary as such does not relieve Member States of their obligations under EU law. Secondly, where the necessary action against pollution cannot be taken by the authorities of one Member State alone, loyal cooperation between Member States is required. To turn the general principle set out in Art. 4(3) TEU into more concrete obligations, the legislation spells out a minimum standard. Where the actions of one Member State affect other Member States, this can result in obligations on ex-ante and ex-post information as well as consultation. Where several Member States act together, this

64 Art. 28 of AAQD 2024. The principle of effectiveness has also been discussed in the context of the burden of proof for establishing a causal link between an infringement of air quality rules and concrete damage to health. See Opinion of Advocate-General Kokott of 5 May 2022, *JP v Ministre de la Transition écologique and Premier ministre*, C-61/21, EU:C 2022:359, para. 138.

65 For cross-border elements opening the material scope of Art. 18 TFEU, see J. Tomkin, "Article 18 TFEU," in M. Kellerbauer, M. Klamert, and J. Tomkin (eds.), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd ed., Oxford University Press 2024) para. 6.

can happen through coordinated procedures. Thirdly, it must be possible to enforce EU environmental law across borders. This can happen either through civil society in a decentralized manner in front of national courts or in infringement procedures brought by the Commission under Art. 258 TFEU or by Member States under Art. 259 TFEU.

3 Nature restoration as a remedy to nature degradation caused by transboundary pollution in international and EU law

Alexandra Aragão

1. Cross-border pollution and damage remediation across borders

In the UN 1992 Convention on Biological Diversity, there is a clear recognition of the transboundary impacts of national activities and the duty to prevent them. In the words of the Convention, States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[1]

However, since the Rio Biodiversity Convention, the status of species and habitats around the world has only deteriorated in terms of quantity, quality and connectivity. Degradation has reached a point where only 3% of Earth's surface can be considered functional and faunistically intact.[2]

Pollution, some of which is generated at a distance, is one of the main causes of biodiversity loss and habitat degradation. Cross-border pollution is harmful to habitats, species and ecosystems in the neighbouring country. This phenomenon is addressed at the international level.

The 1979 Convention on Long-range Transboundary Air Pollution was adopted precisely because "[when] scientists in the 1960s investigated the causes of the 'acid rain' that was destroying forests, causing fish loss in lakes and putting entire ecosystems at risks in the Northern Hemisphere, they found that air pollutants, a significant part of which were emitted thousands of kilometres away, were the culprit".[3] The focus of the Convention is "air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at

1 Full text of Article 3: "Article 3. Principle States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

2 A. J. Plumptre, D. Baisero, R. T. Belote, E. Vázquez-Domínguez, S. Faurby, W. Jędrzejewski, H. Kiara, H. Kühl, A. Benítez-López, C. Luna-Aranguré, M. Voigt, S. Wich, W. Wint, J. Gallego-Zamorano, and C. Boyd, "Where may we find ecologically intact communities?" [2021] 4 *Frontiers in Forests and Global Change* 626635.

3 United Nations Economic Commission for Europe, *Protecting the Air We Breathe: 40 Years of Cooperation under the Convention on Long-Range Transboundary Air Pollution* (UNECE 2019).

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such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources".[4]

1.1 The duty to remediate cross-border contamination and degradation

Similar but different concepts are used in the legal instruments that deal with biodiversity restoration: rehabilitation, recovery, remediation, compensation, reparation, reforestation, and rewetting are just some examples. This conceptual lack of definition is said to contribute to the scarce effectiveness of the international legal norms on restoration.[5]

This chapter is based on the concept approved in the context of the Convention on Biological Diversity. In the Short-term Action Plan adopted in 2016 for the restoration of ecosystems, ecological restoration is understood in the Conference of the Parties of the Convention on Biological Diversity as "the process of managing or supporting the recovery of an ecosystem that has been degraded, damaged or destroyed, as a way of sustaining the resilience of ecosystems and conserving biological diversity".[6]

However, in the current chapter, we will differentiate between remediation and restoration. Both aim at recovering biological diversity, but in the case of remediation, the legal focus is put on the damaging activity that leads to the need to adopt managing or supporting activities to neutralize the damage. In the case of restoration, the legal focus is put on managing or supporting activities regardless of the activities that led to the damage. In restoration, rather than neutralizing damage, the aim is to expand biodiversity, creating a positive impact. When cross-border pollution occurs – be it gradual pollution with long-term cumulative effects or sudden pollution with serious immediate impacts – the duty of remediation arises. However, remediation cannot be used as a justification for allowing cross-border pollution. In the words of parties to the Convention on Biological Diversity, "ecosystem restoration is not a substitute for conservation nor is it a pathway to allow intentional destruction or unsustainable use".[7] In fact, depending on the context in which the duty to remediate emerges, there are different justifications for and typologies of remediation. The most common contexts of remediation are:

4 Article 1 b) of Convention on Long-Range Transboundary Air Pollution, celebrated in Geneva in 1979.

5 Ana Mendes, Lorena Martínez Hernández, Léa Badoz, Lydia Slobodian, and João E. Rabaça consider this fundamental distinction to elucidate the content and extent of the obligations of States. A. Mendes, L. Martínez Hernández, L. Badoz, L. Slobodian, and J. E. Rabaça, "Towards a legal definition of ecological restoration: Reviewing international, European and Member State's case law" [2022] 32/1 *Review of European, Comparative & International Environmental Law* 3.

6 Point 4 of the decision adopted by the Conference of the Parties to the Convention on Biological Diversity XIII/5. Thirteenth meeting Cancun, December 4–17, 2016 CBD/COP/DEC/XIII/5.

7 Decision of the Conference of the Parties to the Convention on Biological Diversity, December 10, 2016, Cancun.

- Remediation of *victim* sites: when harm to an ecosystem can be attributable, through a causal link, to polluting activities carried out on the territory of a neighbouring State[8] and cross-border environmental harm issues occur, the duty to recover the *status quo ante* becomes an absolute priority for the reason of both retributive and preventive justice. Remediation can be executed directly by the polluter, a third party on behalf of the polluter, or the public authorities. This context can be called the *punitive remediation* of *victim* sites.
- Remediation of *orphan* sites: when the cause of border ecosystem degradation is unknown or the nexus with a hypothetical cause is too weak to be affirmed with certainty, an *autonomous remediation* activity must be carried out, as a public interest activity, aimed at the systematic recovery of the good environmental condition of the cross-border area. The advantages of cooperation between neighbouring States for the multinational remediation of ecosystems are due to several reasons: the tight interconnection of habitats, species mobility, and the benefits of the recovery, which will be felt on both sides of the border. Beyond efficiency, commutative and procedural justice are the main reasons for pleading in favour of collaborative remediation, planned together and implemented concurrently and coherently by two or more States. This context can be called the *cooperative remediation* of *orphan* sites.
- Remediation of *substitute* sites: when a polluting activity, likely to cause some harm to biodiversity, is justified for reasons of public interest, or even for imperative reasons of overriding public interest in case the activity at stake causes serious harm, it can be authorized, provided that all the impacts that cannot be prevented or mitigated are compensated. For reasons of distributive and ecological justice, the adoption of strategies to redeem the harm that will be caused in the future is a *sine qua non* condition for permitting polluting activities. The legality of the permit depends on the effectivity of the measures planned, approved and implemented. To make sure that the remediation is sufficient and effective in replacing the services and functions of the ecosystems that will be sacrificed to serve higher public interests, remediation must be executed before the planned polluting activity is implemented. After the remediation activities are concluded and the public interest activity is launched, the result must be neutral for the biodiversity status. This context can be called the *compensatory remediation* of *substitute* sites.

Synthetizing, Table n.1 illustrates the three main contexts in which cross-border remediation of polluted sites occurs.

8 On the importance of nature conservation in border areas, see A. Aragão, "Transboundary nature conservation: Are there no boundaries within the Natura 2000 network?," in C.-H. Born, A. Cliquet, H. Schoukens, D. Misonne, and G. Van Hoorick (eds.), *The Habitats Directive in Its EU Environmental Law Context: European Nature's Best Hope?* (Routledge 2015).

Table n.1 Contexts of cross-border remediation

Remediation	*Punitive*	*Cooperative*	*Compensatory*
Where	*victim sites*	*orphan sites*	*substitute sites*
When	*Ex post*	*Ex post*	*Ex ante*
Who	the past polluter (liable agent)	the competent authorities (2+)	the future polluter (benefited operator)
Justice	Retributive and preventive of recidivism	Commutative and procedural	Distributive and preventive of harm

1.2 The duty to remediate cross-border contamination and degradation

Examples of the different types of remediation can be found explicitly or implicitly in international law.[9]

Regarding punitive and compensatory restoration, implicit references can be found in the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes: "the Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact. The Parties shall, in particular, take all appropriate measures: … to ensure conservation and, where necessary, restoration of ecosystems".[10]

The cooperative remediation of degraded habitats, first of all, is mentioned in the goals and targets of the 2030 Agenda for Sustainable Development. The most relevant is Goal 6 on ensuring the availability and sustainable management of water and sanitation for all. This goal establishes targets regarding cooperation on the management of water and water-related ecosystems in general, including mountains, forests, wetlands, rivers, aquifers, and lakes:[11] "By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate".[12]

Goals 14 and 15 also mention remediation duties: "By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans";[13] "By 2020, ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands,

9 The purpose of the references to the legal framework of international pollution in the current chapter is to shed light on the duties to remediate. Jurisprudence on transboundary pollution, such as the *Trail Smelter* case on air pollution of industrial origin in the 1940s between USA and Canada or *Pulp Mills* on the River Uruguay between Argentina and Uruguay from 2010, will not be analysed.

10 Article 2 (1) and (2) d.

11 SDG 6.6.

12 SDG 6.5.

13 SDG 14.2.

in line with obligations under international agreements";[14] "By 2020, promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally";[15] "By 2030, combat desertification, restore degraded land and soil, including land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world".[16]

In more concrete terms, cooperative remediation can also be found in relation to air quality. In 2017, the UN Environmental Assembly adopted resolution 3/8 on preventing and reducing air pollution to improve air quality globally, which calls on States to take significant action to address air pollution, requests UNEP to create a new platform for cooperation and information-sharing to support countries' efforts to reduce it, and supports enhanced international action to address transboundary air pollution, in particular by enhancing regional cooperation. In fact, it can be very difficult to determine the nexus between the sources and targets of air pollution. Transboundary cooperation can be an effective method to ensure that the remediation techniques are acceptable, the results are effective, and the benefits are shared.

Another example of cooperative transnational remediation relates to soil degradation. In the context of the UN Convention to Combat Desertification,[17] a memorandum of understanding was signed to establish the Peace Forest Initiative (PFI). The Initiative was launched in 2019 during the 14th Conference of the Parties to the United Nations Convention to Combat Desertification in New Delhi. The PFI aims to promote cooperation between countries to recover degraded land and forests in fragile and post-conflict locations while building peace and confidence. It is seen as an innovative way to link peace and security to voluntary land degradation neutrality targets[18] set by countries under the Convention. This example shows that cooperative remediation can be an important and fair tool to achieve the urgent goal of healthy soil[19] and peace as a side effect.

2. Nature restoration in international law

When the goal is to go beyond biodiversity neutrality, nature restoration comes into play. With restoration activities, the goal is to achieve biodiversity-positive results. In this section, we will show that prior advances in international law have already revealed the growing centrality of restoration in international contexts.

14 SDG 15.1.
15 SDG 15.2.
16 SDG 15.3.
17 Established in 1994, it currently has 197 parties.
18 United Nations Convention to Combat Desertification, "Voluntary LDN targets" <https://www.unccd.int/our-work/country-profiles/voluntary-ldn-targets>.
19 United Nations Convention to Combat Desertification, *The Global Land Outlook: Land Restoration for Recovery and Resilience* (2nd ed., UNCCD 2022).

2.1 Convention on Biological Diversity

In 2010, the Conference of the Parties to the Convention on Biological Diversity adopted a Strategic Plan for the period 2011–2020.[20] Under the motto "Living in harmony with nature", one of the strategic objectives of the plan was to increase "the resilience of ecosystems and the contribution of biological diversity to carbon stocks … through conservation and restoration, including the restoration of at least 15% of degraded lands, thus contributing to climate change mitigation and adaptation to it, as well as the fight against desertification".[21]

In 2016, the Conference of the Parties to the Convention on Biological Diversity approved a Short-Term Action Plan for the restoration of ecosystems.[22] The general objective of the plan is to "promote the restoration of degraded natural and semi-natural ecosystems, including those in urban environments, to contribute to reversing the loss of biological diversity, recovering connectivity, increasing the resilience of ecosystems, improving the provision of ecosystem services, mitigate and adapt to the effects of climate change, combat desertification and land degradation, and improve human well-being while reducing environmental risks and resource scarcity".[23] This very ambitious goal is concretized in some specific objectives:

a) Promote, support and accelerate the planning, implementation and monitoring of ecosystem restoration activities at all levels;
b) Identify and formalize regional, national and local goals, policies and actions for ecosystem restoration; and
c) Identify and disseminate the benefits of ecosystem restoration to promote public awareness, support and participation.[24]

More recently, in 2022, the Conference of the Parties to the Convention on Biological Diversity in Montreal approved the Kunming-Montreal Global Framework for Biological Diversity[25] with the same vision for 2050: "Living in harmony with nature". Until 2030, the mission will be "to take urgent action to halt and reverse biodiversity loss to put nature on a path to recovery for the benefit of people and planet by conserving and sustainably using biodiversity and by ensuring the fair and equitable sharing of benefits from the use of genetic resources, while providing the necessary means of implementation".[26]

20 Decision X/2 of the October 27, 2010 meeting of the Conference of the Parties, in Nagoya, Aichi Prefecture, Japan. UNEP/CBD/COP/DEC/X/2.
21 Aichi Goals 15.
22 Thirteenth meeting Cancun, December 4 to 17, 2016, Decision CBD/COP/DEC/XIII/5.
23 Annex Short-Term Action Plan for the Restoration of Ecosystems I. Objectives and Purpose n.1.
24 Annex Short-Term Action Plan for the Restoration of Ecosystems I. Objectives and Purpose n.2 c).
25 Canada, December 7–19, 2022 CBD/COP/15/L.25 December 18, 2022.
26 Section F. Vision for 2050 and Mission for 2030 n.11.

The most relevant goal approved was to ensure that at least 30% of the areas of degraded terrestrial, inland water, coastal, and marine ecosystems are subject to effective restoration by 2030 in order to enhance biodiversity and ecosystem functions and services, ecological integrity, and connectivity.[27]

The framework sets two objectives for restoration. The first is maintaining, increasing, or restoring the integrity, connectivity and resilience of all ecosystems, substantially increasing the surface area of ecosystems by 2050.[28] The second is using and managing biological diversity sustainably and valuing, maintaining, and improving nature's contributions to people.[29] The desired outcome is the restoration of currently declining ecosystem functions and services, supporting the achievement of sustainable development within planetary boundaries.

2.2 Ramsar Convention on Wetlands of International Importance

In 2015, the Conference of the Parties to the 1971 Ramsar Convention on Wetlands of International Importance, especially as habitats for waterfowl, approved a Strategic Plan for the period 2016–2024.[30] The recognition of the importance of wetlands as an ecological system for regulating and producing ecosystem services explains why, 50 years ago, the Ramsar Convention was one of the first to deal with international environmental conservation. The implementation of the Convention is based on three pillars: i) the wise use of all wetlands through national plans, policies and legislation, management actions, and public education; ii) the designation and sustainable management of suitable wetlands for inclusion on the list of Wetlands of International Importance; and iii) international cooperation on transboundary wetlands and shared species.

The third pillar was developed further in the Vision for the 4th Strategic Plan for 2024 adopted during the Meeting of the Conference of the Parties to the Convention on Wetlands in 2015: "wetlands are conserved, wisely used, restored and their benefits are recognized and valued by all".[31] According to the Strategic Plan, one of the priority focus areas for the Convention is to prevent, halt and reverse the loss and degradation of wetlands. The plan identifies the causes of the unfavourable conservation state of wetlands: "the biggest changes in the loss of wetlands continue to be unsustainable agriculture, forestry and extractive industries, particularly oil, gas and mining, the effects of human population growth (including migration and urbanization), as well as changes in land use where environmental considerations are not taken into account".[32]

As a solution, it proposes "to address the factors that drive these pressures on wetlands", for which "it is necessary to measure and value the resources and

27 Section H. Global Targets for 2030. Target 2.
28 Section G. Global Targets for 2050. Target A.
29 Section G. Global Goals for 2050. Goal B.
30 Resolution XII.2 adopted in Punta del Este, Uruguay, June 1–9, 2015.
31 Resolution XII.2.
32 Point 21 of the Resolution on priority areas of interest.

benefits of ecosystems that wetlands provide and ensure that society in general understands them".[33] In addition, "it is essential that the vital functions of ecosystems and the ecosystem services they provide to people and nature are recognized, maintained, restored and used prudently".[34] Only in this way can the mission of the Ramsar Convention of the "conservation and wise use of all wetlands through local and national actions and international cooperation, as a contribution to achieving Sustainable Development throughout the world", be fulfilled.[35]

One of the objectives of the Strategic Plan is to identify and designate wetlands as Ramsar Sites and transboundary Ramsar Sites based on national inventories to ensure their protection for the future and the inclusion of under-represented wetland types in the Ramsar Site network. In line with this objective, Target 6 advocates for a significant increase in the network's area, numbers, and ecological connectivity, particularly in under-represented types of wetlands, including under-represented ecoregions and transboundary sites.

Similarly, Goal 3 on wisely using all wetlands reinforces the key importance of transboundary wetlands: "the wise use of all wetlands requires that Parties ensure they are addressing wetlands beyond those currently included in the Ramsar Site network. This work may occur at the national, subnational, regional, and transboundary levels, including at basin level".[36]

Finally, the role of the Ramsar Secretariat can be fundamental to support the Parties when requested: "further cooperation between Contracting Parties can be strengthened through the designation and joint management of transboundary Ramsar sites at river, lake and groundwater basin level, with the possible support, upon request, of the Ramsar Secretariat, Ramsar Regional Initiatives and IOPs as well as other Contracting Parties and international organizations".[37]

2.3 United Nations Strategic Plan for Forests

In 2017, the Economic and Social Council of the United Nations approved the United Nations Strategic Plan for Forests 2017–2030,[38] which clearly states that "Continued rapid population growth, as well as rising per capita income, is accelerating the global demand for and consumption of forest products and services and putting pressure on forests. With the world population projected to reach 9.6 billion by 2050, meeting future demand for forest products and services depends on urgent action and cross-sectoral policy coordination at all levels to secure sustainable forest management, including forest conservation, restoration and expansion".[39]

33 Point 21 of the Resolution on priority areas of interest.
34 Point 4 on the importance of wetlands.
35 Annex to the Resolution.
36 Goal 3.
37 The Ramsar Strategic Plan 2016–2024, §45 on Regional and Bilateral Cooperation.
38 Resolution 2017/4 of April 20, 2017 adopted on the recommendation of the United Nations Forum on Forests (E/2017/10).
39 United Nations Strategic Plan for Forests 2017–2030 C. Trends and Challenges, point 12.

More specifically, the global goal is to "Reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation and contribute to the global effort of addressing climate change".[40]

The concrete measures that must be adopted to implement this objective are the maintenance and improvement of forest health, reforestation and afforestation, the restoration and rehabilitation of the forest landscape, the natural regeneration of forests, and innovative approaches to the sustainable management of natural and planted forests. Other measures are mainly of a preventive nature: reducing and halting deforestation, degradation and loss of biodiversity of lands and forests, mitigating the effects of invasive alien species and of the pollution of air, water and soil, fire control and management, and preventing and fighting against desertification and sand and dust storms.

2.4 United Nations Decade on Ecosystem Restoration

In 2019, the United Nations General Assembly approved the Decade on Ecosystem Restoration (2021–2030)[41] "with the aim of supporting and scaling up efforts to prevent, halt and reverse the degradation of ecosystems worldwide and raise awareness of the importance of successful ecosystem restoration".[42] The resolution results from the conviction that the political commitments assumed so far are not sufficient and that "in spite of political commitment, additional momentum is needed to generate the necessary transformational impact at all levels in order to conserve and restore ecosystems and to achieve sustainable development".[43] The purpose of the resolution is also to encourage Member States to create synergies between the international and national levels to develop a comprehensive vision of how to meet international commitments and national priorities through ecosystem restoration, promoting "political will, the mobilization of resources, capacity-building, scientific research and cooperation and momentum for ecosystem restoration at the global, regional, national and local levels, as appropriate".[44] This symbolic statement grants restoration a new political centrality and promotes it to the top international priorities.

Although the proclamation of the International Decade for Nature Restoration is an important step, from an environmental perspective, it is not a good indicator. The previous period, between 2011 and 2020,[45] corresponded to the so-called Biodiversity Decade, during which the state of biodiversity did not improve. On the contrary, due to pollution and other human activities, ecosystems have

40 Global Forest Goal 1, page 6.
41 United Nations General Assembly Resolution (A/RES/73/284) of March 1, 2019.
42 Point 1 of the Resolution.
43 §27.
44 Point 3 of the Resolution.
45 Resolution adopted by the United Nations General Assembly on December 20, 2010 (A/RES/65/161).

only worsened and deteriorated even more since the approval of the great legal framework for the protection of nature in international law, the United Nations Convention for Biological Diversity, 30 years ago.[46]

In fact, the International Decade for Nature Restoration is a clear signal of the political recognition of the insufficiency of legal instruments to meet the ecosystem protection objectives of the previous decades. Faced with the catastrophic anthropogenic devastation of the environment in some parts of the globe[47] and the widespread degradation of world ecosystems, the International Decade for Nature Restoration is also a demand from the international community for a stronger and more effective biodiversity law devoted to the prevention and remediation of damage.

2.5 Berne Convention on the Conservation of European Wildlife and Natural Habitats

In 2021, the Standing Committee of the Berne Convention on the Conservation of European Wildlife and Natural Habitats approved the Wildlife Strategy for the period until 2030,[48] the vision of which is to stop the decline of biodiversity, "leading to the recovery of wildlife and habitats, improving people's lives and contributing to the health of the planet".[49] Two of the four goals highlight the importance of increasing and improving nature:

Goal 1: Increase the area, connectivity, integrity, and resilience of natural and semi-natural ecosystems, including through protected areas and other effective area-based conservation measures that cover at least 30% of land and marine areas.

Goal 2: Improve the conservation status of threatened species, increase the abundance of native species, and halt human-induced extinctions.

2.6 United Nations Convention to Combat Desertification

At the Conference of the Parties to the United Nations Convention to Combat Desertification, which took place in the Ivory Coast in 2022, the "Land, Life and Legacy Declaration"[50] was approved. This Declaration recognizes that an important part of all land is degraded and that the mismanagement of the Earth's resources (soil, water, and biodiversity) represents a threat to humanity and the planet. Bearing in mind that sustainable land management and restoration are proven and cost-effective solutions,[51] the goal is to reduce and reverse land degradation by accelerating the implementation of existing national commitments to

46 The Convention was opened for signature at the United Nations Conference on Environment and Development in Rio de Janeiro from June 5, 1992 to June 4, 1993.

47 Net change in forest cover worldwide can be viewed at https://ourworldindata.org/deforestation. The maps are produced from data from the Food and Agriculture Organization of the United Nations.

48 Document T-PVS(2021)14 approved in Strasbourg on December 3, 2021.

49 Vision for the Bern Convention for the period to 2030.

50 Decision 19/COP15 Abidjan, May 9–20, 2022.

51 United Nations Convention to Combat Desertification (n. 19).

achieve land degradation neutrality by 2030, taking into account the connectivity of ecosystems.[52]

2.7 Conclusion

Recent developments in international conventions show that ecological restoration is acknowledged as the only remaining solution to overcome the ecological imbalance that endangers human and non-human life, health and well-being. However, in practice, this awareness is not yet sufficient to provide an effective nature restoration that delivers positive impacts. This is why it is important to look at other arguments underpinning nature restoration and more vigorous initiatives taken at the regional level.

3. Good neighbourliness through transboundary remediation or restoration

In the case of cross-border pollution, the duty to implement ecological remediation and restoration can be justified on the grounds of good neighbourliness.

The benefits of healthy ecosystems are associated with the use of biological diversity as a source of food, clean water and pure air, nutrition, traditional medicines and biomedical discoveries, clothing, heating, shelter,[53] protection against natural disasters, support for leisure activities, and cultural inspiration.[54] This list shows that natural ecosystems are essential for sustainable human development by alleviating poverty,[55] improving well-being,[56] strengthening friendly relations between States, and contributing to the peace of humanity.[57] In addition, ecosystems have economic, scientific, and recreational value, as well as intrinsic cultural and aesthetic value. It is important to preserve and transmit all these values to future generations.[58]

Recalling the words of the Convention on Biological Diversity, States have the obligation to ensure that activities carried out within their jurisdiction or under

52 Decision 19/COP15 Abidjan, May 9–20, 2022.

53 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, Biological diversity and human health §4 a) and k).

54 Conference of the Parties to the Convention on Biological Diversity in Montreal, Section A, Background, point 1.

55 Ramsar Strategic Plan for the Period 2016–2024, Priority areas of interest for the Convention for the next nine years, point 24.

56 Resolution approved by the General Assembly on March 1, 2019 United Nations Decade on Ecosystem Restoration (2021–2030) §8.

57 Convention on Biological Diversity, Preamble §21.

58 Convention on Biological Diversity, Preamble §23, Article 2 last §, Berne Convention on the Conservation of Europe's Wildlife and Natural Environment, Preamble §4. The new Biological Diversity Framework, approved in 2022, enshrines the principle of equality between generations, which translates into meeting the needs of the present without compromising the ability of future generations to meet their own needs. Point 21 of Section C. "Considerations for the implementation of the Framework."

their control do not harm the environment of other States or areas located outside all national jurisdiction.[59]

Just as there are economic activities that harm biodiversity in the long term, there are also restoration activities that have far-reaching effects on biodiversity. This not only means that the main causes of environmental degradation and biodiversity loss should be controlled whenever they occur close to the border, but priority should also be accorded to the environmental restoration of degraded areas along the borders with other States.

Whenever it is not possible to prevent cross-border environmental impacts originating from different sources – such as infrastructure development (like hydropower dams), land conversion (like intensive agriculture), water use (like water diversion), pollution, eutrophication, overexploitation, climate change, and invasive alien species – environmental harm should be remediated through effective recovery measures that revert the state of the environment to its previous state.

States should develop mutual consultations and celebrate regional and multilateral agreements when carrying out restoration activities.[60] The Convention on Biological Diversity contains the general criteria for the selection of priority spaces for restoration: the spaces that require the adoption of urgent conservation measures and those that offer the greatest potential for sustainable use.[61]

In the applicable instruments, there are many concrete examples of spaces whose importance for biodiversity can be considered in the abstract and which should be considered as a priority:[62] arid, semi-arid, and dry sub-humid zones;[63] reef ecosystems, coastal, and marine ecosystems[64] inside and outside national jurisdictions; under-represented wetlands;[65] green and blue spaces in urban and densely populated areas;[66] urban areas, forests, grasslands, croplands, wetlands, and savannahs;[67] habitats for vulnerable species, threatened species, and native wild and domesticated species; zones adjacent to protected areas;[68] and, of course, transboundary sites.

Knowing who to engage in restoration activities is particularly relevant in the case of transboundary restoration. In line with Sustainable Development Goal 17 on the creation of alliances to achieve objectives, restoration law must be inclusive of

59 Article 3.

60 Convention on Biological Diversity Article 14 (1) c.

61 Convention on Biological Diversity Article 2: "'Sustainable use' means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".

62 Convention on Biological Diversity Article 8 (c).

63 Resolution approved by the General Assembly on July 27, 2012, A/RES/66/288, point 207.

64 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, n. 53.

65 Ramsar Strategic Plan for the Period 2016–2024, Goal 6.

66 Kunming-Montreal Global Biodiversity Framework, Target 12.

67 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, II. Scope and Scale, n. 5.

68 Convention on Biological Diversity Article 8 (e).

all actors in all the States involved. In fact, the representation of social, economic and environmental objectives must be balanced in restoration activities.[69]

The list of stakeholders who can facilitate a multilateral dialogue and generate consensus is long[70] and can be grouped into four main categories:

- **Representatives of the public interest:** UN organizations and programmes; secretariats of environmental agreements; parties to international conventions; governments; government organizations; intergovernmental organizations; subnational governments; cities; other local authorities
- **Representatives of individual interests:** land owners; biodiversity-related sectors; business community; financial and industrial communities
- **Representatives of social interests:** Indigenous villages; local communities; non-governmental organizations; faith organizations; women's social groups; youth social groups; other social groups
- **Third parties:** academic circles; scientific community; experts; observers; citizens in general

The role of the Global Environment Facility and regional development banks as international funding agencies is also prominent in assisting ecosystem restoration activities.[71] Considering that restoration involves sustained activities in the medium and long term,[72] the significant participation of younger generations in all decision-making processes and at all levels must be ensured as well.[73]

The advantage of such an extended dialogue is to achieve the broad, full, effective, and meaningful[74] participation[75] of all those directly concerned. A comprehensive participatory procedure allows mobilizing the best available scientific and traditional knowledge,[76] obtaining data to determine the reference bases,[77] getting

69 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, A. Assessment of opportunities for ecosystem restoration §5.

70 A comprehensive list can be found in the Decision adopted by the Conference of the Parties to the Convention on Biological Diversity in Sharm el-Sheikh, 14/34. Comprehensive and participatory process for the preparation of the post-2020 global biodiversity framework, point 6.

71 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, A. Assessment of opportunities for ecosystem restoration, point 4.

72 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, II. Scope and Scale, point 6.

73 Kunming-Montreal Global Biodiversity Framework, Section C. Considerations for the implementation of the Kunming-Montreal Global Biodiversity Framework, 7 (n).

74 Conference of the Parties to the Convention on Biological Diversity in Sharm el-Sheikh, 14/34. A. Fundamental principles guiding the preparatory process for the post-2020 global biodiversity framework (a).

75 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, A. Assessment of opportunities for ecosystem restoration, III. Principles, point 10.

76 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, A. Assessment of opportunities for ecosystem restoration, III. Principles, point 10.

77 Conference of the Parties to the Convention on Biological Diversity in Sharm el-Sheikh, 14/34. D. Documentation (b).

the prior informed consent of all those affected,[78] generating consensus,[79] and enabling fair and equitable participation in the benefits[80] of restoration. In addition, the commitment to communication and education makes it possible to raise public awareness at all stages so that everyone understands the benefits and costs of ecosystem restoration activities[81] and contributes to obtaining public and private funding.[82] This is particularly important when there are conflicting interests, such as between farmers, land owners or hunters, and the public or private entities carrying out restoration activities. For example, awareness-raising is one of the core activities in the binational activities for the recovery of the Iberian lynx population that occupies border territories between Portugal and Spain.[83]

4. Restoration in the European Union

The context of cross-border restoration in the EU has specificities derived from the strong natural bonds and legal proximity between the Member States, whose territories are interconnected by shared ecosystems and subject to a harmonized legal framework.

From an environmental perspective, national borders in the Union are only virtual. Very often, the same habitat can be found on both sides of a border. Besides, rivers flow freely across borders, coastal and maritime waters move with the tides, and species run, fly, swim, crawl, or go with the wind across all borders. So does pollution.

The limits of European biogeographical regions – Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Pannonian, and Steppic – are not coincident with political borders. Besides, when national borderlines coincide with natural geographical features like rivers,[84] lakes, hills, mountains, deserts, or cliffs,[85] natural borders are not separation lines but rather convergence lines.

78 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, A. Assessment of opportunities for ecosystem restoration, III. Principles, point 10.

79 Conference of the Parties to the Convention on Biological Diversity in Sharm el-Sheikh, 14/34 A. Fundamental principles guiding the preparatory process for the post-2020 global biodiversity framework (j).

80 Conference of the Parties to the Convention on Biological Diversity in Sharm el-Sheikh, 14/34. A. Fundamental principles guiding the preparatory process for the post-2020 global biodiversity framework (d).

81 Conference of the Parties to the Convention on Biological Diversity in Cancun, 2016, A. Assessment of opportunities for ecosystem restoration, III. Principles, point 10.

82 Ramsar Strategic Plan for the Period 2016–2024, point 19.

83 The Life+ project "Iberlince" (2011–2018) focused on restoring the species' historical range in the Iberian Peninsula and its reintroduction in Portugal, Extremadura, and Castilla-La Mancha. The main challenge of the Life+ project "Life Lynxconnect" (2020–2025) is to ensure that the Iberian lynx population becomes self-sustainable and genetically viable in the long term.

84 For instance, between Portugal and Spain, the terrestrial border (approximately 1,200 km) is, to some extent, defined by rivers. In fact, the courses of more than 20 rivers or streams are used in part to define the border and separate both countries.

85 Target 13 of the Program of Work on Protected Areas of the UN 1992 Convention on Biological Diversity gives top priority to areas identified as "common conservation priorities" like barrier reef

In fact, while some borderlands are densely populated and benefit from intensive cross-border trade and exchange, many others are inaccessible and "almost forgotten by the State".[86] In this case, "remoteness also means that borderlands are often rich in unexploited natural resources".[87] As stated in the Habitats Directive and repeated by the European Court of Justice, "threats to [habitats and species] are often of a transboundary nature".[88] In such a scenario, cross-border pollution and ecosystem deterioration can be more frequent than expected and require cooperative restoration measures.

4.1 Transboundary remediation and restoration as subsidiary obligations

The main goal of nature protection at the EU level has always been the conservation of existing natural elements. Be it habitats, species, genetic diversity, ecosystems, or ecosystem services, the key objective, in accordance with the prevention principle, is to preserve existing heritage. In any case, recovering lost natural components of ecosystems and improving ecosystem functions becomes a mandatory subsidiary obligation when the primary conservation obligation is no longer sufficient. In these cases, once again, remediation and restoration regain prominence.

In fact, nature remediation and restoration in the EU law has been regulated for a long time in environmental directives, such as the 1992 Habitats Directive, the 2000 Water Framework Directive, and the European commitment to the Cartagena Protocol to the Convention on Biologic Diversity. Since the Green Deal, it has been included in several European strategies, including the biodiversity strategy, the zero-pollution strategy, the soil strategy, the guidelines on biodiversity-friendly afforestation, and the communication on the resilient and sustainable use of the EU's natural resources. The task is to find references to remediation or restoration duties between Member States.

In the context of Natura 2000, Member States are strictly obliged to select and designate areas in the national territory to contribute to the network of nature conservation sites and to manage and protect them against any causes of degradation that may lower the quantitative or qualitative status or the connectivity of the sites. If contamination of a Natura 2000 site occurs, the State shall adopt the necessary measures to remediate and restore the natural habitat types and the species' habitats at a favourable conservation status in their natural range.[89] Beyond restoring

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systems, large-scale river basins, mountain systems, large remaining forest areas, and critical habitats for endangered species.

86 W. de Jong and K. Evans, "Transnational natural resource governance in border regions," in W. de Jong, D. Snelder, and N. Ishikawa (eds.), *Transborder Governance of Forests, Rivers and Seas* (Earthscan 2010) 4.

87 Ibid 1.

88 Preamble §4 of the Habitats Directive and Case C-508/04 *Commission v Austria* [2007] ECR I-3787, para 57.

89 Article 3 (1). "A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types

the sites, it is also required to ensure effective interconnections between the sites dedicated to nature conservation through "landscape features" that "are essential for the migration, dispersal and genetic exchange of wild species".[90] Very often, these corridors cross the territories of two or more Member States, which requires cooperation to ensure the necessary ecological coherence.[91]

In the case of transboundary pollution of water bodies, it is mandatory for Member States, according to EU water law, to protect, enhance, and restore all bodies of surface- and groundwater.[92] The Water Framework Directive acknowledges that its success "relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users".[93] Besides, "within a river basin where use of water may have transboundary effects, the requirements for the achievement of the environmental objectives established under this Directive, and in particular all programmes of measures, should be coordinated for the whole of the river basin district".[94]

Transboundary risks were also considered when the EU signed the Cartagena Protocol to the Biodiversity Convention. In fact, the European Court of Justice, when assessing the competence of the EU to sign the Protocol, recognized that it lays down precise rules on control procedures relating to transboundary movements, risk assessment and management, handling, transport, packaging, and identification of living genetically modified organisms.[95] After analysing the Protocol's context, aims and content, it concluded that its main purpose is the protection of biological diversity against harmful effects that could result from activities that involve dealing with living genetically modified organisms, in particular risks deriving from their transboundary movement.

For biodiversity in general, the EU Biodiversity Strategy for 2030, under the motto "Bringing nature back into our lives", proclaims that "in order to have a truly coherent and resilient Trans-European Nature Network, it will be important to set up ecological corridors to prevent genetic isolation, allow for species migration, and maintain and enhance healthy ecosystems. In this context, investments in green and blue infrastructure and cooperation across borders among Member States should be promoted and supported, including through the European Territorial Cooperation".[96]

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listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range". Council Directive 92/43/EEC of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora.

90 Article 10 (2) *in fine* of the Habitats Directive.

91 Aragão (n. 8).

92 Article 4 of the Directive 2000/60/EC of October 23, 2000, establishing a framework for Community action in the field of water policy.

93 §14 of the Preamble.

94 §35 of the Preamble.

95 Opinion of the Court of December 6, 2001, European Court Reports 2001 I-09713.

96 EU Biodiversity Strategy for 2030, *Bringing Nature Back into Our Lives*, 2. Protecting and restoring nature in the European Union § 10 COM/2020/380 final.

Regarding the strategies that address pollution, the Commission focuses its implementation and enforcement efforts on ensuring that all EU pollution prevention laws are effectively complied with and deliver the intended environmental and health benefits. In the Commission Communication *Pathway to a Healthy Planet for All EU Action Plan: 'Towards Zero Pollution for Air, Water and Soil'*, the Commission brings together "environmental and other enforcement authorities (e.g. those in charge of EU transport, energy, agriculture, fisheries, maritime surveillance or consumer protection legislation) to exchange best practices and devise cross-sectorial compliance actions towards zero tolerance for pollution at national and transboundary level".[97]

The EU's soil strategy recognizes that "resorting to sustainable soil management allows soil to re-establish a healthy condition, leading to full recovery after some years (e.g. in case of loss of carbon and biodiversity or compaction and erosion of the top fertile layer). In other cases, active restoration measures are needed for sometimes only partial recovery (e.g. for sealed, desertified, salinised or acidified soils)".[98] The vision for 2050 is to make significant progress in the remediation of contaminated sites and reduction of soil pollution to levels no longer considered harmful to human health and natural ecosystems, respecting "the boundaries our planet can cope with, thus creating a toxic-free environment".[99]

In the *Guidelines on Biodiversity-Friendly Afforestation, Reforestation and Tree Planting*, the Commission recalls that the cohesion policy funds are also implemented via shared management between the Commission and the Member States, where each Member State is required to prepare a Partnership Agreement, which is then implemented through programmes at a national or regional level. This includes sub-regional territories such as cities, as well as programmes for cross-border, transnational and interregional cooperation.[100]

Finally, the Commission's 2023 communication, *Ensuring Resilient and Sustainable Use of EU's Natural Resources*, explains in detail the benefits of consequent restoration measures giving rise to healthy biodiversity and functioning ecosystems for food production. Ecosystems and habitats that facilitate biodiversity benefit the overall stability of crop production. A more sustainable agricultural production that is less dependent on fertilizers, chemicals, and pesticides will make the sector less dependent on external inputs and more resilient in general, including to the inevitable impacts of climate change. This also applies to forestry, fishery, and other sectors that depend on nature. Restored, more biodiverse ecosystems will

97 Flagship 5: Enforcing zero pollution together COM/2021/400 final.

98 European Commission, "Restoring degraded soils and remediating contaminated sites," in European Commission, *EU Soil Strategy for 2030: Reaping the Benefits of Healthy Soils for People, Food, Nature and Climate* (European Commission 2021).

99 European Commission, "Vision and objectives: Achieving good soil health by 2050," in European Commission, *EU Soil Strategy for 2030: Reaping the Benefits of Healthy Soils for People, Food, Nature and Climate* (European Commission 2021).

100 European Commission, *Guidelines on Biodiversity-Friendly Afforestation, Reforestation and Tree Planting* (European Commission 2023).

be more resilient to external threats and the impacts of climate change and natural disasters.[101]

4.2 Nature Restoration Law

The European Regulation on Nature Restoration, also known as the Nature Restoration Law, proposed in 2022 by the European Commission[102] and adopted in June 2024 after tough negotiations,[103] represents considerable progress in the regulation of activities for the systematic recovery of degraded areas.

For the first time, differently from previous legal acts, the focus is on positive restoration rather than neutralizing the polluting or degrading effects of damaging activities. According to the Regulation, restoration comes first, and conservation comes next. In fact, conservation serves mainly to preserve what has been restored. This is clear, for instance, in Art. 9 (4) regarding river restoration: "Member States shall ensure that the natural connectivity of rivers and natural functions of the related floodplains restored in accordance with paragraphs 2 and 3 are maintained". In general, for every ecosystem, the Member States must make sure that a continuous improvement of the quality leads the habitats to the desired quality (Art. 4 (11), Art. 5 (9)).

This means that the Regulation imposes "*obligationes faciendi*" or duties of action on the States instead of relying on mere abstentions. The duty to restore arises solely from the objective fact that the ecosystems are degraded, without the need to identify the person responsible to investigate whether there were justifications or causes that exclude illegality.

In the words of the Regulation, restoration is the process of actively or passively assisting the recovery of an ecosystem in order to improve its structure and functions with the aim of conserving or enhancing biodiversity and ecosystem resilience.[104]

The most interesting features of the Regulation are its geographic scope, tight timeline and limited discretion left to the Member States regarding the restoration goals.

The geographic scope is very broad because the process of restoration is mandatory for both terrestrial ecosystems (including urban, agricultural and forest ecosystems) and coastal, freshwater, and marine ecosystems (Arts. 4, 5, 8, 9, 11, and 12).

The timeline is highly constrained as draft national restoration plans must be completed and submitted to the European Commission by September 1, 2026 (Art. 16). The dialogue with the Commission must be finalized and any required revisions to the plan implemented within one year, ensuring the final version is published

101 European Commission, *Ensuring Resilient and Sustainable Use of EU's Natural Resources* (European Commission 2023).

102 Proposal for a regulation of the European Parliament and of the Council on nature restoration, a proposal by the Commission (COM(2022)0304) approved in first reading by the Parliament in July 2023.

103 A. Cliquet, A. Aragao, M. Meertens, H. Schoukens, and K. Decleer, "The negotiation process of the EU Nature Restoration Law Proposal: Bringing nature back in Europe against the backdrop of political turmoil?" [2024] 32/5 *Restoration Ecology* e14158.

104 Article 3 (3).

by September 1, 2027. From then on, Member States must implement the national plan by adopting area-based measures detailed in an extensive list annexed to the Regulation (Annex VII) in order to achieve well-defined quantitative targets.[105]

From the entry into force of the Regulation, Member States will have two years to prepare robust science-based national restoration plans aimed at optimizing ecosystems' ecological, economic, and social functions.[106] In fact, "Member States shall each prepare a national restoration plan and carry out the preparatory monitoring and research needed to identify the restoration measures that are necessary to meet the restoration targets and fulfil the obligations set out in Articles 4 to 13 and to contribute to the Union's overarching objectives and targets set out in Article 1, taking into account the latest scientific evidence".[107]

Whenever ecosystems span across borders or where Member States share a marine region or subregion, Member States shall foster synergies between their own national restoration plans and those of other Member States.[108] Member States shall also put in place effective and area-based restoration measures with the aim to jointly cover, as a Union target, by 2030, at least 20% of land and 20% of the sea areas, and, by 2050, all ecosystems in need of restoration.[109]

The Nature Restoration Law provides an extensive – but non-exhaustive – list of measures that must be implemented by the Member States when dealing with degraded ecosystems. Going through the list of 33 restoration measures contained in Annex VII can be an elucidative exercise that allows a visualization of the diverse typology of restoration measures for which European and international cooperation is required. The measures are presented in the Regulation in a random order, but for a better understanding, they will be organized and presented here according to logical criteria.

Thus, some measures are directly related to the recovery of nature's degradation caused by pollution (chemicals, pharmaceuticals, fertilizers, wastewater, plastics, manure, waste, light, noise, etc.) or other harmful activities (excavation, harvesting, grazing, ploughing, dune plantation) whose effects can be felt locally or at a distance. Of the 33 measures in the list, the most relevant examples of transboundary restoration measures to revert degradation caused by cross-border pollution or degradation are measure nos. 16, 18, 23, 28, 30, and 31. These are highlighted in grey and bold in Table 2.

Another relevant criterion is the need for human intervention. Some measures require intensive intervention in the reconstruction of the desired natural status (*active restoration measures*) while others only require abstention, relying above all on natural processes for the desired ecosystem transformation (*passive restoration measures*). These two categories correspond to the columns on the left and right of Table 2, respectively.

105 Article 4 (1).
106 Article 14 (16) a and b.
107 Article 14 (1).
108 Article 14 (17).
109 Article 1 (2).

Active restoration measures may imply the creation of conditions either through the introduction of structures or species that are beneficial to the quantitative or qualitative status or connectivity of ecosystems – called *active introduction restoration* (corresponding to measure nos. 1, 2, 3, 9, 11, 12, 13, 14, 15, 16, 22, 26, 27, 28, 29, 31, and 33) – or through the removal of structures or species that cause harm to ecosystems – called *active removal restoration* (corresponding to measure nos. 1, 2, 3, 5, 6, 7, 8, 22, and 24).

On the other hand, passive restoration measures consist of reducing or giving up activities – *passive reduction restoration* (corresponding to measure nos. 1, 2, 8, 10, 15, 18, 19, 20, 22, 23, 26, 28, 29, 30, 32, and 33) – or preserving practices but changing them to incorporate more nature-friendly procedures – called *passive transforming restoration* (corresponding to measure nos. 4, 10, 11, 16, 17, 18, 19, 22, 24, 25, 29, and 32).

Considering the ecosystems to be restored, some measures can be applied in land (forest, agriculture, and urban ecosystems), water (rivers, lakes, coastal, or maritime ecosystems), or wetland ecosystems, while others are more general and valid for any ecosystem. The area-based measures are presented along the horizontal lines of the table and marked with six illustrative icons.

All the measures presented in Annex VII of the Nature Restoration Regulation can be organized in a table according to the six above-mentioned criteria, thus producing a typology of restoration measures.

5. Conclusion

The failure to attain a good level of environmental protection inside and outside nature protection networks for 30 years explains why restoration duties have gained centrality in both international and European law since the adoption of the new UN Biodiversity Framework for 2050 and the EU Nature Restoration Law.

When cross-border pollution appears and biodiversity degradation happens, restoration becomes a priority. Recent developments in international and EU law provide answers to questions such as where to restore, who should participate in restoration activities or how to restore damage. Remediating contaminated sites reduces environmental risks and improves human well-being. Remediating contaminated sites along country borders also improves justice and contributes to peace and good neighbourliness.

6. Annex 1 – a typology of restoration measures

Table n.2 Area-based measures

Forest	*Agriculture*	*Urban*	*Water*	*Wetlands*	*Any*

Table n.3 Typology of area-based remediation or restoration measures

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
3		Remove unwanted scrub encroachment or non-native plantations on grasslands, forests, and sparsely vegetated land.		
9	Establish riparian buffers, e.g., riparian forests			
10			Increase ecological features in forests, such as large, old and dying trees (habitat trees), and amounts of lying and standing deadwood	Increase ecological features in forests, such as large, old and dying trees (habitat trees), and amounts of lying and standing deadwood
11	Work towards a diversified forest structure in terms of, e.g., species composition and age, enable natural regeneration and succession of tree species			Work towards a diversified forest structure in terms of, e.g., species composition and age, enable natural regeneration and succession of tree species
13	Enhance forest diversity by restoring mosaics of non-forest habitats such as open patches of grassland or heathland, ponds or rocky areas			

(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
14	Make use of "close-to-nature" or "continuous cover" forestry approaches; introduce native tree species			
15	Enhance the development of old-growth native forests and mature stands (e.g., by active mangagement which favours development of autoregulatory functions and appropriate resilience)		Enhance the development of old-growth native forests and mature stands (e.g., by active mangagement which favours development of autoregulatory functions and appropriate resilience)	
33	Convert brownfield sites, former industrial areas, and quarries into natural sites		Convert brownfield sites, former industrial areas, and quarries into natural sites	
Pollution				
9	Establish riparian buffers, e.g., buffer strips, meadows or pastures			
16	Introduce high-diversity landscape features in arable land and intensively used grassland, such as buffer strips, field margins with native flowers, hedgerows, trees, small forests, terrace walls, ponds, habitat corridors, and stepping stones, etc.			Introduce high-diversity landscape features in arable land and intensively used grassland, such as buffer strips, field margins with native flowers, hedgerows, trees, small forests, terrace walls, ponds, habitat corridors, and stepping stones, etc.

(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
17 **Pollution**				Increase the agricultural area subject to agro-ecological management approaches such as organic agriculture or agro-forestry, multicropping and crop rotation, integrated pest, and nutrient management.
18			Reduce grazing intensity or mowing regimes on grasslands where relevant	Reestablish extensive grazing with domestic livestock and extensive mowing regimes where they were abandoned.
19 **Pollution**			Stop or reduce the use of chemical pesticides as well as chemical and animal manure fertilizers	
20			Stop ploughing grassland	Introducing seeds of productive grasses
21			Remove plantations on former dynamic inland dune systems to re-enable natural wind dynamics in favour of open habitats	

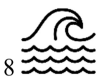
(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
31	Increase urban green spaces with ecological features, such as parks, trees and woodland patches, green roofs, wildflower grasslands, gardens, city horticulture, tree-lined streets, urban meadows and hedges, ponds and watercourses, taking into consideration inter alia species diversity, native species, local conditions, and resilience to climate change			
2	Improve hydrological conditions by increasing quantity, of surface waters and groundwater levels for natural and semi-natural ecosystems	Improve hydrological conditions by increasing dynamics of surface waters for natural and semi-natural ecosystems	Improve hydrological conditions by increasing quantity of surface waters and groundwater levels for natural and semi-natural ecosystems	
5		Re-establish the meandering of rivers and reconnect artificially cut meanders or oxbow lakes		

(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
6		Remove longitudinal and lateral barriers (such as dikes and dams), give more space to river dynamics, and restore free-flowing river stretches		
7		Re-naturalize river beds and lakes and lowland watercourses by, e.g., removing artificial bed fixation, optimizing substrate composition, improving or developing habitat cover.		
 8		Restore natural sedimentation processes	Restore natural sedimentation processes	
25				Minimise negative impacts of fishing activities on the marine ecosystem, for example by using gear with less impact on seabed
26	Restore important fish spawning and nursery areas		Restore important fish spawning and nursery areas	
27	Provide structures or substrates to encourage the return of marine life, for example coral/oyster/boulder reefs			

(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
28	Restore seagrass meadows and kelp forests by actively stabilising the sea bottom, by active propagation and planting		Restore seagrass meadows and kelp forests by actively stabilising the sea bottom, reducing, and, where possible, eliminating pressures	
29	Restore or improve the state of characteristic native species population vital to the ecology of marine habitats by conducting active restoration measures, e.g., introducing juveniles		(27a) Restore or improve the state of characteristic native species population vital to the ecology of marine habitats by conducting passive restoration measures	
30 **Pollution**			Reduce various forms of marine pollution, such as nutrient loading, noise pollution, and plastic waste	Reduce various forms of marine pollution, such as nutrient loading, noise pollution, and plastic waste
5	Restore wetlands, by rewetting drained peatlands	Restore wetlands, by removing peatland drainage structures or de-poldering	Restore wetlands, by discontinuing peat excavation	
3		Remove unwanted scrub encroachment on wetlands		
4				Apply paludiculture

(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
23			Allow ecosystems to develop their own natural dynamics, for example, by abandoning, harvesting, and promoting naturalness, wilderness	
32 **Pollution**			Stop, reduce or remediate pollution from pharmaceuticals, hazardous chemicals, urban and industrial wastewater, and other waste including litter and plastics, as well as light in all ecosystems	Stop, reduce or remediate pollution from pharmaceuticals, hazardous chemicals, urban and industrial wastewater, and other waste including litter and plastics, as well as light in all ecosystem
22	Improve connectivity across habitats to enable the development of populations of species, and to allow for sufficient individual or genetic exchange, as well as for species' migration and adaptation to climate change	Improve connectivity across habitats to enable the development of populations of species, and to allow for sufficient individual or genetic exchange, as well as for species' migration and adaptation to climate change	Improve connectivity across habitats to enable the development of populations of species, and to allow for sufficient individual or genetic exchange, as well as for species' migration and adaptation to climate change	Improve connectivity across habitats to enable the development of populations of species, and to allow for sufficient individual or genetic exchange, as well as for species' migration and adaptation to climate change
12	Assist migration of provenances and species where it may be needed due to climate change.			

(*Continued*)

Table n.3 Continued

Restoration	*Active*		*Passive*	
	Introduction	*Removal*	*Reduction*	*Transforming*
24 **Pollution**		Remove and control invasive alien species, and prevent or minimize new introductions.		Remove and control invasive alien species, and prevent or minimize new introductions.

Some measures are repeated in more than one column because they can imply both active or passive restoration activities.

4 Corporate accountability for environmental damage in a cross-border context

The promises and pitfalls of the EU Corporate Sustainability Due Diligence Directive

Krzysztof Oplustil, Anne-Marie Weber

1. Introduction[1]

The contemporary globalized economy hinges on the division of labor, which is supported by extensive and deeply integrated global value chains (GVCs).[2] The operations of multinational enterprises (MNEs) that utilize GVCs primarily encompass production sectors but also interlock with the energy, food, and service industries. Typically, the value chains of EU-based MNEs span multiple EU Member States and extend to third countries outside the EU. Notably, the initial links of these GVCs are often located in the Global South.

GVCs are generally perceived to foster positive outcomes for firms in developing economies by enhancing productivity and mitigating financial constraints, thereby creating positive cascade effects in the domestic economy.[3] As a rule, workers along GVCs benefit from increased wages and improved working conditions.[4] However, the operation of GVCs is frequently linked to adverse impacts on human rights and environmental protection.[5] This issue is particularly problematic when the harm occurs in developing countries, where legal standards for business conduct are weak in substance and resistant to practical enforcement.[6] This situation

1 The research underlying this chapter was conducted as part of the project "The Role of Sustainable Corporate Governance for EU Climate Policy" (Project ID: 2022/45/B/HS5/00659), funded by the Polish National Science Center. The Authors thank Aleksandra Szczęsna for her assistance in editing the manuscript. Open Access and proofreading of this chapter were supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at the Jagiellonian University (Cracow, Poland).

2 World Trade Organisation, "Global Value Chain Development Report 2023: Resilient and sustainable GVCs in turbulent times" <https://www.wto.org/english/res_e/publications_e/gvc_dev_rep23_e.htm> (accessed 7 March 2025).

3 Ibid. xxvi.

4 Ibid.

5 For further examples, see British Institute of International and Comparative Law et al., *Study on Due Diligence Requirements through the Supply Chain: Final Report* (Publications Office of the European Union 2020) 214–217 <https://data.europa.eu/doi/10.2838/39830> (accessed 7 March 2025).

6 J. Dine, *Companies, International Trade and Human Rights* (Cambridge Studies in Corporate Law, Cambridge University Press, 2005).

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underscores a glaring corporate accountability gap regarding GVCs.[7] Compelling and tragic examples include the Brumadinho dam disaster,[8] the oil spills in the Niger Delta,[9] and the Rupganj factory fire.[10] As a consequence, an expanding academic discourse is addressing the problem that various types of damages inflicted throughout GVCs are inadequately traced and attributed to the ultimate operators of these chains.[11]

The phenomenon of dissociation between the damages occurring within the functioning of GVCs and their actual sources was first examined through the human rights perspective.[12] This arises from the fact that the operations of GVCs in legally fragile countries present an elevated risk concerning the effective protection of human rights and the availability of legal avenues for remedy in case of violations.[13] Therefore, it has been acknowledged that these instances of harm must be addressed through governance obligations, so-called due diligence requirements,[14] that pertain to the entities at the apex of the chain.[15]

7 P. Dowling, "Limited liability and separate corporate personality in multinational corporate groups: Conceptual flaws, accountability gaps, and the case for profit-risk liability," in L. Enneking, I. Giesen, A.-J. Schaap, C. Ryngaert, F. Kristen, and L. Roorda (eds.), *Accountability, International Business Operations and the Law* (Routledge 2019) 219–223; B. Sjåfjell, "How company law has failed human rights – and what to do about it" [2020] 5/2 Business and Human Rights Journal 179; A. Rühmkorf, "Corporate Social Responsibility in der Lieferkette: Governance und Verantwortlichkeiten" [2018] 47/2–3 Zeitschrift für Unternehmens- und Gesellschaftsrecht 414.

8 A. Boadle and G. Slattery, "Brazil's Vale knew Brumadinho Dam was unsafe as early as 2003: Internal report," *Reuters* (21 February 2020) <https://www.reuters.com/article/world/brazils-vale-knew-brumadinho-dam-was-unsafe-as-early-as-2003-internal-report-idUSKBN20F057/> (accessed 7 March 2025).

9 R. Ratcliffe, "'This place used to be green': The brutal impact of oil in the Niger Delta," *The Guardian* (6 December 2019) <https://www.theguardian.com/global-development/2019/dec/06/this-place-used-to-be-green-the-brutal-impact-of-oil-in-the-niger-delta> (accessed 7 March 2025).

10 Associated Press, "Bangladesh factory fire kills at least 52 people," *The Guardian* (9 July 2021) <https://www.theguardian.com/world/2021/jul/09/bangladesh-factory-fire-kills-people-dhaka> (accessed 7 March 2025); for further examples, see British Institute of International and Comparative Law et al. (n. 5).

11 L. Enneking, I. Giesen, A.-J. Schaap, C. Ryngaert, F. Kristen, and L. Roorda (eds.), *Accountability, International Business Operations and the Law* (Routledge 2019); Sjåfjell (n. 7) 179.

12 S. Ratner, "Corporations and human rights: A theory of legal responsibility" [2001] 111/3 Yale Law Journal 443; D. Baumann-Pauly and J. Nolan, *Business and Human Rights: From Principles to Practice* (Routledge 2016); N. Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2016); S. Khoury and D. Whyte, *Corporate Human Rights Violations: Global Prospects for Legal Action* (Routledge 2017); S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012); R. C. Bird, D. R. Cahoy, and J. D. Prenkert, *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar 2014).

13 S. Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing 2004); Khoury and Whyte (n. 12); N. Bueno, "Corporate liability for violations of the human right to just conditions of work in extraterritorial operations" [2017] 21/5 The International Journal of Human Rights 565.

14 In the German literature: *Sorgfaltspflichten*.

15 Dowling (n. 7) 219–238; B. Fasterling, "Human rights due diligence as risk management: Social risk versus human rights risk" [2017] 2/2 Business and Human Rights Journal 225.

In light of the newest evidence from the natural sciences regarding the planetary boundaries of doing business,[16] the debate on the content and enforcement of due diligence requirements has broadened to encompass the issue of environmental damage caused throughout GVCs.

In the EU context, the debate surrounding due diligence requirements in GVCs complements the political and academic discourse on fostering sustainable business practices across diverse legal and regulatory realms. Drawing inspiration from initiatives such as France's "*Loi de vigilance*"[17] and Germany's "*Lieferkettenso rgfaltspflichtengesetz*",[18] as well as international soft law regimes, due diligence obligations are captured by regulation at the EU level: following a rocky legislative ascent, on 24 May 2024, the European Council adopted the final text of the Corporate Sustainability Due Diligence Directive (CSDDD).[19]

On 28 February 2025, the European Commission published the "Omnibus proposal"[20] that requests amendments to the CSDDD, significantly diluting its

16 On the concept of planetary boundaries, see: M. Leach, K. Raworth, and J. Rockström, "Between social and planetary boundaries: Navigating pathways in the safe and just space for humanity," in *World Social Science Report 2013: Changing Global Environments* (OECD 2013) 84–90. In legal science see: B. Sjåfjell, "Sustainable value creation within planetary boundaries—reforming corporate purpose and duties of the corporate board" [2020] 12/15 Sustainability 6245; A.-Ch. Mittwoch, "Die Notwendigkeit eines Lieferkettengesetzes aus der Sicht des Internationalen Privatrechts" [2020] 7 Recht der Internationalen Wirtschaft 397.

17 LOI n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (hereinafter: "French DD Law"). See V. Magnier, "Old-fashioned yet innovative: Corporate law, corporate governance and sustainability in France," in *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 276; S. Cossart, J. Chaplier, and T. Beau de Lomenie, "The French law on duty of care: A historic step towards making globalization work for all" [2017] 2/2 Business and Human Rights Journal 317.

18 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 16. Juli 2021 (hereinafter: "German DD Law"). See A. Rühmkorf, "The German Supply Chain Law: A first step towards more corporate sustainability" [2023] 20/1 European Company Law 6; G. Rühl, "Cross-border protection of human rights: The 2021 German Supply Chain Due Diligence Act," in *Gedächtnisschrift in Honor of Jonathan Fitchen* (Bloomsbury 2024); M. Krajewski, K. Tonstad, and F. Wohltmann, "Mandatory human rights due diligence in Germany and Norway: Stepping, or striding, in the same direction?" [2021] 6/3 Business and Human Rights Journal 550.

19 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760, 5 July 2024. The CSDDD entered into force on 26 July 2024. EU Member States must transpose the CSDDD into their respective national legal systems by 26 July 2026, but the application of national measures is to be phased in over the next five years (see Art. 37 sec. 1 CSDDD). For the first critical analyses of the CSDDD, see A. Schall, "The CSDDD: Good law or bad law?" [2024] 21/3 European Company Law Journal 56; J. Schmidt, *The EU Supply Chain Directive (CSDDD) – Landmark or Bureaucratic Hydra?* (ECCML Working Paper 2024/2, July 2024).

20 Proposal for a Directive of the European Parliament and 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, Brussels, 26 February 2025, COM(2025) 80 final, 2025/0044 (COD).

original scope and strength. At the time of submitting this chapter for publication, these amendments remain at the proposal stage, and their final adoption is uncertain. However, regardless of potential changes to the original text of the CSDDD, an analysis of its underlying mechanisms retains academic value. Understanding these mechanisms provides insight into future developments in EU law, particularly in an increasingly volatile political climate where sustainability objectives navigate shifting economic and regulatory priorities. Moreover, as EU Member States may move forward with their own legislative initiatives, and as due diligence requirements in GVCs gain traction beyond Europe, the foundational concepts of the accountability tools embedded in the CSDDD, which we discuss in this chapter, will continue to shape legal and policy debates in the years to come.

This chapter aims to evaluate the corporate accountability mechanisms for environmental damage occurring in cross-border contexts that have been established in the CSDDD. Specifically, we analyze whether the public and private enforcement mechanisms regarding due diligence requirements construct an effective response to the global environmental challenges posed by the operation of GVCs. To that end, we first outline the global regulatory evolution concerning corporate due diligence obligations (see sec. 2). Subsequently, we examine the nature of the due diligence obligations stemming from the CSDDD (see sec. 3). We then delineate the enforcement mechanisms for environmental damage occurring within GVCs (see sec. 4) and assess their pitfalls (see sec. 5). In the last section, we present our conclusions (see sec. 6).

2. Regulatory evolution of due diligence requirements in the EU

The regulatory evolution regarding due diligence duties is characterized by two primary tendencies. Firstly, there has been an apparent progression from non-binding soft law guidance to binding hard law regulation.[21] Secondly, as noted above, the scope of due diligence requirements has been broadened to encompass not only adverse impacts on human rights but also environmental damage occurring across GVCs.

The core concept of due diligence obligations within value chains, namely, to "identify, prevent, mitigate and account for" actual or potential adverse impacts (in the context of human rights), was first introduced by the UN Guiding Principles

21 Ch. Moser and S. Leipold, "Toward 'hardened' accountability? Analyzing the European Union's hybrid transnational governance in timber and biofuel supply chains" [2021] 15/1 Regulation & Governance 115; O. Martin-Ortega, "Human rights due diligence for corporations: From voluntary standards to hard law at last?" [2014] 32/1 Netherlands Quarterly of Human Rights 44. In the context of EU law see: G. Ferrarini, "Corporate sustainability due diligence and the shifting balance between soft law and hard law in the EU," *ECGI* (25 April 2022) <https://www.ecgi.global/publications/blog/corporate-sustainability-due-diligence-and-the-shifting-balance-between-soft-law> (accessed 7 March 2025).

on Business and Human Rights (UNGPs).[22] According to the UNGPs, this responsibility applies regardless of size, sector, or where the company operates.[23] All adverse impacts that "the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships" are covered.[24] The determination of whether a company has taken "appropriate action" in circumstances where it may contribute or be directly linked to an impact is based on the notion of leverage.[25] Leverage is considered to exist where the company has the ability to effect change in the wrongful practices of an entity that causes harm. The UNGPs declare that human rights due diligence should be understood as an ongoing (permanent) duty and requires a context-specific approach.[26] It should cover all human rights, although certain risks may be prioritized based on severity. Importantly, risks should not be defined solely through the lens of the enterprise but also from the perspective of rights-holders, i.e., people and the planet.[27] Due diligence requirements are also contained in the Revised Draft of the UN Business and Human Rights Treaty.[28]

The foundational ideas and terminology of the UNGPs were incorporated into the OECD Guidelines for Multinational Enterprises.[29] These extended the concept of due diligence beyond human rights, expressly addressing the need for responsible business conduct in other areas.[30] Specifically, the OECD Guidelines have identified the state of the environment and the risks associated with climate change as areas that necessitate the performance of due diligence by enterprises across GVCs. According to the OECD Guidelines, companies should "within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner

22 United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN Office of the High Commissioner for Human Rights 2011).

23 Ibid. 15.

24 Ibid. 17.

25 Ibid. 19 and its Commentary.

26 Ibid. 17.

27 J. G. Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN 2011) para 6.

28 Open-ended Intergovernmental Working Group, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (2021) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> (accessed 7 March 2025).

29 OECD, *Guidelines for Multinational Enterprises* (OECD Publishing 2011).

30 J. G. Ruggie and T. Nelson, "Human rights and the OECD Guidelines for Multinational Enterprises: Normative innovations and implementation challenges" [2015] 22/1 The Brown Journal of World Affairs 99.

contributing to the wider goal of sustainable development".[31] Further, companies should adopt measurable objectives and, where appropriate, targets for improved environmental performance and resource utilization. The relevance of these objectives should be subject to periodic review, and targets should be consistent with national policies and international environmental commitments. Also, companies should continually seek to improve corporate environmental performance at the level of the enterprise and, where appropriate, of its supply chain by encouraging activities such as, for instance, the development and provision of products or services that have no undue environmental impacts, are safe in their intended use, reduce greenhouse gas emissions, are efficient in their consumption of energy and natural resources and can be reused, recycled, or disposed of safely. As a result, although often closely linked and contributing causally to adverse human rights impacts, the OECD Guidelines recognize environmental harm as a significant standalone adverse occurrence within GVCs.

In recent years, the soft law standards established by the UNGPs and the OECD Guidelines have begun to "mature" into binding legal frameworks adopted in several jurisdictions.[32] In the EU context, the adoption of regulation regarding due diligence requirements in value chains is increasingly recognized as an emanation of Member States' obligations enshrined in the European Human Rights Convention and its *leitmotiv* ("to respect, to protect and to fulfill"[33]). The duty to protect entails safeguarding individuals from harm caused by others,[34] which may necessitate intervention through binding regulatory frameworks.

Among the due diligence regulations adopted at the national level so far, the 2017 French DD Law and the 2021 German DD Law impose the most comprehensive mandatory requirements concerning both human rights and environmental impacts. Regarding regulatory intervention at the EU level, sector-specific initiatives preceded the comprehensive approach adopted in the CSDDD. The EU Timber Regulation[35] (EUTR) is part of a broad set of measures introduced by the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan adopted in

31 OECD (n. 29) 42–46.

32 Martin-Ortega (n. 21) 44; C. Ryngaert et al., "Accountability, international business operations, and the law: The way forward," in *Accountability, International Business Operations and the Law* (Routledge 2019) 286.

33 L. Catá Backer, "Moving forward the UN Guiding Principles for Business and Human Rights: Between enterprise social norm, state domestic legal orders, and the treaty law that might bind them all" [2015] 38/2 Fordham International Law Journal 457; N. Weiß and A. Zimmermann, "Völker- und verfassungsrechtliche Parameter eines deutschen Lieferkettengesetzes" [2020] 58/4 Archiv des Völkerrechts 425; R. Klinger et al., *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht* (Amnesty International 2016) 16.

34 See various contributions on this topic in: E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (A. Spitz 2000).

35 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (2010) OJ L 295, 12 November 2010, 23–34.

2003 to tackle illegal logging in the world's forests.[36] It mandates operators placing timber and timber products on the EU market to establish a due diligence system for assessing the risk of illegal logging or trading. Failure to fulfill these due diligence obligations constitutes an offense, regardless of whether the timber itself is proven to be illegal.

The initiation of legislative work on the CSDDD was prompted by increasing recognition of the role of businesses in facilitating the sustainable transition of the EU economy. As the gap between individual Member States' obligations arising from international commitments and corporate responsibilities became apparent, the discourse on due diligence requirements increasingly intersected with corporate law and financial market regulation.[37] In this context, the 2018 Action Plan on Financing Sustainable Growth marked the initial step toward establishing a comprehensive, non-sector-specific due diligence regulatory framework at the EU level.[38] It called for legislative work to require corporate boards to develop and disclose a sustainability strategy, encompassing comprehensive due diligence across the value chain and measurable sustainability.[39] In its May 2018 Report on Sustainable Finance,[40] the European Parliament mandated the European Commission to provide a legislative proposal for an "overarching, mandatory due diligence framework including a duty of care to be fully phased-in within a transitional period and taking into account the proportionality principle". On 3 October 2019, over 80 NGOs and trade unions called on the European Commission "for effective EU legislation that establishes a mandatory human rights and environmental due diligence framework for business, companies and financial institutions operating, or offering products or service, within the EU".[41] The need for explicit legislation on due diligence duties was also deliberately expressed by certain companies.[42]

The EU Commission launched the Sustainable Corporate Governance Initiative in July 2020.[43] Crucially, in 2020, the European Commission published a study

36 EU Forest Law Enforcement, Governance and Trade (FLEGT) Facility, "What is the EU FLEGT action plan?," https://flegtvpafacility.org/flegt/ (accessed 7 March 2025).

37 British Institute of International and Comparative Law et al. (n. 5) 222–223; Sjåfjell (n. 7) 179–199.

38 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth (2018) (hereinafter: "the 2018 Action Plan").

39 See: Action no. 10 of the 2018 Action Plan.

40 M. Scott Cato, "Report on sustainable finance" (May 2018) <https://www.europarl.europa.eu/doceo/document/A-8-2018-0164_EN.html> (accessed 7 March 2025) para 6.

41 "Civil society calls for human rights and environmental due diligence legislation," *ECCJ* (3 October 2019) <https://corporatejustice.org/news/civil-society-calls-for-human-rights-and-environmental-due-diligence-legislation/> (accessed 7 March 2025).

42 J. Christian, "Chocolate companies and MEPs call for EU due diligence regulation," *FERN* (10 April 2019) <https://www.fern.org/publications-insight/chocolate-companies-and-meps-call-for-eu-due-diligence-regulation-954/> (accessed 7 March 2025).

43 European Commission, "Sustainable corporate governance initiative," <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en> (accessed 7 March 2025).

revealing that slightly more than one-third of businesses surveyed reported conducting due diligence encompassing all human rights and environmental impacts, while an additional one-third limited their due diligence efforts to specific areas.[44] However, most business respondents conducting due diligence focus solely on first-tier suppliers. Due diligence practices extending beyond the first tier and throughout the downstream value chain were notably less common. Importantly, the *Study on Due Diligence Requirements through the Supply Chain* report highlighted that the current legal framework does not offer companies legal certainty regarding their due diligence obligations and suggested that new voluntary guidance would not yield significant social, environmental, and human rights impacts.[45]

In their Joint Declaration on EU Legislative Priorities for 2022,[46] the European Parliament, the Council of the EU, and the European Commission committed to delivering an economy that works for people, including improving the regulatory framework on sustainable corporate governance. In order to fulfill this declaration, the European Commission issued the Proposal for a Directive on Corporate Sustainability Due Diligence on 23 February 2022.[47] The CSDDD proposal was rejected by the Regulatory Scrutiny Board in May 2022[48] and, despite the subsequent incorporation of numerous amendments, again in November 2022.[49] Nonetheless, the European Commission advanced the proposal into the trilogue procedure, which faced significant challenges due to strong political resistance from certain EU Member States, threatening its final approval by the EU Council.[50]

The CSDDD's aims extend beyond human rights protection and encompass the pursuit of making corporate players accountable for environmental harm

44 British Institute of International and Comparative Law et al. (n. 5) 16.

45 Ibid.

46 Joint declaration of the European Parliament, the Council of the European Union and the European Commission on EU Legislative Priorities for 2022 (2021) OJ CI 514/1, 21 December 2021, 1–6.

47 Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 23 February 2022.

48 See: Regulatory Scrutiny Board, "Opinion on Impact assessment / Sustainable Corporate Governance" (2021) <https://ahv.nrw/wp-content/uploads/2021/07/Opinion-JUST-on-SGC-May-2021.pdf> (accessed 7 March 2025).

49 See: Regulatory Scrutiny Board, "Opinion on Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937" (2021) <https://ec.europa.eu/transparency/documents-register/api/files/SEC(2022)95?ersIds=090166e5e99ec8f8> (accessed 7 March 2025). On the role of the EU Regulatory Scrutiny Board in the SCG Initiative, see K. H. Eller and I. Kampourakis, "Quantifying 'better regulation'," *Verfassungsblog* (21 February 2022) <https://verfassungsblog.de/quantifying-better-regulation> (accessed 7 March 2025).

50 Schmidt (n. 19) 1–2; A. Hancock and S. Jones, "German liberals pull plug on EU law to prevent supply chain abuses," *Financial Times* (1 February 2024) <https://www.ft.com/content/298882d9-9e5d-4f93-9832-ecb3e463bd56> (accessed March 2025); A.-Ch. Mittwoch, P. Velte, and M. Birkholz, "On the necessary adoption of the CSDDD by the EU Council," *Oxford Business Law Blog* (13 February 2024) <https://blogs.law.ox.ac.uk/oblb/blog-post/2024/02/necessary-adoption-csddd-eu-council> (accessed 7 March 2025).

inflicted throughout their value chain in a cross-border setting.[51] Interestingly, the EU Parliament's call on the Commission to commence legislative efforts explicitly referred to the OECD Guidelines as a normative guidepost for the envisaged pan-EU regime.[52] Therefore, the adopted regulatory measures at the EU level may be regarded as an evolutionary continuity of the preceding soft-law regime.[53] Moreover, the EU Parliament also pointed the European Commission toward the French DD Law. Compliant with this guidance, the European Commission has, in fact, heavily drawn from existing due diligence standards in the EU Member States, i.e., the French DD Law and the German DD Law. This may be seen as a legitimate effort to capitalize on readily available solutions that are already developed and implemented.

Importantly, the CSDDD is to be regarded as another advance on the continuum of the EU's path in fostering sustainable business. Prior to the CSDDD proposal, these considerations were only promoted through indirect nudging based on transparency policies.[54] Certain indirect regulatory effects regarding due diligence duties stem from the Corporate Sustainability Reporting Directive (CSRD).[55] While sustainability reporting does not actually require companies to undertake due diligence, the "comply or explain" mechanism certainly forces them to deliver information on their due diligence endeavors.[56] Consequently, these transparency obligations at least nudge companies to act in a way that allows reporting on diligent behaviors or prevents them from actions that would trigger the obligation to report adverse impacts that occur throughout the value chain. Similar nudging effects may be allotted to the Sustainable Finance Disclosure Regulation (SFDR),[57] which introduces disclosure obligations for financial market participants and financial advisers on their approaches to the integration of sustainability risks and the consideration of adverse sustainability impacts, as well as the Taxonomy Regulation,[58] which categorizes, among others, environmentally sustainable investments in economic activities. It is important to note that the CSDDD's core objectives are envisioned

51 Recital 9 CSDDD.

52 Scott Cato (n. 40) para 11.

53 Also described as legal transplant from soft law by: J. Sinnig and D. A. Zetzsche, "The EU's Corporate Sustainability Due Diligence Directive: From disclosure to prevention of adverse sustainability impacts in supply chains," SSRN Scholarly Paper (14 June 2024) 1.

54 Sjåfjell (n. 7) 188.

55 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16 December 2022, 15–18.

56 Rühmkorf (n. 7) 419–422.

57 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (2019) OJ L 317, 9 December 2019, 1–16 (hereinafter: "SFDR"). Under the SFDR, the in-scope undertakings are required to publish, among others, a statement on their due diligence policies with respect to principal adverse impacts of their investment decisions on sustainability factors on a "comply or explain" basis.

58 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (2020) OJ L 198, 22 June 2020, 13–43.

as catalysts for delivering the EU's climate policy goals, particularly the reduction of net greenhouse gas emissions by at least 55% by 2030 as set out by the European Climate Law.[59]

3. Personal and material scope of the CSDDD

3.1 Personal scope

It is currently estimated that approximately 5,500 companies will fall within the coverage of the CSDDD.[60] The personal scope of the CSDDD is grounded in an expansive interpretation of the term "company" delineated in Art. 3 sec. 1 (a) of the CSDDD. In addition to legal persons listed in Annex I (corporate entities) and Annex II (partnerships) to the Accounting Directive[61] or analogous legal forms constituted in accordance with the law of a third country, the scope also encompasses a wide range of regulated financial entities, including credit institutions (banks), insurance undertakings, and providers of crowdfunding services.[62] Since the CSDDD refers to legal persons, the coverage of partnerships remains a controversial issue, as the laws of EU Member States or third countries differ in terms of attributing legal personality to them.[63] Importantly, the definition of "company" under the CSDDD is not limited to specific sectors of operation, thereby extending its relevance across GVCs in any industry.

The crucial delineation of the CSDDD's scope is effected through thresholds indicative of the size of a company. For companies formed in accordance with the legislation of an EU Member State, the CSDDD applies if they had more than 1,000 employees on average and a net worldwide turnover of more than EUR 450,000,000 in the last financial year for which annual financial statements have been or should have been adopted (Art. 2 sec. 1 a CSDDD). The CSDDD also applies to parent companies if these thresholds are reached on the consolidated group level (Art. 2 sec. 1 b CSDDD). Furthermore, the personal scope of the CSDDD extends to franchising or licensing arrangements where a company, or its ultimate parent company within a group, has engaged in agreements within the EU

59 Recital 13 CSDDD.

60 ECCJ, "Overview of the Corporate Sustainability Due Diligence Directive; advancing corporate responsibility," *ECCJ* (24 May 2024) <https://corporatejustice.org/publications/overview-of-the-corporate-sustainability-due-diligence-directive-advancing-corporate-responsibility/> (accessed 7 March 2025).

61 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

62 As Schmidt (n. 19) 3–4 rightly pointed out, the legal forms of (commercial) partnerships listed in Annex II EU Accounting Directive are therefore only covered if all of the direct or indirect members of the undertaking having otherwise unlimited liability in fact have limited liability, i.e., only if they are a "limited liability company & Co." Therefore, "pure" partnerships are not included in the scope of the CSDDD.

63 See Sinnig and Zetzsche (n. 53) 8–9.

with independent third-party entities involving the payment of royalties exceeding EUR 22,500,000 in the most recent financial year for which annual financial statements have been prepared or should have been prepared. This coverage applies specifically to scenarios where such agreements ensure a common identity, business concept, and the implementation of uniform business methods. Additionally, applicability is constrained to cases where the company or its ultimate parent within a group has achieved a global turnover exceeding EUR 80,000,000 in the last financial year for which annual financial statements have been or should have been adopted (Art. 2 sec. 1 c CSDDD).

One of the most intriguing aspects of the CSDDD as an instrument of EU law is its extraterritorial direct applicability to certain non-EU companies.[64] Companies established under the laws of a third country fall within the scope of the CSDDD if they have achieved a net turnover exceeding EUR 450,000,000 within the EU in the financial year preceding the last financial year (Art. 2 sec. 2 a CSDDD). Similarly, the same threshold, calculated on a consolidated basis for groups, determines whether the CSDDD applies to an ultimate parent company (Art. 2 sec. 2 b CSDDD). Additionally, non-EU incorporated companies may fall under the scope of the CSDDD if they engage in the franchising or licensing agreements described above (Art. 2 sec. 2 c CSDDD). While the direct coverage of non-EU companies certainly marks a new evolutionary milestone for EU law relating to environmental harm, the applied concept of extraterritoriality clearly draws from the UNGPs' heritage[65] and aligns with the broader concept of transnational private law.[66]

An exemption from the personal scope of the CSDDD may be applicable to an ultimate parent company referred to in Art. 2 sec. 1 (b) and Art. 2 sec. 2 (b) CSDDD whose primary activity involves holding shares in operational subsidiaries and refrains from making management, operational, or financial decisions that affect the group or any of its subsidiaries (Art. 2 sec. 3 CSDDD). However, this exemption is contingent upon approval from the competent supervisory authority (Art. 24 CSDDD) and the requirement that one of the ultimate parent company's subsidiaries established in the EU is designated to fulfill its obligations (Art. 2 sec. 3 CSDDD). Despite the exemption, the ultimate parent company remains jointly liable with the designated subsidiary for any failure by the latter to fulfill its obligations (Art. 2 sec. 3 CSDDD).

A functional understanding of the CSDDD's personal scope necessitates considering its indirect effects on entities operating within the covered companies'

64 See in detail: A.-M. Weber, "Expanding the toolbox of sustainable business law: The transnational impacts of the EU Corporate Sustainability Due Diligence Directive (CSDDD)" [2024] 42/1 Pace Environmental Law Review 155.

65 L. Catá Backer, "Multinational corporations, transnational law: The United Nation's norms on the responsibilities of transnational corporations as harbinger of corporate responsibility in international law" [2005] 37/2 Columbia Human Rights Law Review 287.

66 G.-P. Calliess and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing 2010).

entire chains of activities.[67] Given the due diligence requirements stipulated by the CSDDD (see sec. 3.2. below), companies subject to its provisions are obligated to identify, prevent, mitigate, and address adverse impacts not only directly linked to their operations but also to those of their subsidiaries and business partners, regardless of their geographical location. Consequently, companies falling within the CSDDD's direct personal scope will be compelled to gather information and promote the dissemination of due diligence standards of conduct throughout their value chains. To sustain the business relationship with a company under the CSDDD's purview, entities within such value chains will need to adapt to the due diligence standards established by the CSDDD. This "trickle-down" effect leads to the delineation of an "indirect" personal scope of the CSDDD and lays the foundation for the global dissemination of the CSDDD's standards. In this context, the CSDDD is expected to produce a "Brussels effect",[68] referring to the phenomenon where normative standards established by EU law are adopted in other jurisdictions.[69]

The identified "indirect" personal scope of the CSDDD is based upon the notion of the "chain of activities". According to Art. 3 Sec. 1(g) CSDDD, this term encompasses the activities of a company's upstream business partners related to the production of goods or the provision of services by that company, including the design, extraction, sourcing, manufacture, transport, storage, and supply of raw materials, products, or parts of products and the development of the product or the service. Regarding the company's downstream operations, the chain of activities is limited to activities of a company's downstream business partners related to the distribution, transport, and storage of a product of that company, where the business partners carry out those activities for the company or on behalf of the company. Consequently, the definition of the term "chain of activities" does not include the activities of a company's downstream business partners related to the services of the company (see Recital 26 CSDDD).

The term "business partner", as employed in the definition of chains of activities, includes foremost direct business partners. These are entities with whom the company has a commercial agreement related to the operations, products, or services of the company or to which the company provides services within its chain of activities (Art. 3 Sec. 1(f) (i) CSDDD). Additionally, the definition of a business partner extends to entities that, while not direct partners, engage in business

67 Weber (n. 64) 164–167. See also Schmidt (n. 19) 6, who emphasizes the cascade effect of the CSDDD.

68 N. Bueno et al., "The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The final political compromise," *Business and Human Rights Journal* (29 May 2024) 5; L. Enriques and M. Gatti, 'The extraterritorial impact of the proposed EU Directive on Corporate Sustainability Due Diligence: Why corporate America should pay attention," *ECGI* (26 April 2022) <https://ecgi.global/blog/extraterritorial-impact-proposed-eu-directive-corporate-sustainability-due-diligence-why> (accessed 7 March 2025).

69 A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 171.

operations related to the company's activities, products, or services (Art. 3 Sec. 1(f) (ii) CSDDD).

In the context of downstream operations, after extensive debate, regulated financial entities have been granted a substantial exemption. Their chain of activities does not include downstream business partners who receive their services and products. Interestingly, this exemption has only been expressly verbalized in the CSDDD's Recital 26. It has rightly been pointed out that the nature of financial undertakings operations typically conveys the status of an intermediary, which makes it difficult to distinguish their upstream and downstream operations.[70]

Another exemption related to a company's downstream operations that is explicitly mentioned in Art. 3 Sec. 1(g) CSDDD relates to the distribution, transport, and storage of a product that is subject to export controls under Regulation (EU) 2021/821 or to the export controls relating to weapons, munitions, or war materials, once the export of the product is authorized.

3.2 Material scope

The material scope of the CSDDD focuses on instituting a legally enforceable framework for human rights and environmental due diligence. In the context of examining environmental damages in this chapter, a pivotal component of the due diligence framework is the notion of adverse environmental impacts. As defined in Art. 3 sec. 1 (g) of the CSDDD, "adverse environmental impact" pertains to impacts resulting from breaches of the prohibitions and obligations specified in the CSDDD's Annex (Part II). Consequently, adverse environmental impacts may relate to various scenarios of pollution, biodiversity loss, and ecosystem degradation that violate specified international conventions and agreements.

Crucially, the CSDDD will cover an adverse environmental impact regardless of whether the convention or agreement listed in the Annex is ratified or recognized in the jurisdiction in which the violation occurs. In connection with the indirect and direct dimensions of the CSDDD's personal scope, this results in the dissemination of environmental protection standards across GVCs into countries in which the local legal framework does not offer adequate protection.

The foundational elements of the CSDDD's due diligence standard of conduct are summarized in Art. 5 sec. 1 CSDDD and include the following actions:

(a) integrating due diligence into the company's policies and risk management systems (in accordance with Article 7 CSDDD);
(b) identifying and assessing actual or potential adverse impacts (in accordance with Article 8 CSDDD) and, where necessary, prioritizing actual and potential adverse impacts (in accordance with Article 9 CSDDD);

70 Sinnig and Zetzsche (n. 53) 14. As J. Schmidt points out, de facto, regulated financial companies are thus largely outside the scope of the CSDDD because their relevant customers operate downstream. Schmidt (n. 19) 7.

(c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end as well as minimizing their extent (in accordance with Articles 10 and 11 CSDDD);
(d) carrying out meaningful engagement with stakeholders (in accordance with Article 13 CSDDD);
(e) establishing and maintaining a notification mechanism and a complaints procedure (in accordance with Article 14 CSDDD);
(f) monitoring the effectiveness of the due diligence policy and measures (in accordance with Article 15 CSDDD); and
(g) publicly communicating on due diligence (in accordance with Article 16 CSDDD).

An additional obligation relevant to environmental aspects outlined in Article 22 CSDDD mandates companies to develop and implement a transition plan for climate change mitigation. This plan should seek to align the company's business model and strategy with the transition toward a sustainable economy, ensuring compliance with the goal of limiting global warming to 1.5°C as set forth in the Paris Agreement and the objective of achieving climate neutrality as outlined in the European Climate Law.[71] Based on scientific evidence, the transition plan should set targets for addressing climate change by 2030, along with five-year objectives leading up to 2050. It delineates critical actions intended to achieve these targets and identifies mechanisms for decarbonization. Moreover, the plan should include descriptions of adjustments in the company's product and service portfolio and the adoption of new technologies where applicable. It also specifies and quantifies the investments and funding allocated to support the plan's implementation. Additionally, the roles of administrative, management, and supervisory bodies concerning the transition plan must be clearly defined. Annual updates to the transition plan and reporting on progress toward achieving the established targets are mandatory requirements.

4. Accountability mechanisms under the CSDDD

To ensure adherence to the established due diligence framework and thereby reduce the occurrence of adverse impacts, the CSDDD incorporates a blend of public and private enforcement mechanisms.[72] While these mechanisms are outlined to some extent in the CSDDD, their substantial development is required within the national legislation of EU Member States. Public oversight and administrative sanctions primarily operate as deterrents, designed to incentivize companies to comply with the CSDDD's due diligence requirements. Simultaneously, the regulation of civil liability provides a mechanism to compensate victims affected by environmental

71 Regulation (EU) 2021/1119. This includes its intermediate and 2050 climate neutrality targets and, where relevant, the exposure of the company to coal-, oil-, and gas-related activities.
72 Sinnig and Zetzsche (n. 53) 1.

harm. Both facets of enforcement regulation aim to hold accountable the companies falling within the scope of the CSDDD for adverse impacts across their entire chains of activities.

4.1 Public oversight and administrative sanctions

Institutionalized public oversight of the compliance with the national laws implementing the CSDDD will be executed by supervisory authorities that must be designated in each EU Member State (Art. 24 sec. 1 CSDDD). EU companies will fall under the supervisory powers of the competent authority in the EU Member State where the company is registered (Article 24 sec. 2 CSDDD). Non-EU companies, on the other hand, will be supervised by the authority of the country where they have established a branch (Art. 25 sec. 3 CSDDD). In cases where a foreign company does not have a branch, the supervisory authority is assigned according to the country where it generates the highest turnover (Art. 25 sec. 3 CSDDD). EU Member States' national laws must empower supervisory authorities with adequate resources and authority to effectively fulfill their designated responsibilities (Art. 25 sec. 1 CSDDD). These authorities can initiate investigations independently or in response to substantiated concerns (Art. 25 sec. 2 CSDDD). Accessible channels should facilitate the submission of substantiated concerns (Art. 26 sec. 1 CSDDD), with prompt assessments conducted within a reasonable timeframe (Art. 26 sec. 2 CSDDD).

Supervisory authorities have the discretion to initiate investigations without prior notice if providing a warning beforehand could compromise the investigation's effectiveness (Art. 25 sec. 3 CSDDD). When a supervisory authority plans to conduct an inspection within another EU Member State, it may seek assistance from the supervisory authority of that state (Art. 25 Sec. 3 CSDDD). The creation of a European Network of Supervisory Authorities, composed of representatives from these authorities, aims to facilitate their collaboration, enhance regulatory alignment, investigative practices, sanctions, and supervision, and promote the exchange of information among them (Art. 28 CSDDD).

Supervisory authorities have the authority to issue direct orders to companies, requiring them to cease infringements by taking specific actions, discontinuing certain conduct, or refraining from repeating such actions (Article 25 sec. 5 CSDDD). In cases where a company fails to comply with these orders, the supervisory authority should allow an appropriate period for remedial action to be taken. Penalties for violations of national laws implementing the CSDDD must be effective, proportionate, and deterrent (Art. 27 sec. 1 CSDDD). National legislators are instructed to consider the nature, severity, and duration of the infringement, as well as the seriousness of its consequences (Art. 27 sec. 2 CSDDD). Moreover, the design of penalties should consider the company's conduct regarding various aspects of the due diligence standard, including its collaboration with other entities to address impacts and its efforts in undertaking remedial actions (Art. 27 sec. 2 CSDDD).

At a minimum, national laws must include provisions for monetary fines and the establishment of a "naming and shaming" mechanism. This mechanism involves

publicly disclosing the identity of the offending company and detailing the nature of the violation (Art. 27 sec. 3 CSDDD). Furthermore, decisions made by supervisory authorities concerning penalties for breaches of national provisions aligned with the CSDDD must be publicly accessible for at least five years (Art. 27 sec. 5 CSDDD). The maximum limit of pecuniary penalties should at least be set at the level of 5% of the net worldwide turnover of the company in the financial year preceding that of the decision to impose the penalty (Art. 27 sec. 4 CSDDD).

4.2 Civil liability

Member States are obligated to incorporate a civil liability framework for companies that fall within the direct personal scope of the CSDDD into their national laws (Art. 29 sec. 1 CSDDD). Crucially, the broad applicability of this framework is safeguarded by a conflict-of-laws provision. According to Art. 29 sec. 7 CSDDD, Member States must ensure that the provisions of national law transposing the CSDDD's private enforcement framework are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State.[73] However, the civil liability regime outlined in Article 29 of the CSDDD does not constrain companies' liability under EU or national law. It operates without prejudice to the rules on civil liability related to adverse human rights or environmental impacts that establish liability in situations not covered by the CSDDD or that impose a stricter liability framework than that stipulated by the CSDDD (Art. 29 sec. 6 CSDDD).[74]

According to Art. 29 sec. 1 (a) CSDDD, a company to which the due diligence obligation of the CSDDD directly applies can be held liable for damages inflicted on a natural or legal person, contingent on the company's intentional or negligent failure to prevent, mitigate, or cease potential or actual adverse impacts, as outlined in Articles 10 and 11. Liability is further contingent upon the existence of damage to the natural or legal person's legal interests that are protected under national law and the presence of a causal link between the breach of duty on the part of the company and the occurrence of the damage (Art. 29 sec. 1 (b) CSDDD). Consequently, the CSDDD's civil liability regime mirrors typical conditions for fault-based tort liability: (i) a breach of duty, (ii) fault (either through negligence or intent), (iii) the existence of damage, and (iv) causality between the breach of duty and the occurrence of the damage.

According to the above, the breach of duty that conditions liability must occur on the part of the company falling within the CSDDD's direct personal scope. However, the damage may arise not only from the company's own operations but also within the operations of its subsidiaries or those conducted by its business partners throughout its chain of activities. Given that the breach of duty must be

73 As it results from the wording of the provision, it also applies in cases where the law of the third country would, in effect, be more favorable to the claimant. Critically, therefore, Schmidt (n. 19) 22.

74 See the critical remarks in this respect of Schall (n. 19) 57–58.

attributable to the company covered by the CSDDD's direct personal scope, in the two latter scenarios, a causal link between the occurrence of the damage and the company's breach of duty must be established. The CSDDD underscores this causality requirement by explicitly stating that a company should not be held liable if the damage was caused "only by its business partners in its chain of activities" (Art. 29 sec. 1 CSDDD). Confusingly, the invoked provision's wording only refers to "business partners" and does not address damages that occur in subsidiaries' operations.

According to Art. 29 sec. 5 CSDDD, the civil liability of a company to which the private enforcement regime applies directly is without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the chain of activities of the company. When the damage was caused jointly by the company and its subsidiary or jointly by the company and its direct or indirect business partner, they are liable jointly and severally. This is without prejudice to the provisions of national law concerning the conditions of joint and several liability and the rights of recourse.

As regards the nature of the breach of duty, Art. 29 sec. 1 (a) CSDDD states that liability arises if the adverse impact to which the company's breach of duty relates results from a right, prohibition, or obligation listed in the Annex, which is aimed at protecting the natural or legal person. Further, it must be established that the company's breach of duty caused damage to the natural or legal person's legal interests that are protected under national law (Art. 29 sec. 1 (b) CSDDD). As a consequence, the question emerges whether an adverse impact that solely results in environmental damage can be compensated under the CSDDD's civil liability framework. It has been argued that the CSDDD's concept of damage excludes "reparation of purely environmental damage", and therefore, obligations aiming at protecting the environment will remain outside of the scope of liability as long as they do not concurrently aim at protecting natural or legal persons.[75]

The CSDDD does not offer a "safe harbor" for companies based on their demonstrated engagement and commitment to due diligence requirements, which was initially part of the EU Commission's proposal. In fact, Art. 29 sec. 4 CSDDD specifically highlights that companies involved in industry or multi-stakeholder initiatives, or those utilizing independent third-party verification or contractual clauses to support the implementation of due diligence obligations, may nevertheless be subject to civil liability. Under Art. 29 sec. 2 CSDDD, a natural or legal person must be entitled to receive full compensation for damages. However, this compensation should not result in overcompensation, such as through punitive damages.

The CSDDD regulates several procedural aspects of the private enforcement regime. According to Art. 29 sec. 3 (a) CSDDD, national regulations concerning the commencement, duration, suspension, or interruption of limitation periods should not unreasonably hinder the pursuit of claims for damages. These national regulations must not impose stricter limitations than those prescribed in national

75 Bueno et al. (n. 68) 2.

general civil liability frameworks. Specifically, the limitation period for initiating actions for damages must be a minimum of five years and must not be shorter than the limitation period established in national general civil liability regimes. Further, limitation periods laid down in the national laws of the Member States should not commence until the infringement has ceased and the claimant becomes aware, or reasonably should have become aware, of the behavior and its qualification as an infringement, of the harm caused by the infringement, and of the identity of the infringer (Art. 29 sec. 3 (a) CSDDD). According to Art. 29 sec. 3 (b) CSDDD, Member States must ensure that the costs associated with enforcing civil liability are not prohibitively expensive for claimants seeking justice. The national laws implementing the CSDDD must also provide that claimants are able to seek injunctive measures, including through summary proceedings (Art. 29 sec. 3 (c) CSDDD). Injunctive measures must be issued either as definitive or provisional orders requiring the cessation of infringements of the provisions of national law adopted pursuant to the CSDDD. These measures may compel the performance of a specific action or the cessation of particular conduct (Art. 29 sec. 3 (c) CSDDD).

A key procedural element of the CSDDD's civil liability framework pertains to the rules of standing. Under Art. 29 sec. 3 (d) CSDDD, the Member States' laws must establish reasonable conditions under which any alleged injured party may authorize a trade union, non-governmental human rights or environmental organization, or other non-governmental organization, and, in accordance with national law, national human rights institutions, based in a Member State to bring actions to enforce the rights of the alleged injured party. The authorization may be contingent upon compliance with national legal requirements. Such requirements may include maintaining a permanent presence and, according to its statutes, not engaging commercially and not only temporarily in the realization of rights protected under the CSDDD or corresponding national laws.

Procedural aspects of evidence within the CSDDD's private enforcement regime include the Member State's obligation to adopt provisions for a discovery procedure. As outlined in Art. 29 sec. 3 (e) CSDDD, Member States must ensure that when a claim is brought and the claimant provides a reasoned justification with reasonably available facts and evidence supporting the plausibility of their claim for damages and indicates that additional evidence is controlled by the company, the courts can order the disclosure of such evidence by the company in accordance with national procedural law. Disclosure must be confined to what is "necessary and proportionate" to support a potential claim or a claim for damages. To determine proportionality, national courts must consider the extent to which the claim or defense is substantiated by available facts and evidence justifying the request for disclosure, the scope and cost of disclosure, and the legitimate interests of all parties, including any third parties. This includes preventing non-specific searches for irrelevant information. The proportionality assessment must also consider whether the requested evidence contains confidential information, particularly concerning third parties, and whether any measures are in place to protect such confidential information. However, Member States must ensure that national courts possess the authority to order the disclosure of evidence containing confidential information

when deemed relevant to the action for damages. In such cases, Member States must also ensure that national courts have effective measures at their disposal to protect the confidentiality of this information.

5. Potential pitfalls of accountability mechanisms under the CSDDD

The effectiveness of the outlined private and public enforcement mechanisms in ensuring corporate accountability for environmental damage in a cross-border context is anticipated to be impeded in several respects. While the CSDDD largely aligns with the policy objectives of the EU institutions, several potential pitfalls warrant discussion. Nonetheless, these issues can still be addressed by Member States through their national implementing legislation.

The efficiency of public enforcement fundamentally depends on the resources allocated by Member States to their competent supervisory authorities. If financial and human resources are limited, these authorities will face difficulties in conducting the necessary investigations to obtain information. In typical scenarios where a company's chain of activities spans multiple countries and continents, such investigations become especially costly and organizationally challenging.[76] These practical concerns are particularly acute when inquiries into a company's transnational activities require actions by supervisory authorities outside the EU.[77]

The reliance on public enforcement as an accountability mechanism also raises questions about the willingness of supervisory authorities to investigate companies that are significant economic contributors to a Member State's economy. It is uncertain whether Member States will prioritize rigorous enforcement over maintaining their reputation as foreign-investor-friendly hosts, especially when dealing with multinational enterprises that are major taxpayers[78] or employers. This scenario raises the possibility of a "race to the bottom" among EU Member States, where each strives to implement the least stringent public enforcement of the CSDDD to attract both EU and non-EU businesses.

The inclusion of a civil liability regime within the CSDDD certainly contributes a potential pathway to corporate accountability for environmental damage in a cross-border context. However, regarding the conditions of liability, it is regrettable that early concerns about the strategic use of limited corporate liability within corporate groups[79] have not been comprehensively addressed in the final text. While fault-based and causation-dependent liability for damages occurring within

76 M.-T. Gustafsson, A. Schilling-Vacaflor, and A. Lenschow, "The politics of supply chain regulations: Towards foreign corporate accountability in the area of human rights and the environment?" [2023] 17/4 Regulation & Governance 853.

77 Bueno et al. (n. 68) 5.

78 Ibid. 4.

79 M. Pargendler, "The EU proposal on corporate sustainability due diligence and the mystique of complete corporate separateness," *ECGI* (7 April 2022) <https://www.ecgi.global/publications/blog/the-eu-proposal-on-corporate-sustainability-due-diligence-and-the-mystique-of> (accessed 7 March 2025); A. Pacces, "Supply chain liability in the corporate sustainability due diligence direc-

the operations of business partners is delineated, the scenario involving damage within a subsidiary's operations remains elusive. In this respect, the EU legislator has missed an opportunity to implement long-standing and well-substantiated academic proposals to waive the privilege of limited liability within corporate groups, which would ensure adequate deterrence and compensation for corporate torts occurring in GVCs. The CSDDD's concept of liability, based on legal separateness and autonomy, will necessitate proving a parent company's failure to comply with its due diligence obligations. This requirement could significantly hinder effective enforcement by imposing a higher burden of proof on claimants, thereby complicating the process of holding parent companies accountable for transgressions within their subsidiaries.[80]

The decision to withdraw from the safe harbor clauses initially proposed by the EU Commission deserves appreciation.[81] Given that due diligence obligations are framed as obligations of means rather than results (as articulated in Recital 19 CSDDD),[82] they inherently entail a risk of mere procedural compliance. Should the act of participating in stakeholder initiatives or employing third-party verifiers of contractual clauses serve as a method to circumvent liability, it would exacerbate the risk of prioritizing formal adherence over substantive compliance.

A significant deficiency in the CSDDD's regime for private enforcement arises from the potential interpretation excluding purely environmental damages from the scope of civil liability.[83] However, the concept of a "purely environmental claim" loses validity when we acknowledge that a safe, clean, healthy, and sustainable environment is increasingly recognized as a fundamental human right. Consequently, the rights and prohibitions listed in the Annex (Part II) should not only be interpreted as protecting the environment as such but also as mechanisms that may seek to protect the interests of individuals. Therefore, preemptively excluding liability for environmental damages related to Part II of the CSDDD's Annex is unwarranted. Nevertheless, there remains a substantial risk that national legislators and courts may adopt a restrictive interpretation to the contrary.[84]

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tive proposal," *ECGI* (12 April 2022) <https://www.ecgi.global/publications/blog/supply-chain-liability-in-the-corporate-sustainability-due-diligence-directive> (accessed 7 March 2025).

80 Pacces (n. 79); Pargendler (n. 79).

81 Differently, Schall (n. 19) 57 ("The Commission proposal of a safe harbour was blown off the table in the Trilogue without any feasible alternative to reduce the liability risk".).

82 See, however, J. Schmidt, who argues that because requirements laid down in the CSDDD are "extremely high, extensive and detailed", they are "therefore at least very close to obligations of results and will thus pose considerable challenges for companies – especially with regard to the many vague legal concepts". Schmidt (n. 19) 9.

83 European Parliament Research Service, "A universal right to a healthy environment" (December 2021) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf> (accessed 7 March 2025).

84 As J. Schmidt aptly notes: "The fact that national law continues to govern essential aspects (protected legal interests, causality, burden of proof) entails the danger that, in designing their national rules on civil liability, Member States will either turn civil liability into a 'toothless tiger' or, con-

Key challenges to efficient accountability assurance through private enforcement are connected to procedural aspects. Most importantly, litigating for civil liability is costly. When environmental damage occurs outside the EU, affected parties often lack the financial means to engage specialized legal representation and litigate their claims in EU courts. While the CSDDD aims to address this issue by granting standing rights to non-governmental entities, relying solely on civil society to enforce civil liability lacks a comprehensive systemic solution. It is more likely to serve as a mechanism for pursuing selected high-profile cases. Granting standing rights to commercially active organizations that are remunerated based on contingency fees has the potential to increase the number of cases, but it is left at the discretion of Member States. However, if it is not adequately regulated, commercial litigation could exacerbate other issues, particularly the risk of exploiting injured parties.

Another crucial procedural impediment to effectively enforcing civil liability under the CSDDD arises from the information asymmetry between the injured party and the company. Because due diligence requirements are framed as obligations of means, demonstrating a company's negligent or intentional breach of duty can be exceedingly challenging. Essentially, the claimant must substantiate circumstances to which only the company is privy. While the introduction of a discovery procedure is undoubtedly beneficial, the determination of how robust the claimant's motion must be and the extent of disclosure that is proportionate and necessary will hinge on the court's evaluation in each specific case. Naturally, such evaluations can vary significantly across Member States.

6. Conclusion

The adoption of the CSDDD represented a significant step in the EU's multifaceted efforts to promote sustainable business practices. However, the CSDDD must address critiques concerning its ethical implications, particularly regarding the extraterritorial application of laws and transmission of EU values, which some argue resembles modern imperialism.[85] Additionally, questions about potential discriminatory impacts on certain goods and the CSDDD's alignment with WTO principles may arise.[86] Moreover, concerns regarding subsidiarity, proportionality,

versely, impose conditions that are so strict that civil liability becomes a sword of Damocles for companies". Schmidt (n. 19) 23.

85 F. Rafi Khan and P. Lund-Thomsen, "CSR as imperialism: Towards a phenomenological approach to CSR in the developing world" [2011] 11/1 Journal of Change Management 73; P. Lund-Thomson and A. Lindgreen, "Corporate social responsibility in global value chains: Where are we now and where are we going?" [2014] 123/1 Journal of Business Ethics 18.

86 E. Partiti and S. van der Velde, "Curbing supply-chain human rights violations through trade and due diligence. Possible WTO concerns raised by the EU conflict minerals regulation" [2017] 51/6 Journal of World Trade; J. Bäumler, "Nachhaltiges Wirtschaften in globalen Lieferketten: Gesetzliche Sorgfaltspflichten von Unternehmen im Lichte des WTO-Rechts" [2020] 58/4 Archiv des Völkerrechts 469.

and economic implications in an increasingly difficult geopolitical landscape are pertinent and lead to the European Commission's "Omnibus proposal". While these contentious issues were not examined in this chapter, their acknowledgment is crucial as they are likely to shape the background narratives for further academic discussions on the specific normative instruments of the CSDDD, in Europe, and beyond.

Given that the substantive due diligence requirements heavily rely on established soft law recommendations, the CSDDD's significant contribution lies in their transformation into mandatory and enforceable legislation. This framework will apply not only to EU businesses but also to large foreign companies. The CSDDD's transnational impact could be constrained by its omission of provisions granting EU courts jurisdiction over companies headquartered outside the EU.[87] Importantly, the CSDDD's impact on establishing due diligence standards extends beyond companies directly covered by its provisions. Akin to the phenomenon of a "Brussels effect", the CSDDD's normative content is likely to "trickle down" to subsidiaries and business partners across GVCs.

The transformation of soft law into binding obligations under the CSDDD involves the implementation of enforcement regimes to ensure adherence. These regimes are designed to tackle the identified accountability gap within GVCs, which often isolates companies at the top of the chain from the negative impacts generated throughout their entire chain's operations. Thus, the enforcement mechanisms outlined in the CSDDD should be seen as measures of accountability aimed at internalizing the negative externalities occurring within GVCs.

Our analysis has uncovered deficiencies in both the public and private enforcement mechanisms outlined in the CSDDD, which compromise their overall effectiveness. Since a directive allows Member States leeway in implementing measures, some of these shortcomings may be mitigated through national legislation. The establishment of a regime for civil liability represents a pioneering integration of EU law into the varied private law frameworks of Member States, suggesting significant potential for divergence among them. Whether this will lead to regulatory arbitrage by companies subject to the CSDDD remains a topic for future scrutiny.

While the efficiency of public enforcement will depend on institutional commitment and the availability of public resources, the procedural challenges of private enforcement will likely be spearheaded by non-governmental organizations specializing in advocating for the rights of injured parties in cross-border contexts. It is commendable that the CSDDD has clarified the standing rights of such organizations. Given the improbability of individual injured parties successfully bringing claims before EU courts without professional assistance, Member States should consider permitting commercial litigation. However, regulations governing the relationship between injured parties and commercial litigators, especially concerning contingency fees, must be clearly delineated.

87 Weber (n. 64) 181.

5 Scarcity of resources in a cross-border context

A closer look at the EU environmental policy goal of prudent and rational utilisation of natural resources

Ilona Przybojewska

1. Introduction[1]

Although scarcity of resources constitutes a problem that has threatened mankind throughout the centuries with sinister consequences and has been repeatedly pointed out as an imminent danger by many researchers and philosophers, it receives less attention now than it used to receive in the past. As a partial explanation of this condition, a wide array of environmental problems humanity experiences today may be invoked. Whereas scarcity of resources was formerly the only – or at least by far the most significant – environmental problem, at present, man grapples with many other environmental challenges like, to name only a few, the widespread pollution of various elements of the environment, biodiversity loss, depletion of the ozone layer, acid rain, soil degradation and climate change. The enormous abundance and continuously increasing magnitude of environmental problems indicate that, since the Industrial Revolution, we have truly experienced the Anthropocene. This denomination of the era of man is given by scholarship[2] to describe the present epoch, which is characterised by the overwhelming and, alas, predominantly negative impact humans exert on the environment. The issue is not only about the magnitude of such an impact but also, first and foremost, about its kind. As pointed out in the legal doctrine, new environmental risks that appear and increase nowadays have a broad, often global scope and may entail damages affecting not only trade

1 Open Access and proofreading of this chapter were supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at the Jagiellonian University (Cracow, Poland).

2 *Vide*, in particular, W. Steffen et al., "The Anthropocene: From global change to planetary stewardship" [2011] 40 Ambio 739; J. Williams and P. J. Crutzen, "Perspectives on our planet in the Anthropocene" [2013] 10 Environmental 269; W. Steffen et al., "The Anthropocene: Are humans now overwhelming the great forces of nature?" [2007] 36 Ambio 614; J. Zalasiewicz et al., "The new world of the Anthropocene" [2010] 44 Environmental Science & Technology 2228; W. Steffen et al., "The Anthropocene: Conceptual and historical perspectives" [2011] 369 Philosophical Transactions of the Royal Society 842.

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but also, for instance, human health (which makes them hard to estimate in terms of pecuniary value) and are accompanied by high levels of uncertainty.[3]

To make matters worse, although EU environmental law is one of the spheres of legislation experiencing the fastest development,[4] the degree of its environmental effectiveness is definitely not proportional to the pace of its development.[5]

A specific risk related to the scarcity of resources as one of the environmental challenges facing the EU today is that it touches upon the issue of the sovereign power of individual states as regards natural resources. Even if, at present, such sovereignty is not emphasised to such an extent as it used to be, there are still provisions in EU primary law implying caution to be taken by the EU when approaching such matters. Therefore, when adopting measures aimed at rectifying that environmental problem, the EU may be more reluctant to act and directed by the will not to encroach upon the proper domain of the Member States and spur objections.

Apart from the aforementioned obstacles, the abundance and increasing intensity of environmental problems may themselves, quite naturally, lead to a situation where not all of them are taken care of with the same emphasis. We may notice this occurrence in the domain of environmental law and policy of the EU, where the question of scarcity of resources is clearly overshadowed by the climate neutrality agenda. However, that is an error that is taking its toll on the level of effectiveness of environmental regulations. What should be pointed out is that when the discourse about actions to be taken, changes to be made and costs to be borne focuses on other environmental problems and omits the problem of scarcity of resources, then we actually act not at the root cause but at the end of the pipeline. Therefore, we only cure the results of our actions and do not act to eliminate the causes. In such a scenario, negative ramifications to the environment may be alleviated – to a certain extent – but may not be eradicated since the root causes (embodied by excessive use of the environment) are still there.

The departing point is different when we consider how to rectify the problem of scarcity of resources, as it is quite obvious that the right answer revolves around the necessity to reduce the level of use of the environment. What is worth invoking in this context is the fact that devoting more attention to the problem of scarcity of

3 N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rul*es (Oxford University Press 2002) 152–153.

4 S. Kingston, "Surveying the state of EU environmental law: Much bark with little bite?" [2013] 4 International and Comparative Law Quarterly 965.

5 The implementation and effects of provisions of environmental law are often considered inadequate for the intended objectives. *Vide* for instance N. Gunningham, "Enforcing environmental regulation" [2011] 23 Journal of Environmental Law 169, 200–201; L. J. Kotzé, "Arguing global environmental constitutionalism" [2012] 1 Transnational Environmental Law 199, 201. On the other hand, as noticed by L. Krämer, assessments of the effectiveness of EU environmental law cannot be made in isolation from the fact that there is interdependence in this respect between the legal order of the EU and the legal orders of individual Member States. L. Krämer, "Thirty years of EC environmental law: Perspectives and prospectives" [2002] Yearbook of European Environmental Law 155, 180.

resources and taking actions aimed at counteracting this problem (i.e., reducing the level of use of the environment, an assumption inherent in the circular economy concept) would mean a paradigm shift that would be advantageous also in terms of combating challenges, as a set of solutions acting at the stage when they originate. This would provide a chance to nip issues like pollution, biodiversity loss, depletion of the ozone layer, acid rain, soil degradation and climate change in the bud rather than only trying to act when they are in full bloom, which inevitably entails a reduced degree of effectiveness of such efforts.

It is, therefore, a worthwhile task to examine the approach presented by the EU towards the problem of scarcity of resources on the basis of chosen elements of primary and secondary law of the EU. The research hypothesis to be verified is that the EU is currently experiencing a paradigm shift in terms of the general view of environmental protection so that more attention is devoted to challenges (such as scarcity of resources), goals (such as prudent and rational utilisation of natural resources), principles (such as the principle of sustainable development and the principle that environmental damage should as a priority be rectified at source) and instruments (such as intended regulations on raw materials) being conducive to remedying the root cause (i.e., excessive use of the environment), as early as possible.

In order to achieve the intended research goals, the following issues shall be raised and analysed in turn within the framework of this chapter. The problem of scarcity of resources shall be elaborated in the ensuing section, where the factual circumstances related to the nature and magnitude of this challenge will be described and assessed. Thereafter, the cross-border context of the problem of scarcity of resources shall be considered, putting emphasis on the current approach of the EU and its Member States to the question of whether that environmental challenge should be resolved at the level of the EU or rather by each Member State on its own, which affects the scope and content of the EU law aimed at resolving the problem in question. The fourth section shall discuss chosen aspects of EU primary law related to the problem of scarcity of resources (i.e., the goal of prudent and rational utilisation of natural resources, the principle of sustainable development and the source principle), as well as their role in remedying the scarcity of resources problem. Next, aspects of EU secondary law (including soft law in the form of communications issued by the European Commission, but also legal initiatives related to raw materials) shall be pondered and primary and secondary law of the EU analysed in order to verify the research hypothesis. The last section shall include general conclusions as regards the range of problems raised herein.

2. The problem of scarcity of resources

As noticed by economists, the scale of the drain on Earth's resources exerted by economies is staggering. Each year, approximately 50 billion tonnes of raw materials are spent on one use or another, with up to 80 tonnes per capita use in the case of developed countries and a worldwide average of 8 tonnes per capita (i.e., over

200 kg each day).[6] As mentioned by the European Commission in its communication *Roadmap to a Resource Efficient Europe*, "sources of minerals, metals and energy, as well as stocks of fish, timber, water, fertile soils, clean air, biomass, biodiversity are all under pressure, as is the stability of the climate system. Whilst demand for food, feed and fibre may increase by 70% by 2050, 60% of the world's major ecosystems that help produce these resources have already been degraded or are used unsustainably. If we carry on using resources at the current rate, by 2050 we will need, on aggregate, the equivalent of more than two planets to sustain us".[7] Despite the improvements as regards recycling and energy efficiency,[8] demand for resources keeps rising, triggered by a growing global population, intensified urbanisation and widespread and constantly deepening consumerism.[9] As some researchers rightfully point out, the accelerated exploitation of natural resources takes its toll in terms of decreased resource quality and increased spending on energy and waste generation, and excessive use of the environment is conducive to the aggravation of other environmental problems.[10] Such a state of affairs has been deemed a paradox since "globally the depletion of natural resources (and associated carbon emissions) continues to accelerate while paradoxically mountains of waste (and associated pollution) are still piling up".[11]

Such a picture suggests that scarcity of resources is an inevitable consequence. The EU seems particularly prone to this threat as the continent is not rich in deposits of many crucial resources. For instance, as regards energy resources, the EU has never been equipped adequately when comparing supply and demand. In the Green Paper "Towards a European Energy Security Strategy",[12] the European Commission defined the EU as a whole as the largest importer of energy resources (over 80% of crude oil and over 60% of natural gas used in the EU is imported)

6 H. Schandl and N. Eisenmenger, "Regional patterns in global resource extraction" [2006] 10/4 Journal of Industrial Ecology 133 and World Resources Institute, *The Weight of Nations* (WRI 2000) *passim*, after: G. Bridge, "Material worlds: Natural resources, resource geography and the material economy" [2009] 3/3 Geography Compass 1217, 1224.

7 European Commission, *Roadmap to a Resource Efficient Europe* (European Commission 2011) 2.

8 F. Sioshansi, *Energy Efficiency: Towards the End of Demand Growth* (Academic Press 2013) *passim*, after: K. Hobson and N. Lynch, "Diversifying and de-growing the circular economy: Radical social transformation in a resource-scarce world" [2016] 82 Futures 15, 16.

9 B. Lee et al., *Resources Futures: Executive Summary and Recommendations* (Chatham House 2013) *passim*; T. Prior et al., "Resource depletion, peak minerals and the implications for sustainable resource management" [2012] 22/3 Global Environmental Change 577, after: Hobson and Lynch (n. 7).

10 Bridge (n. 5) 1224. As he wrote: "Year-on-year increases in the quantity of materials drawn from the earth are all the more remarkable given that generally they have been secured from progressively lower quality resource stocks. This secular decline in resource quality is a function of both the physical properties of many resources and the fact that humans have normally exploited the best quality resources first. Producing successive units of copper, oil or fish, therefore, has required the application of more energy, and the disposal of larger amounts of waste".

11 A. P. M. Velenturf and P. Purnell, "Principles for a sustainable circular economy" [2021] 27 Sustainable Production and Consumption 1437.

12 *Towards a European Strategy for the Security of Energy Supply*, Green Paper, COM(2000)0769.

and called it "Gulliver in chains", noting the problem of a growing dependence on external supplies. Currently, it is estimated that the EU has less than 4% of the world's proven natural gas reserves.[13] According to researchers, natural gas production in Europe peaked in 1966,[14] followed by the so-called plateau phase, and the current trend indicates a further decline. When the eastern direction of obtaining fossil fuels closes, the EU will be exposed to a great risk of scarcity of energy resources, particularly since renewable energy sources are not available to the extent that they can fully replace fossil fuels.

But the risk in question is, of course, not limited to energy resources. As mentioned by the European Commission in the communication "The Raw Materials Initiative – Meeting Our Critical Needs for Growth and Jobs in Europe", "the EU has many raw material deposits. However, their exploration and extraction are facing increased competition for different land uses and a highly regulated environment, as well as technological limitations in access to mineral deposits. On the other hand, the EU is highly dependent on imports of strategically important raw materials which are increasingly affected by market distortions. In the case of high-tech metals, this dependence can even be considered critical in view of their economic value and high supply risks".[15] The aforementioned import dependency concerns metallic minerals and "high-tech" metals such as cobalt, platinum, rare earths elements and titanium in particular.[16]

However, in fact what we are dealing with is not the depletion of natural resources in general (the scarcity of resources *stricto sensu*), but rather the more and more difficult, costly and detrimental to the environment exploitation of existing deposits as compared to the exploitation of the more accessible ones. This is illustrated by the increasing energy returned on energy invested (EROEI) indicators. In the past, dozens or even hundreds of oil barrels could be obtained and processed with an energy equivalent of one oil barrel invested; now, investing the amount of energy corresponding to one oil barrel allows only a few to be obtained in exchange. Despite that, "the long-term trend has been for the price of most resources to fall. Despite the prodigious rate at which resources like copper and iron have been extracted from the earth – and despite declining resource quality – most materials have become less rather than more scarce over time, as measured by their price in the market place, while falling prices are the primary evidence in support of a 'cornucopian' position on the scarcity of resources, because – if one takes market price as the measure of scarcity – they indicate natural resources are not running out but becoming more available".[17] This is due to technological

13 N. Cornwall, "International trade in gas and prospects for UK gas supplies," in C. Robins (ed.), *Regulating Utilities and Promoting Competition. Lessons for the Future* (Edward Elgar 2006) 46.

14 A. Checchi et al., "Long-term energy security risks for Europe: A sector-specific approach" [2009] 309 CEPS Working Document 14–15.

15 European Commission, *The Raw Materials Initiative: Meeting Our Critical Needs for Growth and Jobs in Europe* (European Commission 2008) 2.

16 *Ibidem* 3.

17 Bridge (n. 5) 1228.

change and the extension of economies of scale in the extraction, exploitation and production of resources,[18] which entail significant savings. However, if there is no price signal to curb the use of the environment (and natural resources), then it may result in further increases in overall resource consumption. This dependence is called the Jevons paradox,[19] showing – with the example that introducing more efficient steam boilers in the second half of the 18th century has increased, not reduced, the use of coal – "the limits of strategies of technological efficiency for dealing with environmental issues that are a function of the scale of material mobilisation".[20] That is not the end of the story, though, since in practice, discoveries of new deposits or possibilities to extract former ones expand known reserves faster than consumption and so decrease the perceived scarcity of resources.[21] The picture created by the level of prices, apart from concealing the truth about speeding consumption, is also flawed in another aspect, namely: "Falling resource prices also reflect the way wastes and pollution associated with extracting, processing and consuming resources have been organized in such a way that some of the costs they impose do not factor into resource prices. Environmental cost-shifting – the legal, economic and geographical means by which many of the environmental 'costs' of producing resources have been re-allocated across space and time – is one of the primary ways in which prices for raw materials have been able to fall".[22] The conclusion presented is that price is an inadequate measure of society's relationship to resources: "[R]esources may be more abundant than ever before and ingenuity may have trumped depletion, but the price of doing so has been the creation of a series of environmental crises".[23]

Nevertheless, even if we may sometimes call into question the scarcity of resources on a global scale, there is no doubt that natural resources are depleted when we consider concrete places, regions, countries or even continents – especially when that scarcity of resources triggers competition for scarce resources.[24] Moreover, it seems that the environment is no longer capable of effectively dealing with the detrimental consequences of the linear economy, based on the continuously intensifying exploitation of natural resources and increasing production and waste. This vicious circle is the result of a linear economy, which, according to scholarship, "is inherently extractive as sources, and 'sinks' are assumed to be limitless and feedback limited outside of the short term and the monetised elements.

18 *Ibidem* 1229.

19 More about the Jevons paradox in the context of the EU Green Deal may be found in: E. Trincado et al., "The European Union Green Deal: Clean energy wellbeing opportunities and the risk of the Jevons Paradox" [2021] 14 Energies 4148.

20 Bridge (n. 5) 1229–1230.

21 *Ibidem* 1230.

22 *Ibidem* 1231.

23 *Ibidem* 1232.

24 C. Roux et al., "On the psychology of scarcity: When reminders of resource scarcity promote selfish (and generous) behavior" [2015] 42/4 Journal of Consumer Research 615, 617.

It also implies that the idea of growth is, in a narrative sense, unlimited".[25] But the growth dependent on resource extraction is limited without a doubt. Even if it is not hampered (at least not yet, despite pessimistic forecasts)[26] by the actual or threatening depletion of resources or rising prices of resources, it should be curbed for the sake of sequential negative ramifications for the environment, constituting elements of the wide array of environmental problems we face today: pollution, biodiversity loss, depletion of the ozone layer, acid rain, soil degradation, etc.

The European Commission's communication setting forth fundamental assumptions of the European Green Deal[27] contains a reference to the "growing global extraction of resources" as one of the primary sources of environmental problems (such as biodiversity loss, pollution of various components of the environment and, last but not least, emissions of greenhouse gases). It is described that "half of total greenhouse gas emissions and more than 90% of biodiversity loss and water stress come from resource extraction and processing".[28] By tightening up resource extraction and use, we may kill two (or actually more) birds with one stone because the aforementioned environmental problems may, at least to a great extent, be attributed to excessive resource extraction and use. Moreover, as the issue of fossil fuels from Russia shows with ruthless clarity, it is not always wise to solve the problem of lack of or limited deposits of certain resources in the territory of the EU by resorting to increasing import dependence. In addition, preventing and counteracting the problem of scarcity of resources may bring positive effects not only in terms of the environment but also for the economy; sooner or later, the problem in question will result in supply-demand imbalances and the rising prices of resources and commodities and services provided with the use of such resources. Therefore, combating the issue is a task worth taking from not only an environmental perspective but also an economic point of view.

3. Running in circles? Cross-border context of resources protection in the past, present and future times

As regards the management of natural resources, as well as dealing with the problem of scarcity of resources, the EU seems to be at a crossroads. Two possible paths appear, creating competitive answers to the question of whether it is the EU or its Member States that should take action. Traditionally, the protection of natural resources against excessive use that could lead to scarcity and/or negative environmental effects used to be in the domain of Member States. In the legal context, that

25 K. Webster, "A circular Economy is about the economy" [2021] 1 Circular Economy and Sustainability 115, 120.

26 See, for example, T. Malthus, *An Essay on the Principle of Population* (Printed for J. Johnson 1798) or the landmark report of the Club of Rome: D. H. Meadows et al., *The Limits to Growth. A Report for the Club of Rome's Project on the Predicament of Mankind* (Club of Rome 1972).

27 European Commission, *The European Green Deal* (European Commission 2019).

28 European Commission, *A New Circular Economy Action Plan: For a Cleaner and More Competitive Europe* (European Commission 2020) 2.

may be a reminiscence of the principle of sovereign power over the resources of a given state, formulated in the resolution of the United Nations General Assembly No. A / RES / 1803 (XVII) of December 14, 1962,[29] and repeated numerous times in other UN resolutions, and, in terms of newer legal elements, in Article 192 (2) c TFEU,[30] which reads that measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply have to be adopted unanimously within the scope of the EU's environmental policy. Such an exception remains a dead letter of the law, though, because the EU has never adopted any act on the basis of Article 192 (2) c TFEU, in spite of the fact that many measures have indeed encroached on the choice between energy sources and the general structure of the energy supply of Member States. Nevertheless, the approach that Member States have the power to decide on the issues used to be highlighted in the past. This corresponds to the aforementioned principle of the sovereign disposal of natural resources. At present, that rule has the status of a customary norm of international law.[31] Permanent sovereignty over natural resources means that resources are "under the sole jurisdiction of the State concerned. Consequently, for instance, if the State does not exploit them, no other State can".[32] Furthermore, apart from the principle of permanent sovereignty over natural resources and provision suggesting the application of a special legislative procedure with unanimous voting in the Council in cases of adopting "measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply", other arguments may be invoked in favour of the EU's inaction: namely, the principles of subsidiarity and proportionality. According to Article 5 (3) TEU,[33] "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level". In turn, Article 5 (4) TEU states that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties" – which defines the principle of proportionality. All the aforementioned factors may be at least a partial reason why

29 General Assembly Resolution 1803 (XVII) of 14 December 1962 – *Permanent sovereignty over natural resources*.

30 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, pp. 47–390.

31 "The notion of permanent sovereignty over natural resources, although originally asserted in non-binding international instruments [UN resolutions], has gained strong currency through the evolution of state practice (and opinio iuris) and is now generally accepted to have emerged to the status of customary international law". See R. Pereira, "The exploration and exploitation of energy resources in international law," in K. E. Makuch and R. Pereira (eds.), *Environmental and Energy Law* (Wiley-Blackwell 2012) 222.

32 N. Sánchez Castillo, "Differentiating between sovereignty over exclusive and shared resources in the light of future discussions on the law of transboundary aquifers" [2015] 24/1 Review of European Community & International Environmental Law 4, 9.

33 Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13–390.

actions of the EU aimed at the problem of scarcity of resources have been modest up to now when juxtaposed with other spheres of environmental policy, like the climate agenda.

However, it should be noted that those concerns have, to some extent, now lost their weight and significance. As regards the principle of permanent sovereignty over natural resources, it may be pointed out that it applies only to the protection of resources existing in a given state and is not actually aimed at the problem of scarcity of resources. The same may be said about the provision of Article 192 (2) c TFEU. Moreover, in the current circumstances, when excessive import dependencies often turn out not to be the right solution in terms of security, principles of subsidiarity and proportionality would justify the action rather than the inaction of the EU, bearing in mind its bargaining power. Last but not least, making efforts to combat scarcity of resources at the EU level could be very useful in terms of grappling with other environmental problems that are fruits of the excessive use of the environment. It seems that such arguments have recently prevailed because, apart from instruments related to the circular economy agenda (which comprise, *inter alia*, solutions that may rectify the problem of scarcity of resources but include many other divergent aspects), the European Commission has proposed a regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials.[34] This framework has a few overarching goals in the form of benchmarks, such as the Union extraction capacity needed to produce at least 10% of the Union's annual consumption of strategic raw materials to the extent that the Union's reserves allow for this; the Union processing capacity, including for all intermediate processing steps, being able to produce at least 40% of the Union's annual consumption of strategic raw materials; the Union recycling capacity, including for all intermediate recycling steps, being able to produce at least 15% of the Union's annual consumption of strategic raw materials; and, last but not least, diversification of the Union's imports of strategic raw materials with a view to ensuring that by 2030, the Union's annual consumption of each strategic raw material at any relevant stage of processing can rely on imports from several third countries, none of which provide more than 65% of the Union's annual consumption.

4. Signs of reflection about the problem of scarcity of resources in EU primary law

Other elements triggering activity related to rectification of the problem of scarcity of resources at the EU level are included in provisions creating determinants of the environmental policy of the EU. This section will analyse them in turn.

34 Proposal of 16 March 2023 for a regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, COM(2023)160 final.

4.1 The goal of prudent and rational utilisation of natural resources

EU environmental policy is, according to Article 191 (1) TFEU, related to the pursuit of a few major objectives. The provision in question invokes:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources; and
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

While the first two goals are of a highly general nature and do not evoke controversies, the latter two seem to be more specific and are encumbered with a certain degree of ambiguity, related in particular to the modes and degrees to which they should be translated into specific legal instruments. Although – contrary to the goal of promoting measures at the international level to deal with regional or worldwide environmental problems, particularly combating climate change, which has appeared only recently in the Lisbon Treaty – the objective of prudent and rational utilisation of natural resources has been anchored in the EU environmental policy from its very beginning,[35] it has not attracted much attention either in terms of EU acquis or in researchers' analyses.

Before discussing the goal of prudent and rational utilisation of natural resources, we should first make an attempt to discover its meaning. The aforementioned notion is not legally defined, which could have been of use. Prudent and rational utilisation of natural resources is tantamount to their protection in order to avoid both scarcity despite an existing demand and negative ramifications to the environment related to the use of natural resources. These two dimensions follow from the logic of the EU environmental policy. Also, when we focus on the scope of resources, we see that the goal pertains to a great variety of natural resources, including energy resources and raw materials in general (the use of which is strictly related to the issue of economic efficiency – the relation between input and output).

The objective in question determines one of the general directions that EU environmental policy should follow. Although it is not possible to perceive it as a binding norm in the sense that a legal reproach could possibly be made about the inconsistency of a given instrument with that goal, it is not deprived of value. Prudent and rational utilisation of natural resources should always guide the European legislator shaping provisions of environmental law.[36] The inclusion of that objective among

35 Single European Act, OJ L 169, 29 June 1987, pp. 1–28.

36 As A. Epiney points out: "Thus, the Treaty contains limitations that define a 'direction' for the potential content of EU environmental law. In other policy fields, there are sometimes also articles which refer to the means and the contents of EU secondary law, especially as there are now a number of integration principles which have been formulated for quite a few areas of EU policies; however, in general, EU actions and competences are defined by means of the objectives to be realized, such kind of objectives being formulated as environmental policy is concerned in Article 11 and

only a few general goals of EU environmental policy underlines its significance and clearly directs attention to the problem of scarcity of resources. The weight of the objective is demonstrated by social studies, which show that issues considered and regulated by EU environmental policy in the eyes of respondents are combined into one fundamental problem concerning unsustainable resource use.[37] This would mean that the prudent and rational utilisation of resources, postulated as one of the objectives mentioned by Article 191 (1) TFEU, is nothing short of a horizontal (cross-section) value of the EU's environmental policy.

However, assessing the theoretical weight of the objective of prudent and rational utilisation of resources is one thing; specifying how to implement it is another. Speaking more precisely, there is a question about measurement. How can we measure prudent and rational utilisation of resources? Should legal thresholds based on some scientific data be imposed? When we look at the percentage levels set forth by the regulation concerning critical raw materials[38] (at least 10% of the EU's annual consumption for extraction; at least 40% of the EU's annual consumption for processing; at least 25% of the EU's annual consumption for recycling; no more than 65% of the EU's annual consumption from a single third country), we see that they are pretty much arbitrary. No scientific reasoning for such benchmarks is visible in the regulation. However, this is not the case when it comes to other spheres of activity of the EU.

Notably, the common fisheries policy is based on setting fishing quotas that should take available and current scientific data into account. In particular, Recital 7 of the regulation on the common fisheries policy[39] mentions "adapting exploitation rates so as to ensure that, within a reasonable time-frame, the exploitation of marine biological resources restores and maintains populations of harvested stocks above levels that can produce the maximum sustainable yield", whereas maximum sustainable yield is defined in Article 1(7) as "the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process". Article 2(2) states that the common fisheries policy has to "apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested

Article 191(1) TFEU". See A. Epiney, "EU environmental law: Sources, instruments and enforcement. Reflections on major developments over the last 20 years" [2013] 20/3 Maastricht Journal of European and Comparative Law 403, 407.

37 A. Fischer et al., "Climate change? No, wise resource use is the issue: Social representations of energy, climate change and the future" [2012] 22/3 Environmental Policy and Governance 161, 173.

38 Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ L, 2024/1252, 3 May 2024, as amended.

39 Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28 December 2013, pp. 22–61, as amended.

species above levels which can produce the maximum sustainable yield". Scientific data must also be taken into account in multiannual plans setting forth fishing quotas. Article 9(1) states that such plans "shall be adopted as a priority, based on scientific, technical and economic advice, and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2)". If there is insufficient data to allow targets related to the maximum sustainable yield to be determined, "the multiannual plans shall provide for measures based on the precautionary approach, ensuring at least a comparable degree of conservation of the relevant stocks" (Article 9(2)).

Regulations establishing those multiannual plans also refer to scientific data and opinions. Article 3(1) of one such legal act[40] states that the plan "shall contribute to the achievement of the objectives of the common fisheries policy listed in Article 2 of Regulation (EU) No 1380/2013, in particular by applying the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce MSY". According to Article 2(2), "'range of FMSY' means a range of values provided in the best available scientific advice, in particular from ICES or a similar independent scientific body recognised at Union or international level, where all levels of fishing mortality within that range result in maximum sustainable yield (MSY) in the long term with a given fishing pattern and under current average environmental conditions without significantly affecting the reproduction process for the stock in question. It is derived to deliver no more than a 5% reduction in long-term yield compared to the MSY. It is capped so that the probability of the stock falling below the limit spawning stock biomass reference point (Blim) is no more than 5%".

We may note numerous references to scientific data and scientific opinions in legal acts concerning common fisheries policy. Nevertheless, as the jurisprudence of the European Court of Justice (ECJ) demonstrates, scientific considerations are not deemed the only or even the prevailing concern when it comes to determining fishing quotas. In *Friends of the Irish Environment CLG*,[41] the ECJ faced the question of whether the objective referred to in Article 2(2) of the regulation on common fisheries policy (namely, ensuring "that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield") is an overarching binding legal imperative that has to be observed by the authorities when setting the quotas, or whether it is only one of a number of objectives that must be borne in

40 Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008, OJ L 83, 25 March 2019, pp. 1–17, as amended.

41 Judgment of the European Court of Justice of 11 January 2024 in Case C-330/22, *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine, Ireland, Attorney General*, EU:C:2024:19.

mind along with a great deal of scientific and economic matters. The ECJ pointed out that setting zero quotas for some stocks "was likely to lead to the premature closure of the fisheries relating to the target stocks with which those stocks were associated and, consequently, to affect the economic viability of the fishing fleets concerned and the standard of living of the persons dependent on those activities" (point 83 of the judgement). The ECJ thus drew attention to purely economic concerns as a counterbalance to scientific considerations. The final conclusion was that by setting respective quotas above zero, the Council did not manifestly exceed the limits of its discretion (point 92 of the judgement).

This example demonstrates that although they are significant, scientific data and opinions do not constitute a sole factor that must be considered. The same applies in the domain of environmental policy; by virtue of Article 191 (3) TFEU, when EU environmental policy is shaped, a wide array of factors has to be considered, including, of course, available scientific and technical data, but also environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, as well as the economic and social development of the Union as a whole and the balanced development of its regions. Thus, it seems that prudent and rational utilisation of resources may play the role of a balancing tool. Such a conclusion is confirmed by the function of that goal within the framework of the principle of sustainable development.

4.2 The principle of sustainable development as the trigger of protection of natural resources

The EU legislator repeatedly touches upon the issue of sustainable development. For example, Article 3 (3) TEU mentions action for the sustainable development of Europe, which is based, among other things, on balanced economic growth and a high level of protection and improvement of the natural environment. Conversely, Article 11 TFEU states that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". However, the notion of sustainable development does not have a uniform definition. Some scholars recognise sustainable development as a meta-principle, operating on the basis of other norms and legal principles, which derives its legal force from its influence on the interpretation of those norms and principles.[42]

Nevertheless, researchers have made some fundamental assumptions on the basis of EU law and jurisprudence that may give us a basic view of the core of the concept of sustainable development. Four elements of sustainable development can be distinguished in the legal doctrine:

42 V. Lowe, "Sustainable development and unsustainable arguments," in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2001) 31, 34, after: P. Merkouris, "Development and best available techniques in international and European law," in K. E. Makuch and R. Pereira (eds.), *Environmental and Energy Law* (Wiley-Blackwell 2012) 42.

1) the principle of intergenerational equity (emphasising the need to preserve environmental resources for the benefit of future generations);
2) the principle of sustainable use (the degree of use of these resources is to be rational and appropriate);
3) the principle of intra-generational equity or fair use of resources (when a given country exploits resources, the needs of other countries must be taken into account); and
4) the principle of integration (emphasising the need to ensure that environmental considerations are included in development plans, programmes and projects and that development needs are considered when achieving environmental goals).[43]

Sustainable development (sometimes perceived as a journey instead of a limited goal)[44] construed in such a manner is inevitably pivoted on the assumption of the proper use of resources. Within the framework of the concept of sustainable development, it is postulated that the use of renewable resources should not exceed the degree of their regeneration, while non-renewable resources should be used in such a way that they are also available to future generations. Thus, it can be seen that as many as three of the aforementioned sustainable development components can be directly related to issues close to the exploitation of natural resources. The conclusion is obvious: the protection of natural resources and ensuring prudent and rational utilisation of natural resources is a crucial objective of the EU's environmental policy, and the success of the concept of sustainable development is dependent on the achievement of that objective. It should have its rightful place in the EU's environmental policy.

4.3 The principle that environmental damage should as a priority be rectified at source

The principle that environmental damage should as a priority be rectified at source (or the proximity principle, or the source principle) is one of a few guiding rules for EU environmental policy. These rules affect not only the shaping and enforcement of the EU's environmental policy but also, through the action of the integration principle, influence all other spheres of activity of the European legislator. Yet the rectification of environmental damages at source seems to attract less attention than it clearly deserves. While the triad of preventive, precautionary and polluter-pays principles is frequently invoked by the European Commission, the ECJ and researchers, the principle of rectification of environmental damage at source is not widely discussed. In EU secondary law, it is limited to the principle of proximity

43 P. Sands, *Principles of International Environmental Law* (Cambridge University Press 2003) 253.

44 K. Collins, "The Constitution: A charter for sustainable development in Europe?," in M. Pallemaerts and A. Azmanova (eds.), *The European Union and Sustainable Development. Internal and External Dimensions* (ASP Editions 2006) 104.

implying "that waste should generally be managed as near as possible to its place of production, mainly because transporting waste has a significant environmental impact".[45] In practice, that principle is applied most often to the sphere of waste management.[46] Scholars call into question the possibility of its application to all aspects of the environmental law of the EU since some areas of this domain are based on quality standards that cannot be perceived as guaranteeing rectification at source.[47] Proper waste management is a significant element of the circular economy, and the idea of "rectification at source" itself complies with the logic of that trend. However, the place of the source principle (among the four general principles of EU environmental policy mentioned in the primary law) clearly suggests a higher rank and wider scope of application than a rule in the Waste Framework Directive.[48]

Rectification of environmental damages at source seems to have two dimensions, the latter of which is usually omitted by researchers: the principle induces liquidation of the damage firstly as soon as possible, preferentially at the initial stage of a production process and not after its end, and secondly before the pollution spreads. This is supported by the mention of the source principle appearing in the first environmental action plan,[49] stating that "the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects".

However, the source principle may currently be only a theoretical reinforcement of the protection of natural resources since its practical scope of application is limited to waste management. Moreover, the entire policy of the EU under the umbrella of sustainable development has not, up to now, put a significant emphasis on prevention and rectification at source in terms of the life cycle of resources, materials and products. General patterns of production and consumption have remained untouched, although the concept of sustainable development does indeed underline the need for adequate exploitation and use of natural resources.

5. Signs of reflection about the problem of scarcity of resources in EU secondary law

The problem of scarcity of resources has gained recognition in the secondary law of the EU relatively recently, predominantly as an indispensable element of the agenda of the circular economy that is intended to replace the linear economy. In

45 "EEA Glossary" <http://glossary.eea.europa.eu/EEAGlossary> accessed 1 April 2023.

46 D. Langlet and S. Mahmoudi, *EU Environmental Law and Policy* (Oxford University Press 2016) 54.

47 L. Krämer, *EU Environmental Law* (Sweet & Maxwell 2012) *passim*.

48 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22 November 2008, pp. 3–30, as amended.

49 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 20 December 1973, pp. 1–53.

the communication on the European Green Deal, it is invoked that the EU industry, although in the process of improving its environmental and climate responsibility, "remains too 'linear', and dependent on a throughput of new materials extracted, traded and processed into goods, and finally disposed of as waste or emissions".[50] The intended transition "will entail a shift from linear production to a circular economy".[51]

The circular economy may comprise many related ideas,[52] which results in a great abundance of definitions and components of the circular economy. The circular economy is, for instance, defined as "an economic system that represents a change of paradigm in the way that human society is interrelated with nature and aims to prevent the depletion of resources, close energy and materials loops, and facilitate sustainable development through its implementation at the micro (enterprises and consumers), meso (economic agents integrated in symbiosis) and macro (city, regions and governments) levels. Attaining this circular model requires cyclical and regenerative environmental innovations in the way society legislates, produces and consumes".[53] Three common theoretical strategies of the circular economy have been identified: "minimizing inputs of raw materials and outputs of waste, keeping resource value as long as possible within the system, and reintegrating products into the system when they reach the end-of-life".[54] Other scholars mention the following principal components that should be taken into account when defining the circular economy: "1) the recirculation of resources and energy, the minimization of resources demand, and the recovery of value from waste, 2) a multilevel approach, 3) its importance as a path to achieve sustainable development, and 4) its close relationship with the way society innovates".[55]

Such doctrinal concepts have a common core with the concept of the circular economy that may be found in the documents issued within the framework of the European Green Deal. When we compare them, it appears that the circular economy concept aims at reversing the linear pattern of "take, make, use, dispose" the EU industry is currently based on and turning it into "take (less), make (less), use (less), reuse, recycle, dispose (in an environmentally responsible manner)". The communication by the European Commission on the European Green Deal seems to contain the simplest definition of the circular economy, referring to the type of economy where "the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimised".[56]

50 European Commission (n. 26) 7.

51 European Commission, *A New Industrial Strategy For Europe* (European Commission 2020) 1.

52 Webster (n. 24) 124.

53 V. Prieto-Sandoval et al., "Towards a consensus on the circular economy" [2018] 179 Journal of Cleaner Production 605, 610.

54 B. Suárez-Eiroa et al., "Operational principles of circular economy for sustainable development: Linking theory and practice" [2019] 214 Journal of Cleaner Production 952, 953.

55 Prieto-Sandoval et al. (n. 52) 613.

56 European Commission, *Closing the Loop: An EU Action Plan for the Circular Economy* (European Commission 2015) 2.

Although it may be said without a doubt that the concept of the circular economy includes the protection of natural resources, it also takes into account the problem of their scarcity, and it is an indispensable element of the aforementioned concept – it is only one of a wide array of components created by the circular economy concept.

The circular economy indeed entails solutions aimed at rectifying the problem of scarcity of resources, but it cannot be exhausted by their prudent and rational utilisation. In fact, measures to implement the circular economy model have to be aimed at both the production and consumption phases and addressed to all actors: producers, consumers and public powers. At the same time, as the very idea of an economy as a circle suggests, it is not viable to functionally separate elements serving to protect natural resources from other elements. Division on the basis of sequence of links in the chain is misleading because even if we discuss, for instance, the recovery of value from waste – and thus actions taking place at the last link of the chain – it is clear that they contribute to a reduction in demand for natural resources and, consequently, to a reduction in their exploitation. Therefore, although the conduct with raw materials deserves special attention in the context of the problem of scarcity of resources, it would be an error to restrict the scope of considerations in this chapter to regulations on raw materials.

The next section of this contribution will attempt to shed some light on the circular economy agenda heralded by a few communications by the European Commission, which have been followed by legislative proposals enshrining the logic of the circular economy, so are definitely worth pondering (even though they constitute merely soft law themselves). A preliminary remark should be made here – the circular economy concept is not entirely new. As noted in the literature, "the idea of materials cycles has been around since the dawn of industrialization".[57] In the EU, the concept of circular economy has also resonated in communications of the European Commission issued in particular over the last fifteen years,[58] giving some researchers a reason to assess the circular economy agenda as old wine in new bottles, especially since the concept has been lacking precision and consistency.[59]

57 P. Desrochers, "Industrial symbiosis: The case for market coordination" [2004] 12 Journal of Cleaner Production 1099, after: J. Korhonen et al., "Circular economy as an essentially contested concept" [2018] 175 Journal of Cleaner Production 544.

58 However, some researchers underline that "the EU has adopted policy measures influenced by 'closed-loop' thinking in several waves since the 1970s" – see O. Fitch-Roy et al., "Going around in circles? Conceptual recycling, patching and policy layering in the EU circular economy package" [2020] 29/6 Environmental Politics 983, 984. On various stages of the EU's related actions and agenda, see the same work, pp. 988–994.

59 *Ibidem* 985.

5.1 Communications by the European Commission concerning the concept of the circular economy

Among several communications by the European Commission touching on the notion of the circular economy, three put particular focus on and develop the concept in question: *Roadmap to a Resource Efficient Europe* (2011),[60] *Closing the Loop: An EU Action Plan for the Circular Economy* (2015)[61] and *A New Circular Economy Action Plan: For a Cleaner and More Competitive Europe* (2020).[62]

The first communication does not cover the circularity concept; instead, it focuses on resource efficiency. As mentioned in the communication, resource-efficient development "allows the economy to create more with less, delivering greater value with less input, using resources in a sustainable way and minimising their impacts on the environment".[63] On the basis of such a formulation, it seems that resource-efficient development is, when compared to later communications by the European Commission trying to determine the notion of the circular economy, actually an equivalent of the latter. The communication sets up a wide web of milestones concerning miscellaneous areas (particular natural resources such as minerals and metals, water, air, land and soils, marine resources, but also specific sectors of the economy that are responsible for the greatest share of environmental impacts – namely food, buildings and mobility; measures contributing to more sustainable waste management and boosting research and innovation are also announced), generally focused on improving resource efficiency. To measure this progress, two levels of indicators are provisionally set forth: the lead indicator of resource productivity[64] "to measure the principal objective of this Roadmap, of improving economic performance while reducing pressure on natural resources" and "a series of complementary indicators on key natural resources such as water, land, materials and carbon, that will take account of the EU's global consumption of these resources".[65] The roadmap was quite concrete and followed by some legislative changes in the aforementioned spheres.

Closing the Loop: An EU Action Plan for the Circular Economy (2015), issued a few years later, contains numerous references to the circular economy model. It includes actions such as "comprehensive commitments on ecodesign, the development of strategic approaches on plastics and chemicals, a major initiative to

60 European Commission (n. 6).

61 European Commission (n. 55).

62 European Commission (n. 27).

63 European Commission (n. 6) 4.

64 Resource productivity is calculated as the ratio between GDP and an indicator of material consumption, generally DMC (Domestic Material Consumption); the latter refers to the annual quantity of raw materials extracted from the domestic territory, plus material imports minus exports – without upstream hidden flows, therefore not including the resource use related to the outsourcing of material intensive sectors to third countries – see more in T. Domenech and B. Bahn-Walkowiak, "Transition towards a resource efficient circular economy in Europe: Policy lessons from the EU and the Member States" [2019] 155 Ecological Economics 7, 7–8.

65 *Ibidem* 4.

fund innovative projects under the umbrella of the EU's Horizon 2020 research programme, and targeted action in areas such as plastics, food waste, construction, critical raw materials, industrial and mining waste, consumption and public procurement. Other key legislative proposals on fertilisers and water reuse will follow. Finally, horizontal enabling measures in areas such as innovation and investment are included to stimulate the transition to a circular economy. The proposed actions support the circular economy in each step of the value chain – from production to consumption, repair and remanufacturing, waste management, and secondary raw materials that are fed back into the economy".[66] When juxtaposed with the previous proposal from 2014 (which was withdrawn), it "has a stronger focus on eco-innovation and aims to cover the whole process from design to disposal and recovery/recycling. The new package includes among other key measures the review of the eco-design directive to include measures to support the reparability, durability and recyclability in product requirements, testing programmes under Horizon 2020 to tackle planned obsolescence, requirements for dismantling, reusing and recycling of electric products, actions to promote green procurement, quality standards for secondary products, action towards including individual responsibility under Extended Producer Responsibility schemes and targeted measures for a number of priority streams such as plastics, food, critical raw materials, building and demolition, biomass and bio-products".[67] Surprisingly, the 2015 circular economy package is deemed less progressive than the 2011 roadmap since it "does not directly continue the Roadmap's milestone approach in the areas beyond the waste issues. While the roadmap is a comprehensive visioning exercise that tackles all key areas, the circular economy package is limited in its scope and weak in terms of instrumentation (no hard-binding objectives apart from those on waste; measures very much rely on adaptation of existing instruments, e.g. eco design, rather than other economic instruments)".[68] This is true, but beyond this softer method of regulation, the 2015 package intensified efforts in areas the 2011 roadmap already affected.

The same may be said about *A New Circular Economy Action Plan: For a Cleaner and More Competitive Europe* (2020). In the initial roadmap of key policies and measures projected by the European Commission within the framework of the European Green Deal, one of the significant aims is referred to as "mobilising industry for a clean and circular economy". The path leading to the achievement of that aim encompasses, in particular, tasks mentioned in *A New Circular Economy Action Plan*. The communication heralds various measures aimed at enshrining the concept of the circular economy in the production and consumption phases and addressed to all actors: producers, consumers and public powers.[69] In particu-

66 European Commission (n. 55) 2–3.

67 Domenech and Bahn-Walkowiak (n. 63) 12.

68 *Ibidem* 17–18.

69 For a detailed analysis of such measures intended under the umbrella of *A New Circular Economy Action Plan*, see I. Przybojewska, "The concept of the circular economy in the EU Green Deal," in E. Radecka and F. Nawrot (eds.), *Green Deal or Green Disorder? Selected Issues* (Dom Organizatora TNOiK 2021) 253–264, jointly with the literature invoked therein.

lar, the European Commission announced amendments intended to lead to the design and manufacture of reusable, durable and repairable products. Apart from aims related to products in general, a special focus was expressed with regard to resource-intensive sectors such as textiles, construction, electronics and plastics. Thus, the initiatives launched under the umbrella of *A New Circular Economy Action Plan* constitute further steps on the road to the circular economy while also contributing to the rectification of the problem of scarcity of resources.

5.2 Actual and intended legal acts dealing with critical raw materials and raw materials of high importance

The direction that seems to be shaped in the EU's activity quite independently from the circular economy agenda comprises actions aimed at raw materials. As indicated in the literature, "while the traditional realm of resource efficiency and environmental policies has been the demand and output side, raw material policies rather focus on the supply side and connect with the international dimension of resource extraction and consumption".[70] Up to now, the EU "has developed targeted measures that tackle investment and innovation in extractive industries in the EU, bilateral and multilateral trade agreements with third countries and anti-dumping instruments".[71] Moreover, the publication of lists of critical raw materials accompanying communications issued by the European Commission indicated the pursuit of such a direction. However, the actual impact of those lists, intended to draw the attention of market participants to the fact that some raw materials are not available or hardly available in the territory of the EU, has been rather limited. The same may be said about the Raw Materials Initiative (2008), which is "based on three pillars: ensuring a level playing field in access to resources in third countries; fostering sustainable supply of raw materials from European sources, and boosting resource efficiency and promoting recycling".[72] The second angle of the strategy remained, to a broad extent, exclusively on paper.

However, the situation has changed since the EU adopted a regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials.[73] The regulation starts by drawing a picture of risks related to access to necessary raw materials. Recital (1) indicates that "access to raw materials is essential for the Union economy and the functioning of the internal market. There is a set of non-energy, non-agricultural raw materials that are considered to be critical due to their high economic importance and their exposure to high supply risk, often

70 Domenech and Bahn-Walkowiak (n. 63) 13.

71 *Ibidem* 14.

72 European Commission, *Tackling the Challenges in Commodity Markets and on Raw Materials* (European Commission 2011) 11.

73 Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ L, 2024/1252, 3 May 2024, as amended.

caused by a high concentration of supply from a few third countries. Given the key role of many such critical raw materials in realising the green and digital transitions and in light of their use for defence and aerospace applications demand is likely to increase exponentially in the coming decades. At the same time, the risk of supply disruptions is increasing against the background of rising geopolitical tensions and resource competition. Furthermore, if not managed properly, increased demand for critical raw materials could lead to negative environmental and social impacts". The regulation follows four paths, consisting of measures to decrease the Union's growing supply risks by strengthening Union capacities along all stages of the strategic raw materials value chain, including extraction, processing and recycling, towards benchmarks defined for each strategic raw material; to increase the diversification of external supplies of strategic raw materials; to reinforce the Union's ability to monitor and mitigate existing and future supply risks; and to increase the circularity and sustainability of the critical raw materials consumed in the Union. Beyond another list of critical materials (selected on the basis of data concerning their economic importance and supply risk), the regulation is accompanied by a list of strategic materials, subject to regular reviews and updates. According to Recital 6, strategic materials are materials of "high strategic importance for the functioning of the internal market, taking into account their use in strategic technologies underpinning the green and digital transitions or for defence or aerospace applications, that are characterised by a potentially significant gap between global supply and projected demand, and for which an increase in production is relatively difficult, for instance due to long lead-times for new projects increasing supply capacity". Strategic raw materials are encompassed by the list of critical raw materials.

What is actually a novelty is the setting of benchmarks expressing capacities to be achieved by the EU in terms of self-sufficiency regarding strategic materials. According to Article 5 (1), the benchmarks are as follows: at least 10% of the EU's annual consumption for extraction; at least 40% of the EU's annual consumption for processing; at least 25% of the EU's annual consumption for recycling; no more than 65% of the EU's annual consumption from a single third country. That marks a change in perception of the question of raw materials in the EU's agenda, demonstrating the growing importance of the range of problems, but first and foremost, it marks a paradigm shift consisting in at least a partial return to autarky. It is a clear sign of a change in thinking, introducing a hint that beyond building trade partnerships with countries with resources of strategic materials, the EU should explore and use its own possibilities regarding all stages of the value chain, such as extraction, processing and recycling, complemented by the limitation of excessive import reliance on a single third state.

This logic is shared by specific measures included in the regulation. *Inter alia*, it introduces the information duty of Member States as regards their strategic stocks, the fundament upon which the European Commission should develop "a draft benchmark for what should be considered to be a safe level of Union strategic stocks, taking into account the total annual Union consumption of the concerned strategic raw materials" (Recital 46). Member States may be given non-binding opinions providing incentives for building up their strategic stocks. The regulation

provides for streamlining permitting procedures for critical raw materials projects in the EU, with additional support consisting in access to finance and shorter permitting timeframes for selected strategic projects. Also, Member States are bound to develop national programmes for exploring geological resources. The regulation also creates provisions for monitoring and stress-testing the raw materials supply chain; stress testing "shall consist of an assessment of the vulnerability of the Union's raw materials supply chain of the relevant strategic raw material to supply disruptions by estimating the impact of different scenarios that may cause such supply disruptions and their potential effects" (Article 20 (3)). The regulation contains several provisions affecting the imports of raw materials in order to diversify them, in particular by creating "a system to aggregate the demand of interested undertakings consuming strategic raw materials established in the Union and to seek offers from suppliers to match that aggregated demand. This shall cover both unprocessed and processed strategic raw materials" (Article 25 (1)). Overall, the regulation has great potential to be a significant step forward in combating the problem of scarcity of resources (or the problem of inefficient resource handling).

6. Conclusion

It may come as a surprise, but among the legal instruments created, adopted and implemented in the scope of the EU's environmental policy, we could hardly find a measure expressly invoking the goal of prudent and rational utilisation of natural resources. It corresponds to the neglect of the problem of scarcity of resources; although there are measures that, in an ancillary manner, counteract that issue, for a long time, it has not occupied the leading position in the environmental discourse of the EU. This seems to have been changing only recently due to the occurrence of interrelated circumstances that have ruthlessly demonstrated imminent risks related to high reliance on natural resources that are not abundant in the territory of the EU. The case of Russia and the EU's high import dependence on natural gas and oil has shown that the EU's energy security is at stake here, but that example may be extrapolated to other kinds of natural resources crucial to the EU's industry and economy. The first category of risks relates to the EU's economic interests and the smooth functioning of its industry, economy and society, which are exposed to danger due to the insufficiently addressed problem of scarcity of resources. The second angle is not so striking but, in terms of the range of problems raised in this contribution, no less important. The problem of the industry's huge and excessive reliance on the extraction of resources, beyond contributing to scarcity of resources, evokes or exacerbates many environmental problems like pollution, biodiversity loss, depletion of the ozone layer, acid rain, soil degradation, etc. Whereas the problem of scarcity of resources is an *ex ante* environmental problem, the latter are *ex post* environmental problems. This means that actions aimed at solving the problem of scarcity of resources (by protecting them, in particular by reducing demand for raw materials in the EU's economy) may at least alleviate all issues belonging to the *ex post* category.

Such an overwhelming impact suggests that the path is worth following, although true implementation of the notion of circular economy and achievement of the goal of prudent and rational utilisation of natural resources is not a piece of cake. The path in question is full of traps and obstacles. There are also various barriers creating a negative loop and preventing the development of the circular economy, acting jointly and independently. The barriers are technological, economic, institutional and cultural,[74] but there are particularly mischievous snares that may actually make the problem of scarcity of resources more acute than it used to be. A waste-resource paradox is worth pointing out here, meaning that "some efforts may lead to stabilization or increases in waste amounts, when considering the further commodification of these. The latter can be described as a rebound effect: when the environmental benefits created by an innovation are mitigated or outweighed by secondary effects".[75] The source of this paradox is a claim (in perfect conformity with the concept of the circular economy) that "a certain material at any time could be considered a waste or a resource.[76] Consequently, business models based on using waste will create a demand, such that current regime incumbents are not incentivized to reduce or minimize their waste production by waste management costs".[77] The waste-resource paradox belongs to the sizeable family of rebound effects, the risk of which has been noticed by the European Commission,[78] but it may raise doubts about whether they are (or could be) fully accounted for.

Finally, it is worth noting that various kinds of techniques related to the circular economy may lead to different consequences for the environment. The cake is not worth the candle if, for example, the reduction of material consumption is accompanied by an increase in energy consumption[79] because that would mean that we would be going in circles – and that is certainly not what the circular economy means. The paradigm shift mentioned at the beginning of this chapter is waiting on the doorstep, but time will tell whether it will be abandoned when it comes to implementation, especially in the context of the very broad scope of the EU's current environmental policy.

74 For a detailed description of such barriers *vide* J. Grafström and S. Aasma, "Breaking circular economy barriers" [2021] 292 Journal of Cleaner Production 126002, as well as J. Kirchherr et al., "Barriers to the circular economy: Evidence from the European Union (EU)" [2018] 150 Ecological Economics 264.

75 R. Greer et al., "The Waste-Resource Paradox: Practical dilemmas and societal implications in the transition to a circular economy" [2021] 303 Journal of Cleaner Production 126831.

76 *Ibidem*.

77 *Ibidem*.

78 For instance, in the form of a mention in the communication *Roadmap to a Resource Efficient Europe* (2011).

79 Greer et al. (n. 74).

6 Hazardous installations outside the EU

The Espoo Convention's Implementation Committee's proceedings concerning Lithuania and Belarus

Leda Žilinskienė, Rasa Ragulskytė-Markovienė, Greta Česnaitytė

1. Introduction

It is incontrovertible that energy production and consumption cause significant transboundary harm and are a major contributor to greenhouse gas (GHG) emissions.[1] The "energy as environmental threat" narrative is associated with concerns where large ultrahazardous energy activities are executed.[2]

Concerns about the effects of such activities were heightened by the Chernobyl and Fukushima nuclear incidents. The storage of spent nuclear power fuel is environmentally problematic, and in the event of a malfunction, nuclear power plants (NPPs) can create an environmental catastrophe that can change the ecosystem for a prolonged period of time.[3] Protection of the environment was not a major concern for the original drafters of the international nuclear law conventions, but this has changed over time.[4] Environmental sustainability as a purpose came along the way, starting in the 1970s, and its regulation is less close to the core of the transaction than security and safety considerations.[5]

As the nature of nuclear energy-related activities involves a potentially wide scope of severe impacts, a great deal of public concern has been raised by this issue, not to mention the potential impact on national interest, in view of which the sound and transparent transboundary environmental impact assessment (EIA) procedure is of great importance. EIAs have emerged as an essential element of a preventive approach to environmental protection and sustainable development.[6]

1 C. Redgwell, "Energy," in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (2nd ed., Oxford Academic 2021) 849.
2 Ibid.
3 F. G. Sourgens and L. Sempertegui, *Principles of International Energy Transition Law* (Oxford Academic 2023) 41.
4 S. Emmerechts, "Environmental law and nuclear law: A growing symbiosis" [2008] 82 Nuclear Law Bulletin 92.
5 J. E. Viñuales, *The International Law of Energy* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2022) 306.
6 O. Elias and M. Wong, "Environmental impact assessment," in M. Fitzmaurice, M. Brus, P. Merkouris, and A. Rydberg (eds.), *Research Handbook on International Environmental Law* (Edward Elgar 2021) 188.

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EIA is a component of a planning process through which environmental considerations are integrated into governmental decision-making.

The Convention on Environmental Impact Assessment in a Transboundary Context[7] (otherwise referred to as the Espoo Convention) is a key instrument in terms of establishing rules for domestic action and international cooperation in preventing, reducing, and controlling significant adverse transboundary environmental impacts.

The construction of Belarus's first NPP is taking place in Ostrovets, near the border with Lithuania. In line with the Espoo Convention, a transboundary EIA for the construction of this NPP was initiated to assess this project's potential environmental impact. The implementation of the transboundary EIA has led to a degree of misunderstanding and disagreement between these neighbouring countries, with the issue being escalated to the Espoo Convention's Implementation Committee.[8] An analysis of the proceedings between Lithuania and Belarus has revealed the peculiarities and limitations of the practical implementation of an EIA.

In addition to the Lithuanian and Belarusian proceedings, the Implementation Committee has opened more non-compliance proceedings concerning EIAs for NPP projects. These proceedings concern the planned construction of the Hinkley Point C NPP in England[9] and the construction of a nuclear power station in Metsamor, Armenia.[10]

The activation of transboundary EIAs in connection with nuclear-related activities has gained attention in terms of scientific examination.[11] While the challenges of cross-border negotiations regarding the Ostrovets NPP have been examined,[12] this article focuses more on a detailed analysis of the Implementation Committee's compliance review procedures.

7 1989 UNTS 309.

8 UNECE, "EIA/IC/S/4 Belarus" <https://unece.org/environmental-policy/environmental-assessment/eiaics4-belarus>.

9 UNECE, "EIA/IC/CI/5 United Kingdom" <https://unece.org/environment-policy/environmental-assessment/eiaicci5-united-kingdom>.

10 UNECE, "EIA/IC/S/3 Armenia" <https://unece.org/environment-policy/environmental-assessment/eiaics3-armenia>.

11 L.-A. Duvic-Paoli and P. Lueger, "A democratic nuclear energy transition? Public participation in nuclear activities" [2022] 31/2 *Review of European, Comparative & International Environmental Law* 199; J. Handrlica, "The unbearable lightness of nuclear jurisprudence" [2021] 39/3 *Journal of Energy & Natural Resources Law* 375; I. Cenevska, "Environmental protection meets security of electricity supply: Case C-411/17, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil Des Ministres, Court of Justice of the European Union" [2021] 10/2 *Transnational Environmental Law* 365; Anon., "The application of the Espoo Convention on environmental impact assessment in a transboundary context to nuclear energy-related activities" [2016] 97 *Nuclear Law Bulletin* 63; S. Emmerechts and P. Bourdon, "Environmental impact assessments and long-term operation of nuclear power reactors: Increasing importance of environmental protection in the European Union?" [2020] 2 *Nuclear Law Bulletin* 7.

12 A. K. Abashidze, V. M. Filippov and A. M. Solntsev, "Belarusian Ostrovets nuclear power plant: The challenge of cross-border negotiations to balance economic development and environmental protection" [2020] 13 Journal of World Energy Law and Business 157.

This chapter aims to examine and analyse the proceedings between Lithuania and Belarus, No. EIA/IC/S/4 under the Espoo Convention, regarding the construction of an NPP in Ostrovets. Furthermore, the chapter aims to analyse the legal framework behind the transboundary EIA under the Espoo Convention, analyse the main aspects of the EIA procedure and the proceedings between Lithuania and Belarus (No. EIA/IC/S/4) under the Espoo Convention, and evaluate the proceedings between Lithuania and Belarus (No. EIA/IC/S/4) under the Espoo Convention.

2. The legal framework behind the Espoo Convention and the transboundary EIA

The Espoo Convention, which was adopted in Espoo, Finland, in 1991, entered into force on 10 September 1997.[13] It was signed by twenty-nine countries and the EU itself. Currently, there are forty-five parties to the Espoo Convention.[14] The Espoo Convention is a key instrument in terms of establishing rules for domestic action and international cooperation in preventing, reducing, and controlling significant adverse transboundary environmental impacts in connection with the proposed activities listed in Appendix 1 and which are likely to result in a significant adverse transboundary impact. Appendix 1 provides various activities for which an EIA must be carried out if the proposed activity may cause a significant adverse transboundary impact, including activities that may be related to the construction of nuclear power stations and other nuclear reactors.

As one of several international environmental law instruments, the Espoo Convention serves to regulate nuclear activities. The Implementation Committee notes that, "for certain activities, and in particular nuclear energy-related activities, while the probability of a major accident, accident beyond design basis or disaster occurring is very low, the likelihood of a significant adverse transboundary impact of such an accident can be very high and the consequences severe".[15] The current methodological guidelines were adopted by taking these factors into account, with the result that those guidelines were formed into the *Good Practice Recommendations on the Application of the Convention for Nuclear Energy-related Activities*[16] and the *Guidance for the Applicability of the Convention to the Lifetime Extension of Nuclear Power Plants.*[17]

13 UNECE, "More on the Convention" <https://unece.org/more-convention>.

14 "United Nations Treaty Collection" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&clang=_en>.

15 United Nations, "Opinions of the Implementation Committee (2001–2020)" (2020) para 47 <https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20opinions%20to%202020_MOP-8_2020.pdf>.

16 UNECE, "Good practice recommendations on the application of the convention to nuclear energy-related activities" <https://unece.org/fileadmin/DAM/env/documents/2017/EIA/MOP7/28_04_2017_ece_mp.eia_2017_10_e.pdf>.

17 UNECE, "Guidance on the applicability of the convention to the lifetime extension of nuclear power plants" <https://unece.org/sites/default/files/2022-10/Guidance_LTE_NPP_2106311_E_WEB-Light.pdf>.

The Espoo Convention is a procedural instrument which, subject to certain conditions being met, requires the party of origin to notify as early as possible any other party which it considers may be an affected party for the purposes of ensuring adequate and effective consultations (Art. 3 (1)). The Espoo Convention sets out obligations for the parties in order that the environmental impact of certain activities can be assessed at an early stage of planning. The general obligation of the parties is to notify and consult each other on all major projects that are under consideration and are likely to have a significant adverse environmental impact across boundaries. A transboundary EIA should be carried out before the decision is taken in regard to authorising or undertaking these activities.

The Espoo Convention establishes an inquiry procedure and contains a mechanism that makes it possible to review compliance and settle disputes. The Meeting of the Parties to the Convention (MOP) served to establish an Implementation Committee in 2001 that would handle the review of compliance by the parties with their obligations under the convention, with a view to assisting them to fully meet their commitments.[18] The Implementation Committee has the dual task of developing the reporting system and considering individual cases of non-compliance. If the committee provisionally finds that a party is not in compliance, it should then consider and agree upon possible recommendations to the MOP. Compliance concerns both legal implementation and practical application.

Paragraph 5 (a) of the Appendix to Decision III/2,[19] covering structure, functions, and operating rules, provides that a submission may be brought before the Implementation Committee by one or more parties to the convention where any of those parties have concerns about another party's compliance with its obligations under that instrument. The Implementation Committee held that this right, however, should not be abused. The Implementation Committee expects that all concerned parties act in good faith and provide substantial proof of their concerns.[20] The compliance mechanisms within the Espoo Convention support the idea that the party that triggers the convention's protections must provide supporting information without having to prove involvement or interest (this differs from any other mechanisms which require proof of an interest that may impose an effect, a detached involvement, or a direct involvement).[21]

As a party to the Espoo Convention, the EU, of which Lithuania is a member, has a well-established regulatory regime for EIA. The main instrument is the EIA Directive 2011/92, as amended by Directive 2014/52/EU.[22] Generally,

18 United Nations (n. 15) para 1.

19 UNECE, "Decision III/2 review of compliance," ECE/MP.EIA/6 <https://unece.org/DAM/env/documents/2004/eia/decision.III.2.e.pdf>.

20 United Nations (n. 15) para 9.

21 N. Goeteyn and F. Maes, "Compliance mechanisms in multilateral environmental agreements: An effective way to improve compliance?" [2011] 10/4 *Chinese Journal of International Law* 791, 818.

22 Directive 2011/92/EU of the European Parliament and Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, Official Journal of the European Union, L 26 (2012), pp. 1–21; and Directive 2014/52/EU of the European Parliament

the EIA Directive is applied to intra-EU relations if a project only has an impact within EU territory. Article 7 of the EIA Directive includes special provisions that should be observed or implemented when a project to be implemented within one Member State is likely to have a significant effect on the environment of another Member State. If it has broader transboundary impacts, compliance with the Espoo Convention is required in addition to Article 7 of the EIA Directive.[23] It is also worth noting that the European Court of Justice has provided an interpretation of the matter: "Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions of that directive, without prejudice, however, to Article 7 of that directive on the obligations incumbent on Member States in whose territory a project that is likely to have significant effects on the environment in another Member State is intended to be carried out".[24] Given that the NPP in question is being constructed in Belarus, which is not a member of the EU, the EIA Directive is not applicable in this case.

EIA transboundary procedures are carried out in accordance with national legislation. The national legal and regulatory frameworks, including those that cover NPPs, vary between parties. Most national legislation that connects parties to the convention already fully covers those nuclear energy-related activities and installations listed in paragraphs 2 (b) and 3 of the revised Appendix 1 contained in the second amendment to the Espoo Convention.[25] The stages of the EIA transboundary procedure should comply with the Espoo Convention regardless of whether the party of origin is an EU or non-EU country.

3. The main aspects of the EIA procedure and proceedings between Lithuania and Belarus (No. EIA/IC/S/4) under the Espoo Convention

All activities falling within the scope of the Espoo Convention require the country of origin to consult with the potentially affected countries (usually neighbouring countries, but not necessarily). Lithuania and Belarus are neighbouring countries and parties to the Espoo Convention (Lithuania has been a party to the Espoo

and Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, Official Journal of the European Union, L 124 (2014), pp. 1–18.

23 European Commission, *Guidance on the Application of the Environmental Impact Assessment Procedure for Large-Scale Transboundary Projects* (European Commission 2013) 3.

24 Case C–411/17, *Inter-Environnement Wallonnie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v Council of Ministers* [2019], ECLI:EU:C:2019:622, para 96.

25 United Nations, *Good Practice Recommendations on the Application of the Convention to Nuclear Energy-Related Activities: Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)* (UN 2018) 11.

Convention since 11 January 2001,[26] and Belarus since 10 November 2005).[27] One of the activities listed in Appendix I of the Espoo Convention includes nuclear power stations and other nuclear reactors. Hence, Belarus, in accordance with the procedure enshrined in the Espoo Convention, was required to consult potentially affected countries, including Lithuania, about its plans to construct an NPP.

The planning and construction of the Belarusian NPP in Ostrovets, located only twenty kilometres from the Lithuanian border and fifty kilometres from the Lithuanian capital of Vilnius – the country's largest city with about six hundred thousand inhabitants – caused a conflict between Lithuania and Belarus for many reasons. These reasons include, but are not limited to, procedural non-compliance in the transboundary EIA carried out by Belarus and Lithuania's efforts to ensure the safety of its population and environment, which could be severely affected in the event of an incident at the Belarusian NPP. Lithuania even passed a law[28] declaring the Belarusian NPP unsafe, stating that it poses a threat to national security, the environment, and public health.

According to the Espoo Convention, the EIA procedure begins with the formal and mandatory notification of the potentially affected countries by the country of origin. If the potentially affected countries decide to participate in the EIA procedure, the country of origin must provide all the relevant documentation,[29] including alternatives to the planned activity. After this, the public in potentially affected countries must be informed and given the opportunity to submit comments. Public participation is a crucial step and may involve multiple rounds. Public participation is followed by consultations between the party of origin and potentially affected countries, which may include alternatives to the proposed activity. Only after these consultations can the country of origin make a final decision regarding the activity.

All these steps imply that the negotiation process regarding the construction itself (whether it can take place or not), as well as the exact location and other aspects, is lengthy and must involve all potentially affected countries (if they wish to be included after formal notification by the country of origin), along with the public and other stakeholders. However, Belarus decided that the NPP would be built at the specific location (in Ostrovets) even before notification according to Espoo Convention provisions and consultations with the potentially affected countries. At that time, Belarus had not submitted the EIA documentation to Lithuania (only on 24 August 2009 did Belarus notify Lithuania in accordance with the Espoo Convention provisions about the proposed NPP activity). On 19 March 2009, Belarus informed Lithuania that on 20 December 2008, a special state commission had decided that the Ostrovets site had been prioritised over two others.

26 United Nations, "Convention on Environmental Impact Assessment in a Transboundary Context" <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&clang=_en>.

27 Ibid.

28 The Law of the Republic of Lithuania of 15 June 2017 No XIII-451.

29 Appendix II of the Espoo Convention provided the list of the documentation that has to be included.

During the 2010–2011 period, Belarus attempted to conduct a transboundary EIA for the NPP project; however, the ongoing process continued to raise fundamental questions for Lithuania. As a result, on 16 June 2011, the Lithuanian government made a submission to the Implementation Committee, expressing concerns about Belarus's compliance with its obligations under the Espoo Convention regarding the planned NPP at Ostrovets.[30]

Lithuania's submission asserted that Belarus had violated key provisions of the Espoo Convention and failed to fulfil its obligations.[31] The submission was based on the following main arguments: (i) concerns that the Ostrovets NPP site was selected before the EIA procedure was conducted, revealing a lack of clarity in Belarus's legal regulations of the planning system in Belarus and its harmonisation with the Espoo Convention;[32] (ii) improper implementation of the procedure for providing public information and conducting bilateral consultations, such as holding a public hearing without providing an appropriate translation into Lithuanian, the poor quality of the English version of the EIA report, the unexpected amendment of that same EIA report immediately prior to the meeting, and a lack of access to the full EIA documentation;[33] (iii) the notification not including the nature of any other possible decisions;[34] (iv) the preliminary EIA report lacking essential information, and the EIA documentation failing to provide a reasonable assessment of alternatives to the proposed activities;[35] (v) no access to the full EIA documentation;[36] (vi) the inappropriate adoption of the final decision, which resulted of a lack of transparency; and (vii) the start of preparatory construction work despite the incomplete EIA procedure.[37]

In the submission, Lithuania requested that the Implementation Committee not only take action by insisting that the Belarussian side fully comply with the requirements of the Espoo Convention and restart the EIA process but also that Belarus be asked to suspend all construction activities until the EIA process is fully completed. Furthermore, Lithuania requested that the decision be revised and that the NPP be relocated from the proposed Ostrovets site.

Three months after the submission, on 15 September 2011, Belarus approved the location of the NPP in Ostrovets through a presidential decree. This decision

30 UNECE, "Submission by Lithuania having concerns about the compliance of the Republic of Belarus with its obligations under Espoo Convention with respect to the construction of the nuclear power plant in the Republic of Belarus" (7 June 2011) <https://unece.org/DAM/env/documents/2019/ece/Restart/Belarus/Submission_by_Lithuania_received_June_2011_ref._5314.pdf>.

31 These obligations relate to legal, administrative, and other measures that are required for the establishment of an EIA procedure (Article 2 (2)); public participation (Article 2 (6)); the contents of a notification (Article 3 (2) (a–c)); the preparation of EIA documentation (Article 4 (1–2)); consultations on the basis of the EIA documentation (Article 5); and the final decision (Article 6 (1–2)).

32 Non-compliance with Article 2 (2) of the Espoo Convention.

33 Non-compliance with Article 2 (6) of the Espoo Convention.

34 Non-compliance with Article 3 (2) (a-c) of the Espoo Convention.

35 Non-compliance with Article 4 (1) and 4 (2) of the Espoo Convention.

36 Non-compliance with Article 5 of the Espoo Convention.

37 Non-compliance with Article 6 (1) and 6 (2) of the Espoo Convention.

was not communicated to Lithuania, did not include the reasons and considerations on which it was based, and did not take due account of Lithuania's comments. However, during the proceedings, this presidential decree was understood as the first final decision, understood according to Article 6 of the Espoo Convention. The second final decision, pertaining to permitting the construction at that specific location, was adopted on 2 November 2013.

The Implementation Committee took note of Lithuania's submission and considered the matter at its twenty-third to twenty-sixth sessions (10 January 2012[38]19 December 2012).[39] Before finalising its findings and recommendations, the Implementation Committee sent its draft to the parties concerned and invited them to submit their comments or representations. At its twenty-seventh session (12–14 March 2013), the Implementation Committee examined the main issues and adopted the following findings (presented according to specific aspects):[40]

Firstly, **EIA legislation in Belarus**. Following the recent legislative changes in Belarus, the country has improved its legal framework in terms of the EIA, and the Implementation Committee had no grounds for finding any instance of non-compliance with Article 2 (2) of the Espoo Convention.[41]

Secondly, **notification**. During the Implementation Committee's hearing, the two parties themselves agreed that requirements concerning the notification had been fulfilled by means of the notification of 24 August 2009. Therefore, the Implementation Committee found that Belarus was not currently failing to comply with Article 3 (2) (a–c).[42]

Thirdly, **public participation**. According to Belarus, it organised a public hearing in Ostrovets on 9 October 2009, which included the participation of some Lithuanian citizens. Lithuania did not receive an official invitation to participate in this public hearing. On 2 March 2010, a public hearing was organised in Vilnius, as proposed by Lithuania. After this event, in its letter to Belarus of 7 May 2010, Lithuania complained that the Belarusian representatives were "not sufficiently well-prepared for the public hearing regarding the EIA report"; in addition, they had failed to provide a "quality" translation into the Lithuanian language and had requested another public hearing in Lithuania based on the "amended" or "supplemented" EIA report which had been posted on the Belarusian website between 2–4 March 2010 but which had not been made available for the public hearing of 2 March 2010. The Implementation Committee held the opinion that "the concerned Parties should share the responsibility for ensuring that the opportunity provided to the public of the affected Party was equivalent to that provided to the

38 UNECE, "Report of the Implementation Committee on its twenty-third session" (10 January 2012) <https://unece.org/DAM/env/documents/2011/eia/ic/ece.mp.eia.ic.2011.8.e.pdf>.

39 UNECE, "Report of the Implementation Committee on its twenty-sixth session" (19 December 2012) <https://unece.org/DAM/env/documents/2012/eia/ic/ece.mp.eia.ic.2012.6.e.pdf>.

40 UNECE, "Report of the Implementation Committee on its twenty-seventh session" (12–14 March 2013) <https://unece.org/DAM/env/documents/2013/eia/ic/ece.mp.eia.ic.2013.2e.pdf>.

41 Ibid, para 60.

42 Ibid, para 61.

public of the Party of origin, including access to at least relevant parts of the documentation in a language the public could understand". On the above grounds, the Implementation Committee found that Belarus had failed to comply with Article 2 (6) but was in compliance with its obligations under Article 3 (8) of the Espoo Convention.

Fourthly, **EIA documentation**. Lithuania considered the preliminary EIA report, which had been provided by Belarus on 15 September 2009, to be only an EIA programme or a scoping document. Furthermore, as far as Lithuania was concerned, the bilateral meeting of 18 June 2010 was "to be considered as a preliminary discussion of the EIA process" (letter dated 9 July 2010). Following modifications to the preliminary report, Belarus provided "a final EIA report" on 11 February 2011. Lithuania, however, claimed (in its letter of 18 March 2011 and in its submission of 7 June 2011) that that report could not be considered "final" because it failed to fully answer Lithuania's previous comments and requests for information. By not informing Lithuania of the availability of the final EIA report and by not submitting it to Lithuania for comments, including those which could be made by members of the public, the Implementation Committee found that Belarus had failed to comply with the requirement of Article 4 (2) to furnish the affected party with the final EIA documentation for the purposes of public participation.

Fifthly, **consultations**. During the transboundary EIA procedure, the two parties consulted each other through an exchange of letters and on the occasion of two bilateral meetings. The Implementation Committee found that the lack of response to several specific questions put to Lithuania by Belarus, as well as delays in answering, rendered such consultations purely formal. On these grounds, the Implementation Committee found that Belarus was not yet fully compliant with the requirements of Article 5.

Sixthly, **alternative sites**. The Espoo Convention requires the EIA documentation to include possible alternatives to the proposed activity. The choice of location for the proposed activity should result from the EIA procedure and should not be determined before the final EIA report is issued unless the choice of location was determined as part of an appropriate strategic environmental assessment (SEA) that includes a transboundary procedure. Ostrovets was chosen as the priority site at the beginning of the process in 2008, prior to the provision of any notification and prior to the completion of the final EIA (the response by Belarus to the Implementation Committee dated 15 June 2012, para 17). The Aarhus Convention[43] Compliance Committee, in its findings and recommendations on communication concerning the Ostrovets project, referred to 2007 in this regard (ECE/MP.PP/C.1/2011/6/Add 1, para 75). The Compliance Committee also stated that "it appears that the option of not building the NPP at this specific location was no longer open for discussion" and "once the decision to permit the proposed activity in the Ostrovets area had already been taken without public involvement, making provision for such an

43 Aarhus Convention, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 UNTS 2161, p. 447.

involvement at a subsequent stage could under no circumstances be considered as meeting the requirement under article 6, paragraph 4 to provide for early public participation when all options are open" (ECE/MP.PP/C.1/2011/6/Add 1, para 76). The Implementation Committee found that Belarus was not yet in full compliance with Article 5 (a) in relation to Appendix 2 (b), (c), and (d).

Seventhly, **final decision**.[44] The Implementation Committee noted that, for the Ostrovets NPP, Belarus split the final decision into two parts: the decision on the location and the decision on permitting construction at that specific location. The Implementation Committee found that when parties split their final decisions into several parts, all such parts of the final decision have to comply with Article 6 of the Espoo Convention. The Belarusian presidential decree of 15 September 2011 approved the location of the future NPP, that is, the Ostrovets site, without taking into account the requirements of the Espoo Convention as set out in Article 6. The decision on the location was not provided to Lithuania. It did not include the reasons and considerations upon which it was based, and it did not take due account of comments by Lithuania. The committee therefore found that Belarus had not complied with Article 6 (1–2) of the Espoo Convention in regard to the decision on the location. The Implementation Committee considered the decision regarding the provision of a green light for construction at the Ostrovets site as not yet having been supplied and, therefore, found that Belarus had not failed to comply with Article 6 (1–2) in regard to this decision.

On 14 March 2013 (the adoption date for the report on its twenty-seventh session), the Implementation Committee found that Belarus had complied with its obligations under Article 3 (2) (a) and (c) and Article 3 (8) but failed to comply with its obligations under Article 2 (6), Article 4 (2), Article 5 (a), and Article 6 (1–2) of the Espoo Convention in relation to those activities referred to in the submission. The Implementation Committee requested that the Belarusian government reach a final decision in regard to site selection in order that Lithuania be provided with such a final decision in regard to the proposed activity that would be undertaken in accordance with the previous recommendation and to continue to undertake the transboundary EIA procedure on the basis of the final EIA documentation. The Implementation Committee also requested that Belarus and Lithuania ensure that the Lithuanian public remain informed about the final EIA report and encouraged Belarus and Lithuania to continue consultations.

After the findings and recommendations were sent to Belarus and Lithuania, both parties expressed their willingness to follow the Implementation Committee's recommendations and sent a substantial amount of additional information to the committee, including correspondence between both parties in regard to activities undertaken in that regard.[45] The Implementation Committee then decided against

44 Belarus's final decision regarding the NPP project in Ostrovets.

45 UNECE, "Report on the activities of the Implementation Committee" (24 March 2014) paras 53–56 <https://unece.org/DAM/env/documents/2014/EIA/MOP/ECE.MP.EIA.2014.4-ECE.MP.EIA.SEA2014.4_E.pdf>.

revising its recommendations to the MOP of March 2013, as it considered that such a re-evaluation would imply a detailed examination of all unsolicited information that had been provided by both parties. The MOP endorsed the Implementation Committee's findings by means of Decision VI/2, which was adopted in Geneva on 2–5 June 2014.

In the 2014–2017 intersessional period, the Implementation Committee considered its follow-up to Decision VI/2 regarding Belarus (paras 48–64). This included additional recommendations made by the Implementation Committee after it had considered extensive documentation submitted by Belarus and Lithuania prior to the sixth session of the MOP covering those steps that had been taken in order to achieve compliance with the committee's earlier findings. In addition, when issuing Decision VI/2, the MOP requested that the committee thoroughly analyse those steps that had been undertaken by the two parties following the adoption of the committee's report on its twenty-seventh session in order to be able to reflect the conclusion of its analysis, to be issued within the report on its thirty-third session at the latest, and to report on the matter to the MOP during its seventh session.

It should be mentioned separately that the need to solve substantive and scientific issues emerged during these proceedings. The Implementation Committee considered, in essence, that the submission covered some very substantive issues, while Lithuania claimed that its objections and requests for information had not been taken into account or had only been partially answered during the related transboundary EIA procedure. The Implementation Committee stated that it was not within its capacity or mandate to examine – or to take a position in regard to – the environmental or scientific issues raised by Lithuania such as, for example, in terms of the scientific assessment of alternative sites, the criteria and reasons for choosing a site near Vilnius, and the alleged violation of Principle 4 of the IAEA's Fundamental Safety Principles (2006) in regard to "the management of radioactive waste", "emergency situations and the potential impact of any accidents", or "geological data" or other substantive issues. However, it stated that it would focus its attention on examining the application of the Espoo Convention's relevant provisions during the EIA procedure.[46] As the Espoo Convention itself is a procedural instrument, the intention to examine substantive and scientific issues required additional effort for the Implementation Committee.

In its draft decision on the review of compliance with the Espoo Convention,[47] the Implementation Committee recognised the efforts that had been made by Belarus when it came to implementing Decision VI/2 but acknowledged that it was not within the Implementation Committee's capacity or mandate to examine the environmental and scientific issues raised in connection with the planned activity at Ostrovets. Further, it acknowledged the need for expert advice in order to be

46 UNECE (n. 40).

47 UNECE, "Draft decision on the review of compliance with the Convention" (13–16 June 2017) paras 57–60 <https://unece.org/DAM/env/documents/2019/ece/IC/Ostrovets/Draft_decesion_VII_2.pdf>.

able to answer the questions listed in Annex 1 to this decision. The Implementation Committee also made it clear that the procedural and substantive aspects of any EIA procedures cannot necessarily be treated separately when assessing compliance. This is particularly true if the essence of the compliance case pertains to substantive aspects.

In order to reach its final conclusion, the Implementation Committee identified the need for additional resources and specific expertise even though it itself had already exhausted all avenues through which it might receive external expert advice, including via the two concerned parties and the International Atomic Energy Agency (IAEA). The Implementation Committee decided, somewhat exceptionally, to examine the documentation prepared by Belarus under the EIA procedure. At its forty-second session (Geneva, 11–14 September 2018),[48] the committee considered the results of its examination of the EIA documentation for the NPP in Ostrovets. This had been prepared by Belarus with regard to the question concerning population density and the size of the area to be considered within the EIA documentation. Questions regarding the contamination of rivers and groundwater, how radioactive waste and spent fuel would be handled, and how the process of site selection was being handled were also examined. The Implementation Committee agreed that the first three of these questions were taken into consideration by Belarus in the EIA documentation and that such consideration had been undertaken in an acceptable manner. The Implementation Committee noted that it had provided Belarus with several opportunities to demonstrate that the issue of site selection had been properly addressed but that Belarus had failed to provide the committee with information to sufficiently justify the selection of the Ostrovets site over the alternatives and that the issue had not been addressed in an acceptable manner under the Espoo Convention to support any final decision on the activity.[49]

Decision IS/1d was adopted between 5–7 February 2019 during the MOP intermediary sessions.[50] This endorsed the findings of the Implementation Committee with respect to Belarus having taken all required procedural steps in order to reach its final decision on the planned activity at Ostrovets, as provided in the Espoo Convention.[51] The Implementation Committee agreed on its findings that the EIA documentation, which had been made available to the affected parties and the general public, made reference to location-related alternatives for an NPP and to criteria for the site selection but did not provide sufficient information that could support or justify the selection of the Ostrovets site when it came to being able to reach a

48 UNECE, "Report of the Implementation Committee on its forty-second session" (11–14 September 2018) paras 21–24 <https://unece.org/DAM/env/documents/2019/ece/IC/Ukraine_S1/42_ece.mp.eia.ic.2018.4e_Advance_copy.pdf>.

49 Ibid, para 27.

50 "Decision IS/1d regarding compliance by Belarus with its obligations under the Convention in respect to the proposed Belarusian nuclear power plant in Ostrovets" (5–7 February 2019) <https://unece.org/DAM/env/eia/meetings/2019/IS_MOP_5-7_February_2019__Geneva/Decision_IS.1d_.pdf>.

51 Ibid, para 5.

final decision in regard to the activity in accordance with the Espoo Convention. By not providing information under Appendix 2 of the Espoo Convention in the EIA documentation and the final decision in regard to the activity in question, Belarus thus failed to comply with Article 4 (1), Article 5 (a), and Article 6 (1) of the Espoo Convention.[52]

The Implementation Committee then turned to information that had originated from other sources (involving information-gathering cases) in regard to compliance with the Espoo Convention. The Implementation Committee paid some consideration regarding the follow-up by Belarus to the decision regarding the Ostrovets NPP[53] and the information provided by international consultants in relation to the recent adoption by Belarus of the law and subsequent regulations on EIA and SEA, as well as to state ecological expertise (committee reference no. EIA/IC/INFO/21).[54]

4. Evaluation and lessons from the proceedings between Lithuania and Belarus (No EIA/IC/S/4) under the Espoo convention

4.1. Article 14 bis of the second amendment to the Espoo Convention sets out the compliance procedure as a non-adversarial and assistance-oriented procedure. The aforementioned proceedings between Lithuania and Belarus are characterised as non-adversarial and assistance-oriented. It is important to note that the role of the Implementation Committee was not only to determine whether Belarus had complied with the provisions of the Espoo Convention but also to provide assistance to Belarus in order to meet its commitments and improve compliance. Despite the fact that the MOP had endorsed the findings and recommendations subsequent to the receipt of a submission by Lithuania regarding Belarus on 12–14 March 2013, this being the date of the Implementation Committee's adoption in its report, the request made was that the committee analyse the steps which the parties had undertaken following the adoption of the Implementation Committee report.[55] In addition, according to the factual situation, requests were made regarding Belarus alone (such as, for example, in terms of taking a final decision on site selection and continuing the transboundary EIA procedures on the basis of the final EIA documentation) or regarding both Belarus and Lithuania together (such as, for example, by ensuring that Lithuania's general public was informed about the final EIA report and in regard to the continuance of consultations). It must be recognised that Belarus responded to the ongoing Implementation Committee proceedings and took steps to improve its compliance with the Espoo Convention: changes were made to Belarusian legislation concerning the EIA, and Belarus has taken procedural steps to reach a final decision in regard to the planned activity. The

52 Ibid, paras 13–15.

53 Decision VI/2 (EIA/IC/S/4).

54 UNECE, "Information from other sources" <https://unece.org/environment-policy/environmental-assessment/information-other-sources-0>.

55 UNECE (n. 40).

progress Belarus has made in terms of the EIA procedure was reflected in Decision IS/1d. Despite its best efforts, however, Belarus was not able to comply fully with its obligations under the Espoo Convention. The Implementation Committee also encouraged both parties to conclude a bilateral agreement, to continue bilateral expert consultations, and to continue working on post-project analysis.

Some authors have criticised the proceedings, saying, "It is absurd to discuss the insufficiency of the Belarussian arguments regarding the justification of the choice of the Ostrovets site a year before the start of the NPP".[56] This would not be the case if it were strictly adhered to that a transboundary EIA should be carried out before the decision to authorise or carry out these activities. On the other hand, the nature of the proceedings, which is non-adversarial and assistance-oriented, makes this necessary. The Implementation Committee is assigned more of a mediator's role, which involves helping the parties engage in constructive discussions and reach an agreement. These aspects show that the Implementation Committee's proceedings can significantly contribute to a better implementation of the EIA procedure and the implementation of and compliance with the Espoo Convention.

4.2. It was almost three years after Belarus provided information to the affected parties about its planned activity (15 July 2008) before Lithuania made the submission to the Implementation Committee concerning Belarus's compliance with its obligations under the terms of the Espoo Convention with respect to the planned NPP at Ostrovets (16 June 2011).[57] One of the main circumstances indicated in the submission was that, on 11 February 2011, Lithuania received a final EIA report on the Belarusian NPP that it did not consider to be a final report, and therefore, the EIA procedure remained incomplete. The submission claimed that Belarus had failed to complete the EIA procedures properly with respect to the planned activity even while it proceeded with ground and other preparatory work on site. In its submission, Lithuania relied on the Implementation Committee's letter, which indicates that a submission by the concerned party "should only be made once the final decision has been taken in regard to the activity in question".

Prior to Lithuania's submission, the Implementation Committee had already sought clarification from Belarus in regard to its application of the Espoo Convention, specifically in terms of the proposed NPP, following information being provided by Ecoclub, a Ukrainian NGO, on 1 July 2009 and having considered information provided by Belarus.[58] In its submission, Ecoclub clearly stated that "in addition, Belarus took several important decisions and began preparatory work to construct its NPP. It is clear that Belarus is also violating the requirement to provide notification 'as early as possible'".[59] In addition, the committee had

56 Abashidze et al. (n. 12).

57 UNECE (n. 30).

58 Committee reference No EIA/IC/INFO/5.

59 "Information for the attention of Implementation Committee, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991)" (1 July 2009), 8 <https://unece.org/fileadmin/DAM/env/documents/2019/ece/IC_new_files/EIAICINFO5/EIA.IC.INFO.5_Information_form_on_Belarus_NPP.pdf>.

already written to Latvia, Lithuania, Poland, and Ukraine in October 2009 to ask about their experience in terms of the convention's application in connection with the proposed activity and had considered the responses received from each of them.

Having assessed the circumstances surrounding the proceedings, it has become obvious that construction and digging work was begun prior to the adoption of the final decision of Belarus regarding the NPP project in Ostrovets, even though this was not clearly emphasised in the Implementation Committee's findings. If we consider the EIA to be an important decision-making tool, then the start of any construction work before the EIA's final decision has even been adopted serves to prove that such a tool was used inappropriately and has not achieved its goals. The outcome of such a situation can be assessed in two ways. Firstly, the beginning of construction work should be taken as an independent basis for non-compliance with the Espoo Convention. Secondly, a formal EIA procedure should be carried out (checking whether the same result regarding the location of the proposed activity can be achieved under the terms of the procedure). It looks as though the later formal completion of the EIA procedures could place different countries, as described earlier, in a similar position regardless of the fact that one had begun construction work prior to the EIA's final decision having been issued.

According to Article 6 of the Espoo Convention, the final decision on a proposed activity must take due account of the outcome of an EIA, including any and all EIA documentation in this process, as well as any comments that have been received within a transboundary procedure. Nevertheless, the Implementation Committee's findings show that Belarus was obliged to carry out the EIA procedure, which indicates that priority was given to the execution of the EIA procedure regardless of information received regarding the earlier start of construction work. We should recall the point that if the EIA procedure is a *sine qua non* for granting administrative authorisation, it is nonetheless a procedural requirement, and the submission of a project to the EIA is a purely formal guarantee, one which does not in itself entail any strengthening of ecological controls.[60] This case shows that mere theoretical compliance with the provisions of the convention is not enough. Moreover, the case confirms that stronger measures need to be taken to achieve the objectives of the convention.

4.3. Lithuania used its submission as a tool to ensure compliance with the Espoo Convention, to force the suspension of the entire construction[61] process, and to attempt to force the withdrawal of the NPP from its proposed Ostrovets site. During the proceedings, Lithuania enacted a law that recognised this NPP as being unsafe and that it posed a threat to its national security, the environment, and public health.[62] During the same proceedings, Belarus adjusted its own national

60 N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2020) 131.

61 In its submission of 7 June 2011, Lithuania requested that the Implementation Committee "invite the Belarusian side to suspend all construction processes until the EIA process is fully finished".

62 On 15 June 2017, the Seimas of the Republic of Lithuania enacted Law No XIII-451, which classified the NPP proposed to be constructed in the Ostrovets district as being unsafe and dangerous

laws, although it did not halt the construction of the NPP. The Implementation Committee was involved in ensuring compliance issues in relation to the Espoo Convention but did not take any measures to stop construction work related to the NPP. However, the Espoo Convention did not provide a legal basis for its decision not to suspend the construction of the NPP entirely. The suspension of the NPP construction process at the Ostrovets site as an interim measure was not included in the Implementation Committee's area of competence, which serves to reflect its limited nature when it comes to the Espoo Convention.

These features can be compared to disputes between EU Member States over the implementation of EIAs. The Czech Republic brought a case against Poland under Article 259 TFEU. It argued that Poland had infringed Directive 2011/92 as it had introduced national legislation under which it is possible to extend the development consent for extraction activity without an EIA by a span of six years.[63] The Czech Republic requested the application of interim measures under Article 279 TFEU from the European Court of Justice, requesting the immediate closure of the lignite mine in question. On 21 May 2021, the court's vice-president instructed that interim measures be granted that ordered the cessation of lignite mining activities at the Turów mine.[64] On 20 September 2021, Poland was ordered to pay the European Commission a penalty payment of EUR 500,000 a day from the date notification was received until Poland complied with the order.[65] Thus, in the event of a dispute between two EU Member States over the application of the EIA Directive, there is a possibility of applying interim measures. However, this is not foreseen under the Espoo Convention.

4.4. In addition to procedural matters, the proceedings between Lithuania and Belarus have also caused a number of substantive issues related to NPP safety to arise.[66] By saying that an EIA requires an administrative process that incorporates both scientific analysis and public participation, Elizabeth Fisher raises questions about how to think legally about these processes and, in particular, how courts should scrutinise these processes.[67] Answering scientific and substantive questions raised by Lithuania during the procedure was quite challenging for the Implementation Committee.

(classification carried out under the Law of the Republic of Lithuania on the Recognition of the Nuclear Power Plant under Construction in the Ostrovets District within the Republic of Belarus as being Unsafe and Posing a Threat to the National Security of the Republic of Lithuania, its Environment, and its Public Health).

63 Case C-121/21, *Czech Republic v Republic of Poland*, ECLI:EU:C:2021:420.

64 Ibid.

65 Ibid.

66 For example, in terms of "the scientific assessment of alternative sites, the criteria and reasons for choosing a site near Vilnius, and the alleged violation of Principle 4 of the IAEA's 'Fundamental Safety Principles'" (2006) in regard to "the management of radioactive waste", "emergency situations and the potential impact of any accidents", or "geological data" or other substantive issues.

67 E. Fisher, "Environmental impact assessment: 'Setting the law ablaze'," in D. Fisher (ed.), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2022) 427–428.

This situation can be attributed to a number of factors. Firstly, the procedural nature of the EIA is a significant contributing element. A process-oriented technique distinct from substantive environmental standards and requirements, EIA facilitates informed decision-making by thoroughly scrutinising anticipated environmental effects.[68]

Secondly, the specific nuclear regulations that form part of the legislative framework also play a role. It is generally acknowledged that the legal framework for the protection of the environment from the impact of nuclear activities has two distinct bodies of law: nuclear law, which mostly covers aspects related to radioactivity, and environmental law, which covers all types of hazards but may also include requirements for the protection of the environment against the harmful effects of ionising radiation. The fundamentals and general requirements of a legislative and regulatory framework for the safety of NPPs are prescribed in the Convention on Nuclear Safety of 1994 (CNS)[69] and internationally recognised as accepted standards comprising the IAEA's Safety Standards Series.[70] Consequently, there is no internationally binding instrument that sets minimum safety standards for nuclear reactors.[71] The international verification and inspection system to determine compliance with safeguards agreements is the pillar of the entire system and the main expression of the centralisation embodied by the IAEA.[72]

In the context of land-based NPP, the CNS entails a specific consultation obligation on the part of a contracting party and a corresponding right for a potential risk-exposed party to obtain, upon request, information to enable an evaluation and assessment of the likely safety impact on their own territory.[73] However, the need for public participation is limited in the main international nuclear law instrument, with the CNS, for instance, only addressing how to inform the public in the area of emergency preparedness.[74] The obligations of the Espoo Convention also reach much further than those found in specific international nuclear law instruments.[75]

Access to information regarding nuclear matters, concepts of transparency, and stakeholder involvement are relatively recent in the nuclear field and are examples of the effect that the development of international environmental law has had on nuclear law and nuclear activities.[76] In the legal field, it has been noted that "an area where nuclear law still has some ways to go, whereas environmental law excels, is

68 D. A. Wirth and N. M. Sachs, "Hazardous substances and activities," in L. Rajamani and J. Peel (eds.), *The Oxford Handbook of International Environmental Law* (2nd ed., Oxford Academic 2021) 590.

69 Convention on Nuclear Safety (adopted 20 September 1994, entered into force 24 October 1996) 1963 UNTS 293.

70 A. Wetherall, "Environmental considerations in regulating nuclear energy," in *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2021) 366.

71 Wirth and Sachs (n. 68) 587.

72 Viñuales (n. 5) 320.

73 Wetherall (n. 70) 368.

74 Ibid.

75 Emmerechts (n. 4) 97.

76 A. Al Faruque, *Nuclear Energy Regulation, Risk, and the Environment* (Routledge 2019).

in promoting values of transparency and public participation in activities where the decisionmaking process has long been left to the 'experts'".[77] Synergies between nuclear and environmental law, which share the common goal of protecting the environment, are essential for this purpose.[78]

Thirdly, it is important to note that additional resources and specific expertise were not fully available to the Implementation Committee, which, despite being confronted with obstacles, fully answered environmental and scientific questions raised in connection with the planned activity. Fisher also states that EIA is a form of "hot" law addressing "hot" situations – polycentric, scientifically uncertain, and normatively conflicted.[79] The EIA carried out for the construction of the Belarusian NPP serves as an illustrative example.

5. Conclusions

1. Proceedings of the case between Lithuania and Belarus discussed by the Espoo Convention's Implementation Committee resulted in Decision VI/2 (2–5 June 2014) and Decision IS/1d (5–7 February 2019), which found that Belarus had failed to fully comply with its obligations under the Espoo Convention in respect of the planned NPP at Ostrovets. The foregoing analysis of the proceedings has revealed the peculiarities and limitations of an EIA's practical implementation.
2. The course of the proceedings shows that the compliance procedure was conducted, as required, in a non-adversarial and supportive manner. Belarus responded to the committee's ongoing proceedings, taking steps to improve its compliance with the Espoo Convention. The progress made by Belarus in terms of the EIA procedure was reflected in Decision IS/1d. Despite its best efforts, though, Belarus was not able to comply fully with its obligations under the convention. The Implementation Committee is also assigned more of a mediator's role, which involves helping the parties engage in constructive discussions and reach an agreement. This shows that the Implementation Committee can significantly contribute to a better implementation of the EIA procedure and the implementation of and compliance with the Espoo Convention.
3. From the circumstances surrounding these proceedings, it is quite obvious that construction and digging work were started before the final decision could be adopted, even though this was not clearly emphasised in the Implementation Committee's findings. If we consider the EIA to be an important decision-making tool, then the start of any construction work before the EIA's final decision has even been adopted serves to prove that such a tool

77 P. Reyners, "Le droit nucléaire confronté au droit de l'environnement: autonomie ou complémentarité?" [2007] 3 Revue Québécoise de Droit International 149.

78 International Atomic Energy Agency, *Nuclear Law: The Global Debate* (Asser Press 2022) 41.

79 Fisher (n. 67) 422.

was used inappropriately and has not achieved its goals. Nevertheless, the Implementation Committee's findings also show that Belarus was obliged to carry out the EIA procedure, which indicates that priority was given to executing the EIA procedure, regardless of the information received in connection with the early start of construction work.

4. Lithuania used its submission as a tool to ensure compliance with the Espoo Convention, suspend all construction processes, and force the relocation of the NPP in question from the Ostrovets site. Suspension as an interim measure of the NPP's construction process at the Ostrovets site was not included in the Implementation Committee's competence, which reflects the limited nature of the implementation of the Espoo Convention. These features can be compared with the application of the EIA Directive. In the event of a dispute between two EU Member States over the application of the EIA Directive, there is a possibility of applying interim measures. However, this is not foreseen under the Espoo Convention.
5. The proceedings between Lithuania and Belarus have also given rise to substantive questions pertaining to the safety of the NPP. The scientific and substantive questions raised by Lithuania during the procedure presented a considerable challenge for the Implementation Committee. This situation can be attributed to a number of factors. Firstly, the procedural nature of the EIA is a significant contributing element. Secondly, the specific nuclear regulations that form part of the legislative framework also play a role. Thirdly, it is important to note that additional resources and specific expertise were not fully available to the Implementation Committee.

7 Sharing a common good beyond borders

The global phenomenon of climate change litigation and its irrelevance in cross-border settings

Marcin Stoczkiewicz

1. The global phenomenon of climate (change) litigation

Climate change is a threat of unprecedented dimensions in scope, scale, time and space. If left unresolved, it has the potential to undermine the basis of (relative) global stability and order.[1] The Intergovernmental Panel on Climate Change (IPCC) states: 'Pathways limiting global warming to 1.5°C with no or limited overshoot would require rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems. These systems transitions are unprecedented in terms of scale, but not necessarily in terms of speed, and imply deep emissions reductions in all sectors, a wide portfolio of mitigation options and a significant upscaling of investments in those options'.[2] As C. Voigt notes, law on all levels is an important lever in the required transformation.[3]

On the basis of this discrepancy between necessary efforts to stop climate change and insufficient action by the legislative and executive branches of government, *climate litigation* has emerged, the essence of which is an attempt to involve the courts in climate protection.[4] Voigt states that courts have started to complement the legal picture in the absence of effective implementation or political will or in the face of (the risk of) harmful climate impacts. Climate litigation has become a global phenomenon in which citizens and NGOs are trying to hold governments and companies accountable for omissions of ineffective actions on climate change or the adverse effects thereof.[5]

According to 2019 data, there were 1,500 pieces of litigation directly related to climate change and its impacts.[6] In 2020, this figure had already reached 1,550 and

1 C. Voigt, "Climate change as a challenge for global governance, courts and human rights," in W. Kahl and M.-P. Weller (eds.), *Climate Change Litigation* (C.H. Beck 2021) 2.

2 IPCC, "Summary for policymakers," in IPCC, *Global Warming of 1.5°C* (World Meteorological Organization 2018) 32.

3 Voigt (n. 1) 3.

4 See S. Maljean-Dubois, "Climate litigation: The impact of the Paris Agreement in national courts" [2022] 324 *The Taiwan Law Review* 211.

5 Voigt (n. 1) 3.

6 Clifford Chance, *Climate Change Litigation. Tackling Climate Change through the Courts* (October 2019) 2, <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/10/growing-the-green-economy-climate-change-litigation.pdf>; Clyde & Co., "The rising tide of climate change

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included cases pending before courts in 38 countries.[7] Globally, the cumulative number of climate litigation cases has more than doubled since 2015.[8]

2. Defining climate litigation

There is a rich academic discussion and debate about definitions in the field of climate change law and climate litigation. As J. Peel and H. M. Osofsky point out, questions that researchers in this field raise include (i) whether to include only cases that expressly raise issues of climate change policy or science or whether to extend the study to cases motivated by concerns over climate change issues; (ii) whether to focus on judgements issued by courts or to include other types of quasi-judicial decision-making processes and actions; and (iii) whether to include only cases with a pro-regulatory focus or also those brought by industry challenging climate regulatory measures.[9]

The most widely accepted definition of climate litigation is that it comprises cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law.[10] In this sense, litigation in which the intention of the plaintiffs is to reduce (or prevent) greenhouse gas emissions but does not involve the 'material issue' of climate change science, policy or law but is based on nature, water or air protection law is not considered climate litigation. Instead, this definition includes cases against individual investment projects if climate change is a material issue in the proceedings.[11] This approach is adopted by, among others, the Sabin Center and the Grantham Research Institute.[12] In the following, we refer

liability" (12 June 2018) <https://www.clydeco.com/en/insights/2018/06/the-rising-tide-of-climate-change-liability>.

7 UN Environment Programme, *Global Climate Litigation Report: 2020 Status Review* (UN Environment Programme 2020) 13.

8 Climate litigation is well-documented thanks to initiatives by the Sabin Center and the Grantham Research Institute. This chapter refers to the Climate Change Laws of the World (CCLW) database, an open-access, searchable database created and maintained by the Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. The database is a joint initiative with the Sabin Center for Climate Change Law at Columbia Law School, using cases, data and summaries identified and prepared by Sabin Center staff and their partners and included in the Center's Global Climate Litigation database. A separate climate litigation database for the United States is maintained by the Sabin Center in collaboration with the law firm Arnold & Porter Kaye Scholer.

9 J. Peel and H. M. Osofsky, "Climate change litigation" [2020] 16 *Annual Review of Law and Social Science* 21, 23.

10 D. Markell and J. B. Ruhl, "An empirical survey of climate change litigation in the United States" [2010] 40 *Environmental Law Review* 27.

11 For example, *Sharma v. Minister for the Environment* [2021] FCA 560. See C. Avgoustinos, "'Sharma': Climate litigation enters the field of negligence in Australia" [2021] 3 *CCLR* 248. See also *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others*, Case No. 65662/16, Judgment, 8 March 2017.

12 J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot* [2022] (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science) 9.

to cases in this area as *climate litigation sensu stricto*. It is worth noting that the figures quoted above, based on data from these research centres, refer only to *climate litigation sensu stricto*. The literature notes that this range mostly includes 'high-profile cases', but this is really only the 'tip of the climate litigation iceberg'.[13]

The limitations of this narrow definition were noted by Peel and Osofsky, who proposed dividing the field into four categories represented as a set of concentric circles, beginning with (a) cases in which climate change is *the* central issue and expanding outwards to include, (b) cases in which climate change is a peripheral issue, (c) litigation with climate change as one motivation but not raised as an issue and (d) litigation with no specific climate framing but implications for mitigation or adaptation.[14] Further cases in categories (b)–(d) are called *climate litigation sensu largo*. Cases of type (b) can include cases against the extraction and burning of coal and other fossil fuels based on classical nature conservation law and horizontal environmental impact assessment regulations. Cases of type (c) can include cases against misleading consumers about the limited climatic and environmental impact of goods and services (so-called *greenwashing cases*). Category (d) can include cases directed at reducing air pollution (rather than reducing climate change), the indirect effect of which may be the decommissioning of fossil fuel-burning facilities.

3. The contribution of climate litigation to overcoming barriers to climate protection

It should be noted that the courts have a very limited role in climate governance. The legal culture of most democratic states under the rule of law is based on the Montesquieu principle of a tripartite division of powers between the legislature, the executive and the judiciary. The role of the courts is not to shape (set directions) or implement public policy but rather to settle legal disputes and provide legal protection. However, in the course of exercising the administration of justice, courts often specify the meaning of legal norms, which often has significant legal consequences. This applies in particular to the application of climate change law by the courts.[15] Consequently, climate litigation has become an instrument used to enforce or enhance climate commitments made by governments, with 73 'framework' cases challenging governments' overall responses to climate change. Of the eight framework cases where decisions have been issued by the country's highest court, six have had favourable outcomes for climate action.[16] However, a

13 J. Setzer, H. Narulla, C. Higham and E. Bradeen, *Climate Litigation in Europe: A Summary Report for the European Union Forum of Judges for the Environment* (Grantham Research Institute on Climate Change and the Environment 2022) 5 and the literature cited therein.

14 Peel and Osofsky (n. 9) 24.

15 M. Stoczkiewicz, "The role of the courts in EU climate policy," in T. Rayner and K. Szulecki (eds.), *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar, forthcoming).

16 Setzer and Higham (n. 12) 4. According to S. Maljean-Dubois, this number is even higher (around 2,300). Maljean-Dubois (n. 4) 212.

purely numerical assessment of outcomes is far from the only way to understand how judgements in climate litigation influence climate governance.[17] Considerably more research is still required to help us understand the overall effectiveness of litigation as a tool for advancing climate action.[18]

Undoubtedly, it is possible to point to court rulings ending climate litigation that can already be said to have had a significant impact on climate governance. Two famous rulings in particular should be pointed out here due to their impact on the understanding of climate mitigation liability in international, cross-border and national terms. These are the judgement of the Supreme Court of the Netherlands in *Urgenda III*[19] and the decision of the Constitutional Court of the Federal Republic of Germany in *Neubauer*.[20] These cases have already had a significant real impact on the climate governance of the Netherlands and Germany. Among other things, the Dutch government decided to close down all coal-fired power plants in order to meet its obligation to reduce carbon emissions at a level determined by the court.[21] In turn, as a result of a decision by the Federal Constitutional Court, the German legislature amended the contested climate protection law in such a way that it introduced a timetable for reducing CO_2 emissions after 2030 and increased overall mitigation targets.[22] Their indirect impact on climate governance is much greater. Among other things, they have significantly influenced the understanding of such climate mitigation and adaptation issues as sources of climate obligations and standard of care, scientific evidence and causality, justiciability, separation of powers, mitigation governance, adaptation obligations, and compensation.[23]

The following section will focus only on the issue of the global problem of climate change and national mitigation obligations and how it was addressed in the *Urgenda III* and *Neubauer* rulings. This is a key climate governance issue, as

17 Setzer et al. (n. 13) 18.

18 Setzer and Higham (n. 12) 27.

19 Judgment of the District Court of The Hague of 24 June 2015, *Urgenda Foundation v. The Netherlands*, ECLI:NL:RBDHA:2015:7196 ("Urgenda *I*"); judgement of the Court of Appeal of The Hague of 9 October 2018, *Urgenda Foundation v. The Netherlands*, ECLI:NL:GHDHA:2018:2610 ("Urgenda *II*"); judgement of the Supreme Court of the Netherlands of 20 December 2019, *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR:2019:2006 ("Urgenda *III*"). See O. Spijkers, "The influence of climate litigation on managing climate change risks: the pioneering work of the Netherlands courts" [2022] 18/2 *Utrecht Law Review* 127, 134–135 and literature cited therein.

20 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 24 March 2021, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 (hereinafter "*Neubauer*"). See BVerfG, "Constitutional complaints against the Federal Climate Change Act partially successful" (29 April 2021) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>; L. J. Kotzé, "Neubauer et al. versus Germany: planetary climate litigation for the Anthropocene?" [2021] 22 *German Law Journal* 1423; R. Bolde and S. Sina, "The German Federal Constitutional Court's decision on the Climate Change Act" [2022] 1 *CCLR* 18 and literature cited therein.

21 See S. Roy, "Urgenda v. the Netherlands: A new climate change constitutionalism?" [2015] 6 *Netherlands Tijdschrift voor Energierecht*.

22 Bolde and Sina (n. 20) 22.

23 See Voigt (n. 1) 14–17; M. Payandeh, "The role of courts in climate protection and separation of powers," in W. Kahl and M.-P. Weller (eds.), *Climate Change Litigation* (C.H. Beck 2021) 62–80.

the international climate law framework shaped by the Framework Convention on Climate Change[24] and the Paris Agreement[25] critically depends on the adoption and implementation of mitigation commitments by parties in the form of Nationally Determined Contributions (NDCs).[26]

4. Climate change: a global problem and domestic obligations

The United Nations Framework Convention on Climate Change (UNFCCC) is based on the idea that climate change is a global problem that needs to be solved globally. As the territories of all countries emit greenhouse gases and all countries are affected, action will have to be taken by all countries. Therefore, all countries will have to do what is necessary to meet the goals of the Paris Agreement. Among the principles of the UNFCCC is the principle of 'common but differentiated responsibilities and respective capabilities' (CBDR). The Framework Convention in Article 3(1) sentence 1 states that: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'.[27] There is no doubt, therefore, that the global problem of climate change can only be solved through the efforts of all Parties to the UNFCCC.

The global nature of climate change means that it has global effects but also global causes, as it is caused by greenhouse gas emissions resulting from the actions of billions of individuals, millions of economic actors and all the countries of the world. Related to the global nature of climate change is the question: does an individual state have an obligation to make specific mitigation efforts (e.g. a certain percentage reduction in greenhouse gas emissions over a certain period of time) if these efforts alone cannot bring climate change to a halt? This dilemma is referred to in the literature as the 'drop-in-the-ocean problem'.[28] There are two aspects to this problem. Firstly, since climate change is a global process caused by many actors, individual responsibility for causing it (of a specific state or economic actor) is excluded. This is an aspect concerning the existence of an entity's responsibility. Secondly, since climate change is a global process, even if the individual responsibility of a specific actor were to be accepted, it cannot consist of an obligation to reduce national emissions, as such a reduction would not solve the problem. This is, therefore, an aspect concerning the general scope of the responsibility of the entity concerned. The court rulings in *Urgenda III* and *Neubauer* seem to contribute to solving this problem.

24 United Nations Framework Convention on Climate Change 1922, adopted 9 May 1922, entered into force 21 March 1994, 1771 ("FCCC").

25 Paris Agreement under the United Nations Framework Convention on Climate Change, adopted 12 December 2015, entered into force 4 November 2016 ("Paris Agreement").

26 See more in M. Stoczkiewicz, *Prawo ochrony klimatu w kontekście praw człowieka* (Wolters Kluwer 2021) 92–100.

27 UNFCCC, Article 3(1) sentence 1.

28 Clyde & Co. (n. 6).

4.1 Global problems and domestic obligations in the Urgenda ruling

In its lawsuit, the Urgenda Foundation demanded that the Netherlands be required to achieve a greater reduction in greenhouse gases by the end of 2020 than the government had planned. Prior to Urgenda's lawsuit, the Dutch government had a clearly defined plan to reduce CO_2 emissions. The District Court of The Hague, in a judgement of 24 June 2015, upheld Urgenda's lawsuit and obliged the state to achieve a reduction of at least 25% of greenhouse gases by the end of 2020, relative to the 1990 base year.[29] On 9 October 2018, the Court of Appeal in The Hague upheld the lower court's judgement,[30] and on 20 December 2019, the Supreme Court dismissed the government's appeal,[31] thereby confirming that the Netherlands has a legal obligation to reduce its emissions by at least 25%. The case has many interesting aspects; however, in this paper, we will only focus on the drop-in-the-ocean problem.[32]

In *Urgenda I*, the Dutch government invoked both of the above-mentioned aspects of the drop-in-the-ocean problem. It argued, firstly, that the state has no legal obligation – arising from either national or international law – to take measures to achieve the reduction targets stated in Urgenda's claims.[33] In particular, the state is not legally bound by a reduction target of 25% in 2020.[34] Concerns about the consequences of a global activity – the emission of greenhouse gases all over the world, not only from Dutch territory – are also felt worldwide, including in the Netherlands. In this connection, the Netherlands argued that the global nature of emissions and their consequences means that no protection can be derived from Articles 2 and 8 ECHR, so those provisions do not impose an obligation on the state in this case.[35] Furthermore, the government argued that the Netherlands alone cannot solve the global climate problem.[36]

In considering the argument raised by the government that the increased reductions by the Netherlands would be of negligible importance in addressing global warming, the Court of First Instance held that this argument must be rejected. According to the Court of First Instance, this is justified by the UNFCCC, the objectives of which influence the determination of the scope of the obligation to protect. The obligations of states to reduce carbon dioxide are obligations of both collective and individual action. According to the Appeal Court, 'The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State's obligation to exercise care'.[37] The Court of Appeal judged that climate change was a global

29 *Urgenda I*, p. 5.1.
30 *Urgenda II*, p. 77.
31 *Urgenda III*, p. 9.
32 See Stoczkiewicz (n. 26) 270–295.
33 *Urgenda I*, p. 3.3.
34 *Urgenda III*, p. 3.4.
35 *UrgendaIII*, p. 5.6.3.
36 *UrgendaIII*, p. 3.4.
37 *Urgenda I*, p. 4.79.

problem and that the Netherlands alone could not solve it. However, this did not relieve it of the obligation to take measures within its territory and within its capabilities that, in conjunction with measures by other states, serve to protect against dangerous climate change.[38]

The Supreme Court broadly agreed with the Court of Appeal. Does the global nature of climate change mean that this circumstance excludes the application of the obligations under Articles 2 and 8 ECHR? The Dutch Supreme Court found no justification for this position. According to the Supreme Court, Articles 2 and 8 ECHR impose their own obligations on the Netherlands, even though this is a global problem. The court found justification in international climate law. The UNFCCC indicates that all states must do their part of the duty. According to the UNFCCC, each state is obliged to take the necessary steps according to its responsibility and capacity.[39] This framing of states' obligations is consistent with the *no-harm principle* as a universally recognised principle of international law that no state shall cause harm to another state.[40] From this principle, referred to in the preamble of the UNFCCC,[41] the Supreme Court derived the rule of partial responsibility according to which 'each state is responsible for its part and can therefore be held responsible for that part'.[42] Therefore, it is not possible to accept the government's argument that a state is not responsible because other states do not perform their part of the responsibility. The partial responsibility rule is particularly relevant in the context of the scientific finding that any reduction of emissions is positively relevant to climate change mitigation.[43] According to the Supreme Court, the Netherlands is obliged to do 'its own' to prevent dangers; 'in short, "partial guilt" also justifies partial responsibility'.[44] Overall, the Supreme Court defined this approach: 'Joint responsibility of states and shared responsibility of individual states'.[45] For the above reasons, the Supreme Court held that 'Articles 2 and 8 ECHR in relation to the threat of climate change should be interpreted as obliging States to do "their part" to counter that threat'.[46] Consequently, the Supreme Court held that under Articles 2 and 8 ECHR, the state owes an obligation to the inhabitants of the Netherlands to take appropriate measures to reduce greenhouse gas emissions from the Dutch territory.[47] In this way, the Supreme Court of the Netherlands responded to the drop-in-the-ocean argument.

38 *Urgenda II*, p. 62.
39 *Urgenda III*, pp. 5.7.3.–5.7.4.
40 On the principle of non-maleficence in international climate change law, see D. Bodansky, J. Brunnée and L. Rajamani, *International Climate Change Law* (Oxford University Press 2017) 40–44.
41 UNFCCC, preamble, recital 8: 'Recalling also that States…have the responsibility to ensure that activities or controls within their own jurisdiction do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction'.
42 *Urgenda III*, p. 5.7.5.
43 *Urgenda III*, pp. 5.7.6–5.7.8.
44 *Urgenda III*, p. 5.7.6.
45 *Urgenda III*(e), pp. 5.7.2–5.8.
46 *Urgenda III*, p. 5.8.
47 *Urgenda III*, p. 6.1.

4.2 Global problems and domestic obligations in Neubauer

On 24 March 2021, the German Federal Constitutional Court ruled on constitutional complaints brought against the provisions of the Federal Climate Protection Act of 12 December 2019 (*Bundes-Klimaschutzgesetz*, hereinafter KSG), regulating national climate targets and permissible annual emissions until 2030.[48] According to Article 1(3) KSG, the basis of the law is the commitment under the Paris Agreement to limit the increase in global average temperature to well below 2°C (preferably to 1.5°C) above pre-industrial levels, as well as the commitment of the Federal Republic of Germany to pursue the long-term goal of greenhouse gas neutrality by 2050. According to Article 3(1) KSG, greenhouse gas emissions had to be progressively reduced by at least 55% from 1990 levels by 2030. Annual emission limit values up to the target year were defined in the KSG. Provisions applicable after 2030 were not included in the KSG.[49]

Constitutional complaints against the KSG were brought by Luisa Neubauer and other individuals. The applicants argued that the provisions of the KSG at the time of filing the complaint were insufficient to protect their fundamental rights and freedoms. In their constitutional complaints, the applicants argued first of all that in enacting the KSG, the state had failed to put in place a legal framework sufficient for the rapid reduction of greenhouse gases, which they considered necessary to limit the increase in the Earth's temperature to 1.5°C or at least to well below 2°C. They believed this was necessary because a temperature rise of more than 1.5°C would put millions of lives at risk and risk passing tipping points with unpredictable consequences for the climate system. In their constitutional complaints, the applicants relied primarily on the constitutional obligations of protection under the Basic Law: Article 2(2) GG ('Everyone has the right to life and physical integrity') and Article 14(1) GG ('The right to property and inheritance shall be guaranteed').[50] The applicants also invoked their fundamental rights in the context of Article 2(1) GG in conjunction with Article 14(1) GG in conjunction with Article 20a GG ('The State, with a sense of responsibility towards future generations, shall, within the framework of the constitutional order, protect natural living conditions and animals by legislation and, in accordance with laws and regulations, by the executive and the judiciary') in conjunction with the first sentence of Article 1(1) GG ('Human dignity is inviolable').[51]

The Federal Constitutional Court partially upheld four constitutional complaints (1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20). The court ruled that the KSG provisions regulating national climate targets and annual emission limit values until 2030 are incompatible with fundamental rights, as they lack sufficient

48 Bundes-Klimaschutzgesetzes (KSG) vom 12. Dezember 2019, Bundesgesetzblatt I Seite 2513 ("KSG").

49 *Neubauer* I.1.

50 'GG' denotes the German Constitution (*Gruntgesetz*).

51 *Neubauer* I.1.

specifications for further emission reductions from 2030 onwards. In all other respects, the constitutional complaints were dismissed.[52]

Many aspects of this landmark decision of the Federal Constitutional Court have been analysed in the literature.[53] In this chapter, only the drop-in-the-ocean problem and its overcoming in the *Neubauer* case are analysed. The Federal Constitutional Court dealt with the drop-in-the-ocean problem *ex officio* due to the nature of the proceedings launched to examine the constitutionality of the KSG provisions. The Federal Constitutional Court stated:

> 1. The protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, *regardless of who or what circumstances are the cause*. The state's duty of protection arising from Art. 2(2) first sentence of the Basic Law also encompasses the duty to protect life and health against the risks posed by climate change. It can furthermore give rise to an objective duty to protect future generations.
>
> 2. Article 20a of the Basic Law obliges the state to take climate action. This includes the aim of achieving climate neutrality …
>
> c. As an obligation to take climate action, Art. 20a of the Basic Law has an international dimension. *The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action*. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. *The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states.*[54]

The Federal Constitutional Court stated that the fundamental right to the protection of life and health enshrined in Article 2(2) first sentence GG obliges the state to afford protection against the risks of climate change. The state must combat the considerable potential risks emanating from climate change by taking steps which – with the help of international involvement – contribute to stopping human-induced global warming and limiting the ensuing climate change. These steps must

52 BVerfG (n. 20).

53 See, e.g., F. Ekardt and K. Heyl, "The German Constitutional verdict is a landmark in climate litigation" [2022] 12 *Nature Climate Change* 697; Kotzé (n. 20) 1423–1444; Bolde and Sina (n. 20) 18–24 and literature cited therein; R. Krämer-Hoppe, "The Climate Protection Order of the Federal Constitutional Court of Germany and the north-south divide" [2021] 22 *German Law Journal* 1393; Z. Roguska, "Zmiana w sprawie zmian klimatu – glosa do wyroku Federalnego Trybunału Konstytucyjnego Republiki Federalnej Niemiec z 24.03.2021 r., 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20" [2021] 4 *Glosa*; W. Kahl, "Ochrona klimatu a konstytucja – historyczno postanowienie federalnego trybunału konstytucyjnego z 24 marca 2021 r." [2022] 2 *RPEiS* and German-language literature cited extensively therein.

54 *Neubauer*, Thesis 1, Thesis 2 sentence 1, Thesis 2c. Emphasis – M.S.

be supplemented by positive measures aimed at alleviating the consequences of climate change ('adaptation measures').[55] The state's duty of protection arising from Article 2(2) first sentence GG does not take effect only after violations have already occurred but is also oriented towards the future.[56] The court further stated that the protection of life and physical integrity under Article 2(2) first sentence GG encompasses protection against impairments and degradation of constitutionally guaranteed interests caused by environmental pollution, *regardless of who or what circumstances are the cause*. The court based the latter statement on its previous case law on the right to life and extensively cited the case law of the European Court of Human Rights on Articles 2 and 8 ECHR.[57] The state's duty of protection arising from Article 2(2) first sentence GG also includes the duty to protect life and health against the risks posed by climate change.[58]

The duty to protect arising from the right to life, which also includes the duty to protect against the consequences of climate change, is therefore, in the court's understanding, a duty detached from the fact of who causes climate change. In this sense, there is no need to demonstrate a causal connection between the state's actions and omissions and climate change in order for the state's duty to protect the right to life with all the consequences for measures of mitigation and adaptation to climate change to become actualised. In doing so, the Karlsruhe court did not resolve the first aspect of the drop-in-the-ocean problem but rather concluded that it was irrelevant to the actualisation of the state's obligations in this regard.

In its decision in *Neubauer*, the Federal Constitutional Court extensively articulated its understanding of the scope of the state's responsibility in connection with the protection of fundamental rights against the consequences of climate change and thus addressed the second aspect of the drop-in-the-ocean problem. The court derived the general scope of this obligation from Article 20a GG. The court stated that the obligation to take climate action arising from Article 20a GG is not invalidated by the fact that climate change and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own. The climate action mandate enshrined in Article 20a GG possesses – like global warming itself – a special international dimension from the outset. Article 20a GG obliges the state to involve the supranational level in seeking to resolve the climate problem. Embedded within an international framework, national climate action measures are capable of having the impact required by Article 20a GG. Even if such measures are incapable of resolving the climate problem on their own, they must be taken in order to fulfil the climate action mandate under constitutional law.[59]

55 *Neubauer*, p. 144.
56 *Neubauer*, p. 146.
57 *Neubauer*, p. 147 (bb).
58 *Neubauer*, p. 148.
59 *Neubauer*, p. 199.

The Karlsruhe court clearly recognised the drop-in-the-ocean problem. It stated that in requiring that the natural foundations of life also be protected for future generations, Article 20a GG makes it obligatory to pursue a goal that the national legislator is not capable of reaching on its own but can only achieve through international cooperation. This is due to the physical realities of climate change and climate action. The problem of climate change and the (legal) activities involved in its prevention are genuinely global in nature. No state can stop global warming on its own. Furthermore, emissions from every state contribute to climate change in the same way. Resolving the global climate problem will only be possible if climate action is taken worldwide.[60] However, the court noted that the state may not evade its responsibility here by pointing to greenhouse gas emissions in other states. The scope of responsibility thus derives from the constitutionally defined obligations of the state, which must be read in the context of international obligations. The court also noted that the Paris Agreement established a voluntary mechanism by which the parties determine their own measures for reaching the agreed temperature target. This agreement is highly reliant on the individual states making their own contributions. A combined reading of the Paris Agreement[61] and Article 20a GG leads to a constitutional necessity to actually implement one's own climate action measures at the national level and in international agreements wherever possible.[62]

Overall, therefore, the state has a constitutional obligation to fulfil its own climate action measures. Overcoming the drop-in-the-ocean problem in its aspect of overall responsibility is thus due in *Neubauer* to a recognition of the institutional infrastructure of international climate law. Admittedly, stopping climate change is only possible through action by all parties to the Paris Agreement, but for this action to have a chance of success, it is necessary for each country not to look to others to fulfil their obligations but to fulfil its part of the emission reduction commitments.

4.3 Lessons learned from capturing the global nature of climate change and national responsibility in Urgenda and Neubauer

The *Urgenda* and *Neubauer* rulings are undoubtedly among the greatest achievements of climate litigation in recent years. It is worth noting that the rulings are essentially about the protection of human rights (fundamental rights), the origins of which are to be found in Articles 2 and 8 ECHR.[63] The legal responsibility they treat is the responsibility to protect these rights. In particular, it derives from the positive duty to protect (duty of protection) of these rights. Outside the scope of

60 *Neubauer*, p. 200.

61 R. Krämer-Hoppe argues that with this justification of the *Neubauer* ruling, the Court 'incorporated the purpose set out by the Paris Agreement into the German constitution'. Krämer-Hoppe (n. 53) 1406.

62 *Neubauer*, pp. 203–204.

63 See T. Karlsson Niska, "Climate change litigation and the European Court of Human Rights – a strategic next step?" [2020] 13 *Journal of World Energy Law and Business* 331.

recognition in these cases were, for example, civil liability for damages, administrative liability and criminal liability. The conclusions regarding the transgression of the drop-in-the-ocean problem therefore only apply to liability relating to the protection of human rights. These conclusions cannot be directly applied to liability for damages, where the problem of proving a so-called adequate causal link between the act (omission) and the damage remains a difficult barrier to break through for plaintiffs seeking compensation for damages resulting from climate change.[64]

Moreover, these rulings only deal with climate obligations and the liability of states, not private actors. The very fact that the findings of the courts in *Urgenda* and *Neubauer* relate to the responsibility of states is highly relevant to the effectiveness of climate law. One should remember that the institutional infrastructure of climate law built by the UNFCCC and the Paris Agreement is based on the obligations of parties to these international agreements. However, the findings of the courts in these cases on the obligations of private actors can only apply to a certain extent. The issue of private actors' climate liability is more complicated. The judgement of the District Court in The Hague in *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell* of 26 May 2021 may shed some light here.[65] In this judgement, the court obliged the company to reduce the greenhouse gas emissions of the entire global Shell group by 45% by the year 2030.[66]

Despite the many similarities in the approaches to the drop-in-the-ocean problem in the judgements in question, significant differences can also be identified. The Dutch Supreme Court invoked the Netherlands' contribution to climate change, finding the country partly to blame for climate change, according to the formula: 'in short, "partial guilt" also justifies partial responsibility'.[67] In *Urgenda*, the Dutch Supreme Court relied on the doctrine of proportionate responsibility, which the court had developed in cases involving pollution of the Rhine by cumulative discharges of salt waste by multiple actors.[68] As the Supreme Court stated: 'The Netherlands is a party to the United Nations Climate Convention…The Convention is based on the premise that all member countries must take measures to prevent climate change, in accordance with each country's specific responsibilities and capabilities… Each country is therefore responsible for its share'.[69] However, it further deduced that 'This obligation for the State to do "its own" is based on Articles 2 and 8 of the European Convention on Human Rights, because there is a serious risk of a dangerous climate change taking place that threatens the lives and welfare of many people in the Netherlands'.[70] It was thus, in the view of

64 See Stoczkiewicz (n. 26) 288–292.

65 *Friends of the Earth Netherlands (Milieudefensie) v. Royal Dutch Shell*, District Court, The Hague, Judgment of 26 May 2021 (hereinafter '*Shell*').

66 *Shell*, p. 5.3.

67 *Urgenda III*, p. 5.7.6.

68 Hoge Raad 23 September 1988, NJ 1989, ECLI:NL:PHR:1988:AD5713.

69 *Urgenda III*, Summary of the statement, p. 4.

70 *Urgenda III*, Summary of the statement, p. 4.

the Dutch Supreme Court, a liability arising both from culpable contribution to climate change and from the UNFCCC and the ECHR.

The Karlsruhe court's response was different. Firstly, in the court's view, the state's responsibility to protect the rights of individuals from violations resulting from climate change does not depend on who causes the threat (causes climate change) or contributes to it. It is worth quoting thesis 1 of *Neubauer* again: 'The protection of life and physical integrity under Art. 2(2) first sentence of the Basic Law encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause'.[71] The Karlsruhe court did not refer to culpable contribution to climate change. Secondly, it is a partial liability, but consequently, this part of the liability is not related to the part in which the state has so far contributed to climate change (it is not determined on the basis of historical emissions). It is a responsibility in the part that is based on the emission budget remaining for the world and in the corresponding part for Germany to reach the Paris Agreement target (well below an increase of 2°C and preferably 1.5°C). The court devoted much space to analysing the scientific data on what Germany's remaining carbon budget is in line with the Paris Agreement target.[72] It is thus, in the Karlsruhe court's view, an objective responsibility to protect the fundamental rights of individuals from the dangers caused by climate change, which derives from the UNFCCC and the German GG (which overlap in meaning with the ECHR). The Karlsruhe court's decision appears to be more consistent than that of the Dutch Supreme Court.

5. Conclusion

Climate litigation is most commonly understood as (i) cases before judicial and quasi-judicial bodies that involve substantive issues of climate change science, policy, or law (*climate litigation sensu stricto*). This definition is increasingly being broadened to include (ii) cases in which climate change is a peripheral issue, (iii) litigation with climate change as one motivation but not raised as an issue and (iv) litigation with no specific climate framing but implications for mitigation or adaptation (*climate litigation sensu largo*). The amount of climate litigation is steadily increasing worldwide. This can already be referred to as 'a global phenomenon'.

Climate litigation can have an impact on climate law and its implementation, particularly in terms of climate change mitigation. The international order of climate law, shaped by the UN Framework Convention on Climate Change and the Paris Agreement, critically depends on the adoption and implementation of mitigation commitments by parties in the form of NDCs. Climate litigation, the vast majority of which is domestic litigation, can affect the scope of individual states' mitigation obligations. Some of the most important climate litigation decisions of

71 *Neubauer*, Thesis 1.
72 *Neubauer*, pp. 215–238.

recent years – *Urgenda III* and *Neubauer* – have increased the domestic obligations of the Netherlands and Germany, respectively.

The multifaceted impact of the rulings indicated on climate law and its implementation seeks, among other things, to overcome the drop-in-the-ocean problem. This problem is expressed in the claims that (i) since climate change is a global process, individual responsibility for causing it is excluded, and (ii) since climate change is a global process, this responsibility cannot entail an obligation to reduce national emissions, as such a reduction will not solve the problem. The responses of the Dutch Supreme Court and the German Constitutional Court differed. The Dutch Supreme Court transcended the drop-in-the-ocean problem by pointing to the state's responsibility arising from its contribution to climate change. The German Constitutional Court went further by making this problem irrelevant as it pointed to the objective responsibility of the state to protect the rights of individuals, which is independent of who causes the violation or threat to those rights. Both courts pointed to the obligation of states to do 'their part' to counter that threat as an objective duty, necessary to protect the rights of individuals. Both judgements appear to break from the approach to climate law expressed in linking the global problem of climate change to a global regulatory response (global problem – joint responsibility of states) in favour of adding the critical element of individual responsibility of individual states (global problem – joint responsibility of states and shared responsibility of individual states).

The most relevant court decisions in the field of climate litigation indicate that, in the view of the courts, the problem of climate change is a global problem and not a local (national) or cross-border one. Its solution cannot, therefore, consist only of an international response, but neither can it consist of protecting only one state's own territory and population. Rather, the judicial jurisprudence in *Urgenda III* and *Neubauer* points to the individual obligations of states to contribute to the solution of the global problem of climate change, and only in this way do they fulfil their duty to protect the individuals under their jurisdiction and within their territory.

Part 2

Remedies, actors and case-studies

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8 The role of the principle of sincere cooperation in the implementation of EU environmental law

Monika Niedźwiedź

1. The principle of sincere cooperation as a general principle of EU law[1]

According to the principle of sincere cooperation, provided for in Article 4(3) TEU, Member States assist each other with full mutual trust in carrying out tasks following from the Treaties or secondary law, facilitating the achievement of the Union's tasks, and taking appropriate measures to ensure the fulfilment of their obligations arising from either primary or secondary law. At the same time, they must refrain from any measure that could jeopardise the attainment of the EU's objectives.

Article 4(3) TEU reflects a constitutional principle known also as "loyalty" or "loyal cooperation".[2] Sometimes, it is considered an enhanced obligation of good faith that is incumbent upon Member States in terms of their relations with one another and with EU institutions as a result of their membership.[3] In the jurisprudence of the Court of Justice of the EU (CJEU), it is sometimes called "the

1 Open Access and proofreading of this chapter were supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at the Jagiellonian University (Cracow, Poland).

2 In general see T. J. Lang, "Article 5 of the EEC Treaty: The emergence of constitutional principles in the case law of the Court of Justice" [1986] X/3 *Fordham International Law Journal* 503; T. J. Lang, "Developments, issues and new remedies – the duties of national authorities and courts under Article 10 of the EC Treaty" [2003] XXVII/6 *Fordham International Law Journal* 1904; T. J. Lang, "The development by the Court of Justice of the duties of cooperation of national authorities and community institutions under Article 10 EC" [2007] XXXI/5 *Fordham International Law Journal* 1483. See also A. Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (Nomos 2001); E. Neframi, "The duty of loyalty: Rethinking its scope through its application in the field of EU external relations" [2010] 47 *Common Market Law Review* 323; M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014); G. De Baere and T. Roes, "EU loyalty as good faith" [2015] 64 *International and Comparative Law Quarterly* 829; T. Roes, "Limits to loyalty. The relevance of Article 4(3) TEU" [2016] 1 *Cahiers de Droit Européen* 253; J. Larik, "Pars pro toto: The Member States' obligations of sincere cooperation, solidarity and unity," in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Oxford University Press 2018) 175–199; A. Miglio, "Differentiated integration and the principle of loyalty" [2018] 14/3 *European Constitutional Law Review* 475.

3 V. Constantinesco, "L'article 5 CEE, de la bonne foi àla loyauté communautaire," in *Du droit international au droit de l'intégration (Liber amicorum Pierre Pescatore)* (Nomos 1989) 97–114. See also Opinion of Advocate General Mazák in case C-203/07 P, *Hellenic Republic v. Commission of the European Communities*, ECLI:EU:C:2008:270, para 83.

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principle of cooperation in good faith".[4] For the purpose of this chapter, the Treaty term "principle of sincere cooperation" will be used, and the focus will be on that principle as resulting from Article 4(3) TEU. The principle also underpins many other provisions of the Treaties.[5] The CJEU referred to it as "the principle of cooperation" for the first time in the judgement of 16 December 1976 in case 33/76 Rewe-Zentralfinanz.[6] It held that in "applying the principle of cooperation laid down in Article 5 of the Treaty [now Article 4(3) TEU], it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law".[7] This statement also reflects the decentralised application of European law as well as the obligation to provide for the full effectiveness of that law, as rooted in the principle of cooperation.

The requirement to ensure the full effectiveness of EU law resulting from that principle determines the law-making effect of the principle. Being itself a constitutional principle, it has also served directly or indirectly as a basis for other fundamental principles of EU law, such as primacy, direct effect, the principle of consistent interpretation, or liability for damages caused by violation of EU law.[8] Obligations (positive and negative) flowing therefrom not only refer to areas of EU competence but also bind the Member States acting within their own competences because, as the CJEU held in its jurisprudence, they must exercise their competence in accordance with EU law.[9] The principle may be a sole source of duties imposed on Member States, meaning that in the event of an infringement procedure, there is

4 See Case C-52/84, *Commission v. Kingdom of Belgium*, ECLI:EU:C:1986:3, para 16; Case C-41/11, *Inter-Environment Wallonie and Terre wallone*, ECLI:EU:C:2012:103, para 43; Opinion of Advocate General E. Sharpston in Case C-508/08, *Commission v. Malta*, ECLI:EU:C:2010:392, para 53–56. See also de Baere and Roes (n. 1). The principle under article 4(3) of TEU is sometimes called the principle of loyalty. However, the view has also been expressed that sincere cooperation covers one dimension of a separate principle of loyalty. Be that as it may, in this chapter the focus is on the principle of sincere cooperation as resulting from art. 4(3) TEU.

5 See articles 24(3) TEU, art. 19(1) TEU, art. 267 TFEU, article 351 TFEU. For overview see Roes (n. 1). With regard to relations amongst EU institutions see article 13(2) TEU. See also F. Casolari, "EU loyalty after Lisbon: An expectation gap to be filled?," in L. S. Rossi and F. Casolari (eds.), *The EU After Lisbon. Amending or Coping with the Existing Treaties?* (Springer 2014) 98–106.

6 Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188. In its earlier judgement, the Court referred to "solidarity" and held that "the solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty [now Article 4(3) TEU]". See joined Cases C-6/69 and C-11/69, *Commission of the European Communities v. French Republic*, ECLI:EU:C:1969:68, para 16.

7 Case C-33/76, *Rewe-Zentralfinanz*, para 5.

8 See landmark judgements such as Case C-6/64, *Flaminio Costa v. E.N.E.L.*, pp. 593–594; Case C-14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para 26; Case C-213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI:EU:C:1990:257, para 19–20 and earlier jurisprudence referred to therein; Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, ECLI:EU:C:1991:428, para 36–37. See also Roes (n. 1) 254–257; Casolari (n. 4) 94–97; Klamert (n. 1) 68–82.

9 On the scope of obligations resulting from that principle see Roes (n. 1).

not always a need to call for an additional legal basis.[10] It binds all the authorities of the Member States: legislative, executive, and judicial authorities. The principle of sincere cooperation is a structural principle, i.e., it refers to the relations between the Union and the Member States (vertical loyalty), but it also has a horizontal application in the state-to-state framework (horizontal loyalty).[11] It has been pointed out that unlike the pre-Lisbon Article 10 of the Treaty on European Union, the principle now is explicitly reciprocal.[12]

Among the objectives of the Treaties is a high level of protection and improvement of the quality of the environment.[13] Although there is now an outstanding amount of EU environmental law, "this impressive development in environmental law has not always been matched by corresponding improvements in environmental quality".[14] Since the laws themselves, even those of good quality, do not always guarantee the achievement of the objective, the question is, what other factors determine the effectiveness of environmental law?[15] It is not sufficient to pass the law. Pollution will not decrease from the moment of the law's entry into force. The law must be implemented and enforced. The implementation of EU law consists of the following stages: transposition into national law if necessary (directives), operationalisation (designation of national authorities that are to be responsible for the subsequent application of the EU law), and enforcement, which shall be understood as the act of compelling compliance with a law, if necessary secured by sanctions.[16]

The effective implementation of EU law is among the EU's priority objectives. Meanwhile, "despite the EU's policy commitments and international obligations, the state of enforcement of EU environmental law is far from satisfactory".[17]

10 See Case C-246/07, *European Commission v. Kingdom of Sweden*, ECLI:EU:C:2010:203, paras 103–105; Case C-459/03, *Commission of the European Communities v. Ireland*, ECLI:EU:C:2006:345, paras 174–179.

11 See i.a. B. Guastaferro, "Sincere cooperation and respect for national identities," in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law. Volume I* (Oxford University Press 2018) 354–366.

12 P. Van Elsuwege, "The duty of sincere cooperation and its implications for autonomous Member State action in the field of external relations: Member State interests and European Union law," in M. Varju (ed.), *Between Compliance and Particularism. Member States Interests and European Union* (Springer 2019) 285.

13 See art. 3(3) TUE.

14 S. Maljean-Dubois, "The effectiveness of environmental law: A key topic," in S. Maljean-Dubois (ed.), *The Effectiveness of Environmental Law* (Intersentia 2017) 2.

15 The effectiveness of environmental law is understood here as the ability to be successful and produce the intended results. See ibid. 3.

16 J. H. Jans and H. H. B. Vedder, *European Environmental Law* (4th ed., Europa Law 2012) 139; Maljean-Dubois (n. 13) 3; J. H. Jans, R. de Lange, S. Prechal, and R. J. G. M Widdershoven, *Europeanisation of Public Law* (Europa Law 2007) 13–17; M. Eliantonio, "Enforcing EU environmental policy effectively: International influences, current barriers and possible solutions," in S. Drake and M. Smith (eds.), *New Directions in the Effective Enforcement of European Law* (Edward Elgar 2016) 177.

17 Eliantonio (n. 15) 176.

According to Article 197 TFEU, the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. The implementation of EU law is the responsibility of the Member States and rests with the authorities competent for a given stage of implementation of EU law. The transposition of EU law is essentially a matter for the national legislator. The executive power is involved in the process of transposing EU law into the national legal order to a limited extent. The enforcement of EU law and national law transposing EU law is the responsibility of Member States' judicial authorities, non-judicial authorities competent to control compliance with the law, and enforcement authorities.

At each stage of the decentralised implementation of EU law, the cooperation of Member States and EU institutions, bodies and agencies is the core characteristic of the integrated administration necessary to ensure the effective and uniform implementation of EU law.[18] At the stage of the transposition of directives, the obligation to cooperate is related to the control powers of the European Commission, which examines the correctness of the transposition of directives into the national legal order. Member States are obliged to notify the legal instruments transposing the directives or provide information in the field of technical regulations. At the stage of the application of EU administrative law, forms of cooperation between the administrative authorities of the Member States are developed in many areas. At the stage of the enforcement of EU law, mutual cooperation between national authorities and between national authorities and EU authorities (bodies and agencies) is also required.[19] The cooperative model of the implementation of EU environmental law is also reflected in cooperation between EU institutions, Member States and EU agencies, as enhanced by a number of EU environmental legal acts.[20]

As early as 1997, it was underlined in the Council Resolution on the drafting, implementation, and enforcement of Community environmental law[21] that environmental protection implies particular challenges that make it in many ways distinct from other subjects of policy and legislation, which should be taken into account when drafting, implementing and enforcing environmental law.[22] The Council invited the Member States to encourage, in the appropriate framework, inter alia by promoting initiatives of the IMPEL network, cooperation between and within Member States to combat illegal practices with a transboundary character in the field of the environment.[23] The IMPEL network was set up in 1992 as an international non-profit association of environmental authorities of the EU Member

18 J. Agudo Gonzáles, "The cooperative administration in the internal market. In search of a typology," in F. Velasco Caballero and F. Pastor Merchante (eds.), *The Public Administration of the Internal Market* (Europa Law 2015) 231–236.

19 Jans and Vedder (n. 15) 163.

20 F. Casolari, "EU loyalty and the protection of Member States' national interest. A mapping of the law," in M. Varju (ed.), *Between Compliance and Particularism* (Springer 2019) 53–54.

21 OJ C 321, 22 October 1997, p. 1.

22 Infra, point 2.

23 Infra, point 18.

States, acceding and candidate countries of the EU, EEA, and EFTA countries and potential candidates to join the EU. It was created with a view to giving the necessary impetus to the EU to make progress on ensuring a more effective application of environmental legislation, including with third countries. However, it has been pointed out that its impact on the actual application of environmental directives, as well as on the monitoring of Member States' compliance with EU law, is very limited.[24] Nevertheless, the networked implementation and enforcement of EU environmental law is still perceived as an important method to ensure its effectiveness.[25]

It has been observed that "in so far as the Union interest incorporates Member States' common/coexisting interests, the principle [of sincere cooperation] and its application cannot be disconnected from the enforcement of those interests".[26] There is a close connection between sincere cooperation and the concept of "ever closer union" as the latter will not be achieved unless the Member States and institutions of the Union cooperate sincerely and in compliance with the law. The constitutional principle of sincere cooperation creates a legal space where common objectives and policies are achieved. The implementation and enforcement of EU environmental law through shared responsibility is one of the key elements of the EU's environmental policy.

European environmental legislation underlines the obligation for Member States and EU institutions, bodies and agencies to cooperate.[27] However, it follows from

24 L. Krämer, *EU Environmental Law* (Sweet & Maxwell 2012) 402.

25 Eliantonio (n. 15) 195–199.

26 Casolari (n. 19).

27 For example, the preamble to 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, 22 December 2000, recital 14, states that "the success of this Directive relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and involvement of the public, including users". This is also reflected in directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11 June 2008, art. 25; directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 1760, 5 July 2024, pp. 1–58, recital 78 of the preamble and art. 24; directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L, 2024/1203, 30 April 2024, pp. 1–28; art. 19; regulation (EU) 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU, OJ L 234, 22 September 2023, pp. 1–47, art. 1, art. 14 para 6; regulation (EU) 2021/783 of the European Parliament and of the Council of 29 April 2021 establishing a Programme for the Environment and Climate Action (LIFE), and repealing Regulation (EU) No 1293/2013, OJ L 172, 17 May 2021, pp. 53–78, recital 28 and 31 of the preamble, art. 7; directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25. October 2003, pp. 32–46, art. 10 para 6; regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16 May 2023, pp. 52–104, recital 60 and art. 12; regulation (EU) 2019/1021 of the European Parliament

the jurisprudence of the CJEU that even without explicit reference to that principle in EU legal acts, the sincere cooperation principle underlines the implementation and enforcement of the EU environmental legislation.

2. The principle of sincere cooperation and the effectiveness of EU environmental law in CJEU jurisprudence

The principle of sincere cooperation is an underlying principle in CJEU jurisprudence for the obligations of the Member States to implement and enforce EU environmental law effectively.

In C-72/95 *Kraaijeveld*,[28] the court referred to the principle of loyal cooperation and implied that if a discretion given by EU provision has been exceeded and the national provisions must consequently be set aside, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.[29]

In C-41/11, *Inter-Environment Wallonie and Terre wallone*, the CJEU held that the competent national authorities are under an obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, such as by revoking or suspending consent already granted without an assessment.[30]

In C-416/10 *Križan*,[31] the court held that a national court seised of a dispute governed by EU law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgement to be given on the existence of the rights claimed under EU law. It added that the right to bring an action provided for by Article 15a of Directive 96/61 must be interpreted in the light of the purpose of that directive. That purpose, as laid down in Article 1, is to achieve the integrated prevention and control of pollution by putting in place measures designed to prevent

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and of the Council of 20 June 2019 on persistent organic pollutants, OJ L 169, 25 June 2019, p. 45, recital 18, 19 and 24 and article 3; regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ L 126, 21 May 2009, p. 13. The need to cooperate is also underlined in Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030, OJ L 114, 12 April 2022, pp. 22–36.

28 Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland*, ECLI:EU:C:1996:404.

29 See para 58 and 61 of Case C-72/95 *Kraaijeveld*.

30 See Case C-41/11, *Inter-Environment Wallonie and Terre wallone*, ECLI:EU:C:2012:103, para 45; Case C-196/16 and Case C-197/16, *Comune di Corridonia and Others*, ECLI:EU:C:2017:589, para 35; Case C-411/17, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v. Conseil des ministres*, ECLI:EU:C:2019:622, para 170–176.

31 Case C-416/10, *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, ECLI:EU:C:2013:8.

or reduce emissions of the activities listed in Annex I into the air, water, and land in order to achieve a high level of protection of the environment. However, the court further held that the exercise of the right to bring an action provided for by Article 15a would not make effective prevention of that pollution possible if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for by Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures, such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit.[32] In this judgement, the court indirectly refers to the principle of sincere cooperation by making reference to its previous judgements, where the principle was directly referred to.[33]

In C-752/18 *Deutsche Umwelthilfe*, the court pointed out that the full effectiveness of EU law and effective protection of the rights that individuals derive from it may, where appropriate, be ensured by the principle of state liability for loss or damage caused to individuals as a result of breaches of EU law for which the state can be held responsible, as that principle is inherent in the system of the treaties on which the EU is based.[34] That principle applies to any case in which a Member State breaches EU law, whichever public authority is responsible for the breach.[35] In light of the loyalty principle, the Member States shall also refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by EU law, in particular by directives.[36]

In C-181/20 *Vysočina wind*,[37] the court held that the Czech law on waste was adopted before Directive 2012/19 on waste from electrical and electronic equipment was adopted and published in the Official Journal of the EU, meaning that the period for transposition had not yet started to run, and even before that directive was capable of producing legal effects vis-à-vis the Member States to which it was

32 See para 107–109 in *Križan.*

33 See para 107 in *Križan*.

34 Thus, it referred to the well-established jurisprudence on the effectiveness of EU law. See Case C-6/60, *Humblet v. Belgian State*, p. 569, and joined cases C-6/90 and C-9/90, *Francovich and Others*, para 36.

35 Case C-752/18, *Deutsche Umwelthilfe eV v. Freistaat Bayern*, ECLI:EU:C:2019:1114.

36 In general, see Case C-129/96, *Inter-Environnement Wallonie ASBL v. Région Wallonne*, ECLI:EU:C:1997:628, para 45–50; Case C-212/04, *Konstantinos Adeneler, et al.*, ECLI:EU:C:2006:443, para 106–123; Case C-165/09 to C-167/09, *Stichting Natuur en Milieu et al.*, ECLI:EU:C:2011:348, para 78; Case C-83/20, *BPC Lux 2 Sàrl et al. v. Banco de Portugal et al.*, ECLI:EU:C:2022:346, para 63–74. See also Opinion of Advocate General G. Petruzzelli in Case C-83/20, *BPC Lux 2 Sàrl et al. v. Banco de Portugal et al.*, ECLI:EU:C:2021:853, para 55–103.

37 Case C-188/07, *Výsočina wind a.s. v. Česká republika – Ministerstvo životního prostředí*, ECLI:EU:C:2022:51.

addressed. Advocate General J. Kokott,[38] in her opinion in this case, underlined the role of the principle of sincere cooperation in this context by saying that

> it is not sufficient to protect the objectives of a piece of EU legislation only formally during the transposition period. The reason for this is that Directive 2012/19 expresses a political compromise between the Council and the Parliament that had already been reached. When it adopted its national legislation, the Czech Republic was therefore aware of the objectives of the EU legislation that would soon enter into force. To circumvent such legislation and seriously jeopardise its objectives would be incompatible with the principle of Union loyalty.[39]

In C-22/20 *European Commission v. Kingdom of Sweden*, the CJEU held that under Article 4(3) TEU, Member States are obliged

> to facilitate the achievement of the Commission's tasks, which consist inter alia, pursuant to Article 17(1) TEU, in ensuring that the provisions of the FEU Treaty and the measures taken by the institutions pursuant thereto are applied. In particular, account should be taken of the fact that, where it is a question of checking that the national provisions intended to ensure effective implementation of a directive are applied correctly in practice, the Commission, which does not have investigative powers of its own in the matter, is largely reliant on the information provided by any complainants and by the Member State concerned.[40]

It is pointed out that

> in contrast to other areas of EU law such as competition, customs, or agriculture where the Commission is empowered to open a mandatory investigation *in situ*, it lacks such powers in environmental matters. This renders it very difficult, if not impossible, for the Commission to verify whether a Member State complies with its operational obligations under EU environmental law, unless it relies on the information provided by national authorities.[41]

In this case, the Kingdom of Sweden did not sufficiently assist the European Commission in the pre-litigation procedure under Article 258 TFEU as it failed to provide the information necessary for the Commission to assess the accuracy of the claims that the urban wastewater discharged from the treatment plants for the Habo and Töreboda agglomerations satisfies the requirements of Council Directive 91/271/EEC of 21 May 1991 concerning urban wastewater treatment.

38 Opinion of Advocate General Kokott in Case C-181/20, ECLI:EU:C:2021:619.

39 Opinion of Advocate General Kokott in Case C-188/07, ECLI:EU:C:2008:174, para 96–98.

40 Case C-22/20, *European Commission v. Sweden*, ECLI:EU:C:2021:669, para 144.

41 See K. Lenaerts and J. A. Gutiérrez-Fons, "The general system of EU environmental law enforcement" [2011] 30/1 *Yearbook of European Law* 3, 36–37.

In C-188/07 *Commune de Mesquer*, the questions were referred to the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste.[42] In 1999, there was an accident involving the tanker Erika off the Brittany coast. The heavy fuel oil spilled in the accident polluted, among other things, beaches in the Commune of Mesquer, which claimed an undertaking in damages from the Total Group. It was pointed out that France is a party to the International Convention of 29 November 1969 on Civil Liability for Oil Pollution Damage to the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. In the opinion of the Advocate General in this case, it was held that

> the Liability Convention and the Fund Convention do not preclude the application of Article 15 of the Waste Framework Directive on the basis of the considerations mentioned so far. However, the arguments presented illustrate a broad political consensus for liability for oil pollution damage to be regulated by the Liability Convention and the Fund Convention. That consensus is confirmed first by the fact that the two conventions are ratified by nearly all the Member States and secondly by several non-binding Community instruments.[43]

Advocate General Kokott underlined that a departure by Community law from those conventions would encumber France and possibly other Member States with a conflict between their obligations under Community law and those under international law. The obligation of loyalty between the Community and the Member States requires such conflicts to be avoided where possible.[44] Moreover, it concerns not only the principle of loyalty but also the cooperation obligation imposed on the Community under Article 235(3) of the Law of the Sea Convention,[45] which implies that the Community must give special consideration to the efforts made by states. This is also consistent with the objective of Community policy on the environment under the fourth intent of Article 174(1) (now Article 191) of the Treaty on promoting measures at an international level to deal with environmental problems.[46] The court, however, put more emphasis on the Member States' obligation to implement directives effectively. It underlined that in applying national

42 Currently Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22 November 2008, p. 3.

43 Opinion of Advocate General Kokott in Case C-188/07, ECLI:EU:C:2008:174, para 99–100.

44 See Opinion of Advocate General Kokott in Case C-188/07, ECLI:EU:C:2008:174, para 101.

45 According to Article 235(3) of the Convention on the Law of the Sea: "With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds".

46 See Opinion of Advocate General Kokott in Case C-188/07, ECLI:EU:C:2008:174, para 101.

law, whether the provisions in question were adopted before or after the directive or derived from international agreements entered into by the Member State, the national court called on to interpret that law is required to do so, as far as possible, in the light of the wording and the purpose of the directive, in order to achieve the result pursued by the directive.[47]

However, there is still the problem that a Member State could formally implement all environmental provisions and provide for criminal penalties but do very little to act against violations of national law implementing provisions on sanctions. It is suggested in this regard that providing for minimum criteria for environmental inspections in the Member States should be a remedy. The idea results, inter alia, from the Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States.[48] This requires that

> the Member States should ensure that environmental inspections aim to achieve a high level of environmental protection and to this end should take the necessary measures to ensure that environmental inspections of controlled installations are organised and carried out in accordance with points IV to VIII of this recommendation. Member States should assist each other administratively in carrying out the guidelines of this recommendation by the exchange of relevant information and, where appropriate, inspecting officials. To prevent illegal cross-border environmental practices, Member States should encourage, in cooperation with IMPEL, the coordination of inspections with regard to installations and activities which might have significant transboundary impact. In order to promote best practice across the Community, Member States may, in cooperation with IMPEL, consider the establishment of a scheme, under which Member States report and offer advice on inspectorates and inspection procedures in Member States, paying due regard to the different systems and contexts in which they operate, and report to the Member States concerned on their findings.[49]

It is worth mentioning that in light of Article 197 TFUE, the effective implementation of Union law by Member States shall not result in the harmonisation of the procedural laws and regulations of the Member States. The general principle of sincere cooperation plays an important role in this context as a basis for claiming the effective action of the Member States' authorities, despite the lack of harmonisation of the procedural laws.

The principle of sincere cooperation and the effectiveness resulting therefrom plays an important role in enforcing environmental law providing for criminal

47 See Case C-188/07, ECLI:EU:C:2008:174, para 84.

48 OJ L 118, 27 April 2001, p. 41.

49 Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States, see infra, point III.1.

enforcement.[50] In C-69/15 *Nutrivet*, the CJEU held that the imposition of a fine penalising a shipment of waste for which the accompanying document contains incorrect or inconsistent information, the basic amount of which is the same as the fine imposed for infringement of the obligation to complete that document, is considered proportionate if the circumstances of the infringement make it possible to find that they involve equally serious infringements in light of the risks they entail for the protection of the environment and human health, which it is for the national court to ascertain.[51]

The principle of sincere cooperation also underlines the implementation and enforcement of obligations resulting from international environmental law.[52] It has been pointed out that the duty of loyal cooperation significantly affects the scope of Member State action at the international level.[53] It must be remembered that a significant number of EU competences in the area of the environment are shared.[54] As a result, the EU and Member States are both usually parties to international agreements in the area(s) of their respective competence(s).[55] However, the court holds that the duty of sincere cooperation is of general application and does not depend on whether the EU competence concerned is exclusive or on any right of the Member States to enter into obligations regarding non-member countries.[56] Therefore, the implementation and enforcement of the agreements require sincere cooperation between the EU and its Member States.[57] That obligation to cooperate flows from the requirement of unity in the international representation of the EU.[58] As Advocate General M. Szpunar put it, "the reputation and credibility of the EU

50 See e.g. art. 50 of the regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12 July 2006, p. 1; article 1 of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6 December 2008, p. 28.

51 Case C-69/15, *Nutrivet D.O.O.E.L. v. Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség*, ECLI:EU:C:2016:425, para 55.

52 See L. Massai, "The EC principle of loyal cooperation and the obligations of the Kyoto Protocol," in L. Massai (ed.), *The Kyoto Protocol in the EU* (Springer 2011), 241–288.

53 Van Elsuwege (n. 11) 288.

54 For overview see A. Cardesa-Salzmann and E. Morgera, "The EU's external action after Lisbon: Competences, policy consistency and participation in international environmental negotiations," in M. Peeters and M. Eliantonio (eds.), *Research Handbook in EU Environmental Law* (Edward Elgar 2020) 71–80; D. Langlet and S. Mahmoudi, *EU Environmental Law and Policy* (Oxford University Press 2016) 95–128.

55 See J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International 2001) 61–67; M. Cremona, "Defending the community interest: The duties of cooperation and compliance," in B. de Witte and M. Cremona (eds.), *EU Foreign Relations Law* (Hart Publishing 2008) 158–161.

56 Judgment of 20 April 2010 in Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203, para 71.

57 See also D. van Eeckhoutte and T. Corthaut, "The participation of the EU and its Member States in multilateral environmental negotiations post Lisbon" [2017] 36/1 Yearbook of European Law 749, 750.

58 Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203, para 73.

on the international stage constitutes a distinct legal interest protected by Article 4(3) TEU".[59]

In C-459/03 *Commission v. Ireland*,[60] the Commission submitted that Ireland had failed to comply with the duty of cooperation under Article 10 EC (Article 4(3) TUE) inasmuch as, by instituting proceedings under the United Nations Convention on the Law of the Sea on the basis of provisions falling within the competence of the Community, Ireland exercised a competence that belongs to the Community. The Commission also contended that Ireland failed in its duty of cooperation under Article 10 EC by bringing those proceedings unilaterally without first informing and consulting the competent Community institutions. The court found the plea justified and confirmed that by bringing proceedings under the dispute-settlement system set out in the Convention on the Law of the Sea without having first informed and consulted the competent Community institutions, Ireland had failed to comply with its duty of cooperation, now provided for in Article 4(3) TUE.

The duty of cooperation implies that Member States' actions at the international level may not affect the EU's decision-making process.[61] In *Commission v. Sweden*, the court held that by unilaterally proposing the addition of PFOS to Annex A to the Stockholm Convention, the Kingdom of Sweden dissociated itself from a concerted common strategy within the Council.[62] In consequence, the court held that such a situation, characterised, as established in paragraph 91 of this judgement, by a unilateral proposal which dissociates the Member State in question from a concerted common strategy within the Council and was submitted within an institutional and procedural framework such as that of the Stockholm Convention, constituted a violation of the principle of sincere cooperation.[63]

3. The principle of sincere cooperation in the state-to-state framework in light of CJEU jurisprudence

The transboundary character of environmental protection results in the requirement to provide for the effectiveness of environmental law not only within the territory of a single Member State but also in the wider European dimension. This could not have been done without the vertical cooperation between the EU institutions and the Member States. However, the effectiveness of environmental law also requires horizontal cooperation between the Member States, which is an important aspect of cooperative enforcement. In the context of sincere cooperation in

59 Opinion of Advocate General M. Szpunar in Case C-620/16, *European Commission v. Federal Republic of Germany*, ECLI:EU:C:2019:3, para 96. See also the Court analysis in the judgement given in the case (C-620/16, ECLI:EU:C:2019:256, para 92–99). See also R. Schütze, *Foreign Affairs and the EU Constitution. Selected Essays* (Cambridge University Press 2014) 339.

60 Case C-459/03, *Commission of the European Communities v. Ireland*, ECLI:EU:C:2006:345.

61 Van Elsuwege (n. 11) 291.

62 Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203, para 91.

63 Case C-246/07, *Commission v. Sweden*, ECLI:EU:C:2010:203, para 102–105.

the state-to-state framework, particular attention shall be paid to C-121/21 *Czech Republic v. Poland*. The Czech Republic argued that pursuant to the principle of loyalty set out in Article 4(3) TEU, Member States are obliged to provide mutual assistance in order to ensure the achievement of the objectives set out in EU law, including in secondary law. As the lignite mining concession until 2026 falls within the scope of the EIA Directive and Directive 2003/4, taking into account the location of the Turów mine, these directives also impose certain obligations on the Czech Republic, the implementation of which the Republic of Poland is obliged to support. Further, it held that by failing to provide complete information related to the procedure for issuing a decision authorising the conduct of mining activities until 2026, the Republic of Poland failed to fulfil its obligations under the principle of sincere cooperation, sanctioned by Article 4(3) TEU.[64] The late and incomplete delivery of the requested information by the Republic of Poland, combined with the refusal to respond to the Czech Republic's requests for assistance, does not meet the requirements of the spirit of solidarity, cooperation, and mutual support between Member States, as established in EU law, with a view to effectively achieving the objective of environmental protection. Such an approach towards a neighbouring Member State, which is in a situation of identical environmental risk, is in breach of the principle of sincere cooperation laid down in Article 4(3) TEU.[65]

The abovementioned judgements underline the importance of the principle of sincere cooperation in environmental cross-border pollution disputes. The effectiveness of EU law calls for such disputes between Member States to be resolved with cooperation and mutual support.

4. Conclusion

It is not possible to achieve a high level of protection and improve the quality of the environment without mutual trust and cooperation between the Member States in the implementation of environmental law, a fundamental premise of which is the principle of sincere cooperation. Therefore, the effectiveness of European environmental policy, like any other EU policy in a decentralised model of implementation of EU law, is largely founded on the cooperative model of implementation and enforcement. It is not sufficient if only some Member States implement legislation; it is also not sufficient if all Member States formally implement legislation but do little to act against violations of properly implemented EU law.[66]

64 See Opinion of Advocate General P. Pikämae in Case C-121/21, ECLI:EU:C:2022:74, para 212–221.

65 For a detailed analysis of the case, see Chapters 18 and 19 in this book. It is worth mentioning that *Czech Republic v. Poland* was finally removed from the court's register as a result of a settlement concluded with the Republic of Poland.

66 See also Jans and Vedder (n. 15) chap. 4.

The transboundary nature of pollutants and the risk of transferring pollution from one state to another requires more cooperation between Member States in the implementation and enforcement of EU law than in any other EU policy.[67] The fulfilment of these obligations is enforceable in cases before the CJEU, which makes the principle of sincere cooperation a real instrument providing for a more effective implementation of EU environmental law in both internal and external dimensions.

67 See point 20 of the preamble to Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11 June 2008, p. 1.

9 Testing the limits of unity of the EU legal order? Reflections on the rise of inter-state litigation and non-compliance

Alicja Sikora-Kalėda

1. Introduction[1]

Unity is one of the most fascinating and controversial phenomena of the EU legal order. As recalled by Giorgio Napolitano, "the Treaties signed in Rome on 25 March 1957 were undoubtedly a milestone in Europe's journey towards unity".[2] Unity refers thus primarily to the ethos of the EU integration, a political promise of "united in diversity" within the meaning of the preambles of the founding treaties.

While punctually referring to various aspects of the constitutional dimension of unity, this exploratory chapter reflects upon the rise of the litigation between the EU Member States before the Court of Justice of the EU (hereinafter the "Court of Justice" or "CJEU") as well as the intensification of resistance from Member States to comply with EU law, both issues coupled with a delicate question of the limits of the Union's competences, through the prism of unity viewed as a systemic feature of the EU legal order, a feature potentially under stress. The concept of unity is scrutinized from a systemic perspective, drawing upon the genesis of the Union as a unique legal order and the historical ethos of European integration that derives from the "commanding moral authority" and "political messianism"[3] of its founding fathers driven by a political wisdom of a conscious choice to focus on a "future of reconciliation and integration" rather than the conflicting past.[4]

1 Open Access and proofreading of this chapter were supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at the Jagiellonian University (Cracow, Poland). The views expressed are those of the author and in no way reflect the views of the Council or the European Council.

2 G. Napolitano, "The fundamental goal of the European project," in G. Amato, E. Moavero-Milanesi, G. Pasquino, and L. Reichlin (eds.), *The History of the European Union. Constructing Utopia* (Bloomsbury 2018) 41–57.

3 J. H. H. Weiler, "Deciphering the political and legal DNA of European integration: An exploratory essay," in J. Dickson and P. Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 137–158.

4 J. H. H. Weiler and J. Justus Vasel, "The states' upcoming choice," in G. Amato, E. Moavero-Milanesi, G. Pasquino, and L. Reichlin (eds.), *The History of the European Union. Constructing Utopia* (Bloomsbury 2018) 540.

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In the last years, mostly through the rule of law crisis, the Court of Justice's case law on the Union's values has been substantially evolving.[5] Also, the judicial dialogue between the national constitutional courts and the Court of Justice has unveiled unprecedented tensions.[6] In parallel, the system of compliance in EU law has been facing one of the most significant challenges since its creation, testing the limits of the resilience of EU law. Indeed, the intensity of EU remedies such as classic infringement procedures under Article 258 TFEU has increased, notably through the wider and unprecedented use of the interim measures under Article 279 TFEU[7] combined with the financial penalties under Article 260(2) TFEU,[8] in order to respond to the need of reactivity and emergency remedies in EU law. It seems indeed that the system of remedies available under EU law is under stress as new, polarizing phenomena and crises resonate in the EU legal space. Likewise, the rise of state-to-state litigation, notably under Article 259 TFEU, echoes potential divergences between the EU Member States. The specific question raised in the present analysis is whether and how the growing dissonances between the EU Member States, which are brought before the CJEU in the form of inter-state litigation, are liable to affect the role of the Court of Justice, as well as the dynamics of the existing remedies meant to ensure compliance with the EU legal order. Are we

5 A. von Bogdandy, P. Bogdanowicz, I. Canor, M. Taborowski, and M. Schmidt, "A potential constitutional moment for the European rule of law – the importance of red lines" [2018] 55/4 Common Market Law Review 983; D. Kochenov and P. Bárd, "The last soldier standing? Courts vs politicians and the rule of law crisis in the new Member States of the EU" [2019] 1 European Yearbook of Constitutional Law 243; A. von Bogdandy and L. D. Spieker, "Countering the judicial silencing of critics: Article 2 TEU values, reverse solange and the responsibilities of national judges" [2019] 15/3 European Constitutional Law Review 391.

6 Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278; Danish Supreme Court, judgment of 6 December 2016, Case C-15/2014; see H. Krunke and S. Klinge, "The Danish Ajos case. The missing case from Maastricht and Lisbon" [2018] 3/1 European Papers 157. Case C-399/09, *Landtová*, ECLI:EU:C:2011:415; ÚS, plenary judgment of 31 January 2012, Pl. ÚS 5/12, see M. Bobek, "Landtová, Holubec, and the problem of an uncooperative court: Implications for the preliminary rulings procedure" [2014] 10/1 European Constitutional Law Review 54 and J. Komárek, "Czech Constitutional Court playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU ultra vires: Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII" [2012] 8 European Constitutional Law Review 323. Judgment in Case C-493/17, *Weiss and Others*, ECLI:EU:C:2018:1000, BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15; see F. Annunziata, "Cannons over the EU legal order: The decision of the BVerfG (5 May 2020) in the Weiss case" [2021] 28/1 Maastricht Journal of European and Comparative Law 123. Case K 3/21, *Polish Constitutional Court*; see A. Gliszczyńska-Grabias and W. Sadurski, "Is it Polexit yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland" [2023] 19/1 European Constitutional Law Review 163. More generally Taricco saga, Case C-105/14, *Taricco I e.a.*, ECLI:EU:C:2015:555 and case C-42/17, M.A.S., M.B. (*Taricco II*), ECLI:EU:C:2017:936 and *Quadrature du Net* saga, joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, EU:C:2020:791 and C-470/21, *La Quadrature du Net and Others (II)*, EU:C:2024:370, see infra.

7 Case C-441/17, *Commission v. Poland (Bialowieza forest)*, EU:C:2018:255; Case C-619/18, *Commission v. Poland (Supreme Court)*, EU:C:2019:531.

8 Order in Case C-441/17R, *Commission v. Poland (Bialowieza forest)*, EU:C:2017:877; order in Case C-619/18 R, *Commission v. Poland (Supreme Court)*, EU:C:2018:1021.

witnessing a "selective exit" phenomenon meant as selective non-compliance with obligations stemming from the EU legal order by a Member State,[9] or is it rather a natural tendency of fluctuating disagreements and tensions that form part of the constantly evolving EU law?

Selected aspects of the concept of unity in EU law as a pluralist legal system are explored in Section II through its interaction with the fundamental constitutional principles of the EU legal order. In this context, both the judicial dimension of unity and the exclusive jurisdiction of the Court of Justice are addressed, as well as their meaning for the system of compliance. Section III discusses the overall rise of non-compliance and the changing nature of inter-state litigation, as well as their consequences for the concept of unity, as expressed notably through the treaty-based remedies.

2. Unity in the EU legal order – selected aspects

2.1 Embracing unity in EU law – doctrinal references

Unity as a neural and holistic description of any system requires an analysis reaching its foundations.[10] Whilst a full exploration of the multifaceted meaning of unity in EU law goes beyond the scope of this chapter, it is worth recalling its selected expressions and interactions with other concepts and constitutional principles of EU law.

As denoted by N. Luhmann, "wherever the word 'system' is used, the unity of the system is tacitly assumed".[11] Intimately closely related to "cohesion", unity represents a "typical of the neural descriptions of any system. It genuinely grasps the holistic dimension of coherence, because it endorses the conclusion which increases or intensifies the relationships of order and structure, and warns us against the ones that could cause any fragmentation in the system".[12] Unity as a systemic feature is thus particularly challenging to situate in the context of modern pluralist models of supranational law,[13] postnational law[14] and transnational

9 "Selective exit", meant as selective non-performance of the obligations stemming from the EU legal order by a Member State, was used by J. H. H. Weiler, "The transformation of Europe" [1991] 100/8 Yale Law Journal 2403.

10 For the systemic definitions, see J. Dickson, "Towards a theory of European Union legal systems," in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 25.

11 N. Luhmann, "The unity of the legal system," in G. Teubner (ed.), *Autopoietic Law – A New Approach to Law and Society* (Brill 1987) 12–36.

12 J. M. Pérez Bernejo, "Coherence: An outline in six metaphors and four rules," in M. Araszkiewicz and J. Šavelka (eds.), *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence* (Springer 2013) 93–111.

13 J. H. H. Weiler, "The community system: The dual character of supranationalism" [1981] 1/1 Yearbook of European Law 267.

14 N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford Academic 2010) 7.

law,[15] and global law[16] marking the "end of the historical unity of law and state".[17] In the legal pluralist forms, given their diffuse nature,[18] as well as political de-territorialization and pluralization and "variable intertwinements",[19] the underlying collision between a plurality and law's tendency for unity[20] is tangible. Scholars underline that "de-territorialisation amounts to … the emergence of 'overlapping' legal orders".[21] In the context of global legal pluralism, understood as one of the leading analytical frameworks for conceptualizing law in the twenty-first century, scholars underline the contrast between pluralism as a factor of distinction and differentiation as a factor meant to epitomize harmony,[22] especially in the Kelsenian meaning of monism.[23]

This is not necessarily the case with the EU's legal order. Whilst the EU has been construed as "a model for the post-national, global governance of tomorrow",[24] there is "neither descriptive nor normative consensus"[25] regarding the conceptual status of the Union. Yet, it is widely recognized that the "European constitutional practice has a pluralist structure"[26] based on the international agreement between the Member States, which combines the features of a treaty and a constitution, thereby "standing for a constitutional treaty".[27] Thus, like all "composite" or federal systems, the Union has inevitably been characterized by the tension "between the whole and the parts, centrifugal and centripetal forces".[28] However, among many arguments in support of the Union's *sui generis* character, the following analysis allows us to reconstruct, at least partially, the abovementioned tension between unity and pluralism and transform it into the driving force of the Union.

15 M. Avbelj, *The European Union under Transnational Law. A Pluralist Appraisal* (Bloomsbury 2020).

16 H. G. Gelber, *Sovereignty Through Interdependence* (Brill 1997); J. C. Hsiung, *Anarchy and Order: The Interplay of Politics and Law in International Relations* (Lynne Rienner 1997); G. Teubner (ed.), *Global Law Without a State* (Dartmouth 1997).

17 G. Teubner, "Foreword: Legal regimes of global non-state actors," in G. Teubner (ed.), *Global Law Without a State* (Dartmouth 1997) xiii, quoted by H. Lindahl, "A-legality: Postnationalism and the question of legal boundaries" [2010] 73/1 Modern Law Review 30, 32.

18 Weiler (n. 13) 270.

19 Lindahl (n. 17).

20 Ibid.

21 Ibid. 32.

22 P. Zumbansen, "Manifestations and arguments: The everyday operation of transnational legal pluralism," in P. Schiff Berman (ed.), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 230–262.

23 H. Kelsen and S. L. Paulsen (trans.), "The concept of the legal order" [1982] 27/1 The American Journal of Jurisprudence 64.

24 J. Monnet, *Memoires*. Quotation after Avbelj (n. 15) 7.

25 Avbelj (n. 15) 42.

26 M. Kumm, "Rethinking constitutional authority: On the structure and limits of constitutional pluralism," in M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury 2012) 39–65.

27 Ibid.

28 Weiler (n. 13) 268.

EU law as an autonomous and comprehensive legal order, in particular given the views of P. Pescatore, who saw it as a "law of integration" conveying "the idea of law as an *open process* and not of a solid state".[29] Indeed, "[t]he inherent unity of this legal order is of the greatest importance for its further development".[30] As argued by the representatives of principled legal pluralism who consider the EU legal system as its exemplification, principled legal pluralism offers "the conceptual and practical continuity to be combined with the integration of new", thus making pluralism a forward-looking rather than conservatory approach, implying "the ethos of a dialectically open self".[31] As for those authors who privilege European constitutionalism over legal pluralism and refer to legal monism as the concept underlying the Court of Justice case law on primacy since *Costa/Enel*,[32] they likewise admit the complementary evolution of EU law and national constitutional law towards a common commitment to constitutionalism.[33]

Secondly, in the Union, "the primary focus has often centered on unity or the policies that bring together the divergent populations of the Union".[34] However, since it is diversity that is at the core of the European integration project, it is precisely through the "novel ways in which the EU has been recognizing difference and incorporating it into its institutions and *modus operandi*"[35] that one can grasp unity in EU law. The Community and Union experience "as a process"[36] embraces unity and diversity through integration as an ultimate objective.

More generally, in the classic EU law doctrine and in a context which goes beyond the legal understanding of unity of the EU legal order, unity has been discussed through the prism of a fundamental dichotomy between "Europe as unity and Europe as Community" in the *Transformation of Europe* by J.H.H. Weiler. In his essay, Weiler considered "civilizing" interstate relations as one of the defining ideas of the early European communities and warned against the potential risks of Europe's development towards a "global power" based on "unity" or superstatehood rather than continuing with the community approach.[37] Indeed, according to Weiler, the EU should be building the community rather than unity where "nationality and state affiliation of the individual, so divisive in the past" will be eliminated "as the principal referent for transnational human intercourse".[38]

29 J. Baquero Cruz, *What's Left of the Law of Integration? Decay and Resistance in European Union Law* (Collected Courses of the Academy of European Law XXVI/2, Oxford University Press 2018) 3.
30 H. G. Schermers, *Judicial Protection in the European Communities* (3rd ed., Dordrecht 2013) 7.
31 Avbelj (n. 15) 38.
32 Kumm (n. 26) 64.
33 Ibid. 62.
34 F. Bieber and R. Bieber, *Negotiating Unity and Diversity in the European Union* (Palgrave Studies in European Union Politics, Palgrave 2021) 1.
35 Ibid.
36 Weiler (n. 13) 269.
37 Weiler (n. 9).
38 Ibid. 2481.

Twenty-five years later, in his *Tale of Two Monsters*,[39] relying on a vision of the Leviathan as a symbol for the state and the Behemoth as a symbol of lawlessness,[40] A. Somek argued that Weiler's normative rejection of unity "partakes of an ambivalence that is written into the genetic code of the Union" and advocated for the unity vision. In his response, Somek considered that a community vision does not make Member States disappear but leads to another vision of the boundaries being "intermittently overridden in the interest of those availing themselves of the benefits of mobility". Likewise, Somek concluded that "[t]he existential question confronting the Union is where the relevant lines will be drawn. Will the Union matter more than the states?"[41]

In parallel, in 2000, a related concept of homogeneity was explored in the EU scholarship by F. Shorkopf, who understood homogeneity as a principle establishing "a fundamental consensus among the Member States on integration, ensuring the legitimacy and functioning of the Union and creating the conditions for the formation of a European identity".[42] The homogeneity embodied in Article 2 TEU was discussed in 2024 from a critical standpoint by E.M. Nettesheim, who argued that the Court of Justice is in the process of transforming Article 2 TEU into a federal homogeneity clause that restricts the constitutional room for maneuver of the EU member states "top-down".[43]

2.2 Embracing unity in EU law – constitutional interactions

From the constitutional perspective, unity resonates through its interaction with the founding principles of EU law. Unity operates internally within the EU legal order itself, in relation to the national legal orders of the Member States and in the external dimension of the EU legal order. Particular attention should be drawn to the relationship between unity and primacy, where primacy acts as an instrument enabling divergence to be overcome.[44] As recalled by the Court of Justice in *Randstad Italia*, by virtue of the principle of primacy of EU law, rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law.[45] Following the *PSPP* judgment of the Bundesverfassungsgericht

39 A. Somek, "Unity and community: A tale of two monsters and one unanswered question," in M. P. Maduro and M. Wind (eds.), *The Transformation of Europe. Twenty-Five Years On* (Cambridge University Press 2017) 249–261.

40 F. Neumann, *Behemoth: The Structure and Practice of National Socialism 1933–1944* (3rd ed., Harper & Row 1963).

41 Somek (n. 39).

42 F. Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und 7 EUV* (Hamburger Studien zum Europäischen und Internationalen Recht 21, Duncker & Humblot 2000).

43 E. M. Nettesheim, "Die föderale Homogenitätsklausel des Art. 2 EUV" [2024] 3 Europarecht 269.

44 K. Lenaerts and T. Corthaurt, "Towards an internally consisted doctrine on invoking norms of EU law," in S. Prechal and B. van Roemund (eds.), *The Coherence of EU Law* (Oxford University Press 2008) 495–515.

45 Case C-497/20, *Randstad Italia SpA*, EU:C:2021:1037, para 52.

(BVerfG),[46] unity has been viewed as an ultimate objective of the system based on primacy and equality between the Member States. As noted by the CJEU, "(d)ivergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty".[47] In the context of interpreting the level of protection of the fundamental rights under Article 53 of the Charter, in *Melloni*, the CJEU placed unity together with the primacy and effectiveness of EU law, emphasizing the autonomy of the EU legal order.[48] Unity echoes solidarity viewed as a "quintessence of what is both *raison d'être* and the objective of the European project"[49] and takes substantive meaning through the principle of loyal cooperation under Article 4(3) TFEU.[50]

In the Court of Justice's case law regarding the scope of its own jurisdiction, the concept of unity is close to uniformity but referred to in a systemic rather than substantive cohesion sense. As noted by Advocate General Mayras in *International Fruit Company*, in relation to direct effect doctrine, "The unity and, it can be said, the very existence of Community law require that the Court is alone empowered to say, with the force of law, whether an agreement binding the Community or all the Member States is or is not directly applicable within the territory of the Community and, if it is, whether or not a measure emanating from a Community institution conforms to that external agreement".[51] As judged in *ATA*, "requirement of uniformity is particularly vital where the validity of an act of European Union law is in question. Differences between courts of the Member States as to the validity of acts of European Union law would be liable to jeopardise the *very unity* of the European Union legal order and to undermine the fundamental requirement of legal certainty".[52] A strong reliance on the unity of EU law, which has almost been elevated to the justification of the court's jurisdiction in the field of preliminary rulings in the area of the Common Foreign and Security Policy (CFSP) by referring to its exclusive competence to control the validity of EU law acts, was tangible in *Rosneft*. The CJEU, with respect to the review of the legality of decisions prescribing the adoption of restrictive measures, considered again that "differences between courts or tribunals of the Member States as to the validity of a European Union act would be liable to jeopardise the *very unity* of the European Union legal

46 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 859/15 (5 May 2020).

47 See the press release following the judgment of the German Constitutional Court of 5 May 2020, No 58/20, Luxembourg, 8 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf.

48 Case C-399/11, *Melloni*, EU:C:2013:107, para 60.

49 Opinion of Advocate General Bot in Case C-643/15, *Slovakia, v. Council*, ECLI:EU:C:2017:618, point 17.

50 M. Klammert, *The Principle of Loyalty in EU Law* (Oxford Academic 2014) 86 et seq.

51 Opinion of Advocate General Mayras in joined Cases C-21/72 to C-24/72, *International Fruit Company and Others*, ECLI:EU:C:1972:89, at 1234.

52 Case C-366/10, *Air Transport Association of America and Others*, EU:C:2011:864, para 47.

order".[53] Ensuring the unity of the Union's legal order and preserving its autonomy coupled with primacy[54] has been debated in the framework of the recent cases *KS and KD v Commission*[55] and *Neves 77 Solutions*[56] with a view to enabling the future accession of the Union to the European Convention on Human Rights (ECHR) by the affirmation of the CJEU jurisdiction to assess the legality of, or interpret, only those acts or omissions that are not related to "political or strategic choices" made in the context of the CFSP or the CSDP.[57]

Finally, it is worth recalling that, recently, unity has been consolidated through the concept of the Union's constitutional identity expounded against the background of the rule of law crisis.[58] This was particularly tangible when the Court of Justice conceptualized the "militating Union" by judging that EU values "define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties".[59] As recalled by the Court of Justice in the rule of law conditionality judgments, "compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State".[60] Referring to the principle of "non-regression", the CJEU also judged that Article 2 TEU "is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".[61] The new concept of the Union's identity is obviously framed by the principle of conferral of power coupled with the principle of subsidiarity.

2.3 Judicial dimension of unity: exclusive jurisdiction of the EU Court of Justice and its relevance for the system of compliance and inter-state disputes

In theoretical studies on the concept of coherence, scholars note that "the judge reconstructs the correct solution when his sentence reflects the legal system

53 Case C-72/15, *Rosneft*, EU:C:2017:236. See, by analogy, Case C-221/88, *Busseni*, EU:C:1990:84, para 15; Case C-461/03, *Gaston Schul Douane-expediteur*, EU:C:2005:742, para 21, and Case C-366/10, *Air Transport Association of America and Others*, EU:C:2011:864, para 47.

54 *Opinion 2/13 (Accession of the European Union to the ECHR*), EU:C:2014:2454, paras 166 and Case C-72/15, *Rosneft*, EU:C:2017:236, paras 66, 78 and 80.

55 Joined Cases C-29/22 P and C-44/22 P, *KS and KD v. Council and Others*, EU:C:2024:725.

56 Case C-351/22, *Neves 77 Solutions SRL*, ECLI:EU:C:2024:723.

57 D. Sarmiento and S. Iglesias Sánchez, "Insight: KS and Neves 77: Paving the way to the EU's accession to the ECHR," *EULawLive* (12 September 2024) <https://eulawlive.com/insight-ks-and-neves-77-paving-the-way-to-the-eus-accession-to-the-echr/>.

58 Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.

59 Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98, para 145.

60 Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98, para 144.

61 Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98, para 145.

speaking with one voice, when it is presented in its best light and can be identified with a state of order, unity and equilibrium extended to all its elements".[62] In the realm of EU law, unity finds its particular expression through the constitutive and constitutional role of the Court of Justice.[63] Unity in a judicial discourse of the EU Court of Justice amounts, in such a perspective, to a *leitmotif* depicting the essence of European integration, understood as a process of searching for the equilibrium between unity and diversity where the CJEU plays the role of a constitutional court "charged with the preservation and the development of the law in a new society".[64]

Following the principle of conferred powers under Article 5(1) TEU, the CJEU "has no general jurisdiction for disputes concerning the application and interpretation of primary and secondary Union law", but the EU courts "have jurisdiction to act only in the areas in which jurisdiction has been conferred upon them by the (EU) Treaty or by secondary legislation".[65] Consequently, "Union courts are only competent with respect to certain actions directed against particular conduct on the part of the institutions and the Member States".[66]

The systemic dimension of unity is echoed through the system of treaty-based remedies, which has not been substantively amended since its inception. Within the system of conferred powers, the core mission of EU courts is encapsulated by ensuring coherence in the interpretation and application of the Treaties. The ideal of unity is implemented through the principle of exclusive jurisdiction of the CJEU under Article 19 TEU, including its exclusive competence to perform validity control in correlation with a requirement of uniformity of EU law.[67]

Regarding bilateral state-to-state litigation, it is Article 344 TFEU that confirms the judicial dimension of the unity of EU law. The intensity of the Court's monopoly on the judicial resolution of disputes between EU Member States falling within the scope of EU law was confirmed by the MOX Plant case (*Commission v Ireland*),[68] emphasized in *Opinion 2/13*[69] and further operationalized in *Achmea*.[70] The Court of Justice is, due to its exclusive competence with respect to the interpretation of

62 Pérez Bernejo (n. 12) 103.

63 A. Tizzano, "Le rôle de la cour de justice et les développements du système Communautaire," in N. Fenger, K. Hagel-Sørensen, and B. Vesterdorf (eds.), *Festskrift til Claus Gulmann: Liber Amicorum* (Thomson 2006) 471: "Nous prenons plutôt non comme conclusion mais comme point de départ que le rôle de la Cour de justice est absolument incontournable dans le système communautaire et que son altération substantielle serait totalement inconcevable, même s'il est malgré tout étroitement lié et conditionné par les caractéristiques que revêt ce système".

64 Schermers (n. 30).

65 Case 1/82, *D/Luxembourg*, EU:C:1982:367, paras 4, 8; order in Case C-396/03 P, *Killinger v. Germany and Others*, EU:C:2005:355, paras 26–28.

66 R. Barents, *Remedies and Procedures before the EU Courts* (Kluwer 2016) 61.

67 Case C-314/85, *Foto-Frost*, ECLI:EU:C:1987:452.

68 Case C-459/03, *Commission v. Ireland* (Mox Plant), ECLI:EU:C:2006:345.

69 *Opinion 2/13 (Accession of the European Union to the ECHR*), EU:C:2014:2454.

70 Case C-284/16, *Achmea*, EU:C:2018:158.

EU law, the gatekeeper of this legal system.[71] Under Article 344 TFEU, Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided therein. Article 344 TFEU is thus a fundamental provision for ensuring the unity of EU law, without aiming, however, at classic inter-state dispute resolution. It should be noted that the Court of Justice acts in a limited area as an inter-state court on the basis of other legal remedies. The Court's jurisdiction in an inter-state context arises under Article 273 TFEU.[72] This provision enables the CJEU to act in disputes between Member States stemming from a bilateral or multilateral arrangement that relates to the subject matter under the EU treaties (*clause compromissoire*).[73] However, given the purpose of this provision, scholars convincingly argue that Article 273 TFEU cannot be considered an alternative to Article 259 TFEU.[74]

Unity is further consolidated through the system of legal remedies ensuring compliance with EU law under Articles 258–260 TFEU. Articles 258–260 reflect the autonomy of EU law given that in one of its first judgments in C-29/59 (*Knutange v ECSC High Authority*), the court judged that "infringement procedure is a procedure *far* exceeding the rules recognized in classic international law to ensure that obligations of States are fulfilled". As noted by Advocate General Tesauro extrajudicially, "failure to comply with the duty of respecting the obligations under the Treaty constitutes a *vulnus* to the essential factors of equilibrium of the system, that is, the principle of non-discrimination and solidarity".[75] In the light of the classic case law, "the purpose of an action for failure to fulfil obligations is to obtain a declaration of the CJEU that the conduct of a Member State infringes Community (EU) law and of terminating that conduct".[76] The status of infringement proceedings has nevertheless evolved from *ultima ratio* and policy-driven procedure to a common and intense tool of supervision and ensuring compliance.[77]

In a unique way and in contrast to the international courts,[78] under Articles 258–260 TFEU, the CJEU has the competence to overview the Member States'

71 N. Jaaskinen and A. Sikora, "The exclusive jurisdiction of the Court of Justice of the European Union and the unity of the EU legal order," in M. Cremona, A. Thies, and Ra. A Wessel (eds), *The European Union and International Dispute Settlement* (Bloomsbury 2017) 102–111.

72 G. Butler, "The Court of Justice as an inter-state court" [2017] 36/1 Yearbook of European Law 179.

73 As confirmed in Case C-648/15, *Austria v. Germany*, ECLI:EU:C:2017:664, para 23 the Court's jurisdiction is conditional upon the dispute being related to the subject matter of the Treaties, where "related to" must be understood as a link rather than a requirement that the subject matter be the same.

74 Butler (n. 72).

75 G. Tesauro, "La sanction des infractions au droit Communautaire" [1992] 2 Rivista di diritto europeo 477.

76 Cases 15/76 and 16/76, *France v. Commission*, EU:C:1979:29, para 27.

77 L. Prete and B. Smulders, "The coming age of infringements proceedings" [2010] 47/1 Common Market Law Review 9.

78 J. A. Goldston, "Challenges in executing judgments of the European Court of Human Rights: The case of the Roma," *EJIL:Talk!* (8 December 2023) <https://www.ejiltalk.org/challenges-in-executing-judgments-of-the-european-court-of-human-rights-the-case-of-the-roma/>.

compliance with EU law and also impose financial penalties in case of breach of their obligations stemming from the Treaties. As summarized in the scholarship, the unusual nature of infringement proceedings is justified by a number of factors. Among these, the extent of Member States' obligations under EU law reflects the importance of infringement proceedings sustaining this model of "integration through law", the historically central role of the EU Court of Justice "in determining whether Member States had breached the Treaties", the relevance of ensuring compliance with the EU *acquis* for the rule of law in the Union, and the capacity of actions for failure to fulfil obligations to contribute to the uniform application of EU law.[79]

The exclusive competence of the Court of Justice to determine the existence of an infringement and its meaning for the unity of the EU legal order has been reaffirmed in recent years in at least two contexts of judicial reform. First, as provided for in Article 3 of Regulation 2015/2422, the Court of Justice was invited to draw up a report for the European Parliament, the Council, and the Commission on possible changes in the distribution of areas of jurisdiction between the Court of Justice and the General Court with respect to questions referred for a preliminary ruling. Although the Court of Justice expressed no need for a partial transfer of its jurisdiction to the General Court with respect to preliminary rulings in its report of December 2017,[80] it suggested that further changes could be made to the division of powers between the CJEU and the General Court, particularly regarding direct actions and appeals. A critical analysis in relation to the transfer of the infringement proceedings to the General Court has been elaborated by the European Commission. In particular, in light of the second paragraph of Article 40 of the Statute, the Commission pointed to the distinct nature of action for failure to fulfil obligations where the protagonists are two Member States or an institution of the Union and a Member State. Equally, compared to the actions for annulment, it was noted that the objective of actions for failure to fulfil obligations is not to obtain a judgment annulling an act or establishing a failure to act but to ensure that a Member State complies with the obligations arising from Union law.[81] A follow-up modified proposal for the amendment of Protocol No. 3 on the Statute of the Court of Justice of the EU, presented in 2018 by the CJEU, did not cover the infringement proceedings.[82]

79 L. Prete, *Infringement Proceedings in EU Law* (Kluwer 2017) 1–6.

80 Report of the Court of Justice on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU.

81 The European Commission presented its opinion on the request by the Court of Justice of the European Union on 11 July 2018 (see document 11076/18).

82 On 10 August 2018, the Court of Justice presented a modified request containing only those parts of the proposal that were unproblematic. This modified request was sent for written observations to Member States (see document 11887/18).

Second, in the context of the 2019 amendment of the Statute of the Court of Justice, the preamble of Regulation 2019/629[83] directly refers to the limits and serious difficulties that the General Court may encounter "when adjudicating on an action for annulment brought by a Member State against an act of the Commission relating to a failure to comply with a judgment delivered by the Court of Justice under Article 260(2) or (3) TFEU … where the Commission and the Member State concerned disagree on the adequacy of the measures adopted by that Member State to comply with the judgment of the Court of Justice". Thus, in the current state of EU law, under Article 51 of the Statute, an exclusive competence has been reserved to the Court of Justice in the field of litigation concerning a lump sum or a penalty payment imposed on a Member State pursuant to Article 260(2) or (3) TFEU.[84]

Through the scope of its jurisdiction and defined mission under the treaties, the CJEU remains a key actor consolidating the development of EU law. Thus, unity finds its expression through the constitutive and constitutional role of the Court of Justice, which characterizes its own jurisdiction as a "fundamental feature of the EU system".[85] This classic approach is currently under pressure.

3. Testing the resilience of the European project. Is state-to-state litigation an adequate response?

3.1 Recent trends and the new intensity of non-compliance

In recent years, various trends have illustrated divergences in the interpretation of the primacy of EU law and the role of the Court of Justice. Undermining the Union's values and defying the respect for EU law, including the judgments of the CJEU, amounts to testing the resilience of the Union as a community. Recent jurisprudence shows the true resilience of Treaty-based remedies and highlights their limits in the context of both indirect and direct actions.

The judicial dialogue between the national constitutional courts and the Court of Justice has gradually unveiled tensions of different dimensions and consequences. This trend was, on the one hand, encapsulated by the "three and a half" cases of the national constitutional courts defying, in complex and incomparable ways, the authority of EU law in *Ajos*, *Landtova*, *Weiss*, and *K 3/21*.[86] On the other hand,

83 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 111, pp. 1–3.

84 With exception of sanction following interim measures, see Case T-200/22 and Case T-314/22, *Poland v. Commission*, EU:T:2024:329.

85 *Opinion 2/13 (Accession of the European Union to the ECHR*), EU:C:2014:2454, para 202.

86 Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, ECLI:EU:C:2016:278; Danish Supreme Court, judgment of 6 December 2016, Case 15/2014; see Krunke and Klinge (n. 6). Case C-399/09 *Landtová*, ECLI:EU:C:2011:415; ÚS, plenary judgment of 31 January 2012, Pl. ÚS 5/12, see Bobek (n. 6) and Komárek (n. 6). Judgment in Case C-493/17, *Weiss and Others*, ECLI:EU:C:2018:1000, BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15; see Annunziata (n. 6). Case K 3/21, *Polish Constitutional Court*;

a delicate balancing exercise and competing constitutional claims were reflected within the preliminary rulings in *Taricco*[87] and *La Quadrature du Net*.[88] The role of the Court of Justice was undoubtedly affected the most by the unprecedented rule of law crisis in the EU Member States.[89] In the context of the judicial independence crisis, the scope and purpose of preliminary ruling procedures under Article 267 TFEU have become meaningful indirect instruments in order to sanction the attitude of Member States in breach of rule of law standards in the field of judicial independence. Following *Associação Sindical dos Juízes Portugueses*, and as illustrated notably by the Polish, Romanian, Hungarian, and Maltese preliminary ruling cases, the judicial dialogue with the Court of Justice has been vested with a new dimension where national judges considered the CJEU as the "last instance" of the rule of law, a source of protection against national political mechanisms.[90]

Within the direct actions and classic system of compliance, as demonstrated both by the scholarly discussions and cases brought before the CEJU, a new trend liable to (re)define both the relations between the EU Member States and the intensity of legal remedies available under the EU treaties such as Articles 258, 259, 263, 273, and 278 TFEU is tangible. Both in the constitutional context of the rule of law crisis and in the field of balancing between economic and environmental objectives, including where the impact of non-compliance has a meaningful impact beyond the national borders, infringement procedures have been stretched to the maximum in recent years, notably through the wide use of interim measures under Article 279 TFEU[91] combined with financial penalties under Article 260(2) TFEU,[92] in order to respond to the need of reactivity and emergency in EU law.

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see Gliszczyńska-Grabias and Sadurski (n. 6). In relation to the Polish Constitutional Court judgment, see Opinion of Advocate General Spielmann in Case C-448/23, *Commission v. Poland*, ECLI:EU:C:2025:165. For a general overview of the ultra vires phenomenon, see C. I. Nagy, "The rebellion of constitutional courts and the normative character of European Union law" [2024] 73 International and Comparative Law Quarterly 65.

87 Case C-105/14, Taricco I e.a., ECLI:EU:C:2015:555 and Case C-42/17, M.A.S., M.B. (Taricco II), ECLI:EU:C:2017:936.

88 Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, EU:C:2020:791 and Case C-470/21, *La Quadrature du Net and Others (II)*, EU:C:2024:370.

89 Von Bogdandy et al. (n. 5); Kochenov and Bárd (n. 5); von Bogdandy and Spieker (n. 5).

90 Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982; joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19), *Asociaţia 'Forumul Judecătorilor Din România'*, ECLI:EU:C:2021:393; Case C-430/21, *RS (Effet des arrêts d'une cour constitutionnelle)*, ECLI:EU:C:2022:99; joined Cases C-558/18 and C-563/18, *Miasto Łowicz (Régime disciplinaire concernant les magistrats)*, ECLI:EU:C:2020:234; Case C-487/19, W. *Ż. (Chambre de contrôle extraordinaire et des affaires publiques de la Cour suprême – Nomination)*, ECLI:EU:C:2021:798; joined Cases C-615/20, C-671/20, *YP and Others (Levée d'immunité et suspension d'un juge)*, ECLI:EU:C:2023:562.

91 Order in Case C-441/17 R, *Commission v. Poland*, *(Bialowieza forest)*, ECLI:EU:C:2017:877; order in Case C-619/18R, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2018:1021; order in Case C-791/19 R, *Commission v. Poland*, ECLI:EU:C:2020:277.

92 Order in Case C-121/21 R, *Czech Republic v. Republic of Poland*, ECLI:EU:C:2021:752; order in Case C-204/21 R-RAP, *Commission v. Poland*, ECLI:EU:C:2023:334.

Historically, these compliance remedies reflected the aspiration of EU law to impose itself as an efficient legal system. In particular, financial penalties under Article 260 TFEU were meant to consolidate the structure of the Union as the community of law. Financial penalties in the event of the non-execution of a judgment of the court opened a new chapter in the understanding of the concept of supervision. The tangible risk of financial burden constituted a striking shift in comparison to the founding EEC Treaty focusing on the principle of loyal cooperation. Later on, in *Commission v France* (C-304/02) and *Bialowieza* (C-441/17 *Commission against Poland*), environmental litigation tested the limits of the available remedies by triggering, respectively, the joint use of financial penalties under Article 260 TFEU in the event of a general and persistent breach of EU law (GAP) and the application of financial penalties in the event of non-respect of interim measures imposed by the Court of Justice in the context of Article 258 TFEU proceedings.

On a more general note, infringement proceedings in cases such as *Commission v Poland* (*Bialowieza*) and *Czechia v Poland* (*Turów*) have equally tested the limits of the axiology of the EU legal order. Notably, the lack of respect for the court's judgments and interim measures orders undermines the concept of the Union founded on the rule of law. In the order of 20 November 2017 in *Białowieża*, the court established a very clear link between compliance and the rule of law by judging that "The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court (by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures) is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded".

Against this background, it is gradually becoming visible that the classic system of compliance and supervision in EU law is reaching its limits by, notably, reaching the limits of the Union's competence in a context of Member States clearly challenging EU values.

On the one hand, the critical LGBTQ discrimination infringement case *Commission v Hungary*[93] resonates with the inefficient Treaty instruments of a political nature, such as Article 7 TUE, and requires clarification of the scopes of Articles 2 TEU, 7 TEU, and 258 TFEU. Its relevance was notably symbolized by the first use of a plea of a breach of Article 2 TEU by a Member State. Likewise, it was under Article 258 TFEU that the Commission relied on Article 1 of the Charter of Fundamental Rights for the first time. As noted by commentators, it has "become the largest human rights case in the EU, where the Court of Justice has to decide not only on the violation of the relevant sectoral directives, but also on whether the stigmatising and exclusionary legislation against sexual and gender minorities violates the EU's fundamental values".[94]

93 Case C-769/22, *Commission v. Hungary*, pending.

94 "EU Member States unite against Hungary's anti-LGBTI propaganda law at infringement hearing," *ILGA-Europe* (21 November 2024) <https://www.ilga-europe.org/news/eu-member-states-unite-against-hungarys-anti-lgbti-propaganda-law-at-infringement-hearing/>.

On the other hand, in the pending case *Commission v Poland*,[95] the Commission argued that through the Polish Constitutional Court judgments of 14 July (Case P 7/20) and 7 October 2021 (Case K 3/21), Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TFEU whilst breaching general principles of autonomy, primacy, effectiveness, and uniform application of EU law as well as the principle of the binding effect of judgments of the Court of Justice. Indeed, in judgment P 7/20, the Polish Constitutional Court argued that EU law's direct effect and primacy were limited to the common market and competences indisputably transferred to the EU and strongly criticized CJEU judgments in *AK*[96] and *Asociaţia "Forumul Judecătorilor din România"*.[97] In the controversial and infamous case K 3/21, the Polish Constitutional Court declared a number of TEU provisions unconstitutional. Whilst it is important to keep in mind that in its *Xero Flor* judgment in May 2021, the European Court of Human Rights ruled that the Constitutional Tribunal (in its particular formations) could not be viewed as a court established by law within the meaning of Article 6 ECHR, the underlying question is whether such systemic infringements that undermine the foundations of the Union should be dealt with under Article 258 TFEU. Can an infringement be constituted in case of a jurisdiction which does not fulfill the criteria of a court established by law under Article 6 TFEU? Likewise, in Polish scholarship, authors have claimed the legal inexistence of the *K 3/21* judgment.[98]

3.2 State-to-state litigation: challenging the meaning of unity in EU law?

The Union is composed of Member States for whom borders are meaningful symbols of sovereignty and responsibility. As argued by N. Walker, "historically, boundaries – and in modern history the particular boundaries associated with states – have been vital for framing devices for law … Today, with the increasing globalization of trade, capital markets, human mobility, information systems, political structures, and cultural forms … it is widely accepted that legal boundaries, though very far from irrelevant, are not *what* they once were, nor even necessarily *where* they once were".[99] Unity as a systemic ideal of EU law emerges when

95 See Opinion of Advocate General Spielmann in Case C-448/23, *Commission v. Poland*, ECLI:EU:C:2025:165.

96 Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982

97 Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19), *Asociaţia 'Forumul Judecătorilor Din România'*, ECLI:EU:C:2021:393

98 N. Półtorak, "Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy" [2021] 12 Europejski Przegląd Sądowy 12; W. Wróbel, "Skutki rozstrzygnięcia w sprawie K 3/21 w perspektywie Sądu Najwyższego i sądów powszechnych" [2021] 12 Europejski Przegląd Sądowy 19; M. Florczak-Wątor, "(Nie)skuteczność wyroku Trybunału Konstytucyjnego z 7.10.2021 r., K 3/21. Ocena znaczenia orzeczenia z perspektywy prawa konstytucyjnego" [2021] 12 Europejski Przegląd Sądowy 4.

99 N. Walker, "Law unbounded? The shifting stakes in global normative order," in P. Schiff Berman (ed.), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 427–438.

juxtaposed with the Union as a space without internal borders yet composed of its Member States.

It is no exaggeration to state that for the first time in the Union's history, state-to-state litigation has real momentum. A telling trend to reinvent and reactivate Article 259 TFEU is also tangible in the academic debate, particularly through the prism of the crisis of EU values and illustrated in parallel by the new generation of state-to-state litigation before the CJEU. In a specific case of an environmental area, climate and environmental protection constitute meaningful litigation factors liable to undermine the consolidated community in a very similar way to the value crisis. Activating Article 259 TFEU and other means of inter-state disputes is not an unambiguous phenomenon. Certainly, it should not be viewed in isolation but rather as a component of a broader phenomenon in response to the compliance crisis. However, it goes without saying that inter-state litigation, given its nature, carries a number of risks triggering bilateral animosities and disagreements of both a legal and a political nature that are liable to be further echoed at various levels. Thus, given the overall sensitivity of a bilateral confrontation, while action for failure to fulfil obligations under EU law has constituted a classic instrument of compliance since the 1952 founding Treaties, infringement actions initiated by a Member State against another Member State have traditionally been considered as minor and relied upon very selectively.[100]

Looking at the origins of EU law, there should be no doubt that both substantive and procedural instruments under the founding Treaties focused on the consolidation and protection of the EU legal order as a new kind of legal order with its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation. Thus, the supervision and compliance rationale was not meant to address particular inter-state differences and their intergovernmental dimension.[101] Likewise, the Court of Justice was not expected to act as a classic international law actor, resolving inter-state disputes and finding resolutions to disputes by peaceful means in order to settle international dilemmas.

Article 259 TFEU is indeed a legal instrument to adjudicate on inter-state disputes, but it relies on the non-compliance of a given Member State with its obligations arising from EU law. Furthermore, Article 259 TFEU relies on the faculty for a Member State to bring an action for failure to fulfil obligations against another

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See also, for the argumentation about the erosion of modern constitutional statehood, D. Grimm, "The achievement of constitutionalism and its prospects in a changing world," in P. Dobren and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford Academic 2010) 12.

100 As of 2024, the CJEU had handed down judgments in seven cases: Case C-141/78, *France v. United Kingdom*, EU:C:1979:225; Case C-388/95, *Kingdom of Belgium v. Kingdom of Spain*, EU:C:2000:244; Case C-145/04, *Kingdom of Spain v. United Kingdom*, EU:C:2006:543; Case C-364/10, *Hungary v. Slovakia*, EU:C:2012:630; Case C-591/17, *Austria v. Germany*, EU:C:2019:504; Case C-457/18, *Slovenia v. Croatia*, EU:C:2020:65; Case C-822/21, *Latvia v. Sweden*, EU:C:2024:373.

101 Butler (n. 72).

Member State. Even if, *par ricochet*, such a breach affects another Member State's interests, Article 259 TFEU is driven by the same rationale as Article 258 TFEU. Likewise, as recalled by the CJEU in the most recent Article 259 TFEU judgment in *Latvia v Sweden*,[102] Articles 258 and 259 TFEU share the same limits insofar as, in an action for failure to fulfil obligations, "all that can be sought is a finding that the failure to fulfil obligations alleged exists with a view to bringing that situation to an end. The Court cannot be asked to require a Member State to adopt a particular line of conduct in order to comply with EU law".[103] The key difference, however, is the role of an applicant Member State compared to the Commission, as highlighted by Advocate General Szpunar in *Commission v Belgium*, since "the purpose of Article 259 TFEU differs from that of Article 258 TFEU in so far as, unlike the Commission, another Member State is not the guardian of the Treaties".[104] This is an aspect to be considered. Boosting Article 259 TFEU may weaken the traditional role of the Commission as a guardian of the Treaties, as shown in *Austria v Germany*,[105] used in the absence of an infringement action by the Commission who did not trigger Article 258 TFEU proceedings notwithstanding a blatant violation of a principle of discrimination on the grounds of nationality. Given, however, the still limited number of Article 259 TFEU cases, state-to-state litigation should discipline the Commission to act rather than undermine its status.

Whilst various ideas aiming at reconsidering instruments of supervision and compliance have been advanced throughout EU law development[106] in the aftermath of democratic backsliding and the rule of law crisis in the EU, scholars have been arguing particularly for a change in infringement actions methodology by relying on a concept of "systemic infringement actions"[107] and a "bottom-up

102 Case C-822/21, *Latvia v. Sweden*, EU:C:2024:373.

103 Case C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, EU:C:2020:257, para 56.

104 Opinion of Advocate General Szpunar in Case C-543/17, *Commission v. Belgium*, footnote 26.

105 Case C-591/17, *Austria v. Germany*, EU:C:2019:504.

106 J. P. Puissochet, "Le recours en manquement – a t-il encore ses vertus?," in N. Colneric, D. Edward, J.-P. Puissochet, and D. Ruiz-Jarabo Colomer (eds.), *Une Communauté de droit. Festchrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag 2003) 572; J. Frowein, "The European Community and the requirement of a republican form of government" [1984] 82 Michigan Law Review 1311, 1318 et seq. suggested to rely on Article 258 TFEU, combined with the current special infringement procedure under Article 348(2) TFEU; L. Prete and B. Smulders, "The age of maturity of infringement proceedings" [2021] 58/2 Common Market Law Review 285. See also, for the concept of general and persistent infringement (GAP) and its impact on financial penalties, A. Sikora, "Financial penalties for non-execution of judgments of the Court of Justice," in A. Lazowski and S. Blockmans (eds.), *Research Handbook on EU Institutional Law* (Springer 2016) 324–352. In the environmental area, see M. Eliantonio and J. Richelle, "Why procedures matter and sanctions much less: 'Second-round' infringement proceedings in environmental matters and the CJEU's ruling European Commission v Bulgaria" [2023] 48/4 European Law Review 458.

107 K. Lane Schepele and R. D. Kelemen, "Defending democracy in EU Member States," in F. Bignami (ed.), *EU Law in Populist Times, Crises and Prospects* (Cambridge University Press 2020) 413–456.

approach".[108] The specific advantages of the Article 258 TFEU procedure and its effectiveness "from an absolute perspective" compared to the political nature of Article 7 TUE were highlighted.[109] Amidst these discussions, scholars argued for a new mission of Article 259 TFEU in the field of the rule of law, and in the field of EU law compliance more broadly,[110] including in the context of the Union's potential accession to the European Convention of Human Rights.[111] For Member States, the idea of relying on Article 259 TFEU implies using it to "take the lead" in the process and the "horizontal enforcement" of the rule of law in Member States deviating from EU values enshrined in Article 2 TEU.[112] A question that arose in particular was whether an EU Member State could initiate the abovementioned LGBTQ case against Hungary under Article 259 TFEU.[113]

As demonstrated by the recent litigation before the Court of Justice, Article 259 TFEU action is no longer a taboo between Member States. As a consequence, a traditional approach relying on Article 259 TFEU to challenge non-compliance with EU law in general has deviated towards addressing specific bilateral disputes. Starting with *Hungary v Slovakia* concerning Slovakia's ban on the President of Hungary from entering its territory,[114] followed by *Slovenia v Croatia* regarding the determination of their internal border,[115] the CJEU has been faced with very specific litigation, including some that went beyond the scope of its jurisdiction. *Czechia v Poland* (*Turów*) undoubtedly reflects the historical momentum of Article 259 TFEU regarding the cross-border consequences of the operation of the Turów mine in Poland. *Turów* has initiated the uncontested potential and dynamism of Article 259 TFEU not only because it implied a cross-border conflict in relation to the economic, social, and environmental choices of a Member State but, above all, because this infringement action was combined with interim measures adopted by the vice-president of the EU Court of Justice requiring Polish authorities to cease

108 M. Bonelli, "Infringement actions 2.0: How to protect EU values before the Court of Justice" [2022] 18/1 European Constitutional Law Review 30.

109 P. Bogdanowicz and M. Schmidt, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU" [2018] 55/4 Common Market Law Review 1061.

110 D. Kochenov, "Biting intergovernmentalism: The case for the reinvention of Article 259 TFEU to make it a viable rule of law enforcement tool" [2015] 7 Hague Journal on the Rule of Law 153; G. Íñiguez, "The enemy within? Article 259 TFEU and the EU's rule of law crisis" [2022] 23/8 German Law Journal 1104; K. Lane Scheppele, D. Kochenov, and B. Grabowska-Moroz, "EU Values are Law, after all: Enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union" [2020] 39 Yearbook of European Law 3.

111 Ch. Breitrel and P. Gragl, "The past, present, and future of European inter-state disputes" [2024] 22/3 The Law and Practice of International Courts and Tribunals 553.

112 D. Kochenov, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool* (NYU Working Paper 11/15, The Jean Monnet Working Paper Series).

113 É. Dubout, "Peut-on défendre les valeurs de l'Union européenne par le droit?" [2024] 80 Revue des Droits et Libertés Fondamentaux 1.

114 Case C-364/10, *Hungary v. Slovakia*, ECLI:EU:C:2012:630.

115 Case C-457/18, *Slovenia v. Croatia*, EU:C:2020:65.

lignite mining activities at the Turów mine,[116] followed by the imposition of periodic penalty payments for non-compliance with this interim measure.[117] Finally, a pending case C-730/23 *Poland v. Germany* illustrates important cross-border tensions in the field of shipment of waste. By its action under Article 259 TFEU Poland claimed that German authorities infringed Regulation n° 1013/2006 on shipment of waste[118] by shipping illegal waste from German territory into six sites in Poland. Furthermore, Poland raised an interesting claim about the violation of Article 4(3) TEU by failing to adopt measures to clarify the circumstances surrounding the illegal shipment of waste. Poland focuses in this context on the lack of coordination and failures during the procedure for the exchange of information and coordination of measures between the two Member States.

Article 259 TFEU is, however, not the only measure to be relied upon by Member States. In particular, it is worth noting that given potential environmental harm in the cross-border context, but also more broadly in the field of new technologies and types of investments having an impact on the Union's choices in the field of energy and climate neutrality, direct and indirect disputes between the EU Member States intensify. The new phenomenon of "indirect" or "hidden" inter-state litigation is already echoed in the jurisprudence and may grow further. In the field of nuclear energy, Member States rely on validity control under Article 263 TFEU to challenge state aid measures in other Member States following the underlying disagreement in the field of sustainable investments under EU law.[119] This is particularly visible in the taxonomy area and qualification of nuclear energy as a sustainable investment.[120] As Advocate General G. Hogan noted in the *Hinckley Point* appeal case,

> [t]his case can be described as the legal side of a dispute between Member States that are in favour of nuclear power and those that are not. Both sides claim that they pursue their course with a view to protecting the environment. At the heart of the matter lies the fundamental question of whether the construction of a nuclear power plant can be the subject of a State aid approval by the European Commission for the purposes of Article 107(3)(c) TFEU.[121]

Among other indirect measures enabling Member States to question an attitude of another Member State before the Court of Justice, the meaning of an intervention in a judicial procedure should not be underestimated. Although no case has yet been submitted under Article 259 TFEU in relation to the breach of the EU

116 Order in Case C-121/21 R, *Czech Republic v. Poland*, EU:C:2021:420.

117 Order in Case C-121/21 R, *Czech Republic v. Poland*, EU:C:2021:752.

118 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

119 Case C-594/18 P, *Austria v. Commission* (*Hinckley Point*), ECLI:EU:C:2020:742.

120 See Opinion of Advocate General Medina in Case C-59/23 P, *Austria v. Commission (Centrale nucléaire Paks II)*, ECLI:EU:C:2025:125.

121 See Opinion of Advocate General Hogan in Case C-594/18 P, *Austria v. Commission* (*Hinckley Point*), point 1.

values and judicial standards, case law shows that Member States are willing to actively participate in ensuring respect for EU values precisely through the intervention in support of the Commission in the critical infringement actions under Article 258 TFEU. *Commission v Poland*[122] was, as noted by Advocate General E. Tanchev, "of fundamental importance to the Union legal order" since this case provided the Court of Justice "with the opportunity to develop its case-law on the compatibility of measures taken by a Member State concerning the organisation of its justice system, and in particular the disciplinary regime for judges, with the requirements of the second subparagraph of Article 19(1) TEU for ensuring effective judicial protection and respect for the rule of law in the Union legal order".[123] The case also raised issues of the relationship between the second subparagraph of Article 19(1) TEU and Articles 47 and 48 of the Charter. In *Commission v Poland*,[124] Belgium, Denmark, the Netherlands, Finland, and Sweden were granted leave to intervene in the proceedings in support of the Commission, which claimed that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU and the second and third paragraphs of Article 267 TFEU on account of national measures establishing the new disciplinary regime for the judges of the Supreme Court and the ordinary courts. Globally intervening Member States shared a position according to which the second subparagraph of Article 19(1) TEU was applicable[125] and heavily criticized the Polish legislation, including its chilling effect in relation to the preliminary ruling procedure.[126] As illustrated by the hearing in *Commission v Hungary*,[127] where 16 Member States intervened in support of the Commission's action, an intervention does not imply that Member States fully share all of the Commission's pleas and arguments but highlights an overall disagreement with the legislative choices of the defendant Member State clearly in breach of the Union's values. In particular, in *Commission v Hungary*, the intervening Member States raised doubts as to the scope of Article 2 TEU and its relation with Article 258 TFEU proceedings.

Finally, in view of the Union's future accession to the European Convention of Human Rights, the existing inter-state mechanism under Article 33 ECHR[128] has

122 Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596.

123 See Opinion of Advocate General Tanchev in Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:366, point s1–7.

124 Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596.

125 See Opinion of Advocate General Tanchev in Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:366, para 39.

126 See Opinion of Advocate General Tanchev in Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:366, paras 45–60.

127 Case C-769/22, *Commission v. Hungary*, pending.

128 For further reading, see B. Browning, "Georgia, Russia and the crisis of the Council of Europe: Inter-state applications, individual complaints, and the future of the Strasbourg model of human rights litigation," in J. Green and C. Waters (eds.), *Conflict in the Caucasus: Implications for International Legal Order* (Springer 2010) 114–135; S. Leckie, "The inter-state complaint procedure in international human rights law: Hopeful prospects or wishful thinking?" [1988] 10/2 Human Rights Quarterly 271. Ex multis, see Cases *Greece v. UK* (I and II) (Appl. Nos. 176/56 and 299/57);

been considered a relevant tool for enforcing fundamental rights in the state-to-state framework.[129] However, the revised accession agreement between the Union and members of the ECHR highlights two important amendments. Firstly, Article 33 ECHR cannot be used for disputes between EU Member States or between EU Member States and the EU regarding the application of the ECHR within the scope *ratione materiae* of EU law.[130] Secondly, according to the "co-respondent mechanism", it is possible for the EU to be held accountable alongside its Member States in situations where an EU Member State implements EU law.[131] EU law-related disputes must respect the exclusive unifying competence of the CJEU under Article 344 TFEU.

At this stage of development of EU law, the *Turów* dispute under Article 259 TFEU, which involved a breach of EU law standards, including environmental harm of a major scope, constitutes a novel and powerful albeit mixed image of inter-state litigation.

On the one hand, new dynamics of the bilateral relations between Member States and applying pressure in the event of a breach of EU law is certainly a positive sign if it is meant to enhance respect for EU law. While the key Article 259 TFEU cases originated in a complex historical and political background where the link to EU law remained inevitably subsidiary, *Turów* definitely changed this approach since it focused on the current, potentially irreversible environmental harm in a cross-border context. Furthermore, *Turów* clearly shows the irrefutable efficiency of enforcement tools such as interim measures coupled with financial penalties. On 20 September 2021,[132] the Vice-President of the Court ordered Poland to pay the Commission a penalty of EUR 500,000 per day for non-compliance with the order of 21 May 2021 requiring Poland to stop mining activities.[133] Poland considered that the settlement agreement between Czechia and Poland and the removal of case C-121/21 from the court's register led to the retroactive cessation of the effects of the interim measures ordered in that case. Poland subsequently lodged an action for annulment[134] against the Commission's decision ordering the recovery of debts

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Austria v. Italy (Appl. No. 788/60); *Denmark, Norway, Sweden and the Netherlands v. Greece* (I and II) (Appl. Nos. 3321–3323/67, 3344/67 and 4448/70); *Ireland v. UK* (I and II) (Appl. Nos. 5310/71 and 5451/72); *Cyprus v. Turkey* (I, II and III) (Appl. Nos. 6780/74, 6950/75 and 8007/77); *Denmark, France, Norway, Sweden and the Netherlands v. Turkey* (Appl. Nos. 9940–9944/82); *Cyprus v. Turkey* (IV) (Appl. No. 25781/94); *Denmark v. Turkey* (Appl. No. 34382/97); *Georgia v. Russia* (I, II and III) (Appl. Nos. 13255/07, 38263/08 and 61186/09) *Ukraine v. Russia* (I and II) (Appl. Nos. 20958/14 and 43800/14).

129 Breitrel and Gragl (n. 111).

130 Art. 4(3) and (4) of the revised Agreement and paras 80–85 of the Explanatory Report. See, for an overview, F. Ronkes Agerbeek, "EU Accession to the European Convention on Human Rights: A new hope" [2024] 9/2 European Papers 695.

131 Ibid.

132 Order in Case C-121/21 R, *Czech Republic v. Poland*, EU:C:2021:752.

133 Order in Case C-121/21 R, *Czech Republic v. Poland*, EU:C:2021:420.

134 Cases T-200/22 and T-314/22, *Poland v. Commission*, EU:T:2024:329.

by offsetting under the EU financial regulation.[135] In its judgment of May 2024, the General Court rejected Poland's action, which means that the Polish debt is due as a sanction for defying the order of the CJEU.

On the other hand, *Turów* shows particular limits and weaknesses of inter-state litigation since it illustrates the bargaining dimension of Article 259 TFEU infringement action. Indeed, if, as in *Turów*, Member States have a possibility of an amicable solution that implies a withdrawal of action under Article 259 TFEU, including at an advanced stage of the judicial procedure,[136] the critical question of a breach of EU law remains unaddressed. Since the court determined no infringement, no remedy to address environmental harm and breach of EU law standards is required under Article 260(1) TFEU beyond a bilateral arrangement between two interested Member States and the following financial agreement. Thus, the intergovernmental dimension of Article 259 TFEU risks trumping the general interest of EU law compliance if not accompanied by additional measures such as interim measures and financial penalties. Finally, while *Turów* is a classic cross-border dispute, this case recalls that the environment does not know any borders, and therefore, horizontal compliance with EU environmental standards is of paramount importance.

4. Conclusion

In the light of the present analysis, unity remains a valid ideal and systemic feature of the EU legal system. Its various expressions resonate in particular through the relationship between unity and the classic constitutional principles of EU law. Grasping unity in EU law is a most adequate exercise when viewed from a dynamic perspective, embracing European integration as a process.

At the current stage of development of EU law, Member States' more dynamic participation in the supervision area traditionally reserved for the European Commission does not constitute a threat to the unity of the EU legal order, provided that it is driven by the genuine objective of ensuring compliance. Thus, the procedural and substantive guarantees of state-to-state disputes should focus on the EU legal order as a whole and not specific bilateral bargaining that defies the idea

135 Regulation Article 101(1) and Article 102 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, pp. 1–222, no longer in force. See Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast), OJ L, 2024/2509.

136 In 2022, in parallel to the CJEU proceedings, Poland and Czechia signed an inter-state agreement on dealing with the impacts of mining activities at the Turów open-pit mine. Consequently, the case was removed from the register. See Order of the President of the Court of 4 February 2022 – *Czech Republic v. Republic of Poland*, intervener in support of the applicant: European Commission (Case C-121/21).

of the unity and community of the European project. At first sight, intensifying the use of Article 259 TFEU and hidden state-to-state litigation in the field of Article 263 TFEU disputes seems to counter the idea of EU law as "civilizing inter-state relations". However, as shown by the case law, Member States trigger bilateral procedures as a last resort when existing enforcement institutions and legal and political instruments are no longer able to ensure the respect of EU law.

Thus, state-to-state litigation should be regarded as a signal for the European Commission and potentially other institutions to reflect upon the efficiency of EU law. More generally, state-to-state disputes indicate the need to reassess the current system of judicial protection in pursuit of the Union's ideals as encapsulated within the constitutional constraints of the EU founding treaties. Finally, the future accession of the Union to the European Convention of Human Rights might trigger new inter-state perspectives and enhance the unity of the European project since Member States and the Union may be jointly acting under the "co-respondent mechanism" before the European Court of Human Rights.

10 The role of interim measures in environmental disputes before the Court of Justice of the European Union

Mariusz Baran and Barbara Iwańska

1. Introduction[1]

The need for interim measures is widely recognised not only in the EU legal system[2] but also in national legal systems. Interim measure[3] is among the primary remedies in the sense that their purpose is to ensure the effectiveness of the final judgments in cases brought before the Court of Justice of the EU (CJEU)[4] and, more generally, the effectiveness of EU law. The need to avert the threat of damage that will be difficult to repair may also be a reason for granting an interim measure.

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2 See the opinion of AG G. Teasuro in Case C-213/89, *Factortame*, paras 18 and 19: "Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right … such protection can be seen to be a fundamental and indispensable instrument of any judicial system, which seeks to achieve, in the particular case and always in an effective manner, the objective of determining the existence of a right and more generally of giving effect to the relevant legal provision, whenever the duration of the proceedings is likely to prejudice the attainment of this objective and therefore to nullify the effectiveness of the judgment". More broadly, see the CoJ's judgments on the grounds for ordering interim measures by national courts in cases concerning the application of EU law: C-213/89, *Factortame*, EU:C:1990:257, para. 21; C-226/99, *Siples*, EU:C:2001:14, para. 19; and C-530/11, *Commission v UK*, EU:C:2014:67, para. 65; C-416/10, *Križan*, EU:C:2013:8, paras. 108–110; C-432/05, *Unibet*, EU:C:2007:163, paras. 79–80.

3 The terms: "interim measure", "interim provision", "interim remedy", and "interim relief" are used in text changeable as synonyms.

4 According to Art. 19(1) TUE, the Court of Justice breaks down into the Court of Justice ("CoJ" or "Court") and the General Court ("GC"). In this chapter we refer to the "CoJ" or the "Court" only where the context so requires; in all other situations, the general term "CJEU" is used.

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An analysis of CJEU jurisprudence in environmental cases shows that interim protection measures have occurred:

- first, in infringement actions lodged by the European Commission against a Member State (Article 258 TFEU – e.g., *Białowieża Forest*) alleging breaches of EU environmental law and only in one case, in an infringement action lodged by the Member State against another Member State (under Article 259 TFEU – *Turów Mine*);
- second, if there was a risk or likelihood of serious and irreversible harm that could be caused to a specific component of the environment (protected species, Natura 2000 sites, water, etc.) or to human health;
- third, if the content of the interim measure ordered was a specific order or prohibition addressed to the Member State, such as suspension of the national law's application, suspension of the project's operation, or suspension of certain activities;
- fourth, to the guarantee of complete and effective judicial protection, the applicant should have the right to ask the court to order interim measures such as to prevent pollution, including, where necessary, by the temporary suspension of the disputed permit, and a national court seised of a dispute governed by EU law must be in a position to grant interim measures in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law.[5]

Two cases deserve special attention when analysing the evolution of interim remedies in environmental cases: *Białowieża Forest* (C-441/17 R) and *Turów Mine* (C-121/21 R). In *Białowieża Forest*, the CJEU ruled for the first time that "additional measures"[6] in the form of periodic penalty payments if a Member State fails to comply with the interim measures ordered fall entirely within the ambit of the objective of Article 279 TFEU ("any necessary interim measures").

Such a periodic penalty payment under Article 279 TFEU was imposed on a Member State for the first time in *Turów Mine*. Periodic penalty payments (if the Member State fails to comply with the interim measures ordered) are a tool to: (i) encourage the relevant Member State to comply with the interim measures ordered; (ii) enhance the effectiveness of those measures; and (iii) guarantee the full effectiveness of the final decision. This instrument, which ensures the efficiency of the interim measure ordered, is a new practice in the case law of the CJEU.

5 See, e.g., C-213/89, *Factortame*, EU:C:1990:257, para. 21; C-432/05, *Unibet*, EU:C:2007:163, paras. 79–80; C-416/10, *Križan*, EU:C:2013:8, paras. 108–110.

6 See C-441/17 R, *Białowieża Forest*, para. 104.

2. Legal grounds for interim (provisional) measures ordered by the CJEU

There are many proposals and criteria in the literature for classifying the different types of provisional measures in EU law.[7] Three categories are usually identified in the regime of interim measures in EU law:[8]

- provisional measures granted by the CJEU under Articles 278 and 279 TFEU;
- provisional measures ordered by a national court in proceedings for the protection of rights of individuals derived from Union law; and
- provisional measures applied by the European Commission or another EU institution.

The further analysis in the context of environmental litigation will focus on the former. In addition, provisional measures may be differentiated according to their addressee, which makes it possible to distinguish between provisional measures addressed to private parties, EU institutions or Member States.[9]

This distinction may be extended within the framework of interim measures applied by the CJEU on the basis of Articles 278 and 279 TFEU:[10] on the one hand, with reference to the type of proceedings before the CJEU, interim measures applied in proceedings before the CJEU on direct actions (in proceedings under Article 267 TFEU, it is not possible to order an interim measure by the CJEU);[11] and on the other, with regard to the merits of a measure, interim measures consisting in suspending the implementation of an EU institution act challenged before

7 In the Polish literature, see K. Żurek, "Środki tymczasowe jako przejaw funkcjonowania zasady efektywnej ochrony prawnej w systemie prawnym Unii Europejskiej," in S. Biernat (ed.), *Studia z prawa Unii Europejskiej* (Wydawnictwo UJ 2000) 196; W. Postulski in D. Kornobis-Romanowska, J. Łacny, A. Wróbel (eds.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz* (vol. 3, Kluwer 2012) 531–535; E. Skotnicka and W. Pustulski, "System tymczasowej ochrony praw jednostek w prawie unijnym," in A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy* (vol. 1, Kluwer 2010) 931–933. See also A. Tizzano, "I procedimenti urgenti nel processo comunitario," in *I processi speciali, Studi offerti a Virgilio Andrioli dai suoi allievi* (Jovene 1979) 360; G. Borchardt, "The award of interim measures by the European Court of Justice" [1985] 22/2 Common Market Law Review 203; P. Oliver, "Interim measures: Some recent developments" [1992] 29 Common Market Law Review 7; F. Jacobs, "Interim measures in the law and practice of the Court of Justice of the European Communities," in R. Bernhardt (ed.), *Interim Measures Indicated by International Courts* (Springer 1994) 37; D. Sinaniotis, *The Interim Protection of Individuals Before the European and National Courts* (Kluwer 2006); F. Castillo de la Torre, "Interim measures in community courts: Recent trends" [2007] 44/2 Common Market Law Review 273.

8 See Żurek (n. 6) 196.

9 Ibid.

10 See Art. 39 and Art. 60 of Protocol (No. 3) on the Statute of the Court of Justice of the European Union (OJ C 2016 No. 202, p. 210), Title IV Chapter 10 of the Rules of Procedure of the Court of Justice of 25 September 2012. (OJ L 2012 No. 265, p. 1, as amended) and Title III Chapter 16 Section 2 of the Rules of Procedure of the General Court of 4 March 2015. (OJ L 2015 No. 105, p. 1 as amended).

11 See, e.g., Postulski (n. 6) 535–536.

the CJEU (Article 278 TFEU) or having another content included in the formula of "necessary interim measures" (Article 279 TFEU).[12]

The application of interim measures is governed by the TFEU, the Statute of the CJEU and the Rules of Procedure of the CJEU.[13]

The legal basis for an interim measure to suspend the application of an EU institution's act in the context of proceedings before the CJEU challenging its validity is Article 278 TFEU *in fine*.[14] Under this provision, the CJEU may, if it considers that the circumstances so require, order a stay of application of the contested act. This is an exception to the rule that the bringing of an action does not have a suspensory effect in accordance with Article 278 TFEU first sentence.[15]

On the other hand, Article 279 TFEU constitutes the legal basis for the application of the "necessary interim measures" in cases before the CJEU. This provision – unlike Article 278 TFEU – does not contain a limitation on the type of actions to which it may apply.[16] The ordering of an interim measure by the CJEU on the basis of Article 279 TFEU is therefore also possible in proceedings relating to actions for failure to fulfil EU obligations (infringement actions), including in the field of the environment (Articles 258, 259, and 260 TFEU). Moreover, in relation to infringement actions, ordering an interim measure on the basis of Article 279 TFEU is the only possibility, as Article 278 TFEU only concerns the suspension of the application of the contested EU act.

Similarly, unlike Article 278 TFEU, Article 279 TFEU does not define the object and extent of the interim measures that may be ordered. The catalogue of possible interim measures (methods of injunction) included in the 'necessary interim measures' formula is open.[17] The literature has emphasised for many years that "the range of possible measures is not predetermined",[18] and it is a matter of discretion, within the discretionary judicial powers of the CJEU, to order (determine) the most appropriate interim measure in order to achieve the purpose of the interim measure and to ensure the effectiveness of the future judgment.[19] As pointed out by Advocate General G. Reischl in *Sea Fisheries*, the provision is "expressed in very

12 See, e.g., M. Kawczyńska, "Spór o kopalnię Turów, czyli stosowanie i efektywność środków tymczasowych w postępowaniach dotyczących naruszenia prawa unijnego" [2021] 11 Europejski Przegląd Sądowy 25.

13 See (n. 6) above and case law of the CJEU therein.

14 For more on the topic, see Postulski (n. 6) 528–548; B. Sasinowska, "Środki tymczasowe w postępowaniach z art. 226 i 230 TWE" [2008] 2 Europejski Przegląd Sądowy 24.

15 It is pointed out in the literature that the fact that actions brought before the CJEU do not have a suspensory effect is justified by the nature of the direct action as a measure brought in the public interest and that this justifies a presumption of lawfulness unless the contrary is proved. See, e.g., Borchardt (n. 6) 206 et seq.

16 A. Sikora, *Sankcje finansowe w razie niewykonania wyroków Trybunały Sprawiedliwości Unii Europejskiej* (Kluwer 2011) 242.

17 K. Lenaerts, I. Maselis, and K. Gutman, *EU Procedural Law* (Oxford University Press 2014) 566.

18 Ibid.; P. E. Lasok, *Lasok's European Court Practice and Procedure* (3rd ed., Bloomsbury 2016) 640.

19 Case C-118/83 R, *Muratori*, EU:C:1983:225, para. 53; C-76/08 R, *Commission v Malta*, EU:C:2008:252, para. 19; and T-203/95 R, *Connelly*, EU:T:1995:208, paras. 24–25.

general terms and does not provide for exceptions for certain types of procedures or measures".[20]

From the current case law, it follows that the content of the "necessary interim measures" may be differentiated, depending on the circumstances of each individual case, and that Article 279 TFEU "confers on the Court the power to prescribe any interim measures that it deems necessary in order to ensure that the final decision is fully effective".[21] The CJEU ruling on interim measures may, in particular, provisionally address appropriate orders to the other party.[22]

Article 279 TFEU, as the CJEU emphasises, grants the judge hearing an application for interim measures not only "a broad discretion, in the exercise of which it is empowered, *inter alia*, having regard to the circumstances of each case, to specify the subject matter and the scope of the interim measures requested" but also, "if it deems appropriate, to adopt, where necessary of its own motion, any ancillary measure intended to guarantee the effectiveness of the interim measures that it orders".[23] A measure aimed at ensuring a party's compliance with a provision may – as confirmed by the court's decisions in *Białowieża Forest* and *Turów Mines* – provide in particular for the imposition of a periodic financial penalty in the event of a failure to comply with a previously ordered interim measure.[24]

The term *ex officio* as used by the CJEU does not appear to refer to the competence of the CJEU to impose financial payments to be enforced without an application by either party to the proceedings, but to the possibility, if such an application is made, of taking into account, of its own motion, to ensure the effectiveness of the interim measures ordered, all the facts of record which make it possible to determine the appropriate amount of the periodic penalty payments to be imposed, in order to dissuade the Member State from disregarding the interim measures ordered.

20 Opinion in Case C-61/77 R, *Commission v Ireland*, ECLI: ECLI:EU:C:1977:87, para. 1.

21 C-441/17 R, *Białowieża Forest*, para. 97; see also order in Case C-204/21 R, *European Commission v Republic of Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2021:878, para. 19.

22 Order in Case C-441/17 R, *Białowieża Forest*, para. 96. The application of interim injunctions and prohibitions by the Court of Justice has a long tradition. As early as 1977, the UK was ordered to suspend a state aid measure (subsidy for pig farmers) – order of the CJEU of 21 May 1977 in Joined Cases 31/77 R and 53/77 R, *Commission v United Kingdom and United Kingdom v Commission*, ECLI:EU:C:1977:86. Similarly to *Białowieża Forest*, an interim measure was ordered in the case against the Republic of Malta, which was ordered to refrain "from adopting any measure to apply the derogation provided for in Art. 9 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds – as amended by Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania – in relation to the hunting of quail (Coturnix coturnix) and turtle doves (Streptopelia turtur) during the spring migration in 2008" – order of the President of the CJEU of 24 April 2008 in Case C-76/08 R, *Commission v Republic of Malta*, ECLI:EU:C:2008:252.

23 C-441/17 R, *Białowieża Forest*, para. 99.

24 C-441/17 R, *Białowieża Forest*, para. 100. This issue, which causes disputes in the literature, is analysed in point 5 of the chapter.

The justifications for the application of interim legal protection are to ensure effective (judicial) legal protection and to guarantee the values expressed in Article 2 TEU on which the EU is based, including the value of the rule of law.[25] Effective legal protection[26] as a general principle of EU law (Article 19(1) TEU) and a fundamental right (Article 47 of the Charter) encompasses "both the protection of Union subjective rights and the protection of the Union (objective) legal order".[27] This is of particular importance in the field of the environment, given the nature of EU environmental law standards. Indeed, legal protection in environmental cases "generally serves not only the individual interests of claimants, but also, or even exclusively, the public".[28]

The purpose of proceedings for interim relief is to guarantee the full effectiveness of a future judgment on the substance in order to avoid any lacunae in the legal protection afforded by the CJEU. The interim relief sought must therefore "have a sufficiently close link with the subject-matter of the main proceedings and it cannot fall outside the framework of the decision which the Court may reach on the main application".[29]

Although the scope of interim protection, determined by ensuring "the full effect of the final judgment", is broad, an order for interim measures does not prejudge the main action,[30] nor can it "create an irreversible state of affairs".[31] Nonetheless, by means of interim measures, the CJEU may order Member States to enforce what cannot be ordered by ruling on the main action since the judgment given in the main proceedings is declaratory in nature.[32] An interim measure proceeding

25 Order in Case C-204/21 R, *Commission v Poland*, para. 58.

26 "As provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields" – Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, para. 34; see also Case C-192/18, *Commission v Poland (Independence of the ordinary courts)*, EU:C:2019:924, para. 99; Case C-619/18 *Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531, para. 48.

27 M. Baran, *Stosowanie z urzędu prawa Unii Europejskiej przez sądy krajowe* (Kluwer 2014) 119; also A. Wróbel in A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* (Kluwer 2013) 1195.

28 Opinion of Advocate General J. Kokot in Case C-260/11, *Edwards and Pallikaropoulos*, EU:C:2012:645, para. 40; L. Kramer, "De l'intérêt général, de l'Union européenne, et de l'environnement," in *Pour un droit économique de l'environnement, Mélanges en l'honneur de Gilles J. Martin* (Frison-Roche 2013) 249–259.

29 Case T-198/12 R, *Germany v Commission*, ECLI:EU:T:2013:245, para. 27 and orders of the President of the Court of First Instance and cases cited therein: T-18/01 R, *Goldstein v Commission*, ECLI:EU:T:2001:110, para. 14; T-78/04 R, *Sumitomo Chemical v Commission*, ECLI:EU:T:2004:204, para. 43.

30 An interim measure "does not … prejudice the decision on the merits of the case, since the interim measure lapses as soon as the final judgment is delivered" – so the CJEU in C-393/96 P(R), *Antonissen v Council and Commission*, para. 39.

31 See C-393/96 P(R), *Antonissen v Council and Commission*, paras 40–41.

32 "Although in principle interim relief is possible in respect of the grant to order that the Member State concerned should do what the Commission is requesting, most often by suspending the alleg-

is "necessarily an adjunct to the main proceedings to which they are attached … so that the decision of the judge hearing the application for interim relief must be provisional in the sense that it cannot either prejudge the future decision in the main proceedings or deprive it of all practical effect".[33] The aspect of temporality, viewed from a substantial perspective, is complemented by the feature of the interim character of a protective measure from a formal perspective.[34] It is expressed in the temporal limitation of the effectiveness of the provisional measure ordered[35] by granting the requested provisional legal protection until the conclusion of the main proceedings or, as specified in the provisional measure order, the date on which the provisional protection expires.[36]

3. Conditions under which the CJEU may order an interim measure

Irrespective of the object and content of the provisional measure, the grounds for its order remain the same. They derive from Article 160(3) of the Rules of Procedure of the Court of Justice, to which Article 30 of the Statute is referred, and from the case law of the CJEU. "An application of a kind referred to in the preceding paragraphs shall state the subject matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for".[37] The grant of interim relief, as follows from the case law of the CJEU, requires three conditions to be met: that it be shown that its application is *prima facie* justified in law and in fact (*fumus boni iuris*), that it is of an urgent nature (*periculm in mora*),[38] and (where appropriate) that the interests at stake are balanced.[39] These conditions are cumulative, and the absence of any one of them therefore justifies the dismissal of the application for interim measures.[40] "The judge hearing an application for interim relief has a wide discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no

edly infringing National measure, it is nonetheless awkward because the Commission is asking for a direct order at the interlocutory stage to do what the main action cannot do because it is merely declaratory" – see Lenaerts et al. (n. 16) 571; see also Case C-36/08, *Commission v Hellenic Republic*, ECLI:EU:C:2008:536 and Case C-104/02, *Commission v Germany*, ECLI: EU:C:2005:219.

33 Case T-198/12 R, *Germany v Commission*, para. 27. See also Case C-441/17 R, *Bialowieża Forest*, para. 95; similarly, Case C-313/90 R, *CIRFS and Others v Commission*, EU:C:1991:220, para. 24.

34 These aspects of provisionality are indicated by Postulski (n. 6) 537.

35 Ibid.

36 Case T-198/12 R, para. 29. See also Article 162(3) of the Rules of Procedure of the Court of Justice and Article 158(3) of the Rules of Procedure of the General Court.

37 See also Article 156 (4) of the Rules of Procedure of the General Court.

38 See, *inter alia*, the Court's order in Case C-441/17 R, *Białowieża Forest*, para. 29 and the case law cited.

39 See order of the CJEU in Case C-791/19 R, *Commission v Poland*, EU:C:2020:277, para. 51 and the case law cited therein.

40 Ibid.

rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed".[41]

The first condition (*fumus boni iuris*) "is met where at least one of the pleas in law relied on by the applicant for interim measures in support of the main action appears, prima facie, not unfounded. That is the case, *inter alia*, where one of the pleas relied on reveals the existence of difficult legal issues, the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the court hearing the application for interim relief but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement whose resolution is not immediately obvious".[42] Not only the need for a more detailed analysis of the dispute and the merits of the parties' arguments by the court hearing the case on the merits but also the precedential character of the allegations put forward by the applicant reinforces the thesis that the condition of *fumus boni iuris* has been demonstrated.[43]

The second condition (*periculum in mora*) requires a sufficient degree of probability (not absolute certainty) of the occurrence of "serious and irreparable harm" to the party seeking interim legal remedy.[44] It is rightly pointed out that "serious and irreparable damage, the likelihood of which must be demonstrated, is … the damage that would have occurred if interim protection had been refused if the application in the main case had been granted as requested by the applicant".[45] It may concern not only individual interests but also interests of a public (common) nature – the protection of the environment and the common heritage, the protection of public health, the EU legal order, and thus the rights that individuals derive from EU law and the values expressed in Article 2 TEU. Damage that is financial in nature is not, unless there are exceptional circumstances, considered irreversible because pecuniary compensation (subsequent financial restitution) can, in principle, restore the victim to the situation before the damage occurred.[46]

41 See order of the President of the Court of First Instance in Case T-198/12 R, *Germany v Commission*, ECLI:EU:T:2013:245, para. 22 and the case law cited therein.

42 See Case C-619/18 R *Commission v Poland*, para. 30 and the case law cited therein. See also, *inter alia*, Case C-791/19 R, *Commission v Poland*, EU:C:2020:277, para. 52; Case C-121/21 R, *Turów Mine*, ECLI:EU:C:2021:420, para. 35.

43 See Case C-619/18 R *Commission v Poland*, para. 49.

44 See Case C-441/17 R, *Białowieża Forest*, paras 43–44. See also Case C-121/21 R, *Turów Mine*, ECLI:EU:C:2021:420, para. 53: "It should be recalled that proceedings on an application for interim measures are intended to guarantee the full effectiveness of a future final judgment in order to avoid gaps in the legal protection afforded by the Court. In order to achieve that objective, urgency must be assessed in terms of the need for an interim judgment in order to avoid serious and irreparable harm to the party seeking interim protection. It is for that party to adduce evidence that it cannot expect to complete the proceedings on the merits without suffering such damage. In establishing the existence of serious and irreparable harm, there is no need to require that the harm be demonstrated with absolute certainty. It is sufficient that it is foreseeable with a sufficient degree of probability".

45 Kawczyńska (n. 11) 30.

46 Ibid.

The third condition concerns the balancing, where necessary, of the various interests at stake (individual and public interests).[47] The CJEU emphasises that both the granting and refusal of the requested measure "is likely to produce, to a certain extent, certain definitive effects"[48] for those interests at stake. It also follows from the case law of the CJEU that the requirement to balance the interests at stake involves examining "whether or not the interest of the applicant for interim measures"[49] outweighs the other interests at stake (the interests of the other parties affected by the provisional measure and, if relevant, the public interest).[50]

4. Interim measures in environmental cases in the CJEU's jurisprudence

Interim legal protection in environmental cases is of particular importance. Indeed, delays in taking preventive action (also under interim legal protection) may lead to serious and irreversible environmental damage.

The assessment of the necessity of interim protection, as well as of the method of protection in environmental cases, is made by the CJEU taking into account the precautionary principle. This principle is one of the cornerstones of the EU's environmental policy, which aims at a high level of protection (Article 191(2), first paragraph TFEU) and must be interpreted in light of EU legislation. The precautionary principle justifies taking protective action in a situation of uncertainty without waiting until the reality and gravity of the threat to the environment or human health have been fully proven.

In environmental cases, the CJEU has ruled on the issue of interim legal protection on several occasions. Two cases deserve particular attention in the evolution of CJEU case law: *Białowieża Forest* and *Turów Mine*. In *Białowieża Forest*, the court ruled for the first time that the scope of Article 279 TFEU ("necessary interim measures") also includes an accessory measure in the form of a periodic penalty payment that may be imposed in the event of a Member State's failure to comply with previously ordered interim measures. Such a penalty was imposed on a Member State for the first time in *Turów Mine*.

4.1 The Białowieża Forest *case – order of the CJEU of 20 November 2017 in Case C-441/17 R,* European Commission v Republic of Poland[51]

In the *Białowieża Forest* case, the Commission's application to the CJEU for interim measures was made in the context of a complaint under Article 258 TFEU

47 Ibid. 31–32.

48 See Case C-619/18 R, *Commission v Poland*, para. 91.

49 Case T-198/12 R, *Germany v Commission*, ECLI:EU:T:2013:245, para. 80.

50 On the possible interests at stake, see Kawczyńska (n. 11) 31.

51 Hereinafter also as Case C-441/17 R, Białowieża Forest.

alleging a breach by Poland of its obligations under the Habitats Directive[52] and the Birds Directive.[53] That breach arose, firstly, from the approval and implementation of forest management measures without ensuring that the integrity of the Natura 2000 site of Białowieża Forest would not be adversely affected; secondly, from the failure to implement the necessary conservation measures for that site; and thirdly, from the failure to ensure the protection of species, as required by the provisions of the aforementioned directives. The European Commission, in its motion for interim measures, requested that Poland be ordered to cease active forest management in the Białowieża Forest, except where public safety is at stake. In addition, the Commission requested that a periodic penalty payment be imposed if Poland failed to comply with the injunctions under the interim measure ordered.

The CJEU, assessing the grounds for ordering an interim measure, found that they had been proved. As regards the condition of *fumus boni iuris*, the CJEU pointed out that the arguments relied on by the Commission were not *prima facie* devoid of serious grounds. Indeed, in light of the precautionary principle, it could not be ruled out that the active forest management measures in question did not meet the protection requirements of the Habitats and Birds Directives relating to the obligations to carry out an appropriate assessment of a plan or project likely to have a significant effect on the integrity of a Natura 2000 site (Article 6(3) of the Habitats Directive), to establish the necessary conservation measures corresponding to the ecological requirements of the natural habitat types and the animal species as well as the bird species for which the site of Community importance and the SPA PLC200004 Białowieża Forest was designated (Article 6(1) of the Habitats Directive and Articles 4(1) and (2) of the Birds Directive), and to ensure strict protection of certain animal species and bird species (Article 12(1)(a) and (d) of the Habitats Directive and Articles 5(b) and (d) of the Birds Directive).[54] As regards the condition of urgency of the interim measures, the CJEU found that it could not be ruled out beyond all reasonable doubt that the active forest management measures in question would have harmful and irreversible effects on the protected habitats[55] and may, therefore, constitute "serious and irreparable damage to the interests of the Union and the common heritage".[56]

Finally, in weighing up the interests at stake, the CJEU found that the public interest in preserving the favourable conservation status of habitats and species against possible threats outweighed the interest in stopping the destruction of the natural habitats of the Białowieża Forest affected by the bark beetle,[57] which, according to Poland, required that the disputed cutting be carried out. As for the

52 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 1992, No. 206, p. 7).

53 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 2010, No. 20, p. 7).

54 Case C-441/17 R, *Białowieża Forest*, paras 38–42.

55 Case C-441/17 R, *Białowieża Forest*, para. 61.

56 Case C-441/17 R, *Białowieża Forest*, para. 59.

57 Case C-441/17 R, *Białowieża Forest*, paras 62–77.

damage of a social nature invoked by Poland (consisting in restricting the possibility of using the socio-economic function of the area in question and, in particular, the use of the Białowieża Forest for economic purposes), the CJEU considered that "those interests do not appear to be of greater value than the interest of preserving the habitats and species at issue".[58]

Consequently, the CJEU granted the Commission's request to order Poland to cease active forest management activities, excluding from the scope of the interim measure those active forest management activities which are strictly necessary and proportionate to ensure, directly and immediately, the public safety of persons, provided that other less drastic measures are not possible for objective reasons.[59] When assessing the Commission's supplementary request to order the payment of a financial penalty in the event Poland failed to comply with the cessation of active forest management activities,[60] the CJEU ordered Poland to notify the Commission of any measures it had taken to fully respect the interim measure ordered.[61] Failure to do so could require the Commission to reopen the proceedings, and if it found an infringement, the CJEU would order Poland to pay the Commission a periodic penalty payment of at least EUR 100,000 per day.[62]

4.2 The Turów Mine *case – order of the Vice-President of the CJEU of 21 May 2021 and of 20 September 2021 in case C-121/21 R,* Czech Republic v Poland

As regards the *Turów Mine* case, the application for interim measures was made in the context of an infringement action brought by the Czech Republic under Article 259 TFEU, seeking a finding that the Republic of Poland had infringed Directive 2011/92,[63] Directive 2000/60,[64] Directive 2003/4,[65] and the principle of loyal cooperation, in the context of the extension of concessions for lignite mining in the Turów mine. The Czech Republic requested that Poland be ordered, as an interim measure, to immediately cease lignite mining at the Turów mine until a judgment in the main case had been issued.

The Vice-President of the Court found that the conditions for the interim measure had been met. Examining the premise of *fumus boni iuris*, the Vice-President

58 Case C-441/17 R, *Białowieża Forest*, paras 78–79.
59 Case C-441/17 R, *Białowieża Forest*, sentence of the Court's order.
60 Case C-441/17 R, *Białowieża Forest*, para. 114.
61 Case C-441/17 R, *Białowieża Forest*, para. 114.
62 Case C-441/17 R, *Białowieża Forest*, paras 115–118.
63 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012, L 26, p. 1).
64 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 2000, L 327, p. 1).
65 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003, L 41, p. 26).

found that the arguments raised by the Czech Republic in support of the allegation of the incompatibility of national law with Directive 2011/92 appeared, *prima facie*, to be well founded within the meaning of the CJEU's previous case law.[66] The justification for satisfying the condition of urgency was the sufficient likelihood that the continuation of lignite mining at the Turów mine could have an adverse impact on the level of the groundwater table in Czech territory and that damage associated with a fall in the level of the groundwater table and a threat to the supply of drinking water to the communities dependent on those bodies of water could constitute serious damage to the environment and human health. That damage – in the Vice-President's opinion – was also of an irreversible nature since, more often than not, infringements of such interests cannot, by their nature, be rectified with retroactive effect.[67] However, such irreversible character was not present in the financial damage also claimed by the Czech Republic, caused by the damage to buildings resulting from the lowering of the ground due to the continuation of lignite mining in the Turów mine.[68]

In determining whether the balance of interests favoured ordering the requested interim measures, the Vice-President of the Court found that the risk of serious and irreversible damage to the environment and human health outweighed the energy security of the Member State. In turn, the socio-economic damage associated with the elimination of jobs, as indicated by Poland, was considered to be of a financial nature which could not, barring exceptional circumstances, be considered irreversible.[69] Consequently, the Vice President granted the Czech Republic's request and ordered Poland to immediately cease lignite mining at the Turów mine until the delivery of the judgment terminating the proceedings in case C-121/21.[70]

Subsequent orders issued in *Turów Mine* resulted from Poland's failure to comply with the ordered interim measure of 21 May 2021,[71] i.e., its failure to cease lignite mining at the Turów mine. The conclusion of an agreement between the Czech Republic and the Republic of Poland aimed at an amicable settlement of the Turów mine dispute, as a result of which the Czech Republic withdrew its application from the CJEU and the President of the Court ordered case C-121/21 to be removed from the court's register.[72]

Subsequently, by the order of the Vice-President of the Court of 20 September 2021 in case C-121/21 R,[73] the Vice-President of the Court first dismissed the

66 Case C-121/21 R, *Turów Mine*, paras 35–52.
67 Case C-121/21 R, *Turów Mine*, paras 65–79.
68 Case C-121/21 R, *Turów Mine*, paras 53–64.
69 Case C-121/21 R, *Turów Mine*, paras 80–95.
70 Order of the Vice-President of the CoJ of 21 May 2021 in Case C-121/21 R, *Turów Mine*, ECLI:EU:C:2021:420.
71 Order of the Vice-President of the CoJ of 20 September 2021 in Case C-121/21 R, *Turów Mine*, EU:C:2021:752.
72 Order of the Vice-President of the CoJ of 21 May 2021 in Case C-121/21 R, *Turów Mine*, ECLI:EU:C:2021:420.
73 Case C-121/21 R, *Turów Mine*, EU:C:2021:752.

Republic of Poland's application seeking cancellation of the order of 21 May 2021 and ordered the Republic of Poland to pay the Commission a penalty of EUR 500,000 per day from the date of notification of that order to the Republic of Poland until that Member State complied with the order of 21 May 2021.

Second, by the order of the Vice-President of the Court of 19 May 2022 in case C-121/21 R-RAP,[74] the Vice-President of the Court: (a) discontinued the proceedings on Poland's application seeking to set aside the order of 21 May 2021 (ordering the immediate cessation of lignite mining at the Turów mine) insofar as that application concerned the effects of that order after 4 February 2022, i.e., after case C-121/21 had been removed from the court's register, on the grounds that it was devoid of subject matter; and (b) rejected Poland's application to set aside the orders of 21 May 2021 and of 20 September 2021 (ordering Poland to pay a periodic penalty payment of EUR 500,000 per day to the European Commission) insofar as that application concerned the effects of those orders before 4 February 2022, i.e., before the main case was removed from the court's register, on the grounds that they were inadmissible.

By actions under Article 263 TFEU, the Republic of Poland sought the annulment, in case T-200/22, of the decisions of the European Commission of 7 and 8 February 2022 and 16 and 31 March 2022 and, in case T-314/22, of the Commission's decision of 16 May 2022, by which the Commission recovered, by way of offsetting, the amounts payable by the Republic of Poland in respect of the daily penalty payment ordered by the Vice-President of the Court in order of 20 September 2021, *Czech Republic v Poland* (C-121/21), for the periods between, first, 20 September 2021 and 17 January 2022 and, second, 18 January 2022 and 3 February 2022. In its judgment of 29 May 2024, the court dismissed the actions.[75] The Republic of Poland's appeal against the General Court's judgment was dismissed by the Court of Justice in its judgment of 22 January 2026 in case C-554/24 P.

The described orders on interim measures in *Białowieża Forest* and *Turów Mine*, the reasoning contained therein, and the discussion initiated by those orders justify subjecting the financial penalty imposed as security for the execution of the interim measure to legal assessment from several perspectives – the legal basis of the financial penalty imposed secures compliance of an ordered interim measure, its amount, and the consequences of its non-payment.

5. Periodic penalty payment as an "instrument of enforcement" of an interim measure

Article 279 TFEU confers on the CJEU the power to prescribe any interim measures that it deems necessary in order to ensure that the final decision is fully effective.[76] In particular, the court hearing an application for interim measures must be able to ensure the effectiveness of an order directed at a party pursuant to Article

74 Case C-121/21 R, *Turów Mine*, ECLI:EU:C:2022:408.

75 Case T-200/22 and T-314/22, *Poland v Commission*, ECLI:EU:T:2024:329.

76 Order of the CoJ in Case C-441/17 R, *Commission* v *Poland*, EU:C:2017:877, para. 97 and Order of Vice-President of the CoJ of 27 October 2021 in Case C-204/21 R, *Commission* v *Poland*, EU:C:2021:878, para. 19.

279 TFEU by adopting any measure intended to ensure that the obligations laid down in the interim order are complied with by that party. Such a measure may entail, *inter alia*, provision for a periodic penalty payment to be imposed should that order not be complied with.[77]

5.1 The nature and purpose of periodic penalty payments under Article 279 TFEU

As has been emphasised, the provision of Article 279 TFEU confers on the CJEU[78] the power to order any interim measure that the court considers necessary to give full effect to the final judgment.[79] While the ordering of an interim measure by the CJEU requires the applicant party to apply for the interim measures that it considers necessary and to show that the conditions required for their ordering are fulfilled,[80] once such an application has been made, it is for the court to satisfy itself that the measures it intends to order are sufficiently effective to achieve their purpose.[81]

The literature points out that "the breadth and heterogeneity [of the interim protection granted by the court] would make any … exemplification extremely difficult, if not impossible". In this regard, "the vagueness of the texts is justified by the fact that emergency measures … precisely because of the function they perform, are unnamed measures, the definition of which, like their adoption, is a matter for the [court's] discretion, which is in each case concrete and precise in relation to the individual case".[82]

Consequently, as the CJEU determined in its order of 20 November 2017 in case C-441/17 R (*Białowieża Forest*), the judge hearing such an application enjoys a wide margin of discretion and, "having regard to the circumstances of each case, to specify the subject matter and the scope of the interim measures requested", is entitled "also, if it deems appropriate, to adopt, where necessary of its own motion, any ancillary measure intended to guarantee the effectiveness of the interim measures that it orders".[83] This led the CJEU in *Białowieża Forest* to conclude that, in the event of a Member State's failure to comply with an order resulting from an interim measure, the court would have the power to impose a financial penalty on such a State, at the request of the European Commission, to secure the enforcement of the interim measure ordered.

77 See, to that effect, order of 27 October 2021 in Case C-204/21 R, *Commission* v *Poland*, EU:C:2021:878, para. 20 and the case law cited therein.

78 Pursuant to Article 39 of the Statute of the Court, it is for the President or the Vice-President "under the conditions laid down in the Rules of Procedure" to rule on applications for suspension of enforcement under Article 278 TFEU or for interim measures under Article 279 TFEU.

79 Order in Case C-441/17 R, *Białowieża Forest*, para. 97.

80 Article 160(3) of the Rules of Procedure; also the Order of the CoJ in Case C-441/17 R, *Bialowieża Forest*, para. 98.

81 Ibid. para 99.

82 This was already argued in the late 1970s by Tizzano (n. 6) 378.

83 Case C-441/17 R, *Białowieża Forest*, para. 99.

In turn, in case C-121/21 R, *Czech Republic v Republic of Poland* (*Turów Mine*), the Vice-President of the Court, by order of 20 September 2021, in connection with the failure of the Polish authorities to comply with the order of 21 May 2021 ordering the Republic of Poland to immediately cease lignite mining at the Turów mine, imposed on Poland a periodic penalty payment of EUR 500,000 per day from the date of service of the order imposing the penalty until such time as that Member State complied with the substance of the Vice-President of the Court's order of 21 May 2021.

Periodic penalty payments ordered as provisional measures (penalties to secure the execution of a provisional measure ordered) are a new practice of the CJEU.[84] However, there have also never before been cases where a Member State has ignored the content of orders resulting from the content of an ordered provisional measure (CJEU ruling). The EU is a union of laws[85] in which the need to comply with judgments (including interim measures orders), as well as their enforcement, is essential both for the effectiveness and autonomy of EU law and for its uniform application in the Member States.

The principle of effective judicial protection "requires that interim protection be available to individuals, if it is necessary for the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice".[86] Thus, while the CJEU may not interpret provisions of EU law in a way that extends its jurisdiction beyond the limits set out in the Treaty, this does not mean that those provisions – including Article 279 TFEU – must be interpreted narrowly if it would lead to depriving the ordered provisional measures of their effectiveness. This is particularly the case in relation to Article 279 TFEU, the role of provisional measures and its broad wording ("any must be taken into account").[87]

The CJEU's reasoning in *Białowieża Forest* and *Turów Mine* as to the possibility of imposing periodic penalty payments under Article 279 TFEU concerned two issues.[88] First, the wording of Article 279 TFEU refers to "any necessary provisional measures", meaning that the provision does not impose any limitation on the type of provisional measures that may be applied. Second, the purpose of imposing periodic penalty payments is to ensure the effectiveness of the provisional measures ordered, which in turn serve to give effect to the judgment to be given in

84 Thus, formulating broader objections to the practice of the Court of Justice see I. Kamiński, *Kary zabezpieczające w polskich sprawach (kopalnia Turów, wymiar sprawiedliwości) – wiele wątpliwości* (LEX/el. 2022); see also P. Wennerås, "Saving a forest and the rule of law: Commission v. Poland. Case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017, EU:C:2017:877" [2019] 56 Common Market Law Review 541 with the reasoning presented therein.

85 See, e.g., Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 31.

86 Case C-399/95 R, *Germany v Commission*, EU:C:1996:193, para. 46 and the case-law cited.

87 Lasok wrote: "there is in principle no limit (other than practicalities) to the type of measure that the Court may order". Lasok (n. 17) 640.

88 See L. Prete, "Can't see the forest for the trees? Penalties under Article 279 TFEU" [2020] 2 *MPILux Research Paper Series* 157, 162.

the main proceedings. A different (restrictive) interpretation of Article 279 TFEU would give rise to undermining the concept of completeness of the system of judicial remedies provided for in the EU Treaties.[89]

In the context of the interpretation of Article 279 TFEU adopted in *Białowieża Forest* and *Turów Mine* as to the possibility of imposing periodic penalty payments, several arguments are raised challenging the interpretation adopted by the CJEU. First, the possibility to impose periodic penalty payments on Member States provided for in Article 260(2) and (3) TFEU is to be seen as an exception (*leges speciales*) in EU law because they were introduced only with the changes introduced by the Maastricht and Lisbon Treaties.[90] This was to justify the view that the lack of enforcement measures for provisional measures was widely regarded as a lacuna in the EU Treaties.[91] Second, this interpretation of Article 279 TFEU is said to be at odds with the purpose of the interim measures procedure, as the purpose of the penalty is enforcement: to ensure compliance with the court's ruling rather than "to maintain the existing situation or to restore the status quo ante pending a decision in the main case".[92] Third, the imposition of fines under Article 279 TFEU may lead to a somewhat paradoxical situation where non-compliance with the court's judgment may only result in the imposition of a penalty after further proceedings and a judgment under Article 260(2) TFEU, whereas non-compliance with the injunction as an interim measure may be enforced by periodic penalty payments imposed in the same proceedings in which the injunction was issued.[93] The mere fact that Article 279 TFUE allows compliance with interim measures to be enforced more effectively and more quickly than the procedure for enforcing compliance with judgments of the CJEU issued pursuant to Article 258 or 259 TFEU cannot in any way constitute a reason to reject the possibility of periodic penalty payments to deter from delaying its compliance with ordered interim measures.[94]

It is part of the EU standard of effective judicial protection (Article 47 of the Charter of Fundamental Rights) that, *inter alia*, any final judicial decision should be enforceable (respected) by the parties to the proceedings and not ineffective – this undoubtedly also applies to decisions of the CJEU.[95] In *Deutsche Umwelthilfe*,

89 Ibid. 162.

90 Ibid. 162–163.

91 See, *inter alia*, C. W. A. Timmermans, *La sanction des infractions au droit communautaire – Rapport communautaire* (FIDE Report 1992) 26; L. Prete, *Infringement Proceedings in EU Law* (Kluwer 2017) 396–397. According to CJEU case law, "Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually … such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts". Case C-50/00 P, *Unión de Pequeños Agricultores*, EU:C:2002:462, para. 44.

92 See 352/88 R, *Commission v Italy*, EU:C:1989:55, para. 23.

93 See Prete (n. 87) 163–164.

94 See Prete (n. 87) 163–164.

95 See, e.g., Case C-205/15, *Toma*, ECLI:EU:C:2016:499, para. 43; Case C-556/17, *Alekszij Torubarov*, ECLI:EU:C:2019:626, paras 57, 76–78.

in relation to a similar problem of a national authority's persistent refusal to comply with a national court decision ordering it to enforce a clear, precise and unconditional obligation under EU law,[96] the court held that it followed from the requirements of the first paragraph of Article 47 of the Court of Justice that "it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter".[97]

Before analysing the financial penalties securing the execution of a provisional measure, it is first necessary to refer to the legal basis for their imposition, which, as some authors have pointed out,[98] is by no means obvious. These doubts stem, firstly, from the fact that Article 279 TFEU does not explicitly mention periodic penalty payments as a provisional measure but only indicates the possibility for the CJEU to order "any necessary" provisional measures.[99] Secondly, Article 260(2) and (3) TFEU explicitly gives the CJEU the competence to impose financial penalties on a Member State if it has not taken the necessary measures to comply with the judgment of the court.[100]

An argument in favour of the justification of the imposition, on the basis of Article 279 TFEU, of periodic penalty payments is the need to ensure the effectiveness of an order addressed to a party in order to ensure compliance (reinforcement of the protection) with a provision concerning orders or prohibitions addressed to it. Such a measure may, in particular, formulate the threat of periodic penalty payments or impose periodic penalty payments in the event that the said order is not complied with by the party to whom it is addressed.[101] The CJEU, in interpreting Article 279 TFEU in this way, referred in case C-441/17 R (*Białowieża Forest*) furthermore to Article 2 TEU and the principle of the rule of law expressed therein as a value on which the Union is based, indicating that the imposition of a financial

96 Directive 2008/50/EC on ambient air quality and cleaner air for Europe (OJ 2008, L p. 152) and the obligation of the Member States – pursuant to Article 23 – to draw up air protection plans.

97 Case C-752/18, *Deutsche Umwelthilfe*, para. 56.

98 See, for example, Kamiński (n. 83).

99 Ibid.

100 It is worth mentioning that Article 260 (1) TFUE does not limit the competence of the CJEU to the infringement procedures under 258 and 259 TFUE, but states that if a "Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court"; there are more infringement procedures than those two provisions, and therefore, "if the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it" (Article 260(2) in fine TFUE); see Sikora (n. 15) 140 et seq. and literature and case law therein.

101 See Case C-441/17 R, *Białowieża Forest*, para. 109.

penalty is justified in order to ensure the effective application of Union law (here: compliance by the Member State with provisional measures).[102]

The purpose of imposing a periodic penalty payment to ensure compliance with the interim measures adopted by the CJEU hearing the application for interim measures is to guarantee the effective application of EU law.[103] A periodic penalty payment imposed as ancillary to interim measures cannot be regarded as a penalty but as an instrument of a coercive nature in order to "deter from delaying its compliance with [the] order".[104]

This role and meaning of periodic penalty payments are justified by the rule of law, a value enshrined in Article 2 TEU on which the EU is founded and which is common to the Member States.[105] It is not merely a programmatic norm, i.e., a direction or will of a political nature, but a normative value that constitutes the very identity of the EU as a common legal order – values that have been concretised in principles that translate into legally binding obligations for the Member States.[106] The EU brings together states that have freely and voluntarily subscribed to the common values referred to in Article 2 TEU, adhering to those values and undertaking to promote them.[107]

Article 19 TEU, as emphasised by the Court of Justice, is the concretisation of the value of the rule of law in Article 2 TEU.[108] Under Article 19(1) TEU, the Court of Justice "shall ensure that in the interpretation and application of the Treaties … Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This means that this provision is a clarification of the general obligation under the principle of loyal cooperation (Article 4(3) TEU), which obliges Member States "to take any appropriate measure, general

102 Ibidem, pkt 102; see also P. Tacik, "Poland's defiance against the CJEU in the Puszcza Bialowieska Case (C-441/17)," in C. Rauchegger and A. Wallerman (eds.), *The Eurosceptic Challenge: National Implementation and Interpretation of EU* (Hart 2019) 80–86.

103 Order of 20 November 2017 in Case C-441/17 R, *Commission* v *Poland*, EU:C:2017:877, para. 102; Cases T-200/22 and T-314/22, *Poland v Commission*, ECLI:EU:T:2024:329, para. 32.

104 See Case T-200/22 and T-314/22, *Poland v Commission*, ECLI:EU:T:2024:329, paras 33–34 and case law therein.

105 The CoJ emphasises that "the review of Member States' compliance with the requirements of Article 2 and the second subparagraph of Article 19(1) TEU is entirely within the competence of the Court, in particular where, as in the present case, it is dealing with an action for failure to fulfil obligations brought by the Commission on the basis of Article 258 TFEU". Case C-204/21 *Commission v Poland*, para. 62; see similarly Case C 156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para. 161 and the case law cited therein.

106 Case C-204/21 *Commission v Poland*, para. 67; see also Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para. 232.

107 Case C-791/19, *Commission v Poland (Disciplinary liability of judges)*, para. 50 and the case law cited therein.

108 See, e.g., CJEU in Case C-204/21, *Commission v Poland*, para. 69: "Article 19 TEU is the concretisation of the value of the rule of law affirmed in Article 2 TEU (Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C 64/16, ECLI:EU:C:2018:117, para. 32)"; see in the context of the interim penalty payments T. von Danwitz, "Values and the rule of law: Foundations of the European Union – an inside perspective from the ECJ" [2018] /21 PER/PELJ 1, 11–12.

or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".[109]

In *Białowieża Forest*, the CJEU rejected the Polish government's argument that only Article 260 (2) TFEU, i.e., the second stage of the infringement procedure, entitles the CJEU to impose penalty payments on a Member State. If that were the case, and if there were no possibility of imposing a financial penalty to reinforce the effectiveness of provisional measures imposed on a Member State in the event of non-compliance with them, this would have the effect of "considerably reducing the likelihood of those proceedings [of application for interim measures] achieving their objective".[110] It would even undermine the point of ordering interim protection measures in the context of an action under Article 258 TFEU.[111] If the possibility of imposing periodic penalty payments as an interim measure were to be rejected, it could turn out that orders imposed under Article 279 TFEU are purely illusory (*ius nudum*) if they are not complied with by a party to the proceedings.

The nature of provisional measures, i.e., being provisional (pending the conclusion of the main proceedings) and accessory (i.e., sharing the fate of those proceedings) to the main proceedings,[112] does not in any way mean that measures ordered on that basis are, in any legal sense, less important or relevant. On the contrary, the nature of the conditions for ordering a provisional measure and the requirement of its effectiveness require that there be a wide margin of discretion granted to the judge hearing the provisional measures in order to make it possible, if the Member State does not comply with the measures imposed, to ensure that the final judgment is fully effective.

Nor can the argument be abstracted from the fact that if, in the assessment of the judge ordering the interim measure, the conditions for granting interim judicial protection have been met, in view, *inter alia*, of the urgency and the threatened damage, there must be all the more legal means to reinforce the effectiveness of the interim measure so ordered "in order to deter that Member State from delaying bringing its conduct into line with that order"[113] of the judge ordering the interim measure.

Only the imposition of a financial penalty can act as such a tool to reinforce the provisional measure imposed and to dissuade the Member State from delaying the compliance of its conduct with the measure ordered. The competence of the CJEU to order periodic penalty payments securing (reinforcing) the implementation of an

109 The CoJ has repeatedly reaffirmed that the principle of loyal cooperation also extends to Member States' obligations in the area of their judicial application of and compliance with EU law.

110 Case C-441/17 R, *Bialowieża Forest*, para. 102.

111 There must be a link between the content of the interim measure and the relief sought; indeed, the interim measure is "tailored to the case" – Lenaerts et al. (n. 16) 567.

112 An interim measure "does not … prejudice the decision on the merits of the case, since the interim measure lapses when the final judgment is delivered" – Case C-393/96 P(R), *Antonissen v Council and Commission*, para. 39.

113 Order of the Vice-President of the Court of 20 September 2021 in Case C-121/21 R, *Turów Mine*, para. 49.

interim measure cannot be called into question by the fact that a judgment given as a result of infringement proceeding action (procedures stipulated in Articles 258 and 259 TFUE) does not have the effect of restoring the status *quo ante* but merely establishes an infringement of EU law by a Member State (declaratory nature) and requires implementation by the Member State that is party to such proceedings (Article 260(1) TFEU).[114]

The fact that the infringement procedure (procedures under Articles 258 and 260 TFEU) is, as a rule, a two-stage procedure (first: procedure established under Article 258 TFEU is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and that the conduct will be terminated; second: procedure provided under Article 260 TFEU to enforce compliance with an infringement judgment, i.e., repetitive infringements)[115] cannot in itself deprive the CJEU of the possibility of imposing, on the basis of Article 279 TFEU in conjunction with Article 2 TEU and Article 163 of the Rules of Procedure, periodic penalty payments as a measure to reinforce (secure) the enforcement of orders or prohibitions imposed by way of interim measure. As a consequence of the nature of the infringement procedure, the fact that the effects of the interim measure (as an accessory measure) will cease to exist with the ruling in the main proceedings and that financial sanctions can only be imposed on a Member State by a subsequent judgment of the CJEU under Article 260(2) TFEU if it does not comply with a judgment finding an infringement of EU law cannot constitute an argument excluding the possibility of the court imposing periodic penalty payments as an interim measure either.

Indeed, in a judgment based on Article 260(1) TFEU, the CJEU could not impose a specific course of action on Member States or impose a financial penalty for an established infringement, leaving it free to decide how to implement the judgment establishing the infringement. However, one should consider the wording of Article 260(3) TFEU, under which the CJEU may directly impose a lump sum or a periodic penalty payment if a Member State has failed to fulfil its obligations under EU law.[116]

The declaratory character of judgments of the CJEU under Article 258 or 259 TFEU, if it upholds a complaint, is not limited to a finding of an infringement of EU law but has binding legal effects (Article 260(1) TFEU) on the Member State

114 See Case C-441/17 R, *Białowieża Forest*, para. 91.

115 See, e.g., Case C-304/02, *Commission v France*, para. 91: "The procedure provided for in Article 228(2) EC is a special judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure. The order imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct".

116 See A. Sikora, "Financial penalties for non-execution of judgements of the Court," in A. Łazowski and S. Blockmans (eds.), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) 326–328.

in the form of specific conduct: action, i.e., to bring the matter into conformity, and inaction, i.e., to stop further infringements.[117] An argument of this nature prejudiced the dismissal of the application for interim measures against the French Republic, continuing to apply trade-restrictive measures despite a previous judgment finding a breach of Treaty obligations. The CJEU considered that the Commission was "asking the Court for an order whose purpose would be essentially the same as that of the judgment of 25.09.1979".[118] Indeed, it was incumbent on the state to comply with the CJEU's judgment, making the interim order irrelevant in the view of the President of the CJEU.[119] However, the question of the nature of the judgment on the application in the main proceedings and the relationship between the content of the provisional measure (the orders or prohibitions formulated against the Member State) and the claim of the application is a problem *in genere* of the admissibility of the ordering of a provisional measure on an application under Article 258 or 259 TFEU in the form of orders or prohibitions directed against a Member State party to the proceedings and not a question of the admissibility (or legitimacy) of the imposition of a financial penalty in order to reinforce an already imposed provisional measure ordered by such orders or prohibitions.

The provisional nature of interim measures ordered under Article 279 TFEU has both strengths and weaknesses. On the one hand, provisional measures cease to have effect when a judgment on the merits is delivered, although this does not mean that EU law is not then infringed by the Member State, a party to the infringement procedure.[120] On the other hand, they may have a more far-reaching effect than a judgment on the merits (particularly as regards the content of the orders or prohibitions formulated against the Member State or the imposition of a pecuniary penalty as an interim measure) because of the fundamental role they play in ensuring the full effectiveness of the main action, which would otherwise be jeopardised.[121] Thus, the reinforcement of an imposed provisional measure by imposing (or threatening to impose) periodic penalty payments to dissuade a Member State from delaying the compliance of its conduct with the measure imposed may have a

117 See also K. Zawodziński, "Zarządzenie środków tymczasowych w sprawie ze skargi Komisji Europejskiej dotyczącej Puszczy Białowieskiej – glosa do postanowienia Trybunału Sprawiedliwości Unii Europejskiej z 20.11.2017 r., C-441/17 R Komisja p. Polsce" [2019] 1–2 Palestra 143.

118 "Is asking the Court for an order the purpose of which would in substance be the same as that of the judgment of 25 September 1979" – Cases C-24/80 R and C-97/80 R, *Commission v French Republic*, ECLI:EU:C:1980:107, para. 19. See also Prete (n. 87) 163–164; T. C. Hartley, "Interim measures against France in the 'Lamb War'" [1980] 5 European Law Review 363. This is a very particular judgment that led indirectly to the change to the Maastricht Treaty.

119 Article 260(1) TFUE has always existed under the Treaties, even if the following paragraphs were added by the Maastricht Treaty (paragraph 2) and the Lisbon Treaty (paragraph 3).

120 See also G. d'Agnone, "Interim relief in Commission v. Poland: the end justifies the means?," *Il Diritto dell'Unione Europea* (31 December 2017) <https://www.dirittounioneeuropea.eu/Tool/Evidenza/Single/view_html?id_evidenza=129>.

121 Ibid.

kind of anticipatory effect, reinforcing the subsequent enforcement of the judgment given in the principal action if it confirms the breach of EU law.

The consideration of the need to guarantee full compliance with EU law (the effectiveness of the final judgment in the main case), and therefore also compliance with orders imposed by interim measures, means that periodic penalty payments may constitute a necessary measure within the meaning of Article 279 TFEU, which may be imposed on a State in order to reinforce (secure) compliance by that state with the measures imposed on it.[122]

The wording of Article 163 of the Rules of Procedure of the Court of Justice, which provides that "an order may at any time be varied or revoked on account of a change in circumstances", is also not irrelevant to the conclusion reached. It is not clear how the concept of "change of circumstances" is to be understood, as so far, only in *Commission v Italy* has the court held that a change of national legislation cannot be considered as a change of circumstances justifying the modification or revocation of an interim measure.[123] However, it can be inferred from this ruling that a "change of circumstances" does not occur in the case of a mere normative change but when there is a change of factual circumstances.[124] Therefore, the continuation or even non-compliance with a provisional measure may be considered as such a change of factual circumstances that also justifies the imposition of a financial penalty to reinforce the enforcement of the injunctions or prohibitions imposed on a Member State by way of a provisional measure.

Accordingly, the imposition of a periodic penalty payment under Article 279 TFEU in order to reinforce (secure) compliance by that Member State with interim measures ordered against it **is not *ultra vires* action** by the CJEU or the judge ruling on such a penalty.

When interpreting Article 279 TFEU in conjunction with Article 2 TEU and the relevant provisions of the Statute of the CJEU and the Rules of Procedure of the CJEU, the concept of "any necessary interim measure" must be borne in mind. When interpreting provisions of EU law, according to established case law, "it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part".[125]

While endorsing the reasoning of the Court of Justice, the above-mentioned direction of interpretation of Article 279 TFEU made in *Białowieża Forest* and *Turów Mine* should be placed in the broader context of tools aimed at ensuring effective compliance with EU law (i.e., the purpose of the regulation in question), and which have been shaped in the case law of the CJEU as a reaction to the actions

122 See Order of 20 September 2021 in Case C-121/21 R, *Turów Mine*, para. 49.

123 C-272/91 R, *Commission v Italy*, para. 7.

124 C-204/21 R-RAP, *Commission v Poland*, para. 112.

125 C-44/17, *Scotch Whisky Association*, EU:C:2018:415, para. 27; see also Case C-367/16, *Piotrowski*, EU:C:2018:27, para. 40; Case C-304/16, *American Express*, EU:C:2018:66, para. 54. See more extensively K. Lenaerts and J. A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice* (EUI Working Paper AEL 2013/9) 6–28, <https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf> (accessed 17 August 2024).

of a Member State grossly infringing EU law.[126] As regards the infringement procedure (Articles 258 and 260 TFEU), one should point out, for example, the evolving interpretation of the CJEU over the years regarding the following issues:

(i) the existence of an administrative practice of the Member State that is characterised by a certain degree of entrenchment and generality (failure of a general and persistent nature) in terms of the burden of proof and the timeframe for proving such an allegation;[127]
(ii) the possibility of a combination of financial penalties under Article 260(2) TFEU, that is, the simultaneous imposition of a lump sum and a periodic penalty payment on a Member State in breach of its Treaty obligations;[128] and
(iii) the possibility of imposing a financial penalty (lump sum) where a Member State has implemented a CJEU judgment before the end of a procedure brought under Article 260(2) TFEU.[129]

Białowieża Forest and *Turów Mine* are further examples of the interpretation of Article 279 TFEU, which has evolved over the years, which is pro-environmental and guarantees the rule of law[130] as a value common to Member States (Article 2 TEU).

126 See Wennerås (n. 83) 542 n. 5; see more broadly Prete (n. 90).

127 Case C-494/01, *Commission v Ireland*, ECLI:EU:C:2005:250, paras 37 and 38: "in so far as the action seeks to bring to light a breach of a general nature of the provisions of a directive, based in particular on an attitude on the part of the Irish authorities of systematic and permanent tolerance of situations of non-compliance with the directive, it is not possible, in principle, to exclude the production of additional evidence intended to demonstrate, at the stage of the proceedings before the Court, the general and continuing nature of the alleged breach … It should be stressed that the Commission may elaborate in its application on the initial allegations, provided, however, that it does not change the subject-matter of the dispute. Such a change does not arise where it adduces new evidence intended to illustrate the allegations made in the reasoned opinion of a failure to comply with the provisions of a directive of a general nature". See, e.g., P. Wennerås, "A new dawn for Commission enforcement under Articles 226 and 228 EC: General and persistent (GAP) infringements, lump sums and penalty payments" [2006] 43 Common Market Law Review 31; A. Sikora, "Administrative practice as a failure of a Member State to fulfil its obligations under community law" [2009] 2/1 REALReview 5.

128 See Case C-304/02, *Commission v France*, EU:C:2005:444, para. 82: "the combined application of the two types of sanction laid down in Article 228(2) EC is not excluded, in particular where the failure has been going on for a long time and tends to persist".

129 See Case C-121/07, *Commission v France*, EU:C:2008:695, para. 60: "the imposition of a lump sum has not hitherto been used by the Court in situations where full enforcement of the first judgment has been secured before the conclusion of proceedings brought under Article 228 EC, it cannot prevent such a measure from being decided in the context of another case if it appears necessary in view of its nature and the degree of persuasion and deterrence required".

130 See, e.g., Tacik (n. 101) 67–86.

5.2 The question of the amount of the financial penalty imposed to secure compliance with an interim measure

In the event of financial penalties being imposed as an interim measure, there are no regulations regarding their calculation.

In the order of 20 September 2021, in C-121/21 R, *Czech Republic v Republic of Poland* (*Turów Mine*), the Vice-President of the Court, referring to the Czech Republic's proposal, indicated that the amount did not bind the judge ruling on interim measures (the Czech party requested a penalty of EUR 5 million) since that judge was free to determine the periodic penalty to be imposed in the amount and form that he or she considered appropriate to induce the cessation of the non-performance of the obligations incumbent under the interim measure order. Furthermore, "the periodic penalty payment fixed must be both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of that Member State".[131] Finally, the Vice-President ordered that Poland be fined EUR 500,000 per day from the date of notification of the order until such time as it complied with the order imposing the interim measure.

Criticism has been raised in the literature regarding the relationship between the amount of financial sanctions imposed under Article 260 TFEU (lump sum and periodic penalty payments) and the financial penalty imposed as a provisional measure under Article 279 TFEU.[132] The latter (as confirmed by *Turów Mine*) is several times higher than the penalties that would be imposed on a Member State under Article 260 (2) and (3) TFEU and in accordance with the Commission's guidelines for their calculation.[133]

In the case of financial penalties imposed under Article 260(2) and (3) TFEU, as this provision is general in its wording and does not provide guidance to the Commission in the exercise of its discretion to propose and calculate the level of penalties, this lacuna has been filled by the Commission through the publication of relevant guidelines in its communications on the calculation of financial penalties imposed under this provision.[134] While these guidelines are not binding on the

131 Ibid; see, by analogy, Case C-842/19, *Commission v Belgium (Income relating to immovable property situated abroad)*, EU:C:2020:915, paras 63, 64 and the case law cited therein.

132 See, e.g., Kamiński (n. 83).

133 Communication from the Commission – Application of Article 228 of the EC Treaty (SEC/2005/1658). The volume of data for the calculation is presented in the annually updated communications from the European Commission. As of the time of writing, the latest is dated 15 February 2022; see Communication from the Commission – Update of the data used to calculate the lump sum and periodic penalty payments to be indicated to the Court of Justice of the European Union by the Commission in the framework of infringement proceedings, Update of the data used to calculate the lump sum and periodic penalty payments to be indicated to the Court of Justice of the European Union by the Commission in the framework of infringement proceedings (2022/C 74/02).

134 See the 1996 Commission Communication on the application of Article 228 of the EC Treaty (OJ C 242, 21 August 1996, p. 6), followed by the 1997 Communication (OJ C 63, 28 February 1997, p. 2) and the 2005 Communication (document SEC(2005) 1658) Commission Communication – Application of Article 260(3) TFEU (2011/C 12/01).

CJEU, they undoubtedly contribute to ensuring transparency, predictability and legal certainty for the Commission's actions.[135]

However, it should be borne in mind that financial penalties imposed under Article 279 TFEU are *sui generis* "an enforcement measure" of orders or prohibitions previously imposed on a Member State as an interim measure. It would seem to be consistent with the purpose and nature of the institution of provisional measures that the amount of penalties imposed for failure to enforce (or comply with) a provisional measure should be a multiple of the penalty (it remains an open question as to what that multiple should be) that would be imposed on the State under Article 260(2) TFEU in the event of non-enforcement (pursuant to Article 260(1) TFEU) of an anti-enforcement judgment.

It has been expressed in the literature that it is desirable for the European Commission to draw up a document, analogous to the penalties imposed under Article 260 (2) and (3) TFEU, on how to calculate the financial penalties imposed as a provisional measure.[136] This is all the more important as the possibility of their imposition has already been prejudged in the CJEU case law; moreover, *Turów Mine* shows that a situation of non-compliance by a Member State with an ordered interim measure is possible in practice. It cannot be ruled out that this kind of attitude of Member States will occur again. Hence, the elaboration of such a document will allow both the European Commission and the CJEU (the judge ruling on interim measures) to avoid accusations of arbitrariness in determining the amount of the fines ordered to secure compliance with an interim measure.

5.3 The problem of unpaid periodic penalty payments ordered in **Turów Mine**

By the order of 4 February 2022, the President of the Court, following the conclusion of an amicable settlement agreement between the Czech Republic and the Republic of Poland, removed case C-121/21 from the register of cases. As a result of the conclusion of the main case, the legal effects of the order of 20 September 2021 imposing a periodic penalty payment on Poland as an interim measure also fell away. However, a doubt has arisen as to whether the periodic penalty payment of EUR 500,000 per day imposed on Poland was still payable to the European Commission because the mining of coal in the Turów mine had not ceased by that date (Poland did not comply with the substance of the order of the Vice-President of the Court of 21 May 2021). Alternatively, with the main case finished, should the periodic penalty payment imposed as an interim measure be discontinued?

Doubts as to the enforceability question were resolved in the cited order of the Vice-President of the Court of 19 May 2022 in case C-121/21 R-RAP, according to which the periodic penalty payment imposed for the period from the date of service

135 See Case C-270/11, *Commission v Kingdom of Sweden*, para. 41; Case C-369/07, *Commission v Greece*, para. 112.

136 See, e.g., A. Łazowski, "Winter is coming. The Polish woodworm games" [2017] 2/3 European Papers 797, 801; Prete (n. 87) 168; Kamiński (n. 83).

on Poland of 20 September 2021 until 3 February 2022 was not, by virtue of the termination of the main case (its removal from the register), to be discontinued but was due and payable by the Member State. The Vice-President of the Court aptly argued that while it is possible to apply to vary or set aside, on account of a change of circumstances, an order for interim measures (Art. 163 of the Rules of Procedure),

> the purpose of such an application is not to set aside with retrospective effect the order by which the interim measure in question was ordered, but merely to amend that order or to set it aside ex nunc, making use of the possibility open to the court … of reformulating such an order, with future effect only, in the exercise of which it may reassess, having regard to the circumstances prevailing at the time when it made its ruling, whether it is necessary, in fact and in law, to grant the interim measure in question.[137]

Thus, Poland's application to set aside the order of 20 September 2022 imposing a financial penalty could not call into question "the past effects of the order by which the interim measure was ordered"[138] – in this case, the obligation of the Republic of Poland to pay a financial penalty for the period from the date of service of the order of 20 September 2021 until the date of removal of case C-121/21 from the register. The application was therefore rejected as inadmissible. On the other hand, in view of the removal of case C-121/21 from the CJEU's register and the consequent expiry of the interim measure requiring the immediate cessation of lignite mining at the Turów mine, the legal effects of the order of 20 September 2021 imposing a financial penalty on Poland so as to secure compliance, which was to be paid until the expiry of the interim measure requiring the immediate cessation of lignite mining in connection with the end of the main case (its removal from the register), also lapsed.

Notwithstanding the arguments set out in the aforementioned order relating to the purpose of an application to vary or set aside an order for interim measures on account of a change in circumstances (Article 163 of the Rules of Procedure) and the powers conferred on the adjudicating judge by that provision, the correctness of the decision is further supported by the considerations set out above relating to the nature of the interim measures and the purpose of imposing a pecuniary penalty as an interim measure (consideration of the need to ensure full compliance with EU law and therefore compliance with the obligations imposed by the interim measures).

While the continuation of the periodic penalty payment ordered as an interim measure ceased to have any purpose as the main proceedings were brought to an end (expiry of the interim measure *ex nunc*), irrespective of the outcome of the main proceedings, the penalty payment accrued for the period up to the day (*ad quem*) preceding the conclusion of the main proceedings is therefore due, in the

137 Case C-121/21 R-RAP, para. 22.
138 Ibid. para. 23.

absence of compliance by the Member State with the content of the interim measure order binding on it during that period. The pecuniary penalty accrued over the period of non-compliance by the Member State with the content of the binding interim measure acquires, in this sense, an autonomous character and is not subject to retroactive discontinuance due to the termination of the main case.

6. Conclusion

The practice of using financial penalties imposed to secure compliance with an interim measure is new. It was established only recently in the proceedings against Poland: for the first time in 2017 in *Białowieża Forest* and in 2021 in *Turów Mine*.[139] To take a *Latin* paremia, it can be said that *extremis malis extrema remedia*.[140] The new practice was a consequence of the orders issued in the interlocutory proceedings accompanying the adjudication of the Commission's infringement complaints (Article 258 TFEU – *Białowieża Forest* and *Independence and Privacy of Judges*) and an inter-state complaint (Article 259 TFEU – *Turów Mine*). It therefore also applies to disputes of a cross-border nature.

Recently, there have been more requests than in the past for interim measures in the context of infringement proceedings initiated by the European Commission. When interim measures are ordered (issued in the context of a summary procedure as indicated by the grounds for its order), time is of the essence. Article 279 TFEU, as already mentioned, also applies in the context of proceedings brought under Articles 258 and 259 TFEU. The CJEU, in its jurisprudence on interim measures, emphasised that they may not "exceed the jurisdiction of the Court in interlocutory cases" and "may not go beyond the scope of the final judgment which the Court may give in the main case". Additionally, their provisional nature means that these measures must not create an irreversible situation and should remain within the scope of the main action. Finally, an application under Article 279 TFEU is admissible "if there is a sufficiently close connection between the interim measure sought and the subject-matter of the principal action". This does not mean, however, that there is no legal basis or explanatory text for an order of periodic penalty payments to deter a Member State from delaying its compliance with ordered interim measures.

Regarding *Białowieża Forest*, the CJEU resorted to the "well-hidden remedy" of financial sanctions that "are now part of the interim relief available under Article

139 See also Order of the Vice-President of the Court of Justice of 27 October 2021 in Case C-204/21 R, *Commission v Poland (Independence and Privacy of Judges)*, pursuant to which Poland was "ordered to pay to the European Commission a periodic penalty payment of EUR 1 000 000 per day from the date of notification of this order to the Republic of Poland until the date on which that Member State complies with the obligations arising from the order of the Vice-President of the Court of 14 July 2021. Commission/Poland (C 204/21 R, EU:C:2021:593), or, in the absence of compliance with that order, until the date of the judgment terminating the proceedings in Case C 204/21".

140 Prete (n. 87) 170.

279 TFEU" in order to "enhance the effectiveness of interim relief at the Union level",[141] while the wording and objectives of Article 279 TFEU support the court's broad interpretation of that provision.[142] The contextual objections based on Article 260 TFEU do not alter the interpretation adopted – they are "pertinent, but neither univocal nor necessarily decisive in light of the wording and objectives of Article 279 TFEU".[143] After the order in *Białowieża Forest*, it was also stressed that "the facts of the case suggest that it may be limited to very special occasions. The reasoning of the Court, however, suggests otherwise. It emphasized the need to put a Member State under economic pressure to comply with its obligations in a prompt manner".[144]

The financial payments "as part of the interim measure"[145] imposed in *Turów Mine* and *Independence and Privacy of Judges* confirm that "the circumstances of the case required additional measures to ensure the effectiveness of the interim measures requested",[146] not only because of the subject matter of the dispute and the values protected, which are of fundamental importance in themselves (protection of the environment, protection of the rule of law), but above all because of the need to ensure full compliance with EU law by Member States in the face of non-compliance with orders ordered by interim measures. While in *Białowieża Forest*, there was only concern as to whether Poland "has fully complied with the [interim] order … or that it intends to comply with this order", and the prospect of imposing a penalty was provided for in the order, in case C-441/17 R, *Białowieża Forest* was intended to prevent this (which *de facto* occurred). Conversely, in *Turów Mine*,[147] the circumstance of the Member State's failure to comply with the content of a binding interim measure became a fact and the reason for the imposition of a financial penalty to secure compliance with an interim measure.

Thus, the consideration of the need to guarantee full compliance with EU law in a situation of non-compliance with orders ordered by way of interim measure makes a financial penalty, constituting a "necessary measure" within the meaning of Article 279 TFEU, which may be imposed on a state in order to reinforce (secure) its compliance with the measures ordered against it,[148] a confirmed element of the legal protection system in EU law. Irrespective of the subject matter of the main case, the mere fact of non-compliance with interim measures ordered updates the court's competence to order "any necessary" interim measure within the meaning of Article 279 TFEU, i.e., a financial penalty. This is all the more relevant since non-compliance with the interim measures ordered (specific orders

141 See Wennerås (n. 126) 557.
142 Ibid. 547.
143 Ibid. 548.
144 Ibid. 557.
145 Expressions: Ibid. 557.
146 Order in Case C-441/17 R, *Białowieża Forest*, para. 104.
147 See also Case C-204/21 R, *Commission v Poland (Independence and Privacy of Judges)*.
148 See Order of 20 September 2021 in Case C-121/21 R, *Turów Mine*, para. 49.

or prohibitions) is likely to cause serious and irreparable damage, which was the premise for the granting of interim legal protection.

In the context of financial penalties imposed under Article 279 TFEU to secure compliance with an interim measure, a number of questions arise that have not (yet) been explicitly resolved in CJEU case law.[149] For example, at what stage(s) of the proceedings before the CJEU can financial penalties be imposed under Article 279 TFEU? Could penalties be imposed in the context of the first application for interim measures? Could penalties under Article 279 TFEU also be imposed when the main action has been brought under Article 260(2) TFEU?[150] Finally, to what extent can the reasoning adopted by the CJEU for proceedings under Article 260(2) TFEU be applied by analogy to penalties imposed under Article 279 TFEU?[151]

While endorsing the line of interpretation of Article 279 TFEU (and its justification) by the Court of Justice in *Białowieża Forest* and *Turów Mine*, it should be placed in the broader context of tools aimed at ensuring effective compliance with EU law (i.e., the purpose of the regulation in question), and which have been shaped in the case law of the Court of Justice as a reaction to actions of a Member State in flagrant breach of EU law.[152] As a consequence of the above, there is no basis for arguing that the imposition of a financial penalty under Article 279 TFEU in order to reinforce (secure) compliance by that Member State with interim measures ordered against it is *ultra vires* action by the CJEU or the judge ruling on such a penalty.

Only once (in *Białowieża Forest*) did the Court of Justice rule on the possibility of imposing a financial penalty as a provisional measure in the Grand Chamber. In the other cases, financial penalties were ordered by the Vice-President of the Court on a one-man basis. It may be questioned whether the creation of such precedent-setting and, at the same time, important, albeit commentary-inducing, jurisprudential practice should not lead to the participation of larger formations of the court in their issuance, particularly since there are no appeal procedures apart from the possibility of changing, under Rule 163 of the Rules of Procedure,[153] the provisional measure ordered as a result of a "change of circumstances" against such rulings.[154] There is also no document, even in the form of a communication from the European Commission, relating to the way in which periodic penalty payments

149 See Prete (n. 87) 168–170.

150 On this issue, see Wennerås (n. 126) 551–553.

151 See, e.g., Case C-328/16, *Commission v Greece*, EU:C:2018:98, para. 118 and the case-law cited. Penalties under Article 260(2) TFUE are also aimed at preventing similar infringements of EU law from recurring (see, e.g., Case C-70/06, *Commission v Portugal*, EU:C:2008:3, para. 35); the same might not hold true with regard to penalties under Article 279 TFE – see also Prete (n. 87) 169–170.

152 See Wennerås (n. 126) 542.

153 See the order of the Vice President of the Court of Justice in Case C-204/21 R-RAP, *Commission v Poland (Independence and Privacy of Judges)*, according to which "the amount of the periodic penalty payment to be paid to the European Commission by the Republic of Poland by the order of the Vice President of the Court of 27 October 2021, Commission/Poland (C 204/21 R, EU:C:2021:878), is reduced to EUR 500,000 per day as of the date of signing of this order".

154 See also Kamiński (n. 83).

are calculated, other than in the case of penalties imposed by the Court of Justice under Article 260 TFEU. Issuing guidelines of this kind would make it possible for both the European Commission and the Court of Justice (the judge ruling on interim measures) to avoid accusations of arbitrariness in determining the amount of penalty payments ordered to secure compliance with an interim measure.

11 Intergovernmental mediation versus classical remedies

Towards efficient conflict resolution in cross-border environmental disputes

Małgorzata Kożuch

1. Introduction[1]

The EU bases its existence on international agreements concluded between the Member States. In the exercise of their sovereign powers, Member States have equipped the EU with competences in order to achieve the objectives set out in the Treaties (principle of conferral). The competences with which the Union has been endowed can be divided into exclusive EU competences (Article 3 TFEU), shared competences between the EU and its Member States (Article 4 TFEU), and complementary (supporting, coordinating) competences (Article 6 TFEU). The characteristics of the different categories of competences are widely discussed in the literature.[2] From the point of view of the discussion below, it is important to emphasise that exclusive competences are those within which the EU may legislate and adopt legal acts, and Member States may act insofar as this results from EU authorisation. In the opinion 1/94 of the Court of Justice of the EU (CJEU) it was held that if the Community has competence, the Member States cannot act contrary to it. In case 469/98[3] *Commission v Finland* and others, it was confirmed that where the Community has acted in pursuit of exclusive internal powers it possesses, any action by the Member States in adopting an international agreement affecting the common Community rules was an unlawful intrusion on Community competence.

Shared competences, on the other hand, are those in which both the EU and its Member States may legislate and adopt legal acts, the exercise of which is subject to the general principle of EU law, i.e., subsidiarity and proportionality (Article 5 TFEU). The principle of subsidiarity states that 'in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, and can therefore, by reason of the

1 Open Access and proofreading of this chapter were supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at the Jagiellonian University (Cracow, Poland).

2 C. Timmermans, "ECJ doctrines on competences," in L. Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press 2014) 155–167; R. Schütze, *European Union Law* (Cambridge University Press 2015) 263.

3 Case C-469/97, *Commission v Finland*, CLI:EU:C:2002:627.

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scale or effects of the proposed action, be better achieved by the Union' (Article 5.3 TFEU).[4] As some authors underline,[5] the exact meaning of those is far from clear, particularly regarding where the line might be drawn between the competence of the Community/EU and the competences of the Member States. The principle of proportionality, on the other hand, means that 'the scope and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. In case 84/94[6] *UK v Council*, the ECJ said that unless there had been a manifest error or misuse of power, the Council must be allowed to exercise its discretion in law-making involving social policy choices. In addition, it should be noted that Article 352 TFEU grants the EU an instrument to achieve the objectives of the EU as set out in Article 3 TEU in situations where the Treaties have not provided the necessary power. This instrument cannot be used to harmonise the law of the Member States. As can be seen, the evolution of the scope of EU competence is the result of the widely accepted activity of the CJEU, especially of the attorneys general, in the field of the environment,[7] sometimes with the tacit consent of the Member States. The CJEU has used a certain method of action (purposive or interpretative), indicating that the use of a certain method of action, e.g., in the area of commercial policy, will allow the EU to better achieve its objectives.[8] The CJEU, in Opinion 1/75,[9] explicitly pointed out that the achievement of the European Community's objectives in the field of the common commercial policy[10] requires the restriction of Member States' activities in the area indicated, in particular from undertaking international obligations that could impair the objectives of the commercial policy. The external policy of the EU defines only its objectives and the method and procedure of its operation. Originally, the EU's external policy included a common commercial policy and the right to conclude association agreements with third countries. Nowadays, the activities undertaken in the framework of the EU's external policy are/should be, alongside the common commercial policy, a reflection of the activities previously undertaken in the internal forum of the EU.[11] Article 191(4) TFEU provides that, within their respective spheres of competence, the EU and the Member States shall cooperate with third countries and international organisations. The cooperation procedure is based on the application of Article

4 In Case C-120/70, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, ECLI:EU:C:1979:42, it was said that only where the Community had not acted could the Member States act independently, and even then, if concerned with a general area, the Member States could act only within prescribed limits.

5 N. Foster, *EU Law Directions* (Oxford University Press 2008) 112.

6 Case C-84/94 *UK v Council*, ECLI:EU:C:1996:431.

7 A. Sikora, *Constitutionalisation of Environmental Protection in EU Law* (Europa Law 2020) 238.

8 Case C-22/70, *Commission v Council*, ECLI:EU:C:1971:32; joined Cases C-3/76, C-4/76, C-6/76, *Cornelis Kramer and others*, ECLI:EU:C:1976:114.

9 Opinion 1/75 [1975] ECLI:EU:C:1975:145.

10 Nowadays Article 206 and 207 TFEU.

11 In Opinion 1/78 [1979], ECLI:EU:C:1979:224, the court answered the question of whether the Community's competence is to liberalise trade or regulate commodity prices in raw materials so as to assist developing countries. The answer was in favour of regulating.

218 TFEU. In fact, the tension that arises between the EU and the Member States in the area of conferred competences is apparent, as the Member States want to preserve their sovereignty in international relations and apply intergovernmental cooperation methods (excluding the common commercial policy, which is an exclusive competence of the EU), while the EU wants to emancipate itself as an independent actor in international relations due to its legal personality.

2. Environmental area and EU competences

The environment is an area of shared competence (Article 4 TFEU). The basic scope of competence in the field of the environment is covered by Articles 191 and 192 TFEU, Article 114 and 100 TFEU (used in an ancillary manner as a legal basis for acts to be adopted), and Article 37 CFR. However, the EU's environmental competence can be exercised by issuing acts under the Common Commercial Policy, which is an exclusive competence of the EU (Article 207 TFEU), the Common Development Policy (Article 209 TFEU), Education (Article 165 TFEU), Health (Article 168 TFEU), and Research and Technological Development (Article 186 TFEU). The importance of the link between international trade and the environment has also been recognised by the WTO, which set up a Committee on Trade and Environment (Decision of the Ministerial Committee in 1995 during the Uruguay Round). In terms of energy policy, the EU has become independent and promotes the rational production and use of energy with a view to meeting environmental objectives, promotes the development of renewable energies, and sets standards for the use of the environment, sometimes over and above the mandate it has from states and against the vested interests of some of them.

Most of the agreements concluded by the EU in the area of the environment are mixed agreements, i.e., agreements to which both the EU and its Member States are parties. This form of application is used when it is not possible to differentiate obligations due to the division of competences within the EU between the EU and its Member States. As a result, the assessment of the EU's international environmental performance is a combination of the actors involved (the EU itself, the EU and its Member States, and the Member States themselves), the legal basis for action used and the purpose of the action taken (exclusive competence of the EU, implied powers, joint decision of all, or a group of Member States) and the procedure used to take action or adopt legal acts, including the conclusion of international agreements. The EU tries to present a coherent and unified policy externally, but within the EU, divisions may be visible (plurality inwards, unity outwards). Sometimes, the legal basis adopted helps to limit internal discussions within the EU. For example, the Convention on Biological Diversity (CBD),[12] to which the EU acceded, mandated a declaration of the competence of the acceding entity on the matter covered by the Convention. The EU made a declaration that it can

12 Signed by 150 government leaders at the 1992 Rio Earth Summit, the Convention on Biological Diversity is dedicated to promoting sustainable development.

conclude international agreements and that it has the competence to implement the obligations of the Convention and, moreover, that it supports the pursuit of conservation, protection, and improvement of the quality of the environment, the protection of human health, the prudent and rational utilisation of natural resources, and the promotion of measures to deal with environmental problems at the regional and global level. Furthermore, the EU's statement included an assurance that it had already implemented binding legal instruments on states and assumed responsibility for the implementation of its obligations under the Convention and the Protocol. Currently, within the framework of international environmental agreements to which the EU is a party, a distinction can be made between: (1) those which aim to implement EU policies in the area of the environment; (2) those which aim to implement other EU policies, where the principle of inclusiveness applies, i.e., environmental protection requirements will be integrated into the definition and implementation of EU policies in accordance with Article 11 TFEU, but the environmental matter is not an essential subject of the agreement; and (3) association or cooperation agreements relating to activities in international organisations containing provisions relevant to environmental protection but for which environmental protection is only one element and not the main subject of the agreement.[13]

The very concept of the environment is covered differently in different pieces of legislation.[14] Its widest scope covers elements of both the natural and the man-made environment. As a result, the elements of this concept are and can be human beings, fauna and flora, soil, water, air, climate, landscape, natural resources and cultural heritage, the social environment, living space, and even the social environment. Moreover, both energy production and waste management, as well as spatial management and architecture, can be subject to the environment in a broad sense. Prevention is important in the protection of the environment, so the application of the principle that states must not make their territory available for activities that may harm another state by interfering with the environment should be universally respected. This also applies to the use of areas not under any jurisdiction.[15] As a result, the environment as a common good should be subject to protection by every user.

A number of environmental principles have been developed in international law: enjoining every state not to allow its territory to be used in such a way as to damage the environment of the other states or of areas beyond the limits of national jurisdiction and imposing upon states the obligation to cooperate for the protection of the environment, notify other states of the possible risk that their

13 Agreement of 13 December 1993 on the European Economic Area (OJ L 1, 3 January 1994, p. 572; Fourth Lomé Convention of 15 December 1989), OJ EC L 229, 17 August 1991, p. 287.

14 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993, ETS No. 150.

15 E.g., the diversion of watercourses through infrastructure developments or by causing a lowering of groundwater levels, resulting in the desertification of land adjacent to the development but located in another jurisdiction, or the siting of hydroelectric or wind turbines in such a way that the use of neighbouring land is restricted or excluded.

environment may be damaged or affected, and refrain from causing massive pollution of the atmosphere or the sea, as well as specific customary rules and the precautionary principle. With regard to conflict resolution, it is difficult to speak of a uniform model. No central authorities responsible for enforcing the law on behalf of the whole international community exist.[16] On the contrary, despite the historical attempt to shape an amicable model,[17] adjudicative methods reign supreme. Of course, Article 2.3 of the UN Charter is broad in its scope, encompassing the peaceful settlement of all disputes. Similarly, the UN Declaration on Friendly Relations laid down the principle that states must seek a peaceful settlement for any disputes. But there is no duty to settle disputes at any cost. International law also knows very flexible mechanisms for either preventing or settling disputes. An example is the General Agreement on Tariffs and Trade (GATT), a mechanism of which, established in 1994 (the Dispute Settlement Understanding), is annexed to the WTO.[18] Unfortunately, in order to protect its powers, the EU denies direct effect to the provisions of the GATT and the WTO.[19] This issue raises a number of questions in view of the unambiguous wording of certain provisions of both agreements. Undoubtedly, however, the CJEU's analysis appears convincing.[20]

The resolution of environmental disputes based on acts of EU law is subject to general Treaty principles. This means that, as a general rule, Member States are liable for breaches of their Treaty obligations under Article 4 TFEU in conjunction with Article 288 TFEU, and the relevant procedure is, as a general rule, an action by the Commission[21] against the State[22] (Article 258 TFEU) or by the State against the State (Article 259 TFEU). This, of course, raises problems when the perpetrator of the damage is not the State (which is the case in the vast majority of cases) but a private entity (trader or individual). Likewise, the injured parties as a result of environmentally damaging activities are very often individual entities (individuals,

16 A. Cassese, *International Law* (2nd ed., Oxford University Press 2003) 296.

17 Hague Convention for the Peaceful Settlement of Disputes (1899), revised and improved upon in 1907.

18 Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994) (94/800/EC) OJ. EU.E. 23 December 1994. L 336, p. 1.

19 Case C-21/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, ECLI:EU:C:1972:115, p. 20; Case C-280/93 *Germany v Council (Bananas I)*, ECLI:EU:C:1994:367, p. 105.

20 H. Ruiz Fabri, "Is there a case – legally and politically – for direct effect of WTO obligations?" [2014] 25/1 European Journal of International Law 151; P. Kuilwijk, *The European Court of Justice and the GATT Dilemma* (Nexed 1996) 122–160.

21 The Commission has discretion over whether or not to initiate an infringement procedure. K. Banks and G. von Rintelen, "Infringement procedures and the Juncker Commission" [2020] 45 European Law Review 619.

22 Case C-422/92, *Commission v Germany*, ECLI:EU:C:1995:125; Case C-392/96, *Commission v Ireland*, CLI:EU:C:1999:431.

entrepreneurs) and not just the State.[23] Consequently, flexibility in terms of the formation of parties and how disputes are resolved is very important.

There is a question about what constitutes an object of judicial protection in EU law. Is it the environment per se or the fulfilment of obligations under acts of EU law? As a result, the CJEU may conclude that there has been a breach of EU law and that there will be a positive obligation on the offending state to fulfil its obligations. Potential sanctions will also relate to a breach of an obligation, e.g., failure to implement a directive or incorrect implementation of a directive, failure to comply with a CJEU judgment, or failure to notify implementing measures, although the sanction itself may be linked to the gravity/significance of the breach of EU law. It is also possible to implement interim protection measures (Article 279 TFEU), which, although they were not promising for the effectiveness of implementation in the initial period of the development of environmental law,[24] in the last decade, especially in Polish cases (Białowieża[25] or Turów power plant[26]), have proven extremely effective.[27] Paradoxically, it can be said that the application of interim measures by the CJEU and the imposition of, for example, a penalty in the event of non-implementation of the interim measure provides a better chance of protecting the environment than obtaining a ruling on a breach of treaty obligations. Of course, it is also possible in the latter case to impose a sanction in the form of a lump sum or a periodic penalty payment for non-implementation of a CJEU ruling (Article 260(2) TFEU), but not for a breach of the environment.

Union law does not provide for a direct individual action for a State's breach of its environmental obligations under EU law, which could be brought by an individual entity before the CJEU. However, there are avenues of solutions that indirectly compensate for the lack of a direct action. It is possible, for example, to make use of the competence of the Commission, which, drawing its knowledge from private reports from EU citizens, can, on the basis of complaints addressed to it, initiate an informal procedure to clarify the existence of violations and, if it verifies the reports or makes its own findings, take an autonomous decision to initiate a formal procedure.

However, the effectiveness of Union law presupposes that the redress of claims by individuals against each other, but also against the State, takes place at a national level, according to national procedures.[28] The design of the procedural path for

23 A. Lipiński, "Glosa do postanowienia wiceprezesa TSUE z 21.05.2021 r. (Republika Czeska v Rzeczpospolita)" [2021] LXXIV Przegląd ustawodawstwa gospodarczego 61.

24 Case C-57/89, *Commission v Germany*, ECLI:EU:C:1991:89.

25 Case C-441/17, *Commission v Poland*, ECLI:EU:C:2018:255.

26 Case C-121/21, *Czech Republic and Commission v Poland*, ECLI:EU:C:2021:752.

27 A. Cieśliński and E. Bobin-Dobrzańska, "Dopuszczalność stosowania środków tymczasowych wobec uchybień zobowiązaniom państwa członkowskiego UE," in A. Kozłowski (ed.), *Rządy prawa jako wartość uniwersalna: księga jubileuszowa Profesora Krzysztofa Wójtowicza* (Uniwersytet Wrocławski 2022) 523–541.

28 A. Arnull, "Article 47 CFR and national procedural autonomy" [2020] 45 European Law Review 681; Case C-6/90 and Case C-9/90, *A. Frankovich, D. Bonifaci and others v Italy*, ECLI:EU:C:1991:428; Case C-302/97, *K. Konle v Republic Osterreich*, ECLI:EU:C:1999:271.

the protection of individuals' environmental claims is of great importance. Some authors emphasise that even if there is no fundamental right to the environment or a substantive right granted to the individual, there are procedural rights that allow individuals to invoke provisions of EU law (the concept of concern in relation to direct effect,[29] effective interests[30]) to protect their rights. Notwithstanding the above, the EU has implemented a legal basis in this regard for the creation of criminal liability for environmental infringements, though not at an EU level[31] but at a national level,[32] as well as civil liability.[33] The latter appears to be civil in name as it in fact contains administrative measures.[34]

A complementary instrument to protect the rights of individuals indirectly may be the use of the Aarhus Convention insofar as it allows individuals to obtain information on environmental matters. It also provides the right to a judicial remedy in the event of a state's refusal to provide access to environmental information.[35] The European Commission has also issued a Communication on the evaluation of the implementation of environmental directives.[36] The Communication sets out minimum evaluation criteria for bodies that control implementation and the effectiveness of procedures for investigating complaints and situations relating to implemented standards and places emphasis on increasing the effectiveness of environmental courts. These soft law instruments assist national authorities in assessing the environmental situation but do not in themselves improve the situation.

It seems that only the shaping of the situation after the resolution of the environmental infringement dispute can have a positive effect on the environment. It is also worth noting that the European Commission has issued recommendations

29 Sikora (n. 7) 215.

30 S. Gáspar-Szilágyi, "EU international agreements through a US lens: Different methods of interpretation. Test and the issue of 'rights'" [2014] 39 European Law Review 621; the author cites Hohfeld's concept in *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.

31 A possible test may be the applicability of Article 261 TFEU, which allows that regulations adopted by the European Parliament and the Council or regulations adopted by the Council, under the provisions of the Treaties, may confer on the CJEU the power to rule on the penalties provided for in those regulations.

32 On 27 January 2003, the Council adopted Framework Decision 2003/80/JHA on the protection of the environment through criminal law (OJ L 29, 5 February 2003, p. 55), upon which the CJEU annulled Case 176/03 *Commission v Council*; subsequently, the European Parliament and the Council adopted Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law (OJ L 328, 6 December 2008, p. 28), which will be in force until 21 May 2026, i.e., until the entry into force of a new directive, namely Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law, replacing Directives 2008/99/EC and 2009/123/EC.

33 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L143 of 30 April 2004, p. 357).

34 See M. Kenig-Witkowska, *Prawo ochrony środowiska zagadnienia systemowe* (Kluwer 2011) 201.

35 P. Oliver, "Access to information and justice in EU environmental law: The Aarhus Convention" [2013] 36 Fordham International Law Journal 1423, 1456.

36 Communication from the Commission on Implementing Environmental Law, COM 96/500 final.

on so-called environmental agreements. The definition of an agreement is set out in Directive 94/96 (Article 3, point 12). It is a formal agreement between a public authority and an interested economic sector that wishes to comply with the objectives of the directive. This soft power of influencing the economic environment raises awareness of environmental protection and can lead to a better understanding of risks and, in the event of environmental damage, to a quicker and more complete solution based on already identified environmental needs.

Taking all the aforementioned conditions into account, it should be noted that the environment is a common good, and all the entities using it, be they individuals, companies, or states, have a duty to protect it in order to preserve it for future generations. Matters giving rise to conflicts in the field of the environment do not have to be based on the violation of particular standards introduced at an international or national level but be the result of perceiving a threat to the environment or even its violation, contamination, and thus the necessity to take preventive, damage-limiting, or environmentally remedial action. This issue is extremely interesting as the environment is a state of constant change and self-reproduction. It is sometimes said that nature abhors a vacuum. Large fires caused by human activity, which destroy vast areas of land, do not always need to be rehabilitated by humans. Nature recovers itself. In such cases, the liability for environmental damage is difficult to assess, as the material substrate of the damage sometimes results in the release of new energy and natural regeneration that might not have occurred without the fire. Of course, environmental damage may be irreparable or very difficult to repair. Sometimes, nature is unable to regenerate or restore a polluted or contaminated area on its own. However, in order to enforce legal obligations at an inter-state level, there must be constitutive elements based on common rules. There are elements that need to be agreed between states in advance: common rules on purpose and scope, terminology and definitions, types of environmental offences, liability and sanctions, procedural rights and cooperation, preventive measures, and civil society involvement.[37]

37 The Convention on the Protection of the Environment through Criminal Law (ETS No. 172), adopted in 1998 on behalf of the Council of Europe, did not enter into force because the required minimum number of ratifications or accessions was not reached. The first international instrument containing definitions of serious environmental offences committed intentionally or through negligence, provisions on jurisdiction, sanctions and restoration of the environment is currently under review in order to negotiate, update and prepare the text for its entry into force as a new Council of Europe Convention on Environmental Crime in the XXI century. The European Commission has now made a recommendation to the Council of the EU to obtain a negotiating mandate to work on the revised convention, Recommendation for a Council Decision authorising the European Commission to participate, on behalf of the EU, in negotiations on a Council of Europe Convention superseding and replacing the 1998 Convention of the Protection of the Environment through Criminal Law (ETS No. 172), as well as a draft Explanatory Report thereto Brussels 7 July 2023 COM (2023) 419 final; Council decision (EU) 2023/2170 of 28 September 2023 authorising the European Commission to participate, on behalf of the EU, in negotiations on a Council of Europe Convention superseding and replacing the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172).

3. Alternative dispute resolutions and environmental protection – mediation?

As an alternative to building detailed legal constructions dedicated solely to environmental protection, one can use methods that are referred to in legal science as alternative dispute resolutions (ADRs). Why pay attention to them when considering methods of resolving environmental disputes?[38] First of all, it is necessary to appeal to the potential based on the common interest of the parties involved in the conflict. This is not straightforward, as the rapid course of events following a conflict over environmental damage tends to lead to the positioning of fringe positions and the escalation of damage rather than focusing on ad hoc measures to limit the risk of damage expansion, mitigating damage and introducing corrective and preventive measures. Nevertheless, the potential of the existing value of the environment is worth considering.

Mediation is not a widely known tool, despite the fact that it has lived to see legal regulations in both domestic,[39] international,[40] and, of course, EU law.[41] The

38 Soft law instruments already exist but are not very popular, e.g., Resolving Climate Change-Related disputes through Arbitration and ADR 2019, ICC Commission on Arbitration and ADR Leading Dispute Resolution Worldwide 2019.

39 M. Pel, *Referral to Mediation. A Practical Guide for an Effective Mediation Proposal* (Sud Uitgevers 2008).

40 Association for International Arbitration (ed.), *European Mediation Training for Practitioners of Justice. A Guide to European Mediation* (Maklu 1997).

41 At an early stage, it was only an Action Plan established on 3 December 1998 in Vienna. Then it was a Green Paper of 19 April 2002 on alternative dispute resolution in civil and commercial matters. Currently, the EU has issued legislation on mediation (Directive 2008/52), but so far, it has not been formally linked to environmental protection. This situation is set to change. The Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes and Directives (EU) 2015/2302, (EU) 2019/2161, and (EU) 2020/1828 2023/0376 (COD) contain important consumer-related facilitation in the cross-border context: 'The facilitation of cross-border ADR procedures is another significant change of the proposal. With the newly proposed Article 14 on assistance for consumers, the information rights of the parties would be improved. Article 14(1) would ensure the right of consumers and traders to obtain assistance to access the competent ADR, in the case of a cross-border dispute. Article 14(3) lays down the minimum requirements of these information rights: it should cover explanations on the rules applied by the relevant ADR entities. Article 14(2) requires Member States to designate one ADR contact point in charge of the obligations laid down in Article 14. It also prescribes to Member State to confer the responsibility for the operation of such contact points to the European Consumers Centres Network, to consumer organisations, or any other entity in charge of consumer protection'. The COM proposal has a section about environmental impacts: 'Expanding the scope of the Directive to include extra-contractual disputes would allow consumers to seek redress for damages resulting from unfair commercial practices, including those related to misleading green claims. The possibility of obtaining redress against greenwashing through ADR would reinforce the efforts of public consumer protection authorities and contribute to achieving the goals of the European Green Deal strategy. Within the same context, consumers would also be able to file ADR claim on other cases with environmental impact such as those related to misleading pre-contractual information with regards to energy contracts or to environmental claims'. The proposal concerns limited and targeted changes to legislation in view of rationalising reporting requirements. They are

history of mediation in different countries has various roots.[42] It has been used primarily in family disputes, business relations, and labour law.[43] One may ask whether these fields are too distant from environmental protection. Well, paradoxically not. Family relations, economic relations, and labour law relations share the common element of long-term relationships. This circumstance makes us see, when analysing the needs of environmental protection, that protection must be based on measures of a permanent nature, both remedial, directed towards the past, and capturing the causes of the dispute. However, environmental protection measures must also be directed toward the future; that is, they must be both preventive and consequential. From this point of view, mediation appears to be an ideal measure. This is because the parties to mediation can freely shape past relationships, as well as make commitments for the future. No court procedure has such advantages.

In order to assess the usefulness of this method of dispute resolution in the field of environmental disputes, it is worth starting by defining the concept of mediation. Mediation is a process 'whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons … lacking the authority to impose a solution upon the parties to the dispute'. Several elements of the definition are worth noting. The most significant element concerns the culture of dispute resolution itself. Amicable settlement means that the dispute will be resolved in good faith, with the intention of reaching an agreement, by all parties. Thus, it is not about winning and losing for one or more parties. Rather, it is about creating such values in the mediation process (in this case, environmental protection) that each party will win.[44] Contrary to appearances, in many countries, adherence to the linear view that the only way out of a conflict is through judicial resolution is hardly negligible.[45] In this context, the existing provision in the Mexican Constitution on the right of a citizen to use an alternative way of resolving a dispute to the judicial route (as a fundamental right) is extremely inspiring.[46] Of

based on experience from implementing legislation. The changes do not have significant impacts on the policy but only ensure greater efficiency.

42 E. Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym. Zastosowanie w Europie i Polsce* (C.H. Beck 2007); E. Kruk and H. Spasowska, *Mediacja wybór źródeł, wzory dokumentów i pism, statystyki, bibliografia* (C.H. Beck 2008).

43 G. Nordhelle, *Mediacja. Sztuka Rozwiązywania konfliktów* (FISO Fundacja Inicjatyw Społecznie Odpowiedzialnych 2010).

44 R. H. Mnookin, S. R. Peppet and A. S. Tulumello, *Beyond Winning. Negotiating to Create Value in Deals and Disputes* (The Belknap Press of Harvard University Press 2000).

45 R. A. Posner, *How Judges Think* (Harvard University Press, 2010).

46 Based on Article 17 of the Mexican Constitution, Mexican courts have held that access to justice as a human right includes the right to resort to alternative dispute resolution mechanisms. Thus, the right to resort to ADR mechanisms constitutes a human right in Mexico. *Véase Acceso a los mecanismos alternativos de solución de controversias, como derecho humano. Goza de la misma dignidad que el acceso a la jurisdicción del Estado*, Tesis Aislada III.2o.C.6 K (10a), Registro Digital No. 2004630, Semanario Judicial de la Federación y su Gaceta, Octubre de 2013, Tomo 3, p. 1723 (Access to Alternative Dispute Resolution Mechanisms, as a Human Right. It entails the same constitutional protection as the right of access to the courts, III.2o.C.6 K [2004630], Official Judicial Gazette, October 2013, XXV, Vol. 3, p. 1723).

course, Mexico is far from a model of democracy, but drawing inspiration from this source is possible.

An extremely important element is the very wide subject accessibility of mediation. Various entities can be participants in the mediation process. These include countries as actors involved in the protection of their natural resources, e.g., in the case of the construction of a nuclear power plant near a major river that supplies households in a neighbouring country, or investments in digging that lower groundwater levels in neighbouring local communities belonging to different countries. Participants can be regional or local authorities, but they can also be economic entities whose actions have contributed to the environmental damage. Parties can be individual or collective entities (NGO activists, local communies of residents). The consensus of subjects affected by the impact of a violation of the common good, which is the environment, must boil down to a willingness to enter into mediation with the intention of reaching an agreement.[47] Such a step requires a realised decision that nothing will happen on its own and that the parties will be obliged to actively participate in the solution, not just demand that 'someone else' perform the action for them or stop the violation. The interdependence of the interests of those participating in mediation is not necessarily due to the focus of their activities being directly on environmental protection.[48] On the contrary, their interest in resolving the dispute may arise directly from the object of their business activities or from the public tasks they perform. A painful example in this regard may be the dispute over the Turów mine.[49] On one side were economic interests, i.e., company income, thus generating employment for the local and non-local population and taxation for the municipal revenue, and on the other were public interests–fighting unemployment, organising the local social life and supporting economic and cultural development.[50] In the background stood a dispute over the exploitation of the mine, which caused the groundwater level to drop not only at the site of exploitation but also in neighbouring regions across borders. These elements build conflict, but on the other hand, they are common. They also build the potential for entering into joint talks to resolve the environmental dispute.

Despite the obviousness of these interrelationships, when there is a dispute, the common element is obscured by the emotional factor. Paradoxically, the sense of harm generated by the event that caused the damage stimulates atavistic elements in human nature, pursuing a compensatory mechanism, while losing sight of the

47 M. Tabernacka, *Negocjacje i mediacje w sferze publicznej* (Kluwer 2018).

48 On the topic of methods to break through positional thinking, see E. Carroll QC (Hon) and K. Mackie CBE, *International Mediation: Breaking Business Deadlock* (Bloomsbury 2016).

49 Case C-121/21, *Czech Republic v Republic of Poland*, ECLI:EU:C:2022:74.

50 It is worth noting that the problem of mineral exploitation and the lowering of the groundwater level had been known for a long time as the mine had been exploiting the deposit for nearly 100 years. Nevertheless, the 'court problem' arose in 2021 and was the result of internal political tensions in the two neighbouring countries rather than an extraordinary change in factual circumstances.

bigger picture.[51] This results in the issuance of exorbitant expectations to the party or parties suspected of contributing to the cause of the damage in the first stage of the action. If, in addition, counsel focused on the pursuit of very narrowly perceived individual interests (e.g., the element of financial benefit from litigation or the reputational benefit associated with a high-profile trial)[52] becomes involved, this narrow view of the problem may lead to the abandonment of consideration of any elements of the consensual route. This is because the latter is fraught with a dose of risk and uncertainty related to the approach and expectations of the other party or parties. The reaction of the party that may have actually contributed to the injury is usually defensive. The desire to avoid or minimise liability makes dialogue almost impossible as the parties take positions, suppress elements based on causation judged rationally based on life experience, and demand 'hard evidence'. The result is an escalation of the conflict, as each side secures its legal flank, denying any potential basis for liability.

Arbitration is also considered the classic means of ADR.[53] It has its basis in acts of international law – e.g., the New York Convention[54] – and in acts of domestic law. It can be said that thousands of books and articles have been written about arbitration. Its effectiveness is unquestionable; however, it is a costly process and based on many elements similar to those of a court of law, including a rigorous evidentiary procedure. Moreover, arbitration requires formal elements such as an arbitration clause, which in the practice of 'environmental events/disputes' makes its usefulness negligible. Within the EU, the effectiveness of arbitration has been weakened in recent years due to important CJEU rulings.

Given that the concept of the environment is very capacious and legal acts, whether international, EU or national, have only partially kept pace with changes in the natural and social environment of human beings, it can be seen that looking at environmental conflicts through the prism of the rules already developed for its protection and then through a mechanism built on the Singapore Convention for the enforcement of mediated settlements may prove extremely helpful in resolving environmental disputes. Of course, the Singapore Convention has a narrow application to transboundary commercial disputes, but there is nothing to prevent a mechanism for the enforceability of settlements ending environmental disputes from obtaining its international 'stamp' in the form of adopting a mechanism both in principle for the amicable resolution of environmental disputes and for the

51 R. Fisher and D. Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Penguin 2016); D. R. Shapiro, *Negotiating the Nonnegotiable: How to Resolve Your Most Emotionally Charged Conflicts* (Viking 2006).

52 S. Walker and D. Smith, *Advising and Representing Clients at Mediation* (2nd ed., Wildy, Simmons & Hill 2019); A. Goodman, *Effective Mediation Advocacy* (Mediation Publishing 2017).

53 This is the prevailing view in the doctrine; however, the European Commission excluded arbitration from ADRs. The European Commission's Green Paper of 19 April 2002 on alternative dispute resolution in civil and commercial matters COM (2002) 196 final.

54 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, OJ 1962, No. 9, item 41.

'automatic' enforcement of settlements reached as a result of the termination of environmental disputes, so as to accelerate the realisation of its protection.

The lack of legal formalism in undertaking mediation to resolve a dispute is not the only advantage. However, it raises the legitimate question of how it can work for an effective, enforceable outcome if it is a non-binding process. The answer is surprisingly simple. The mediation process itself is indeed flexible and voluntary, based on the parties' agreement and choice of mediator, but the resulting settlement is binding and enforceable. Moreover, the conclusion of the Singapore Convention under the auspices of the UN[55] has made mediation a tool that, with the will and determination of the parties, can lead to results that are not achievable in court or arbitration proceedings. Referring to the history of the Singapore Convention, the UN General Assembly, on the basis of Resolution 2205 (XXI) of 17 December 1966, established the UN Commission on International Trade Law (UNCITRAL) with a mandate to harmonise and unify international trade law in the interests of all nations, especially developing nations. The Commission's work resulted, among other things, in Resolution 35/52 of 4 December 1980, setting forth a harmonised legal framework for fair and effective settlement proceedings arising from international trade relations. On 19 November 2002, on the basis of Resolution 57/18, UNCITRAL adopted the so-called Model Law on International Commercial Conciliation.

These instruments gained popularity over time, but they were far from achieving the stature and practical significance that the 1958 New York Convention achieved.[56] The main objection that arose regarding the Model Law's lack of operability concerned the inadequacy of the legal norms that would regulate the enforceability of conciliation settlements, especially in terms of Article 14. Thus, the US made proposals to work on a new convention on mediated settlements in 2014. The original idea was not warmly received, as even the chairman of Working Group II, which was entrusted with the work, was sceptical about starting work on the Convention and expressed concerns about the long-drawn-out process and little prospect of future consensus.[57] The result of this sceptical attitude was that Working Group II was given a much broader mandate for its work than the proposer had envisioned in order to allow it to develop the instrument that experts

55 The Convention was opened for signature on 7 August 2019 in Singapore. Its entry into force was set for six months after the deposit of the third instrument of ratification. As of the first day, 46 countries had signed it, and there are currently 55 signatures, including nine ratifications. Signatories to the Convention include such prominent entities as Australia, China, India, Iran, Israel, Kazakhstan, Malaysia, Nigeria, Qatar, South Korea, Saudi Arabia, Sri Lanka, Ukraine, the USA, and Venezuela. The Convention entered into force on 20 September 2020. It is drawn up in six official languages: English, French, Spanish, Russian, Chinese, and Arabic.

56 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, OJ 1962, No. 9, item 41.

57 "IMI survey results overview: How users view the proposal for a UN Convention on the Enforcement of Mediated Settlements," *International Mediation Institute* (16 January 2017) https://imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/ (accessed 28 October 2022).

thought would be most effective. A few months later, the mood in Working Group II improved. A balanced position on both the need for regulatory harmonisation and the creation of an instrument other than the existing one was expressed by the EU, but this did not prevent UNCITRAL from continuing negotiations and work, which was subsequently confirmed at UN sessions. The next six working sessions focused on intensive screening work, with Working Group II constantly continuing the open legal formula, not limiting itself to the form of a convention and including work on an instrument in the form of a Model Law in parallel.

The breakthrough in the work came in February 2017, when, during a UN session, the Israeli representative addressed five internally related elements, the formation of which in the newly developed legal instrument seemed essential for success in the negotiations. Undoubtedly, this approach reflected the basic model of the mediator's work of addressing problems and pointing out potentially new insights into the analysed scope with the perspective of a new solution, sometimes overlooked or deemed outright unacceptable at first glance. The first element was to emphasise the importance of moving away from the term 'recognition' in the mediation settlement in the domestic legal order due to the very different methods of 'recognition' of court decisions and settlements, as well as the meanings of the term in the internal jurisdictions of the states party to international agreements.[58] Instead of using the term 'recognition', a functional description of the mechanism already at the level of the international instrument was proposed, which could eliminate implementation differences and have a very positive impact on practice. Second, in view of the existing models of recognition and enforcement of judicial and arbitral awards in the states party to international agreements, which could lead to a multiplication of provisions and unintended chaos, it was proposed to exclude judicial awards of all types and arbitral awards from the developed instrument as instruments coming 'from a third party' with the power to impose a solution, i.e., from a judge or arbitrator. Mediation settlements in this regard remain the 'pure' will of the parties,[59] and the participation of the mediator should not affect the content of the decision but only the fact of its adoption. However, this does not mean that mediation settlements are given an exclusively contractual character. On the contrary, the elevation of mediation settlements to the international level was

58 See the analysis of the so-called country reports presented in the Green Paper on the review of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, on the notion of enforcement of an arbitral award can be considered narrowly, i.e., the possibility to enforce an award (in the sense of enforcement), or more broadly, i.e., the award becoming enforceable (after proceedings for recognition of the award). See W. Sadowski, "Ensuring the effectiveness of arbitral tribunal awards in investment disputes," in A. Wróbel (ed.), *Ensuring the Effectiveness of International Court Awards in the Polish Legal Order* (Warsaw 2011) 923–954.

59 On the subject of the autonomy of the will of the parties, see, e.g., M. Dąbroś, "Rules forcing their application – a barrier to the consideration of the autonomy of the will in private international law," in M. Gajda (ed.), *Autonomy of the Will in Private International Law and Arbitration* (Katowice 2015) 45.

intended to put these settlements practically on a par with arbitral awards and even to enable the development of instruments to facilitate their operability.[60]

The third element highlighted concerns the extent to which the new legal instrument would be binding. In this regard, the importance of the possibility of eliminating the presumption of validity was emphasised, and, as a result, the possibility of choosing a solution that would require the parties to the mediation settlement to affirmatively indicate their willingness to produce the legal effects specified explicitly in the instrument under development was pointed out. Fourth, very extensive reference was made to the various models of mediation, as well as the mediator's competence and the form of its embedding in the internal legal order of the states party to international agreements, which, for a uniform international instrument, could raise barriers that are difficult to overcome. The approach proposed once again suggested the need to free oneself from the implications derived from the internal norms of the state parties in favour of defining at the level of the international instrument what manifestation of the mediator's action will be able to raise a nullifying objection to the admissibility of the enforcement of the settlement in the internal legal order by means of possible enforcement coercion. Fifth, it was explicitly stated that UNCITRAL should broaden the formula of its work and propose a legal instrument not in the form of 'either a convention or Model Law' but an instrument combining both forms (which has never been practised before). As a result, the identification of the areas identified resulted in a refocusing of the energies of Working Group II and a constructive rethinking of the challenges posed. The result of the work was the proposal at the UN session of 26 June 2018 to adopt the draft convention and at the session of 20 December 2018 to accept it and set a date for the ceremonial signing in Singapore. The choice of the venue for the Convention's promulgation was not accidental but honoured the contribution that Natalia Morris-Sharma, a native of Singapore, made to the work on the draft. The Convention was promulgated, open for signature as scheduled, on 7 August 2019 in Singapore.

Will the Singapore Convention become the basis for defining a method for resolving environmental disputes? It is difficult to extrapolate at this stage. Of course, the Singapore Convention is a tool dedicated principally to economic disputes. However, many environmental disputes are precisely of this nature. Moreover, there is no obstacle to the parties agreeing to mediate outside the scope indicated in the Convention (but based on its principles or a target instrument modelled on the Singapore Convention) and then using domestic methods of settlement enforcement once an agreement is reached in mediation. Considering whether mediation

60 This highlights the element that the parties, when entering into an arbitration agreement, 'agree' to the procedural rules, not necessarily to the consequence of their application (hence the possible contestation of the arbitral award). However, when entering into a mediation agreement, the parties agree not only to the type of proceedings but also to their outcome, which falls within the scope of their autonomy. See the comments of T. Schnabel, "The Singapore Convention on Mediation: A framework for the cross-border recognition and enforcement of mediated settlements" [2019] 19 Dispute Resolution Law Journal at Pepperdine 1, 11.

as a method of dispute resolution opens up space for a comprehensive resolution of multithreaded and often multi-stakeholder environmental disputes is worth considering.[61] Is the Singapore Mediation Convention the answer? If we consider that the Convention aims to establish a mechanism for the recognition of mediated agreements by setting out how contracting states must either enforce the agreement or allow it to be used as a defence (on the basis that the dispute has already been resolved by way of a settlement agreement), the answer would be yes. It could be a model law to resolve environmental disputes. The current condition for applying the mechanism of the Convention is that the settlement must result from mediation and have a cross-border element. A cross-border element means that the agreement is between parties from different countries or that the parties are from countries that are different from (a) the place of performance, or (b) the jurisdiction with which the subject matter of the agreement is most closely connected. Foreign courts will have to consider the mediated settlement itself and not merely an application to enforce a judgment. In other words, the Convention allows the enforcing party to directly enforce the settlement agreement in the courts, or by any other competent authority, of the country where the assets are located (this elevates the contractual act to a sui generis status, which is comparable to the status of arbitral awards). In some cases, mediated agreements should consider inserting an express statement confirming that the parties agree to the application of the Convention (Article 8).

Analysing the acts of EU law, it is noticeable that dispute resolution mechanisms based on consensual methods are not alien to the EU law system.[62] In particular, Directive 2008/52[63] and Directive 2013/11[64] referred to the resolution of consumer disputes through mediation.[65] Without going into a discussion of the detailed matter regulated by both directives, it should be noted that, against their background, the CJEU interpreted the relationship between the right to a judicial route and the obligation to use the route of amicable dispute resolution.[66] The CJEU took the view that even mandatory referral of a certain type of case to mediation does not exclude the right to judicial redress but only postpones its availability. This means that in some disputes, it is reasonable to try the amicable route first (because it is quicker, cheaper, and more easily accessible) rather than involve the judiciary. The CJEU, on the other hand, considered that the compulsory use of lawyers or the obligation to give a reason for withdrawing from the consensual route was not

61 K. Cloke, *The Crossroads of Conflict. A Journey into the Heart of Dispute Resolution* (Janis Publications 2006).

62 Free Trade Agreement between the European Union and the Republic of Singapore, OJ 14 November 2019 L 294, p. 3.

63 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ EU 24 May 2008 L 136, p. 3.

64 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ EU 18 June 2013 L 165, p. 63.

65 There are many more EU instruments referring to the amicable resolution of disputes or even mediation. However, they are neither comprehensive nor universal.

66 Case C-75/16, *Livio Menini and others*, ECLI:EU:C:2017:457.

proportionate to the purpose such obligations were intended to serve in the national order. On the other hand, it is worth noting that Directive 2003/8[67] lays down the conditions for minimum legal aid in cross-border disputes. Interestingly, it provides for obtaining legal aid at the pre-litigation stage (Article 3), and this means that such aid would be guaranteed in the mediation process.[68] The EU even went a step further and introduced an online dispute resolution system under Regulation 524/2013,[69] Regulation 2006/2004,[70] and Directive 2009/22/EC[71] on ODR in consumer matters. Not all elements of the dispute resolution infrastructure have proved to meet expectations,[72] and a revision of Directive 2013/11 is currently underway.[73] However, the use of the mediator-neutral third-party tool for resolving disputes seems to have proven to be an apt solution. Moreover, the EU sees the positive potential of this method in consumer relations with third-country traders and in pre-contractual relations. As a result, the route of amicable dispute resolution will extend to pre-contractual situations and a wider geographical scope.[74] The existence of amicable dispute resolution instruments could potentially be extended to other areas and other actors, especially if the EU allows this method to be applied to pre-contractual relations.

The EU, on the basis of the provisions contained in the TFEU in the chapter on cooperation in the area of freedom, security, and justice, issued Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on

67 Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 203 L 26, p. 41.

68 J. Barcz, *Przestrzeń wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej* (Instytut Wydawniczy EuroPrawo 2010).

69 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on ODR in consumer disputes), OJ EU, L 165, p. 1.

70 Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), replaced Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance), OJ EU, L 345, p. 1.

71 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) Text with EEA relevance, OJ EU, L 110 p. 30.

72 The European Commission considered that some of the reporting mechanisms linked to the Directive were too costly in relation to the objectives they serve. The Commission, in a document called 'Long-term competitiveness of the EU: looking beyond 2030' COM (2023)168 final, assumed that the costs of operating the solutions should be reduced by 25%.

73 Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes and Directives (EU) 2015/2302, (EU) 2019/2161, (EU) 2020/1828; DOC 2023/0376 (COD).

74 The Bureau of Parliamentary Analyses of the Chancellery of the Sejm has issued a favourable opinion on the proposal to amend the Directive. Opinion of 11 December 2023 available at www.bas.sejm.gov.pl.

the law applicable to contractual obligations (Rome I).[75] The CJEU has interpreted the concept of contractual obligation, indicating that it has an autonomous character in Community law. The element of voluntariness means that a party's conduct is guided by the will resulting from an autonomous (individual) decision, and in order for a contract to be valid, it is sufficient to establish that the addressee of the offer was in a position to duly discern the meaning of his declaration of intent to commit himself by means of a legal act.[76] The essence of the Rome I Regulation is to achieve consistency on the subject of jurisdiction and the choice of law applicable to contractual obligations.[77] In other words, the smooth operation of the courts and the judiciary at large is the driving force behind the cooperation. The Rome I Regulation applies to civil and commercial matters,[78] and these concepts too must be interpreted on the basis of EU law and within the scope of the purpose for which the Regulation was issued.[79] Two subsequent regulations, namely Rome II[80] and Rome III,[81] had similar objectives. In all cases, the burden of regulation was on the 'enforcement of claims', and the axis of regulation was the procedurally and substantively applicable law.

In the case of mediated settlements, the choice of the substantively applicable law, like the procedurally applicable law, recedes into the background. The parties

75 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU, L 177, p. 6.

76 Case C-27/02, *Perta Engler v Janus Versand GmbH*, ECLI:EU:C:2005:33; Case C-9/87 *SPRL Arcado v SPA Haviland*, ECLI:EU:C:1988:127; Case C-26/91, *Jacob Handte traitements mécano chinique de surfaces*, ECLI:EU:C:1992:268; Case C-51/97, *Réunion Européene/Spliethoff's Bevrachtingskantoor*, ECLI:EU:C:1998:509; Case C-265/02 *Frahuil SA v Assitalia SpA*, ECLI:EU:C:2004:77.

77 EP and Council Regulation 593/2008 applies to civil and commercial obligations that are linked to the law of different countries (Article 1.1). The primary exclusions concern fiscal, customs, and administrative matters, i.e., in principle those which cannot be formed by a legal relationship. The other exclusions are broad in scope and include, *inter alia*, matters relating to marital status, obligations arising from family relationships, maintenance, relating to the matrimonial regime, bills of exchange, cheques, trusts, and others, including pre-contractual obligations (Article 1.2). At first glance, it is apparent that the scope is similarly shaped to the material scope of the Singapore Convention, even though the interpretation of the term 'civil and commercial matters' is a matter of EU competence. The qualifying attribute for the application of the Regulation is an element called 'obligations … related to the law of different States'. In the case of the Singapore Convention, the attributes are different, related to the actors involved in the dispute – for example, the place of establishment, the place of settlement, or the facts of the case, such as the place of enforcement of the settlement. Thus, the relevant circumstance is the practical aspect of the execution of the settlement agreement rather than jurisdictional jurisdiction.

78 This is consistent with the scope of the Singapore Convention.

79 Alexander Bélohlavek reflects very extensively on the concept of 'contractual obligation' and the differences that, against the background of the Rome I Regulation and the 2001/44 Regulation (now 2015/2012), but also the 1968 Brussels Convention, may arise between Member States. See A. Bélohlavek, *Rozporządzenie Rzym I Konwencja Rzymska Komentarz* (vol. 1, C.H. Beck 2010) 90 and following.

80 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 31 12 2007, L 199, p. 40.

81 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 29 12 2010, L 343, p. 10.

concluding a settlement as a result of the termination of a conflict in principle want to end the dispute and voluntarily perform their obligations. Indeed, the essence of the mediation process is to shape the relationship between the parties in such a way as to satisfy their needs and interests to the fullest extent possible by consensual means. The flexibility of the procedure and the possibility of adjusting financial and non-financial solutions is almost entirely detached from the law, albeit built on the basis of the rules that bind the parties and shape their legal relations. It is based on economic interests, emotions, and individual and group relations, shaping the legal relationship for the future based on facts that have already occurred. It is also important that the parties voluntarily and jointly seek the best solution. Thus, unlike in litigation, where the parties are unwilling or unable to resolve their dispute voluntarily, in mediated cases, voluntariness is the key to avoiding conflict arising from the collision of substantive norms with procedural norms. The parties, being aware of the conflict of norms (actual or potential), seek to conclude a settlement agreement precisely in order to avoid settlement. The settlement agreement may also specify the applicable law.

Analysing the preambles of the Rome I and Rome II Regulations, which contain the motivation for their adoption, one is struck by the EU legislator's focus on the legal element. What is missing is a reflection on the practical implementation or enforcement element. In this respect, the theory of the effectiveness of EU law seems to lack confidence in the subjects of EU law themselves, as manifested in their ability to implement the agreement voluntarily. The entire burden of contract enforcement and execution is shifted to the institutional side, i.e., the courts. Perhaps in 2008, when the foundations of the Rome I and Rome II Regulations were being laid, no one was yet open to the idea that, in addition to the right to a court, there should be a right to alternative methods other than settlement by a judge or arbitrator. Today, the observed inefficiency of the judicial dispute resolution system is turning the eyes of politicians to other methods of dispute resolution than dispute settlement.

Another legal instrument used by the EU to facilitate the movement of judgments given in one Member State and enforced in another is Regulation 1215/2012,[82] which establishes a uniform framework for the recognition and enforcement of judgments given in the Member States in civil and commercial matters.[83] Under

82 Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012, L 351, p. 1; its predecessor was the Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12, p. 1, and its basis was the Convention signed in Brussels on 27 September 1968. OJ 1972, L 299, p. 32 (hence the Brussels bis and Brussels Regulations).

83 The regulation refers to court decisions rendered by the courts of a Member State but also to authentic instruments and settlements. The latter two terms are defined in the body of the Regulation. An authentic instrument is to be understood as a document which has been drawn up or registered in the Member State of origin and the official character of which is apparent from the signature and the content and has been established by a public authority or other authority empowered for that purpose (Article 2(c) of Regulation 2015/2012).

these rules, a judgment given in one Member State, if enforceable in that state,[84] is automatically enforceable in any other Member State.[85] At the same time, there are very narrow grounds (a closed catalogue, but public order is part of it) for refusing to enforce a judgment in the state addressed for enforcement (Article 34 of the Brussels I Regulation, now Articles 44 and 45 of Regulation 1215/2012). One of the grounds for refusing to recognise a judgment is that it is contrary to the public policy (ordre public) of the state requested to enforce it. In the recent ruling C-633/22,[86] the CJEU stated that the declaration of enforceability of a judgment given in another Member State must be refused if the enforcement of the judgment would result in a manifest breach of the principle of freedom of the press enshrined in Article 11 of the Charter of Fundamental Rights. This ruling was preceded by the opinion of Advocate General Maciej Szpunar, who, in his opinion on the ruling,[87] analysed the existing practice of interpreting the concept of public policy for the purposes of declining to enforce a judgment. This analysis is important for the present deliberations as it shows the importance of trust between Member States in the operation of their justice systems. The principle of mutual trust is important in EU law, as it is the basis for the creation and maintenance of an area of freedom and justice.[88] It requires each state to recognise and enforce judgments given in other Member States, subject to exceptional circumstances defined by EU law.[89] A breakthrough in the interpretation of public policy to date is that the refusal to enforce a judgment was dictated by the fact that it would be contrary to Article 11 of the Charter of Fundamental Rights. The Court of Justice has also had the opportunity to define the limits of its own competence when interpreting the concept of public policy, which falls within the domain of national law. However, the essence of Regulation 2012/2015 is the recognition and enforcement of judgments,[90] i.e., acts other than those arising from party autonomy.

84 A similar instrument is the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters COM(2021) 388 final, which potentially has a broader personal scope. It entered into force on 1 September 2023.

85 This situation has changed from the earlier Regulation 44/2001, which required a prior declaration of enforceability in the state of enforcement. Regulation 2015/2012 establishes a system of automatic recognition 'without the need for a special procedure'.

86 C-Case 633/22 *Real Madrid Club de Fútbol AE v EE Société Éditrice du Monde SA* [2004], ECLI:EU:C:2024:127.

87 Opinion of AG Szpunar in Case C-633/22 *Real Madrid Club de Fútbol AE v EE Société Éditrice du Monde SA* [2004], ECLI:EU:C:2024:127.

88 A. Frąckowiak-Adamska, "Brexit a zasada wzajemnego zaufania w europejskiej przestrzeni sądowej" [2022] 5 Europejski Przegląd Sądowy 4; A. Wysocka-Bar, "Brexit a konwencja o jurysdykcji i uznawaniu oraz wykonywaniu orzeczeń sadowych w sprawach cywilnych i handlowych (Lugano II)" [2022] 5 Europejski Przegląd Sądowy 15; Ł. Dyrda, "Pobrexitowy obrot w sprawach cywilnych i handlowych a planowane przystąpienie przez Unię Europejską do konwencji haskiej z 2019r" [2022] 5 Europejski Przegląd Sądowy 22.

89 CJEU Opinion 2/13 EU accession to the ECHR of 18 December 2014, EU:C:2014:2454, p. 191.

90 The definition of a judgment was originally contained in Article 25 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and stated that a judgment for the purposes of the Convention is any judgment given by a court of a

4. The Singapore Convention

The Singapore Convention is open for accession to international organisations of sovereign states (Article 12), provided that the organisation has competence over the matters covered by the Convention. The EU undoubtedly fulfils the criterion for organisations, as it currently has 27 Member States as members. The EU itself has legal personality and may enter into contractual relations with third parties, whether international organisations or states.

Does the EU's competence extend to matters covered by the Convention? If the answer to this question is in the affirmative, the question is whether the EU's competence in this area is exclusive or shared. If we assume that accession to the Singapore Convention would be a form of implementation by the EU of a common commercial policy, then the competence to bind itself to the Convention would be an exclusive competence of the EU. In its preamble, the Convention refers to the premises of reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice. These rationales appear to remain consistent with the objectives of the implementation of EU trade policy and with the existence of a common market in the EU. The conclusion of settlements and the strengthening of their enforceability contribute to the strengthening of the economy, and the maintenance of trade relations between the parties contributes to deeper integration. The above elements are also relevant for trade relations with third countries, the free movement of capital and the internal market. A position in favour of exclusive EU competence can be supported by the cross-border element of any settlement to which the Convention is to apply. Moreover, the EU acts alone in trade agreements with third countries, and such agreements contain elements of 'dispute settlement'.

On the other hand, it should be noted that the negotiating mandate that was prepared for the EU representative at UNICITRAL was not based on Article 4 TEU and the implementation of the common commercial policy but on Article 81 (2) TEU and Article 218 (3) and (4) TEU.[91] The assumption that accession to the

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Contracting State, whether it is described as a judgment, an order or an enforcement order, including an order for costs by an officer of the court. OJ 1972, L 299, p. 32. A judgment would be, for example, a divorce document drawn up by the registrar of the Member State of origin, containing an agreement on divorce between the spouses and confirmed by them before the registrar to the satisfaction of the state of origin. Judgment in Case C-646/20, *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB*, ECLI:EU:C:2022:879.

91 Free Trade Agreement between the EU and the Republic of Singapore, OJ 14 November 2019, L 294, p. 3.

Council Decision authorising the Commission to negotiate instruments on the enforcement of international commercial settlement agreements resulting from conciliation in the framework of the UN Commission on International Trade Law (UNICITAL) doc. 12176/1/17/REV1JUSTCIV 205 EN version and the negotiating directives attached in the addendum to this Council decision doc 12176/17 ADD 1 JUSTCIV 205 EU Restricted. The decision was adopted by the Council on 29 September 2017 (12176/1/17 REV 1+ADD1 DCL). The Council decision is based on points (a) and (g) of Article 81 (2) TFEU in conjunction with Article 218 (3) and (4) thereof. The negotiating

Singapore Convention should occur under shared competence and that both the EU and its Member States should be party to the agreement is supported by the fact that the EU has a questionable basis for exercising the possibility to make reservations to the Convention under Article 8 of the Convention on behalf of itself and at the same time the Member States. Given the argument concerning the functioning of the common market (and not just trade policy) and the possibility of making reservations to the Convention (opt in and opt out of Article 8 of the Singapore Convention), it argues that the material scope of the Convention is relevant to the shared competences between the EU and its Member States and that the Member States themselves should be party to the Convention as it concerns their financial interests.

The question is whether EU accession to the Convention meets the conditions of proportionality, i.e., whether the scope and form of the action do not exceed what is necessary, and of subsidiarity, i.e., the principle that the EU takes action only if and in so far as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Union level. In answering these questions, it should be pointed out that the scope and form of Union action, i.e., accession to the Convention by the EU, is not necessary but adequate for the purpose it serves. Again, it is necessary to return to the question of the possibility of making a reservation to the Convention set out in Article 8 of the Convention. This element supports the idea that a potential solution would be for the EU to accede to the Convention and make the reservation set out in Article 8.1(b), i.e., to allow the parties to a mediated settlement to choose whether the Convention would apply. At the same time, such a solution might not be satisfactory and sufficient for Member States, which would wish to see the application of the Convention outside the scope of EU competence, e.g., to settlements concluded before a mediator that concern obligations wholly unrelated to the territory of the EU (neither of the parties is established in the territory of the EU and the conclusion of the settlement has no effect in the territory of the EU), or would wish to avail themselves of the possibility to make a reservation to the Convention covered by Article 8.1(a). As a result, there would need to be an opportunity for Member States to comment on the scope of the Convention and any reservations under Article 8 to matters involving governmental agencies or any persons acting on behalf of the governmental organisation and to matters not subjectively or territorially related to the EU. The EU does not appear to have the competence to make the reservations set out in Article 8.1(a) of the Convention

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mandate empowers the Commission to negotiate on behalf of the entire EU: Case C-551/21, *Commission v Council*, ECLI:EU:C:2024:281: 'The wording of the sixth sentence of Article 17(1) TEU, according to which the Commission is to "ensure the Union's external representation", thus tends to establish that that provision confers on the Commission the power to take, outside of the CFSP and unless the Treaties provide for a different allocation of powers on that point, any action that, following a decision of the Council authorising the signing of an international agreement on behalf of the European Union, ensures that that signature is given'.

on behalf of the governments of the Member States, and thus it is not possible to assume that it is only the EU that could become a party to the Convention.

As a result, having to consider three configurations of accession to the Convention by (1) only the EU, (2) the EU and its Member States, or (3) only the Member States, including only some Member States, option (2) should be favoured, or alternatively (3). The Member States could produce the necessary effect by acceding individually to the Convention on their own and without the assistance of the EU. It is important that all Member States do so. The implementation of such an international agreement in the framework of internal relations within the EU could then possibly be modified by the provisions of Article 351 TFEU.[92] None of the EU law instruments appear to conflict with the scope of the Singapore Convention. The Rome I, II, and III Regulations deal with jurisdiction, while the Brussels I and Brussels I bis Regulations deal with the recognition and enforcement of judgments, i.e., acts emanating from the judicial authority. The mediation Directives 2008/52 and 2011/13, or those legal instruments containing an ADR mechanism, deal with mediation mechanisms, settlement agreements, and building a mediation-friendly environment, but do not include rules on the enforcement of settlements. EU enforcement instruments concern acts certified by the courts.

5. Mediation as a new approach

Reading the definition of mediation taken from the UN Convention on International Settlements Resulting from Mediation signed on 1 August 2019 in Singapore, one may wonder why mediation may be better than other available dispute resolution methods. Why consider mediation as an alternative to litigation or arbitration? The baseline elements of mediation are the flexibility and ability to resolve complex environmental disputes, the applicability to multiple critical stakeholders with different levels of authority, control over the outcome of the dispute, the assistance of a neutral party who proactively facilitates a difficult dialogue, the space to review issues against the backdrop of current and future circumstances, a horizon of opportunity to discuss and test realistic perspectives of best and worst-case scenarios, a space to consider cost control, a process built on relationships and reputation, in harmony with the social and public responsibilities of governments (honesty,

92 In cases where there is a conflict between EU law and an international agreement concluded between Member States, the provisions that are irreconcilable with EU law shall be inapplicable and EU law shall take its place. Article 351, sentences 2 and 3: 'To the extent that such agreements are incompatible with the Treaties, the Member State or States concerned shall take all appropriate measures to eliminate the incompatibilities established. Where necessary, Member States shall assist each other to this end and shall, where appropriate, adopt a common attitude'. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages agreed upon in the Treaties by each Member State are integrally linked with the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferral of powers on them and the granting of the same advantages by all the other Member States.

fairness, and transparency), a space of willingness to make adjustments for 'give and take' as an outcome, and a way to regain control of a potential conflict.

One of the most important elements is that mediation is voluntary in both subject and object aspects. This means that it will be possible to take into account the complexity of environmental disputes with many critical stakeholders representing different levels of authority. Moreover, in the mediation process, the participants maintain control of the outcome of the dispute. This is a feature that distinguishes mediation significantly from arbitration proceedings, where the decision is made by an arbitrator, or court proceedings, where the judgment is issued by a judge. In a mediation process, it is the parties who shape the solution in both substance and form. They can include remedial (compensation) as well as protective and preventive measures. Their detailed scope is the result of negotiation and the consideration of mutual interests subject to the will of all parties to protect the environment. The mediation process is conducted by a neutral party assisting proactively with the facilitation of difficult dialogue. The presence of a third party (mediator) allows emotions to be controlled, confidential conversations to present interests, and the impassable limits of agreement in a safe environment. The confidentiality of the mediation process and the neutral party (mediator) leading the discussions and supporting the balancing of the parties' interests leads to an optimised outcome.

Moreover, the mediator's neutral and, as it were, external assessment of the dispute allows space for reviewing problems against current and future circumstances. The possibility of organising in the mediation process not only joint sessions, in which all parties involved take part in discussions, but also individual sessions with each party separately, makes it possible to discuss and test realistic prospects of best and worst scenarios.[93] The support of lawyers in this process, who do not have to arm themselves with evidence-based court arguments but whose role is to support the construction of the most appropriate legal constructions for resolving the dispute in the circumstances, is of great value. At the same time, the mediation process is flexible, and its costs are subject to constant review and updating. A party does not risk costs that do not lead to its desired solutions. On the contrary, each party can withdraw from the mediation, saving the costs that a trial would have generated. Moreover, the mediation process is built on relationship and reputation, in harmony with the social and public responsibilities of governments (fairness, equity, and transparency). These elements give a sense of empowerment to each participant and, as a result, create socially relevant values.

Throughout the mediation process, the parties maintain a readiness to make adjustments to 'give and take' as an outcome. The result is a self-contained way of regaining control of the conflict. The advantage of mediation is the discovery of its potential as a method of dispute resolution in almost every area. This is because it does not require any prior act of initiation in the form of, for example, an arbitration clause. It is based on the principle of voluntariness. This voluntariness means

93 G. Friedman and J. Himmelstein, *Challenging Conflict. Mediation Through Understanding* (ABA Section of Dispute Resolution 2008).

that the parties can start and stop the mediation process at any stage of the dispute. However, if we take into account that environmental protection is a higher-order good serving not only the present but also future generations, the determination to protect the environment is undeniable. Thus, if mediation is such a promising process, why is it not a first option in environmental disputes? The elements that make up the answer are many. At the forefront is the fact that mediation is a new method in the area of large dispute resolution. Until the first decade of the 21st century, mediation was mainly used in local internal disputes and diplomacy. Visually, it did not and probably still does not break through as a method adaptable to changing circumstances. Flexibility is its primary advantage. Distrust of new approaches is a social feature that can be overcome through knowledge and repeated experience. The effort made by mediator organisations and public authorities to relieve the burden on the justice system by using alternative methods to resolve cases is already producing the first tangible results. Court case statistics are falling in favour of mediation, and the best market for obtaining indicators is the USA. The second element influencing the distrust of mediation seems to be the desire for autonomy. Modern society and, more broadly, decision-makers are focused on self-efficacy. It is not without reason that modernity is called anthropocentrism. As a result, a collaborative method of conflict resolution requires effort and common will, overcoming distrust and building trust that the goal towards which all parties are working (environmental protection) is equally paramount, and each party will make efforts to achieve the common goal. A third element that does not support the mediation process is the 'macho managers' or 'advisers' schemes. This is because it is easier to build up the egocentrism of the decision-maker than to support a process that leads to optimising the solution and taking into account the interests of the other parties as well (and the environment per se).

There is also no doubt that there are organisational structures and individuals who, because of political constraints, are guided by the principle of decision avoidance, postpone the moment of decision and avoid contact, conversation, and facing the problem. As a result, the prospect that, at the end of the mediation process, a settlement will have to be decided upon, justified in the environment, and sometimes defended against attacks from those with different views can give rise to anxiety. As a result, it is easier for those who have difficulty accepting responsibility for their decisions to use the power-based methods of dispute resolution, i.e., litigation or arbitration. This is because one can say that such a decision has been made by the court and must be implemented, ending the case. Due to its friendly environment and confidentiality of the process, mediation can alleviate these tendencies, but it must first be entered into.

No less importantly, the degree of development of mediation and its cultural background is an element that creates concern towards mediation in the international environment. Analysing the development of mediation in different areas of the globe from a historical perspective, it can be observed that for the Americans, mediation creates commercial flexibility; for the Japanese, the emphasis is on amicable settlement and face-saving avoidance; while for the Europeans, the basic element is uncertainty as to whether the parties have a common understanding of

the objectives of the process. Last but not least, up to 2020, there was a lack of enforceability of the resulting mediated settlement agreements in cross-border disputes. However, if it is assumed that the Singapore Convention is concerned with cooperation in civil and commercial matters in the broadest sense and could also cover at least some environmental disputes, then EU Member States should also agree to accede to the Convention.

6. Conclusion

The changes in civilisation that result from the implementation of solutions built on the basis of the development of science and technology may cause a disturbance in the balance between the intention to keep nature 'as is' and to make changes that radically transform the environment. Above all, consensual methods seem to be the way forward, rather than a policy of *faits accomplish* and possibly facing the consequences of environmental changes already implemented. Given the widespread drive to make societies richer and to meet the economic objectives of states and international organisations, it is sometimes difficult to have a direct dialogue. The use of a neutral intermediary with a sufficient degree of authority among the parties based not on power but on the ability to balance interests and a sufficiently broad view seems to be the most desirable solution. Finding such an authority on a global scale may be difficult, but on a local level, it is a relatively simple solution to adopt.

Given the existing trend of creating pathways to amicable dispute resolution, a convention on the enforcement of mediated settlements has been developed. The Singapore Convention meets the expectations of the parties in that it shapes and simplifies the procedure not so much for concluding a settlement (the parties must reach an agreement themselves with the mediator's participation) but for enforcing the settlement. The Convention very narrowly allows for opposition to the settlement formed by the parties as it is based on the assumption that the settlement was reached voluntarily, after weighing the pros and cons, in full knowledge of the legal consequences. The presence of a neutral mediator is intended to be a stabilising factor in the dialogue between parties with conflicting interests and to foster a dialogue in which the emotions of the parties may overshadow substantive consideration. The Singapore Convention seems to be a promising instrument to build effective tools for solving environmental disputes.

12 Energy-related cross-border disputes

A future without the energy charter treaty

Vojtěch Vomáčka

1. Introduction

Writing about energy-related cross-border disputes is a supremely important but at the same time Sisyphean task. This is because of several unprecedented events that have reshaped the energy market and the relationship between EU Member States with the Energy Charter Treaty (ECT). When the EU notified its exit from the ECT in June 2024, it marked the end of more than a three-decade-long era. However, withdrawing from the ECT with all its consequences is not easy, and related legal issues will likely echo in both academia and practice for years to come. Even without the ECT, cross-border energy investment disputes are not going to disappear in the EU. On the one hand, it is clearer than ever that Member States need to take urgent and substantial steps to transform their energy systems in the fight for climate protection. On the other hand, however, it is equally certain that they will not be able to avoid investment disputes. By contrast, it is not at all clear how significant a role the ECT – until recently the cornerstone of cross-border investment protection – will have in resolving the problems, if any.

This chapter addresses the role of the ECT, the failed attempt at its modernisation against the background of the reasoning provided by the Court of Justice of the EU (CJEU) in *Komstroy* (C-741/19)[1] and *Opinion 1/20*,[2] and the final step the EU is taking to exit the treaty. The reasons why efforts to modernise the ECT have failed so far are outlined with an overview of the options for resolving cross-border energy disputes without the ECT. In particular, the author focuses on the principles of protection provided to the legitimate expectations of investors under the regime of EU law and the European Convention of Human Rights (ECHR), which would gain importance if some or all the Member States and the EU leave the ECT.

2. The significance of the Energy Charter Treaty

The ECT was originally intended to ensure secure energy supplies in the turbulent 1990s. It obliges Contracting Parties to create "stable, equitable, favourable

1 Judgment of the CJEU of 2 September 2021, Case C-741/19, *Republic of Moldova v. Komstroy LLC*.

2 Opinion of the CJEU of 16 June 2022, Avis 1/20, *Avis rendu en vertu de l'article 218, paragraphe 11, TFUE (Traité sur la Charte de l'énergie modernisé)*.

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and transparent" conditions for investors while also calling on states to formulate "stable and transparent legal frameworks."[3] For investors, the ECT was supposed to become a guarantee that they would not lose their long-term investments in the energy business in the post-Soviet countries.[4] Several states that signed the ECT or the non-binding 2015 International Energy Charter, including Australia, Canada, China and the USA, are observers of the Energy Charter Conference, which is the governing body for the ECT process. Belarus and Norway signed but never ratified the treaty. Italy became the first state to withdraw from the ECT in 2016.

The ECT was hardly invoked in the first years after the signing. Gradually, however, it became the most often-used investment agreement worldwide and also a source of serious concerns, paradoxically in the western part of the EU. Discussions were particularly triggered by the proceedings of *Vattenfall against Germany* regarding the operating licence for a coal-fired power plant, brought before an international arbitral tribunal in 2009.[5] The second *Vattenfall* case in 2012[6] opened an even more sensitive area of nuclear energy.

The ECT's investor-state dispute settlement (ISDS) succeeded in improving the climate for investment even though there are many inconsistencies in ECT case law.[7] These most notably lie in the interpretation of the standards of investment protection. The potential causes of inconsistencies are also numerous and include the textual deficiencies of the ECT itself, the *ad hoc* nature of arbitration, its adversarial rather than inquisitorial nature, the lack of an appeal mechanism, the remuneration scheme for the arbitrators' fees, and the very limited role that Contracting Parties have played in the interpretation process after the conclusion of the treaty.[8]

The main reasons for the success of the ECT seem to be – despite the differences in interpretation – a high standard of protection and, above all, friendly compensation for damages. To counter investors' concerns about the potential nationalisation of energy companies, the ECT grants legal safeguards through an ambiguous definition of expropriation. Almost any regulation that could jeopardise an investment project's profit could be interpreted as expropriation that goes beyond shared European standards of protection of ownership (see below). Moreover, the ECT protects not only lost investments but also uncertain future profits.

Investors' legal expectations can be aroused mainly by commitments and legislation on the part of the host country. This means that if a government has made a

3 Energy Charter Treaty (Annex I of the Final Act of the European Energy Charter Conference) (signed 17 December 1994, entered into force 16 April 1998) (1995) 34 ILM 373 (ECT) arts 2, 10(1). See also Concluding Document of The Hague Conference on the European Energy Charter (signed 17 December 1991) title I.

4 A. Konoplyanik and T. Wälde, "Energy Charter Treaty and its role in international energy" [2006] 24/4 Journal of Energy & Natural Resources Law 523, 524.

5 ICSID Case No. ARB/09/6.

6 ICSID Case No. ARB/12/12.

7 C. Verburg, "Modernising the Energy Charter Treaty: An opportunity to enhance legal certainty in investor-state dispute settlement" [2019] 20/2–3 The Journal of World Investment & Trade 425.

8 Ibid.

commitment or representation to an investor that the investor relies on in making an investment, the government may be held liable for any adverse consequences that result from a change in that commitment or representation. The ECT provides a few exceptions. These include, *inter alia*, measures taken for the protection of human, animal or plant life or health.[9] However, the exception does not apply to any of the substantive investment protections.

3. Climate Killer Treaty?

Environmental protection is one of the pillars of the ECT, reflecting the outcomes of the 1992 UN Conference on Environment and Development's sustainable development goals.[10] Most importantly, Article 19 of the ECT calls on Parties to strive to minimise harmful environmental impacts arising from all energy cycle operations in an economically efficient manner and to take precautionary measures to prevent or minimise environmental degradation. In this context, the ECT also explicitly refers to the 1992 UN Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects.[11]

Nevertheless, the environmental commitments are weakly phrased in the ECT, which does not incorporate an explicit clause on environmental concerns and the states' right to regulate and respond to climate concerns. Therefore, the manoeuvring space of the national legislators is considerably restricted. This does not mean that under the ECT, investor interests automatically take precedence over climate protection goals but rather that investors can rely heavily on the guarantees provided by legal and administrative decisions.[12] Furthermore, in practice, the reference by the arbitration bodies to the ECT environmental provisions is, to date, virtually non-existent. The study of arbitral awards conducted by the Climate Change Counsel[13] shows that only four of the 64 ECT awards refer to Article 19 or preambular language at all, and only limited references to climate change or energy transition are found in tribunals' analyses. Moreover, the ECT has not been expressly interpreted alongside any international environmental agreements, such as the 2015 Paris Agreement. This raises concerns about its ability to balance climate protection with investor interests without adequate rules.

9 Article 24(2) ECT.

10 M. Švec, "The Energy Charter Treaty as a key instrument of international energy law: The 20th anniversary of the Energy Charter Treaty's entry into force" [2019] 27/4 Časopis pro právní vědu a praxi 519.

11 ECT, preamble.

12 R. Klimke and J. Bertling, "Klagewelle im Sonnenuntergang? Welche Lehren sich aus Rockhopper vs. Italy ziehen lassen," *VerfBlog* (14 November 2022) <https://verfassungsblog.de/klagewelle-im-sonnenuntergang/> accessed 21 November 2022.

13 A. Ipp, A. Magnusson, and A. Kjellgren, *Climate Change Counsel. The Energy Charter Treaty, Climate Change and Clean Energy Transition: A Study of the Jurisprudence* (2022) <https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf> accessed 25 November 2022.

It would be a great simplification to say that the investment protection law is straightforwardly hostile to regulation in environmental and climate issues. Recent studies of ISDS procedures show that arbitral tribunals are becoming increasingly sensitive to environmental and climate policy concerns and the willingness to treat state measures as regulation without compensation, regardless of their economic consequences for investors, and not as to be assessed as expropriation subject to compensation.[14] This could be a future scenario for the ECT's ISDS as well, but it is far from certain. Instead, states and the public must deal with the huge compensation cases that have been awarded to energy companies. There is also the corresponding opportunity cost: the ISDS may divert public resources away from environmentally critical areas. According to Tienhaara et al.,[15] the high-end estimate of ECT settlements ($340 billion) could surpass the global amount spent by states in 2020 to support mitigation and adaptation actions to address climate change.

It is therefore not surprising that the ECT has been criticised for obstructing government climate protection measures even though such measures have not yet been directly addressed to a large extent in any ECT case. The strong protection of fossil fuel investments under the ECT appears to be in direct contradiction with the need to move away swiftly from coal, oil and gas. The necessary measures for phasing out fossil fuels might be postponed for fear of lawsuits by private investors. Furthermore, the ECT may also prevent states from adjusting the rules for the new low-carbon energy mix. As noted, only a small portion of cases under the ECT have been brought for climate-related reasons. However, it is not only operators of *dirty* sources that are applying for compensation but also those of renewable sources.[16] In Spain, for example, arbitration disputes are underway for financial compensation in the event of premature termination of support for the purchase of electricity from renewable sources.[17]

The ECT has even earned the nickname 'Climate Killer Treaty' (*Der Klima-Killer Vertrag*[18]) and has been the subject of a petition launched by over 500 scientists

14 D. Ruff, *Entschädigungslose Enteignungen im internationalen Investitionsschutzrecht im Interesse des Klimaschutzes? Hintergrund, Stand der Diskussion, aktuelle Entwicklungen* (Institut für Wirtschaftsrecht, Martin-Luther-Universität 2022).

15 K. Tienhaara, R. Thrasher, B. A. Simmons, and K. P. Gallagher, "Investor-state disputes threaten the global green energy transition" [2022] 376/6594 Science 701.

16 K. Tienhaara, "Regulatory chill in a warming world: The threat to climate policy posed by investor-state dispute settlement" [2017] 7/1 Transnational Environmental Law 23.

17 C. Osborne and D. Grunwald, "The renewable energy law review: Determination of quantum in Spanish solar disputes," *The Law Reviews* (26 July 2022) <https://thelawreviews.co.uk/title/the-renewable-energy-law-review/determination-of-quantum-in-spanish-solar-disputes> accessed 25 November 2022.

18 K. Henneberger, "Deutschlands Rücktritt vom Energiecharta-Vertrag ist ein voller Erfolg der globalen Bewegung für Klimagerechtigkeit" (31 November 2022) <https://kathrinhenneberger.de/pms/pressemitteilung-deutschlands-ruecktritt-vom-energiecharta-vertrag-istein-voller-erfolg-der-globalen-bewegung-fuer-klimagerechtigkeit/> accessed 2 December 2022.

and climate leaders in December 2020.[19] In the run-up to COP26, over 400 civil society organisations signed an open letter rejecting the revised agreement as an "obstacle to the clean energy transition."[20] The criticism was shared by the 2022 Intergovernmental Panel on Climate Change (IPCC) report on climate change mitigation,[21] which addressed for the first time the issue of investment protection provisions and their incompatibility with the implementation of states' commitments under the Paris Climate Agreement. It noted that fossil fuel companies could use provisions for an ISDS in many bilateral and multilateral agreements to block national legislation aimed at phasing out the use of their assets:[22]

> Recent phase-out deals [of polluting technologies] tend to aim for (partial or full) compensation rather than no relief for losses … In particular, transactions in the energy sector show a high level of investor protection also against much needed climate action which is also well illustrated by share of claims settled in favour of foreign investors under the Energy Charter Treaty and investor-state dispute settlement.[23]

There are plausible ways to reconcile the ECT investment protection provisions and the international climate regime. However, as Hinrichsen points out, due to the structure of ISDS and the broad nature of international mitigation obligations, the integration of international climate law into ECT arbitration ultimately depends on the specific situation and the arbitrators. States can present (strong) arguments for the integration of climate obligations into the interpretation of the ECT's provisions in the context of a specific dispute but then have to rely on the arbitrator to take international climate obligations into account.[24] Ekard et al. have demonstrated that an interpretation of the ECT that strongly limits damage claims of fossil fuel companies that may thwart energy transition is possible. Taking into account other norms of the ECT as well as legal interpretative effects of the Paris Agreement and international human rights, they argue, the claim for compensation under Art. 13 ECT is less far-reaching than assumed.[25] Even after the coordinated withdrawal of the EU from the ECT, the above-mentioned issues are far from obsolete. The ECT will remain binding for many countries, and energy ISDS in general will have

19 Open letter from climate leaders and scientists to signatories of the Energy Charter Treaty (ECT): Withdraw from the Energy Charter Treaty because it impedes the transition to clean energy.

20 Statement signed by 401 worldwide civil society organisations asking their governments to exit the Energy Charter Treaty by COP26, 2021. "Civil society organisations' statement," *ECT's Dirty Secrets* <https://energy-charter-dirty-secrets.org/2021/07/05/civil-society-organisations-statement/> accessed 3 December 2022.

21 IPCC, *Climate Change 2022: Mitigation of Climate Change* (2022) <https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf> accessed 5 December 2022.

22 Ibid., 2442.

23 Ibid., 2582.

24 E. Hinrichsen, "Reconciling international climate law and the Energy Charter Treaty through the use of integrative interpretation in arbitration" [2024] 13/2 Laws 24.

25 F. Ekardt, P. Roos, M. Bärenwaldt, and L. Nesselhauf, "Energy Charter Treaty: Towards a new interpretation in the light of Paris Agreement and human rights" [2023] 15/6 Sustainability 5006.

to reform or find a balanced interpretative approach reflecting recent changes in both climate and human rights law.

The protection of investors under the ECT has already been disputed on the grounds of human rights protection. In January 2022, five claimants aged between 17 and 31 who experienced devastating floods, forest fires and hurricanes brought a case[26] to the ECtHR against 12 parties to the European Convention on Human Rights (ECHR), including France, Germany and the UK. They argued that membership of the ECT violated the right to life (Article 2) and the right to respect for private and family life (Article 8) of the ECHR. As of 2024, the case was still awaiting a final decision.

4. Komstroy (C-741/19) and Opinion 1/20

From an institutional perspective, the most serious concern with the ECT is the incompatibility of its ISDS mechanisms with EU law. Following the CJEU's judgment in *Achmea* (C-284/16)[27] finding the Dutch-Slovak bilateral investment treaty (BIT) incompatible with the autonomy of EU law, disagreements persisted about whether the *Achmea* reasoning applied to the multilateral ECT as well since both the EU itself and non-EU members are parties to the ECT. Nevertheless, the Agreement for the termination of Bilateral Investment Treaties between the Member States of the EU adopted in May 2020[28] expressly states in its preamble that it does not cover intra-EU disputes conducted based on the ECT and that this matter will be dealt with at a later stage.

In September 2021, the CJEU held in *Komstroy* (C-741/19) that intra-EU arbitration under the current version of the ECT was not permitted by EU law: "In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State."[29] The CJEU applied the *Achmea* test to ECT Article 26(2)(c) as follows: (i) the arbitration tribunals under ECT Article 26(2)(c) are required to interpret and apply EU law, (ii) the arbitration tribunals are not considered part of the judiciary of the Member State and (iii) the awards rendered by arbitration tribunals are not subject to review by a national court.[30] As the CJEU was not asked to rule on whether the arbitration clause in the ECT is compatible with EU law, it introduced its opinion as *obiter dictum*.

On that occasion, there was already a pending request from Belgium for an opinion on intra-EU arbitration under a modernised ECT. The Belgian government had asked whether the probable outcome of the modernisation process was

26 ECtHR Case No. 31925/22, *Soubeste and Others v. Austria and 11 Other States*.

27 Judgment of the CJEU of 6 March 2018, Case C-284/16, *Slovak Republic v. Achmea BV*.

28 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT, OJ L 169, 29 May 2020, pp. 1–41.

29 *Komstroy*, para. 66.

30 *Komstroy*, paras. 42–60.

compatible with EU law. The CJEU found the Belgian request to be premature and therefore inadmissible as the modernisation process was not over (*Opinion 1/20*). However, the CJEU reaffirmed its approach in *Komstroy*, pointing out that intra-EU arbitration under the existing ECT contravened EU law.

In *Poland v. PL Holdings* (C-109/20),[31] the CJEU took its opinion one step further and declared all *ad hoc* intra-EU arbitrations inadmissible as well. Based on that judgment: "to allow a Member State to replace an arbitration clause, included in an international agreement between Member States, by concluding an ad hoc arbitration agreement in order to make it possible to pursue arbitration proceedings initiated on the basis of that clause, would, as has been held in paragraph 47 above, amount to circumventing that Member State's obligations under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU."[32]

As a result, it is tempting to expect that it would be increasingly difficult to initiate investment protection proceedings under BITs or the ECT in the intra-EU relationship. Nevertheless, things are not that simple. The *Achmea* and *Komstroy* decisions naturally reflect the EU law perspective, and the CJEU provides a binding interpretation of EU law that applies to all EU Member States. From the international law perspective, however, it is not clear whether EU law can simply deprive the arbitration tribunals of their jurisdiction, which is determined by Article 26 of the ECT. The interpretation provided by the CJEU may seem novel and potentially be disputed before the arbitration tribunals.

The jurisprudence of the CJEU has been somewhat reflected in the practice of the investment tribunals, but still in a very limited way. The CJEU's decisions in *Komstroy* and *Holdings* in particular have not been subject to consideration, interpretation or application by a judicial or quasi-judicial body applying public international law outside the CJEU or EU Member State courts. For example, in the arbitration proceedings in *Green Power Partners K/S & SCE Solar Don Benito APS v. Spain*,[33] the tribunal decided that it had no jurisdiction to hear and decide the claims before it. On the other hand, in the arbitration proceedings in *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*,[34] the arbitration tribunal denied the application of Germany concerning lack of jurisdiction in January 2022. The tribunal accepted that there was a dispute between the Parties as to the compatibility of Article 26 of the ECT and the EU Treaties. However, at the same time, it refused to rule that for this reason, the Claimants' legal position is "manifestly without legal merit" as opposed to which of the Parties' legal positions should ultimately prevail: "That is a matter that is not only 'widely discussed', but also widely debated, in public international law circles, including beyond the EU in the context of the broader application of international investment protection."[35]

31 Judgment of the CJEU of 26 October 2021, Case C-109/20, *Poland v. PL Holdings*.
32 Ibid., para. 65.
33 SCC 2016/135.
34 ICSID Case No. ARB/21/26.
35 Ibid., para. 104.

Moreover, some decisions of the national courts show that awards based on intra-EU BITs are still potentially enforceable, especially if the measures being challenged under an investment treaty occurred prior to or after a respondent state's EU accession. For example, in *Micula v. Government of Romania*,[36] the US Court of Appeals for the District of Columbia confirmed the decision of the DC District Court regarding recognising and enforcing an International Centre for Settlement of Investment Disputes (ICSID) award obtained by an EU investor (the Micula brothers) against Romania. This decision shows that some cases can be differentiated from *Achmea*. At the same time, as Yanos[37] points out, the court's decision in *Micula* does not foreclose the relevance of the CJEU's decision in future proceedings to enforce intra-EU investor-state awards before US courts and leaves significant questions unanswered. Zabala Alonso[38] concludes that the enforcement by the US of awards originating from intra-EU awards is an unclear landscape.

5. Deadlock on the ECT's modernisation and finding a way out

Even after *Achmea* and *Komstroy*, European investors continued to bring treaty claims against EU Member States. While the Commission pushed for the termination of BITs in all EU Member States,[39] it also made all efforts to modernise the ECT and solve its incompatibility with EU law by agreement among the Member States on the non-application of the ECT in the intra-EU relationship.[40] Furthermore, the Energy Charter Conference announced in 2017 that it would consider the need to modernise and approved a list of topics for the discussion on the modernisation of the treaty.[41] The modernisation of the ECT has been a long-term process involving many rounds of negotiations between July 2020 and June 2022. The revision was expected to, *inter alia*, reform the ECT ISDS and explicitly allow countries to take regulatory actions affecting existing investments for reasons such as environmental protection or climate action.

The modernisation process has not been without issues. The ISDS mechanism has attracted criticism from Member States and the general public both in itself and

36 *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265 (D.D.C. 11 September 2019), aff'd, No. 19-7127, 2020 U.S. App. LEXIS 16008 (D.C. Cir. 19 May 2020).

37 A. A. Yanos, "Intra-EU investment treaty disputes in US courts," *The Arbitration Review of the Americas* (29 July 2022) <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2023/article/intra-eu-investment-treaty-disputes-in-us-courts> accessed 15 December 2022.

38 A. I. Zabala, "Enforceability of intra-EU arbitration awards in the USA," *The Comparative Jurist* (30 March 2022) <https://comparativejurist.org/2022/03/30/6481/> accessed 17 December 2022.

39 V. Korom, "Intra-EU BITs in light of the Achmea decision" [2022] 3/1 Central European Journal of Comparative Law 97.

40 Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an Agreement between the Member States, the EU, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty.

41 Decision of the Energy Charter Conference on the Modernisation of the Energy Charter Treaty, 28 November 2017, CCDEC 2017 23 STR, para 2.

because the negotiations on the ECT amendment were not transparent.[42] The EU proposed in May 2020 to add a new article to the ECT on regulatory measures and include the right to regulate for measures to combat climate change, which should be considered a public interest objective, and a new exemption clause for indirect expropriation in the Annex to the ECT.[43] Some proposals were partially taken up. For example, the definition of indirect expropriation and the inclusion of a right to regulate clause in the treaty text were negotiated.[44]

At the end of June 2022, a tentative agreement on the modernised ECT was reached. The revised ECT would expand to several other sources of energy (ammonia, biomass, biogas, hydrogen and synthetic fuels), making these growing areas subject to the ECT ISDS. The ISDS itself, however, remained mostly unaddressed. The Council of the EU failed to reach an agreement on the reforms to the ECT before the Energy Charter Conference in November 2022. A vote to determine the common position was eventually dropped after it appeared there would not be enough support to provide the European Commission with a mandate to endorse the reforms. As a result, the Commission asked for modernisation to be removed from the conference agenda.[45] Therefore, the European Commission's approach towards the ECT was clearly to follow through with the modernisation process until February 2023, when the different positions of its Member States could no longer be ignored.

Since the summer of 2023, EU talks around the Energy Charter Treaty have reached a deadlock. With neither proposal garnering a qualified majority, progress has been stagnant for several months. Gradually, the Commission abandoned its advocacy for the approval of reforms and began strongly advocating for collective withdrawal. Several Member States asked the Commission to explore how the EU could exit from the ECT, with doubts expressed about the treaty's reconcilability with European environmental commitments. The European Parliament called on the Commission and the Member States to start preparing a coordinated exit from the ECT.[46] However, the only step in that direction taken since the initial calls for a coordinated withdrawal was a proposal for a Council Decision adopted by the EU Commission in July 2023.[47]

42 See K. Roiger-Simek, "The modernization of the Energy Charter Treaty: Dead in the water?" [2023] 26/1 Austrian Review of International and European Law Online 124.

43 EU text proposal for the modernisation of the Energy Charter Treaty (ECT): "The Contracting Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of the environment, including combatting climate change."

44 Decision of the Energy Charter Conference of 14 December 2021, Progress Report of the Modernisation Group 2021, Dok.-Nr. CCDEC 2021 21, pp. 4–5.

45 Decision of the Energy Charter Conference of 22 November 2022 (Preliminary draft schedule of planned and proposed Energy Charter Meetings and Activities for 2023), CCDEC 2022 32 NOT.

46 European Parliament resolution on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934 (RSP).

47 European Commission, Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023) 447 final.

With the two decisions adopted in May 2024,[48] the Council gave the final green light for the EU and Euratom to leave the ECT; at the same time, remaining Member States are still allowed to support its modernisation when voting during the next Energy Charter Conference. In June 2024, the EU took the final and formal step of exiting the ECT. The President of the Council, represented by the Belgian presidency and acting on behalf of the EU, gave written notification of the withdrawal to the depositary of the ECT.

6. A future without the Energy Charter Treaty: investments without investors?

In the atmosphere of the failed modernisation of the ECT, nine EU Member States, representing a majority of the EU population, and the UK are set on withdrawing from the ECT. In a pattern of uncoordinated announcements, Denmark, France, the Netherlands, Spain, Slovenia, Germany, Poland, Portugal, Austria and Luxembourg have announced an early exit from the ECT as the proposed modernisations do not go far enough for them. The withdrawals will mostly become effective in 2025.

Was the failure to modernise the ECT the primary motive to urgently design a plan to leave the ECT? Not necessarily, but as a non-acceptance of the modernisation proposal seems tantamount to a continuation of the ECT in its current form, countries favouring modernisation also considered withdrawing from the ECT. At the same time, however, several states, mainly from Africa and Latin America, have begun to accede to the ECT. This implies there are more reasons behind efforts to leave the ECT than merely climate protection concerns. An important contributing factor appears to be Russia's unprecedented aggression in Ukraine and its impact on Europe's energy supply, which may be causing some countries to rethink their reliance on traditional fossil fuels.

Similarly, the wave of withdrawals from the ECT does not in itself put the final halt to the modernisation of the ECT. However, modernisation relies on all parties to the ECT finding agreement. As Kehl and Wuschka note regarding the EU and its Member States,

> sufficient opposition within the block could put the modernization process to an end (at least as long as their status as contracting parties lasts). In fact, it would already be sufficient for one of them to oppose the adoption of the AIP. Further, even if most EU member states after all decided to opt for the adoption of the modernized ECT and the skeptical ones – including those from outside the EU – abstained from voting at the relevant meeting, the ratification process would certainly not be a smooth one.[49]

48 Council decision on the withdrawal of the Union from the Energy Charter Treaty, 4 May 2024, 6509/24; Council decision on the approval of the withdrawal of the European Atomic Energy Community from the Energy Charter Treaty, 4 May 2024, 6514/24.

49 P. Kehl and S. Wuschka, "The Energy Charter Treaty at a tipping point – modernization efforts, withdrawal plans and their legal consequences" [2024] ZEuS Zeitschrift für Europarechtliche 59, 67.

Even a withdrawal from the ECT does not immediately solve the problem of investment protection. A so-called sunset clause in the ECT protects existing investments for another 20 years in the event of a withdrawal. The modernisation proposal suggested only ten years of additional protection (and new investments in renewables would no longer be protected). Quitting the treaty, therefore, does not fully solve the problem. To illustrate the issue, after leaving the ECT in 2016, Italy was held liable for damages caused by banning the UK-based company Rockhopper Exploration from operating in 2015 and ordered to pay €190 million plus interest. The reason behind the ban was a surge of public mobilisation against an oil drilling project in the Adriatic Sea. Arguably, even a ten-year sunset clause could still inhibit the rapid phase-out of fossil fuels required to keep global warming in check.

Ironically, a modernised ECT could at least mitigate the effect of the sunset clause. It appears that those states that have already outlined their concrete withdrawal plans also accept this legal position.[50] The Law of Treaties and the ECT itself do not generally offer a possibility to terminate the ECT's sunset clause separately from the treaty as such.[51] However, the Commission may now facilitate and coordinate the departure with EU Member States and negotiate an *inter-se* agreement that neutralises the sunset clause. It has already proposed such modification agreement under Article 41 of the Vienna Convention on the Law of Treaties among the EU, Euratom and the Member States on the interpretation of the ECT, including a confirmation that "the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for intra-EU arbitration proceedings, and that the sunset clause does not apply intra-EU."[52]

This way, EU countries can avoid the application of the ECT among themselves for an additional 20 years. If the UK were also to join such an arrangement, the vast majority of ISDS risk associated with upstream oil and gas assets would be eliminated. An EU-UK deal on the ECT exit would seem particularly plausible if the Labour Party, which has expressed opposition to ISDS, wins the 2024 elections. Furthermore, given the number of members withdrawing, a general amendment to waive the 20-year sunset clause provision may be on the cards.

Eventually, Member States may attempt to prevent companies from invoking the ECT sunset clause by limiting their access to public subsidies if they do so through state aid conditions or tax exemptions. This could weaken the tendencies of investors to modify their corporate structure to restructure their investments through countries that remain in the ECT and take advantage of treaty protection.

On the other hand, weakening the ECT may destabilise energy investments in the EU, this time regarding renewable energy and introducing new technologies, much needed for phasing out fossil fuels. Such a risk is not very high, though,

50 Ibid., 69.

51 J. Klabbers, "A moral holiday – withdrawal from the Energy Charter Treaty" [2022] 11/6 ESIL Reflections 1, 4–5.

52 M. T. Karayiğit, "The compatibility of the ISDS mechanism under the Energy Charter Treaty with the autonomy of the EU legal order" [2024] 29/1 European Foreign Affairs Review 85, 113.

given the profitability of investing in this sector. The largest recipients of foreign direct investment (India, China, Brazil) are not parties to the ECT, and neither is the largest investor, the US.

7. Protecting legitimate expectations without the ECT

As noted, the ECT protects not only lost investments but also future profits. Consequently, investors have even been compensated for future profits based on legitimate expectations. The concept of legitimate expectations is interpreted widely and does not sufficiently consider public interests or the inevitable changes in the business sphere. Such an approach might be abused by speculative funds trying to make windfall profits. For example, the tribunal in *Eiser*[53] ordered Spain to pay €128 million in compensation for "lost future cash flows." These are profits that the fund might have earned with its solar power plants over an assumed 25-year life in a hypothetical scenario without any subsidy cuts. Several similar cases are pending under the ECT. For example, the German energy company RWE has a claim pending against the Dutch government for the ban on burning coal in its power plants after 2030.[54]

Eckes[55] puts the approach of the ECT into stark contrast with *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, in which the ECtHR held that a company's loss of profit from a temporary ban on fishing mussel seeds imposed to comply with EU law did not call for compensation. The ECHR argued, first, that the protection of the environment and compliance with EU law were both legitimate objectives and, second, that the company should have been aware that the need for the state to comply with EU regulations was likely to affect its future business.

There are more cases that confirm the ECtHR considers the protection of the environment or the protection of natural heritage as one of the legitimate objectives for limiting the right to property – and also as a reason for the limited protection of legitimate expectations. However, none of these cases deal with the effects of a change in national energy policy.

In *Kristiana Ltd.*,[56] for example, the ECtHR confirmed that a reasonable and foreseeable limitation for the sake of environmental protection does not necessarily have to be accompanied by financial compensation. The applicant bought several former Soviet army buildings at auction at a time when all similar buildings were to be gradually removed to restore the natural wealth according to the government plan for the development of the Curonian Spit National Park. In the meantime,

53 ICSID Case ARB/13/36, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*.

54 ICSID Case ARB/21/14, *RWE v. the Netherlands*.

55 C. Eckes, "Stepping out of the modernized Energy Charter Treaty – the best way forward?," *European Law Blog* (23 September 2022) <https://europeanlawblog.eu/2022/09/23/stepping-out-of-the-modernized-energy-charter-treaty-the-best-way-forward/> accessed 17 December 2022.

56 Judgment of the ECtHR of 6 February 2018, *Kristiana Ltd. v. Lithuania* (No. 36184/13).

the Curonian Spit was included in the list of UNESCO natural monuments. The ECtHR opined that the applicant should have assumed that, despite certain efforts by the local authorities to reconstruct the buildings, a building permit would not be granted to the applicant and the buildings would be destined for demolition according to the original government plan.[57]

In *Beinarovic and Others v. Lithuania*,[58] the applicants were restored to their land, which had been nationalised under the Soviet regime. However, since it fell within the category of forest land of national importance, it should not have been returned, and the applicants should have been granted financial compensation instead. After the land was returned, it was taken away again. In the court's view, the annulment of property rights did not in itself automatically constitute a violation of fundamental rights since the Lithuanian authorities had a legitimate reason to remedy their errors based on the special regime for the protection of important forests.

The broad protection provided by the ECT also seems to be in contrast with the approach of the CJEU on balancing the protection of investors and other entrepreneurs with the protection of the environment and human health. This is particularly interesting given that the Commission opines that EU law provides for adequate safeguards of investments, thus suggesting that there is no need for any new measures.[59]

Similar to the ECHR, the CJEU regularly reminds us that the right to property is not absolute and that its exercise may be subject to, under the conditions laid down in Article 52(1) of the Charter of Fundamental Rights of the EU (EU Charter), restrictions justified by objectives of general interest pursued by the EU. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed.[60] In this respect, it is necessary to consider not only the wording of the provision, which presents a restrictive measure, but also the context in which it occurs and the objectives pursued by the rules of which it is part.[61]

For example, the CJEU accepted as justified and proportionate the prohibition of the marketing of certain food supplements designed to protect human health in Joined Cases C-154/04 and C-155/04 (*Alliance for Natural Health and Others*),[62]

57 Ibid., para. 100.

58 Judgment of the ECtHR of 12 June 2018, *Beinarovic and Others v. Lithuania* (No. 70520/10, 21920/10 and 41876/11).

59 Communication from the Commission to the European Parliament and the Council on Protection of intra-EU investment, COM(2018) 547 final.

60 Judgment of the CJEU of 20 September 2016, C-8/15 P to C-10/15 P, *Ledra Advertising and Others v. Commission and ECB*, para. 69.

61 Judgment of the CJEU of 8 December 2020, C-584/19, *Staatsanwaltschaft Wien (Ordres de virement falsifiés)*, para. 49.

62 Judgment of the CJEU of 12 July 2005, C-154/04 and C-155/04, *Alliance for Natural Health and Others*.

fishing quotas adopted as a measure to close the fishing season in Case C-611/12 P (*Giordano v. Commission*),[63] and the destruction of fish infected with a viral disease without compensation in Joined Cases C-20/00 and C-64/00 (*Booker Aquaculture and Hydro Seafood*).[64] Regarding the extensive ban on the placing of seal products on the internal market of the EU, the CJEU stated in Case C-398/13 P (*Inuit Tapiriit Kanatami and Others v. Commission*)[65] that "the protection of the right to property afforded by Article 17 of the Charter does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity, but applies to rights with an asset value creating, under the legal system, an established legal position enabling the holder to exercise those rights autonomously and for his benefit."[66] The protection afforded by EU law thus takes the form of what Advocate General Kokott, in the same case, described as a minimum standard of protection of property.[67]

In EU law, the scope of protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules.[68] Investors and entrepreneurs should not be entitled to expect the legislative framework to remain the same when they decide to engage in a field already subject to EU or international environmental protection.[69] This way, the adoption of restrictive measures can be foreseen.[70] This is particularly evident in cases concerning nature protection. In T-333/10 (*ATC and Others v. Commission*)[71] and T-817/14 (*Zoofachhandel Züpke and Others v. Commission*),[72] the applicants argued that they had been pushed to the brink of poverty by the reduction in their turnover and the loss of investment made in the operation of quarantine stations because of the EU ban on the importation of captured wild birds. The CJEU, however, stated that the Commission has wide discretion to adopt veterinary rules, that the measures pursue a legitimate objective, and that they are not manifestly disproportionate in that respect. The applicants have the burden of proving whether the very essence of the protected rights has been

63 Judgment of the CJEU of 14 October 2014, C-611/12 P, *Giordano v. Commission*.

64 Judgment of the CJEU of 10 July 2003, C-20/00 and C-64/00, *Booker Aquaculture and Hydro Seafood*.

65 Judgment of the CJEU of 3 September 2015, C-398/13 P, *Inuit Tapiriit Kanatami and Others v. Commission*.

66 Ibid., para. 60.

67 Opinion of Advocate General Kokott of 19 March 2015, C-398/13 P, *Inuit Tapiriit Kanatami and Others v. Commission*, para. 78.

68 Judgment of the CJEU of 21 December 2021, C-428/20, *Skarb Państwa (Motor insurance cover)*, para. 45.

69 See Opinion of Advocate General of 3 March 2022, C-659/20, *Ministerstvo životního prostředí (Perroquets Ara hyacinthe)*, para. 76. Whether the regulatory framework in force becomes more stringent after a state becomes a member of the EU is also irrelevant. See Judgment of the CJEU of 8 September 2022, C-659/20, *Ministerstvo životního prostředí (Perroquets Ara hyacinthe)*, para. 68.

70 Judgment of the CJEU of 14 October 2014, C-611/12 P, *Giordano v. Commission*.

71 Judgment of the General Court of 16 September 2013, T-333/10, *ATC and Others v. Commission*.

72 Judgment of the General Court of 17 March 2016, T-817/14, *Zoofachhandel Züpke and Others v. Commission*.

affected. Any reduction in turnover or any loss of profit is not sufficient, especially in a situation where the volume of trade in the segment in question is increasing.[73] Elsewhere, the CJEU confirmed that "no economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting the market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances."[74]

It follows from the foregoing that as long as a measure adopted at the EU level or an obligation imposed by EU law does not violate the principle of proportionality, it does not, as a rule, conflict with the protection of the right to property enshrined in Article 17 of the EU Charter.

Similar to the ECtHR, however, the case law of the CJEU does not deal with the effects of a complex change in national energy policy. Moreover, not all national energy-related laws implement EU law. By way of illustration, in Joined Cases C-215/16, C-216/16, C-220/16 and C-221/16 (*Elecdey Carcelen*),[75] the CJEU reviewed the Spanish tax treatment of wind farms. This was not a typical tax but a special levy imposed in the Spanish region of La Mancha on the power plant itself. Therefore, the relevant EU regulation on the taxation of energy products and electricity was not applicable.[76] In Joined Cases C-818/19 and C-878/19 (*MARVIK – PASTROGOR*),[77] the CJEU ruled that even the requirement to promote renewable energy does not preclude national energy taxation. The Directive on the promotion of the use of energy from renewable sources is not an EU measure on the approximation of tax rules, so it cannot be used against the taxation of renewable energy. As a result, the CJEU was not competent to answer some of the preliminary questions (it was not possible to assess compliance with the EU Charter).

Nevertheless, the above-mentioned case law confirms that the use of renewable energy sources to produce electricity is one of the important elements of the package of measures to reduce greenhouse gas emissions. For the functioning of the common market, this promotion (or the increase in use itself) serves a reason of general interest within the meaning of Article 36 of the Treaty on the Functioning of the EU (TFEU). The development of renewable energy sources is one of the objectives guiding the Union's energy policy. In pursuing the objective of securing a certain proportion of energy from renewable sources, the Member States still have a certain margin of discretion, subject, of course, to compliance with the fundamental freedoms guaranteed by the TFEU.

73 Ibid., paras. 130–134.

74 Judgment of the CJEU of 12 July 2005, C-154/04 and C-155/04, *Alliance for Natural Health and Others*, para. 128.

75 Judgment of the CJEU of 20 September 2017, C-2015/16, C-216/16, C-220/16 and C-221/16, *Elecdey Carcelen*.

76 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

77 Order of the CJEU of 30 April 2020, C-818/19 and C-878/19, *MARVIK – PASTROGOR*.

8. Conclusion

It is difficult to predict the exact future of the ECT as it depends on various factors, such as the actions and decisions of member countries and changes in the global energy market. In deciding to leave the ECT, the EU has taken a significant step towards eliminating the risk of ISDS cases. Unfortunately, not all EU Member States have indicated that they will also withdraw, and non-EU parties to the ECT, which are largely low- and middle-income states, may also choose to remain. These countries are both more vulnerable to climate change and to the financial shocks of losing a major ISDS case.

The ECT continues to be an important, albeit weakened international agreement for promoting cooperation and investment in the energy sector. Its modernisation has proven difficult. One reason is that the treaty is a complex and multifaceted agreement with a wide range of provisions, and modernising it requires consensus and cooperation among all member countries. This can be difficult to achieve, as countries have different priorities and interests in the energy sector. Additionally, the global energy market has undergone significant changes since the ECT was first established, and these changes have led to new challenges and issues that the treaty has not yet addressed. Another reason, without a doubt, is the ECT ISDS.

It remains to be seen how future tribunals will deal with Article 16 of the ECT in relation to the obligations of states under international environmental law, considering whether investors could possibly have legitimate expectations given the global emphasis on fighting international climate change. It is, however, hard to dispute that the interaction between international legal frameworks leads to competing obligations of the states towards a protection of the environment on the one hand and a protection of the investor on the other.

While the ECT is significant for its broad membership, there are thousands of smaller bilateral investment treaties crisscrossing the globe with similar ISDS provisions. This could hinder climate action as developing nations with limited financial resources may be reluctant to implement stricter environmental regulations due to the fear of costly ISDS claims.

Against the background of the current geopolitical results of the Russian aggression against Ukraine, the complete exit of the EU from the ECT could be considered the "lesser evil" compared to more complex solutions which require wide acceptance. However, as shown, the level of protection of investments provided by both the ECHR and the EU law regime is considerably lower than that offered by the ECT. Both the EU and its Member States should therefore not abstain from creating a stable environment for investments to drive energy transition and address climate change.

13 Rebalancing international (investment) law

Is there a space for Rights of Nature arguments?

Piotr Szwedo

1. Introduction[1]

Since antiquity, the theory of the balance of nature has shaped our understanding of ecosystems.[2] More recently, the idea of long-term equilibrium has been questioned and replaced by alternative approaches, e.g., chaos theories and catastrophe theories.[3] Still, the concept of homeostasis penetrated biology and influenced social sciences through the idea of social homeostasis.[4] According to these theories, organisms, biological species, and even societies strive for balance.

Treating this perspective as a metaphor, we may conclude that law also seeks balance as a system of social regulation. Even if the state of perfect equilibrium is neither attainable nor even clearly identifiable, this does not mean that lawmakers or decision-makers are not directed to strive for this state. Failure to do so causes defects in the functioning of the entire legal system.

The desired role of nature in the legal equilibrium is an increasingly important subject of debate. Recent developments in some legal systems[5] draw from the idea of the Rights of Nature – a new legal concept rooted in traditional indigenous

1 This paper employs the results of research activities funded in whole or in part by the National Science Centre, Poland, grant no. 2021/43/B/HS5/01839. I'm very thankful to Lena Helińska for her assistance in the research. Any errors contained herein are mine. Open Access and proofreading of this chapter were supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at the Jagiellonian University (Cracow, Poland).

2 See more in F. N. Egerton, "Changing concepts of the balance of nature" [1973] 48/2 The Quarterly Review of Biology 322; D. Simberloff, "The 'balance of nature'—evolution of a panchreston" [2014] 12/10 PLOS Biology 1.

3 J. Wu and O. L. Loucks, "From balance of nature to hierarchical patch dynamics: A paradigm shift in ecology" [1995] 70/4 The Quarterly Review of Biology 439.

4 M. Mazur, "Homeostaza społeczna," in M. Pęcherski and J. Tudrej (eds.), *Procesy samoregulacji w oświacie. Problemy homeostazy społecznej* (PWN 1983) 107–115.

5 Thirty states have been listed by the United Nations Harmony with Nature group as having at least considered the introduction of the Rights of Nature, with most initiatives taking the form of draft proposals, local regulations, or alienated court decisions. Australia, Belize, Bolivia, Ecuador, Mexico, New Zealand, Panama, Spain, and Uganda have made references to Rights of Nature in national law. The Rights of Nature have been present in the Constitution of Ecuador since 2008 and were added to the Constitution of Mexico in May 2024. See <http://www.harmonywithnatureun.org/rightsOfNature/> (accessed 17 August 2024).

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beliefs. While states' recognitions of the Rights of Nature remain exceptions, it would be imprudent to dismiss it as a localized phenomenon. Most importantly, the Rights of Nature have already been used in international investment proceedings related to environmental pollution in one of the most critical ecosystems of our planet, the Amazon rainforest, which could easily have yielded cross-border impacts.

The purpose of this chapter is to check how the introduction of the Rights of Nature argument impacts the outcomes of investment arbitration when it comes to averting the consequences of economic activities harmful to the environment. A shift in this regard would be vital, especially in the context of cross-border ecosystems like the Amazon rainforest. More broadly, Rights of Nature arguments may potentially rebalance the neoliberal economic model of international investment law. We will see how the emergence of new approaches to the economy has led to the development of environmental counterclaims in investment proceedings, how the counterclaims have created a space for Rights of Nature arguments in two recent disputes, and what influence they may have on the process of rebalancing international law.

2. Rebalancing the economic model of development: from growth to degrowth

The idea of degrowth originated in the 1970s and was present in France under the label of *décroissance*. It takes its roots from the critique of development, which had previously been considered a major driving force for the resolution of global problems. Development was at first closely linked to the notion of growth (*croissance*), understood as an increase in the market value of produced goods and services. Gross domestic product (GDP) became popular as the main indicator of growth, giving rise to the critique of *croissance* as an overly simplified concept, omitting factors other than production and trade. This resulted in the emergence of alternative concepts, leading not only to skepticism of growth and development as such but also of the notion of sustainable development – a call for a balance between economic, environmental, and social development. Sustainable development has gained international recognition but is perceived predominantly as a product of Western culture.[6] It does not challenge the very foundations of the modern economy, instead emphasizing the importance of a better balance of values. These are some of the main reasons why it was deemed insufficient by a part of the academic community.

6 See, e.g., F. Mazzocchi, "A deeper meaning of sustainability: Insights from indigenous knowledge" [2019] 7/1 The Anthropocene Review 77.

"Postgrowth" first appeared as a term in 1972 in the writings of André Gorz,[7] parallel to the report *The Limits of Growth* authored by Donella H. Meadows et al.[8] To some extent, postgrowth became an umbrella term for different approaches to the limits-to-growth challenge, including the more radical plea for degrowth.[9] While many of them originated in the 1970s, the popularity of concepts aimed at alternatives to growth came only later – at the beginning of the 21*st* century – and overlapped with the critique of the idea of sustainable development. Much of the popularization was due to the works of the French economist Serge Latouche[10] and the Catalan political scientist Carlos Taibo.[11] The beginning of the 21st century witnessed a strategic alliance between social and ecology activists and propagators of degrowth. Recent years have resulted in a significant number of publications that do not attempt to offer a toolbox for degrowth but instead promote the idea as a theoretical and moral lens through which global phenomena should be observed, often arguing for the rejection of capitalist thinking.[12] The movement became popular in European countries and in wider international discussions, often embedded in the context of global poverty.[13]

Parallel to the reflections on degrowth in Europe, Latin America became the homeland of concepts resulting from disappointment with neoliberal economic schools. Reforms failed to alleviate income disparities; some evidence suggests that liberalization of finances and trade could even have aggravated the problem.[14] Growing poverty has led to overexploitation of natural resources and to even bigger social inequalities. It explains why the idea of *buen vivir* based on the cultural and social roots of Andean communities has won the war of hearts and minds of

7 "L'équilibre global, dont la non-croissance – voire la décroissance – de la production matérielle est une condition, cet équilibre est-il compatible avec la survie du système": André Gorz (as Michel Bosquet), cited in G. D'Alisa, F. Damaria, and G. Kallis, *Décroissance. Vocabulaire pour une nouvelle ère* (Les Éditions Écosociété 2015) 21.

8 D. H. Meadows, D. L. Meadows, J. Randers, and W. W. Behrens III, *The Limits of Growth. A Report for the Clum of Rome's Project on the Predicament of Mankind* (Universe Books 1992).

9 See, e.g., André Reichel, "Postgrowth and Degrowth" (11 October 2003) <https://andrereichel.de/2016/03/11/postgrowth-and-degrowth/> (accessed 3 January 2023).

10 S. Latouche, *Petit traité de la décroissance sereine* (Mille et une nuit 2007); S. Latouche, *Farewell to Growth* (Polity 2009).

11 C. Taibo, *En defensa del decrecimiento: Sobre capitalismo, crisis y barbarie* (Los libros de la Catarata 2009).

12 Including, but not limited to, J. Hickel, *Less Is More: How Degrowth Will Save the World* (Penguin 2020); K. Saito, *Slow Down: The Degrowth Manifesto* (Astra House 2024); M. Schmelzer, A. Vetter, and A. Vansintjan, *The Future is Degrowth: A Guide to a World Beyond Capitalism* (Verso Books 2022); V. Liegey and A. Nelson, *Exploring Degrowth: A Critical Guide* (Pluto Press 2020); G. Kallis, S. Paulson, G. D'Alisa, and F. Demaria, *The Case for Degrowth* (Polity 2020).

13 See, for example, the recent report of the Special Rapporteur on extreme poverty and human rights, Olivier De Schutter "Eradicating poverty beyond growth" (A/HRC/56/61) and a long-term, somewhat heated debate between Noah Smith and Jason Hickel (to be found on their respective blogs, https://www.noahpinion.blog/ and https://www.jasonhickel.org/).

14 See more in M. Walton, "Neoliberalism in Latin America: Good, bad, or incomplete?" [2004] 39/3 Latin American Research Review 165, 171.

people in those countries. The term itself is a translation of the Quechuan term *sumak kawsay*, which signifies a sweet, harmonious, and vigorous life.[15] It implies alternative life goals that are less related to GDP growth and more to the quality of life and the environment. It is also correlated to an alternative vision of a human-nature relationship based less on the idea of anthropocentrism – focused on humans as superior beings – and more on biocentrism, which attributes an inherent value to all life forms.

3. Rebalancing international investment law: from protecting multinational corporations to environmental counterclaims

Critiques of neoliberalism come in line with a skeptical approach toward trade liberalization and the activity of multinational corporations. International investment law was an object of legitimate critique as being propitious for big companies at the expense of developing countries' interests. Sustainable development as a principle and a goal was declared as an insufficient paradigm that should be replaced by degrowth. This movement postulates a radical reduction of environmental degradation and an alleviation of wealth inequalities, implying a decrease in worldwide economic activity. In some contexts, degrowth implies a departure from capitalism as a model of social relations and promotes a greater respect for indigenous knowledge and a departure from the domination of science. It also represents a complete break with the internal rationales of international economic law as a legal system, explicitly giving precedence to norms that favor the social and environmental over the economic.[16]

The current system of international investment law has been accused of even more negative consequences like regulatory chill in developing countries. As legislative initiatives often faced investment claims, a number of which have been decided in favor of investors, it provoked a reluctance for social and environmental reforms in developing countries.[17] One of the novel methods for rebalancing the interests of developing countries was the application of environmental counterclaims.

Ecuador is no stranger to international investment disputes related to the alleged destruction of its fragile ecosystem, but its results have been mixed at best. The legal saga surrounding the Chevron/Texaco pollution of the Amazon rainforest is still ongoing, with Ecuador having won the case in its own Constitutional Court while losing it in the Permanent Court of Arbitration in the Hague.[18] The Chilean mining company Codelco also initiated arbitration proceedings against Ecuador in the International Centre for Settlement of Investment Disputes following a

15 J. van Kessel, "Economia Bidimensional Andina" [2006] 17 Revista de Ciencias Sociales 86, 89.

16 C. Fyock, "What might degrowth mean for international economic law? A necessary alternative to the (un)sustainable development paradigm" [2022] 12 Asian Journal of International Law 40, 45.

17 Ibid. 54–55.

18 A rough timeline of the complex legal proceedings can be found here: <https://www.business-humanrights.org/en/latest-news/chevron-wins-ecuador-case/> (accessed 17 August 2024).

dispute centered on the Llurimagua copper mining project.[19] Examples of other legal troubles include the pending *Junefield v. Ecuador* arbitration, accepted by the Permanent Court of Arbitration in 2023 in light of the dispute concerning the Río Blanco mining concession.[20] However, as of August 2024, none of these cases seem to be utilizing the mechanism of environmental counterclaims on the international plane.

Two cases diverged from this tendency and played an important role in the development of the environmental counterclaims approach: *Perenco vs. Ecuador*[21] and *Burlington vs. Ecuador*.[22] The cases were initiated in 2008 before arbitral tribunals established by the International Centre for Settlement of Investment Disputes on the basis of the Ecuador-France bilateral investment treaty (BIT)[23] of 1994[24] in the case of *Perenco* and the Ecuador-United States of America BIT from 1993[25] accompanied by an *ad hoc* arbitration agreement in the case of *Burlington*. Both foreign investors were active in the oil extraction and production business in Ecuador. Their activities provoked alleged groundwater pollution and soil contamination in the Ecuadorian Amazon region. Extraction took place in Blocks 7 and 21 – territories outlined by the participation contracts between the state and the investors. The two hydrocarbon exploration blocks are part of El Oriente, an oil region covered by rainforests and swamps connected to the Napo River, one of the Amazon's tributaries. The business activity took place in the territory of Ecuador, but its harmful environmental effects had a potentially cross-border effect on the Amazon ecosystem. The activity also impacted the fourteen Kichwa and three Huaorani communities living in the area of Block 21.[26] The very special geographical situation and the unique importance of the Amazon region made it problematic to provide an accurate assessment of environmental damage. As the arbitrators agreed in the

19 UNCTAD, "Investment Dispute Settlement Navigator > Codelco and others v. Ecuador" <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1205/codelco-and-others-v-ecuador> (accessed 17 August 2024).

20 Ibid.

21 ICSID Case ARB/08/6, *Perenco Ecuador Limited vs. Republic of Ecuador*, Interim Decision on the Environmental Counterclaim, 11 August 2015.

22 ICSID Case ARB/08/5, *Burlington Resources Inc v. Republic of Ecuador*, Decision on Counterclaims, 7 February 2017.

23 According to the United Nations Trade and Development definition, a bilateral investment treaty (BIT) is an agreement between two countries regarding the promotion and protection of investments made by investors from the respective countries in each other's territory. See <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> (accessed 17 August 2024).

24 Agreement Between The Government Of The French Republic And The Government Of The Republic Of Ecuador On The Reciprocal Protection And Encouragement Of Investments, 07 September 1994, available at <https://edit.wti.org/document/show/e22b3bb4-ebcc-4139-a8be-95fa68e2c45f> (accessed 17 August 2024).

25 The Treaty Between The United States Of America And The Republic Of Ecuador Concerning The Encouragement And Reciprocal Protection Of Investment, With Protocol And A Related Exchange Of Letters, Washington, 27 August 1993, available at <https://2001-2009.state.gov/documents/organization/43558.pdf> (accessed 17 August 2024).

26 Ibid. para. 48.

Perenco case, the rapidly changing environment of the Amazonian rainforest made it difficult to determine the existence and consequences of the spill.[27]

The broad socio-geographical influence of the Amazon region is addressed in Art. 259 of the Ecuadorian Constitution: "With the aim of safeguarding the biodiversity of the Amazon ecosystem, the central State and decentralized autonomous governments shall adopt sustainable development policies which shall also offset disparities in their development and consolidate sovereignty."[28] The Amazon's importance for the planet's environmental equilibrium was also raised in the Burlington case with reference to Art. 250, which stipulates that: "The territory of the Amazon provinces is part of an ecosystem that is necessary for the planet's environmental balance. This territory shall constitute a special territorial district, for which there will be integrated planning embodied in a law including social, economic, environmental, and cultural aspects, with land use development and planning that ensures the conservation and protection of its ecosystems and the principle of *sumak kawsay* (the good way of living)."[29]

In *Burlington*, the competence to deal with the counterclaims resulted from a separate compromise.[30] In *Perenco*, the consent was impliedly construed from the broad dispute settlement resolution provision in the France-Ecuador BIT.[31] The arbitral tribunal could not but agree that the "environmental catastrophe" was an extremely serious matter deserving the most careful consideration.[32] In its later decision on counterclaims, the tribunal confirmed that "Perenco never in the past challenged its jurisdiction to hear Ecuador's counterclaims nor their admissibility" and "[a]t no previous stage of the proceedings relating to Ecuador's counterclaims has Perenco raised objections, either to the Tribunal's jurisdiction or to the admissibility of the counterclaims."[33] However, in the outcome of both cases, arbitration tribunals proceeded with counterclaims where the Rights of Nature argument had a role to play.

4. Rebalancing international environmental law: from anthropocentrism to Rights of Nature?

4.1 Rights of Nature: an axiological revolution

According to many proponents of the Rights of Nature, the subjectivity of nature is meant to be a legal expression of an alleged axiological shift from anthropocentrism

27 *Perenco Ecuador Limited vs. Republic of Ecuador*, fn. 166, para. 408.
28 *Burlington Resources Inc v. Republic of Ecuador*, fn. 177, para. 203.
29 Ibid. para. 202.
30 Ibid. para. 6. The text of the Agreement between Burlington et al. and Ecuador dated 26 May 2011 is not publicly available.
31 *Perenco Ecuador Limited vs. Republic of Ecuador*, fn. 166, para. 34.
32 Ibid.
33 ICSID Case ARB/08/6, *Perenco Ecuador Limited vs. Republic of Ecuador*, Decision on Perenco's Application for Dismissal of Ecuador's Counterclaims, 18 August 2017, paras. 35 and 44.

to non-anthropocentric worldviews, such as ecocentrism or biocentrism.[34] The axiological root of this shift should be based on the recognition of the intrinsic value of nature, i.e., a value independent from the usability of nature for man. Even though ecocentric tendencies can be observed in traditional beliefs of communities closely dependent on nature, their proliferation in the legal current is mostly traced back to the publication of *Should Trees Have Standing?* by Christopher Stone,[35] which was itself based on a thought experiment placed in the context of the 1972 US case *Sierra Club v. Morton*. According to this approach and the title of the book, nature or its parts should not only be objects of protection but also an autonomous legal subject capable of defending its rights and interests. The judgment in the aforementioned case did not follow the proposed reasoning; nonetheless, the publication incited significant interest in the legal subjectivity of nature. The concept has subsequently been introduced to a growing number of regulations and judicial cases, the most prominent example of which is the Constitution of Ecuador. While the justification of the Rights of Nature oftentimes refers to indigenous cosmologies, these cosmologies are believed to have recognized nature's paramount significance and intrinsic value but with no explicit mentions of its legal rights. The rights-based discourse seems to have originated in Western scholarship.[36]

34 For more insight on such arguments, see, e.g., L. J. Kotzé and D. French, "The anthropocentric ontology of international environmental law and the Sustainable Development Goals: Towards an ecocentric rule of law in the Anthropocene" [2018] 7/1 Global Journal of Comparative Law 5, 15; S. Emmenegger and A. Tschentscher, "Taking nature's rights seriously: The long way to biocentrism in environmental law" [1994] VI Georgetown International Environmental Law Journal 545; T. Wesche, "Who owns nature? About the rights of nature" [2022] 65 Estudios de Filosofía 49; P. Kanwal, "Ecocentric governance: Recognising the rights of nature" [2023] 69/2 Indian Journal of Public Administration 440; N. Hoek, I. Kaststeen, S. van Gils, E. Janssen, and M. van Gils, "Implementing rights of nature: An EU natureship to address anthropocentrism in environmental law" [2023] 19/1 Utrecht Law Review 72; D. Ghijselinck, "Relational values of nature: Outgrowing anthropocentrism by enriching human-nature relationships?" [2023] 73 Journal for Nature Conservation 126386; V. Doudaki and N. Carpentier, "Behind the narratives of climate change denial and rights of nature: Sustainability and the ideological struggle between anthropocentrism and ecocentrism in two radical Facebook groups in Sweden" [2023] Journal of Political Ideologies 1; S. Borràs, "Rights of nature to protect human rights in times of environmental crisis," in C. Akrivopoulou (ed.), *Defending Human Rights and Democracy in the Era of Globalization* (IGI Global 2017); and "Rights of nature – from anthropocentrism to ecocentrism," *Center for Democratic and Environmental Rights* <https://www.centerforenvironmentalrights.org/blog-2/webinar-rights-of-nature-from-anthropocentrism-to-ecocentrism> (accessed 17 August 2024).

35 C. D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd ed., Oxford University Press 2010).

36 A. Martínez-Moscoso and E. Burdette, "The rights of nature: A preliminary analysis of the recent case law of the Ecuadorian Constitutional Court," *Blog Revista Derecho del Estado* (16 August 2023) <https://blogrevistaderechoestado.uexternado.edu.co/2023/08/16/the-rights-of-nature-a-preliminary-analysis-of-the-recent-case-law-of-the-ecuadorian-constitutional-court> (accessed 17 August 2024); see also F. S. Campaña, "Los derechos de la naturaleza en la Constitución ecuatoriana del 2008: alcance, fundamentos y relación con los derechos humanos" [2019] 11/17 Revista Esmat.

4.2 Operationalization of the Rights of Nature in investment arbitration: Burlington and Perencos

References to the Rights of Nature in the Ecuadorian Constitution appear in two dimensions. First, it appears as a value, in an introductory context, or as a narrative behind Ecuadorian public policies. Secondly, it appears as a normative element correlated with other environmental principles.

The emergence of the Rights of Nature in the Ecuadorian Constitution resulted from a process that previously took place in its legal system. This evolution was presented in *Perenco* as a description of applicable law. In 1971, the Hydrocarbons Law (*Ley de Hidrocarburos*) was enacted, and in 1984, an individual's right to live in an environment free of pollution was recognized in the Constitution.[37] Later, in 1995, Ecuador promulgated the Environmental Regulations for Hydrocarbon Operations in Ecuador (*Reglamento Ambiental para las Operaciones Hidrocarburíferas en el Ecuador*), which regulated the extraction and production of oil and gas. Between 1995 and 2001, numerous acts on both constitutional and legislative levels were introduced and aimed at the prevention and rehabilitation of the environment.[38] In 2003, Ecuador promulgated the Unified Text of Secondary Environmental Legislation (*Texto Unificado de Legislación Ambiental Secundaria*), which sets out rules for the evaluation of the environmental impact of oilfield activities.[39]

The 2008 Constitution was a step that followed previous regulatory changes. However, it has a more complex history that results from numerous factors and must be perceived in a broader context. What on the surface may look like the state's attempt to rein in the multinational mining and petroleum corporations has actually had more nuanced reasons and consequences. First, the Rights of Nature are part of the reconfiguration of the country's model of development based on the concept of *sumak kawsay* or *buen vivir* – the idea of the "good life" inspired by indigenous cultures, mentioned *supra*.[40] This idea of coexistence in close harmony

37 *Perenco Ecuador Limited vs. Republic of Ecuador*, fn. 15, para. 65 and legal acts referred in footnotes 101 and 102 thereto.

38 Ibid. paras. 66–67 and fn. 103–105.

39 Ibid. para. 68, fn. 109.

40 These concepts are explicitly included in the 2008 Constitution of Ecuador in the Preamble ("We women and men, the sovereign people of Ecuador … [h]ereby decide to build (a) new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the *sumak kawsay*"), Article 14 ("The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living [*sumak kawsay*], is recognized"), Article 250 ("The territory of the Amazon provinces is part of an ecosystem that is necessary for the planet's environmental balance of the planet. This territory shall constitute a special territorial district, for which there will be integrated planning embodied in a law including social, economic, environmental and cultural aspects, with land use development and planning that ensures the conservation and protection of its ecosystems and the principle of *sumak kawsay* [the good way of living]"), Article 275 ("The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living [*sumak kawsay*]"), and Article 387 ("The following shall be responsibilities of the State: … 2. To promote the generation and production of knowledge, to

with nature could be perceived as an alternative or complementary to sustainable development. Another important factor for including the Rights of Nature in the Ecuadorian Constitution was the role of external NGOs in the preparation process. The Community Environmental Legal Defense Fund (CELDF),[41] headquartered in Pennsylvania, was instrumental in passing the first municipal ordinances in history to proclaim and uphold the Rights of Nature in various municipalities across the USA.[42] At the time, it was the only organization in the world with practical experience of the Rights of Nature.[43] American lawyers helped Ecuadorian environmental groups draft the constitutional provisions.[44] A local NGO, Fundación Pachamama, was also active in preparing some parts of the constitutional draft.[45] This unit's work was led by Natalia Greene, President of CEDENMA, Ecuador's national coordinating entity for environmental NGOs.[46] She is an activist in the Rights of Nature movement in Ecuador and promoted the recognition of the Rights of Nature in the Ecuadorian Constitution. The axiological references and international involvement of the third sector point to a wide array of motivations, from symbolism, cultural recognition, and reinforcement of indigenous rights through keeping big polluters at bay to the creation of red lines for the state itself, especially given that large-scale corporations have, to some extent, been incentivized to extract natural resources in Ecuador.[47] It seems too early to determine whether the Rights of Nature are the solution Ecuador has been looking for; its symbolic dimension is often met with praise from environmental NGOs and ecological activists, while opinions on its effectiveness are evolving as the relevant case law becomes more abundant.

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foster scientific and technological research, and to upgrade ancestral wisdom to thus contribute to the achievement of the good way of living [*sumak kawsay*]").

41 Read more at <https://celdf.org> (accessed 29 November 2022).

42 M. Tanasescu, "The rights of nature in Ecuador: The making of an idea" [2013] 70/6 International Journal of Environmental Studies 846, 853.

43 Ibid.

44 Ibid.

45 Ibid.

46 CEDENMA = La Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y el Medio Ambiente (The Ecuadorian Coordinator of Organizations for the Defense of Nature and the Environment).

47 Notably, Texaco – later involved in a series of infamous disputes – was invited by the state of Ecuador in 1964 in the hopes of transforming the then-unstable country into a prosperous oil exporter. See J. Kimerling, "Indigenous peoples and the oil frontier in Amazonia: The case of Ecuador, ChevronTexaco, and Aguinda v. Texaco" [2006] 38 NYU Journal of International Law and Politics 413, 435–436. A series of further significant investments in the mining industry was validated in March 2024 (see <https://www.bnamericas.com/en/news/ecuador-signs-historic-agreements-for-more-than-us48-billion-within-the-framework-of-pdac-2024>, accessed 17 August 2024). The flagship Llurimagua mining project has been offered to foreign investors, and despite being a subject of litigation, it remains in the plans of an Ecuadorian-Chilean consortium (see <https://www.bnamericas.com/en/features/ecuador-remains-optimistic-on-reviving-us3bn-llurimagua-project>, accessed 17 August 2024).

In *Burlington*, the arbitrators admitted that the adoption of the 2008 Constitution started a new stage of Ecuadorian environmental protection, and its most notable manifestation is the bestowment of the Rights of Nature with reference to *Pacha Mama* – the Mother Earth in indigenous cosmologies.[48] The tribunal referred to Art. 10 of the Constitution, which declares: "Nature shall be the subject of those rights that the Constitution recognizes for it." Those rights are later enumerated in Articles 71 and 74, and some are correlated with other environmental principles enshrined in the Constitution and analyzed in more detail by the tribunal (see paras. 3.2.1, 3.2.2 below).

The first set of rights is declared in Art. 71, which stipulates that "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes." For the Rights of Nature, the human rights lens is a self-imposing perspective of analysis. Therefore, a right often attributed to nature is a close or distant analogy to human rights. The "right to integral respect" may play a similar function as a reference to dignity in human rights instruments, especially as it appears as the first right in the catalog of Art. 71. It is true that, in the context of Art. 71, "integral respect" is directed to "existence," but the call for "respect" echoes the foundation of dignity as the basis of human rights.[49] The right to existence is similar to the right to life. It is also not any kind of existence but one which allows for the "maintenance and regeneration of its life cycles, structure, functions and evolutionary processes." This qualified form of existence implies not only the state restraining from interfering with the existence of nature but also implies positive duties on the state, which stem from Art. 71 para. 3: "The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem." Art. 73 obliges the state to take not only restrictive but also preventive measures to control activities that may provoke the permanent alteration of natural cycles.

The ambiguous phrasing of Art. 71 para. 2 was a catalyst for experimenting with universal jurisdiction and *actio popularis* in cases not territorially limited to Ecuadorian soil. This interpretation of the article was proposed, e.g., by activists willing to sue British Petroleum in Ecuador for the oil spill in the Gulf of Mexico.[50] While universal jurisdiction in environmental cases seems particularly interesting in the context of cross-boundary pollution, so far, there is no evidence supporting the view that a dispute unrelated to Ecuador could be resolved by an Ecuadorian court in the absence of separate agreements.

48 Preamble and Art. 71 of the Constitution of the Republic of Ecuador of 2008.

49 C. O'Mahony, "There is no such thing as a right to dignity" [2012] 10/2 International Journal of Constitutional Law 551, 574.

50 A translation of the lawsuit they claim to have submitted to the Constitutional Court is available at <https://www.rainforest-rescue.org/updates/3237/plaintiff-to-bp-for-nature-s-rights-in-ecuador-s-constitutional-court> (accessed 21 November 2022). There is no trace of the lawsuit in the database of the Constitutional Court.

4.2.1 Rights of Nature and strict liability

In arbitration proceedings, Ecuador argued that the source of strict liability lies in the fact that Nature (Pacha Mama) has rights, including the right to remediation.[51] Therefore, the Rights of Nature provide an important interpretative context for strict liability in Ecuadorian law. According to this standard, the very existence of environmental harm is sufficient to hold the economic operator liable. The state must only prove the existence of an economic activity in the relevant area, entailing serious risks to the environment and a negative impact on the environment of the type that comes with such perilous economic activity.[52] The state does not have to prove the operator's fault or a causal nexus between its operation and the harm.[53] Causation is presumed, and Burlington could only escape liability if it proved *force majeure* or that a third party caused the environmental harm.[54] In *Burlington*, arbitrators referred to further constitutional principles that constitute the rules of strict liability: (i) the burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant; (ii) the operator is only responsible for the harm caused by him; and (iii) environmental claims are imprescriptible.[55]

4.2.2 The Rights of Nature and the right to be restored

The arbitrators in *Burlington* based their reasoning about the legal consequences of the soil contamination on Rights of Nature arguments and the interrelation between Articles 71 and 72 and Articles 396 and 397 of the Ecuadorian Constitution.

Art. 396, para. 2, sentence 2 of the Constitution provides that "All damage to the environment, in addition to the respective penalties, shall also entail the obligation of integrally restoring the ecosystems and compensating the affected persons and communities." The arbitrators further suggested that this provision is correlated with Art. 71, which provides that nature has the "right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."

According to Art. 72, "Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems." The second sentence of the same article provides an obligation of concretization by the establishment of "the most effective mechanisms to achieve the restoration and … adopt[ion] of adequate measures to eliminate or mitigate harmful environmental consequences." In follow up, Art. 397 provides that: "In case of environmental

51 *Perenco Ecuador Limited vs. Republic of Ecuador*, fn. 15, para. 121; argument based on the opinion of Professor Ricardo Crespo Plaza.

52 *Burlington Resources Inc v. Republic of Ecuador*, fn. 16, para. 82.

53 Ibid. para. 81.

54 Ibid. para. 93.

55 Ibid. para. 225, making reference to art. 397, para. 1, 2nd sentence, 396 paras. 3 and 4.

damages, the State shall act immediately and with a subsidiary approach to guarantee the health and restoration of ecosystems. … [T]he State shall file against the operator of the activity that produced the damage proceedings for the obligations entailing integral reparation." In the first subparagraph of Art. 397, the Constitution stipulates that "the State pledges: 1. To permit any natural person or legal entity, human community or group, to file legal proceedings and resort to judicial and administrative bodies without detriment to their direct interest, to obtain from them effective custody in environmental matters, including the possibility of requesting precautionary measures that would make it possible to end the threat or the environmental damage that is the object of the litigation." This article serves as an establishment of *actio popularis* even on precautionary grounds.

The arbitrators decoded the idea of "integral restoration" in Ecuadorian law on the grounds of the *travaux préparatoires* of the 2008 Constitution, which implies that full restoration means returning things to their original state ("*volver las cosas a su estado original o a su lugar*"). Ministerial Agreement No. 169 (2012) defines "integral restoration" as a right of nature, as a return "to the conditions set forth by the environmental authority that ensure the reestablishment of natural balances, cycles and function."[56] In their analysis, the arbitrators reached a conclusion that the Constitution does not define "environmental harm" but requires its full restoration according to standards set by law. They did not share Ecuador's view that full restoration shall imply a return to pre-human conditions or to the environment "prior to any form of contamination."[57] Taking this statement into account, the arbitrators had to determine the reference point for contamination and determination of the existence of environmental harm. For that purpose, they further analyzed the relevance of the so-called background/basic values.[58] In their conclusion, the arbitrators decided to base the soil remediation on regulatory criteria, i.e., the applicable permissible limits stemming from Ecuadorian law.[59]

5. Conclusion

International investment law serves as a regulatory instrument for a growing number of questions related to the management of natural resources. This tendency is related to strengthening the connection between economic growth and the increasingly limited access to raw materials. Investment law is therefore a tool of crisis governance.[60] The Rights of Nature concept takes it one step further, putting emphasis not on resource management but on a departure from thinking about

56 *Burlington Resources Inc v. Republic of Ecuador*, fn. 16, para. 275 with reference to Ministerial Agreement No. 169 (2012), published in Official Register No. 655 of 7 March 2012, Article 1.

57 *Burlington Resources Inc v. Republic of Ecuador*, fn. 16, para. 275.

58 Ibid. para. 278 et seq.

59 Ibid. para. 293, 294.

60 In the context of water resources, see M. Hirano, "Settling water disputes through international investment arbitration: When and by what standards?" [2022] 6/2 Chinese Journal of Environmental Law 200.

nature as a resource. It is one of the regulatory responses aimed at strengthening environmental protection and plays a growing role not only in domestic legal systems but also – as *Burlington* and *Perenco* demonstrate – as a valid instrument for the argumentation of responding states in investment arbitration.

The Rights of Nature seem to play more of a political and symbolic role in arbitration proceedings, and their legal content remains to be more precisely determined. In Ecuador, this process is taking place mostly through the case law of its Constitutional Tribunal. Ecuador used its constitutional law as an argument in counterclaims proceedings aimed at the enforcement of damages caused by the investor to its natural environment; closer scrutiny shows, however, that constitutional provisions serve as a context for more precise provisions such as the strict liability principle or the standard of restoration. It is worth noting that while Ecuador is the birthplace of investment disputes involving the Rights of Nature arguments, the concept is also being developed in other legal systems, with around thirty states recognizing the Rights of Nature to some extent on a national or regional level.[61]

Ecuador's attitude toward international arbitration has evolved over time,[62] especially since the 2008 Constitution created a significant barrier to investor-state dispute settlement,[63] confirmed by the recent referendum with 65% of voters expressing disagreement with the question "Do you agree that the Ecuadorian State recognizes international arbitration as a method to resolve disputes related to investment, contractual, or commercial matters?"[64] The willingness to keep Ecuadorian affairs in Ecuadorian courts stems not only from worries about constitutional values or sovereignty but also from the magnitude of previous awards issued against

61 United Nations, Harmony with Nature, "Rights of Nature Law and Policy" <http://www.harmonywithnatureun.org/rightsOfNature/> (accessed 3 January 2023).

62 M. I. Ortiz Nuques, "El arbitraje internacional de inversiones y el artículo 422 de la Constitución ecuatoriana," *Instituto Ecuatoriano de Arbitraje* (3 May 2024) <https://iea.ec/articulos/el-arbitraje-internacional-de-inversiones-y-el-articulo-422-de-la-constitucion-ecuatoriana/> (accessed 17 August 2024).

63 Article 422 of the Ecuadorian constitution of 2008: "Treaties or international instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into. The treaties and international instruments that provide for the settlement of disputes between States and citizens in Latin America by regional arbitration entities or by jurisdictional organizations designated by the signatory countries are exempt from this prohibition. Judges of the States that, as such or their nationals, are part of the dispute cannot intervene in the above. In the case of disputes involving the foreign debt, the Ecuadorian State shall promote arbitration solutions on the basis of the origin of the debt and subject to the principles of transparency, equity, and international justice."

64 See <https://www.cne.gob.ec/wp-content/uploads/2024/05/RESOLUCION-PLE-CNE-1-8-5-2024-signed.pdf> (available from Ecuadorian IP addresses, accessed 17 August 2024); see also D. Toscano, G. Ortega, and S. Arrieta, "Did Ecuador just renounce international arbitration? The aftermath of a complex referendum," *Kluwer Arbitration Blog* (22 June 2024) <https://arbitrationblog.kluwerarbitration.com/2024/06/22/did-ecuador-just-renounce-international-arbitration-the-aftermath-of-a-complex-referendum/> (accessed 17 August 2024).

Ecuador.[65] The growing number of domestic cases in Ecuador is expected to give more shape to the content of Rights of Nature; in parallel, Rights of Nature-related disputes will continue to emerge in other states. This process may have a potential impact on states' shrinking willingness to accept certain categories of economic activities, which is expected to be evaluated in future investment proceedings. Furthermore, as some states may use the Rights of Nature to impose a more rigid approach to the protection of the environment, the differences in legal systems are bound to influence the behavior of actors in cases involving transboundary risks. In the grand scheme of things, the Rights of Nature and connected concepts, even if adopted by a minority of states, may cause a shift in investment decisions and policies, eventually leading to a further rebalancing of international law.

65 For instance, in a 2012 case, Ecuador argued that the amount of the award represented almost 9% of Ecuador's 2012 annual budget, 59% of the country's 2012 annual budget for education, and 135% of the country's annual healthcare budget. See <https://www.italaw.com/sites/default/files/case-documents/italaw1603.pdf> (accessed 17 August 2024).

14 Litigating cross-border environmental damages

How to bridge the gap between foreign authorizations and domestic claims

Dominik Düsterhaus[1]

1. Introduction

States can discharge their duty under international law to ensure prompt and adequate compensation for victims of transboundary pollution by granting civil remedies.[2] Still, whoever seeks to litigate in respect of damage stemming from cross-border pollution faces a normative riddle involving at least two legal orders and three distinct fields of law, viz. public environmental, private, and (public and private) international law. There is no shortage of legal bases or instruments for the prevention and compensation of environmental damage in any of these fields. EU law clearly follows suit. Most recently, the revised Industrial Emissions Directive[3] has obliged Member States to ensure that individuals suffering damage to their health following a violation of the rules established under the Directive are able to claim and obtain compensation for that damage from the relevant natural or legal persons.[4] On the other hand, counter-intuitive as it may be, the Environmental Liability Directive[5] does not give private parties[6] a right to compensation in case of actual or impending environmental damage.[7]

1 Legal secretary, Court of Justice of the EU. Views expressed are those of the author alone.

2 G. Laganière, *Liability for Transboundary Pollution in International Environmental Law* (Bloomsbury 2022) 21.

3 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [OJ 2010 L 334, p. 17, as amended by Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC on the landfill of waste].

4 Article 79a of the Industrial Emissions Directive as amended.

5 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56), as amended by Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 (OJ 2013 L 178, p. 66).

6 As opposed to Member States which, in the case of cross-border damages, may seek, under Article 15(3), "in accordance with this Directive, to recover the costs it has incurred in relation to the adoption of preventive or remedial measures."

7 Recital 51 of Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU of the European Parliament and of the Council on industrial

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A similar thematic limitation of most EU environmental protection directives, which seek to prevent or eliminate damage to the environment rather than the (individual) consequences of such damage,[8] also explains why, as recently confirmed by the EU Court of Justice,[9] it is almost impossible to construe corresponding claims by way of State liability either.

Alongside (solvable) questions of international jurisdiction, a serious challenge for cross-border litigants arises from the fact that the interplay between private law remedies and the administrative authorization of polluting activities is a matter of domestic law. While, within the national legal orders, administrative authorizations shape private law as well insofar as they are granted restrictive or even exclusionary[10] effects,[11] there are no rules expressly addressing their relationship in a cross-border situation. A permit granted for an emitting installation[12] under domestic environmental law does not of itself enjoy any effects in other Member States. Even though sovereign and/or administrative acts *may* still have effects abroad, these are solely based on the will of the state in which the effects are to occur.[13] Courts can thus find in favor of claimants without the latter standing reasonable chances of enforcing their preventive or compensatory claims before the courts of the emitting installation's state, which may find themselves to be bound by the domestic permit.

But there are ways to solve this conundrum.

Some national courts already suggested forty years ago that, under certain conditions, permits from neighboring countries should have the effect of evading or mitigating damage claims.[14] Moreover, previous litigation reaching the European Court of Justice has resulted in a field-specific framework for the admissibility and limited preventability of cross-border nuisances from nuclear power plants.[15] While these precedents do not fall under the uniform conflict of law rules established by Regulation 864/2007 on the law applicable to non-contractual obligations (Rome

emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC on the landfill of waste.

8 See, most recently, Case C-434/22, *Latvijas valsts meži*, ECLI:EU:C:2023:966, para. 84.

9 Case C-61/21, *JP v Ministre de la Transition écologique*, ECLI:EU:C:2022:1015.

10 T. Kadner Graziano, "The law applicable to cross-border damage to the environment" [2007] *Yearbook of Private International Law* 71, 78.

11 E. Rehbinder, "§ 14 BImSchG, Rn. 21," in R. Landmann and G. Rohmer (eds.), *Umweltrecht* 99 (EL September 2022). However, as C. Masieri notes, administrative authorizations do not necessarily shield their holders from civil liability. C. Masieri, "The permit defence between the EU environmental liability directive and national private law," in B. Pozzo and V. Giacometti (eds.), *Environmental Loss and Damage in a Comparative Law Perspective* (Intersentia 2021) 39–51.

12 CO₂ certificates under the ETS raise comparable issues.

13 U. Wolf, *Deliktsstatut und internationales Umweltrecht* (Duncker und Humblot 1995) 101; P. Rüppell, *Die Berücksichtigungsfähigkeit ausländischer Anlagengenehmigungen: eine Analyse im Rahmen der grenzüberschreitenden Umwelthaftung nach der Rom II-Verordnung* (Mohr Siebeck 2012) 122.

14 Rechtbank Rotterdam 16 December 1983, Ned Jur 1084, No. 341, para. 8.7; OGH 20 December 1988, JBl. 1989, 239.

15 Case C-115/08, *Land Oberösterreich v ČEZ*, ECLI:EU:C:2009:660.

II),[16] the latter rules allow for solving the clash between the domestic administrative legality of certain polluting activities and preventive or compensatory claims against them under the civil law of a neighboring Member State. As will be argued in this chapter, the key lies in treating domestic authorizations for emitting installations as "rules of safety and conduct" within the meaning of Article 17 of the Rome II Regulation. This does not necessarily result in preventive or compensatory actions failing wherever an authorization has been granted to a polluting installation. Indeed, it is in principle only where the legal interests of the claimants have been properly heard and addressed in the course of previous cross-border consultations that the authorization will have to be considered as opposable to their preventive claims. Since, among EU Member States, these conditions can be met in practice, Article 17 of Rome II operates much more smoothly in a cross-border context than in the framework of global climate litigation, which has started testing its limits.[17]

The argument proceeds as follows. After a brief clarification of concepts and terminology (section 1), the absence of a common regulatory regime at the EU level is compared to the solution applicable in the nuclear energy sector (section 2). Section 3 exposes in detail how the rules of the Rome II Regulation allow the problem of giving effect to foreign authorizations to be addressed before the final section lays down the conditions to be fulfilled in order to allow such authorizations to have an effect on preventive or cessation claims.

2. Key concepts and terminology

The horizontal perspective adopted in this chapter, cutting across various fields of law, requires some clarification of the concepts and terminology used.

2.1 Damage vs nuisance

Article 2(1)(a) of the Environmental Liability Directive defines "environmental damage" as damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favorable conservation status of such habitats or species. This definition corresponds in essence to that set out in Recital 24 of Rome II, according to which "environmental damage" should be understood as meaning adverse change in a natural resource, such as water, land, or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

16 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31 July 2007, pp. 40–49.

17 See Rechtbank Den Haag, Case C/09/571932 / HA ZA 19–379, ECLI:NL:RBDHA:2021:5339 (English translation), as well as M.-P. Weller and M.-L. Tran, "Climate litigation against companies" [2022] 1 *Climate Action* 14; M. Pasqua, 'Authorisations to emit greenhouse gases – a conflict-of-laws perspective" [2023] 3 *The Italian Review of International and Comparative Law* 409.

Article 7 of Rome II, which concerns such environmental damage, specifies that it determines the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage. This is irrespective of the compensatory or preventive nature of a claim,[18] for the Regulation also applies to damage that is likely to occur (Article 2(2)). That can be damage suffered as a result of, say, the deterioration of air quality or polluted water spilled on private property.

The reference in Article 7 of Rome II to non-contractual obligations arising from property sustaining damage illustrates to what extent the legal framework for preventive and/or compensatory claims has evolved. Historically, the (property-based) law of nuisance has been used to solve conflicts among neighbors arising from undesired emanations. Nuisance law combines property and liability rules leading to injunction and damage remedies.[19] Initially, injunction (cessation action) was the main remedy. Then, alongside injunctions, damage compensation gained ground and eventually became the main private law remedy as the polluting activity was often protected by an administrative authorization.[20]

In most domestic regimes and under Rome II, the distinction between property-based nuisance claims and non-contractual liability for actual or prospective damage has by now lost its relevance[21] and will thus not be dealt with in this chapter. For the sake of clarity, we would stress, though, that even if the environmental law term of nuisance (broadly understood as interference with an environmental value) conceptually differs from what property law nuisance means, i.e., disturbance of property, both may come down to being one and the same where a property owner claims to be unreasonably affected by emissions from a neighboring installation.

2.2 Cross-border participation

As a consequence of the territorial limits of national laws and their application, the appreciation of environmental damage or nuisances caused by industry and other installations in border regions does not automatically take into account how those living on the other side of the border are affected. Against this backdrop, the Espoo[22] and Aarhus[23] Conventions concluded at the level of the United Nations Economic Commission for Europe (UNECE) aim to ensure inter-state consultation and cooperation in the planning of specific projects that may have international

18 Kadner Graziano (n. 10) 76.

19 V. Casado-Pérez and C. Gomez Liguerre, "From nuisance to environmental protection in continental Europe" [2019] 92 Southern California Law Review 1003, 1005.

20 Ibid. 1009.

21 Kadner Graziano (n. 10) 77.

22 1991 Convention on Environmental Impact Assessment in a Transboundary Context (OJ 1992 C 104, p. 7).

23 1998 Convention on access to information, public participation in decision making and access to justice in environmental matters (OJ 2005 L 124, p. 4), adopted by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

or transboundary effects. The public concerned by such projects must also be involved.

The EU took the lead here with the 1985 EIA Directive,[24] which eventually incorporated the Espoo and Aarhus provisions.[25] In particular, Article 15 of the 1996 IPPC Directive[26] provided for the first time a right of "the public" to participate in administrative procedures for the grant of permits to installations used to perform certain polluting activities before the adoption of any final decisions. Article 17 of that Directive[27] required transboundary information in case of eponymous effects.

While addressing the if and how of public participation with a view to preventing the creation of pollution or nuisances at source rather than to counteract their effects subsequently, these directives do not, however, deal with the question of how cross-border prevention or compensation claims brought by private individuals should be assessed. This is the focus of the following sections.

3. Litigating cross-border damages under EU law

It is certainly conceivable that, under EU law, the merits of such claims, on the one hand, and of foreign authorizations, on the other, should be mandatory, as a matter of non-discrimination,[28] the elimination of unjustified barriers to free movement, judicial cooperation,[29] or environmental law[30] – but there is no common European regime as of yet.

An exceptional counter-example can be found in the EU nuclear energy regime, as the *Temelín* saga of protracted legal proceedings in Austrian courts and before the ECJ on the right to prevent cross-border nuisances from a Czech nuclear power

24 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1).

25 M. Wu, *Öffentlichkeitsbeteiligung an umweltrechtlichen Fachplanungen* (Nomos 2013) 118.

26 Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996], OJ L 257/26. See now Article 24 of Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) as revised by Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024.

27 Now Article 26 of the revised Industrial Emissions Directive.

28 S. Matthes, "Umwelthaftung unter der Rom II-VO" [2011] *Zeitschrift für Gemeinschaftsprivatrecht* 146, 150; L. Hübner, "Climate Change Litigation an der Schnittstelle von öffentlichem Recht und Privatrecht – Die ausländische Anlagengenehmigung" [2022] *Praxis des Internationalen Privatrechts* 224.

29 G. Buchholtz, "Entterritorialisierung des Öffentlichen Rechts" [2016] *Neue Zeitschrift für Verwaltungsrecht* 1353.

30 While the most recent legislative reform has introduced compensation claims under the Industrial Emissions Directive, they remain for the time being a domestic matter.

plant[31] has highlighted. In order to illustrate the contrast between this exceptional case and the general situation of regulatory void, the main findings shall be recalled.

With regard to jurisdiction over an action for cessation of such nuisances, the ECJ held, first, that it cannot be based on what is now Article 24 of Regulation 1215/2012,[32] i.e., the *forum rei sitae*:

> An action for cessation of a nuisance, possibly preventive in nature, … does not constitute a dispute having as its object rights in rem in immovable property either. [T]he real and immovable nature of that right is, in this context, of only marginal significance. [It] does not have a decisive influence on the issues to be determined in the dispute in the main proceedings, which would not have been raised in substantially different terms if the right whose protection is sought against the alleged nuisance were of a different type, such as, for example, the right to physical integrity or a personal right. Just like the action at issue in the main proceedings, such actions essentially seek an order that the person causing the interference, actual or potential, to a right, for example by failing to comply with current generally recognised technological standards, put an end to it.[33]

Instead, it hinted at the possibility of jurisdiction being conferred by what is now Article 7(2) of Regulation 1215/2012 (jurisdiction in tort):

> [T]he examination of an action such as that at issue in the main proceedings does not require an assessment of facts which, being more particularly appropriate to the place where one of the two properties concerned is situated, are likely to justify conferring jurisdiction on the courts of one of the two States to the exclusion of the other. Therefore, in paragraphs 15 and 17 of the judgment in Case 21/76 '*Mines de potasse d'Alsace*' [1976] ECR 1735, delivered in respect of an action for liability for damage caused to property situated in one Member State by toxic waste discharged in a river by an undertaking situated in another Member State, the Court stated that, when faced with this type of situation, the place of the event giving rise to the damage and the place where the damage occurred are both capable, depending on the circumstances, of being particularly helpful from the point of view of the evidence and of the conduct of the proceedings.[34]

31 See M. Möstl, "Case C-115/08, Land Oberösterreich v. ČEZ, Judgment of the Grand Chamber of 27 October 2009" [2010] *Common Market Law Review* 1221.

32 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), which has replaced Regulation No. 44/2001 on the same matter which, in turn, took over from the 1968 Brussels Convention on the recognition and enforcement of judgments in civil and commercial matters.

33 Case C-343/04, *Land Oberösterreich v ČEZ*, ECLI:EU:C:2006:330, para. 34.

34 Case C-343/04, *Land Oberösterreich v ČEZ*, ECLI:EU:C:2006:330, para. 38.

These considerations apply indiscriminately to any form of actual or prospective cross-border damages or nuisances. Jurisdiction is thus not too difficult to establish in such cases.

As to the substance, the court found that, in the specific field of nuclear energy, regulated and closely surveilled under the rules of the EAEC Treaty, treating foreign installation permit holders differently from their domestic counterparts would amount to unjustified discrimination. Indeed:

> the principle of prohibition of discrimination on grounds of nationality within the scope of application of the EAEC Treaty precludes the application of the legislation of a Member State, … under which an undertaking in possession of the necessary official authorisations for operating a nuclear power plant situated in the territory of another Member State, may be the subject of an action for an injunction to prevent an actual or potential nuisance to neighbouring property emanating from that installation, whereas undertakings having an industrial installation situated in the Member State where the action is brought and in possession of an official authorisation may not be the subject of such an action and may only be the subject of a claim for damages for harm caused to a neighbouring property.[35]

In the absence of a common regulatory framework, the national courts seised in the place of damage are faced with the dilemma that by taking foreign installation permits into account, they may restrict the procedural and substantive rights of the persons concerned within the national territory. Failing to take account thereof, however, would likely result in the judgments handed down being unenforceable, for the public policy of the permitting state would stand in the way.

The question therefore arises whether an open-minded assessment under the EU's uniform conflict of law rules in the Rome II Regulation can ensure the necessary balance of interests with regard to the civil claims of affected neighbors in border regions.

4. How the Rome II Regulation allows the border between a domestic permit and prevention or compensation claims under foreign private law to be crossed

Before Rome II became applicable, national case law relied, with some notable exceptions,[36] on a strict application of the territoriality principle, thus denying foreign permits any domestic effects.[37] While this has rightly been criticized,[38] there

35 Case C-115/08, *Land Oberösterreich v ČEZ*, ECLI:EU:C:2009:660, para. 138.

36 Rechtbank Rotterdam 16 December 1983, Ned Jur 1084, No. 341, para. 8.7; OGH 20 December 1988, JBl. 1989, 239.

37 Hübner (n. 28) 219; Kadner Graziano (n. 10) 79.

38 Rüppell (n. 13) 124 ff.; F. Maultzsch, "Art. 17 Rom II-VO, Rn. 23," in C. Budzikiewicz, M.-P. Weller, and W. Wurmnest (eds.), *beck-online.Grosskommentar, Internationales Gesellschaftsrecht* (C.H. Beck 2022).

was no compelling normative basis to find otherwise. As will now be argued, this has changed with the entry into force of the Rome II Regulation.

In a nutshell, this Regulation harmonizes the determination, by the courts of the Member States, of the law that applies to non-contractual obligations, irrespective of which court has jurisdiction.[39] Other than a general rule declaring the laws of the place where damage occurs, the Regulation contains a number of specific provisions, of which Article 7 (environmental damage) is the *sedes materiae* for our purposes. It provides that the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined under the general rule, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.[40] In other words, the claimant may decide to choose the law that appears to be more generous (principle of ubiquity). Without such choice, the law of the place of (prospective)[41] damage becomes the applicable law (*lex causae*) governing the alleged obligations.

However, even with that law being applied, *taking account of* the dispensation granted under the law of the emitting installation's country of establishment is not excluded. This presupposes that one accepts qualifying such a permit as a "rule of safety and conduct" within the meaning of Article 17 of Rome II. The latter provides that, in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and insofar as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

How does this provision apply? It can be assumed that, as a defense against a claim for the prevention or compensation of damages, the owner of the emitting installation will try to invoke the valid permit under national law insofar as the applicable (foreign) law allows for such justification.[42] While that law does not recognize the (effects of) the permit, Article 17 of Rome II may step in to tell the judge that "as a matter of fact and in so far as is appropriate" "account shall be taken" of the "rules of safety and conduct" which were in force at the place and time of the event giving rise to the liability.

But is Article 17 of Rome II indeed a suitable instrument for the purpose of "translating" the effects of a foreign installation permit into the applicable, i.e.,

39 G. van Calster, "Lex ecologia" [2022] 42 *Praxis des internationalen Privatrechts* 441.

40 In more detail, K. F. Gómez, "The law applicable to cross-border environmental damage: From the European national systems to Rome II" [2004] *Yearbook of Private International Law* 291.

41 Art. 2(2) and (3) provide that this Regulation shall apply also to non-contractual obligations that are likely to arise. Any reference in this Regulation to an event giving rise to damage shall include events giving rise to damage that are likely to occur; and damage shall include damage that is likely to occur.

42 Strictly speaking, this defense does not argue in terms of justification but *preclusion*: Private law claims may not invalidate, or deprive of its effects, a valid administrative permit. See M. Buschbaum, *Privatrechtsgestaltende Anspruchspräklusion im internationalen Privatrecht* (Verlag Dr. Kovač 2008); Rehbinder (n. 11).

domestic, private law?[43] With a view to the sole wording of Article 17,[44] one may doubt that it covers an installation permit.[45]

It is also argued that, because it is much more extensive than merely containing "rules of safety and conduct," such a permit is not captured by Article 17.[46]

Some authors further claim that because granting the permit presupposes an application and thus depends on the will of the installation's owner ("permissive"), it differs from the objective, "prescriptive" rules of safety and conduct.[47] Finally, it has been opined that the balancing operation suggested by its wording should lead courts to ignore a permit,[48] whereas an extensive reading of Article 17 would contradict the ubiquity principle informing Article 7 for the sake of effective environmental protection.[49]

There are nevertheless convincing arguments in favor of installation permits being covered by Article 17 of Rome II. First, one needs to bear in mind that this provision is to be interpreted autonomously and with a view to ensuring its *effet utile*. In that regard, it follows from its dual objective, i.e., to take account of the public interests of the state where the event giving rise to the damage took place *and* to avoid conflicting obligations,[50] that it seeks to widen the scope of an alleged tortfeasor's exemption from liability in comparison to an unaltered application of the *lex causae*.[51] Moreover, the Commission's proposal of a Rome II Regulation already expressly favored an application of Article 17 to installation permits.[52] Finally, such an understanding is in line with the overarching private international law principle of ensuring decisional harmony as it allows for the avoidance of unenforceable judgments by appropriately (not blindly) taking foreign rules into

43 Hübner (n. 28) 219; Maultzsch (n. 38).

44 Compared with the "permit defense" rule that Member States may adopt under Article 8(4)(a) of the Environmental Liability Directive, exempting the operator from the cost of remedial actions taken pursuant to this Directive where they demonstrate that they were not at fault or negligent and that the environmental damage was caused by an emission or event expressly authorized by, and fully in accordance with the conditions of, an authorization conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event. See van Calster (n. 39).

45 F. M. Wilke, "Grenzüberschreitendes Nachbarrecht," in G. Ring, B. Klose, C. M. Jeromin, and H. Schulte Beerbühl (eds.), *StichwortKommentar Nachbarrecht* (Nomos 2021); Pasqua (n. 17).

46 Van Calster (n. 39); Buschbaum (n. 42) 217.

47 P. Mankowski, "Internationalprozess- und internationalprivatrechtliche Aspekte von grenzüberscheitender Climate Change Litigation in Deutschland," in W. Durner, F. Reimer, I. Spiecker gen. Döhmann, and A. Wallrabenstein (eds.), *Das sinnvoll Denkbare denken, das davon Machbare machen, Gedächtnisschrift für Arndt Schmehl* (Duncker und Humblot 2019) 557 (567 f.); Matthes (n. 28) 151.

48 Pasqua (n. 17).

49 A. Junker, "Internationale Umwelthaftung der Betreiber von Energieanlagen nach der Rom II-Verordnung," in *Energie – Wirtschaft – Recht, Festschrift für Peter Salje* (2013) 243 (261 f.); E.-M. Kieninger, "Conflicts of jurisdiction and the applicable law in domestic courts," in W. Kahl and M.-P. Weller (eds.), *Climate Change Litigation* (C.H. Beck 2021) 142; Pasqua (n. 17).

50 Hübner (n. 28) 219.

51 Maultzsch (n. 38); Rüppell (n. 13); Hübner (n. 28) 219.

52 COM(2003) 427 final, p. 22, with reference to what was then Article 13.

account. The harmonizing approach taken by the EU legislature in drafting the Rome II Regulation would be ineffective if it did not allow such situations typically arising among Member States to be addressed. Foreign installation permits may thus, in principle and by virtue of being "local data," apply directly at the level of substantive law, thus mitigating the eviction of the foreign law *in toto*.[53] This view is widely shared in the scholarship.[54]

Effectively taking account of domestic authorizations is, however, further preconditioned on the *lex causae* itself allowing for such "permit defense." Otherwise, its preclusionary effect would not be in accordance with the Regulation's general scheme, under which limitations and exemptions of liability are governed by the *lex causae* (Art. 15 (b)).[55]

5. Three conditions of appropriateness

Taking a foreign permit into account must be "appropriate" within the meaning of Article 17 of Rome II. Scholarship on the matter[56] suggests that the appropriateness turns on the same three cumulative conditions that courts in Austria[57] and the Netherlands[58] had set out under their autonomous PIL rules long before Rome II, namely compatibility with public international law, equivalence of domestic and foreign permitting standards, and decisive participation of the persons concerned in the permit procedure. While meeting these specific conditions would indeed plead in favor of appropriateness under Article 17 of Rome II, it is equally conceivable to assess the appropriateness without being bound by those conditions.[59] In any case, the discretion conferred by this provision ("in so far as is appropriate") appears to leave the extent to which account is taken of a given foreign permit in the hands of the judge.[60]

I shall briefly address these conditions anyhow.

53 Rüppell (n. 13); Maultzsch (n. 38).

54 P. Wautelet, "Article 17," in U. Magnus and P. Mankowski (eds.), *European Commentaries on Private International Law*, *Rome II Regulation Commentary* (Verlag Dr. Otto Schmidt 2019) para. 14; M.-P. Weller and M.-L. Tran, "Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?" [2021] *Zeitschrift für europäisches Privatrecht* 573, 596; Rüppell (n. 13) 160 ff.; J. v. Hein in G. P. Calliess (ed.), *Rome Regulations, Commentary on the European Rules of the Conflict of Laws* (Wolters Kluwer 2020); Buschbaum (n. 42); M. Lehmann and F. Eichel, "Globaler Klimawandel und Internationales Privatrecht" [2019] 83 *Rabels Zeitschrift* 77, 98–100; Y. Arif, "Eingriffsnormen und öffentlich-rechtliche Genehmigungen unter der Rom II-VO" [2011] *Zeitschrift für Rechtsvergleichung* 258, 264.

55 Hübner (n. 28) 219.

56 Kadner Graziano (n. 10) 76; Hübner (n. 28) 219; Weller and Tran (n. 54) 596.

57 OGH 20 December 1988, JBl. 1989, 239

58 Rechtbank Rotterdam 16 December 1983, Ned Jur 1084, No. 341, para. 8.7.

59 See M.-L. Tran, *Klimaschutz zwischen öffentlichem Recht und Privatrecht. Normenkollision in der Climate Change Litigation* (Mohr Sibeck 2024), who disputes the pertinence of the conditions.

60 Even though one may argue that meeting all three conditions leads to a duty to take account of a permit from another Member State so as not to contravene the non-discrimination principle; see Maultzsch (n. 38).

A permit would respect public international law if it does not authorize anything that would contravene applicable treaties or recognized principles, such as good neighborliness or the requirement to avoid damage to the extent possible.[61]

As regards the comparability of the permitting standards, one may assume, in view of the density of EU law prescriptions for all types of emitting installations, that a correct implementation of these prescriptions will ensure sufficient comparability.[62]

Finally, it would only be appropriate to take account of the installation permit if it has been granted in a procedure in which the persons concerned on the other side of the state borders have also been given an effective opportunity to participate. Without such participation, one may consider the granting of the permit to violate the applicable UNECE conventions and their implementation under EU and, ultimately, national law.[63]

This assertion deserves some contextualization.

At the EU level, the EIA Directive[64] notably ensures that cross-border environmental concerns are properly processed. Its Article 7 establishes a multi-step regime of cross-border information, participation, and consultation with a view to possibly taming transboundary effects.

From the perspective of the potentially affected public, the main drawback of that regime is the absence of a formal right to make the competent authorities issue a request for participation, which cannot be derived either from the text of the Espoo Convention itself.[65] There is thus a possibility of cross-border participation not happening at all. Moreover, there is no guarantee of such participation leading to decisions properly reflecting the foreign neighbors' interests and positions.

These concerns equally affect the implementation of Articles 24 and 26 of the Industrial Emissions Directive.[66]

Such difficulties do not, however, put into doubt the conclusion that, at least on paper,[67] the EU Member States share a basic cross-border public participation

61 Matthes (n. 28) 151.

62 Also suggested by Hübner (n. 28) 219. This view is contested by Rüppell (n. 13) 241, who highlights the persisting diversity of standards while finding the requirement of comparability dispensable.

63 P. Huber, "Art. 7," in C. Budzikiewicz, M.-P. Weller, and W. Wurmnest (eds.), *beck-online. Grosskommentar, Internationales Gesellschaftsrecht* (C.H. Beck 2022).

64 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1).

65 A. Rietzler, "Behörden- und Öffentlichkeitsbeteiligung bei ausländischen Vorhaben im Lichte der Espoo-Konvention" [2015] *Neue Zeitschrift für Verwaltungsrecht* 483, 486.

66 Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) as revised by Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024.

67 For an overview, see G. Gattinara and M. Noll-Ehlers, "The scope and requirements of public participation in EU environmental law," in B. Peters and E. J. Lohse (eds.), *Sustainability through Participation?* (Brill 2023) 139–175. With regard to practical challenges, see the UNECE *Guidance on the practical application of the ESPOO Convention* and *Guidance on public participation*, as well

standard for environmental authorization and emission control procedures.[68] At the same time, the provisions of EU law do not standardize the procedures preceding the granting of project authorizations. Instead, Member States are free to choose the form and means by which they wish to contribute to the objectives of the EIA Directive. As a result, national regulations in the various Member States may differ substantially in the way they organize administrative procedures for authorizing projects likely to have a substantial impact on the environment.[69]

As a result, it is for the courts to examine whether, in a specific procedure, there was in fact a possibility of participation for the parties concerned and whether their position and interests have been properly addressed.[70] Only if that was the case, one may consider, for the purpose of applying the rules of the Rome II Regulation, that the installation permit in question may be taken into account in accordance with Article 17 of the Rome II Regulation.

In view of the cross-border public participation rules thus existing in the EU (and its neighboring countries), a failure to involve the relevant foreign public or to properly address their observations appears to stand in the way of legitimately refusing recognition and enforcement[71] of a foreign judgment granting injunctive relief against pollution from an emitting installation even though the latter benefits from a domestically valid permit.

6. Concluding remarks

It has been argued throughout this chapter that, in combination with the rules on cross-border participation in environmental authorization and impact assessment procedures, the Rome II Regulation allows the clash between the domestic administrative legality of polluting activities and injunctive or compensatory claims against them under the civil law of a neighboring state to be solved. This understanding of the EU's common rules on the conflict of laws in non-contractual obligations serves the purpose of decisional harmony and helps avoid the enforcement trap. But make no mistake, rather than facilitating injunctive relief galore, the decisional harmony thus brought about will be one of mitigated claims at best once effective cross-border participation finally becomes a reality in the EU by properly addressing all individual interests already at the authorization stage.

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as M. Piri Damagh, "Trans-boundary environmental impact assessment in cross-border oil and gas pipelines: What lessons can be learned from the Espoo Convention and the EU EIA Directive," in B. Vanheusden and L. Squintani (eds.), *EU Environmental and Planning Law Aspects of Large-Scale Projects* (Intersentia 2016) 169–188.

68 Rüppell (n. 13); Hübner (n. 28) 224.

69 Opinion of AG Pikamäe of 3 February 2022 in Case C-121/21, *Czech Republic v Poland (Turów mine)*, ECLI:EU:C:2022:74.

70 Rüppell (n. 13) 220–223.

71 On the basis of public policy (*ordre public*), Rehbinder (n. 11).

15 Cross-border pollution in the context of the Scheldt Estuary

The complex search for a sustainable level playing field

Hendrik Schoukens and Nienke van der Burgt

1. Introduction: water without borders

It is a truism that water knows no borders. Transboundary waters are generally defined as aquifers and lake and river basins shared by two or more countries. Seeing that most human borders reflect the irrationalities of history and often look arbitrary – history does not usually produce straight lines – such transboundary waters are present everywhere on our planet. Globally, more than 150 countries have territory within at least one of the 286 transboundary river and lake basins, and there are 592 transboundary aquifer systems.[1] This leads transboundary waters to account for 60% of the world's freshwater flows.[2] If not handled adequately, mismanaged transboundary water systems might spark increasing social unrest, diplomatic tensions, and, in worst-case scenarios, even conflict and war. To avoid such scenarios materializing, an impressive body of so-called water treaties has emerged. The first international water treaty supposedly dates back to 2500 BC, when the two Sumerian city-states of Lagash and Umma signed an agreement ending a water dispute along the Tigris River.[3] It is now estimated that more than 3,600 treaties related to international water resources have been drawn up since the start of the 9th century AD.[4] However, the majority of these deal with navigation and boundary demarcation. Only in the second half of the 20th century did the focus gradually shift to environmental protection, reducing pollution and the conservation of water resources.[5]

This shift was also reflected in the adoption of some landmark multilateral treaties regarding the equitable use of transboundary rivers, such as the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and

1 United Nations, "Transboundary waters" <https://www.unwater.org/water-facts/transboundary-waters>, accessed 1 March 2025.

2 Ibid.

3 "Transboundary water resources," *CAWater-Info* <http://www.cawater-info.net/bk/1-7_e.htm>, accessed 1 March 2025.

4 UN Water, *United Nations World Water Development Report 4: Managing Water under Uncertainty and Risk* (UN Water 2012).

5 P. Sands, J. Peel, A. Fabra and R. MacKenzie, *Principles of International Environmental Law* (3rd ed., Cambridge University Press 2022) 304.

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International Lakes (Water Convention). This Convention entered into force in 1996 in the context of the UN Economic Commission for Europe (UNECE)[6] and puts forward a mechanism to strengthen international cooperation and national measures for the ecologically sound management and protection of transboundary surface waters and groundwaters. The 1992 Water Convention includes a general obligation to prevent the pollution of waters that causes or is likely to cause a transboundary impact.[7] It was followed by the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention), which entered into force in 2014 and is the only treaty governing shared freshwater resources that is of universal applicability.[8] In this international agreement, ample emphasis is placed on the equitable and reasonable utilization of international watercourses, the application of appropriate measures to prevent harm to other states sharing an international watercourse, and the principle of prior notification of planned measures.[9] In general, the 1997 UN Watercourses Convention aims to balance the right to equitable utilization with the duty to prevent transboundary damage. Where significant transboundary harm still occurs, the responsible state is obliged to take all appropriate measures to eliminate or mitigate the harm and, if necessary, consider the question of compensation.[10]

Over the past decades, the International Court of Justice (ICJ) has adjudicated several disputes regarding management and pollution issues in the context of shared watercourses, among others, in its notable rulings in *Gabčíkovo-Nagymaros* (between Hungary and Slovakia regarding the impacts of a hydroelectric dam project)[11] and, more recently, *Pulp Mills* (between Argentina and Uruguay concerning the construction of two pulp mills on the River Uruguay).[12] Most famously, the ICJ seized the opportunity in the former case to put further emphasis on the concept of sustainable development in the context of transboundary river management,[13] while it highlighted in the latter case the binding status of the duty to carry out an environmental impact assessment (EIA), especially in the context of the proposed industrial activity which may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[14]

In the context of the EU, the Scheldt estuary presents an interesting case study to assess the interplay between the international legal instruments regarding transboundary river management and EU environmental law. The Scheldt River is a 435-km-long river that flows through three countries: Northern France, Western Belgium (Wallonia and Flanders), and the southwestern part of the Netherlands,

6 Convention on the Protection and Use of Transboundary Water Resources, Helsinki, 17 March 1992.
7 Article 2(1) and (2), 1992 UN Water Convention.
8 Adopted on 21 May 1997, by UNGA Res. 51/229, 36 ILM 700 (1997).
9 Articles 5, 7 and 21, 1997 UN Watercourses Convention.
10 Articles 7(1) and (2), 1997 UN Watercourses Convention.
11 *Case Concerning the Gabčíkovo-Nagymaros Project* (1997) ICJ Report 7.
12 *Case Concerning Pulp Mills on the River Uruguay* (2010).
13 *Case Concerning the Gabčíkovo-Nagymaros Project* (1997) ICJ Report 7, para. 140.
14 *Case Concerning Pulp Mills on the River Uruguay* (2010), para. 205.

with its mouth at the North Sea. Throughout history, the Scheldt River, particularly its estuary, has been of major strategic, military, and economic importance.[15] While the Scheldt (*Scaldis* in Latin) served as a key shipping lane for the Roman army and merchants from the provinces in Gaul and Germania to Britain, it also marked the boundary between France and the Holy Roman Empire throughout the Middle Ages. Most famously, a battle for control over the Scheldt River occurred at the end of the 16th century at a time when Antwerp had become the most prominent harbor in Western Europe. When the city was finally reconquered by the Spanish army in 1585, the recently established Dutch Republic closed the Scheldt to shipping. This blockade negatively impacted Antwerp in favor of the Dutch ports of Amsterdam and Middelburg. Access to the river remained a contentious topic – and was even the subject of a brief war – in subsequent centuries until it was finally settled in several treaties, concluded between Belgium, which had gained its independence, and the Netherlands in 1839.[16] After repeated blockades of the river, one of the core provisions of these agreements stipulated that the river should remain accessible to ships heading for Antwerp.[17]

In the past century, diplomatic tensions over the usage of the Scheldt River have eased considerably, partly as a result of a new set of treaties and agreements between Flanders and the Netherlands. In recent decades, however, the application of the ecological quality standards and conservation instruments set forth by several EU environmental directives rendered the transboundary management of the Scheldt estuary increasingly complex. The alignment of economic and ecological considerations became a sensitive political matter, taking into account that the Port of Antwerp had become one of Europe's largest seaports in the meantime, ranking second behind Rotterdam by total freight shipped.[18] In terms of economic importance, it is now one of the key engines of Flanders, counting for more than 70,000 direct and 80,000 indirect jobs.[19] However, since the port is located at the upper end of the tidal estuary of the Scheldt, the Scheldt River is the only maritime access to the Port of Antwerp, so it plays a vital role in the economy. Given its strategic importance, the Flemish government aims to guarantee a minimum depth for seagoing vessels along the trajectory towards the Port of Antwerp. However, as vessels are getting larger, several deepening dredging campaigns in the Scheldt

15 For more information, see <https://northsearegion.eu/immerse/project-estuaries/the-scheldt-estuary/>, accessed 1 March 2025 (hereafter: 'The Scheldt Estuary').

16 Treaty between the Kingdom of the Netherlands and the Kingdom of Belgium concerning the separation of the respective territories, concluded on 19 April 1839 in London (hereafter: 1839 Separation Treaty); see <https://verdragenbank.overheid.nl/en/Treaty/Details/001258.html>, accessed 1 March 2025.

17 Ibid.

18 The 2014 ranking of ports is available at <https://www.porteconomics.eu/top-15-europen-union-container-ports-in-2024/>, accessed 1 March 2025.

19 Port of Antwerp-Bruges, "Port of Antwerp-Bruges: merger of the ports of Antwerp and Zeebrugge creates Europe's largest export port" (28 April 2022) <https://newsroom.portofantwerpbruges.com/port-of-antwerp-bruges-merger-of-the-ports-of-antwerp-and-zeebrugge-creates-europes-largest-export-port>, accessed 1 March 2025.

estuary have been necessary in the past. A considerable part of these works needs to take place in Dutch territory, where several environmental organizations and farmers' groups launched courtroom proceedings against the authorizations and permits needed for the dredging. Accordingly, it has become clear that compliance with the environmental standards included in the applicable EU environmental directives, such as the EU Nature Directives (Birds[20] and Habitats Directive[21]), the Water Framework Directive,[22] and the Environmental Impact Assessment (EIA) Directive,[23] is a crucial success factor in the context of the decision-making procedures for works related to the port management. Failure to do so can lead to serious delays and a plethora of court cases.

For instance, in the past two decades, several port expansion plans that clashed with, among others, the preservation of EU-protected sites under the EU Nature Directives in the vicinity of Antwerp[24] were halted as a result of court rulings in Belgium and the Netherlands.[25] Cross-border aspects played a crucial role in this context since part of the dredging works needed to render the Port of Antwerp accessible were carried out by the Dutch authorities, partly in Dutch Natura 2000 protected sites (designated under the EU Nature Directives), whereas part of the necessary nature compensation measures also needed to be implemented in a transboundary context.[26]

Moreover, during the past years, novel environmental challenges of a more indirect nature, such as the presence of persistent organic pollutants and nitrogen pollution, put additional strain on the transboundary cooperation of the Scheldt estuary. The port area of Antwerp is currently facing one of the biggest 'forever chemicals' pollution scandals worldwide after massive levels of PFAS (per- and polyfluoroalkyl substances) were uncovered in 2021.[27] The increased scrutiny that emerged in the wake of this environmental crisis revealed that several companies located

20 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L20/7-25.

21 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, 7–50.

22 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 [2020] OJ L 327/1-73.

23 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L 26/1.

24 For more information on this ecological network of protected sites, see European Environment Agency, "The Natura 2000 protected areas network" (28 February 2023) <https://www.eea.europa.eu/themes/biodiversity/natura-2000/the-natura-2000-protected-areas-network>, accessed 1 March 2025.

25 For an overview, see H. Schoukens, "Proactive habitat restoration and the avoidance of adverse effects on protected areas: Development review after Orleans" [2017] 20/2 Journal of International Wildlife and Policy 125.

26 See H. Schoukens, M. Bogaart, and A. Cliquet, "De verdieping van de Westerschelde: de stuwing voorbij?" [2010] Tijdschrift voor Milieurecht 304.

27 M. Torfs, "PFOS pollution scandal continues to make waves in Flanders as leaked e-mails pop up," *VRT* (24 September 2021) <https://www.vrt.be/vrtnws/en/2021/09/24/pfos-scandal-more-evidence-that-the-flemish-government-asked-no/>, accessed 1 March 2025.

in the Port of Antwerp area, as part of their environmental license provided by the province of Antwerp, had been authorized to discharge PFAS in the Scheldt River. In the past two years, several Dutch authorities requested additional restrictions in this respect to avoid further cross-border pollution in the Scheldt estuary. In 2021, several news reports held that a major diplomatic row had erupted between the Netherlands and Flanders on the lack of proactive disclosure of information regarding the cross-border pollution.[28] The so-called 'nitrogen crisis' in Flanders, which revolved around the reduced leeway when granting permits for activities contributing to further nitrogen deposition on protected sites, created additional tensions between the competent authorities.[29] This was further underscored by the legal battle that had ensued over a permit for the building and exploitation of the new ethane cracker in the Port of Antwerp area, located near Dutch Natura 2000 sites. At the request of the Dutch provinces of Zeeland and North Brabant, the Flemish Council for Permit Disputes annulled the permit for what was to become the first new European methane cracker in decades. In its ruling of July 2023, the Council used the Habitats Directive as its main benchmark to annul the permit, siding with the Dutch authorities that claimed that the nitrogen emissions from the project would cause significant cross-border damage on the nearby Dutch Natura 2000 site, located just across the border.[30] This represents just one of the many legal proceedings that have emerged in the context of the cross-border management of the Scheldt estuary, yet, as will be seen in this chapter, it is representative of the sensitive nature of many of the cross-border pollution challenges that have recently emerged.

Against the backdrop of this recent string of court decisions, this chapter lays out the existing policy and legal framework applicable in the Scheldt estuary while subsequently focusing on these recently emerged environmental challenges to the preservation of the estuarine ecosystem, as mandated by EU environmental law. This chapter carries out a comprehensive case study to illustrate the increased complexity that arises when operationalizing the international cooperation duties that apply in the context of transboundary estuaries, especially when important economic interests are at play. A particular focus is placed on the recent legal disputes that have recently emerged in the context of the transboundary management of the Scheldt estuary related, for instance, to the protection of vulnerable habitats and the reduction of pollution and to what extent compliance with several EU environmental directives is to be aligned with long-standing bilateral cooperation mechanisms.

28 A. Brands and J. Truijman, "Diplomatieke pfas rel tussen Zeeland en Vlaanderen komt tot ontknoping," *NOS* (30 September 2021) <https://nos.nl/artikel/2399802-diplomatieke-pfas-rel-tussen-zeeland-en-vlaanderen-komt-tot-ontknoping>, accessed 1 March 2025.

29 "Nitrogen crisis deepens rift in the Flemish government," *Belga News Agency* (1 August 2023) <https://www.belganewsagency.eu/nitrogen-crisis-deepens-rift-in-flemish-government>, accessed 1 March 2025.

30 Flemish Council for Dispute Settlement, 20 July 2023, no. RvVb-A-2223-1097 (hereafter: INEOS ruling).

This chapter follows the following structure. After sketching out the existing policy and legal instruments that apply in the context of the Scheldt estuary and the most relevant court decisions in this regard (section 2), this chapter zooms in on the recent PFAS and nitrogen crisis in Flanders as well as the increased importance of climate change-related impacts in the planning policies (section 3). Subsequently, this chapter analyzes the main litigation trends in the latter context, with a particular focus on cross-border pollution (section 4). A subsequent section outlines the main challenges that arise from the perspective of EU environmental law for the current management of the Scheldt estuary (section 5), and the main take-home messages are compiled in the conclusion (section 6).

2. The Scheldt estuary: the wider legal and policy context

To fully grasp the complex and multilayered cross-border reality in which the management of the Scheldt estuary has to be operationalized, this section outlines the area's main geographical and ecological features. The applicable legal framework and policy documents, as well as the relevant case-law developments of the previous two decades, are also presented.

2.1 Geographical context

Traditionally, the Scheldt River is divided into the non-tidal Upper Scheldt section and the tidal section that ranges from Ghent (Belgium) to the mouth at Vlissingen (the Netherlands). The Westerscheldt is the name used to designate the lower and middle estuary, which is exclusively located in the Netherlands. The Flemish sections of the estuary are called the Lower Sea Scheldt, stretching from the border to the city of Antwerp, and the Upper Sea Scheldt, stretching from Antwerp to Ghent.[31] The river basin can no longer be characterized as natural since its total catchment area hosts more than 10 million people. It is located in one of the most densely populated areas of Western Europe, with an average density of 477 inhabitants per km^2.[32]

The estuary's natural features, such as large swaths of tidal marshes and mudflats, gradually give way to agricultural lands, subject to strict water management levels (the so-called 'polders').[33] Meire et al. concluded that human influence is intertwined with natural evolutions in the estuary, which they describe as a 'changing ecosystem'.[34] Major land reclamation works have been undertaken throughout the past centuries, while the river was also gradually deepened and dredged for

31 The Scheldt Estuary (n. 15).
32 Ibid.
33 Ibid.
34 P. Meire et al., "The Scheldt Estuary: Description of a changing ecosystem" [2005] 240 Hydrobiologia 1.

shipping purposes from the 19th century onwards.[35] The rapid expansion of the Port of Antwerp, as well as the massive urbanization after the Second World War, led to a sharp decrease in the Scheldt estuary's surface area (from 45,000 ha in 1800 to 30,000 ha at present).[36]

2.2 Ecological value of the Scheldt estuary and its legal dimensions

The Scheldt estuary is a macro-tidal and relatively turbid estuary, with a mean depth varying from an average of 14 m at the mouth to 7 m close to Ghent. It is described as being characterized by 'a complex morphology with flood and ebb channels surrounding several large intertidal mud and sand flats'.[37]

As far as the water quality is concerned, the massive discharge of untreated domestic wastewater, industrial pollution from the various port areas, and the extensive nutrient input from intensive agricultural activities led to moderate to bad water quality.[38] However, in the past decades, some significant improvements have been noted. Since the mid-1990s, the increased efforts in water treatment of household effluents significantly reduced the inputs of phosphorus.[39] The more effective treatment of industrial wastewater also contributed to the further improvement of the Scheldt's water quality. This spectacular and rapid improvement of the water quality manifested itself most prominently in increased oxygen levels. However, when using ecological parameters in the water column as a benchmark, the freshwater Scheldt has not yet been found to meet good water quality standards. In 2009, no surface water body in the Scheldt estuary was found to be in an acceptable environmental or ecological status in light of the Water Framework Directive.[40] Regarding the chemical status, the amount of metals, industrial pollutants, and pesticides meet the standards in only 60% of the water bodies. Most of the water bodies also score insufficiently when assessing the ecological quality elements of the Water Framework Directive.[41] Moreover, no significant improvement in the ecological water quality has taken place during the past decade (2010–2020). Recent

35 L. Schepers et al., "The Scheldt Estuary: An overview of the morphodynamics of intertidal areas," in A. Demoulin (ed.), *Landscapes and Landforms of Belgium and Luxemburg* (Springer 2017) 281–296.

36 The Scheldt Estuary (n. 15).

37 Ibid.

38 "Indicators of the Long term vision 2030 (LTV) for the Scheldt estuary," *Schelde Monitor* <https://www.scheldemonitor.be/en/indicatoren.php>, accessed 1 March 2025.

39 For more background information: Flemish Institute for Nature and Forestry Research (INBO), *KRW doelstellingen in Vlaamse getijrivieren. Afleiden en beschrijven van typespecifiek maximaal-ecologisch potentieel en goed ecologisch potentieel in een aantal Vlaamse getijrivierwaterlichamen* (Brussels 2009).

40 Supra (n. 39).

41 See also T. Maris, N. Brion and P. Meire, *Evolution of Water Quality in a Large Eutrophic European Estuary under Changing Pressures: Past, Present and Future of the Scheldt Estuary* (VUB 2019).

reports also underscore the significant hydrodynamic and geomorphologic changes caused by the dredging and deepening of the river to influence water quality.[42]

In spite of the continued environmental pressures and the massive loss of valuable wetlands during the past centuries, the Scheldt estuary still harbors a unique collection of wetlands and threatened species. The Scheldt estuary qualifies as an area of international importance for 21 specific water bird species under the 1971 Convention on Wetlands of International Importance, especially as waterfowl habitats (Ramsar Convention).[43] As a result, large swaths of the Scheldt estuary are designated as 'wetlands of international importance' under the Ramsar Convention in both the Netherlands and Belgium.[44] These areas stretch for 60 km from the border with Belgium to the North Sea, including the Drowned Land of Saeftinghe (*Verdronken Land van Saeftinge*), constituting one of the largest and most intact Atlantic salt marshes in Europe.[45]

To comply with their conservation duties under the Birds and Habitats Directive, Flanders and the Netherlands have also designated large parts of the Scheldt estuary as protected sites (Natura 2000).[46] Flanders designated the Upper Sea Scheldt, following the Scheldt River towards the city of Ghent, as a Natura 2000 site for the protection of both species and habitats. In addition, the Lower Sea Scheldt is designated for the protection of species.[47] The Netherlands designated the entire estuary on its territory, the Westerscheldt and Saeftinge, under both directives.[48] While the Natura 2000 sites straddle the border between the Netherlands and Flanders, the areas are managed separately. Both the Netherlands and Flanders have established nature conservation objectives and measures for their Natura 2000 sites.[49] Seeing that the current status of the estuarine nature is unfavorable, many of the conservation objectives include large-scale restoration actions aimed at improving the quantity and quality of these biodiversity types.[50]

A more recent development is the designation of two nature parks within the Scheldt estuary in Flanders: the landscape park 'Zwinstreek'[51] and the national

42 Ibid.

43 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, 2 February 1971.

44 "Verdronken Land van Saeftinghe" <https://www.hetzeeuwselandschap.nl/natuurgebieden/verdronken-land-van-saeftinghe>, accessed 1 March 2025.

45 Ramsar website on the designation of sites, available at <https://www.ramsar.org/country-profile/netherlands-kingdom>, accessed 1 March 2025.

46 For more background information, see Schoukens et al. (n. 26).

47 Map available at <https://natura2000.vlaanderen.be/natura-2000-gebieden>, accessed 1 March 2025.

48 Map available at <https://www.natura2000.nl/gebieden/zeeland/westerschelde-saeftinghe/westerschelde-saeftinghe-kaart>, accessed 1 March 2025.

49 In Flanders, these were adopted in 2005. See "Specifieke natuurdoelen" <https://natura2000.vlaanderen.be/specifieke-natuurdoelen>, accessed 1 March 2025.

50 For more background, see Schoukens et al. (n. 26).

51 "Landschapspark Zwinstreek," <https://www.west-vlaanderen.be/landschapspark-zwinstreek>, accessed 1 March 2025.

park 'Scheldevallei'.[52] While the focus of a landscape park is on strengthening and restoring the landscape identity and quality from an integral vision of heritage, nature, agriculture, and recreation, the main aim of a national park is to bolster nature conservation on a landscape-based scale without imposing new restrictions on property rights. Finally, the Scheldt estuary was recently classified as a UNESCO global geopark,[53] which indicates that the area is recognized by UNESCO for its 'unique international geological importance'.

2.3 Historical outline of the relevant political and legal developments

The current governance of the Scheldt estuary cannot be understood without considering the history of transboundary cooperation and conflict, as described in the introduction. It is important to understand that the need for cooperation found its origins in the importance of ensuring broad access to the Port of Antwerp, the economic heart of Flanders. The 1839 Separation Treaty[54] establishing the territorial status of Belgium and the Netherlands explicitly confirmed the principle of freedom of navigation on the Scheldt River. More specifically, both countries agreed to undertake to keep the river, the navigable channels of the Scheldt and its estuaries in good condition, each for its part of the Scheldt.[55] The economic basis of this transboundary cooperation was further defined in an 1863 Treaty that regulated Belgium's redemption of the Scheldt toll.[56] Moreover, it established that the pilotage fees on the Scheldt should never be higher than those at the mouth of the Meuse.

In the decades after, the different interpretations by the Netherlands and Belgium of Article IX of the 1939 Separation Treaty, requiring that pilotage and buoyage as well as the maintenance of the Scheldt estuaries below Antwerp will be subject to common supervision, led to continued conflict. Whereas the Netherlands read a minimalistic obligation on the maintenance of the river, Belgium argued that maintenance and adaptation works fell squarely under the obligation.[57]

However, other factors impacted the process of inter-state coordination. As mentioned in the introduction, evolving customary international law had an impact, as riparian states were increasingly viewed as having an obligation to keep the waterways navigable for neighboring countries with transnational rivers. This

52 "Nationaal Park Scheldevallei," <https://www.rivierparkscheldevallei.be/nationaal-park>, accessed 1 March 2025.

53 "UNESCO Global Geopark," <https://www.scheldedelta.eu/nl/unesco-global-park>, accessed 1 March 2025.

54 See supra (n. 16).

55 Article IX of the 1839 Separation Treaty.

56 Treaty (*tractaat*) between the Kingdom of the Netherlands and the Kingdom of Belgium on the surrender of Scheldt tolls, <https://verdragenbank.overheid.nl/nl/Verdrag/Details/001554.html>, accessed 1 March 2025

57 Matthias Vanden Borre, *Een juridische analyse van de Scheldeverdragen tussen België en Nederland* (Master's thesis, Universiteit van Gent 2014).

implied, among other things, permanent dredging to keep the waterway accessible.[58] Secondly, global requirements for shipping were changing. To compete on a global level, the waterway should be not only deepened but also widened to allow the largest ships to reach the Port of Antwerp.

In the early phases of the transnational cooperation, including the first phases of deepening and widening of the waterway, no legal requirements existed in terms of conservation or nature restoration. A focus on the natural function of the estuary was first introduced in the 1995 treaty between Flanders and the Netherlands regarding the second widening of the Western Scheldt,[59] emphasizing that care for the waterway function should be in harmony with care for the other functions of the Western Scheldt, including the natural function. This resulted in the inclusion of restoration works related to the loss of natural values because of the widening of the shipping channel. These restoration works aimed 'to prevent or reduce undesirable effects on the natural values of the Western Scheldt, which may or may not occur directly as a result of the widening dredging'.[60] Examples of such undesirable effects include the loss of salt marsh and mud flats, the loss of diversity of environmental types, the loss of natural dynamics, and an increase in suspended matter levels. The Annex to the 1995 Treaty underlines that the restoration work should interfere as little as possible with the natural dynamic processes in the Western Scheldt.[61]

When Flanders requested a third widening operation in 1998, it was the view of the Netherlands that any new widening should take place with respect for the naturalness and safety of the Western Scheldt. This would require a long-term vision to be drawn up in which three different functions were considered in conjunction: safety against flooding, accessibility for the port, and the naturalness of the estuary. On behalf of the Technical Scheldt Commission (TSC), the Long-Term Vision for the Scheldt estuary[62] was adopted in 2001. This document prescribes that by 2030,

58 See, e.g., as included in the Helsinki Rules on the Uses of the Waters of International Rivers, adopted in 1966 by the International Association. Article XVIII states that each riparian state is, to the extent of the means available or made available to it, required to maintain in good order that portion of the navigable course of a river or lake within its jurisdiction. From the comments to the article, it follows that 'maintenance includes the removal of any obstructions to navigation, dredging where required and other works necessary to preserve navigability. The obligation is limited, necessarily, by the financial ability of the riparian State. "Helsinki rules," <https://www.internationalwaterlaw.org/documents/intldocs/ILA/Helsinki_Rules-original_with_comments.pdf>, accessed 1 March 2025.

59 Treaty between the Kingdom of the Netherlands and the Flemish Region on the widening of the waterway in the Western Scheldt, Antwerp, adopted on 17 January 1995, <https://wetten.overheid.nl/BWBV0001233/1996-07-01>, accessed 1 March 2025.

60 Annex B, Article 3(a), to the 1995 Treaty between the Kingdom of the Netherlands and the Flemish Region on the widening of the waterway in the Western Scheldt.

61 Ibid.

62 "Explanatory Memorandum," <https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vi3aq6dkq1zn/f=/kst102874.pdf>, accessed 1 March 2025.

the Scheldt should be a healthy and multifunctional estuarine ecosystem that can be used sustainably for human needs.

These policy developments resulted in an update in 2005 of the so-called 'Sigmaplan', which was originally created to protect Flanders from flooding in the wake of the terrible floods in the 1970s.[63] In storm weather conditions, the tidal Scheldt River and its tributaries can reach dangerously high water levels and even overflow their banks. Hence, the Sigmaplan invested in sturdier and higher levees and a chain of natural flood control areas in the river valleys. Areas like these can catch excess river water, giving rivers room to flow and overflow in a controlled manner. In 2005, when the Sigmaplan was revised, considering the consequences of climate change and applying integrated water management, the Flemish government decided to include nature conservation as an explicit second pillar. The Scheldt River was offered room to flow and overflow while contributing to the European nature goals. This coincided with the operationalization of a scheme of nature compensation actions, partially needed to offset the damage linked to the expansion of the Port of Antwerp.[64] In this context, nature restoration actions were also put forward, with the aim of creating 14,000 ha of restored wetlands, marshes, and flood plains along the Scheldt River. Recent restoration efforts include the depoldering of the Hedwigepolder, a large-scale transboundary tidal wetland of more than 300 ha, which aims to improve both flood protection and nature restoration for endangered species.[65]

After Flanders and the Netherlands agreed on a long-term vision, this was further translated into the '2010 Scheldt Estuary Development Outline' (*Ontwikkelingsschets*).[66] From here, it follows that the decision to widen the shipping channel had to be weighed against the objectives set out in Article 6 of the Habitats Directive and Articles 3 and 4 of the Birds Directive to ensure the conservation of the natural habitats and wild flora and fauna of the special protection areas (SPAs) in the Scheldt estuary (Natura 2000 area).[67]

The adoption of the 2001 Long-Term Vision was the prelude to the 2005 Scheldt Conventions. After years of negotiations, four 'new' Scheldt treaties were signed by the Netherlands and Flanders in 2005.[68] Among these treaties, the Scheldt

63 For more background information: "Sigmaplan bouwt aan een overstromingsveilig Vlaanderen," <https://www.sigmaplan.be/nl>, accessed 1 March 2025.

64 See also *infra*.

65 "Hedwige and Prosper Polders brochure," https://climate-adapt.eea.europa.eu/en/metadata/case-studies/a-transboundary-depoldered-area-for-flood-protection-and-nature-hedwige-and-prosper-polders/hedwige-and-prosper-polders_document_brochure.pdf, accessed 1 March 2025.

66 "Ontwikkelingsschets 2010 Schelde estuarium. Besluiten van de nederlandse en Vlaamse regering," https://vnsc.eu/publicaties/archief/ontwikkelingsschets-2010-schelde-estuarium-2/, accessed 1 March 2025, noted that a Bird and Habitat Assessment is an appendix to the Development Outline 2010 and is an integral part of it.

67 Ibid, 38–39.

68 The Treaty between the Kingdom of the Netherlands and the Flemish Community on policy and management in the Scheldt estuary, <https://wetten.overheid.nl/BWBV0003047/2008-10-01/>; the Treaty between the Kingdom of the Netherlands and the Flemish Region on the implementation of

treaty regarding the policy and management of the Scheldt estuary (hereinafter, the Scheldt Treaty) aims to achieve a common policy and corresponding common management in the Scheldt estuary with the objective of developing the Scheldt estuary as a multifunctional estuarine water system that shall be used in a sustainable manner for human needs.[69] Continuing what is discussed in the long-term vision, it is based on finding a balance between the three pillars of cooperation: providing maximum flood protection, ensuring optimal accessibility of the Scheldt ports, and maintaining a healthy and dynamic estuarine ecosystem.[70]

The 2005 Scheldt Treaty has a demarcated application, with Article 2 setting out the parts of the Scheldt River that fall under the treaty's geographical scope. The focus of the cooperation and the basis of the mandate is to ensure a balance between the pillars just mentioned. In this regard, cooperation between the Netherlands and Flanders takes shape through preparing, adopting, and implementing short- and medium-term plans and programs as well as concrete projects.[71] Cooperation in scientific research between the Netherlands and Flanders is also listed as one of the treaty's objectives.[72] Several organs were thus set up with the purpose of developing, implementing, and monitoring the treaty's objectives. The Flemish-Dutch Scheldt Commission[73] is the key operational organ, stimulating the cooperation between Flanders and the Netherlands in the policy and management of the Scheldt estuary.

A separate decision was established in 2014 to set up an advisory organ, the Scheldt Council,[74] shaping the involvement of external interested parties.[75] The rationale of the Scheldt Council is to stimulate and structure the participatory processes between interested parties and the Flemish-Dutch Scheldt Commission regarding the policies developed by the Commission for the Scheldt estuary.[76] Participation and advising in this context is considered a proactive process, the foundation of which lies in the creation of a joint fact base via a so-called

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the 2010 Scheldt estuary development plan, <https://wetten.overheid.nl/BWBV0003046/2008-10-01>; the Treaty between the Kingdom of the Netherlands and the Flemish Region on the termination of the interconnection of pilotage fees, <https://wetten.overheid.nl/BWBV0003049/2009-01-01>; and the Treaty between the Kingdom of the Netherlands and the Flemish Region on joint nautical management in the Scheldt area, <https://wetten.overheid.nl/BWBV0003048/2008-10-01>. All treaties were signed in Middelburg on 21 December 2005. References last accessed on 1 March 2025.

69 Article 3(1) of the 2005 Scheldt Treaty regarding the Policy and Management of the Scheldt estuary.

70 Article 3(2) of the 2005 Scheldt Treaty regarding the Policy and Management of the Scheldt estuary.

71 Article 3(4) of the 2005 Scheldt Treaty regarding the Policy and Management of the Scheldt estuary.

72 Article 3(5) in conjunction with Article 6 of the 2005 Scheldt Treaty regarding the Policy and Management of the Scheldt estuary.

73 Article 4 of the 2005 Scheldt Treaty regarding the Policy and Management of the Scheldt estuary.

74 Decision of the Political College of the Flemish-Dutch Scheldt Commission on the establishment and activation of the Scheldt Council (Establishment Decision of the Scheldt Council), <https://vnsc.eu/publicaties/archief/instellingsbesluit-schelderaad/>, accessed 1 March 2025.

75 The annex to the Establishment Decision of the Scheldt Council contains a list of its members.

76 Article 2 of the Establishment Decision of the Scheldt Council.

fact-finding process between the Commission and the Council.[77] This mechanism is used to avoid discussions on facts in decision-making processes. As mentioned, it follows from the treaty text that the focus is on cooperation between Flanders and the Netherlands to ensure balancing the management of flood protection, accessibility and a healthy and dynamic estuarine ecosystem. It is not in the mandate of the Commission and other organs to regulate pollution. Stakeholders, however, are increasingly dealing with the effects and impacts of pollution, such as the occurrence of PFAS in dredging grounds or disruption due to nitrogen deposition. While the main impacts are on health and the environment, they can also have practical impacts for the stakeholders in the Scheldt estuary, such as project delays.

2.4 First waves of litigation with cross-border implications

The designation of large swaths of the Scheldt estuary also implied increased scrutiny when authorizing impactful intervention in the vicinity of these protected sites. When doing so, the substantive protection duties set out in Article 6(3) of the Habitats Directive, focused on avoiding significant harm to natural habitats when authorizing new plans and projects, provide a binding and relatively strict benchmark, with a clear focus on the long-term preservation of the integrity of the Natura 2000 site. A precautionary approach is to be applied when authorizing potentially impactful works.[78] If damage cannot be avoided, impactful works can only go through after having obtained a derogation in line with Article 6(4) of the Habitats Directive. In this context, an alternative assessment is mandatory, while proactive compensation measures also need to be provided. Most of the port-related works framed in the above-mentioned policy instruments were subsequently challenged by environmental organizations and/or inhabitants of nearby villages in court.

Thus, the potency of Article 6(3) and (4) of the Habitats Directive became very tangible in the court decisions of the past two decades, with significant transboundary implications. This became first visible in the context of the previous expansion of the port area of Antwerp, in particular when constructing the Deurganckdok at the turn of the 21st century. These construction works were initially halted by the Belgian Council of State in 2002 because the proposed compensation actions did not meet the standards of Article 6(3) and (4) of the Habitats Directive.[79] To salvage the project, the Flemish Parliament had to adopt a so-called emergency decree that declared the works of overriding public interest and included 1,200 ha of offset actions.[80] Legal challenges against the emergency decree were dismissed by the Constitutional Court in the following years.[81]

77 Article 8 of the Establishment Decision of the Scheldt Council.

78 Case C-127/02, *Waddenzee*, ECLI:EU:C:2004:482, para. 56–59.

79 Belgian Council of State, 30 July 2002, no. 109.563.

80 Flemish Decree of 14 December 2001.

81 See amongst others: Belgian Constitutional Court, 2 July 2003, no. 2003/94.

A new round of litigation was kicked off when the permits for the deepening of the Scheldt estuary were granted by the competent Flemish and Dutch authorities between 2007 and 2009.[82] As underscored, these dredging works constituted an essential component of the bilateral agreement between Flanders and the Netherlands, as they were key for the further economic development of the Port of Antwerp. Whereas these decisions had been subject to a prior EIA and an appropriate assessment, the necessary Dutch authorizations were attacked in court by several Dutch NGOs. The president of the Dutch Council of State decided to temporarily suspend the permit in 2009 because the further deepening of the Westerscheldt could significantly affect the vulnerable habitats in the estuary. In the end, the president found that a risk of further deterioration could not be reasonably excluded, rendering the permit illegal in light of Article 6(3) of the Habitats Directive.[83]

The 2009 decision of the Dutch Council of State to suspend the dredging works caused outrage in Flanders. Some politicians even advocated boycotting the import of Dutch products, such as mussels, to force Dutch authorities to comply with their duties laid down in the 2005 Scheldt Treaty on the implementation of the 2010 Scheldt estuary development plan.[84] In light of the significant impact of the ruling of the Dutch Council of State on the operationalization of the 2010 Ontwikkelingsschets and the increasing diplomatic tensions, however, a subsequent deal was struck between the Dutch authorities and the environmental NGOs that had initially challenged the permits. In the meantime, the Dutch government had decided to reassert its decision to 'depolder' the Hedwigepolder. While this nature restoration project was included in the 2005 Scheldt Treaty on the implementation of the 2010 Scheldt estuary development plan, in which the Netherlands agreed to develop at least 600 ha of estuarine natural areas on Dutch territory, the Dutch government had wavered and hesitated to push forward with the project seeing the increased societal protest, especially from farmers and landowners, against the nature restoration ambitions. Partly also pressured by the Flemish government, the Dutch government gave in and operationalized this large-scale wetland recovery program. When the environmental NGOs dropped out, the final challenges against the dredging permits were dismissed by the Dutch Council of State in 2010.[85] The same court also rejected the legal challenges against the depoldering decisions, which aimed to restore estuarine wetlands in the Hedwigepolder in the Netherlands in 2014.[86]

82 For more details: Schoukens et al. (n. 26).

83 Dutch Council of State, 28 July 2009, ECLI:NL:RVS:2009:BJ4587.

84 2005 Treaty between the Kingdom of the Netherlands and the Flemish Region on the implementation of the 2010 Scheldt estuary development plan, available at: <https://wetten.overheid.nl/BWBV0003046/2005-12-21>. In describing the projects and works to be realized, Article 3 mentions the development of an intertidal area of at least 440 ha in the Hedwigepolder.

85 Dutch Council of State, 13 January 2010, nos. 200806565/1, 200903364/1, 200903365/1 and 200903367/1.

86 Dutch Council of State, 12 November 2014, ECLI:NL:RVS:2014:4074.

A third and last wave of legal actions centered around the 1,000-ha expansion of the Port of Antwerp northwards towards the Dutch border.[87] This expansion included the construction of a new large-scale tidal dock, called the Saeftinghe Dock, to be built where the Flemish village of Doel is now located. Even though a large-scale nature restoration program was linked to the planning permits, the inhabitants of Doel nevertheless succeeded in blocking the project. In 2017, the Belgian Council of State, after having referred several questions for a preliminary ruling to the Court of Justice of the EU (CJEU),[88] held that future restoration actions could not be used as an argument to offset damage to an existing Natura 2000 site in the context of an appropriate assessment.[89] As a result, the planning permit was quashed since it could not offset the damage to existing wetlands with a reference to future restoration actions.[90] This 2017 ruling was a major setback for the Port of Antwerp, which framed this new expansion round as indispensable in order to keep up with its rival ports in Europe.

A new attempt to relaunch the building program in the context of a more participatory legislative framework[91] originally fared little better. In 2021, the Auditor at the Belgian Council of State proposed to annul the new planning decision, among other reasons, because the transboundary nitrogen emissions, which would adversely affect Dutch Natura 2000 sites, had not been properly taken into consideration in the newly appropriate drafted assessment.[92] In the new legal proceedings before the Belgian Council of State, it was also argued that no attention had been paid to the climate change-related impacts, among others, in light of the massive land-use change to which the project would lead. After fresh negotiations between the inhabitants of Doel and representatives of the Flemish government, the expansion project was modified at important points. The village of Doel would continue to exist as the tidal dock would be slightly reduced in size, and its location was partially changed.[93]

3. The emergency of new pollution challenges in Flanders

As has become clear from the previous section, the impressive track record of the cross-border management schemes in the context of the Scheldt estuary, for instance in the context of nature restoration and water quality management, has so far not resulted in a comprehensive reboot for the vulnerable habitats and species

87 See in more detail: Schoukens (n. 25).

88 Cases C-387/26 and C-388/15, *Orleans*, ECLI:EU:C:2016:583.

89 Belgian Council of State, 12 May 2017, no. 238.186.

90 Ibid.

91 The so-called 'complex projects decree': Flemish Decree of 25 April 2014 regarding Complex Projects.

92 See "Vertraging geeft Antwerpen slechte kaarten voor de toekomst," *De Tijd* (29 March 2022) <https://www.tijd.be/ondernemen/logistiek/vertraging-geeft-antwerpen-slechte-kaarten-voor-de-toekomst/10308203.html>, accessed 11 October 2024.

93 Ibid.

in the area. A considerable number of habitats and species are still in a moderate to unfavorable conservation status, partially due to the recurring deepening works needed to guarantee the accessibility of the Port of Antwerp and the recent expansion works. However, whereas direct habitat loss turned out to be a crucial benchmark in the above-mentioned court decisions regarding dredging and expansion works, new environmental challenges were looming around the corner, as was evidenced by several 'crises' that took place in Flanders during the past five years. Many of these crises focused on cases of indirect pollution with cross-border impacts.

3.1 The Flemish and Dutch nitrogen crisis (2019–2021): a new obstacle to the port's expansion?

The first pollution-related challenge was provided by nitrogen. Together with the Netherlands, Flanders is often described as the 'nitrogen hotspot' in Europe, with reference to the high number of critical load exceedances in many sections of its territory. As of 2023, the average atmospheric nitrogen deposition level in Flanders is 23 kg per ha per year. These elevated levels are, to a large extent, linked to the high numbers of livestock present in Flanders. In 2023, the total pig population in Flanders amounted to approximately 5 million, while the cattle population stands at approximately 1 million heads. The poultry population in Flanders is also expanding, standing at nearly 40 million.[94] While nitrogen emissions have significantly dropped, largely thanks to stricter manure management, the past two decades have seen stagnation. This is especially the case in the context of ammonia emissions caused by farming, whereas the emissions of nitrogen oxides caused by traffic and industry continue to decrease.[95] In the majority of the Flemish Natura 2000 sites, the high deposition levels constitute an important obstacle to achieving conservation objectives.[96] The same findings apply to the Netherlands, the second biggest agricultural exporter in the world.[97]

This overload of nitrogen has a concrete impact on the Scheldt estuary. Water quality in the Flanders countryside, including in the catchment area of the Scheldt River, is still deteriorating instead of improving: fertilization remains a seminal problem, even in light of the Nitrates Directive.[98] At the Flemish level, the standard for nitrate was exceeded in a quarter of the watercourses examined. The amount of

94 For more background on the precise facts and figures in the Flemish context, see H. Schoukens (ed.), *De stikstofcrisis in de Lage Landen nader ontleed: richtlijnen voor een duurzame transitie* (die Keure 2023).

95 Ibid.

96 Ibid.

97 For a comparative analysis, see: H. Schoukens, "The ruling of the CJEU in the Dutch nitrogen case and the limits to growth: No longer borrowing from the future when granting permits for activities in the context of degraded ecosystems," in D. Misonne and M.-S. de Clippele (eds.), *Les Grands Arrêts Inspirants du Droit de l'Environnement* (Larcier Intersentia 2024) 30–51.

98 "Nitraat in grondwater," *vlaanderen.be* <https://www.vmm.be/water/grondwater/nitraat-in-grondwater>, accessed 1 March 2025.

nitrate in the groundwater has also risen again to the highest level since 2010. The main culprit remains the fertilization of Flemish fields.[99]

In Flanders more generally, the most significant pressure on rivers and groundwater bodies comes from diffuse agricultural sources for nitrogen and from diffuse agriculture and household sources for phosphorus. The nitrogen balance decreased between 2000 and 2015 from 190 to 132 kg/ha, and the phosphorus balance went down from 20 to 5 kg/ha during the same period. Even so, the threshold values of both the Water Framework Directive and the Nitrates Directive have not been met.[100]

The issue of elevated nitrogen levels also arises in the context of the Scheldt estuary, as many of the Dutch Natura 2000 sites located close to the estuary suffer from an overload of atmospheric nitrogen deposition, which might represent an important obstacle for future expansion projects in the (nearby) Port of Antwerp.[101] Even when these projects might in themselves only lead to a minor contribution in terms of nitrogen deposition, the elevated levels in the protected sites render further additions problematic from a legal perspective, among others, in light of Article 6(2) and (3) of the Habitats Directive. The water quality of the Scheldt River has also not reached the required standards set forth in the Water Framework Directive. Future economic developments might face a tougher legal benchmark as a result of the limited progress made during the past decade in terms of reducing nitrogen pollution, especially in light of the continued expansion of livestock in the areas surrounding the Scheldt estuary.

3.2 The forever chemicals scandal in Zwijndrecht (2021) and its backlash

As alluded to in the introduction, the massive levels of PFAS have become a major cause for concern in the Port of Antwerp area in the past decade.[102] Until 2020, however, relatively little information had been disclosed about the true scale and nature of the soil and water pollution caused by these so-called 'forever chemicals'. In the spring of 2021, new PFAS-related information became accessible to the wider public, and as a result, PFAS-related pollution turned into a major environmental challenge in Flanders, in particular in the areas surrounding the Port of Antwerp. At the center of much of the controversy of the past years is the Oosterweel Link Infrastructure Project – a proposed subterranean tunnel that would connect the ends of the R1, Antwerp's not-quite-ring road. This tunnel would run near a 3M plant in Zwijndrecht, Flanders, that, until 2002, produced the

99 Ibid.

100 See *supra*.

101 "Antwerpse havenuitbreiding in houdgreep door stikstof chaos," *De Tijd* (27 July 2023) <https://www.tijd.be/politiek-economie/belgie/vlaanderen/antwerpse-havenuitbreiding-in-houdgreep-door-stikstofchaos/10482816.html>, accessed 1 March 2025.

102 PFAS is a collective name and stands for per- and polyfluoroalkyl substances. This group of chemical substances is man-made and does not occur naturally in the environment. PFAS can have a negative effect on the environment and health.

chemical perfluorooctanesulfonic acid (PFOS), a forever chemical used in hydrophobic coatings that is almost impossible to eradicate from soil, water, and the human body.[103] This plant contaminated the ground with PFOS, and although 3M (a chemical company) stopped producing PFOS in 2002, its long-standing impacts were soon revealed in the monitoring of the surface and groundwater in the area.

In the summer of 2021, it became clear that much of the soil tested directly above the tunnel's path contained more than 3 micrograms of PFOS per kilogram of dirt, a level the regional Flemish government considers a health risk. Near the end of the tunnel closest to 3M's facilities, the soil exceeds 300 micrograms in places. In addition, a question arose as to how to deal with the soil that had already been transported and moved. Initially, the contaminated soil was to be assembled into a 21-foot-high 'security wall'. In 2023, it emerged from the Forever Pollution Project[104] that Belgium, particularly Flanders, is home to the highest levels of PFAS pollution, with groundwater concentrations of up to 73m ng/l found around 3M's PFAS manufacturing site in Zwijndrecht.[105]

It also became obvious that 3M was not ready to disclose all its information regarding PFAS-related pollution or cooperate in its remediation, as was highlighted in September 2023 when some production processes at 3M were temporarily halted by the Flemish enforcement authorities following the detection of illegal PFAS emissions.[106] In the meantime, the Flemish authorities implemented precautionary measures, so-called 'no-regret measures', in the vicinity of the affected area: people living within 15 km of 3M were told not to eat any eggs laid in their gardens and to avoid homegrown vegetables. Additionally, 70,000 people living within a 5 km radius of the plant were offered a blood test to look for the presence of PFAS. Preliminary results from 2021 showed increased PFAS values in the blood of the immediate neighbors of the factory.[107] In 2022, 3M signed an agreement with the Flemish government, agreeing to invest the sum of €571 million for the remediation of the pollution in the affected site and compensation for the affected citizens and farmers.[108] Be that as it may, the high pollution levels continue to constitute an important challenge for both planning and permitting policies in

103 For more background information on PFOS: "How PFAS impacts your health," <https://www.atsdr.cdc.gov/pfas/health-effects/index.html>, accessed 1 March 2025.

104 "The Forever Pollution Project," <https://foreverpollution.eu/>, accessed 1 March 2025.

105 L. Hosea and R. Salvidge, "Belgium has highest levels of PFAS chemical pollution in Europe, study reveals," *Euractiv* (24 February 2023) <https://www.euractiv.com/section/chemicals/news/belgium-has-highest-levels-of-pfas-chemical-pollution-in-europe-study-reveals/>, accessed 1 March 2025.

106 "Illegal PFAS emissions detected at 3M, production halted," *The Brussels Times* (23 September 2023) <https://www.brusselstimes.com/705926/illegal-pfas-emissions-detected-at-3m-production-halted>, accessed 1 March 2025.

107 "PFAS-bloedonderzoek 2021," *vlaanderen.be* <https://www.vlaanderen.be/pfas-vervuiling/pfas-bloedonderzoeken-algemeen/pfas-bloedonderzoek-2021>, accessed 1 March 2025.

108 M. Torfs, "3M to pay 571 million in deal with Flemish government: 'We take our responsibility seriously'," *VRT* (6 July 2022) <https://www.vrt.be/vrtnws/en/2022/07/06/3m-to-pay-571-million-in-deal-with-flemish-government/> accessed 1 March 2025.

the Scheldt estuary, especially taking into account that a significant section of the pollution is flowing to a neighboring state through the Scheldt River and therefore is undoubtedly causing cross-border pollution.

3.3 Climate change in Flanders (2020–2024) and its legal implications for the management of the Scheldt estuary

Lastly, climate change is also a relevant benchmark in the context of the Scheldt estuary. In recent decades, the impact of climate change has slowly turned the Flemish Region into one of the driest in Europe, on a par with Southern Spain,[109] while recurrent floods gave rise to serious economic damage in many urban areas, including in the catchment area of the Scheldt River.

A sequence of intensive and consecutive droughts has put additional pressure on the existing aquifers, leading, *inter alia*, to a ban on farmers pumping water out of water courses to irrigate their fields.[110] Flanders is particularly vulnerable to drought since a large swath of its territory has been built up due to increasing urbanization, whereas the presence of intensive agricultural activities is leading to additional drainage of wetlands. In the spring of 2020, some consumers could barely get running water out of their taps in 14 communes of Flemish Brabant, despite a plea from the provincial governor for people to use water sparingly.[111] In 2017–2020, groundwater levels decreased in 57% of shallow measuring points.[112] Usually, reserves are replenished during the winter as a result of more continued rainfall, but this did not happen in recent years. Average annual temperatures have also been rising considerably, meaning more water evaporates. The presence of water-intensive farming and industry makes the situation even more dire since it compromises pathways to improvement. In 2019, 259 billion liters of groundwater were used: 65% went towards drinking water production, 20% in farming, and 12% in industry. The amount of groundwater used by industry has halved over the past two decades, partly because water is being reused. But in the agricultural sector, no significant improvements have been made.[113] So far, the autumn and winter of 2023–2024 have been a good period for groundwater levels, with

109 I. Renson, "Het land is droog, en daar kunnen we maar beter aan wennen," *De Standaard* (14 May 2022) <https://www.standaard.be/cnt/dmf20220513_97452775>, accessed 1 March 2025.

110 M. Torfs, "Restrictions imposed on farmers as water levels are low," *VRT* (21 May 2020) <https://www.vrt.be/vrtnws/en/2020/05/20/restrictions-imposed-on-farmers-as-water-levels-are-low/>, accessed 1 March 2025.

111 A. Hope, "Drought fears spread as tap water dries up in Flemish Brabant," *The Brussels Times* (22 May 2020) <https://www.brusselstimes.com/news/belgium-all-news/112951/drought-fears-spread-as-tap-water-dries-up-in-flemish-brabant>, accessed 1 March 2025.

112 W. Schepens et al., "Vlaanderen verliest groot deel watervoorraad; grondwaterstanden in 20 jaar tijd op 70% van de meetpunten gedaald," *VRT* (8 July 2021) <https://www.vrt.be/vrtnws/nl/2021/07/07/grondwaterstanden-in-vlaanderen-in-20-jaar-met-70-procent-gedaal/>, accessed 1 March 2025.

113 "Grondwaterverbruik," *vlaanderen.be* <https://www.vmm.be/water/grondwater/grondwaterverbruik>, accessed 1 March 2025.

exceptional amounts of rainfall during the first six months of the year. However, in recent years, periods of prolonged drought are no longer exceptional. The spring of 2022 was exceptionally dry, with March 2022 being the driest March since records began in 1833.[114]

These consecutive periods of drought are interjected by periods with intense precipitation, leading to massive flooding. A few years after the deadly 2021 floods in the valley of the Vesder River, which killed 43 people in Wallonia,[115] Flanders was hit by massive flooding – thankfully on a much smaller scale. Hundreds of houses in the valley of the Dender River, the right tributary of the Scheldt River, suffered serious damage as a result of massive flooding at the start of 2024.[116] These repeated floods in the catchment area of the Dender River pushed the Flemish government to decide in May 2024 to expropriate the owners of 90 houses, which will have to be destroyed in order to create more room for the river.[117]

While climate change is generating global impacts, its effects are, of course, also felt at the local level. In general, it is clear that climate change and sea-level rise put considerable strain on the fundamental premises upon which the flood protection measures, compiled in the 2005 Sigmaplan and the 2005 Scheldt Treaty, were built. Accordingly, the Flemish-Dutch Scheldt Commission requested the development of the Long-Term Nature Perspective (LTP-N). In 2023 and 2024, stakeholders provided input in this guidance document that allows the Commission to work in balance with nature in all its interventions. In defining what a robust and resilient nature is, stakeholders underline the aspect that nature is resilient to climate change and human pressure factors.

The Flemish-Dutch Scheldt Commission also uses the LTP-N to recalibrate the Long-term Vision 2030 for the Scheldt estuary. This recalibration offers the possibility to use the long-term perspectives currently being drawn up for nature, accessibility, and water safety regarding integral area concepts for the estuary's climate-proof and sustainable development. For now, it is clear that additional flood protection measures are to be considered after 2030 to deal with the increased impacts related to rising sea levels and climate change. However, as will be outlined in the next section of this chapter, climate change-related arguments also present themselves as ever stricter benchmarks for economic projects in the context of the Scheldt estuary.

114 C. Clapson, "Rainwater shortage already at 1976 levels," *VRT* (18 May 2022) <https://www.vrt.be/vrtnws/en/2022/05/18/rainwater-shortage-already-at-1976-levels/>, accessed 1 March 2025.

115 M. Torfs, "Death toll climbs to 37, over 12,000. Verviers and Pepinster residents need to find a new home," *VRT* (22 July 2021) <https://www.vrt.be/vrtnws/en/2021/07/22/12-000-verviers-and-pepinster-residents-need-to-find-a-new-home/>, accessed 1 March 2025.

116 "Belgium inundated by floods in early 2024 (photos)," *The Brussels Times* <https://www.brusselstimes.com/860658/belgium-inundated-by-floods-in-early-2024-photos-tbtb>, accessed 1 March 2025.

117 S. Van Chaze, "Vlaamse regering wil 90 gebouwen opkopen in Denderstreek om waterlast tegen te gaan," *VRT* (31 May 2024) <https://www.vrt.be/vrtnws/nl/2024/05/31/huizen-denderstreek-onteigenen/>, accessed 1 March 2025.

4. Recent litigation trends in Flanders: taking cross-border litigation to the next level?

The above-featured environmental challenges are gradually trickling down in the case-law developments regarding the further management and economic development of the Scheldt estuary. Whereas the first generation of legal challenges against economic-related developments in the estuary primarily focused on direct impacts on existing habitats, such as habitat loss as a result of expansion works or dredging activities, more recent legal proceedings also take aim at indirect impacts related to elevated levels of nitrogen deposition, persistent pollutants, and climate change-related impacts.

4.1 Nitrogen-related case law: the INEOS ruling as a game changer for cross-border pollution?

In light of the excess nitrogen deposition in many Flemish and Dutch Natura 2000 sites, the nitrogen-related impacts of project developments have become an increasingly important benchmark to be considered when authorizing planning permits in both the Netherlands and Belgium. The CJEU's 2018 landmark judgment on the compatibility of the Dutch programmatic approach to nitrogen (*programmatische aanpak stikstof*, PAS) with Articles 6(2) and (3) of the Habitats Directive set a strict standard for permitting policies in Natura 2000 sites that already have excessive levels of nitrogen deposition.[118] The CJEU favored a more programmatic approach to elevated levels of nitrogen deposition in the context of Natura 2000 sites, yet it stressed that the strict substantive requirements set out by Article 6(3) of the Habitats Directive need to be complied with.[119] No borrowing from the future is allowed. Against this backdrop, the CJEU underscored that the Dutch programmatic approach was anticipating the future benefits of reduction and restoration actions that have not yet been executed when new, additional nitrogen deposition is permitted.[120] This ultimately led the Dutch Council of State to invalidate the premises of the Dutch programmatic approach.[121] This jurisprudence prompted a permit freeze in the Netherlands, as the justification for granting permits for new nitrogen deposition had disappeared altogether. Thousands of building projects and livestock expansions had to be stalled, causing societal unrest and protests.[122]

With some delay, a similar scenario also unfolded in Flanders. Since 2019, the Flemish administrative courts have expressed doubts as to the compatibility of the Flemish preliminary permitting schemes applied to assess the acceptability of the nitrogen loads for Natura 2000 sites.[123] Among others, the threshold values used

118 Case C-293/17, *Coöperatie Mobilisation for the Environment UA*, ECLI:EU:C:2018:882.
119 Ibid, para. 97.
120 Ibid, para. 125–130.
121 Dutch Council of State, 29 May 2019, ECLI:NL:RVS:2019:1063.
122 Schoukens (n. 94).
123 See more extensively Schoukens (n. 97).

in the context of the Flemish nitrogen permitting schemes assumed that nitrogen depositions that made a contribution of no more than 5% to the critical deposition value for the impacted natural habitats were lawful by definition. For such activities, no prior appropriate assessment was even needed. In a first ruling in 2019, the Flemish Council for Dispute Settlements annulled a permit for the expansion of a livestock farm located close to the Dutch border. A Dutch provincial authority initiated an annulment procedure against this permit since it deemed the additional nitrogen impacts on a nearby Dutch Natura 2000-site unacceptable in light of Article 6(3) of the Habitats Directive. In other words, the nitrogen crisis gave rise to discussions about cross-border pollution between Flanders and the Netherlands. The Flemish court ultimately sided with the Dutch authority and annulled the permit in what is to be considered the first example of cross-border litigation in the context of nitrogen deposition.[124] The final blow to the Flemish nitrogen policy on permitting was given two years later when it was finally struck down by a ruling of the Flemish Council for Dispute Settlements on 25 February 2021. With reference to the 2018 decision of the CJEU on the Dutch programmatic approach, the Flemish Council for Dispute Settlements held that the Flemish permitting schemes were not grounded in sound science.[125] Not only did they lack any proper scientific backing, but the Flemish authorities also did not provide the necessary evidence to rule out the risk of a death-by-a-thousand-cuts scenario. It could not be demonstrated that the accumulation of the exempted nitrogen loads, which, individually, did not exceed the applicable threshold value, was not capable of generating significant impacts on Natura 2000 sites in Flanders.[126]

However, seeing that the approval of stricter permitting rules in Flanders led to a prolonged political crisis, several other permits for building projects were annulled by several administrative courts in light of their additional nitrogen impact on overloaded Natura 2000 sites.[127]

Even so, the recent litigation spurred by the permit handed out by the Flemish government to INEOS for its Project ONE ethane cracker in the Port of Antwerp serves as a remarkable illustration of the cross-border impact of nitrogen deposition. The case revolved around the building and exploitation of a new ethane cracker located close to Dutch Natura 2000 sites, which generated considerable contestation. Many high-ranking politicians in Flanders welcomed INEOS's €3 billion plastics project, whereas several environmental NGOs as well as the Dutch authorities objected to it. Next to climate change-related concerns, the latter were of the opinion that the additional nitrogen impacts on Dutch Natura 2000 sites, including the Drowned Land of Saeftinghe, located at the heart of the Scheldt estuary, rendered the project illegal in light of Article 6(3) of the Habitats Directive.

124 Flemish Council for Dispute Settlement, 5 November 2021, no. RvVb/A/1920/0220.
125 Flemish Council for Dispute Settlement, 25 February 2021, no. RvVb/A/2021/0697.
126 Ibid.
127 Schoukens (n. 94).

The Dutch authorities argued that the amount of nitrogen that was allowed to be emitted was tens of times higher than the applicable threshold in the Netherlands. At the request of the Dutch province of North Brabant, the Flemish Council for Permit Disputes annulled the permit for what was to become the first new European methane cracker in decades. In its ruling of July 2023, the Council used Article 6(3) of the Habitats Directive as the main benchmark to annul the permit, siding with the Dutch authorities' rationale. In doing so, the Council refused to apply the nitrogen thresholds that were present in Flemish soft law documents, among others, the 1% threshold, holding that minor deposition can also cause significant damage to ecosystems already overloaded with nitrogen, as was the case with the Dutch Natura 2000 site of the Brabantse Wal, located on the outer edge of the Scheldt estuary.[128] In any case, the rationale used in the available appropriate assessment was considered flawed in light of the importance of avoiding negative cumulative effects. Specific attention had to be directed to the effects of added additional nitrogen, even at limited levels, in an ecosystem where the critical loads had already been surpassed.[129]

This 2023 decision of the Flemish Council for Permit Disputes[130] caused quite a stir in Flemish politics. It was a remarkable precedent, especially since it tackled nitrogen deposition from a cross-border perspective. A flagship project of the Flemish government – located in the heart of the Port of Antwerp – was halted because of a court action launched by Dutch local authorities. This seemed to clash with the long-standing cooperative approach that had prevailed in the context of the management of the Scheldt estuary. From a legal perspective, the 2023 ruling is not groundbreaking at first glance. In line with the case law of the CJEU on Article 6(3) of the Habitats Directive, authorities can only exempt small-scale effects on Natura 2000 sites from a more in-depth assessment when they have sound scientific evidence that no adverse impacts on the integrity of the site can arise.[131] Nevertheless, the indirect effect of the ruling is that in a context of cross-border nitrogen-related impacts, the Dutch impact assessment rules apply when permitting impacts generated by an activity located on Flemish territory on Dutch Natura 2000 sites. In the case law of the Dutch Council of State, it had already been accepted that Dutch authorities could use German and Flemish assessment rules when authorizing nitrogen-related cross-border impacts on German and Flemish Natura 2000 sites.[132] The rationale is that Dutch law does not apply to German territory, so the effects of nitrogen deposition on, e.g., German Natura 2000 sites should be assessed according to the standards applicable in Germany.[133] However, the German nitrogen standards were less stringent than the Dutch rules, thereby mostly not constituting an obstacle to granting permits in the Netherlands.

128 INEOS-ruling (n. 30).
129 Ibid.
130 Ibid.
131 See for instance MOB-ruling (n. 118), para. 109–113.
132 See for instance Dutch Council of State, 16 April 2014, ECLI:NL:RVS:2014:1312.
133 See the Hague District Court, 18 April 2024, ECLI:NL:RBDHA:2024:5519

In contrast, applying Dutch permitting rules when authorizing economic activities in the (Flemish) Port of Antwerp might seriously contain the development options in Flanders since they are stricter than the Flemish standards.[134]

In the wake of the 2023 INEOS ruling,[135] the Flemish Parliament adopted a new piece of legislation, the so-called Nitrogen Decree (*Stikstofdecreet*),[136] implementing the programmatic approach that had already been approved in the seat of the Flemish government in March 2023.[137] This programmatic approach included a set of binding reduction actions aimed at reducing nitrogen depositions in Flanders by 50% with a specific focus on limiting the ammonia input from the livestock sector. However, INEOS did not wait for the entry into force of this legislation to introduce a new application for its ethane cracker.[138] By the end of 2023, a new – 800-page-long – appropriate assessment was produced with explicit attention to the cross-border impact on the Dutch Natura 2000 sites. The assessment concluded that the project depositions would not lead to a meaningful degradation of the natural features of the relevant Nature 2000 sites in Flanders and the Netherlands. New appeals were launched, including by Dutch environmental NGOs and authorities, thereby launching another round of cross-border litigation focused on the benchmark to be used when authorizing economic developments that impact already overburdened Natura 2000 sites. It remains to be seen whether the Flemish administrative court will once again side with the arguments of, among others, Dutch provincial authorities when adjudicating the acceptability of the transboundary nitrogen-related impacts. In the meantime, the province of Zeeland entered into talks with INEOS to find solutions that would allow Project ONE to go ahead while providing assurances that the natural features of the affected Natura 2000 sites will not be affected. However, in the summer of 2024, it emerged that the province of North Brabant would appeal the new permit issued for Project ONE, ensuring a continuation of the ongoing courtroom battles.

4.2 Climate litigation at the national level: a binding benchmark when authorizing new economic developments in the Scheldt estuary

As already illustrated by the INEOS litigation discussed above, climate-related arguments are also being increasingly relied upon in the context of the legal proceedings against economic development in the Scheldt estuary. For instance, in the recently launched new legal challenges against the permit of the INEOS factory, it is explicitly argued that the CO_2 emissions that will be generated by the ethane

134 See also *supra*.

135 INEOS-ruling (n. 30).

136 Decreet over de programmatische aanpak Stikstof, 26 January 2024.

137 "Stikstof in Vlaanderen," *vlaanderen.be* <https://www.vlaanderen.be/stikstof-in-vlaanderen>, accessed 1 March 2025.

138 C. Michiels, "Ineos doet nieuwe poging voor vergunning ethaankraker in Antwerpen," *VRT* (12 October 2023) https://www.vrt.be/vrtnws/nl/2023/10/12/ineos-nieuwe-vergunning-antwerpen-stikstof/, accessed 1 March 2025.

crackers, including the scope 3 emissions (downstream) related to the shale gas used in its installations, are not acceptable in line with international and EU climate commitments.[139] Scope 3 emissions include 'all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas'.[140]

Such litigation strategies are not chanceless by definition. For one, in the autumn of 2023, several Belgian authorities were condemned for their lack of adequate climate mitigation policies. In a case filed in 2014 by an organization of concerned citizens, the Court of Appeal of Brussels, in its judgment of 30 November 2023, held that, with regard to the current Belgian climate policy and in view of its commitments to emissions reductions for 2020 and 2030, the Belgian State, the Flemish Region and the Brussels-Capital Region had violated Articles 2 and 8 of the European Convention of Human Rights (ECHR), which encompass the right to life and the right to respect for family life.[141] In doing so, the Brussels Court of Appeal reasoned that, even though climate change is a global phenomenon, Belgium internationally committed itself to do its share by ratifying the UN climate agreements. The failure to come forward with adequate climate mitigation plans also constituted a fault in light of Belgian tort law. This rationale is a copy-paste of the ruling of the Dutch Supreme Court in *Urgenda*, in which the Dutch government was found liable for not stepping up its climate mitigation efforts towards 2020.[142] As compensation for the harmful consequences of the breaches observed, some of which had already occurred, as well as to prevent the occurrence of future and certain damage and ensure the effectiveness of the protection duties enshrined in Articles 2 and 8 of the ECHR, the Brussels Court of Appeal issued an injunction to the Belgian State, the Flemish Region and the Brussels-Capital Region to take, after consultation with the Walloon Region, the appropriate measures to do their part in the reduction in the overall volume of annual greenhouse gas emissions from the Belgian territory of at least 55% in 2030 compared to 1990 (according to

139 S. Laville and L. O'Carroll, "Belgium: ClientEarth lodges legal challenge to halt new petrochemical plant by Ineos," *Business & Human Rights Resource Centre* (22 February 2024) <https://www.business-humanrights.org/en/latest-news/belgium-clientearth-lodges-new-legal-challenge-to-halt-new-petrochemical-plant-by-ineos/>, accessed 1 March 2025.

140 This definition is provided by the Greenhouse Gas Protocol, <https://www.wri.org/initiatives/greenhouse-gas-protocol>, accessed 1 March 2025. This reference has been used in case law, e.g., the Hague District Court ECLI:NL:RBDHA:2021:5339 (*Milieudefensie et al. v Royal Dutch Shell*). The judgment by the Court of Appeal of 12 November 2024 (ECLI:NL:GHDHA:2024:2100) acknowledged that while Shell may have obligations to reduce its scope 3 emissions, this cannot lead to the award of the claim by Milieudefensie et al. on this point (reducing CO2 emissions by 45% or any other percentage). For further discussion see e.g., A. Nollkaemper, "Lessons of a Landmark Lost," *Verfassungsblog* (12 November 2024) <https://verfassungsblog.de/shell-milieudefensie-climate-litigation/>, accessed 1 March 2025.

141 Brussels Court of Appeal, 30 November 2023, *vzw Klimaatzaak vs Belgian federal State et al* (hereafter: Klimaatzaak-decision).

142 *Urgenda Foundation v State of the Netherlands*, ECLI:NL:GHDHA:2018:2591.

EU law, Belgium has to reduce its emissions in non-ETS sectors by 47% compared with its 2005 emissions by 2030).[143]

Although the Flemish government decided to appeal the ruling before the Cour de Cassation, it has become clear that the margin for authorizing fossil projects in Flanders has been relatively limited since this decision. This might also play a determinative role at the permit level since recent case-law developments indicate that climate change-related arguments are also to be considered when drafting EIAs for economic developments.[144] So-called scope 3 emissions, i.e., all other indirect emissions an organization is responsible for in its value chain, are to be considered, as indicated by some recent judicial decisions of the UK Supreme Court[145] and the District Court of Oslo[146] from the first half of 2024.

In this emerging case law, it seems increasingly accepted that scope 3 emissions, linked, for instance, to combustion emissions and/or emissions linked to products used in a subsequent production process, also need to be included in an EIA for fossil fuel-based projects, such as oil development projects and gas fields. These jurisprudential evolutions might be especially significant in port areas, where many large-scale industrial plants with significant carbon footprints are located. They might indeed tighten up the leeway when granting permits for further expansion.

In Flanders, an influential ruling of the Belgian Council of State dealing with large-scale deforestation of 100 ha to create a new sand extraction site indicates that climate change-related interests are not to be ignored when authorizing planning permits.[147] In this case, specific attention was paid to the legal duties of Flanders in the context of the EU LULUCF-Regulation,[148] which is designed to tackle the greenhouse gas emissions linked to land use and land use change and limit future emissions in this regard. However, since a lot of the expansion of the Port of Antwerp is taking place in former wet- and peatlands, one might equally raise the question of whether the future CO_2 emissions that will be released as a result of future economic developments have been accounted for. In the Netherlands, for instance, a local court held that the impacts of new CO_2 emissions need to be taken into account in an appropriate assessment for a new industrial installation since they will contribute to global warming. In turn, global warming might also impact

143 Klimaatzaak-decision (n. 141).

144 See also H. Schoukens, "Project review, fossil infrastructure and climate change: The Flemish petrol station case as unexpected breakthrough," in I. Alogna et al. (eds.), *Climate Change Litigation in Europe* (Intersentia 2023) 287.

145 UK Supreme Court, 20 June 2024, R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others, UKSC 20.

146 Oslo District Court, 18 January 2018, no. 23-099330TVI-TOSL/05.

147 Belgian Council of State, 4 July 2023, no. 257.052.

148 Regulation (EU) 2023/839 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review [2023] OJ L 107, 1–28.

low-lying Natura 2000 sites in the Netherlands, the court held.[149] This rationale also applies when it comes to many protected marshlands in the Scheldt estuary, such as the Drowned Land of Saeftinghe. It goes without saying that the same conclusion also applies to the importance of climate adaptation, which is instrumental to preparing the Scheldt estuary for a warmer climate and protecting its citizens against future floods and inundations. Accordingly, even while climate change is rightly characterized as a global environmental challenge, its local effects increasingly trickle down in the decision-making procedures regarding the Scheldt estuary.

4.3 PFAS-based legal proceedings: cross-border pollution and the lack of a level playing field?

In the wake of the PFAS scandal in June 2021, which revealed that citizens and NGOs were not adequately informed about the high PFAS levels in the vicinity of the 3M factory in Zwijndrecht, near the Port of Antwerp, it gradually became clear that the pollution also had significant cross-border impacts. Beyond the immediate effects on the nearby villages, the wider ecosystem of the Scheldt estuary was also impacted. The 3M plant is located a stone's throw from the Scheldt River, which flows into the Netherlands 15 km away. After it became clear that 3M was allowed to discharge PFAS into the Scheldt at a quantity hundreds of times more than was permitted in the Netherlands, the Dutch province of Zeeland expressed its concern. Because PFAS accumulates in nature, the PFAS levels in fish in the Westerscheldt exceed the applicable Dutch safety norm by 800 times.[150] In 2022, Flemish authorities revealed that no less than 66 Flemish enterprises, mostly located in the vicinity of the Port of Antwerp, are, legally speaking, allowed to discharge PFAS in accordance with their applicable environmental permits. These findings urged the Flemish authorities to revise 27 of these permits and include stricter discharge norms.[151] Legislative changes were set in motion in order to revise the older permits so as to reduce the amount of PFAS that is allowed to be discharged into the Flemish side of the Scheldt estuary.[152] A new permit application from 3M's side to include a specific discharge restriction for short-chain PFAS was rejected by the competent authorities.[153]

While the provincial authority of Zeeland repeatedly issued its concerns regarding the leniency when authorizing PFAS discharges in Flanders and the Dutch government put 3M in default for the PFAS damage the plant caused in the

149 Court of Oost-Brabant (8 December 2021), ECLI:NL:RBOBR:2021:6389.

150 "Niet alleen in de oostkant van de Westerschelde zit er PFAS in vis," *Omroep Zeeland* (13 March 2024) <https://www.omroepzeeland.nl/nieuws/16355664/niet-alleen-in-oostkant-van-de-westerschelde-zit-er-pfas-in-vis>, accessed 1 March 2025.

151 "Pijler 3: omgevingsvergunning en toezicht," *vlaanderen.be* <https://www.vlaanderen.be/pfas-vervuiling/pfas-aanpak-regio-zwijndrecht/pijler-3-omgevingsvergunning-en-toezicht>, accessed 1 March 2025.

152 Ibid.

153 Ibid.

Westerscheldt with a letter,[154] no court cases based on cross-border PFAS pollution have been identified so far. In the meantime, however, several concerned citizens and NGOs tried to halt the further construction of the tunnel in light of the PFAS-related impacts on the immediate environment. By its decisions of 29 December 2021 and 19 April 2022, the Council of State ordered the suspension of several conformity statements (*conformverklaringen*) and permits needed for the disposal and transportation of the excavated contaminated soil on the construction site (*grondverzettoelatingen*).[155] One of the legal arguments put forward by the NGOs in these court proceedings was linked to the risk of the further spreading of PFOS contamination due to the transportation of the excavated soil and through the groundwater. The applicants argued, *inter alia*, that the use as soil of excavated soil containing between 3 and 47 µg/kg ds sum of PFAS causes further pollution of already contaminated groundwater. The defendants countered that this use of soil in already contaminated groundwater could not cause 'additional' contamination through leaching, but this did not convince the court. The Council of State held that the non-regression duty of the Flemish soil legislation was breached. In addition, the NGOs put forward that the movement of soil permitted by the declarations of compliance interfered with waste regulations. The Council of State found that the intended storage of excavated soil materials containing between 47 and 1,000 µg/kg ds sum of PFAS could qualify as 'waste storage' and therefore could not be exclusively regulated outside of the context of the applicable waste legislation in Flanders.[156] This rationale was reasserted by the Council of State in its annulment decision of 12 July 2024.[157]

Whereas the halting of the construction works related to the tunnel was the immediate result of the decision of the Belgian Council of State of 19 April 2022, most of the other works related to the road infrastructure project were later resumed when new conformity statements and permits were issued. Also, an action before the president of the civil court of Antwerp, aimed at provisionally halting the further completion of the tunnel project considering the impending environmental impacts linked to the transportation and further spreading of the PFOS-contaminated soil, did not succeed in halting the projects in light of the risk of spreading further PFOS pollution. In a first tier, the president held in his decision of 11 May 2023 that he could not pronounce himself on the suitability of the soil remediation scheme that had been imposed on the project developers by the Flemish competent administration since such a substantive assessment would fly in the face of the *trias politica* principle.[158] In addition, the president referred to a new agreement reached

154 "Staat stelt 3M aansprakelijk voor PFAS-schade in de Westerschelde," *Rijksoverheid* <https://www.rijksoverheid.nl/actueel/nieuws/2023/05/23/staat-stelt-3m-aansprakelijk-voor-pfas-schade-in-de-westerschelde>, accessed 1 March 2025.

155 Belgian Council of State, 19 April 2022, no. 253.523; Belgian Council of State, 29 December 2021, no. 252.567.

156 Ibid.

157 Belgian Council of State, 12 July 2024, no. 260.429.

158 President Court of First Instance Antwerp, 11 May 2023.

between the Flemish authorities, the project developer, and several NGOs and the intervening decisions of the Council of State. He concluded that the competent authorities and project developers observed the outcome of these rulings, so no further enforcement actions appeared needed from the civil court's side. As to the storage of contaminated soil, the judge ruled that it was not made crystal clear that the storage of these quantities of soil constituted a clear violation of the applicable environmental standards.

More impactful, however, was the provisional outcome of a civil court action by several inhabitants of Zwijndrecht directly aimed against the American chemical company 3M. 3M was ordered by a local court (*Vredegerecht*) decision of 15 May 2023 to pay provisional damages of €2,000 in compensation to a family from Zwijndrecht whose blood had been contaminated by its activities. The family sued 3M in 2023 after discovering all four members had abnormally high amounts of PFAS in their blood. The local judge held that the family had experienced 'excessive neighbourly nuisance', a legal liability concept included in Article 3.101 of the Belgian Civil Code and found that 3M was liable. The case marked the first time an Antwerp court had ruled on the consequences of the company's activities.[159] It remains to be seen whether similar actions could be initiated in a cross-border context, such as by inhabitants of Dutch villages in the vicinity of 3M.

In another recent judgment, the Flemish Council for Permit Disputes annulled a decision of the Flemish government related to the granting of a permit for the discharge of industrial wastewater containing PFAS.[160] The Flemish government had assessed this permit application on the basis of the impact assessment tool and came to the conclusion that there could be no negative impact on water quality because the amount of PFOS discharge was below the reporting threshold.[161] The Flemish Council for Permit Disputes did not agree with the exception to allow the permanent storage of PFOS-containing waste and ruled that no consideration had been given to whether the discharge could lead to further deterioration in the status of the relevant surface water body.

In the latter ruling, the Flemish administrative court increasingly referred to the 2015 ruling of the CJEU in the renowned *Weser* case, in which, firstly, the CJEU clarified that the environmental objectives laid down by Article 4(1)(a)(i)–(iii) of the Water Framework Directive are to be interpreted in such a manner that they require the national authorities to refuse authorization for a project that may cause a deterioration of the said water body.[162] Secondly, the CJEU held that the latter concept must be construed in such a manner that there is a deterioration as soon as the status of at least one of the quality elements or criteria, within the meaning of Annex V to the Water Framework Directive, falls by one class, even if this

159 Justice of the Peace Antwerp, 15 May 2023.

160 Flemish Council for Permit Disputes, 8 February 2024, nr. RvVb-A-2324-0438

161 The reporting limit is the value below which a substance is reported as not quantifiable (cf. Art. 1.1.2 of section II of VLAREM)

162 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV*, ECLI:EU:C:2015:433, para. 43.

does not result in a fall in the overall classification of the body of surface water.[163] Reinforcing its status quo approach within the context of severely degraded water-bodies, the CJEU added that if the quality element is already in the lowest class, 'any deterioration of that element constitutes a "deterioration of the status" of a body of surface water, within the meaning of Article 4(1)(a)(i)'.[164] Applying the *Weser* rationale in a cross-border context might be a useful lever to further limit the influx of PFAS pollution from Flemish companies in the Scheldt estuary and thereby help to create a more level playing field with companies located across the border in the Netherlands. In due course, the increased scrutiny that will have to be applied in the permitting policy might also yield better results in terms of water quality in the Scheldt estuary. As the improvement of the water quality, as demonstrated above, has stagnated during the past decades, such a shift is to be very welcomed, among other reasons, to ensure a level playing field in terms of permitting policies.

5. Outlook

The fresh waves of litigation in the context of the Scheldt estuary reveal that, until recently, limited to no attention has been paid to the cumulative impacts of environmental stressors, such as persistent organic pollutants, nitrogen, and climate change in the permitting policies in the context of the Port of Antwerp area. The 2023 INEOS ruling indicated that there might exist a manifest lack of a level playing field between the Netherlands and Flanders in the context of the permitting policies, depending on which side of the border a company finds itself. Diverging environmental standards have even led to diplomatic tensions. It also revealed that environmental challenges that had long been viewed as 'local' or 'national' problems included notable cross-border implications. Nitrogen deposition can indeed straddle the border, which also explains the court actions initiated by Dutch provincial authorities against Flemish permits. Similar conclusions arise in the context of PFAS and, to a certain extent, climate change-related impacts. The increased focus on accumulated environmental stressors, in addition to the existing focus on direct habitat loss, yields a new, stringent set of environmental standards to be applied when authorizing future economic developments in the estuary. A more ecosystem-based approach, which not only focuses on the direct adverse impacts of projects on the Scheldt estuary but also includes indirect effects, is emerging, underscored by the need to render future projects carbon-proof and resilient in light of the existing climate commitments. Below, some of the more prominent levers that exist to implement this shift towards more sustainability, as also put forward in the 1997 UN Watercourses Convention, are highlighted.

163 Ibid, para. 67–68.
164 Ibid, para. 69.

5.1 The importance of cross-border consultation

One obvious benchmark when streamlining future permitting procedures in the context of the newly emerged environmental stressors with a transboundary impact, such as PFAS, nitrogen, and climate impacts, is the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), which sets out the obligations of states to notify and consult each other on all major projects under consideration that are likely to have a transboundary adverse environmental impact.[165] The Espoo Convention requires assessments to be extended across borders when a planned activity is conducted in a transboundary context and evidently plays a crucial role when dealing with cross-border pollution. Pursuant to Article 3(1), the party of origin is required to notify the affected party as early as possible about a proposed activity that is likely to have a transboundary impact. It shall do this no later than when informing its own public about the proposed activity.

Whereas the Espoo Convention has been implemented in the EIA Directive and the notification procedure, laid down in Article 3, has been applied for many major infrastructure works in the Scheldt estuary, recent case law shows that there is room for a more widespread application of the Espoo rules in the context of permitting procedures with transboundary consequences in the Scheldt estuary. For instance, as noted, many of the PFAS permits granted by the competent Flemish authorities in recent decades had not been communicated to the Dutch authorities, who were ignorant of the precise context of these authorizations. Even so, transboundary emissions in the air and water, such as is the case with PFAS and nitrogen, are explicitly covered by the EIA Directive. The Espoo Convention defines 'impact' in very comprehensive terms, encompassing 'any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate'.[166] In addition, the concept of 'transboundary impact' is very large, covering 'any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or is part within the jurisdiction of another party'.[167]

The reference to 'likely' in Article 3(1) of the Espoo Convention ('likely to cause a significant adverse transboundary impact') also seems to presume that a precautionary approach is to prevail. Against this backdrop, it might be recommended that the application of these transboundary consultation procedures be revised in light of the recent case-law developments in Flanders. Specific attention needs to be paid to the application of the cross-border consultation procedures beyond the classic context of major infrastructure projects. As has been demonstrated, environmental permits for industrial facilities can also give rise to cross-border pollution (e.g., PFAS or nitrogen deposition). The start of the notification procedure, whenever the affected party decides this to be, allows effective transboundary consultation and

165 Espoo, 25 February 1991, 30 ILM 802 (1991).
166 Article 1(vii), Espoo Convention.
167 Article 1(viii), Espoo Convention.

participation of the public of the affected party before authorizing projects that can give rise to cross-border pollution. Although a shift towards more transboundary EIAs might help in designing development projects that are more sustainable and acceptable across either side of the border, it should be underscored that this is not a panacea. For instance, affected parties might not be interested in allowing their own public to take part in the participation procedures tied to a transboundary EIA, while conflicting views on the desirability of certain economic projects might still persist, as illustrated by the INEOS litigation of recent years. A more proactive engagement with the public concerned could potentially be operationalized by an increased focus on consultation when drafting plans and programs, which is further underscored by the so-called Protocol on Strategic Environmental Assessment (SEA) to the Espoo Convention.[168]

5.2 More comprehensive and ecosystem-based EIAs

Besides an increased focus on transboundary impacts and cross-border pollution as such in the context of EIAs and, potentially, SEAs, it should also be ensured in the Scheldt estuary that *all* environmental impacts are effectively included in these EIAs and SEAs. The present analysis has sufficiently indicated that this has not been the case in many instances in the past, at least as far as the Flemish section of the Scheldt estuary is concerned. The example of the complete or partial absence of assessment of the negative impacts of PFAS discharges for tens of industrial enterprises illustrates that the Flemish permitting policy flouted the basic requirements of an EIA, as set out by Articles 3 and 5 of the EIA Directive.[169] As indicated above, ample attention also needs to be devoted to cumulative impacts because this is a general requirement under the EIA Directive, particularly whenever the impacts take place on protected areas, such as Natura 2000 sites.[170] A similar conclusion arises in the context of climate change-related impacts, seeing that the revised EIA Directive explicitly requires that considerations regarding climate mitigation and adaptation are to be integrated into an EIA, which seems to be backed up by recent case-law developments.[171] All these considerations hint at a more ecosystem-based approach to the drafting of EIAs, encompassing both direct and indirect environmental impacts on the estuarine nature.

168 Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kiev, 21 May 2003, UNTS, vol. 2685, p. 140.

169 According to Article 5(1) of the EIA Directive, an EIA report shall, *inter alia*, include at least a description of the likely significant effects of the project on the environment and a description of the features of the project and/or measures envisioned in order to avoid, prevent, or reduce, and, if possible, offset likely significant adverse effects on the environment.

170 See *supra*.

171 Annex IV to Directive 2014/52/EU, in specifying the information required in Article 5(1), requires a description of the likely significant effects of the project on the environment, from *inter alia*, the impact of the project on the climate (for example, the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change.

Even so, caution is in order as to the more long-term ecological impacts of a more comprehensive approach towards EIAs. As such, this evolution will lead towards more transparency and effective participation, as the wider public will be aware of the environmental stressors in an ecosystem. That said, EIA is but a 'procedural' environmental instrument, as its outcome is in itself not binding on the permit issuing authorities. As a result, harmful activities can still be authorized in spite of the negative conclusions included in a prior EIA. Be that as it may, in general, more comprehensive EIAs will lead to more qualitative and performant permitting procedures, and even if they are, legally speaking, not binding, they still offer additional opportunities to better integrate mitigation and compensation measures in the decision-making procedures. For now, case law developments in Flanders indicate that administrative courts do not hesitate to quash permits when mitigation impacts identified in an EIA have not been precisely translated into these authorizations.[172]

5.3 Tackling existing pressures and accumulated impacts

The analysis has revealed a glaring lack of enforcement of existing environmental rules in the context of accumulated and cross-border pollutants, such as PFAS and nitrogen. On a broader level, recent scientific reports also indicate that the sharp progress in terms of ecological improvement in the Scheldt estuary has stagnated during the past decade. Pollutants such as PFAS, the adverse effects of which have only fairly recently been on the radar, have not been properly monitored, while the accumulated effects of nitrogen seem to hinder a swift restoration of the affected natural habitats. The 2023 INEOS decision has indirectly revealed that this fight for so-called 'development space' for new economic activities can give rise to transboundary quarrels with sharp political thorns. Indirectly, this jurisprudence also attests that some environmental pressures, such as the elevated levels of nitrogen deposition in Natura 2000 sites, cannot be fully solved without proper cooperation between Dutch and Flemish authorities. For instance, it is clear that more than 30% of the nitrogen deposition that is monitored in the Dutch Natura 2000 site has Flemish origins, which means that it is the result of economic and agricultural activities authorized on the Flemish territory. The reverse situation has been noted in several Flemish Natura 2000 sites close to the Dutch border, which suffer from the transboundary influx of nitrogen from Dutch livestock activities.[173]

Similar conclusions arise when it comes to the PFAS pollution in the Scheldt estuary, which might also compromise future restoration projects.[174] Without effective

172 For an overview, see H. Schoukens, "De ondraaglijke lichtheid van milieueffectrapportage: einmal ist keinmal?" [2014] Tijdschrift voor Ruimtelijke Ordening, Omgeving en Stedenbouw 25.

173 Schoukens (n. 94).

174 In 2022, the Dutch Council of State rejected an application to revise its earlier assessment of the legality of the decision to depolder the Hedwigepolder in light of the PFAS pollution. It reasoned that the presence of this pollution was already clear in 2014, entailing that it could have been raised as a separate argument in 2014. Dutch Council of State, 19 October 2022, ECLI:NL:RVS:2022:3003.

transboundary cooperation and aligned permitting schemes, the Netherlands will never be able to achieve a good ecological status for the Westerscheldt in the years to come. If such cooperation remains absent or insufficient, we can expect to see an increase in clashes between states, whereby the 'do no harm' clause, an inherent part of the sovereignty principle, shall be further elaborated in light of emerging environmental risks.[175] A level playing field, a crucial cornerstone of European integration, will not be achieved any time soon if no comprehensive EIAs are produced in the context of the permitting procedures.

Differently put, when developing more integral and programmatic approaches to certain environmental stressors, such as nitrogen, and other pollutants, such as PFAS, sufficient time and energy should be invested in ensuring their ecological robustness from a transboundary perspective. While the Flemish authorities have had proactive negotiations with the Dutch authorities when drafting their programmatic approach to nitrogen, for instance, this did not prevent transboundary court challenges from arising, as shown by the INEOS case. Several EU environmental directives, such as the Water Framework Directive,[176] the Habitats Directive,[177] and the Industrial Emission Directive,[178] include duties to revise and tighten existing permits in a context of continued degradation. This case study has demonstrated that such a plea for more scrutiny could also arise in the context of cross-border pollution, especially when the impression that no level playing field exists is created. However, tightening up permitting policies will only yield long-term results when carried out in a cross-border context, or potentially also at the EU level, to ensure a common understanding of the relevant benchmarks to be used when applying the non-deterioration obligation in the context of important pollutants.[179]

5.4 Increased proactive transparency to the wider public

Last but not least, the lack of proactive communication about the presence and effects of persistent pollutants, such as PFAS, came to the fore as an important deficiency in the current management strategies for the Scheldt estuary. Active communication does not only arise where it regards the disclosure obligations arising from Article 5(1)(c) of the 1998 Convention on access to information, public participation in decision-making and access to justice in environmental matters

175 See also United Nations, *ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries* (United Nations 2008), <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf>, accessed 1 March 2025.

176 See, for instance, Article 11(5) of the EU Water Framework Directive.

177 Article 6(2) of the EU Habitats Directive. See, for instance, Case C-399/14 14 January 2016, *Grüne Liga Sachsen eV e.a. contre Freistaat Sachsen*, ECLI:EU:C:2016:10.

178 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L 334/17.

179 Water Framework Directive, available at <https://environment.ec.europa.eu/topics/water/water-framework-directive_en>, accessed 1 March 2025.

(Aarhus Convention);[180] it is also an essential component of the positive duties resting upon the shoulders of states in light of Articles 2 and 8 of the ECHR.[181] In its recent case law, the European Court of Human Rights (ECtHR) has repeatedly underscored the procedural nature of positive duties arising from the latter provision. For instance, in *Hatton*, which revolved around the noise impact linked to the operation of Heathrow airport, it held that 'a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake'.[182] In its recent ruling in *Cordella*, which concerned pollution from a steel factory, the court underscored the importance of informing the affected population and workers of the health risks caused by pollution when adjudicating whether the Italian state had gone beyond the margin of appreciation when implementing its positive duties under Article 8 of the ECHR.[183]

Transparency is also linked to the need to take action when information is available, as might follow from the subpoena against the Dutch state by 11 interest groups in connection with the harmful effects of PFAS contamination.[184] The central issue is whether the Dutch state, with regard to national and international law, is liable based on unlawful acts for the widespread damage to the environment and public health resulting from the production and distribution of and exposure to PFAS. The NGOs aim to hold the Dutch state accountable for grossly neglecting its duty of care to protect Dutch citizens, animals, and the environment from the harmful effects of PFAS contamination.[185] In September 2024, the Flemish government was held liable by the Brussels Court of First Instance for not proactively disclosing the information regarding the presence and dangers of the elevated levels of PFAS present in the vicinity of the 3M plant in Zwijndrecht to the wider public. The court concluded that the refusal to disseminate this information amounted to a violation of the due diligence obligation.[186]

This chapter has amply revealed that the Flemish authorities failed to comply with their active information duties with respect to the PFAS pollution in the vicinity of the 3M plant and beyond. Both the citizens living in the factory's immediate vicinity and all the relevant local and provincial authorities should have been informed about the presence of high levels of PFAS pollution. In future years,

180 Convention on access to information, public participation in decision-making and access to justice in environmental matters, 25 June 1998, 2161 UNTS 447, 38 ILM 517 (1999).

181 See, for instance, European Court of Human Rights (ECtHR), 9 December 1994, *López Ostra v Spain* (app. no. 16798/90).

182 ECtHR 8 July 2003, *Hatton and Others v UK* (app. no. 36022/97), para. 128.

183 ECtHR 24 January 2019, *Cordella and Others v Italy* (app. no. 54414/13), para. 172.

184 Subpoena of 24 April 2024, available at <https://knoopsadvocaten.nl/2024/04/24/persbericht-dagvaarding-staat-der-nederlanden-in-verband-met-pfas-verontreiniging/>, accessed 1 March 2025.

185 Ibid.

186 Brussels Court of First Instance, 19 September 2024, *vzw Bioforum et al. v the Flemish Government et al*.

novel litigation strategies might further clarify the exact nature of these procedural duties in a transboundary context, especially when dealing with cross-border pollution. This could further specify the specific nature of the notification duties, which are also present in the more generally applicable international agreements regarding transboundary water management, such as the 1997 UN Watercourses Convention.[187]

6. Conclusion

This chapter has revealed that the comprehensive and multilayered cooperation mechanisms governing the cross-border management of the Scheldt estuary have not given rise to an ecological utopia. This is not surprising, as the transboundary management is taking place in a very sensitive political context, with clashing economic and societal interests, increasingly tight benchmarks regarding environmental protection, and, therefore, to a great extent, overlapping or shared ecological interests. While the 2010 Scheldt Estuary Development Outline can surely be presented as a remarkable translation of the principles of wise use put forward by international environmental law in the context of the transboundary management of rivers, its exact operationalization in cases of concrete economic projects gave rise to ample environmental concerns and, in their wake, court cases. The precise alignment of the objectives in terms of accessibility, protection, and nature restoration, as laid down in the applicable conventions and agreements, also generated increased diplomatic tensions between Flanders and the Netherlands. Flagship projects, such as the expansion of the Port of Antwerp, the deepening of the Westerscheldt, and industrial development were repeatedly halted by court decisions, where ample focus was put on the direct habitat losses in the Scheldt estuary to which these interventions might lead. In recent years, a similar picture arose in the context of projects that might give rise to indirect damage to the estuary and the importance of addressing indirect environmental stressors, such as water and atmospheric pollution.

Whereas impressive large-scale restoration actions have been initiated and implemented throughout the past decade, it remains uncertain whether they will be able to effectively and truly offset the incurred environmental damage, especially in the context of stagnating water quality and a warming climate. Moreover, in the past few years, indirect cumulative impacts, such as nitrogen deposition, greenhouse gas emissions, and persistent pollutants, have come to the fore in the available case law. Climate change is putting additional pressure on the already vulnerable estuarine ecosystem. A toxic and potentially dangerous cocktail of existing and future environmental stressors will have to be faced in the coming decades.

Seeing that several indicators show that the environmental quality of the Scheldt estuary is stagnating, leaving these environmental challenges unaddressed will only give rise to further diplomatic tensions between the Netherlands and Flanders.

187 See for instance Article 10, 1977 UN Watercourses Convention.

It is clear that a more rigid ecosystem-based approach will be necessary at a cross-border level to stave off further deterioration and to allow the long-term recovery of the Scheldt estuary, which might entail some systemic choices, for instance, as to the dogma of infinite expansion of port areas as well as the continuation of intensive livestock farming in the catchment area of the Scheldt. More transparency and cooperation, a more comprehensive harmonization of the thresholds relevant to permitting schemes and the gradual implementation of systemic solutions to persistent environmental challenges appear to be the key success factors for more effectively, sustainably, and cooperatively managing this transboundary ecosystem.

16 Czechia v. Poland (C-121/21)—legal and political background—Czech perspective

Jiri Vodicka

1. Introduction

The Turów open-cast lignite mine case exemplifies a cross-border issue within the EU, particularly concerning Polish mining activities and their impact on the Czech environment, health, and environmental protection. The lignite mine is situated a few hundred metres from the Czech border and directly adjacent to Germany. This mining dispute raises various factual and legal questions on both sides of the border. The Czech side argues that the environmental impacts of the mining activities are evident in the significant decline in underground water levels and land subsidence. Conversely, the Polish side contends that halting extraction activities would jeopardise employment and energy security, thereby harming the economy.

The legal questions at issue involve the cross-border strategic environmental assessment (SEA), the cross-border environmental impact assessment (EIA), and the legal stance of the EU, including the European Commission and the Court of Justice of the EU (CJEU), on this matter.

This chapter aims to provide a practical example of a recent cross-border dispute with regional specificities. It begins by introducing the Czech perspective and the challenges encountered with the Polish SEA (Bogatynia's spatial plan) and EIA (decision of the Polish mining authority) processes. Secondly, the chapter offers an overview of proceedings related to Article 259 TFEU and the subsequent case C-121/21 R (interim measures and the Opinion of Advocate General Pikamäe). Finally, the chapter discusses the aftermath of the dispute in the Czech Republic.

This chapter does not address the broader issue of the exploitation of non-renewable natural resources contributing to climate change under EU law. However, it is important to recognise that the Turów case involves the expansion of a lignite mine—a non-renewable resource—at a time when the world is grappling with climate change. The question of whether this type of resource exploitation is permissible under EU law is a matter of ongoing debate.[1] Beyond potential legal ramifications, there is an unexplored moral dimension to the extension of mining

1 For further discussion, see C. Kaupa, "Is it still permissible under EU law to issue new permits for oil and gas extraction?" [2024] 33/2 RECIEL 236.

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activities, particularly in relation to climate change and whether such extensions can be morally justified.

2. Preceding cross-border issues[2]

2.1 Strategic environmental assessment

One often overlooked aspect of this case is the SEA conducted in the first half of 2019 to amend Bogatynia's spatial plan.[3] This assessment permitted the expansion of the Turów mine towards the Polish border. However, the assessment of the local plan was not without issues. Because the spatial plan (or its amendment) required assessment under the SEA and could potentially impact the Czech side due to the mine's expansion, the Czech Republic, the Liberec Region, and several municipalities submitted objections to the Polish authority regarding the spatial plan. The Czech authorities anticipated transboundary consultations pursuant to Article 7 of Directive 2001/42/EC (the SEA Directive).[4] Despite this, the Polish authority issued the amended spatial plan without explicitly considering or justifying the Czech objections.[5] Only a partial justification of these objections was sent several months after the spatial plan was issued.

This could indicate that the Polish authorities effectively denied the Czech authorities and municipalities proper access to the proceedings, potentially breaching several provisions of EU and international law. Under EU law, a breach of Article 8 of the SEA Directive is particularly relevant. This provision requires Polish authorities to take into account transboundary consultations during the preparation of the plan or programme. Failure to do so may constitute a breach of obligations under the SEA Directive.

The Liberec Region unsuccessfully attempted to have the spatial plan annulled by the superior authority (the Regional Authority of Lower Silesian Region), but their efforts were in vain. Following this failure, the Liberec Region and the municipality of Hrádek nad Nisou filed an action with the Polish administrative court seeking to annul the amendment to the spatial plan. However, the action was dismissed, and Hrádek nad Nisou's subsequent appeal was also unsuccessful.[6]

2 For additional genesis and the Polish perspective, see P. Żuk, "The Turów Brown Coal Mine in the shadow of an international conflict: Surveying the actions of the European Union Court of Justice and the populist policies of the Polish government" [2022] 10 The Extractive Industries and Society 101054.

3 Resolution No. XIII/83/19 on adopting an amendment to the local spatial development plan for the town and commune of Bogatynia—the area of the Turów opencast brown coal mine in the vicinity of the village of Opolno-Zdrój. Bogatynia [online]. Published on 28 May 2019.

4 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment. OJ L 197, 21 July 2001, pp. 30–37.

5 Summary of the Strategic Environmental Assessment. Bogatynia [online]. Published on 28 May 2019.

6 Decision of the Supreme Administrative Court of 27 November 2020 case no. II OSK 2739/20.

In this context, not only can a breach of EU law be identified, but there are also likely breaches of international law. Specifically, potential violations of Article 11(1)(c) and Article 11(2) of the Protocol on SEA to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[7] can be noted.[8] Under Article 11(1)(c), Poland was required to ensure that the Czech public had timely and effective opportunities to participate in the proceedings.[9] Additionally, the relevant Polish authorities were obliged to make the spatial plan available to the Czech authorities and ensure that the latter had opportunities to express their opinions.[10] Finally, Article 10 of the Protocol prescribes the issuance of a timely notification to the Czech authorities.

2.2 Environmental Impact Assessment

The Turów lignite mine operated under mining concessions that officially ended on 30 April 2020. Consequently, a new mining concession or an extension of the previous concession needed to be issued under the relevant Polish legislation. The concession could only be issued if the preceding Decision of the Regional Director for Environmental Protection in Wrocław, dated 21 January 2020, on the environmental conditions for the continued operation of the Turów lignite deposit until 2044[11] (EIA decision) was issued by the Polish authorities.

The initial steps in the EIA procedure for the Turów lignite mine were already undertaken in 2015. Since then, some information has been exchanged between the Czech competent authorities, the Liberec Region, and their Polish counterparts. However, the process reached a critical point in February 2019 when the Czech Ministry of the Environment received incomplete project documentation. Once the documentation was completed, the Ministry distributed it to the relevant parties for their comments.[12]

In autumn 2019, a public consultation on the mining extraction was held in the town of Bogatynia. According to Czech officials, the consultation was poorly conducted, with issues such as inadequate interpretation and translation, limited speaking time (2 minutes per speaker), restrictions on the number of questions allowed

7 Protocol on strategic environmental assessment to the convention on environmental impact assessment in a transboundary context, 11 July 2010.

8 J. Vozak, "Vývoj kauzy rozšíření hnědouhelného dolu Turów" [Development of Turów open-cast lignite mine enlargement case] [2021] 2 České právo životního prostředí: časopis České společnosti pro právo životního prostředí 57, 59.

9 Article 8 of the Protocol on strategic environmental assessment to the convention on environmental impact assessment in a transboundary context, 11 July 2010.

10 Article 9, ibid.

11 Decision WOOŚ.4235.1.1.2015.59 of Regional Director for the protection of Environment in Wroclaw of 21 January 2020. Installations outside of the Czech Republic. Continued mining of the Turów lignite deposit (MZP049M). EIA Database.

12 MŽP odstartovalo další fázi mezistátního posouzení EIA k rozšiřování dolu Turów [Ministry of the Environment has launched the next phase of the interstate EIA for the expansion of the Turów mine]. Ministerstvo životního prostředí [online]. Published on 30 April 2019.

(only one per person), and the revocation of speaker rights. In response, the Czech representatives filed several complaints under Article 7(5) of Directive 2011/92/EU (the EIA Directive)[13] and Article 3(9) of the Aarhus Convention.[14]

Subsequently, two-day consultations under the Espoo Convention were held in October 2019, resulting in a protocol that declared a mutual intent to cooperate in providing additional information about underground water and other relevant data between the Czech Republic and Poland.[15]

Following the Espoo consultations, the Committee on Environment within the Czech Parliament issued a resolution in November 2019 opposing the mine's enlargement.[16] The resolution also requested that the Czech government seek compensation for environmental damage and demand an immediate halt to mining activities. A few days later, the Ministry of the Environment echoed this dissent, setting forth specific conditions such as limiting the mine's area, requiring financial compensation, and installing an anti-filtration screen (underground wall).[17] This dissent arose due to ongoing problems in negotiations, which allegedly stemmed from the Polish side's minimal cooperation and refusal to provide information. However, the governmental dissent was merely a political statement without legal repercussions.

On 21 January 2020, the Polish competent authority issued an EIA decision that was directly enforceable, extending mining activities until 2044. The investor promised to build an anti-filtration screen to mitigate or stop underground water flow from the Czech side to the mine. The EIA authority deemed this measure sufficient. However, the Czech public raised objections about the screen's effectiveness, and the Czech Geological Survey[18] expressed uncertainty regarding its efficacy. Preliminary results indicated no changes in underground water flows even after 70% of the screen was completed.[19]

The EIA decision did not incorporate objections from the Czech public, infringing Article 7(4) of the EIA Directive. Consequently, the Liberec Region and

13 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. OJ L 26, 28 January 2012, pp. 1–21.

14 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 July 1998. Vozak (n. 8) 60.

15 Installations outside of the Czech Republic. Continued mining of the Turów lignite deposit (MZP049M). EIA Database [online]. All subsequent documents are also available in the database.

16 Resolution No. 90 of the Committee on Environment within the Czech Parliament of 13 November 2019. Poslanecká sněmovna Parlamentu ČR [online].

17 MŽP vydalo nesouhlasné stanovisko k polskému záměru rozšířit těžbu na dole Turów [The Ministry issued a disapproving opinion on the Polish plan to expand mining at the Turów mine]. Ministerstvo životního prostředí [online]. Published on 15 November 2019. Installations outside of the Czech Republic. Continued mining of the Turów lignite deposit (MZP049M). EIA Database.

18 A state-funded organisation, a departmental research institute of the Ministry of the Environment, providing the state geological service for the Czech Republic.

19 H. Truchlá, "V okolí Hrádku se něco děje, zjistily satelity. Země klesá, voda totiž mizí do Polska," *Aktualne.cz* (2 February 2021) <https://zpravy.aktualne.cz/ekonomika/voda-z-hlubin-u-dolu-turow-mizi-jednoznacne-kvuli-polske-tez/r~c14608da618011ebb115ac1f6b220ee8/>.

Hrádek nad Nisou appealed against the decision and its direct enforceability. The appeal against direct enforceability was rejected, but the municipality challenged this rejection in court.

The final part of the administrative proceedings occurred before the Polish mining authority, which issued a decision on 20 March 2020, extending the mining concession until 2026. This decision was unexpected, as the initial EIA decision concerned mining activities until 2044. The mining decision was issued without a corresponding EIA decision, thereby infringing Articles 4–9 of the EIA Directive, including the lack of an environmental assessment for the mining activity and failure to comprehensively communicate the decision.[20]

However, on 28 April 2021, the mining authority issued a final decision extending the mining activity until 2044.[21] A significant issue in these proceedings was the exclusion of the concerned public, as these were follow-up proceedings based on the initial EIA decision. This exclusion may have violated Article 11 of the EIA Directive.[22] The Liberec Region, Hrádek nad Nisou, and other Czech and Polish environmental organisations and entities challenged all administrative decisions with varying degrees of success.[23]

It could be argued that Poland breached its obligations under international law, similarly to the SEA of Bogatynia's spatial plan. In particular, potential breaches of Articles 3(8), 4(2), 5, and 6 of the Convention on Environmental Impact Assessment in a Transboundary Context[24] (Espoo Convention) can be identified. Article 3(8) presumes cooperation between two states, including the opportunity for the concerned public to react (by objecting or commenting) on activities that might adversely affect another state. Furthermore, the lack of communication with the concerned public and the failure to deliver EIA documentation constitute breaches of Article 4(2). It can also be argued that consultations under Article 5 were not conducted properly. Lastly, the final EIA decision by the Polish authorities did not adequately address comments received from the Czech authorities and the concerned public, thus infringing Article 6.

20 Vozak (n. 8) 64.

21 Decision DGK-6.4771.34.2020.MN.23 of the Minister of the Climate and the Environment of 28 April 2021. Installations outside of the Czech Republic. Continued mining of the Turów lignite deposit (MZP049M). EIA Database.

22 Ibid.

23 For example, Judgment of the Provincial Administrative Court in Warsaw of 13 March 2024, case no. IV SA/Wa 654/23 or Decision of the Supreme Administrative Court of 18 July 2023, case no. III OZ 331/23.

24 Convention on Environmental Impact Assessment in a Transboundary Context. Espoo, Finland, 25 February 1991.

3. C-121/21—the Czech perspective

3.1 The European Commission

In December 2019, the Liberec Region, Greenpeace, and several municipalities filed an informal complaint with the European Commission. A few months later, these same entities submitted a petition to the European Parliament, supported by more than 13,000 EU citizens.[25] Both documents cited not only infringements of the EIA Directive but also violations of Article 4(1)(b)(ii), Article 4(7), and Article 12 of Directive 2000/60/EC (Water Framework Directive),[26] as well as Article 15 of Directive 2004/35/CE (Environmental Liability Directive).[27]

In February 2020, following increased media coverage,[28] the European Commission initiated the EU Pilot procedure against Poland. The Commission met with representatives of the Liberec Region to further investigate the issues surrounding the Turów mine. Simultaneously, representatives from the Liberec Region submitted the petition to the European Parliament's Committee on Petitions (the EP Petition Committee). The petition was heard at a special, non-scheduled meeting and received support from various political factions. The EP Petition Committee invited the Commission, Poland, and the European Parliament's Committee on the Environment to collaborate in resolving the situation.[29]

Meanwhile, at the national level in the Czech Republic, the Environmental Committee of the Czech Parliament urged the Czech government to prepare a motion to initiate proceedings against Poland under the second paragraph of Article 259 TFEU. The first step in this procedure involved lodging an official complaint with the European Commission.

The official complaint was submitted to the Commission in September 2020. In December, the Commission issued a reasoned opinion, acknowledging some of the Czech Republic's claims and agreeing that Poland had infringed EU law. The Commission found that Poland had incorrectly transposed provisions regarding access to justice and had misapplied provisions of the EIA Directive. Additionally, the Commission determined that Poland had incorrectly applied provisions of

25 Petition No. 1236/2019 by Jiří Vozák (Czech), on behalf of Liberecký kraj, on the danger of losing drinking water in the Liberec Region (Czech Republic) due to the expansion of a brown coal mine in Turów (Poland).

26 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, 22 December 2000, pp. 1–73.

27 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. OJ L 143, 30 April 2004, pp. 56–75.

28 E.g., P. Tamma, "Poland's coal appetite angers its neighbour," *Politico* (27 January 2020) <https://www.politico.eu/article/poland-polish-coal-appetite-angers-its-neighbor-czech-republic-prague-germany/>.

29 Vozak (n. 8) 65.

Directive 2003/4/EC (the Access to Information Directive) and violated the principle of loyal cooperation under Article 4(3) TEU.[30]

3.2 The Court of Justice of the EU

3.2.1 The first interim measure

On 26 February 2021, the Czech Republic filed its first action against another Member State for failure to fulfil obligations under Article 259 TFEU, initiating case C-121/21. In this action, the Czech Republic sought a declaration that Poland had failed to fulfil its legal obligations under EU law. The applicant presented 11 pleas in law, alleging that Poland breached specific obligations:[31]

- EIA Requirement Violation: The extension of lignite extraction for six years was authorised without conducting a mandatory EIA, violating Articles 4(1) and (2) of the EIA Directive.
- Public Participation Exclusion: The exclusion of the public from the development consent process violated Articles 6(2) to (7), Article 7(5), Articles 8 and 9, and Article 11(1) of the EIA Directive.
- Immediate Enforceability: The decision to make the EIA decision immediately enforceable violated Article 11(1) of the EIA Directive.
- Water Framework Directive Non-Compliance: The EIA decision failed to include necessary procedures for exemptions under the Water Framework Directive, violating Article 4(1)(a)(ii) and (b)(ii) of that directive.
- Failure to Include the Public and the Neighbouring State: There was a failure to involve the public and the Czech Republic in the development consent process for the extension of lignite extraction, violating Articles 6(2) to (7), Articles 7(1), (2), and (5), and Article 8 of the EIA Directive.
- Lack of Publication and Communication: The development consent was not published or communicated to the Czech Republic in an understandable form, violating Articles 9(1) and (2) of the EIA Directive.
- Judicial Review Denial: The failure to enable judicial review of the development consent violated Article 11(1) of the EIA Directive.
- Failure to Publish Development Consent: The development consent was not published, violating Article 7 of the Access to Information Directive.
- Breach of Sincere Cooperation Principle: Incomplete information was provided regarding the development consent process, violating Article 4(3) TEU.
- Insufficient Consideration of EIA Decision: The development consent did not sufficiently regard the EIA decision, violating Article 2(1) of the EIA Directive.

30 European Commission, "Environmental Impact Assessment: Commission adopts reasoned opinion in case brought by Czechia against Poland" (17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2452>.

31 Point 2 of the Order of the Vice-President of the Court of 21 May 2021, C-121/21 R, *Czech Republic v. Republic of Poland*, ECLI:EU:C:2021:420.

- Incomplete Environmental Conditions: The development consent failed to adequately set out all necessary environmental conditions, violating Article 8a(1)(b) of the EIA Directive.

Furthermore, the Czech Republic requested that the court impose an interim measure under Article 279 TFEU, seeking an immediate cessation of mining activities at the Turów mine until a final judgment was delivered. To obtain such an interim measure, the applicant must satisfy several cumulative conditions: a *prima facie* case in law and fact, urgency (demonstrating serious and irreparable harm to the applicant's interests), and, in some cases, a balancing of interests.[32]

According to the order of the Vice-President, the first condition—a *prima facie* case—was met. The Vice-President found that, at first glance, at least one plea in the main action, specifically the alleged infringement of Article 4(1) and (2) of the EIA Directive, appeared to be well-founded.[33]

The second condition—urgency—was also satisfied. The Vice-President recognised that the ongoing mining activity negatively impacts groundwater levels and that the resulting decrease in groundwater could lead to land subsidence, causing damage to buildings and potentially harming human health.[34] The Czech Republic's arguments were based on the need to protect the environment, human health, and property.[35] All of Poland's counterarguments, including the denial of a link between mining activity and the lowering of groundwater, the claim that the anti-filtration screen being constructed was effective, and the assertion that the damage was already present, were dismissed.[36] The Vice-President concluded that environmental and health damage is often irreversible, thereby fulfilling the urgency requirement.[37]

The final condition for granting interim measures under Article 279 TFEU is the balancing of interests. A summary of the arguments presented by the Czech Republic and Poland can be found in point 81 of the interim order dated 21 May 2021:

> According to the Czech Republic, the interest in preventing the serious and irreparable damage to the environment and human health which would result from the continuation of mining activities at the Turów mine prevails over the socioeconomic and energy interests of the Republic of Poland in the continuation of those activities.

The Czech arguments remained consistent throughout the proceedings. However, Poland introduced additional arguments related to energy security, such as

32 Ibid., point 34.
33 Ibid., point 51.
34 Ibid., point 61.
35 Ibid., point 62.
36 Ibid., points 74–77.
37 Ibid., points 70 and 78.

dependence on fossil fuels, the safety of the electricity grid, and the potentially irreversible closure of the power plant.[38] Poland also highlighted potential socio-economic damage, including the dismissal of workers and subcontractors and the inability to carry out important investments and projects.[39] Surprisingly, Poland also argued that ceasing mining activities would cause environmental damage, claiming that it would disrupt the environmental balance at the mine, leading to uncontrolled flooding and triggering landslides.[40]

The Vice-President rejected all of Poland's arguments, either as unsubstantiated (regarding environmental damage and energy security) or as purely of a pecuniary nature (socioeconomic damage).[41] Consequently, on 21 May 2021, the Vice-President concluded that all cumulative conditions were met and ordered Poland to cease lignite mining activities at the Turów mine immediately until the final judgment in the case was delivered.[42]

The order of 21 May 2021 was warmly welcomed in the Czech Republic, particularly in the Liberec Region and municipalities close to the border. However, this enthusiasm quickly diminished when the Polish Prime Minister announced that Poland would not comply with the interim measure.[43]

On the other hand, the order of 21 May compelled Poland to engage more seriously in discussions with the Czech Republic, which had been attempting to initiate talks for several years. Despite this, the negotiations proved ineffective, leading the Czech Republic to file another application for an interim measure on 7 June 2021. The significance of this application was heightened by the European Commission's intervention in support of the Czech Republic.[44]

3.2.2 The second interim measure

Poland did not comply with the first interim measure. Consequently, the Czech Republic sought another interim measure to compel Poland to cease mining activities, requesting the imposition of a daily penalty of €5,000,000 for failure to fulfil obligations under Articles 279 and 260(2) TFEU.

The Czech Republic presented arguments demonstrating Poland's deliberate actions leading to non-compliance with the previous interim measure ordered by

38 Ibid., points 85–86.

39 Ibid., point 87.

40 Ibid., point 84.

41 Ibid., points 89–93.

42 Ibid., count 1 of the ruling.

43 "Poland will not comply with EU top court ruling on Turów, PM says," *euractive.com* (25 May 2021) <https://www.euractiv.com/section/eet/news/poland-will-not-comply-with-eu-top-court-ruling-on-turow-pm-says/>.

44 A. Zachova, "EU Commission joins Czechia in legal case over Polish coal mine," *euractive.com* (10 June 2021) <https://www.euractiv.com/section/eet/news/eu-commission-joins-czechia-in-legal-case-over-polish-coal-mine/>.

the Vice-President on 21 May 2021, such as the Polish Prime Minister's public announcement to continue lignite extraction at the Turów mine.[45]

The court largely agreed with the Czech arguments, acknowledging that Poland had indeed failed to comply with the previous order. The court determined that imposing a periodic penalty payment under Article 260(2) TFEU was necessary to reinforce the earlier interim measure.[46]

However, the court did not agree with the proposed amount of the periodic penalty, stating that "the periodic penalty payment fixed must be both appropriate to the circumstances and proportionate to the infringement established and the ability to pay of that Member State."[47] In this regard, and with a view to establishing the necessary compliance, "to avoid serious and irreparable harm to the environment and human health," the Vice-President imposed a periodic penalty payment of €500,000. Therefore, on 20 September 2021, the Vice-President of the Court ordered Poland to pay a penalty of €500,000 per day for its continued non-compliance.[48]

In the autumn of 2021, the Czech Republic held governmental elections, which were won by a political coalition made up of several parties. The leading party in this coalition shares ideological similarities with its counterpart in Poland. As a result, the new Czech government began addressing the Turów issue with greater determination.

3.2.3 The Advocate General's Opinion

Advocate General Pikamäe delivered his Opinion on 3 February 2022. The Advocate General agreed with the Czech Republic on four out of 11 pleas in law (I, VI, VIII, IX).

The first plea in law concerned the infringement of "Article 4(1) and (2) of [the EIA Directive] read in conjunction with Article 4(4) to (6), Article 5(1) and (2) and Articles 6 to 9 of that directive, by authorising the extension of lignite extraction for a period of six years, without conducting an environmental-impact assessment."

In this context, the Advocate General referred to existing case law (Case C-411/17)[49] and stated that, under Article 4(1) of the EIA Directive, subsequent extension measures connected to projects listed in the Annex fall within the scope of this article.[50] Furthermore, the Advocate General concluded that Polish legislation is incompatible with Articles 2(1) and 4(2) of the EIA Directive because it does

45 Points 41–43 of the Order of the Vice-President of the Court of 21 May 2021, C-121/21 R, *Czech Republic v. Republic of Poland*, ECLI:EU:C:2021:420.

46 Ibid., points 48 and 49.

47 Ibid, point 50.

48 Ibid., count 2 of the ruling.

49 Judgment of the Court (Grand Chamber) of 29 July 2019, C-411/17, *Inter-Environment Wallonie and Bond Beter Leefmilieu Vlaanderen*, EU:C:2019:622.

50 Advocate General's Opinion of 3 February 2022, Case C-121/21, *Czech Republic v. Republic of Poland*, point 66.

not correctly implement the requirements outlined in Annex II of the Directive.[51] The Opinion also emphasised that procedural aspects of environmental impact assessments are closely connected to Articles 4(1) and 4(2) of the EIA Directive and therefore cannot be excluded from considerations of infringement.[52]

The sixth plea in law concerned the infringement of "Article 9(1) and (2) of the EIA Directive, by failing to publish the development consent for the extraction of lignite until 2026 and by failing to communicate the development consent to the Czech Republic in a comprehensible form."

The Advocate General emphasised that publicly accessible information must be presented accurately and in a manner that is accessible and useful to the intended audience. Accordingly, any decision—such as the extension of a concession—must include all relevant documents and information considered during the decision-making process, as required by Article 9(1) of the EIA Directive. However, Poland not only failed to include all necessary facts in its decision but also did not properly inform the concerned public, thereby infringing Article 9(1) of the EIA Directive.[53] Furthermore, the decision was sent to the Czech authorities five months after its issuance and in an incomplete form, which constituted a breach of Article 9(2) of the EIA Directive.[54]

The eighth plea in law concerned the infringement of "Article 7 of [the Access to Information Directive], by failing to publish the development consent for the extraction of lignite until 2026."

In this context, the Advocate General partially referred to the sixth plea in law and considered whether the same breach could also constitute an infringement under the Access to Information Directive. The Advocate General reasoned that mining activity falls within the category of activities that can impact components of the environment and, therefore, falls under the scope of the Access to Information Directive.[55] Furthermore, the Advocate General argued that Articles 9(1) and (2) of the EIA Directive and Article 7(2)(f) of the Access to Information Directive must be interpreted with the same objective in mind: ensuring clear and complete access to information for the public.[56] As a result, he concluded that Poland breached the right to access environmental information under the Access to Information Directive when its authorities provided insufficient and incomprehensible information to the Czech side.

The ninth plea in law concerned the infringement of "the principle of sincere cooperation referred to in Article 4(3) TEU, by failing to provide complete information in relation to the procedure for the grant of development consent for the extraction of lignite until 2026."

51 Ibid., points 75 and 77.
52 Ibid., point 82.
53 Ibid., points 171–173.
54 Ibid., points 174–178.
55 Ibid., points 200–201.
56 Ibid., point 203.

In this plea, the Advocate General reiterated his earlier assessments from the sixth and eighth pleas and referenced the principle of sincere cooperation in EU law, as enshrined in the TEU, TFEU, and the Charter of Fundamental Rights of the EU.[57] He highlighted that Poland's approach to providing access to information, both to the public and to the Czech Republic as a neighbouring Member State, was in direct contradiction to the principles of solidarity, cooperation, and mutual assistance among Member States. These principles are essential for ensuring a high level of environmental protection.[58] Consequently, the Advocate General concluded that Poland had infringed Article 4(3) TEU.

4. Aftermath

Despite the Orders of the Vice-President of the Court and the favourable Opinion of the Advocate General, the Czech government, somewhat unexpectedly, withdrew its action on 4 February 2022, just one day after the Advocate General delivered his Opinion. This was because it had reached an agreement with the Polish government on 3 February.

The governmental agreement on the Turów mine consists of 14 articles and was set to last for at least five years (Article 14). In summary, the agreement stipulates:[59]

- Withdrawal of the Action and Compensation: The Czech Republic agreed to withdraw its legal action in exchange for financial compensation of €10 million to the Czech Ministry of the Environment and €25 million to the Liberec Region (Article 2).
- Mining Activity Restrictions: The agreement stipulates a temporary suspension of mining activities towards the Czech border, a suspension of mining activities 30 metres below sea level, completion of the anti-filtration screen, and on-site inspections four times per year (Article 3).
- Construction of Protective Measures: Poland committed to constructing a protective ground wall (Article 4).
- Environmental Monitoring: The agreement includes provisions for monitoring noise pollution (Article 5), air pollution (Article 6), ground movement (Article 7), and the creation of monitoring boreholes for underground water with data transmission (Article 8).
- Small Project Fund: A small project fund was established to support various initiatives (Article 9).

57 Ibid., point 215.

58 Ibid., point 219.

59 Dohoda mezi vládou České republiky a vládou Polské republiky o spolupráci k řešení vlivů těžební činnosti v povrchovém hnědouhelném dole Turów v Polské republice na území České republiky [Agreement between the Government of the Czech Republic and the Government of the Republic of Poland on cooperation to address the impact of mining activities at the Turów opencast coal mine in Poland on the territory of the Czech Republic]. mzp.cz [online]. Published on 3 February 2022.

- Dispute Resolution: The CJEU was designated as the last-instance arbiter in the event of disputes arising from the agreement. The provision refers to Article 273 TFEU and stipulates that CJEU judgments are binding on both parties. If a contracting party does not adhere to the judgment, the party can refer this failure to the court again and seek a financial penalty (Article 13).

Additionally, Fundacja PGE pledged to donate €10 million to the Liberec Region.

However, the agreement sparked controversy among scientists, academics, and other communities due to its non-transparent and hasty creation process. The agreement was developed behind closed doors without public oversight. Some coalition members of the Czech government were surprised by the agreement and later expressed their disagreement. Concerns remain among experts about the potential loss of underground water due to the unsuitable location of the anti-filtration screen. In February 2022, several hundred people protested against the agreement in Prague, and Czech Greenpeace considered filing a complaint against it with the European Commission.

The agreement was challenged in the Czech Constitutional Court, with plaintiffs arguing that the Czech government had infringed their constitutional rights, particularly the right to property and ownership[60] and the right to a favourable environment.[61] However, the Constitutional Court dismissed the constitutional complaint due to a lack of authority.[62]

Two years after the agreement came into force, noise and air pollution measurements around the mine showed that all limits and thresholds were being upheld.[63] The expert group on groundwater cautiously admitted that the anti-filtration screen seems to be effective, although final results would not be available until 2024.[64]

The Turów Fund, as envisioned in the agreement, has financially supported the construction of water supply infrastructure within the Liberec Region.[65]

60 Art. 11 Act No. 2/1993 Coll., Declaration of Human Rights and Art. 1 Protocol No. 1 to the European Convention on Human Rights.

61 Art. 35 Declaration of Human Rights.

62 Decision of the Constitutional Court of the Czech Republic of 23 August 2022, Case Pl. ÚS 9/22, ECLI:CZ:US:2022:Pl.US.9.22.1.

63 "Turów" <https://www.kraj-lbc.cz/aktuality/section:34/page:1/>.

64 F. Trdla, "Expertní skupina zhodnotila funkčnost podzemní těsnicí stěny v dolu Turów" [The expert group reviewed functionality of ground wall in Turów lignite mine].

65 For example: J. Mikulička, "Horní Vítkov získá nový vodovod. Díky dohodě s Polskem" [Horní Vítkov will get a new water supply system. Thanks to an agreement with Poland], *kraj-lbc.cz* (6 May 2024) <https://www.kraj-lbc.cz/aktuality/horni-vitkov-ziska-novy-vodovod-diky-dohode-s-polskem-n565600.htm>; F. Trdla, "Krajští radní odsouhlasili poskytnutí dotace z Fondu Turów. Peníze podpoří zásobování vodou na Hrádecku" [Regional councillors approved a grant from the Turów Fund to support water supply in Hrádek], *kraj-lbc.cz* (20 August 2024) <https://www.kraj-lbc.cz/aktuality/krajsti-radni-odsouhlasili-poskytnuti-dotace-z-fondu-turow-penize-podpori-zasobovani-vodou-na-hradecku-n572615.htm>.

Finally, it is worth mentioning the General Court's judgment in case T-200/22,[66] in which the court dismissed Poland's actions to annul the European Commission's decisions regarding Poland's incurred debt for failing to pay the periodic penalty ordered by the Vice-President's Order of 20 September 2021 in case C-121/21 R.[67]

5. Conclusion

This chapter aimed to introduce a practical and current example of a cross-border issue within the EU, illustrated by the challenges surrounding environmental assessment and communication between the Czech Republic and Poland regarding the mining activities at the Turów open-cast lignite mine.

The core issue in this case lies in the lack of cooperation between the Czech Republic and Poland. The ideal of cooperation, as embodied in EU legislation, takes specific form in the legal provisions of the TEU, TFEU, SEA Directive, EIA Directive, and Access to Information Directive.

Problems were particularly evident in the Polish administrative proceedings concerning the SEA of Bogatynia's spatial plan, the EIA decision, and the extension of mining activities. These proceedings were marred by various missteps and shortcomings, which ultimately deprived the Czech competent authorities and the concerned public of their right to protect the Czech environment and public health.

This lack of cooperation was acknowledged by the European Commission in its reasoned opinion and further supported by the Orders of the Vice-President of the Court in two interim measures in case C-121/21 R. The action that led to these interim measures was filed under Article 259 TFEU as an action for failure to fulfil obligations against another Member State. The court ordered Poland to cease mining activities and imposed a daily penalty of €500,000 for non-compliance with the cessation order.

In his Opinion, Advocate General Pikamäe upheld four out of 11 pleas in law, thereby acknowledging that Poland had infringed the principle of sincere cooperation and other provisions related to access to environmental information, environmental assessment, and procedural aspects of environmental assessment.

Unfortunately, the Advocate General's Opinion marked the final step in the CJEU proceedings as the Czech Republic subsequently withdrew its action against Poland. This withdrawal was a direct consequence of the new governmental agreement between the two Member States. However, the agreement was met with criticism from both the public and experts as it failed to address the primary issue of environmental damage. One might argue that the agreement effectively placed a price tag on environmental protection and human health.

66 Judgment of the General Court (Second Chamber, Extended Composition) of 29 May 2024, T-200/22 and T-314/22, ECLI:EU:T:2024:329

67 For more information, see V. Vomáčka, "Vymáhání pokuty v kauze Turów a další nová judikatura SDEU" [Enforcement of fines in the Turów case and other new CJEU case law] [2024] 71 České právo životního prostředí: časopis České společnosti pro právo životního prostředí 98.

17 Czechia v. Poland (C-121/21) – legal and political background – Polish perspective

Bartosz Rakoczy

1. Introduction

The case *Czechia v. Poland* C-121/21 should be analysed with reference to both European and Polish law. The European law perspective is relevant as the opinion of Advocate General Priita Pikamäe and the orders of the Vice-President of the Court of Justice of the EU (hereinafter CJEU or Court of Justice) in connection with this case were issued and related to the breach of obligations stemming from EU law.

It is significant that the proceedings before the Court of Justice were the only ones instituted in connection with the dispute under review and that the judgment of the Court of Justice was the only statement of an adjudicating agency concerning the dispute in question.

Case Czechia v. Poland was initiated by the action of the Czech Republic brought pursuant to Article 259 TFEU. It sought a declaration that the Republic of Poland had violated the provisions of Directive 2011/92,[1] Directive 2000/60,[2] Directive 2003/4,[3] and the TEU (the principle of loyal cooperation) in connection with the extension of the concession for lignite mining in the Turów mine. This case is an example of the use of the mechanism for enforcement of EU law provided for in Article 259 TFEU, according to which "any Member State may bring an action before the Court of Justice of the European Union if it considers that another Member State has failed to fulfil one of its obligations under the Treaties". The aim of this remedy (like the Commission's action under Article 258 TFEU) is to declare and achieve the ending of behaviour by a Member State that violates its treaty obligations. Thus, while an action under Article 259 TFEU does not directly address the resolution of disputes arising between Member States, as *Czechia v.*

1 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) Text with EEA relevance (OJ L 26, 28 January 2012, p. 1), amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ L 124, 25 April 2014, p. 1).

2 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, 22 December 2000, p. 1).

3 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14 February 2003, p. 26).

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Poland shows, it can be used in such disputes, including those of a cross-border nature. Advocate General P. Pikamäe, in his opinion on *Czechia v. Poland*, noted that it "concerns the transboundary effects resulting from mining activities of the Polish operator of the abovementioned mine and is a matter of contention between the two Member States" and that this is "the first interstate dispute relating entirely to EU environmental law to be brought before the Court".[4]

The case of *Czechia v. Poland* was not finally resolved by the CJEU due to the amicable settlement entered into by the parties.[5] Poland and the Czech Republic informed the Court that they were waiving all claims raised in the case in connection with the settlement they had concluded,[6] as a result of which the case was removed from the register.[7] However, in the course of the proceedings, the court's Vice-President issued orders for interim measures (Article 279 TFEU).[8]

The first was the order of May 21, 2021 (C-121/21 R), in which the Vice-President of the Court granted the Czech Republic's request and ordered Poland to immediately cease lignite mining at the Turów mine until the judgment terminating the proceedings in case C-121/21.[9] The second was the order of September 20, 2021, Czech Republic/Poland (C-121/21 R) in which the Vice-President of the Court first dismissed the application filed by the Republic of Poland to set aside the order of May 21, 2021, Czech Republic/Poland (C-121/21 R) and, second, ordered Poland to pay to the Commission a periodic penalty payment in the amount of EUR 500,000 per day, calculated from the date of service of that order on the Republic of Poland until that Member State complies with the contents of the aforementioned order of May 21, 2021.[10] Subsequent adjudications in this case, in view of Poland's failure to comply with the adjudicated measures, concerned the issue of the enforceability of the imposed periodic penalty from the date of delivery of the order imposing it until the date of the main case's removal from the register (since coal mining in the Turów mine had not ceased by that date)[11] and its enforcement

4 Opinion of Advocate General Pikamäe in Case C-121/21, *Czech Republic v. Republic of Poland*, ECLI:EU:C:2022:74, points 2 and 3.

5 However, the Opinion of the Advocate General was issued – see ibid.

6 On 3 February 2022, the governments of Poland and the Czech Republic concluded a cooperation agreement addressing the effects of mining activities in the Turów open-pit mine.

7 Order of the President of the Court of 4 February 2022, Case C-121/21, *Czech Republic v. Republic of Poland*, intervener in support of the applicant. The President of the Grand Chamber ordered that the case be removed from the register.

8 For more on the orders of the Vice-President of the Court regarding interim measures in *Czechia v. Poland*, see Iwańska and Baran's chapter in this volume.

9 Order of the Vice-President of the Court of 21 May 2021 in Case C-121/21 R, *Czech Republic v. Republic of Poland*, EU:C:2021:420.

10 Order of the Vice-President of the Court of 20 September 2021 in Case C-121/21 R, *Czech Republic v. Republic of Poland*, EU:C:2021:752.

11 Order of the Vice-President of the Court of 19 May 2022 in Case C-121/21 R, *Czech Republic v. Republic of Poland*, EU:C:2022:408.

by the European Commission.[12] In this context, it can therefore be viewed that it was ruled (at least provisionally) that the Republic of Poland was accountable.[13]

2. Polish law perspective

The chapter in this volume presenting the Czech perspective contains a detailed analysis of the European law and legal norms that were violated. Accordingly, there is no need to repeat or supplement the deliberations presented therein. However, provisions of Polish law applicable to the dispute should be analysed more closely in order to present the Polish perspective.

From the point of view of Polish law, the dispute referred to four juridical realms: an assessment of the project's impact on the environment and (in broader terms) the decision on environmental conditions which determines the environmental conditions for the implementation of the project (hereinafter, "the decision on the environmental conditions"), as well as issues related to geological and mining law, issues related to spatial planning and development, and, finally, those related to cross-border impacts.[14] The main challenge raised in the action submitted to the Court of Justice in *Czechia v. Poland* referred to the issue of the assessment of the impact of the project on the environment.[15] Of course, legal problems are not limited to this issue alone, and it should be mentioned that all these four realms intertwine; however, the complaint was made on account of a cross-border environmental impact. Therefore, the analysis of Polish legislation should start with these two issues.

12 See European Commission decisions issued in this matter, which, pursuant to Art. 263 TFEU, were contested. In the action, the Republic of Poland sought the annulment, in Case T-200/22, of the Commission's decision of 7 and 8 February 2022 and of 16 and 31 March 2022, and, in Case T-314/22, of the Commission's decision of 16 May 2022, on the basis of which that institution recovered by offsetting amounts payable in respect of the daily penalty payment ordered by the Vice-President of the Court in the order of 20 September 2021 in Case C-121/21 R, *Czech Republic v. Republic of Poland*, EU:C:2021:752, in respect of the periods, firstly, from 20 September 2021 to 17 January 2022 and, secondly, from 18 January to 3 February 2022. The actions in Cases T-200/22 and T-314/22 were consolidated for the purposes of judgment and dismissed – see judgment of the General Court of 29 May 2024 in joined Cases T-200/22 and T-314/22, ECLI:EU:T:2024:329. The Republic of Poland's appeal against the General Court's judgment was dismissed by the Court of Justice in its judgment of 22 January 2026 in case C-554/24 P.

13 Vide, e.g., A. Verrilli, *Diritto dell'Unione europea* (Simone 2007) 589; R. Adamo, M. Safjan, and A. Tizzano, *Outline of the Law of the European Union* (Warsaw 2014) 362 et seq.; M. Tomášek, V. Týč, and D. Petrlik (eds.), *Právo Evropské unie* (3rd ed., Leges 2021) 182 et seq.

14 J. Kiraga, "Spór o kopalnię w Turowie – na granicy bezpieczeństwa energetycznego i ekologicznego państw," in A. Powałowski (ed.), *Gospodarka w synergii prawa gospodarczego, finansowego i prawnej ochrony środowiska* (C.H. Beck 2022) 81 et seq.

15 In the action filed under Art. 259 TFEU, the Czech Republic, supported by the European Commission, requested that the Court declare that the Republic of Poland, by adopting measures in the context of the administrative procedure aimed at extending the validity period of the mining concession for the Turów lignite mine (Poland) until 2026, had breached a number of pieces of Union environmental legislation, including the provisions of the Directive of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014, L 124, p. 1).

In the Polish legal system, the issue of setting out all the environmental conditions for a project in the development consent procedure is determined according to the Act of October 3, 2008, on providing information on the environment and environmental protection, public participation in environmental protection, and environmental impact assessments (hereinafter, "the EIA Act").[16] It is essential that in the Polish legal system, environmental conditions for a project are determined under and pursuant to an administrative decision, called the decision on environmental conditions.[17] The mentioned decision was introduced to Polish law so as to implement the EIA Directive. An administrative decision is an imperative form of statement by a public administration authority. Environmental conditions for a project are therefore determined in and according to the rules of administrative proceedings. For certain projects deemed by the Polish legislator as projects that may always or potentially have a significant impact on the environment, obtaining the decision on environmental conditions of approval for a project is required and should be preceded by an assessment of the project's environmental impact.[18]

In the Polish legal system, the decision on environmental conditions has the nature of a "preliminary decision" in relation to other development consents required by law. This means not only that it precedes the issuance of other decisions required under specific circumstances but also that this decision is binding for authorities issuing subsequent decisions required by law in a multi-stage investment process (implementation or operating permits). In addition, the environmental conditions specified in the environmental decision for the implementation of the project cannot be modified or changed at further stages of the investment process. In the extensive catalogue of development consents, the issuance of which precedes the issuance of a decision on environmental conditions, a concession for the extraction of minerals from deposits is listed.[19] However, in the state of law involved in the dispute in *Czechia v. Poland*, Article 72(2)(2)(k) of the EIA Act was in effect, which excluded the obligation to obtain an environmental decision in the case of "a single extension of the term of a lignite mining concession up to 6 years, only if the

16 Dz. U. (Journal of Laws) of 2022, item 1029 as amended.

17 Vide, e.g., M. Pchałek and M. Behnke, *Postępowanie w sprawie oceny oddziaływania na środowisko w prawie polskim i UE* (C.H. Beck 2010); G. Dobrowolski, *Decyzja o środowiskowych uwarunkowaniach* (TNOiK 2011); A. Siwskowska, *Decyzje środowiskowe. Opinie i uzgodnienia* (C.H. Beck 2020).

18 Vide K. Gruszecki, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz* (C.H. Beck 2009); B. Rakoczy, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz* (C.H. Beck 2010); T. Filipowicz, A. Plucińska-Filipowicz, and M. Wierzbowski (eds.), *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz* (C.H. Beck 2020); B. Opaliński, *Ustawa o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko. Komentarz* (C.H. Beck 2021).

19 See Art. 72 ust. 1 pkt 4 of the EIA Act.

extension of the concession is justified by the rational management of the deposit and without extending the scope of the concession".[20]

Another legislative act applicable from the perspective of Polish law is the Act of June 9, 2012 – Geological and Mining Law.[21] The act is relevant to the studied case to the extent that its application and the extension of the term of mining concession triggered a categorical reaction from Czechia.

It should be underlined that under Polish law, minerals can be extracted only based on a special administrative decision, that is, a concession decision. The legal basis for its issuance is complex and constituted by the above-mentioned Geological and Mining Law and the Act of March 6, 2018 – Entrepreneurs' Law.[22] The latter act refers to concessions for the extraction of minerals but is also a general legal act governing business operations in Poland. It is applicable unless the Geological and Mining Law regulates issues otherwise.[23]

Article 37 of the Entrepreneurs' Law reads:

1. Running economic activity in areas that are particularly relevant to the security of the state or citizens, or to other important public interest, requires a licence only if the activity cannot be conducted as free activity or after being entered in the register of regulated activities or after obtaining a permit.
2. The granting, refusal to grant, modification, suspension and revocation of a concession, or the limitation of its scope in relation to that described in the application for the concession, takes place by way of a decision of the minister in charge of the business activity that requires a concession, unless separate provisions stipulate otherwise.
3. The detailed scope and conditions for running the business economic activity subject to concession, and in particular the principles and procedure for granting, modifying, suspending, revoking or limiting the scope of the concession, are set out in separate regulations.

The specific regulations referred to in par. 3 include the Geological and Mining Law.[24] Pursuant to Article 21(2) of the Geological and Mining Law, activities in the scope of extracting minerals from reserves can be carried out after a concession has been granted. The concession decision is a type of administrative decision. One of its essential characteristics is that it can be changed, including by extending its validity.

20 Art. 72 ust. 2 pkt 2 lit. k of the EIA Act was repealed.

21 Consolidated text of Dz. U. of 2024, item 1290.

22 Consolidated text of Dz. U. of 2024, item 236.

23 B. Rakoczy (ed.), *Prawo przedsiębiorców* (C.H. Beck 2020).

24 Vide, e.g., H. Schwarz, *Prawo geologiczne i górnicze. Komentarz* (vol. I, C.H. Beck 2012); B. Rakoczy (ed.), *Prawo geologiczne i górnicze* (C.H. Beck 2015); A. Lipiński, *Prawne podstawy geologii i górnictwa* (C.H. Beck 2019); T. Kocowski, W. Małecki, and P. M. Wojtulek, *Prawo geologiczne i górnicze* (C.H. Beck 2021).

The Polish Geological and Mining Law does not provide for any special and separate mode for changing the concession decision. As stipulated in Article 34(1)(a): "Any change of concession shall be governed accordingly by the provisions on its granting. In such a case, cooperation with the authorities specified in the Act shall only apply to those matters which are subject to the intended change, in particular as regards compliance with the intended use or the use of the immovable property in the manner stipulated in Article 7. The provision of Article 155 of the Code of Administrative Procedure shall not apply".

This provision clearly implies that the concession decision can be changed. However, it is interesting and significant that the legislator does not specify the extent to which this is possible. Simultaneously, it does not indicate to what extent such a change is not acceptable. The Polish legislator does not elaborate on the change of the concession decision, so such a change can refer to any element decided by the concession authority. Indeed, the legislator neither explicitly indicates the positive scope of such changes nor excludes the possibility of changing any of the elements.

This provision also implies a fundamental procedural rule, namely that the authority deciding on the change of the concession should apply the same rules as those upon the issuance of the concession. Therefore, the course of proceedings for a change of the concession decision is identical to that of the proceedings for its issuance. However, the legislator did introduce certain modifications concerning its formal and material aspects.

The issuance of the concession decision should be preceded by several actions taken by the concession authority in cooperation with other public administration authorities. Such cooperation can take various forms, such as a consent or an opinion of another authority. The obligation to cooperate with other authorities stems from Article 9 of the Geological and Mining Law stipulating that:

1. If the Act makes the decision of an administrative authority conditional on cooperation (agreement or opinion) with another administrative authority, the authority shall take its stance no later than within 14 days of the draft decision being served.
2. Where the cooperating authority fails to take its stance within the time limit prescribed in paragraph 1, it shall be deemed to approve of the said draft decision.
3. The time limit for taking the stance shall be observed where the cooperating authority serves or sends the decision referring to the case within 14 days after the delivery of the request for taking the stance on the case.

However, in the case mentioned in Article 34(1)(a) of the Geological and Mining Law, the legislator imposed clear limitations on the scope of cooperation. These limitations are both subjective and objective. The limitation of the obligation to cooperate means that, in the event of a change of concession, it takes place only in the scope determined by the change introduced by the applicant. A limitation to

the objective scope of cooperation is also a limitation to its subjective scope. In a specific case, the cooperation of any authority can simply be redundant.

From the analysed point of view, it is also significant that if the concession decision is changed, the procedure for the determination of the environmental conditions for a project in the decision on the environmental conditions (in the current legal status) is also necessary. This is due to the fact that in Article 34(1)(a) of the Geological and Mining Law, the legislator clearly indicated that the change is subject to provisions identical to those applied upon issuance of the decision. The only exception is the limitation of the necessity for cooperating with other authorities. However, such cooperation refers solely to authorities whose rights and obligations to cooperate stem from the Geological and Mining Law.

As indicated hereinabove, the decision on the environmental conditions is issued based on separate provisions and pursuant to the rules set out in the EIA Act. The authority issuing the decision on the environmental conditions is, in this case, not the cooperating authority within the meaning of Article 34(1)(a) of the Geological and Mining Law. Therefore, cooperation cannot be limited only with respect to issues subject to change.

The period of granting the concession can also be an object of change. As such, it is impossible to present the Republic of Poland with an effective allegation of violating Polish internal law since, as indicated above, the legislator does not exclude the possibility of changing the concession decision in terms of its term of validity. By contrast, Article 34(1)(a) of the Geological and Mining Law stipulates that a change to this decision, if any, including to the extent of its term of validity, requires that the authority proceeds as it was required to proceed in the case of issuance of the concession decision.

Indeed, the allegation of the Czech Republic related to the fact that the Polish public administration authority, by changing the concession, acted without a previously issued decision on the environmental conditions. As stipulated in Article 145(1)(6) of the Act of June 14, 1960 – Code of Administrative Procedure,[25] when a decision is issued before another body takes a stance it is required to take by law, the administrative proceedings can be recommenced, and a new decision can be issued instead of the one issued without such cooperation. This relates to the authorities cooperating not only under and pursuant to the Geological and Mining Law but also under the EIA Act.

Thus, the infringement, as reported by Czechia in case C-121/21, involving a change of concession in the temporal scope without first conducting an environmental impact assessment procedure,[26] constituted, from the point of view of

25 Dz. U. of 2022, item 2000 as amended

26 See Case C-121/21, *Czech Republic v. Republic of Poland*. The allegations raised in the action included, among others, violations of Art. 4 sections 1–2 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 r., in connection with Art. 4 sections 4–6, Art. 5 sec-

Polish law, a material breach of law that could result in the revocation or change of the decision amending the concession decision.

As regards the case at hand, it should also be considered that the environmental impact assessment of a project (involving a change of concession in the temporal scope) could not be limited exclusively to the territory of the Republic of Poland. A cross-border proceeding was also necessary and justified. Articles 154 and 155 of the Code of Administrative Procedure[27] should also be indicated as a legal basis for the possibility of issuing a decision on the change of the concession decision. According to Article 154 of the Code of Administrative Procedure:

> §1. A final decision, on the basis of which none of the parties acquired any rights, may be at any time quashed or amended by the public administration authority which issued the decision or by the authority of higher level if it is justified by the public interest or just interest of the party.
>
> §2. In cases specified in §1, the relevant authority shall issue a decision on quashing or amending the original decision.

By contrast, Article 155 of the Code of Administrative Procedure reads as follows: "Upon consent of a party, the final decision on the basis of which the party acquired a right, may be at any time quashed or amended by the public administration authority which issued the decision or by a higher-level authority, unless specific provisions object to quashing or amending such a decision, and provided that it is justified by public interest or just interest of the party; Article 154(2) shall apply accordingly".

Juxtaposing these two provisions of the Polish act on administrative proceedings, the basic difference between them is that one refers to a decision regarding rights and the other to a decision regarding obligations. Both of these provisions apply to the studied case.

The division of procedural legal bases to change the decision relies on the assumption that a decision concerns either rights or obligations. From the point of view of environmental protection law, this division is highly dubious. Decisions issued under environmental protection law are complex. Their complexity is manifested in that they contain statements regarding rights and, simultaneously, obligations. Even if the decision, as a rule, is a decision to the extent of rights, by deciding on the rights, the authority simultaneously decides on the obligations stemming from such rights.

Examples of such decisions are a decision on the environmental conditions and a concession decision. In the first case, by determining the environmental conditions for a project the authority, as a matter of fact, gives its approval to the specific project. Such an indirect approval imposes several obligations on the applicant that will be subject to other administrative decisions in the future. The same applies to

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tions 1–2 and Arts. 6–9 of that directive, by authorising the extension of lignite mining for a period of six years without carrying out an environmental impact assessment.

27 Consolidated text of Dz. U. of 2024, item 572.

the concession decision, as it also contains statements on rights and obligations. Thus, a change of the concession decision should comply with Articles 154 and 155 of the Code of Administrative Procedure, though only to the extent amended by the special provisions of the Geological and Mining Law.

At the level of European law, as indicated above, proceedings before the Court of Justice ended with Czechia withdrawing the action against Poland. Therefore, the Court was not in a position to issue a final judgment. Nevertheless, it had already made a preliminary analysis of Poland's liability by issuing orders on the interim measures necessary to ensure the full effectiveness of the final judgment (Article 279 TFEU). Czechia withdrew its complaint after an agreement was concluded between the disputing parties on February 3, 2022 regulating the contested issues on a bilateral basis.

The fact that Poland had not complied with the content of the aforementioned orders of the Vice-President of the Court on interim measures cannot be ignored in a legal assessment. From a Polish perspective, this is a symptomatic phenomenon that fits into the broader context of relations between Poland as a Member State of the EU and the EU itself.

3. Conclusion

At this stage, it should be pointed out that the rule of law is one of the fundamental values of the Union in the meaning of Article 2 TEU. One of the elements of the rule of law is compliance with the rulings of courts and tribunals, even when the decision is not accepted by its addressee. Making the enforcement of a judgment conditional on the acceptance of its content would, in fact, nullify the rule of law and reduce the role of courts and tribunals to mere mediating rather than adjudicating bodies. In this respect, a court decision can be challenged only under specific rules and procedures, which are also regulated in the legal norm. In addition, it should be underlined that this case study concerns not only the legal but also the political realm. Poland's attitude, first towards its neighbour and then towards the orders of the Vice-President of the Court, had specific repercussions in both domestic and foreign policy. Poland's attitude towards the orders regarding interim measures was interpreted in European politics as stemming from the broader context of Poland's relations with the EU. It was not, therefore, a single response to the ruling that Poland recognised as unfair but an attitude interpreted as another demonstration of tense relations with the EU. One could even assume that this case was another pretext to repudiate the EU as a legal and political entity, as well as the values the EU is guided by, protects, and embodies.

In domestic policy, the same was recognised, although the issue of the costs of non-compliance with the order of the Vice-President of the Court of Justice came to the fore above all else. Poland's inappropriate attitude towards the court's order was considered a secondary element. However, the Czech-Polish dispute was not a typical legal dispute. Leaving legal matters aside, a short-term exacerbation of good neighbourly relations also occurred, and, in that context, signing an agreement should be deemed the best solution possible. As the Czech Prime Minister

pointed out, a significant obstacle to good neighbourly relations between the two countries had been removed.

In conclusion, it should be highlighted that although the Court of Justice did not settle the case but only issued orders and the dispute ended with the conclusion of an agreement resolving all the claims, the conduct of the Republic of Poland was given a preliminary negative assessment. Of course, it cannot be deemed a procedural defeat, but nevertheless, the preliminary assessments were not favourable for Poland. In presenting the Polish perspective, this paper has indicated which provisions of Polish law regulate the contested issues. Although *Czechia v. Poland* was not substantially decided by the Court of Justice, the reconstruction of its legal bases in Polish law is undoubtedly complicated. Indeed, they comprise at least several fundamental legislative acts, including the EIA Act, the Geological and Mining Law, and the Code of Administrative Procedure.

Interestingly, no court or authority in Poland considered the case and made a direct procedural statement as to whether Polish law had been violated and, if so, how. In fact, the only decisions issued were the orders of the Vice-President of the Court of Justice. These are, therefore, the only procedural statements containing an assessment of Poland's conduct. However, it should be remembered that, as there was no substantial examination of the complaint, the legal assessment was narrowed down to European law only, in light of which violations did occur. However, it was not indicated whether and how Polish law could have been violated. The case's complex and intricate legal basis, presented in its basic form, implies that Polish law could also have been violated. Nevertheless, such digressions are purely speculative.

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