4

Environmental Principles in European Union Case Law

I. Introduction

This Chapter maps the case law of the Court of Justice of the European Union ('CJEU')—formerly the European Court of Justice ('ECJ') and Court of First Instance ('CFI'), now the Court of Justice and General Court[1]—in which EU environmental principles are involved or relied on in judicial doctrine. This analysis shows that environmental principles—as legal concepts—are playing significant and innovative roles in the developing doctrine of the EU courts. These legal roles are partly determined by the EU legal instruments and frameworks in which EU environmental principles are found, as set out in Chapter Three, but they are also shaped by the institutional features of the EU courts and their evolving doctrinal reasoning. The resulting map is an expression of environmental principles as part of EU legal culture.

The main EU environmental principles mapped in this chapter include six principles of EU environmental policy, as outlined in Chapter Three: the preventive principle, the precautionary principle, the polluter pays principle, the principle of rectification at source, the integration principle and the principle of sustainable development.[2] By analysing how these principles are used in judicial reasoning,

[1] The Court of Justice of the European Union ('CJEU') has been known as such since the Lisbon Treaty became effective in 2009, and comprises the Court of Justice, General Court and specialised courts: Treaty on European Union (Lisbon Treaty) ('TEU') art 19. Art 19 renames and expands the EU court structure, which formerly comprised the European Court of Justice and Court of First Instance, with judicial panels set up under the latter in specific areas: EC Treaty of Rome (as amended) ('EC Treaty') art 220. Since many cases discussed in this Chapter were decided prior to the Lisbon Treaty, references will often be to pre-Lisbon courts ('ECJ', or 'CFI'). Where there is no need to distinguish between individual EU courts, whether pre- or post-Lisbon, 'EU courts' generally will be referred to.

[2] They also include a number of environmental principles at the fringe of this group in terms of their legal impact in EU law—the substitution principle, and the principles of proximity, self-sufficiency, substitution, and a high level of protection: these are discussed in the chapter as they arise in cases.

the chapter shows that they are performing a range of doctrinal functions in the EU legal context, influencing the development of EU legal doctrine in ways that reflect their character as benchmarks of EU environmental policy. Thus environmental principles give the courts a broad interpretive discretion in construing EU legislation and the Treaties. They also inform, and even generate, legal tests that are applied by the EU courts in reviewing the lawfulness of EU and Member State action within the scope of EU environmental competence. In this chapter, 'EU environmental competence' is referred to as the area of EU-prescribed policy authority concerning environmental matters[3] within which political institutions—legislative and administrative[4]—can lawfully act. This area of competence is partly defined by environmental principles—particularly those in Article 191(2) TFEU outlining EU environmental policy—and can thus be policed by these principles as constitutionally prescribed boundaries of lawful action. This area of policy authority has also expanded in EU law, particularly under the influence of the integration principle in Article 11 TFEU. The chapter shows that the scope of EU environmental competence acts as a moving indicator of the legal roles of environmental principles, which frame the competence of institutions acting in this shifting field of EU policy.

There are also limits to the legal roles played by environmental principles in the reasoning of the EU courts. For the most part, environmental principles do not have freestanding roles to compel or review generally the exercise of policy discretion by EU institutions, or by Member State institutions acting within the scope of EU law. They are not equivalent to 'general principles of EU law' or fundamental rights in doctrinal terms. In fact, they can be a reason to defer to institutional discretion, where this is seen to reflect the application of certain environmental principles. Environmental principles are also used to justify reasoning only to the extent that EU courts are deciding questions about EU environmental competence that has *already* been exercised by EU and Member State institutions on the basis of environmental principles. This final limit can lead to circularity of reasoning in some cases, since identifying when such EU environmental competence has been exercised is partly defined by judicial interpretations of when environmental principles have been relied on and what they mean, which can be open for argument in light of the ambiguous definitions of environmental principles.

[3] What are 'environmental matters' itself raises problems of definition, considering that environmental matters may be narrowly understood as pertaining only to non-human ecological concerns, or broadly understood to cover, for example, the built environment, matters of international trade and questions of public health: Stuart Bell, Donald McGillivray and Ole Pedersen, *Environmental Law* (8th edn, OUP 2013) 7–9. See also ch 1, n 105. In relation to 'EU environmental competence', a broad notion of the environment is here adopted to accommodate the wide-ranging subject matter in relation to which environmental principles are employed in EU case law.

[4] In the EU, such institutions comprise the Council, Commission and European Parliament (TEU, arts 13, 14, 16, 17), hereafter the EU 'institutions'. These political institutions also include Member State governments acting within the scope of EU law.

All these limits reflect the self-perceived constitutional limits of the EU courts.[5] Unsurprisingly, such limits are frequently touched on by the doctrinal use of EU environmental principles, since these principles prescribe matters of socio-economic policy in legal terms (in the TFEU). Identifying the boundaries of these constitutional limits is implicitly part of much judicial reasoning involving EU environmental principles. This exercise is complicated by the fact that competence for environmental matters is shared across EU and Member State institutions,[6] and so EU courts are working out these constitutional limits in a context of multi-level governance in their doctrinal use of principles.

In terms of the meanings of EU environmental principles, marginal definitions of environmental principles are identified throughout the chapter when principles are employed in particular legal contexts. This reinforces the position that definitions of environmental principles are end points—or analytical by-products—rather than starting points in analysing environmental principles across the different legal cultures in which they play a role. The chapter shows that there are no short-cuts to analysing the roles of environmental principles in this legal context—they are implicated doctrinally in cases of wide-ranging subject matter, which has expanded beyond narrowly-defined 'environmental' matters in terms of EU competence, and which involve a variety of different EU legal actions, both procedurally and in terms of the legal questions involved.

To identify the different legal roles of environmental principles, the chapter maps the patterns of doctrinal reasoning involving environmental principles in EU case law by tracking the judicial techniques involved in such reasoning. It reveals a doctrinal picture of environmental principles in EU law in terms of 'treatment categories', which are categories of cases characterised by the particular technique used by the courts in employing environmental principles, or declining to use them, to justify their reasoning. Three treatment categories chart the legal use of environmental principles in this chapter: policy cases (where environmental principles are relegated to the policy sphere and not used doctrinally), interpretive cases (where they are used as interpretive aids) or informing legal test cases (where they are used to inform legal tests relating to the boundaries and exercise of EU environmental competence). These three categories are constructed and examined in Parts III to V, analysing cases falling within each category to exemplify and elaborate the respective roles played by environmental principles. A single case might fit into more than one of the treatment categories, as one case might contain environmental principles playing more than one

[5] By 'constitutional' limits, role and so on, this chapter refers to the proper role of the Court as an EU institution in constituting—alongside the Council, Commission and Parliament—a governing body of the EU.

[6] TFEU, art 191.

doctrinal role.[7] Furthermore, the chapter does not provide an exhaustive map of all cases involving environmental principles in EU case law since there are over 390 Court of Justice, General Court, ECJ and CFI judgments, Advocate-General opinions and lodged appeals involving environmental principles (at the time of writing). Rather, it discusses representative cases to demonstrate their doctrinal contours.

Overall, the doctrinal map drawn of environmental principles in EU law shows a highly active legal landscape, with interesting and novel legal developments that are fundamentally contingent on the EU law context, in that they reflect issues and questions of EU law. The map also highlights what environmental principles are *not* doing legally in this context. In particular, the idea that environmental principles might represent simple or comprehensive solutions to environmental problems or solutions to legal problems is negated in the EU context. Environmental principles in EU law cannot be called in aid directly as legal responses to environmental problems; they do not fit existing models of 'legal principles' in this legal context; they do not (yet) render EU environmental law comprehensively coherent; and they do not represent a radical new form of law. The mapping exercise of this chapter reveals a range of interesting developments of EU law, focused on environmental principles, but does not support grander claims for their legal roles universally. It is at once a very intricate but more modest legal landscape.

In terms of transnational legal influences in the reasoning of the EU courts, these are limited in this legal context. Most reasoning about environmental principles is internally focused on the treaties, legislation and doctrine of the EU legal order. Some judicial references to external legal influences are found in cases concerned with the concept or principle of sustainable development. These transnational references are considered briefly in Part VI, which considers the special case of sustainable development in EU judicial reasoning. This special treatment reflects its dual identity as an overarching concept in EU law and policy, which informs EU action internally whilst also connecting to the international sustainable development agenda. Sustainable development also has a particularly ambiguous meaning, and accordingly its doctrinal use is less focused than reasoning relating to other EU environmental principles. These distinctive features of sustainable development as a 'principle' were introduced in Chapter Three: the EU principle of sustainable development, along with the integration principle, developed separately from the four environmental principles in Article 191(2) TFEU,[8] at different

[7] eg Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105, which appears in both Parts III and IV below.

[8] Treaty on the Functioning of the European Union (Lisbon Treaty) ('TFEU' or the 'Treaty'). References throughout this chapter to the 'Treaty' are either to this current Treaty, or to the predecessor EC Treaty (with articles identified by the suffix 'EC'), whichever was relevantly in force. EU legislation adopted under the EC Treaty is variously described as 'EC' or 'Community' legislation.

times, and has both overarching and externally facing roles in the Treaties. Part VI also considers emerging doctrinal possibilities relating to Article 37 of the EU Charter of Fundamental Rights. Article 37 has not featured strongly in the EU courts' jurisprudence to date but it provides scope for legal developments relating to sustainable development in the EU context, and also for connecting the courts' reasoning to international human rights law. Thus, even within a single legal context, environmental principles are not of the same legal order or status. No map can (currently) neatly capture the legal story of EU environmental principles.

This legal variation is also seen in the case of the integration principle.[9] Whilst this principle has legal roles in EU case law that map onto the three main treatment categories developed in this chapter, this is often in ways that shape and influence the very scope of these categories. This influence is due to the fact the integration principle in Article 11 TFEU is concerned with how 'environmental protection requirements', including those reflected in Article 191(2)'s principles of environmental policy, are integrated into other areas of EU policy.[10] Its legal influence thus gives extra dimensions to these other environmental principles, expanding their legal roles beyond the strict domain of EU environmental policy in Title XX of the TFEU,[11] widening the area of EU environmental policy itself,[12] and suggesting more ambitious legal roles for environmental principles in EU law in the future.[13] The integration principle thereby broadens the map of EU case law involving environmental principles, amplifies their legal roles, and suggests that the legal story of environmental principles in EU law will continue to evolve. This is reinforced by the legal potential of Article 37 of the Charter mentioned above, as this also contains a legal version of the integration principle, albeit without reference to 'environmental protection requirements' that link directly to other EU environmental principles.

In order to draw (and then read and understand) this chapter's doctrinal map of EU case law involving environmental principles, Part II first explores in more detail the legal culture in which environmental principles are employed in EU law. It examines the jurisdiction and institutional identity of the EU courts, considering their constitutional role, their openness to developing judicial doctrine within different aspects of their jurisdiction, and their style of judicial reasoning, relating these features to their treatment of environmental principles. This legal background describes the 'internal' legal culture of EU law in which environmental principles have developing doctrinal roles, building on the picture set out in Chapter Three of how six particular environmental principles have evolved to have prominent roles in EU Treaties, legislation and policy documents.

[9] As will be seen, the precautionary principle also has a distinctive legal role in EU case law, partly due to the impact of the integration principle, and also because of the quantity of case law involving the principle.

[10] TFEU, arts 11 & 191(2).

[11] See below, Section IV(B).

[12] See below, Section V(A).

[13] See below, Section III(E).

II. The Jurisdiction and Institutional Identity of EU Courts: Reasoning with Environmental Principles in EU Legal Culture

The legal roles of environmental principles in EU case law are shaped by EU legal culture, and particularly by the jurisdiction and institutional identity of the EU courts and the law they apply. This section sets out the nature of this identity and jurisdiction, examining the EU courts' progressive constitutional role and their reasoning style and doctrine, considering how the body of case law involving environmental principles fits within this legal picture. This case law is very diverse in EU law terms and it is only by appreciating the nature of EU courts, the legal questions they decide, and how they decide them, that a doctrinal map of the legal roles of environmental principles in EU law can be drawn, and made sense of. The treatment categories into which environmental principles fall in EU law are not abstract doctrinal categories; they involve questions of EU law to be answered by the courts, and specific EU legal tests and patterns of doctrinal reasoning developed to answer them. Further, the constitutional role of the EU courts in deciding the lawfulness of EU action—including all action in relation to environmental matters within the scope of EU law—determines the extent to which environmental principles have legal roles at all. In light of this EU law background, the section concludes by introducing the three mapping categories of the chapter as reflections of this EU legal culture.

A. The Constitutional Role and Progressive Nature of the CJEU

The CJEU has a central constitutional role in EU law. This role is articulated in Article 19 TEU, which provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Since the EU Treaties—the TEU and TFEU—constitute the European Union as a polity, with the consent of its Member States (the Treaty signatories), this role for the CJEU establishes it as a key institution in the EU's constitutional architecture, responsible for maintaining its rule of law.[14] The CJEU has taken on this constitutional role and developed a progressive institutional identity, reflecting the novelty of the EU 'law' that it interprets, applies and articulates. As Tridimas states, EU law is 'not only a new legal order but also a novel one in the sense that it has no historical precedent or indeed contemporary equivalent'.[15] As ultimate arbiter of such law, the EU courts have

[14] See above n 5.
[15] Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 18.

(had) great scope for innovative doctrinal reasoning, as well as a need to define their own institutional identity in elaborating EU law.[16] Much commentary has reflected on the ECJ's progressive constitutional steps in asserting the supremacy and direct effect of EU law within Member State legal orders,[17] such that it has created a body of European constitutional case law.[18] Member States and Member State courts,[19] as well as academics,[20] have largely supported the bold assertions of constitutional authority by the EU courts.[21] Carol Harlow also notes that the ECJ was equally 'strong and self-confident' as a 'founding father' of EU administrative law, whilst the European Community was in its infancy.[22]

This progressiveness is possible due to the doctrinal freedom given to the EU courts to shape EU law by the EU's founding Treaties. This freedom is seen at a broad level in Article 19 TEU above, which states simply that the CJEU is to ensure that the 'law' is observed. That law comprises the rules set out in the Treaties, and the secondary EU legislation enacted under them, but is otherwise undefined. The resulting space for legal development has allowed the EU courts to develop a wide-ranging body of judicial doctrine,[23] including using environmental principles creatively within that evolving doctrine.

B. The CJEU's Jurisdiction

There are three main Treaty provisions that provide for the CJEU's jurisdiction in procedural terms: Article 263 TFEU (actions to review the legality of acts of

[16] eg Case 6/64 *Costa v ENEL* [1964] ECR 585; Joined Cases 98 & 230/83 *van Gend en Loos v Commission* [1984] ECR 3763; Joined Cases C-6 & 9/90 *Francovich v Italy* [1991] ECR I-5357.

[17] Some scholars have charged the ECJ with illegitimate activism: Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparitive Study in Judicial Policymaking* (Martinus Nijhoff Publishers 1986) 62; Trevor Hartley, 'The European Court, Judicial Objectitivity and the Constitution of the European Union' (1996) 112 *LQR* 95; *cf* Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 390–391.

[18] Eric Stein, '"Lawyers", Judges & the Making of a Transnational Constitution?' (1981) 75 *AJIL* 1, 3 *et seq*; Joseph Weiler, 'The Transformation of Europe' (1991) 100 *Yale LJ* 2403.

[19] Nial Fennelly, 'Preserving the Legal Coherence Within the New Treaty' (1988) 5(2) *MJ* 185, 198; Miguel Maduro, *We the Court: the European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998) 30–34.

[20] Joseph Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31(4) *JCMS* 417, 431–432.

[21] Although Member State courts have occasionally rebelled against the CJEU's assertion of constitutional authority: see Anne-Marie Slaughter et al (eds), *The European Courts and National Courts—Doctrine and Jurisprudence* (Hart Publishing 1998).

[22] Carol Harlow, 'Three Phases in the Evolution of EU Administrative Law' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011).

[23] Including the transformative internal market tests laid down in Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntweinn (Cassis de Dijon)* [1979] ECR 649 and Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1994] ECR I-4165, as well as review tests applicable under art 263 TFEU: see below, nn 28–34 and accompanying text.

the EU institutions); Article 267 TFEU (preliminary references from Member States); and Article 258 TFEU (enforcement actions against Member States). Identifying these different procedural avenues of the CJEU's jurisdiction is significant for understanding reasoning involving environmental principles in two respects. First, like Article 19 TEU, they are drafted openly, giving the courts considerable scope to develop doctrine and review tests within these jurisdictional domains. Second, the same legal issues can arise across these different types of action, with the result that the doctrinal use of environmental principles is not determined by the kind of case that the court is hearing procedurally.

A significant number of cases involving environmental principles are Article 263 cases, where the legality of EU institutional acts is under review. Article 263(2) lays down various grounds for reviewing this legality, including, most relevantly, lack of competence, and infringement of the EU Treaties or 'any rule of law relating to their application'.[24] The ground of lack of competence reflects the fact that the EU comprises a set of legally limited competences conferred on it, or attributed to it, by its Member States,[25] some of which are exclusive to EU institutions (such as EU competition policy),[26] and others, including environment policy, which are shared with Member State governments.[27]

In applying these grounds of review in Article 263(2), which are otherwise undefined, the EU courts have developed a range of tests for reviewing EU institutional acts—a body of EU constitutional and administrative law doctrine.[28] For the ground of 'lack of competence', the main test for determining whether a measure is within the scope of (a particular basis of) EU competence relates to its 'centre of gravity', as determined by its predominant aim and content.[29] When considering 'infringement of the Treaties or of any rule of law relating to their application', the CJEU applies a range of tests, including the pervasive test of proportionality to determine whether EU action strays unlawfully beyond its legitimate Treaty objective,[30] as well as a test of 'manifest error of assessment' for judging any discretionary overreach by EU institutions in matters of complex economic or social policy, or scientific fact evaluation.[31] These administrative law tests also include increasingly fine-grained tests that structure and confine the discretion of EU institutions in their decision-making, as EU administrative law has continued to evolve.[32] These review tests are complemented by the 'general principles of EU

[24] TFEU, art 263(2).
[25] TEU, art 5(2).
[26] TFEU, art 3(1).
[27] TFEU, art 4.
[28] On the nature of EU administrative law, see Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012). See also Harlow (n 22) 444–450 on how the ECJ had doctrinal freedom to develop the building blocks of administrative law and pursued this against a moving constitutional backdrop.
[29] Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867 [10].
[30] Now enshrined in TEU, art 5(4).
[31] Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305 [311]; Craig , *EU Administrative* Law (n 28) ch 15.
[32] See below, Section V(B)(iii).

law', discussed in Chapter Two,[33] which the CJEU has developed in its case law as standards of legality for EU action (including principles such as those of equal treatment or legitimate expectations).[34] EU environmental principles do not constitute general principles in this EU law sense;[35] rather, as will be seen in Section V below, environmental principles have an influential role on the doctrinal development of other review tests that apply in Article 263 actions.

The doctrinal openness of the 'law' to be applied by EU courts is also seen in the second main area of the CJEU's jurisdiction—preliminary references from Member State courts under Article 267 TFEU. Member State courts can refer to the CJEU questions of interpretation of the Treaties and EU legislation, and of any element of the EU legal order more broadly,[36] as well as questions concerning the validity of EU institutional acts. Preliminary reference judgments are important in EU law in establishing precedents of EU law and building uniformity.[37] In deciding on the validity of EU institutional acts, the preliminary reference procedure provides an indirect form of legality review on the same grounds set out in Article 263(2), with equivalent doctrine applied by the EU courts. When it comes to the interpretive function of preliminary references, the EU courts answer a range of legal questions. They may be called on to interpret ambiguous provisions of the Treaties and EU legislation, and they may also be asked to 'interpret' EU law doctrines that constrain or guide Member States when acting within the scope of EU law. In the latter sense, the EU courts effectively review the lawfulness of Member State action through the preliminary reference procedure, even though they do not decide on the legality of such action in EU law on the facts.[38] The tests that the CJEU relies on to review Member State action in this way include the general principles of EU law,[39] the test of proportionality,[40] as well as more specific tests

[33] See ch 2(III)(B).

[34] Tridimas, *General Principles* (n 15).

[35] They are not employed by the courts as a stand-alone tests of review for all EU acts, and environmental principles derive from the Treaties as statements of substantive policy, rather than being creatures of judicial doctrine: ibid 5; *cf* Craig, *EU Administrative Law* (n 28) ch 21. In addition, general principles of EU law are also seen as distinct from, and constraining the legal operation of, environmental principles: eg Case C-293/97 *R v Secretary for the Environment, ex p Standley* [1999] ECR I-2603 [52]–[53]; Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* [2009] ECR I-06995, Opinion of Advocate-General Kokott (23 April 2009) [32]–[33], [55]. See also ch 2(III)(B).

[36] The extent of this jurisdiction is based on a broad interpretation of the CJEU's jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and of acts of EU institutions and bodies: TFEU, art 267. See Damien Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd edn, CUP 2014) 179–180.

[37] Joined Cases 28-30/62 *Da Costa en Schaake NV v Netherlands Inland Revenue Administration* [1962] ECR Eng Spec Ed 31.

[38] There is an important constitutional demarcation between interpretation and application of EU law in cases referred by Member State courts under art 267, even if it is blurred in practice: Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 496–498.

[39] Although the extent of such review is unclear: Editorial, 'The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?' (2010) 47 *CMLRev* 1589.

[40] This is similar to the test of proportionality applied to EU action, although with some structural differences: Tridimas, *General Principles* (n 15) chs 3 and 5. See also Craig, *EU Administrative Law* (n 28) chs 19 and 20.

relating to provisions of the Treaties that are alleged to have been infringed or to be otherwise relevant.[41] Through both Article 263 and 267 actions, therefore, the EU courts have developed legal tests of 'review' in relation to environmental action by both EU and Member States acting within the scope of EU law.[42] In developing doctrine relating to these various review tests across the jurisdiction of the EU courts, environmental principles have had an influential, albeit varying, doctrinal role, as examined in Part V.

In Article 267 cases that involve interpreting EU provisions, the EU courts also have doctrinal latitude, particularly due to the teleological approach taken by the courts. The ECJ,[43] and how the Court of Justice, has tended to examine 'the whole context in which a particular provision is situated, and [to give] the interpretation most likely to further *what the Court considers* the provision sought to achieve'.[44] In deciding these kinds of interpretive questions, the ECJ has built doctrine around specific provisions and areas of substantive EU law, including EU environmental law. In so doing, the EU courts have relied on environmental principles to interpret EU legislation in sometimes radical ways,[45] by attributing meanings to environmental principles in the context of particular provisions, in relation to which the courts have identified environmental principles as being relevant purposes. Through the courts' purposive reasoning and the open-ended nature of environmental principles, interpretive reasoning incorporates particular policy visions of environmental principles into the EU legal order.

The CJEU's third main area of jurisdiction—enforcement actions against Member States under Article 258 TFEU—also involves issues of interpretation of EU law, since the courts must interpret the EU Treaties, secondary legislation and related doctrines, in order to enforce them against allegedly delinquent Member States. Similar doctrinal roles for environmental principles can thus occur in both Article 267 and 258 cases, just as there is overlap between Article 263 and 267 cases in the ways that environmental principles can inform review tests.

This outline of the EU courts' jurisdiction demonstrates two points. First, the EU courts have a wide platform (and need) to develop EU law doctrinally through their case law. Second, the different types of action that might be brought before the EU courts do not clearly demarcate the legal questions with which the courts are concerned. These questions overlap between the Court's jurisdictional classes

[41] The specific review tests pertinent to reasoning involving environmental principles include the series of tests developed by the Court to determine whether a Member State has infringed art 34 TFEU, and also the tests laid down in, and developed by the Court in relation to, arts 114(4) and (5) TFEU.

[42] It is in both these senses that the term 'review test' is used in this chapter.

[43] The ECJ (prior to the Lisbon Treaty) had sole jurisdictional responsibility for preliminary references. Since the Lisbon Treaty, there is some shared jurisdiction for preliminary references between the EU courts but the Court of Justice hears the majority of cases.

[44] Craig and de Búrca, *EU Law* (n 38) 64 (emphasis added).

[45] eg Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I-7405, and see Part IV generally.

in procedural terms. This overlap is seen in the CJEU cases involving environmental principles. To an extent, in different forms of action, different types of argument and reasoning apply. For example, arguments challenging the legality of EU legislation have no place in Article 258 enforcement actions, thus preventing any legality arguments involving environmental principles in such cases.[46] However, there are several ways in which there are doctrinal connections between legal issues across different aspects of the CJEU's jurisdiction, as outlined above. The following section examines further the EU law-specific challenges in mapping the diverse body of case law involving environmental principles.

C. Diversity of EU Case Law Involving Environmental Principles

The previous section showed how the EU case law involving environmental principles is not readily classifiable by the types of action brought in procedural terms. This section highlights two further aspects of the diversity of EU cases involving environmental principles that give rise to challenges in making sense of them. First, cases involving environmental principles involve a range of legal questions and subject matters. Second, the reasoning style involving environmental principles varies across the cases. These challenges reinforce the mapping method of this project, indicating that close scrutiny of the reasoning techniques employed by the EU courts is required to determine the legal roles played by environmental principles. Environmental principles follow no clearly established model in EU law with their doctrinal roles in a state of evolution.

Chapter One explained that all EU cases involving environmental principles are public law cases, broadly understood, in that they decide on the legality of, or otherwise guide, public action. However, they represent many different types of case, depending on how one might choose to categorise them. In terms of the particular questions of EU law decided in this case law, the legal points at issue give rise to some predictable lines of doctrinal reasoning involving environmental principles, as seen in cases where the precautionary principle is used to inform the issue of proportionality of Member State action taken on precautionary grounds which infringes Article 34's guarantee of the free movement of goods.[47] However, the doctrinal reasoning involving the precautionary principle employed in these cases also overlaps with reasoning in relation to other questions of EU law, revealing doctrinal connections between different areas of EU law through reliance on the precautionary principle.[48] This demonstrates the openness and evolving nature of EU law, and how the mapping exercise of this chapter might be used to draw con-

[46] Case C-1/00 *Commission v France* [2001] ECR I-9989.
[47] See Section V(B)(v).
[48] See Section V(B)(ii)–(iv).

clusions about the development of EU law itself, as well as drawing conclusions for environmental law and environmental law scholarship.

In terms of subject matter, again the case law is diverse, extending beyond narrowly drawn 'environmental' matters.[49] The case law is in fact skewed by the number of public health cases in which the precautionary principle is discussed—Paul Craig describes this highly contested area as an 'eclectic' area of EU law.[50] However, as discussed below, the role of the integration principle, which has extended the influence of the precautionary principle into public health cases, has also begun to extend the role of other environmental principles into legal disputes involving other areas of EU competence, including competition and transport policy. The current subject matter profile of EU cases involving environmental principles appears to represent a stage in the developing doctrine of environmental principles in EU law, which reflects a developing integration of environmental policy requirements into other areas of EU law.

Another challenge in identifying the role of environmental principles in CJEU reasoning concerns the nature of that reasoning. The Court of Justice, and previously the ECJ, often gives limited reasoning for its decisions. It is difficult to discern the legal roles played by environmental principles when references to them are brief, whether those references are dismissive or integral to the outcome of the case. In other cases, particularly those involving the precautionary principle, very lengthy and complex reasoning is delivered, by the General Court (formerly CFI) in particular. Detailed reasoning gives more clues about the legal role, if any, played by the precautionary principle in these cases, but its helpfulness can also be limited when it involves overlapping threads of reasoning, which are inconsistent from case to case. Furthermore, there is often also no linearity in the judicial discussion of environmental principles, so that, for example, the principles might be mentioned in the Opinion of an Advocate-General or in arguments put to the relevant court, but then not picked up on in the reasoning of the Court of Justice, or vice versa (the courts might address the principles without prompting). A doctrinal focus minimises these difficulties by identifying the patterns of judicial reasoning or technique across the case law, and organising the cases according to these patterns (the 'treatment categories' in this chapter).

In sum, the EU case law involving environmental principles follows no simple patterns. It is a miscellany of cases that involve different types of actions, different subject matter, and different legal issues, with no consistent linearity of judicial discussion, although there are some identifiable patterns of reasoning. The limitations of these classifications are both exposed and cured by a doctrinal analysis of the case law involving environmental principles. This chapter analyses the judicial treatment of environmental principles in EU law with no presumed boundaries

[49] See above n 3.
[50] Craig, *EU Administrative Law* (n 28) 473.

in the reasoning of the EU courts concerning environmental principles, so as to capture all their legal roles. The contextual considerations examined in this section are not tools or categories for mapping the case law, but attributes of the cases in EU law terms that help in navigating the resulting map.

D. Mapping Environmental Principles: Treatment Categories Shaped by EU Legal Culture

In doctrinally mapping the EU case law involving environmental principles, the cases fall into three treatment categories according to the judicial techniques used to engage (or not engage) environmental principles in the reasoning of decisions. These categories—policy cases, interpretive cases, and 'informing legal test' cases—are explained in this section. An important feature of these three categories is that, in different ways, they each reflect the CJEU's position on its proper constitutional role in reasoning with principles. The Court is certainly prepared to reason using environmental principles, taking the lead from the Treaties that dictate environmental principles as the legal basis of the EU's environmental policy. However, the Court's reasoning with these principles is also limited, reflecting the fact that environmental principles are policy ideas, which are employed by the EU institutions in domains of complex social and economic policy. Without always making this explicit, the doctrinal limits adopted in reasoning with environmental principles prevent the Court from straying too far into the sphere of policymaking. The CJEU's self-imposed doctrinal limits have a common link—the Court only employs environmental principles doctrinally in its reasoning when reviewing or interpreting acts of 'EU environmental competence' adopted first by the EU institutions on the basis of environmental principles.[51] The delimiting factor of 'EU environmental competence' is a notion that characterises the boundaries of EU environmental law generally and it is a central aspect of EU legal culture that shapes the roles of environmental principles in EU law.

As set out in the Introduction to the Chapter, 'EU environmental competence' is defined as the area of EU-prescribed policy authority concerning environmental matters within which political institutions can lawfully act.[52] EU environmental competence is set out, first and foremost, in Title XX of the TFEU, which confers competence on EU institutions to act in the area of environmental policy.[53] However EU environmental competence is a wider domain of competence than this for two reasons. First, under the integration principle, as Article 11 TFEU explicitly requires, environmental protection requirements are to be incorporated into

[51] A similar limit applies to constrain the legal roles of 'principles' in the EU Charter: Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 52(5). See further below, n 371.

[52] See above, text accompanying nn 3–4.

[53] TEU, art 5(1).

other EU policy domains. Whilst the legal impact of Article 11 in EU law is not yet fully resolved,[54] the EU case law involving environmental principles shows that the integration principle has widened the area of EU competence within which the CJEU recognises the legal relevance of environmental principles, to include at least public health, agriculture, transport and competition policy.

Second, this area of regulatory competence is shared with Member State governments, with the demarcation of policy authority for environmental matters determined by the principle of subsidiarity.[55] Section V(B)(v) demonstrates that '*Union* policy on the environment' in Article 191(2) TFEU[56] is interpreted by the CJEU to extend beyond the environmental policy of EU institutions to include the environmental policy of Member States when acting *within the scope of EU law*—that is, when Member States implement EU environmental policy but also when Member State environmental regulation encroaches on any area of EU harmonisation or on EU internal market rules in particular. In this expanded sense of EU environmental competence, environmental principles also have doctrinal roles to play, guiding the lawful discretion of Member States within this shared policy domain. These legal roles are triggered when the EU courts have to decide legal questions relating to purported exercises of EU environmental competence, understood in this broad sense.

There are other factors that limit the legal roles of environmental principles in EU legal reasoning—such as the openness of the review test applied by the Court (some Treaty provisions restrict the scope of EU environmental competence so as to generate review tests that leave no room for environmental principles in the Court's doctrine),[57] and the standing restrictions applied with respect to private litigants in bringing direct Article 263 actions[58]—but the boundaries of EU environmental competence limit are critical in this respect. They reflect a jurisdictional limit accepted by the EU courts in considering arguments and developing doctrine by reference to environmental principles. However, this limit is not a straitjacket for the CJEU. As indicated above in relation to the integration principle, the very notion of EU environmental competence can be stretched by the Court's own reasoning. Further, the Court's interpretation of when other institutions have taken action on the basis of environmental principles is sometimes a matter only of the Court's interpretation.[59]

In light of this appreciation of the internal EU legal culture in which environmental principles have legal roles, the chapter identifies that there are three different ways in which the EU courts reason with environmental principles as a matter

[54] See ch 3, Section III(A)–(C).
[55] TEU, art 5(1) & 5(3).
[56] Formerly 'Community policy on the environment': ex-174(2) TEC.
[57] See Section III(D).
[58] Case C-263/02 P *Commission v Jego-Quere et Cie SA* [2004] ECR I-3425.
[59] eg *Monsanto* (n 7): see Section IV(B)(i).

of doctrine. That is, there are three treatment categories that map the case law. The first category—*policy cases*—comprises cases in which environmental principles are mentioned or argued about but the EU courts do not use them in any way to resolve the legal issue before them. Rather they treat the principles as policy ideas either that are yet to be applied in legislative or decision-making processes of EU and Member State institutions acting within the scope of EU environmental competence, or that have otherwise been applied in such processes by EU institutions exhaustively. Environmental principles do not act as independent legal standards against which any EU action might be reviewed, or by which any Member State action might be defended. In all these cases, the EU courts are not being asked to interpret or determine the lawfulness of EU or Member State action taken on the basis of environmental principles within the scope of EU environmental competence. Thus they have no proper role to engage with legal arguments involving environmental principles. Principles are adduced in argument beyond the constitutional competence of the courts, or discussed in a way that is extraneous to the decisive reasoning of the case. Thus also included in this category of cases are cases in which environmental principles are mentioned simply as part of the policy background to the case. In all these cases, environmental principles have no doctrinal roles; they do not inform the reasoning of the courts in any decisive way. Rather, they remain policy ideas that are for the non-judicial institutions of the EU to pursue and implement, with no legal compulsion for them to do so.

The second treatment category—*interpretive cases*—comprises those cases in which EU courts use environmental principles to interpret expressions of EU environmental competence. That is, environmental principles are employed doctrinally to interpret EU legislation enacted on the basis of EU environmental competence in Title XX of the TFEU, or to interpret EU Treaty provisions beyond Title XX that fall within the scope of EU environmental competence by virtue of the integration principle. The judicial technique adopted with respect to environmental principles in these cases is teleological interpretation that engages environmental principles as purposes underlying the legislation or Treaty provision at issue. Environmental principles are thus relied on to elaborate the nature and direction of the EU environmental competence exercised, or to be exercised, in a range of discrete regulatory contexts. There are two constitutionally contentious aspects of this interpretive function. First, whilst the EU courts engage in purposive interpretation of EU measures that are determined to be based on environmental principles, the courts also determine when such measures are so based, even when this might not be obvious on the face of a particular Directive or Treaty provision. Through their interpretive function, the EU courts can thus expand the boundaries of EU environmental competence in relation to which environmental principles are found to be legally relevant as interpretive aids. Second, the open-textured formulation of environmental principles gives the courts a broad discretion in such interpretive tasks, so that the courts are effectively defining the competence of EU and Member State institutions acting in this policy domain through their interpretive findings, sometimes in unexpected or significant ways. Furthermore,

the principles are themselves being interpreted in these cases and given marginal definitions as they are used to clarify ambiguous EU legislation or Treaty provisions. As indicated in Chapter Three,[60] environmental principles conceal multiple potential meanings, so they must be interpreted and find contingent expression within discrete legal cultures.

The third treatment category—*informing legal test cases*—is the group of cases in which environmental principles are used in reviewing the lawful boundaries and exercise of EU environmental competence. This category includes two types of cases: *legal basis cases* (informing legal tests for reviewing the boundaries within which EU institutions must exercise their Treaty competence in environmental matters), and *exercise of competence cases* (informing tests of administrative review that determine the lawfulness of environmental competence exercised within the scope of EU law). In both types of cases, either EU or Member State institutions have (purportedly) exercised EU environmental competence on the basis of environmental principles, but the validity of this exercise is under review. In both cases, environmental principles are used to inform the relevant legal review tests that are applied. The central issue in both types of these cases is the lawful extent of discretionary power afforded to these institutions to adopt environmental policy on the basis of environmental principles, when acting within the scope of EU law. The issue is not whether these institutions *should* adopt any particular line of policy—the EU courts are not engaged in reviewing the merits of institutional decision-making in these cases.[61] Again, environmental principles are employed legally to define and delimit the nature of EU environmental competence, broadly understood, rather than compelling its exercise in any way.

The second set of cases in this treatment category—cases concerning the proper exercise of EU environmental competence—is the most voluminous and complex. These cases are complex because they include review of both EU and Member State action in environmental matters (including public health matters), and because of the doctrinal openness and ongoing evolution of the review tests that environmental principles are used to inform. These review tests include manifest error of assessment and proportionality, which are commonly applied tests in EU administrative law, along with developing administrative law tests for scrutinising factual decision-making, as well as rules relating to lawful derogations from the free movement of goods guarantee in Article 34 TFEU. Further, with respect to the precautionary principle, a new review test is generated by the principle itself: a test of 'adequate scientific evidence' or 'due diligence'. The precautionary principle, in light of the Commission Communication on the precautionary

[60] See ch 3, text accompanying n 1 and generally.

[61] While the courts do not evaluate or remake institutional decisions on the merits, they do scrutinise closely the factual basis of institutional decision-making and will annul decisions where there has been a failure to evaluate factual evidence with sufficient rigour, particularly in relation to scientific decision-making in the context of risk regulation: see Section V(B).

principle ('Communication'),[62] is used to generate this legal review test, which has been applied to review EU and Member State discretion exercised in public health cases. While the courts are using a different reasoning technique with respect to the precautionary principle by *generating* a new legal test, these cases are considered together because a version of this test is usually applied to inform a broader review test in reviewing the exercise of EU environmental competence by either EU or Member State institutions. This makes for somewhat confusing analysis, which reflects the particularly complicated doctrinal role of the precautionary principle in EU law, but this confusion reflects the fact that environmental principles are being used both to define and to police the boundaries of EU environmental competence.

These three treatment categories demonstrate that environmental principles have legal roles in EU law that match three different techniques of judicial reasoning: avoiding their use altogether in developing doctrine; their use as interpretive aids; and their use to inform legal review tests. These treatment categories are not qualitatively equivalent in a taxonomic sense—they involve different types of judicial reasoning *and* different reasons. This includes differing reasons relied on by the courts within treatment categories. Thus policy cases avoid doctrinal reasoning involving environmental principles for several distinct reasons, which are not neatly or logically connected. These three treatment categories are best understood as reflecting key elements of EU legal culture—including the nature of the CJEU's jurisdiction, the central role of competence in EU environmental law (including the Treaties' prescription of environmental principles to inform this), the evolving role of the CJEU in interpreting and policing this competence, and the constitutional limits of the Court's role. The doctrinal roles of environmental principles in EU law are mapped within these categories in the Parts that follow, reflecting and expressing these elements of EU legal culture.

III. Policy Cases

The first treatment category comprises 'policy cases'—cases in which environmental principles are raised in argument, or mentioned or discussed by the EU courts, but are legally irrelevant in deciding the question at issue in the particular case. Advocate-General Sharpston, in the ECJ appeal of *Land Oberösterreich*, observes why EU courts are often reluctant to engage with environmental principles—in this instance the precautionary principle—to resolve particular legal issues, although this observation is not decisive for the legal question in this case.[63]

[62] Commission of the European Communities, 'Communication from the Commission on the Precautionary Principle', COM (2000) 1 ('Communication'). See ch 3, text accompanying nn 153–163.

[63] See below, text accompanying nn 110–113.

The Austrian government had defended its national ban on genetically modified plants and animals, which contravened an applicable EU Directive, arguing that the Commission's refusal to approve the ban did not adequately take into account the precautionary principle. Reflecting the view of the CFI at first instance, Advocate-General Sharpston observed that:[64]

> … the concerns [raised by the Austrian government in argument] are *policy concerns* which must be dealt with in political fora. It is not for this or any other court to determine proper national or Community environmental policy. And the concerns in question are not in themselves directly relevant to the legal issues raised in this case …

The idea of separation between legal issues and environmental principles as policy concerns filters through the cases in this treatment category, reflecting the fact that the legal issues in these cases do not involve the review or interpretation of EU environmental competence first exercised by EU or Member State institutions. Further, the EU courts have no business legally compelling EU institutions to take particular policy actions on the basis of environmental principles, and they resist arguments encouraging them to do so. As a result, there is no room for the courts to consider legal arguments based on environmental principles. Rather, environmental principles articulate policy positions to be adopted at the discretion of EU and Member State institutions within the scope of EU environmental competence. As the Court of Justice held in *Fipa Group*:[65]

> Article 191(2) TFEU … does no more than define the general environmental objectives of the European Union, since Article 192 TFEU confers on the European Parliament and the Council of the European Union … responsibility for deciding what action is to be taken in order to attain those objectives.

In the cases in this section, this institutional discretion has not been exercised at all, or it has been exercised but is not at issue in the cases, or it has been exercised unlawfully in other EU law terms. In all these cases, environmental principles appear as policy ideas, which inform EU environmental competence generally but have no effect on the legal outcomes of each case.

Four kinds of policy cases are identifiable in this treatment category. First, there are cases in which the principles are observed as part of the policy background to the case, but have no doctrinal role in its resolution.[66] Second, there are cases in

[64] Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich v Commission* [2007] 3 CMLR 52, Opinion of Advocate-General Sharpston (15 May 2007) [145]. In its judgment on appeal, the ECJ upheld the decision of the CFI, but did not comment on Austria's precautionary principle argument specifically: Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich v Commission* [2007] 3 CMLR 52 (ECJ).

[65] Case C-534/13 *Ministero dell'Ambiente e della Tutela del Territorio e del Mare v Fipa Group SrL* [2015] ECLI:EU:C:2015:140 [39].

[66] Joined Cases C-164/97 & C-165/97 *Parliament v Council (Forest Protection)* [1999] ECR I-1139, Opinion of Advocate-General Jacobs (17 December 1998); Case C-318/98 *Fornasar* [2000] ECR I-4785; Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* [2005] ECR I-2753; Case

which the policy discretion conferred by EU environmental principles has *yet to be exercised* in an area of EU environmental competence not yet subject to harmonisation, which exercise the courts have no business to compel.[67] Third, there are cases in which the policy discretion of the EU legislative institutions *has been exercised* to harmonise or otherwise legislate in an area of EU environmental competence, on the basis of environmental principles, but where the exercise of such competence is not the subject of legal inquiry.[68] Arguments challenging related EU action on the basis of environmental principles, or challenging or defending Member State action outside the relevant scheme of EU legislation on similar grounds, are rejected by the Court. Environmental principles do not constitute freestanding legal standards for compelling, interpreting or defending EU and Member State environmental actions generally. Fourth, there are cases in which Member States have purported to exercise EU environmental competence, on the basis of the precautionary principle in particular (derogating from internal market harmonising measures on environmental grounds under Article 114(4) and (5) TFEU), but have done so unlawfully in terms of the Treaty, thus leaving no room for legal arguments based on environmental principles.[69] In this final set of cases, the explicit provisions of the relevant review tests in the TFEU limit the discretion of Member States to exercise EU environment competence and thus limit the legal roles of environmental principles.

Cases in all these four groups are linked by the common theme that, while environmental principles might provide a policy basis for EU environmental competence (within the limits of the Treaty), they are not principles that are directly engaged or relevant in resolving the legal issues before the courts. Rather, the principles are part of EU and Member State institutional decision-making processes—whether legislative or administrative—relevant to these cases, whether in the background or built into the legislative structure under consideration, but not legally at issue or justiciable. Or, they are excluded altogether from the institutional decision-making processes concerned by explicit limits within the Treaties. For all these reasons, environmental principles have no doctrinal roles in these cases.

The following four sections consider representative cases that fall within these four sets of policy cases. The Part concludes by examining a further group of cases that challenge the boundaries of this treatment category, by extending the Court's

C-494/01 *Commission v Ireland* [2005] ECR I-3331; Case C-176/03 *Commission v Council (Environmental Crime)* [2005] ECR I-07879, Opinion of Advocate-General Colomer (26 May 2005).

[67] Case C-379/92 *Re Peralta* [1994] ECR I-3453; Case C-445/00 *Austria v Council* [2003] ECR I-8549.

[68] *Standley* (n 35); Case C-6/99 *Association Greenpeace France v Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651; *Monsanto* (n 7); *Waddenzee* (n 45); Case C-132/03 *Ministero della Salute v Codacons* [2005] ECR I-3465; Case C-221/06 *Stadtgemeinde Frohnleiten v Bundesminister für Land- und Forstwirtschaft* [2007] ECR I-09643.

[69] Case C-3/00 *Denmark v Commission (Sulphites)* [2003] ECR I-2643; Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria v Commission* [2005] ECR II-4005.

role in reviewing EU action on the basis of environmental principles. This deviation in the case law reflects a potentially significant change in terms of the legal roles that environmental principles might play in EU law, but one that has yet to be adopted by the EU courts.

A. Principles as Policy Background

In this first set of EU policy cases, judicial references to environmental principles are passing ones. The EU courts observe the principles as part of the contextual policy background to a case, but they play no direct role in justifying the reasoning of decisions.

One such case is *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*,[70] in which the interpretation of the Landfill Directive and Article 193 TFEU (ex-Article 176 EC) were at issue.[71] The ECJ found that German national landfill measures, which were more stringently protective than those set out in the Directive, were compatible with EU law, primarily because the EU rules did not exhaustively harmonise this area of waste regulation. In finding that the Landfill Directive permitted this shared regulation of German landfill waste, the ECJ set out the policy background informing the adoption of the Directive, including the four principles in Article 191(2) TFEU (ex-Article 174(2) EC).[72] The principles of Article 191(2) are often referred to as a group of policy ideas in Court of Justice judgments in this way.

Another policy case, in which the principle of sustainable development is discussed by the Advocate-General with some enthusiasm to set out the policy background of the case,[73] is *Commission v Council (Environmental Crime)*.[74] In this case, Advocate-General Ruiz-Jarabo Colomer considers the nature of sustainable development in the EC Treaty, in light of the overall 'globalisation' of environmental policy concerning sustainable development, in order to '[illustrate] the importance which "ecological consciousness" has acquired in recent decades'.[75] This global policy background provides a platform from which the Advocate-General then develops a radical legal argument—that Community competence to develop environmental policy should go so far as to require criminal sanctions where this is the only 'effective, proportionate and dissuasive' means for its enforcement.[76] While the sustainable development principle is not used doctrinally in this legal

[70] *Deponiezweckverband Eiterköpfe* (n 66).
[71] Council Directive (EC) 1999/31 on the landfill of waste [1999] OJ L182/1 ('Landfill Directive').
[72] *Deponiezweckverband Eiterköpfe* (n 66) [28].
[73] Although it is not consistently described as a 'principle', being also described as a 'concept'.
[74] Case C-176/03 *Commission v Council (Environmental Crime)* [2005] ECR I-07879.
[75] *Environmental Crime, Opinion of Advocate-General Colomer* (n 66) [61]–[71].
[76] ibid [72].

conclusion—indeed, it is not mentioned by the ECJ, which nevertheless arrives at the conclusion suggested by the Advocate-General—the principle paints a policy picture that contextualises the legal arguments made to support the Court's ultimate conclusion.[77]

B. Principles of EU Environmental Competence—Unexercised Discretion

In this second set of policy cases, the EU courts reject arguments based on environmental principles, finding them legally irrelevant since environmental principles are limited to defining policy discretion exercised within the scope of EU environmental competence and do not empower the courts to compel its exercise. It is in this sense that EU environmental policy '*shall* be based' on the four environmental principles set out in Article 191(2). Environmental principles do not justify stand-alone legal arguments for compelling environmental action. Rather, EU courts will wait for institutions to exercise their discretion within this area before employing environmental principles doctrinally to interpret or police the scope of EU environmental competence.

Re Peralta is an exemplary case.[78] In this case, the ECJ found that it had no business compelling the exercise of EU environmental policy discretion. It involved an Article 267 TFEU (ex-Article 177 TEC) reference to the ECJ from an Italian court asking, inter alia, whether an Italian law that prohibited national vessels from discharging certain harmful substances into the sea, in contravention of internationally accepted practice, was precluded by the preventive principle.[79] The ECJ found that the preventive principle did not preclude the national legislation because Article 191 TFEU (ex-Article 174 TEC) is 'confined to defining the general [environmental] objectives of the Community'.[80] Moreover it is the responsibility of the Council to determine what action is to be taken in this policy field, and Article 193 TFEU (ex-Article 176 TEC) allows Member States to adopt more stringent environmental protective measures in any case, so long as they are compatible with the Treaty.

This reasoning can be read in one of two ways. First, the appeal to the preventive principle was unsuccessful since Article 191(2) extends only to *EU*

[77] Although the integration principle does play a doctrinal role in the Court's reasoning: see below, text accompanying nn 209–210.

[78] *Re Peralta* (n 67). See also *Austria v Council* (n 67).

[79] This argument may seem counter-intuitive. The argument put to the Italian court was that the level of environmental protection required by the preventive principle in the Treaty should match that set out in the MARPOL Convention (*UNTS, vols 1340 and 1341, no 22484)*, the relevant provisions of which were not as stringent as those in Italian national law.

[80] *Re Peralta* (n 67) [57].

environmental policy, and does not affect Member State actions,[81] at least to the extent that they are acting outside the scope of EU law.[82] However the ECJ did not explicitly say this—it referred instead to the general nature of Article 191, to the responsibility of the Council to adopt EU environmental policy, and to the latitude afforded to Member States to adopt complementary and more protective measures. The better way to read this case is that the preventive principle argument was unsuccessful because the ECJ was being asked to adopt and compel an environmental policy position, which it felt it is not its job to do. While Member State action was at issue, EU environmental policy and Member State environmental policy (covering common territory) overlap (as acknowledged by Article 193), and, while the EU could take action in this unharmonised area if it wanted to, whether it does so is not an issue for the EU courts. The preventive principle did not have legal force beyond its general policy prescription role.[83]

C. Principles of EU Environmental Competence—Exercised but Unchallenged Discretion

In this third set of policy cases, environmental principles have been unsuccessfully relied on in argument to either challenge or interpret legislative schemes regulating environmental and public health matters. The EU courts have found, with respect to each legislative scheme examined, that environmental principles were legally relevant only in guiding the policy discretion afforded to EU or Member State institutions in exercising decision-making power under, or in implementing, the elements of these schemes that are based on environmental principles. However, the exercise of such discretion was not at issue in these cases. Rather, legal arguments are made, on the basis of environmental principles, to challenge or defend EU action and Member State action in relation to these schemes more broadly. The outcomes of these cases show that environmental principles do not support such independent legal arguments for challenging or interpreting EU environmental action generally.

In these cases, the ECJ or Court of Justice identifies environmental principles as being legally relevant in guiding institutional policy discretion within EU

[81] Nicolas de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12(2) *ELJ* 139, 143.

[82] *cf* Section V(B)(v) below.

[83] This position is reinforced by Advocate-General Kokott in Case C-378/08 *Raffinerie Mediterranee (ERG)*, where she rejects a preliminary reference question suggesting art 191 as a legal basis for assessing national rules on environmental liability; rather art 191 'simply sets out the general objectives of [EU] environmental law, which the [EU] legislature must give substance to before they can be binding on the Member States': Case C-378/08 *Raffinerie Mediterranee (ERG) v Ministero dello Sviluppo Economico* ECR I-01919, Opinion of Advocate-General Kokott (22 October 2009) [45]; approved by the ECJ: Case C-378/08 *Raffinerie Mediterranee (ERG) v Ministero dello Sviluppo Economico* [2010] ECR I-01919 [46].

environmental regulatory frameworks, but they have no role in deciding the specific legal questions involved in these cases. This is because, whilst environmental principles underlie and guide the exercise of EU environmental competence in these cases, they do not have independent legal roles that extend beyond this. There are various ways in which environmental principles inform the exercise of EU environmental competence in these cases. They are taken into account by relevant Commission decision-making processes established by or supporting the regulatory scheme under consideration;[84] they guide Member State discretion in opting out of a regulatory scheme through a safeguard clause based on the principles;[85] they guide Member State discretion in implementing EU environmental schemes;[86] and they also define the limits of such EU environmental schemes.[87] However, the legal questions in these cases are not concerned with these legal roles for environmental principles in defining and constraining EU environmental competence. They are concerned with challenging EU and Member State measures in a way that undermines the policymaking discretion of institutions and extends beyond the boundaries of EU environmental competence exercised on the basis of environmental principles.

Several of these cases involve harmonising EU legislation relating to genetically modified organisms (GMOs). In these cases, the precautionary principle has an important role in guiding the policy discretion exercised by EU institutions that are tasked with making decisions under frameworks of harmonised GMO regulation, and that of Member States under safeguard clauses within these EU frameworks. This legal function exhausts any broader legal role for the precautionary principle in challenging elements of these regulatory schemes.

An example is *Ministero della Salute v Codacons*.[88] This was a preliminary reference from an Italian court concerning the interpretation of Article 2(2)(b) of Regulation 1139/98 on the compulsory labelling of certain genetically modified (GM) food.[89] Article 2(2)(b) provided an exception from the Regulation's labelling requirements in the case of foodstuffs where the concentration of GM food was less than 1 per cent and such presence was 'adventitious'. The issue for the ECJ was whether that exception applied to infant food, and the Court found that it did, since there was no indication from the wording, the context or the purpose of Article 2(2)(b) that it should not so apply, and EU measures adopted with respect to the labelling of infant food had not been extended to derogate from this provision.[90] There was no room for calling into question this interpretation 'on the

[84] *Monsanto* (n 7); *Codacons* (n 68).
[85] *Greenpeace* (n 68); *Monsanto* (n 7).
[86] *Standley* (n 35); *Stadtgemeinde* (n 68).
[87] *Fipa Group* (n 65).
[88] *Codacons* (n 68).
[89] Council Regulation (EC) 1139/98 concerning the compulsory indication on the labelling of certain foodstuffs produced from genetically modified organisms [1998] OJ L159/4 (as amended) art (2)(b).
[90] *Codacons* (n 68) [54]–[55].

basis of the precautionary principle', which was found to be applicable only as part of the decision-making process involved in putting the relevant GM foods on the market in the first place, which is intended to ensure that the genetically modified organisms (GMOs) are safe for the consumer.[91] Once such a decision had been made, there was no longer any relevant 'uncertainty as to the existence or extent of risks to human health', a 'presupposition' of the precautionary principle.[92] The Court made no attempt to explore this prior decision-making process, since it was not challenged in argument (or because the referred question did not extend that far).[93] In any case, the precautionary principle, whatever it involves, was confined to influencing the decision-making of the Commission under the relevant EU legislation that embodied the precautionary principle and not the particular legal issue of interpretation before the Court.

Monsanto is another GM food case in which the precautionary principle was raised in argument, largely unsuccessfully. The *Monsanto* case arose out of the Italian government's abiding concern over the risks involved in releasing GMOs and putting GM products on the market. At issue in the case was the 'simplified procedure' in the previous Regulation 258/97 on novel foods for authorising the introduction of novel GM foods on to the European market, which could be employed when a novel food was produced from, but no longer contained, any GMOs, *and* when it was 'substantially equivalent' to an existing food.[94] This simplified procedure required mere notification to the Commission once substantial equivalence was established (by existing science or in the opinion of a relevant national food authority), and no detailed risk assessment by the Commission, as required by the formal (non-simplified) novel food authorisation process. The Italian government, relying on the safeguard procedure in Article 12 of the Regulation,[95] passed a decree temporarily banning novel foods produced from particular strands of GM maize that still contained small amounts of transgenic protein. This decree was challenged in the Italian national courts by the producers of the GM maize (Monsanto). The Italian court referred several questions to the ECJ, the two most relevant concerning: (a) the interpretation of the safeguard clause in Article 12, particularly in relation to the ability of Member States to take action on the basis of the precautionary principle, and (b) the legality of the 'simplified procedure', in particular whether it breached Articles 169 and 191 TFEU (ex-Articles 153 and 174 EC) and the principles of precaution and proportionality.

Arguments on the basis of the precautionary principle were made on both questions, suggesting that the principle might have a legal role which overlaid the

[91] ibid [56], [63].
[92] ibid [61].
[93] *cf Pfizer* (n 31): see Section V(B)(ii).
[94] Regulation 258/97/EC concerning novel foods and novel food ingredients [1997] OJ L43/1, arts 3(4), 5. Note this regulation has been replaced with Regulation 2015/2283/EU on novel foods [2015] OJ 327/1.
[95] ibid, art 12.

scheme of the Regulation, and which could be relied on to guide or contest its operation. The Court gave a limited legal role to the precautionary principle as an aid in interpreting Article 12, discussed in Part IV below.[96] However, the precautionary principle was not found to have a legal role independent of the scheme of the Regulation. The Court found that a Member State could only take action on the basis of the precautionary principle in accordance with Article 12, which is based on and gives legislative expression to the principle in this EU regulatory context. When it came to challenging the lawfulness of the Regulation's simplified procedure, the ECJ gave short shrift to the argument based on the precautionary principle, finding that the principle was already relevantly taken into account in the authorisation and safeguard decision-making procedures set up by the Regulation.[97] The precautionary principle was not a general legal ground for reviewing the legality of the simplified authorisation procedure. Rather, as in *Codacons*, it was to be taken into account in the decision-making processes involved in the normal authorisation and safeguard procedures of the Regulation, undertaken by the Commission.

Three other cases, which relate to a range of EU environmental schemes, also exemplify this set of policy cases. In each of these cases, environmental principles underlie an EU environmental measure but there is a legal challenge to the EU measure or related Member State action, which either undermines the policymaking discretion of the institutions involved or extends beyond the scope of the EU measure in question. The first case, *Standley*, is a premature challenge to EU environmental competence exercised on the basis of environmental principles. This case involved a challenge to the legality of provisions of Directive 91/676 on nitrate pollution from agricultural sources,[98] on the basis of, inter alia, infringement of the principle of rectification at source and the polluter pays principle.[99] In this case, the relevant provisions of the Directive were found to be consistent with these principles, and should be interpreted in accordance with them. The Directive's scheme was based on the environmental title (Title XX TFEU) and its provisions were sufficiently flexible for Member States to implement its measures in accordance with the principle of rectification at source and polluter pays principle.[100] The result of the case was that, until the Directive was interpreted and applied by the Member States in a manner incompatible with those principles, they remain principles of policy that are incorporated into the provisions of the Directive and guide the discretion of Member States in overseeing its implementation into national law.

[96] See below Section IV(B)(i).

[97] *Monsanto* (n 7) [133].

[98] Council Directive (EC) 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.

[99] *Standley* (n 35).

[100] ibid [51]–[53]. For these reasons, this case could also be seen as a prospective interpretive case involving reasoning with principles (see Part IV).

The second environmental case is *Stadtgemeinde Frohnleiten*,[101] which concerned the shipment of waste from Italy to Austria. In the course of deciding the legal issue in this case—whether an Austrian tax on contaminated waste breached Article 110 TFEU[102]—the ECJ considered the extent to which a Member State can rely on the principles of proximity and self-sufficiency to defend the operation of a tax that discriminated against imported waste. These environmental principles are not found in the Treaties but are principles of EU waste policy, which generally provide that waste should be treated (recovered or disposed of) as near to its source as possible, and that a designated area (region, Member State, or the EU as a whole) should be self-sufficient in dealing with its own waste.[103] These environmental principles extend the grouping of environmental principles that are legally relevant in EU law. In this case, there was no scope for a Member State to rely on these principles to justify a discriminatory tax because they had already been relied on by the EU institutions in harmonising waste shipment regulation within this area of EU environmental competence,[104] thereby exhausting their legal roles and limiting the discretion of Member States to take independent environmental action.[105] Member States could only rely on these environmental principles, to object to or to hinder imported waste on environmental grounds, by following the explicit procedures implementing these principles in the Waste Shipment Regulation. They could not rely on them as independent grounds of legal argument in this case, which raised a different legal question.

A third case that complements *Stadtgemeinde Frohnleiten* is *Fipa Group.*[106] This case also questioned the legality of a Member State measure aiming to pursue an environmental objective, in light of EU environmental principles. However, the harmonising EU environmental measure in this case—the Environmental Liability Directive[107]—was not so extensive in its regulatory scope. The case was a preliminary reference from the Italian courts, concerning the obligations on owners of contaminated land in cases where the original polluters could not be found. Italian legislation provided that owners of such land could only be liable for the costs of remedial work up to the value of the site, and were not required to take

[101] *Stadtgemeinde* (n 68).

[102] Ex-art 90 EC ('No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products').

[103] On the ambiguous meaning of these principles that are found in EU waste legislation, see Eloise Scotford, 'The New Waste Directive—Trying to Do it All … An Early Assessment' (2009) 11(2) *Env LR* 75, 87–88.

[104] Council Regulation (EC) 259/93 on the supervision and control of shipments of waste within, into and out of the EC [1993] OJ L030/1 ('WSR').

[105] *cf* Case 402/09 *Ioan Tatu v Statul român prin Ministerul Finanţelor şi Economiei and others* [2011] ECR I-02711 (where Romania sought to rely on environmental objectives to defend a national tax that otherwise breached art 110, unsuccessfully).

[106] *Fipa Group* (n 65).

[107] Council & Parliament Directive (EC) 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56 ('ELD').

remedial measures themselves. The Italian courts referred a question to the Court of Justice, asking whether this Italian law was consistent with the environmental principles in the Environmental Liability Directive and in Article 191(2) TFEU. The Court of Justice found that there was no problem with the Italian law as a matter of EU law, since it applied to circumstances outside the scope of the Environmental Liability Directive and thus was not based on the principles in Article 191(2), including the polluter pays principle, and did not need to be guided by them. The Court of Justice emphasised that the principles in Article 191(2) were legally relevant only to measures covered by EU environmental competence that had been exercised:[108]

> [S]ince Article 191(2) TFEU, which establishes the 'polluter pays' principle, is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation—such as that at issue in the main proceedings—in an area covered by environmental policy for which there is no EU legislation adopted on the basis of Article 192 TFEU that specifically covers the situation in question.

All these cases show that environmental principles have been used in legal argument in various ways to question or impugn EU and Member State measures relating to environmental and public health policy. They also show that such arguments have to be carefully targeted in order to be successful. In particular, environmental principles are not legally relevant in relation to measures that are not within the scope of EU environmental competence, which has first been exercised by EU and Member State institutions exercising their policy discretion under the Treaties.

D. Purported Exercises of EU Environmental Competence: Member State Derogation under Articles 114(4) and (5) TFEU

This final set of policy cases comprises cases in which Member States purport to exercise EU environmental competence on the basis of environmental principles, but do so unlawfully because their action is outside the permissible bounds of the TFEU, thereby restricting doctrinal roles for environmental principles in subsequent legal challenges. While environmental policy is a shared competence, the scope for unilateral Member State environmental action is restricted by directly applicable Treaty provisions (such as Article 110 TFEU in *Stadtgemeinde Frohnleiten* above) and harmonising measures taken by EU institutions, whether in relation to environmental policy (again exemplified in *Stadtgemeinde Frohnleiten*) or in relation to the internal market. In relation to internal market harmonising measures, Article 114 TFEU explicitly provides restricted grounds for Member

[108] *Fipa Group* (n 65) [40].

States to take unilateral action on environmental protection grounds where this conflicts with a harmonising measure. These limited grounds give rise to Treaty-based 'review' tests for examining the legality of derogating Member State action. In this set of cases, the ECJ rejected arguments of Member States defending such derogation from internal market harmonising measures on the basis of the precautionary principle. Such arguments were rejected since they are not directly relevant to the particular legal inquiries required by Articles 114(4) and (5), which set out precise and limited circumstances in which Member States are permitted to derogate from harmonising measures, leaving no room for consideration of the precautionary principle.[109] The ECJ thus held that the Treaty precludes Member States having any discretion to exercise EU environmental competence on the basis of the precautionary principle in these cases. Arguments based on the precautionary principle are dismissed as considerations that should be addressed in national and EU political arenas.

In *Land Oberösterreich*, mentioned above,[110] the Austrian government had sought to derogate from Directive 2001/18 on the release of GMOs (a harmonising measure) by imposing, in a particular farming area, a general ban on the cultivation of genetically modified plants or seed, and on the breeding and release of transgenic animals.[111] The Commission had refused to allow this derogation, and the CFI and ECJ supported the Commission's position,[112] since Austria had failed to fulfil the conditions in Article 114(5) that permit derogation for internal market measures adopted under Article 114 (in particular, it failed to present 'new scientific evidence' and to identify 'a problem specific to that Member State'). Arguments that the Commission had failed adequately to consider the precautionary principle in assessing the submissions of the Austrian government, in this case where the risks associated with releasing and propagating GMOs were highly contestable, thus failed. These arguments added nothing to the legal conditions imposed by the Treaty. Rather than being a reason to derogate from the Directive, the precautionary principle was found to inform fundamentally its harmonised procedures of GMO authorisation. Each GMO underwent rigorous assessment by the Commission of the potential risks it might pose for environmental and human health, in accordance with the precautionary principle, in order to be approved for release under the procedures laid down in Directive 2001/18. The precautionary

[109] ie these review tests are not sufficiently open to allow the EU courts to use environmental principles to inform their application: *cf* Section V(B)(v).

[110] See above, text accompanying n 64.

[111] Council & Parliament Directive (EC) 2001/18 on the deliberate release into the environment of genetically modified organisms [2001] OJ L106/1. This was an internal market measure adopted under ex-art 95 EC (now art 114 TFEU).

[112] *Land Oberösterreich* (CFI) (n 69); *Land Oberösterreich* (ECJ) (n 64). See also Case C-3/00 *Denmark v Commission (Sulphites)* [2003] ECR I-2643, Opinion of Advocate-General Tizzano (30 May 2002) [100] in relation to art 114(4).

principle had no further doctrinal role in relation to the particular tests, mandated by the Treaty conditions in Article 114(5), applied by the ECJ to decide this case.[113]

Again, in these policy cases, environmental principles do not constitute free-standing legal arguments, here for defending Member State action on environmental grounds. Rather, the purported exercise of EU environmental competence by the Member States was unlawful under the internal market provisions of the Treaty, which limit the scope of EU environmental competence exercised by Member States, and thus the doctrinal roles of environmental principles in EU law.

E. Integration Principle: Breaking Down the Barrier of Policy Cases?

In the policy cases considered so far, EU courts have found that environmental principles have no doctrinal roles to play. In these cases, the legal questions at issue have not directly concerned the exercise, by EU or Member State institutions, of EU environmental competence based on environmental principles. There is however some suggestion in the case law that this competence limit, which demarcates policy cases and constrains the Court's role in developing doctrine with respect to environmental principles, can be stretched or overridden. These cases involve the integration principle (and other environmental principles incidental to, or in combination with, the integration principle) as an independent legal ground for challenging EU action generally. These cases suggest that environmental principles might have an overriding legal role in constraining *all* action within the scope of EU law, which can be challenged by way of review in court, giving the CJEU a robust constitutional role in the domain of environmental policy and undermining the policy discretion of EU institutions (and potentially Member State institutions acting within the scope of EU law).

Early cases militated against such a view, but left room for its development. In *Austria v Parliament*,[114] a case involving a challenge to the legality of an EU Regulation establishing an eco-points system for heavy goods vehicles under the EU's transport policy, the Austrian government argued that the Regulation violated the 'objective of promoting sustainable development laid down in [Article 11 TFEU]' because it resulted in an increase of NOx emissions.[115] Advocate-General Geelhoed responded to this argument by finding that the integration principle in Article 11 does not act with 'simple rigidity' as a binding rule: 'it cannot be

[113] *cf* Case C-165/08 *Commission v Poland* [2009] ECR I-06843. In pre-litigation procedure, the Polish government raised a similar precautionary principle argument to defend a measure derogating from Directive 2001/18, but shifted to an (unsuccessful) argument based on ethical principles: see [59] and generally.

[114] Case C-161/04 *Austria v Parliament and Council (Ecopoints)* [2006] ECR I-7183.

[115] Case C-161/04 *Austria v Parliament and Council (Ecopoints)* [2006] ECR I-7183, Opinion of Advocate-General Geelhoed (26 January 2006) [54].

regarded as laying down a standard according to which in defining [EU] policies environmental protection must always be taken to be the prevalent interest'.[116] The Court's role did not extend to 'unacceptably [restricting]' the discretionary powers of the EU institutions in this way. However, the Advocate-General did suggest that where ecological interests 'manifestly have not been taken into account or have been completely disregarded', the integration principle may serve as the standard for reviewing the validity of EU legislation.[117] Advocate-General Jacobs had previously picked up on this suggested legal role for the integration principle in *PreussenElektra*, arguing that it is 'not merely programmatic; it imposes legal obligations'.[118]

In the CFI decision of *Sweden v Commission*, such legal obligations based on the integration principle are demonstrated.[119] This case was a legality challenge to the Commission's decision to include a weedkiller substance—paraquat—in the list of approved plant protection products on the market under Directive 91/414 ('Plant Protection Product Directive').[120] Sweden claimed that the decision breached the integration principle, as well as the precautionary principle and the principle that 'a high level of protection should be ensured'.[121] The CFI accepted these arguments. The reasoning of the Court is quite technical, turning on scientific evidence that demonstrated compelling environmental and health risks associated with paraquat, which informed the Court's finding that these environmental principles were infringed. However, this was a case in which the Commission did *not* purport to act on the basis of any environmental principle (since it had approved the relevant substance) and yet these environmental principles were employed doctrinally to review its action. On one view, this is a case in which the integration principle was used to expand the scope of 'EU environmental competence' (to EU agricultural policy), so as to give other environmental principles (here the precautionary principle and principle of a high level of protection) doctrinal roles

[116] ibid [59].

[117] ibid. He also gave another proviso that the totality of measures in a policy area needs to be taken into account. The case was withdrawn by the Austrian government before it was decided by the ECJ.

[118] Case C-379/98 *PreussenElektra v Schhleswag* [2001] ECR I-2099, Opinion of Advocate-General Jacobs (26 October 2000) [231].

[119] Case T-229/04 *Sweden v Commission* [2007] ECR II-02437.

[120] Council Directive (EC) 91/414 concerning the placing of plant protection products on the market [1991] OJ L230/1.

[121] This so-called 'principle' is another EU environmental principle that demonstrates the porous grouping of environmental principles in EU law. It derives from art 191(2) TFEU ('Union policy on the environment shall aim at a high level of protection'), as well as references throughout the Treaty to a 'high level of protection' in various policy areas (see below n 167), but its description as a principle is inconsistent and it can be seen as an overall policy objective that does not set any particular standard, which is mediated by the need to take into account the diversity of situations across the EU: Ludwig Krämer, *EU Environmental Law* (7th edn, Sweet & Maxwell 2012) 11–13; *cf* Jan H Jans and Hans HB Vedder, *EU Environmental Law*, (4th edn, Europa Law Publishing 2012) 41–43. However, its doctrinal treatment as an environmental 'principle' in this case includes it within the group of legally relevant EU environmental principles for the purpose of this mapping exercise.

across a wider range of cases, in terms of subject-matter and policy competence. It thus potentially indicates that such expansion may occur to cover any area, or all areas, of EU policy competence, giving environmental principles wide-ranging legal roles in EU law.

It is also a remarkable case because the integration principle is not simply a linking and expanding principle in this case but, in doctrinal terms, it constitutes an explicit and separate ground for testing the lawfulness of the Commission decision.[122] The detailed reasoning of the CFI in arriving at this conclusion is obscure. Much of the reasoning focuses on the precautionary principle, and the case can also be viewed as an interpretive case, since the precautionary principle is applied to interpret provisions of the relevant Directive to determine a breach of that principle.[123] Its reasoning on the breach of the integration principle appears largely to rely on finding that other environmental principles have been infringed. However, the *independent* doctrinal roles of all three environmental principles are explicitly articulated by the Court—the nature of the legal reasoning is thus different from most EU cases in which environmental principles have doctrinal roles where there is some prior exercise of environmental competence by the EU institutions triggering the legal relevance of environmental principles.[124] More recent cases of the General Court also suggest that the precautionary principle can act as an independent ground of review in cases where EU measures are challenged on public health grounds. As discussed in Part V, these cases reflect that fact that the precautionary principle has been increasingly recognised as generally guiding risk-based decision-making in the area of public health.[125] These cases at least reflect a trend, throughout the case law mapped in this chapter, of the integration principle being relied on to expand the scope of EU law in which environmental principles have ever more influential doctrinal roles. Environmental principles not only have unique legal roles in EU law, but these roles are in a state of evolution.

F. Conclusion

This Part has demonstrated that there are limits to the doctrinal roles taken on environmental principles in EU law. The scope of EU environmental competence,

[122] Environmental principles might also be 'infringed' by Member State measures if they are expressed in sufficiently clear terms in secondary legislation so that they are directly effective in EU law: *Futura, Opinion of Advocate-General Kokott* (n 35) [58]–[59]; *cf ERG* (n 83) [46].

[123] See below, text accompanying nn 181–186.

[124] While this case in some ways resembles the reasoning techniques used in informing legal review test cases examined in Section V(B) where Commission decisions are challenged for breach of the precautionary principle (eg in *Pfizer* (n 31) and Case T-392/02 *Solvay Pharmaceuticals BV v Council* [2004] ECR II-4555), *Sweden v Commission* is distinct in that the Court isolates environmental principles as independent standards that can be breached.

[125] eg Case C-77/09 *Gowan v Ministero della Salute* [2010] ECR I-13533; Case T-31/07 *Du Pont v Commission* [2013] ECLI:EU:T:2013:167; *cf* Case T-475/07 *Dow AgroSciences Ltd v Commission* [2011] ECR II-05937. See further n 297 and accompanying text.

and the proper role of the EU courts in interfering with EU and Member State institutional discretion, constrains legal arguments that might be made on the basis of environmental principles. In particular, the EU courts generally cannot compel the taking of particular environmental action on the basis of environmental principles, where EU institutions have not first acted to exercise their competence.

As a result, environmental principles do not operate as prescriptive legal solutions to environmental problems, in the manner hoped by some scholars and outlined in Chapter Two,[126] in this EU legal context. Further, environmental principles do not have pervasive and independent legal roles across EU law. Thus, rather than cohering EU environmental law, they signify both its competence-bounded reach, as well as its incremental expansion by virtue of the integration principle. Environmental principles also have a prominent role in guiding the policy discretion of EU and Member State institutions, which is often outside the preserve of legal control. Scholarly hopes with respect to environmental principles as legal concepts are thus often incorrectly focused within EU law, considering its developing doctrine, institutional constraints and distinctive legal culture.

IV. Interpretive Cases

This second treatment category comprises cases in which EU courts interpret the EU Treaties or secondary EU legislation and rely on environmental principles to elucidate the meaning of ambiguous provisions.[127] The Court of Justice (and the ECJ before it) adopts the judicial technique of teleological interpretation in these cases, relying on the principles to inform the purposive inquiry undertaken, thereby introducing a doctrinal role for environmental principles in resolving questions of legal interpretation.

In these cases, the EU institutions have first exercised their EU environmental competence to legislate, or to act under a particular Treaty provision, on the basis of environmental principles and that exercise of competence is then legally constrained by environmental principles through their interpretive influence. In this way, environmental principles define the nature of EU environmental competence exercised by EU institutions.[128] However, because environmental principles are so general in their formulation, such 'definition' of competence also involves the

[126] See ch 2(II)(C).

[127] These are primarily referred by Member State courts under art 267 TFEU, but also include art 258 and 263 proceedings in which issues of interpretation arise.

[128] There are also indications that environmental principles can have interpretive roles in relation to EU environmental competence as exercised by Member State institutions. In one case, the polluter pays principle was suggested to have a role in interpreting a UK tax (levied on extracted materials used commercially for aggregates) in a dispute about the nature of the tax. This was a measure that fell within the scope of EU law in that it was designed to incentivise waste recovery, pursuing the aims of EU waste law

marginal definition of environmental principles themselves in each interpretive context—the way in which environmental principles are employed by the courts to elucidate ambiguous provisions gives insight into the meaning of these principles, without constituting universal definitions for them. Their general formulation also gives the courts some latitude in defining the nature and scope of the EU environmental competence exercised on the part of the EU institutions (and Member States acting within the scope of EU law).

The interpretive cases to date fall into two groups. First, there are cases in which the Court of Justice has interpreted ambiguous EU legislation enacted under Title XX of the TFEU. These cases concern institutional acts of EU environmental competence in a narrow sense. Second, this Part considers interpretive cases in which the scope of EU environmental competence is extended beyond Title XX, largely by virtue of the integration principle, giving environmental principles a wider doctrinal role in construing Treaty provisions and EU legislation, concerning public health, agriculture, competition and transport policy. In these cases, the interpretive roles of environmental principles are limited to cases where this expanded EU competence has been exercised on the basis of environmental principles. Even so, they demonstrate how far the scope of EU environmental competence—and concomitantly the legal relevance of environmental principles—has become intertwined with other areas of EU policy and law.

A. Interpreting EU Environmental Competence in a Narrow Sense: Environmental Principles under Title XX TFEU

The interpretive cases that concern exercises of EU environmental competence under Title XX TFEU involve the construction of a group of EU environmental directives: the Waste Directive,[129] Landfill Directive,[130] Habitats Directive,[131] Urban Waste Water Treatment Directive,[132] Environmental Liability Directive,[133]

(see n 129), and it was successfully challenged as a state aid under EU law. The principle was found not to have an interpretive role as all parties agreed that it was not 'apparent' on the wording or operation of the tax that it was based on the polluter pays principle. See Case T-210/02 RENV *British Aggregates Association v European Commission* [2012] ECLI:EU:T:2012:110 [66].

[129] Council & Parliament Directive (EC) 2008/98 on waste [2008] OJ L312/3 ('Waste Directive 2008'), replacing previous Council Directive (EC) 91/156 amending Directive 75/442 on waste [1991] OJ L78/32 ('Old Waste Directive'). See Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881.

[130] Landfill Directive (n 71).

[131] Council Directive (EC) 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 ('Habitats Directive').

[132] Council Directive (EC) 91/271 concerning urban waste-water treatment [1991] OJ L135/40. See Case C-280/02 *Commission v France* [2004] ECR I-8573; *cf* Case C-119/02 *Commission v Greece* [2004] ECLI:EU:C:2004:385.

[133] ELD (n 107).

and the Water Framework Directive.[134] All these directives are either based on, or have specific provisions that give concrete expression to, environmental principles. It is notable that these particular directives, as opposed to other EU environmental directives with ambiguous provisions that have come before the courts for interpretation,[135] have been interpreted in light of environmental principles. If environmental principles are hoped to unify environmental law,[136] the selective use of environmental principles as interpretive aids indicates that this hope is either misplaced or yet to be realised in EU environmental law. In the interpretive cases discussed in this section, the TFEU's legal prescription that EU environmental policy 'shall be based' on the four environmental principles in Article 191(2) is reflected in these environmental principles having doctrinal roles as interpretive aids.

A significant number of these interpretive cases concern the definition of 'waste' in the Waste Directive.[137] There has been much litigation about the definition of waste, because it is undefined in the Directive and it is the central concept that triggers regulatory consequences that follow under the Directive.[138] In *ARCO*,[139] the ECJ concluded from the fact that Community policy on the environment, under Article 191(2) (ex-Article 174(2) EC), 'is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken', that the definition of 'waste' in the Directive should not be interpreted restrictively.[140] In reaching this interpretive conclusion, the ECJ relied explicitly on the interpretive influence of the preventive and precautionary principles, giving these principles doctrinal roles. However, it is far from clear that either principle should have led to this interpretive outcome. Both principles have open and not obviously overlapping meanings.[141] And it is not obvious that the idea of either preventing waste, or avoiding uncertain risks that might be associated with it, leads to a broad definition of waste, which may in fact discourage efforts to develop innovative production processes that maximise the use of resources and thereby prevent waste.[142] However, the ECJ's conclusion,

[134] Council & Parliament Directive (EC) 2000/60 establishing a framework for Community action in the field of water policy [2000] OJ L327/1 ('Water Framework Directive').

[135] *cf* Council & Parliament Directive (EU) 2011/92 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1, art 2(1). See eg Case C-72/95 *Aannemersbedrijf PK Kraaijeveld BV ea v Gedeputeerde Staten van Zuid-Holland (Dutch Dykes)* [1996] ECR I-05403; Case C-201/02 *R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723. However, note an interesting decision of the UK Supreme Court interpreting the EIA Directive in UK law in light of the precautionary principle: *R (Champion) v North Norfolk District Council and anor* [2015] UKSC 52 [51].

[136] See ch 2(II)(D).

[137] Waste Directive 2008 (n 129) art 3(1).

[138] Eloise Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (2007) 19(3) *JEL* 367, 374–376.

[139] Joined Cases C-418/97 & C-419/97 *ARCO Chemie Nederland v Minister Van Volkshuisvesting* [2000] ECR I-4475.

[140] ibid [36]–[40].

[141] See ch 3, nn 150–152 and accompanying text.

[142] Scotford, 'Trash or Treasure' (n 138).

despite its lack of explanation, demonstrates what these general environmental principles mean legally *in this particular regulatory context*. In a line of cases following *ARCO*, the ECJ has repeatedly adopted this same interpretive reasoning.[143]

A recent spate of cases has involved the polluter pays principle being used as an interpretive aid. These cases are remarkable in demonstrating the flexibility of this principle. Not only is the principle expressed by different marginal definitions, which are applied to interpret the Waste Directive, Landfill Directive, and Environmental Liability Directive respectively, but its precise manner of implementation as a scheme of cost allocation for pollution under those directives leaves Member States a wide margin of discretion that depends on local conditions.[144] At the same time, the Court also makes general statements about the nature and meaning of the polluter pays principle, which resonate across the different environmental regulatory contexts to which these various directives relate. Thus the ECJ clarifies, over a series of cases, that the polluter pays principle applies only to impose on polluters the burden of remedying pollution to which they have contributed.[145] This kind of general statement about the polluter pays principle gives it doctrinal continuity across the Court's case law and informs its evolving interpretive role, deepening its doctrinal role in EU law over time.

Having said that, how the general element of 'contribution' by a polluter is identified varies across the cases, in light of different legislative expressions of the polluter pays principle, again giving rise to marginal definitions of the principle. Thus in *Commune de Mesquer*,[146] the ECJ used the polluter pays principle to interpret Article 15 of the former Waste Directive, which mentioned this principle explicitly,[147] providing, inter alia, that 'producers' of products that become waste are responsible for bearing the cost of disposing of waste, 'in accordance with the polluter pays principle'. In this case, the interpretive issue for the ECJ was the meaning of a 'producer'. The ECJ found, 'in accordance with the "polluter pays" principle', that a producer will only fall within the Article 15 obligation if 'he has contributed by his conduct to the risk that the pollution caused [by the waste] will occur'.[148]

[143] Case C-9/00 *Palin Granit Oy* [2002] ECR I-3533; Case C-114/01 *AvestaPolarit Chrome Oy* [2003] ECR I-8725; Case C-457/02 *Criminal Proceedings against Niselli* [2004] ECR I-10853; Case C-235/02 *Criminal Proceedings against Saetti and Frediani* [2004] ECR I-1005; Case C-1/03 *Criminal Proceedings against Van de Walle* [2004] ECR I-7613; Case C-176/05 *KVZ retec v Republik Österreich* [2007] ECR I-01721.

[144] Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* [2009] 3 CMLR 45 [48], [55]; *ERG* (n 83) [55]. Such national implementation of the polluter pays principle would be open to potential review under EU law, not as an infringement of the polluter pays principle but as an infringement of the principle of proportionality: *Futura* [56]; see also *Standley* (n 35) [52].

[145] Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd* [2008] 3 CMLR 16 [77]; *Futura* (n 144) [45]; *ERG* (n 83) [57], [67].

[146] *Commune de Mesquer* (n 145).

[147] Old Waste Directive (n 129) art 15.

[148] *Commune de Mesquer* (n 145) [82] (emphasis added). In *Futura Immobiliare*, the ECJ interpreted the same provision of the Waste Directive using the polluter pays principle as an interpretive aid in

In this case, such conduct included that of the seller of hydrocarbons chartering a ship to transport the oil, particularly if he failed to take measures to prevent the incident of a shipwreck that would cause pollution of the sea (for example, by choice of ship).[149]

By contrast, in *ERG*,[150] the ECJ was concerned with interpreting a different expression of the polluter pays principle—various articles of the Environmental Liability Directive, which overall itself represents an expression of the principle.[151] In this case, the Court employed the polluter pays principle doctrinally to find that the causal link required under the Directive between a relevant activity and pollution, in order to establish liability, can be presumed if the responsible national authority has 'plausible evidence' capable of justifying the presumption (such as the fact that an installation is located close to pollution and there is a correlation between the substances used and emitted by the installation and the pollution).[152] This is a different aspect of how a polluter might 'contribute' to pollution within the interpretive scope of the polluter pays principle, and it ascribes a different marginal definition to the principle.[153]

Another case on the interpretation of the Environmental Liability Directive, *Fipa Group*,[154] discussed above, demonstrates the limits of the interpretive role of the polluter pays principle in this regulatory context. As seen in *ERG*, the polluter pays principle relates to the Directive's imposition of liability on operators who have caused relevant environmental damage, and the Italian law at issue in *Fipa* related to different circumstances, concerning liability for contaminated land in cases where those operators could not be found. The polluter pays principle thus did not have an interpretive role in this case, as it related to factual circumstances beyond the scope of the Directive.

In another line of interpretive cases, concerning the interpretation of Article 6(3) of the Habitats Directive, the Court of Justice has relied on the precautionary principle as an interpretive aid, revealing some precision about its content in this

quite different circumstances—concerning the cost allocation mechanism for the collection of urban waste by national authorities—giving rise to a different marginal definition of the principle: *Futura* (n 144) [50]–[52].

[149] *Futura* (n 144).

[150] *ERG* (n 83).

[151] ELD (n 107) arts 1, 6 & 8(1). The ELD 'seeks to implement the "polluter pays" principle in a certain form': *ERG, Opinion of Advocate-General Kokott* (n 83) [94].

[152] *ERG* (n 83) [57]. Note Advocate-General Kokott goes further than the ECJ in using the polluter pays principle to interpret the *ELD*, examining how Member States might take more stringent measures under the Directive in accordance with the polluter pays principle: *ERG, Opinion of Advocate-General Kokott* (n 83) [96]–[115].

[153] For another regulatory context in which the polluter pays principle is used doctrinally as an interpretive aid, reflecting again differently how polluters must make good the costs of pollution to which they contribute, see Case C-172/08 *Pontina Ambiente Srl v Regione Lazio* [2010] ECR I-01175.

[154] *Fipa Group* (n 65).

different EU legislative context.[155] The Court has established that, with respect to uncertain environmental risks, the precautionary principle dictates that the protective measures of the Directive should apply where environmental risks cannot be excluded. In relation to this particular regulatory scheme, the precautionary principle requires erring on the side of caution, and the Directive is interpreted accordingly. In these interpretive cases, the precise issue that has come repeatedly before the ECJ concerns when a plan or project is 'likely to have a significant effect' on a special area of conservation, thereby triggering the requirement for an 'appropriate assessment' to be carried out in Article 6(3). The Court has concluded:[156]

> In the light … of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment [under Article 191(2) TFEU], and by reference to which the Habitats Directive must be interpreted, such a risk [ie likelihood] exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.

This risk of significant effects, so identified by the precautionary principle, is an important trigger in the scheme of the Habitats Directive. This is because, once an appropriate assessment is then carried out, the second sentence of Article 6(3) provides that a Member State consenting authority cannot authorise the project in question if the assessment indicates that there will be an adverse impact on the integrity of the EU protected area in question. The Court of Justice has also relied on the precautionary principle to give this authorisation restriction a strict interpretation. Thus, in *Sweetman*,[157] the Court found that national authorities cannot authorise projects, after an appropriate assessment has been carried out, where there is 'a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types'.[158] Such a risk exists where there is any reasonable doubt about the absence of such effects. The Court based this interpretation on the fact that the second sentence of Article 6(3) 'integrates the precautionary principle', making it possible to 'prevent in an effective manner adverse effects on the integrity of protected sites'.[159] In the subsequent case of *Briels*, the Court of Justice similarly relied on the precautionary principle to find that the appropriate assessment carried out under Article 6(3) 'cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all

[155] *Waddenzee* (n 45); Case C-6/04 *Commission v UK (Conformity)* [2005] ECR I-9017; Case C-98/03 *Commission v Germany* [2006] ECR I-53; Case C-538/08 *Commission v Belgium* [2011] ECR I-04687. For a different example of how the Habitats Directive might be interpreted by drawing on an environmental principle—the sustainable development principle—see Case C-371/98 *R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping* [2000] ECR I-9235, Opinion of Advocate-General Leger (7 March 2000): see further text accompanying n 347.

[156] *Waddenzee* (n 45) [44].

[157] Case C-258/11 *Sweetman v An Bord Pleanála* [2013] ECLI:EU:C:2013:220.

[158] ibid [43].

[159] ibid [41].

reasonable scientific doubt' as to the effects of the proposed works.[160] Overall, these interpretations of Article 6(3), informed by the precautionary principle, lead to a robust interpretation of this important rule of EU nature conservation law. This interpretation is not uncontroversial due to its prescriptive direction as to how national land use decisions should be made.[161]

A more recent case is a reminder that the teleological interpretation of the Court of Justice does not rest on environmental principles alone. Environmental principles are not ends in themselves—they have interpretive roles that are rooted in their legislative and regulatory contexts. By contrast with Article 6(3) of the Habitats Directive, the relevant provision in *Commission v Germany* was Article 9 of the Water Framework Directive, which is a very different kind of provision in a very different kind of Directive. Article 9 requires Member States to take into account the 'principle of recovery of the costs of water services, including environmental and resource costs … in accordance in particular with the polluter pays principle'. It thus requires Member States to introduce water pricing policies by 2020, and to ensure by that time that different water uses (including industry, household and agriculture uses) adequately contribute to the recovery of the costs of water services. This provision is concerned with providing adequate incentives for the efficient use of water resources so as to comply with the environmental objectives of the WFD.[162] In *Commission v Germany*,[163] the interpretive issue was whether Article 9, and the polluter pays principle that supports it, required pricing schemes for all water use activities specified in the Directive, as argued by the Commission.[164] The Court of Justice found that Article 9 did not impose a generalised pricing obligation on all water uses. It reached this conclusion by taking into account the overall scheme of the Directive, which establishes a system of management of river basins based on programmes devised by Member States that are adapted to local and regional conditions, rather than pursuing harmonisation

[160] Case C-521/12 *Briels v Minister van Infrastructuur en Milieu* ECLI:EU:C:2014:330 (this meant that an appropriate assessment should take into account protective measures to the extent that they reduce adverse effects on the site, but not measures that are proposed to compensate for damage caused to the site).

[161] Art 6(3) impacts significantly on land use planning of Member States, an area that is otherwise outside the competence of EU action. The requirements of art 6(3) can be contrasted with EU environmental impact assessment processes, which require assessment and consideration of environmental effects of risky developments, but leave final consent decisions to Member State authorities: Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1, as amended.

[162] These objectives of non-deterioration of water resources and achieving good surface and groundwater status are found in art 4 of the Water Framework Directive (n 134).

[163] Case C-525/12 *Commission v Germany* [2014] ECLI:EU:C:2014:2202.

[164] This argument relied on a particular interpretation of the polluter pays principle—that it required *all* 'polluters' (here those involved in water abstraction) to pay the price for the environmental impacts of their water use. Similar arguments have been made in other cases, ie that the principle requires all actors involved in a particular environmentally harmful activity to pay for the impacts of their activities: eg Case 402/09 *Ioan Tatu v Statul român prin Ministerul Finanţelor şi Economiei and others* [2011] ECLI:EU:C:2011:219 [60].

of water regulation. In this context, the Court of Justice found that water pricing is one instrument available to Member States to manage water quality and its rational use. The polluter pays principle was part of the interpretive picture but not the definitive purpose of Article 9. As the court stated, the 'interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of EU law as a whole'.[165] This case highlights that EU environmental principles can be important interpretive aids when EU institutions rely on them to introduce particular measures and obligations, but it reinforces that their interpretive role and meaning will critically depend on the regulatory context in which they are employed.

B. Interpreting EU Environmental Competence More Broadly: Environmental Principles Beyond Title XX TFEU

Environmental principles are also used as interpretive aids in cases involving Treaty provisions and EU legislation beyond Title XX of the TFEU. These cases involve legislative or administrative acts by EU institutions in an expanded area of EU environmental competence, which is based on, and thus legally guided by, environmental principles. The Court finds that these acts exercising broader EU environmental competence are based on environmental principles, either by determining (or assuming) this is the case in the context of the relevant measure, or by finding that the integration principle has expanded the policy area in relation to which EU environmental principles apply. However, there are limits to the interpretive roles of environmental principles in relation to EU acts: environmental principles will have no interpretive roles where the Court finds that the relevant provision or measure is not based on environmental principles, as seen in some policy cases above.[166] The interpretive cases involving environmental principles in relation to EU legislation beyond Title XX fall into two sub-groups: those involving the precautionary principle and areas of EU competence guided by a 'high level of protection'; and cases in which the integration principle drives the interpretive role of environmental principles even further into other areas of EU competence.

i. A 'High Level of Protection' and the Precautionary Principle

First, there are cases in which EU environmental competence extends into other areas of competence in which a 'high level of protection' is required by the Treaty or secondary legislation—these include EU competences relating to public health, the internal market and consumer protection.[167] In these areas, the precautionary

[165] *Commission v Germany* (n 163) [43].
[166] See above, Section III(C).
[167] TFEU, arts 114, 168, 169.

principle is employed to resolve interpretive issues in light of the 'high level of protection' required in these areas, just as it is required in relation to environmental protection in Article 191(2) TFEU. Since the CFI's judgment in *Artegodan*,[168] the CFI and subsequently the General Court have often asserted that the precautionary principle is a 'general principle' that applies to guide and inform EU policy across these areas, expanding the area of competence in which the precautionary principle has a legal role, by virtue of the integration principle in Article 11 TFEU and the so-called 'principle of a high level of protection'.[169] The interpretive role for the precautionary principle across these different areas of EU competence highlights that there is no clear demarcation of 'environmental' issues in EU law.[170] Rather, environmental protection issues are interconnected with other policy areas, and the widening doctrinal role of the precautionary principle examined in this subsection (as well as of other environmental principles examined in sub-section (ii) below) demonstrates how these areas of overlapping policy manifest legally.

In *Monsanto*, discussed above,[171] the ECJ deflected most of the arguments based on the precautionary principle, but observed that the precautionary principle was given expression in the safeguard clause (Article 12) of the previous novel food GMO Regulation. This Regulation was an internal market measure based on Article 114 TFEU (ex-Article 95 EC), which was required to take as its base a 'high level of protection' in relation to any environmental protection or health issues.[172] The Court found that 'the conditions for the application of [the safeguard] clause must be interpreted having due regard to [the precautionary] principle'.[173] Relying on previous case law, the ECJ asserted that it follows from the precautionary principle that:[174]

> where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.

Accordingly a Member State may take protective measures under Article 12 even if a full risk assessment cannot be carried out because of inadequate available scientific data. The ECJ identified the relevant content of the precautionary principle, and used this to influence the interpretive outcome.[175]

[168] Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, T-141/00 *Artegodan v Commission* [2002] ECR II-4945.

[169] See above n 121.

[170] See above n 3.

[171] *Monsanto* (n 7); see above, text accompanying nn 94–95.

[172] TFEU, art 114(3) (ex-art 95(3) EC).

[173] *Monsanto* (n 7) [110].

[174] ibid [111].

[175] The Court of Justice undertakes a similar interpretive exercise in Joined Cases C-58/10 to C-68/10 *Monsanto SAS and others v Ministre de l'Agriculture et de la Pêche* [2011] ECR I-07763, albeit reaching a conclusion that restricts the scope of Member States to take unilateral protective measures (in relation to the safeguard clause under Regulation 1829/2003/EU on genetically modified food and feed [2003] OJ 2003 L268/1).

The Court went on to expand on the content of the precautionary principle, asserting that, despite inadequate scientific data, there must be[176]

> specific evidence which … makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available … that the implementation of those measures is necessary in order to avoid … potential risks.

The requirement of reliable scientific evidence in cases of scientific uncertainty is a theme that recurs in other public health cases involving the precautionary principle,[177] and it gives the principle quite a different identity from that isolated in *Waddenzee* above.[178] This difference, or conflict, can again be explained by appreciating that the courts are defining the principles marginally with respect to different legal issues in different EU regulatory contexts. As a result, the overall definitional picture appears confused.[179] Since legal definitions of environmental principles are the end points of their legal analysis in EU case law, they may constitute a variety of end points.

Another definitional end-point of the precautionary principle is seen in *Sweden v Commission*, also discussed above,[180] a case in which the principle is employed by the CFI to interpret an EU legislative framework outside the environmental title of the Treaty. In this case, the relevant legislation was the assessment framework for approving pesticides for use within the EU under the Plant Protection Product Directive, adopted on the basis of the common agricultural policy in ex-Title II of the EC Treaty. While this Title contained no reference to environmental protection or a high level of protection, the Directive does,[181] particularly in its requirement that no pesticides be approved unless they have no harmful effects on human or animal health or groundwater or any unacceptable influence on the environment.[182] In interpreting this requirement, the CFI used the precautionary principle to find that a substance may be refused approval if there is 'solid evidence [which] may reasonably raise doubts as to [its] safety', but not if there are only hypothetical risks.[183] This echoes the ECJ's version of the principle in *Monsanto*,

[176] Monsanto (n 7) [113].

[177] For analogous interpretive cases, see Case C-446/08 *Solgar Vitamin's France v Ministre de l'Économie, des Finances et de l'Emploi* (ECJ 29 April 2010) [63]–[70]; *Monsanto SAS and others v Ministre de l'Agriculture et de la Pêche* (n 175) [70]–[77]. For further cases and discussion on the precautionary principle's requirement of adequate scientific evidence, see below: Section V(B)(ii)–(iii), (v).

[178] See above, text accompanying nn 155–156.

[179] Arguably, the key difference lies in the nature of the legal issue; in environmental cases such as *Waddenzee* (n 45), the Court needed to determine when environmental protective measures should apply (ie when they are *required* to apply), whereas, in this case, the concern is when a Member State is allowed to rely on the safeguard clause (ie when it *may* do so).

[180] See above, text accompanying nn 119–123.

[181] Plant Protection Product Directive (n 120) recital 9 ('high standard of protection' in relation to environmental, human and animal health).

[182] Plant Protection Product Directive (n 120) art 5(1).

[183] *Sweden v Commission* (n 119) [161].

which has been further elaborated in more recent cases as requiring review by the courts into whether the evidence relied on is:[184]

> factually accurate, reliable and consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it.

However, the CFI in *Sweden v Commission* also goes on to find that the possibility of placing restrictions on the use of pesticides under the Directive, as interpreted by the precautionary principle, means that a substance may only be approved if it is established 'beyond a reasonable doubt' that restrictions on use make it possible to 'ensure' that its use will not have harmful health or environmental effects.[185] This is a stricter approach to the precautionary principle, highlighting again its marginal definition in this different regulatory context.[186]

ii. The Expansive Reach of the Integration Principle

There are other cases in which the integration principle is used to extend the interpretive roles of environmental principles even further, so that they inform the meaning of ambiguous provisions in areas of policy where there is no clear Treaty mandate or legislative direction for a 'high level of protection', only the overarching environmental protection requirements of Article 11 TFEU itself. This is seen particularly in public procurement and state aid cases, where the integration principle is used directly as an interpretive aid, or as a linking device to employ other environmental principles or requirements to interpret provisions within an expanded scope of EU environmental competence.

An example where the integration principle is directly used to interpret an ambiguous provision is found in *Concordia Bus Finland*,[187] concerning Article 36(1)(a) of Directive 92/50,[188] which set out criteria on the basis of which a national contracting authority may award a public service contract. The ECJ held, in light of the integration principle, that Article 36(1)(a) does not exclude the possibility of a contracting authority using other criteria relating to environmental

[184] *Dow AgroSciences Ltd v Commission* (n 125) [153].

[185] *Sweden v Commission* (n 119) [170]. For a similar interpretation, see *Du Pont v Commission* (n 125) [153].

[186] For a case in which the precautionary principle has a similar interpretive role, see *Solvay* (n 124) [121], in which the principle informs EC authorisation provisions under Directive 70/524 on additives to feeding stuffs [1970] OJ Eng Spec Ed (III) 840: [122]–[123]. The principle is again defined differently in light of the different regulatory context: ibid [148]–[149].

[187] Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213.

[188] Council Directive (EC) 92/50 relating to the co-ordination of procedures for the award of public service contracts [1992] OJ L209/1. This has now been repealed and replaced by Council & Parliament Directive (EC) 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

protection when assessing the 'economically most advantageous' tender under the Directive.[189]

An example of a case in which the integration principle has been used as a linking principle is in the Opinion of Advocate-General Jacobs in *GEMO*,[190] which is the first in a group of state aid cases in which environmental principles are employed doctrinally to interpret Article 107 TFEU (ex-Article 87(1) EC) (prohibiting state aids that distort or threaten to distort competition). In this case, Advocate-General Jacobs found that a French law establishing a compulsory and free public service for the collection and disposal of animal slaughterhouse waste constituted a state aid because the waste constituted an economic burden that would normally, in accordance with the polluter pays principle, have to be borne by slaughterhouses. Advocate-General Jacobs justified his use of the polluter pays principle as an 'analytical tool' to resolve this issue of competition law by appealing to the integration principle.[191] Whilst the ECJ did not rely explicitly on environmental principles in its reasoning, it arrived at the same conclusion as the Advocate-General, finding that the financial cost involved in disposing of animal carcasses and slaughterhouse waste, which are harmful to the environment, is an inherent cost of the businesses that generate this waste.

There have since followed other state aid cases in which environmental principles have been adduced in argument and reasoning as interpretive aids in different ways. In some cases, arguments based on environmental principles are dismissed since the measure in question was not based in any way on environmental principles.[192] In other cases, there have been innovative suggestions about the interpretive use of the integration principle that stretches its doctrinal role into the fundamental structure of EU competition law. In two particular cases, the CFI relied on the integration principle to interpret Article 107(1) TFEU (ex-Article 87(1) EC) to conclude that a national environmental tax and an emission trading scheme respectively were not unlawful state aids.[193] The environmental objectives of both schemes altered how the CFI determined that the Commission should interpret and apply the Treaty's state aid rules, so that Member State measures pursuing environmental aims were found not to be unlawful state aids, in light of the integration principle and the importance of including environmental protection requirements in all aspects of EU policy. Whilst the reasoning of the CFI in both cases has been overturned on appeal,[194] the doctrinal role of the integration

[189] *Concordia* (n 187) [57].

[190] Case C-126/01 *Ministre de l'Économie, des Finances et de l'Industrie v GEMO* [2003] ECR I-13769, Opinion of Advocate-General Jacobs (30 April 2002).

[191] ibid.

[192] eg Case T-57/11 *Castelnou Energía, SL v Commission* [2014] ECLI:EU:T:2014:1021.

[193] Case T-210/02 *British Aggregates Association v Commission* [2006] ECR II-02789; Case T-233/04 *Netherlands v Commission* [2008] ECR II-00591. See also Case T-295/12 *Germany v Commission* [2014] EU:T:2014:675.

[194] Case C-487/06 P *British Aggregates Association v Commission* [2008] ECR I-10515 [79]–[92]; Case 279/08 P *Commission v Netherlands* [2011] ECR I-07671 [74]–[79].

principle was not dismissed altogether. The reasoning of the ECJ on appeal in *British Aggregates Association v Commission* is particularly interesting in finding that the integration principle can still play a role determining whether measures constitute unlawful state aids. This is because:[195]

> [I]t is for the Commission, when assessing … a specific measure such as an environmental levy adopted by Member States in a field in which they retain their powers in the absence of harmonisation measures, to take account of the environmental protection requirements referred to in Article 6 EC [now Article 11 TFEU], which provides that those requirements are to be integrated into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market … [This] cannot justify the exclusion of selective measures, even specific ones such as environmental levies, from the scope of Article 87(1) EC … as account may in any event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article 87(3) EC.

In other words, whilst the CFI had gone too far in interpreting state aid principles in light of environmental objectives to support a selective Member State measure in this case,[196] the Commission could still take into account environmental goals at a different stage of the state aid assessment process, in determining the ultimate compatibility of state aids with the internal market under Article 107(3) TFEU (ex-Article 87(3) EC). The Court of Justice's suggestion here reflects another legal dimension of the integration principle within a widened scope of EU environmental competence. This scope is widened in that these cases are dealing with measures that relate to the internal market—a core economic area of EU competence—and which also relate to Member States exercising their own environmental competence within the scope of EU law. Yet again, this judicial expansion of the scope of EU environmental competence in which environmental principles have doctrinal roles shows that the legal roles of EU environmental principles are continually evolving.[197]

C. Conclusion

In this Part, environmental principles have been used doctrinally by the EU courts to interpret provisions of EU legislation based on the environmental title of the Treaty, as well as EU legislation and Treaty provisions beyond that discrete area of

[195] *British Aggregates Association v Commission* (ECJ) (n 194) [90]–[92].

[196] In particular, the CFI erred by assessing measures by their objectives rather than their effects, improperly excusing their character as state aids by virtue of their environmental objectives: ibid [85]–[88].

[197] For discussion as to the interpretive limits of the integration principle in relation to internal market measures: Case C-246/99 *Commission v Denmark* [2002] ECR I-6943, Opinion of Advocate-General Colomer (13 September 2001).

EU competence. Environmental principles have doctrinal roles in these cases in that they act as reasons that influence the outcomes of legal issues of interpretation, purposively guiding the courts' interpretation. In the second category of cases considered in this Part, the case law of the EU courts reveals how environmental considerations infiltrate areas of EU competence beyond the environmental title, expanding the area of EU environmental competence in which environmental principles have legal roles and showing how environmental principles are linking different policy domains legally through their interpretive roles. This aspect of the doctrinal picture of environmental principles demonstrates, in particular, an important legal dimension of the integration principle in EU law. The interpretive cases in this Part also give rise to marginal definitions for environmental principles in different regulatory contexts. In employing environmental principles doctrinally in these cases, the courts need to substantiate them to some extent. Through such acts of 'definition for interpretation', the courts effectively have discretion to identify and define the competence of the institutions acting on the basis of environmental principles. This is due to the open-textured nature of these principles, which can and do have multiple meanings in different contexts.

In sum, the interpretive cases in this Part display a particular technique of judicial reasoning but they do not create definitive, universal legal meanings for environmental principles. Nor do they compel particular actions by institutions to solve environmental problems, although they do restrict permissible lines of administrative decision-making by EU institutions and Member State institutions acting within the scope of EU law, particularly on the stricter manifestations of the precautionary principle seen in cases such as *Waddenzee* and *Sweden v Commission*. Nor do environmental principles, in their interpretive guise, solve perceived legal problems in environmental law. They do not unify EU environmental law since they are not employed to interpret all EU environmental legislation, although their doctrinal scope is expanding. By contrast, their legal use within an expanded area of EU environmental competence, which overlaps with other policy areas, shows that EU environmental law is not in fact a discrete area of law that requires coherence, but an evolving and wide-ranging legal area.

It might be argued that environmental principles in this treatment category look like Dworkinian 'legal principles', in that they guide judicial reasoning in a particular direction without mandating a particular outcome.[198] On a very general level, this is a fair description of these cases, but it does not account for the fact that the same environmental principles might point in quite different directions, depending on the regulatory context; nor for the more complex role played by the integration principle in these cases; nor for the fact that the EU courts use environmental principles interpretively only when they determine that EU (or Member State) institutions have first acted on the basis of the principles, reinforcing that environmental principles are intertwined with the exercise of

[198] See ch 2(II)(D)(i).

institutional competence in the EU context. The legal roles played by environmental principles in this sense are a unique manifestation of EU legal culture, reflecting the teleological reasoning style of the EU courts, the regulatory frameworks which they consider (as well as the Treaty context within which these frameworks are devised), and the particular legal questions being considered by the courts.

V. Informing Legal Test Cases: Reviewing the Boundaries and Exercise of EU Environmental Competence

In this third treatment category, environmental principles have doctrinal roles in informing tests of legal review that are applied by the EU courts. The cases in this category involve EU and Member State institutions acting on the basis of environmental principles, purportedly within the boundaries of EU environmental competence, to introduce legislative measures or implement administrative regimes, and the legality of this action is then questioned under EU law. The primary issue in these cases is the lawful extent of discretionary power afforded to these institutions to adopt policy and make decisions on the basis of environmental principles—in constitutional or administrative law terms—rather than any particular line of policy that should be adopted by them.

Since environmental principles legally prescribe the limits of policy discretion exercisable by EU (and Member State)[199] institutions under the Treaties, they are employed by the courts to inform review tests in determining whether those institutions have overstepped the bounds of their policy authority. The nature of the legal inquiry in such review is finely balanced in that the courts have a duty to police the legality of exercises of discretion,[200] but they also need to allow policy decisions to be made. This balance is reflected in a careful constitutional path trodden by the EU courts in reviewing the legality of EU and Member State institutional decision-making in many cases considered in this Part. The delicacy of this balancing exercise often translates into doctrinal opacity in the treatment of environmental principles, since they form the basis for the exercise of policy discretion, but also for legally testing its bounds. The courts thus use the principles to inform, and to generate, legal tests applied to review institutional discretion in these cases, but also as the basis for deferring to the policy decisions of the EU institutions (and of the Member States in unharmonised domains) within the limits of permissible policy identified by the courts. This dual role of EU environmental principles, as directing legal outcomes but preserving policy discretion,

[199] When Member States institutions are acting within the scope of EU law: see below, Section V(B)(v).

[200] TEU, art 19; TFEU, art 263.

features in several cases in this treatment category, particularly in Section V(B) below.

In using environmental principles to inform various tests of review, the EU courts often give marginal definitions to the principles. Again, the general formulation of environmental principles requires this so that they can inform review tests in a meaningful way. The courts have gone a step further in relation to the precautionary principle, defining and elaborating it to the point of generating a new test of review—a test of adequate scientific evidence—which now (in various guises) appears in much of the EU case law in this treatment category involving the precautionary principle. This review test is used mainly in a supplementary manner, so that its determination is relied on to inform the primary review test being applied by the Court, which is often whether a 'manifest error of assessment' has been committed on the part of the relevant institutional decision-maker. Some cases go so far as to suggest that the precautionary principle acts as a test of review in its own right, along with its self-generated test of adequate scientific evidence.

The cases in this Part fall into two groups: (1) those concerned with the boundaries of EU environmental competence as exercised by EU institutions, and (2) those concerned with the lawful exercise of discretion within the scope of EU environmental competence, by both EU and Member State institutions. In both cases, environmental principles are used to inform review tests that have been developed in the doctrine of the EU courts for the relevant legal question at issue. These review tests are all relatively open in their formulation, leaving scope for environmental principles to inform their application. Some of these review tests have also themselves been evolving, partly through the influence of environmental principles, particularly as the body of EU administrative law has become more sophisticated and penetrating in holding EU decision-makers to account.

A. Legal Basis Cases

In this group of cases, the ECJ employed environmental principles to inform legal tests in resolving disputes between the EU institutions over the correct legal basis for Community measures before the Lisbon Treaty came into force.[201] These are disputes about the legality of EC measures on the ground of 'lack of competence' in Article 263 TFEU. Arguments about lack of competence are arguments about the proper boundaries of EU (previously EC) law making, where those boundaries are determined by the relevant legal basis for legislating set out in the Treaty. A measure must be properly based on a Treaty provision and title, and introduced in accordance with its prescribed legislative method, for the relevant EU legislative

[201] These cases were decided under the pre-Lisbon Treaty structure, which distinguished EC from EU measures by its three discrete pillars of competence. Similar cases are unlikely in the future.

institutions to have acted within their competence. This ground of review—lack of competence—is not further elaborated in the Treaty, and the ECJ developed tests for deciding whether an EU (or EC) measure is properly based, which involve isolating the predominant aim and content of a measure to determine its centre of gravity.[202] In a number of cases, the Court used environmental principles to inform these tests.[203] This was done in two ways.

First, environmental principles have been used to identify when EU environmental competence has been validly exercised under Title XX of the TFEU. In *Commission v Council (Waste Directive)*, the ECJ considered whether the Waste Directive[204] was properly adopted on the basis of Article 192 TFEU (ex-Article 130s EC).[205] In finding that it was properly adopted on that basis, the ECJ looked to the aim and content of the measure,[206] finding that its aim was to implement the principle of rectification at source,[207] and that its content included, inter alia, a 'confirmation' of the polluter pays principle in Article 15.[208] In this way, environmental principles were observed as the legislative policy underlying the contested Directive, and employed to inform the relevant legal test through purposive reasoning.

A contentious case in which the integration principle was used to inform a Title XX legal basis decision is *Commission v Council (Environmental Crime)*.[209] In this case, the ECJ found that the Community had competence to adopt legislative provisions establishing environmental offences, despite the general exclusion of criminal law and procedure from what was then EC competence. This is because environmental protection was a 'fundamental' objective of the Community, as emphasised by the integration principle.[210] Here the integration principle was used to inform the aim and content tests indirectly by giving extra weight to the environmental protection aim and content of the contested measure, thereby

[202] See above n 29 and accompanying text. For doctrinal developments in relation to these tests, see Chalmers, Davies and Monti, *European Union Law* (n 36) 110–111.

[203] The jurisprudence of these cases is now out of date in that the legislative procedure under the environmental title (with the exception of legislation passed under art 192(2)) is now equivalent to that under the internal market basis of competence—both areas of competence require the 'ordinary legislative procedure' under the TFEU, previously the 'co-decision' procedure. Thus there is no longer the same competition for institutional influence along this dividing line of legal basis. The abolition of the pillar structure with the Lisbon Treaty also means that there is no longer institutional tension in relation to decision-making across different Treaty pillars. However, questions of legal basis remain relevant under the new Treaty structure, since EU competence remains legally bounded, and the doctrinal use of environmental principles in informing legal competence issues in this general sense remains relevant in EU law.

[204] Old Waste Directive (n 129).

[205] Case C-155/91 *Commission v Council (Waste Directive)* [1993] ECR I-939. See also Case C-187/93 *Parliament v Council (Waste Regulation)* [1994] ECR I-2857 [20].

[206] *Waste Directive case* (n 205) [7].

[207] ibid [13]–[14].

[208] ibid [9]

[209] *Environmental Crime* (n 74).

[210] ibid [42].

justifying the assertion of competence in this case. The integration principle served to expand EC environmental competence under Title XX.

The second type of legal basis case in which environmental principles have played doctrinal roles involves the expansion of EU environmental competence beyond Title XX. There is a line of cases in which the integration principle has been used as a reason why a contested measure is *not* properly based on Article 192 TFEU, because that principle cannot be used to create a bias that a measure has an environmental aim and content whenever it serves environmental protection objectives.[211] On the contrary, the integration principle indicates that environmental objectives may, and should, feature in EU measures enacted on the full range of legal bases in the Treaty (including, in various cases, transport policy, regulation of the internal market, and the common commercial policy). It is only when the environmental protection objective of a measure is predominant that it will be properly based on Title XX.[212] In these cases, the integration principle limits any environmental bias that might inform tests of legal basis. This finding qualifies the conclusion in the *Environmental Crime case*, and indicates that EU environmental competence, beyond Title XX, overlaps with other areas of EU policy, creating blurred competence boundaries. This overlapping and extended competence reflects the trend, seen in some policy and interpretive cases above, of the integration principle expanding, or potentially expanding, the doctrinal roles of environmental principles into various spheres of EU action.[213]

B. Exercise of EU Environmental Competence Cases

So far, this Part has mapped cases in which environmental principles have been used doctrinally to inform the proper boundaries of EU competence. In this second set of cases, environmental principles are employed to inform legal tests of review in relation to acts taken by EU and Member State institutions on the basis of environmental principles within the scope of EU environmental competence. The question in these cases is not whether the correct institutions adopted an EU measure, by the correct legislative procedure, or whether they had the power to do so. The question is whether the relevant institution exercised its policy discretion validly under EU law.

The grounds for such review include a range of EU 'administrative law' tests, such as proportionality and manifest error of assessment, as well as breach of substantive internal market rules. Notably, the administrative law tests to determine

[211] Case C-62/88 *Hellenic Republic v Council (Chernobyl I)* [1990] ECR I-1527 [20]; *Titanium Dioxide* (n 29) [22]; Case C-440/05 *Commission v Council (Ship-Source Pollution)* [2007] I-09097 [60].

[212] Case C-411/06 *Commission v Parliament and Council (Waste Shipment Regulation)* [2009] I-07585, Opinion of Advocate-General Maduro (26 March 2009) [17].

[213] See above, Sections III(E) & IV(B).

whether institutions have properly exercised their discretion have been developing in sophistication and complexity as the case law involving environmental principles has similarly progressed, so that these doctrinal areas have been co-evolving. In all cases in this section, the review tests are broadly formulated, involving doctrine derived from the Court's own case law in light of minimal Treaty guidance,[214] and environmental principles play a role in their determination. The EU courts draw on environmental principles as the basis of the policy discretion exercised by the institutions and then use principles to inform the relevant legal tests. In almost all cases, they do not use environmental principles as freestanding grounds of review for challenging the legality of EU (or Member State) action. Any identified 'infringements' of an environmental principle are generally used to inform a legal test of review.[215] In using environmental principles to inform tests of review, the courts again ascribe marginal meanings to the principles in this body of case law.

The cases examined in Section V(B)(v) below, which concern the legality of unilateral Member State action within EU law, expand the scope of EU environmental competence in which environmental principles have legal roles. In these cases, the Court of Justice applies review tests in relation to alleged breach of internal market rules by Member States acting on public health and environmental grounds, which prima facie infringe the free movement of goods obligation in Article 34 TFEU. In these cases, Member States purport to act on the basis of environmental principles, thereby justifying infringement of Article 34, and the Court employs a number of tests to determine the legality of this action. The Treaty gives some guidance as to the 'law' to be applied in these cases: Article 36 TFEU provides a general description of some market disruptive measures (infringing Article 34) that Member States are entitled to take in the name of public health, and to an extent environmental, protection.[216] However, Article 36 gives few clues as to the nature of or limits to that idea, leaving doctrinal space for the courts to use environmental principles, particularly in relation to the test of proportionality applied by the Court to qualify reliance on Article 36.[217] Further, the Court has developed its own doctrine beyond this to determine when Member States might justify infringement of Article 34—a 'rule of reason'.[218] This doctrine involves a number of stages of reasoning and two legal tests in particular: Member States might justify infringement of Article 34 on the basis of a mandatory or imperative requirement (including environmental or public health protection) when the relevant measure is: (1) indistinctly applicable to domestic and imported goods ('discrimination' test),

[214] *cf* TFEU, art 114(4)–(5) policy cases: see above Section III(D).

[215] Although this position may change: see above nn 122–125 and accompanying text.

[216] Art 36 TFEU allows Member States to justify infringements of art 34 on the ground of 'the protection of health and life of humans, animals or plants'.

[217] The open-ended nature of the legal inquiries provoked by arts 34 and 36 are highlighted in academic analysis of art 34 cases: Maduro, *We the Court* (n 19) chs 2, 3.

[218] *Cassis de Dijon* (n 23) [8].

and (2) necessary and proportionate to its objective.[219] Again, these tests provide scope for the Court of Justice to develop doctrine involving environmental principles.

In this section, there is a progression from cases in which principles are employed by EU courts to inform legal tests of review (the rule of reason, proportionality), to cases in which the principles are discussed in greater detail by the courts and used also to generate legal tests (adequate scientific evidence) as well as to inform legal review tests (manifest error, proportionality), to suggestions that the precautionary principle constitutes a ground of review in its own right. The latter developments have occurred in relation to the precautionary principle in public health cases, inspired initially by the policy guidance in the Commission Communication.[220] This progression of cases is examined sequentially in the sub-sections that follow, demonstrating the increasing doctrinal complexity of environmental principles, particularly relating to the precautionary principle, alongside the increasing complexity of EU administrative law and the continuing development of Article 34 TFEU internal market law, which remains one of the most litigated areas of the EU Treaties.

i. Early Cases of Informing Review Tests: Expanding EU Environmental Competence, Defining Precaution and Embracing More Principles

In these early cases, EU courts used a range of environmental principles to inform legal tests in reviewing EU and Member State discretion exercised in the overlapping areas of environmental, agricultural and public health policy. These cases show a variety of ways in which environmental principles can inform legal tests that review acts of institutions, including Member State institutions acting within the scope of EU law. They also set the scene for more complex legal developments to follow, involving the precautionary principle in particular. Overall, these early cases show that there is no single or obvious mode of reasoning by which environmental principles inform legal review tests, but that they can be flexible and powerful devices in informing EU administrative and substantive legal doctrine.

An early landmark and controversial case was *Walloon Waste*.[221] In this case, the ECJ used the principle of rectification at source to inform the rule of reason under Article 34 TFEU (ex-Article 30 EC at the time), in proceedings brought against Belgium for preventing the import of waste from other Member States. The issue was whether this infringement of Article 34 was justified by 'imperative requirements relating to environmental protection',[222] which could only be relied

[219] Case 302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607 [6], [9].
[220] Communication (n 62).
[221] Case C-2/90 *Commission v Belgium (Walloon Waste)* [1992] ECR I-4431; *cf* Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743; Case C-320/03 *Commission v Austria* [2005] ECR I-9871.
[222] *Walloon Waste* (n 221) [29], [34].

on if the Belgian measure were indistinctly applicable to waste from Belgium and from other Member States. The ECJ found that the infringement was justified, and that the rule of reason applied. The Court referred to the principle of rectification at source, relied on in argument by Belgium, in resolving this legal question as follows:[223]

> In assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by [Article 191(2)] of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region … to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste … It follows that having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory.

The principle of rectification at source here informed the test of discrimination that triggers the 'imperative requirements' justification, since it was prescribed in the EC Treaty as founding 'Community' environmental policy.[224] The principle informed the rule of reason in such a way that expanded the scope of EU environmental competence to include Member State action, which was also legally prescribed and delimited by environmental principles. This was not obviously the case, since Article 191(2) TFEU concerns *EU* (previously *Community*)[225] environmental policy, but the ECJ's conclusion in *Walloon Waste* indicated that such policy includes Member State environmental policy when Member States are acting within the scope of EU law. EU environmental policy thus dictated what Member State policy may lawfully be adopted to derogate from the Article 34 free movement guarantee in the name of environmental protection.[226]

This doctrinal use of the principle of rectification at source is somewhat crude. The decision has been criticised on the ground that waste in one Member State is not qualitatively different from waste in another Member State, and so the measures at issue should be seen as discriminatory.[227] This crudeness might be explained

[223] ibid [34], [36].

[224] *cf* Michael Doherty, 'Hard Cases and Environmental Principles: An Aid to Interpretation?' (2004) 3 *YEEL* 57, 60–62; Stephen Weatherill, 'Publication Review: "Free Movement of Goods in the European Community" (Peter Oliver)' (2003) 28(5) *ELR* 756, 758.

[225] Ex-art 130r(2) EC.

[226] See Case C-463/01 *Commission v Germany* [2004] ECR I-11705 [74]. This resembles how EU fundamental rights doctrine has a wide-ranging scope in binding Member State action: Case C-260/89 *Elliniki Radiophonia Tiléorassi v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925.

[227] eg Francis Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18 *JEL* 185, 189. Note the decision itself is out of date in light of the WSR (n 104), which now applies to *all* waste shipments between Member States, and otherwise is likely overruled: *Stadtgemeinde* (n 68) [59], [62]–[63], *cf* [69].

by the ECJ's inclination to endorse a policy that conformed to the requirements of Article 191(2) TFEU and adjusting its legal reasoning to fit. The doctrinal roles of environmental principles in EU law are thus not obvious or predictable. This is reinforced by the fact that a series of Advocate Generals' opinions have encouraged the Court of Justice to depart from the rule of reason's requirement for discrimination in cases where Member States seek to justify environmental measures that infringe Article 34, on the basis that this departure is supported by the integration principle, 'according to which environmental objectives, the transverse and fundamental nature of which have been noted by the Court, should be taken into account in the definition and implementation of European Union policies'.[228] This suggested legal argument displays another creative potential role for environmental principles in informing this body of EU legal doctrine. From this early case in *Walloon Waste*, despite its doctrinal limitations, environmental principles have come to inform both EU and Member State review tests, and, while they do so in different ways, they perform the same overarching function in these cases: identifying the limits of the policy discretion afforded to EU and Member State institutions when exercising EU environmental competence.

Another fundamental early informing legal test case, *BSE*,[229] involved the precautionary principle in the review of an EU measure. The relevant review test in this case was the test of proportionality, or the proportionality principle. Proportionality—a 'general principle of Community law'[230]—is an independent ground of review,[231] comprised of discrete legal tests, which limits the discretionary power of both EU and Member State institutions as they legislate and make decisions within the scope of EU law. The precise tests comprising, and manner of application of, the proportionality principle differ slightly from case to case, and particularly between review of EU and Member State measures.[232] However, the basic three-pronged test of proportionality appears with some consistency across

[228] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits—en Gasmarkt* [2014] ECLI:EU:C:2014:2192, Opinion of Advocate-General Bot (8 May 2013) [96]–[97] (arguing that the requirement that Member State measures be non-discriminatory should be dropped in environmental cases so as to ensure the 'pre-eminence' of environmental protection over other considerations, justifying this on the basis of the integration principle). See also *PreussenElektra, Opinion of Advocate-General Jacobs* (n 118) [230]–[231]; Case C-320/03 *Commission v Austria* [2005] ECR I-9871, Opinion of Advocate-General Geelhoed (14 July 2005) [107]. While the Court has not explicitly adopted this suggested shift in doctrine, it has avoided addressing the discrimination question by focusing its reasoning on the issue of proportionality instead, a trend which has continued in more recent art 34 environmental cases: eg Case C-142/05 *Åklagaren v Mickelsson & Roos* [2009] I-04273; Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2014:2037.

[229] Case C-180/96 *United Kingdom v Commission* [1998] ECR I-3906 ('*BSE*').

[230] ibid [96].

[231] It is a 'rule of law relating to [the application of the Treaties]' under art 263: see above text accompanying n 30. The principle is now enshrined in TEU, art 5.

[232] Case C-434/04 *Ahokainen & Leppik v Virallinen Syyttäjä* [2006] ECR I-9171, Opinion of Advocate-General Maduro (13 July 2006) [23]–[31].

EU legal contexts, and has been informed in various ways by environmental principles in EU case law. The proportionality principle requires that:[233]

— measures adopted by EU institutions do not exceed the limits of what is *appropriate and necessary* in order to attain the objectives legitimately pursued by the legislation in question ('necessity' or 'suitability' test);
— when there is a choice between several appropriate measures, recourse must be had to the *least onerous or restrictive*;
— the disadvantages caused must not be *disproportionate* to the aims pursued ('proportionality *stricto sensu*', or in a narrow sense).

These three discrete limbs of the proportionality principle are informed differently by environmental principles in different cases.[234]

BSE and its accompanying case—*NFU*—were public health cases,[235] which involved legality challenges to an emergency Commission decision banning the export of British beef.[236] The 'precautionary principle', as recognised in later cases and the Commission Communication on the precautionary principle,[237] was first defined (although not mentioned by name) in the following way by the ECJ in these cases:[238]

> Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.

This principle was articulated to represent a policy position that the EU legislative institutions could lawfully adopt within this area of EU environmental competence, beyond the environmental title of the Treaty. The ECJ found that this principle derived from ex-Article 130r EC (now Article 191 TFEU),[239] which was equally applicable in this area of agricultural and public health policy, in light of the objective of Community environmental policy to protect human health, and in light of the integration principle.[240] Having acknowledged this expression of the precautionary principle as demarcating the scope of permissible policy discretion

[233] Case C-331/88 *Fedesa* [1990] ECR I-4023 [13].

[234] On environmental principles informing the different elements of proportionality, see Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 291–391; *cf* Joanne Scott, 'The Precautionary Principle before the European Courts' in Richard Macrory, Ian Havercroft and Ray Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing 2004) 54.

[235] In this expanded area of EU environmental competence, extensive treatment of the precautionary principle in review cases has developed.

[236] *BSE* (n 229); Case C-157/96 *Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union* [1998] ECR I-2265 ('*NFU*'). References will be to *BSE* only, since *NFU* is identical in all relevant respects.

[237] eg *Monsanto* (n 7) [111]; Communication (n 62) 24.

[238] *BSE* (n 229) [99].

[239] These equivalent Treaty provisions are similar but not identical in their incorporation of environmental principles: see ch 3(III)(A).

[240] *BSE* (n 229) [100].

in this case, the ECJ used it to inform the first limb of the proportionality test (the suitability test) in reviewing the legality of the contested Commission decision. The ECJ found that, in the context of EC agricultural policy, Community institutions in that domain had considerable discretion; the legality of a measure taken could only be judged inappropriate and unnecessary if 'manifestly inappropriate' in relation to the objective pursued.[241] In this case, where the risks to human health were uncertain, it was not manifestly inappropriate for the institutions to adopt protective measures before the reality of risks became apparent.[242]

Thus, the precautionary principle, as defined by the Court, marked out the permissible area of Community discretion in this policy domain, and informed part of the legal review test applied by the ECJ in reviewing this discretion.[243] This doctrinal treatment of the precautionary principle, informing proportionality review, is a trend that extends throughout the cases in this section. In later cases, environmental principles are also used to inform other parts of the three-part proportionality test.[244] The formulation of the precautionary principle in *BSE* is a classic formulation in EU case law, particularly due to its repetition in later cases.[245] However, it is not the only formulation of the principle used to inform review tests. The definition is further adapted in later cases, giving rise to different versions of the principle associated with evolving tests of administrative law and patterns of doctrinal reasoning in different EU regulatory contexts.[246]

A final early case in which an environmental principle informed a legal review test was *Safety Hi-Tech*, which extended the group of EU environmental principles employed doctrinally in reviewing EU action.[247] In this case, the legality of a Council Regulation banning the use and marketing of certain ozone-depleting substances was indirectly challenged in a preliminary reference action, on the ground that it breached Article 191(2) TFEU (ex-Article 130r(2) EC) for failing to ensure a 'high level of protection',[248] since it did not ban *all* ozone-depleting substances. The relevant review test applied by the ECJ was whether the measure, based on Article 192(1), constituted a 'manifest error of appraisal' by the EU institutions in exercising the policy discretion under Article 191, particularly on

[241] ibid [97].

[242] ibid [99], [103].

[243] In *Artegodan*, the CFI acknowledged that the precautionary principle was 'implicitly applied in the review of proportionality' in *BSE: Artegodan* (n 168) [185].

[244] eg *Pfizer* (n 31) [441]–[444] (duty to take less onerous measures), [456], [471] (proportionality in the strict sense); Case C-304/01 *Spain v Council* [2004] I-07655, Opinion of Advocate-General Kokott (18 November 2003) [68] (proportionality in the strict sense); Case T-158/03 *Industrias Químicas del Vallés v Commission* [2005] ECR II-2425 [133], [137] (identification of objectives legitimately pursued); Case T-370/11 *Poland v Commission* [2013] ECLI:EU:T:2013:113 [90] (proportionality in the strict sense).

[245] *Pfizer* (n 31) [139]; Case C-192/01 *Commission v Denmark* [2003] ECR I-9693 [49]; Case C-269/13 P *Acino v Commission* [2014] EU:C:2014:255 [57].

[246] See below Sections V(B)(iii)–(v); *cf* n 326.

[247] Case C-284/95 *Safety Hi-Tech Srl v S&T Srl* [1998] ECR I-4301.

[248] Ex-art 130r(2) EC.

the basis of the 'principle' of a high level of protection.[249] In concluding that the institutions had made no such error, the ECJ reasoned that a high level of protection does not require the highest level of environmental protection technically possible—it is sufficient if such measures 'contribute to the preservation, protection and improvement of the quality of the environment'.[250] In this way, this environmental principle was marginally defined and relied on to inform the legal review test in this case.

In these early cases, environmental principles are used to mark out an area of permissible institutional policy discretion to which the courts defer, and then to inform the legal tests applied by the Community courts in reviewing exercises of such discretion. A similarity with the interpretive cases can also be seen in these cases: where the principles take on doctrinal roles, the courts define them marginally, substantiating them to the extent required to resolve the legal test at issue.

ii. Pfizer

The subsequent cases in which environmental principles inform legal review tests primarily involve the precautionary principle. This is for various reasons—it is a principle that is particularly controversial in its definition and application, and it is a principle that is implicated in highly contested areas of risk regulation that are characterised by scientific uncertainty. As a result, the case law relating to this principle is the most sophisticated and also the most complicated, co-evolving with developing norms of EU administrative law doctrine.[251] The precautionary principle has also been identified in some cases as a 'general principle of EU law',[252] highlighting the well-established competence of EU institutions to act on the basis of the principle, in areas beyond the environmental title of the treaty, particularly in public health regulation. However, this legal characterisation of the principle requires closer analysis to understand how it defines and delimits the exercise of discretion in this area of EU environmental competence as a matter of law.

The doctrinal role of the precautionary principle in EU case law was initially transformed in two seminal decisions of the CFI reviewing the public health discretion of the (then) Community legislature, *Pfizer* and *Alpharma*.[253] These

[249] The review test was so limited in light of the 'need to strike a balance' between art 191 objectives and principles and the 'complexity of the implementation' of those criteria': *Safety Hi-Tech* (n 247) [37]. In other words, the courts will not overstep their proper constitutional role and meddle in the policy decision-making of the EU institutions unnecessarily.

[250] ibid [45], [49].

[251] Thus Craig devotes an entire chapter to the precautionary principle in his book on EU administrative law: Craig (n 28) ch 21.

[252] *Artegodan* (n 168); *Dow AgroSciences Ltd v Commission* (n 126) [144]; Case T-257/07 *France v Commission* [2011] ECR II-05827 [66]. See below nn 302–304 and accompanying text.

[253] *Pfizer* (n 31); Case T-70/99 *Alpharma v Council* [2002] ECR II-3495.

cases mark a significant shift in the case law,[254] with the precautionary principle being used to generate as well as inform tests for reviewing institutional policy discretion in these cases. This shift was prompted by the Communication, which elaborated the Commission's view on applying the precautionary principle in its decision-making,[255] the ideas and language of which resonate through *Pfizer* and later cases. Influenced by the contents of this policy document, the CFI gives the precautionary principle much more attention and doctrinal importance. In *Pfizer* and *Alpharma*, the precautionary principle is used both to generate a test of 'adequate scientific cogency and objectivity' and to inform the legal tests of manifest error of assessment and proportionality. Some unpacking of the treatment of the precautionary principle in these cases is necessary to understand this dual role.[256]

Pfizer involved a challenge to Regulation 2821/98,[257] which withdrew Community authorisation for an antibiotic, virginiamycin, used as a growth promoter in animals reared for human consumption.[258] The Regulation was explicitly adopted on the basis of the precautionary principle,[259] in light of the risk that use of virginiamycin as an animal growth promoter might promote antibiotic resistance in humans through animal consumption. Pfizer challenged the Regulation on eight different grounds, including manifest errors of assessment, breach of the principle of proportionality, and breach of the precautionary principle. Argued in this fashion, the precautionary principle looks like a stand-alone ground for challenging the review of EU measures. However, the precautionary principle is not a review test in the way that manifest error or proportionality are; rather it sets out a remit of substantive policy exercisable by Community institutions. In the CFI's reasoning, the limits of this remit are policed by the other two review tests as informed by the precautionary principle, including its test of adequate scientific risk assessment and objectivity deriving from the Commission's Communication.

The reasoning of the decision is lengthy and often difficult to follow; in particular, there are layers of reasoning involving the precautionary principle. The Court found that six of the grounds, including the three particularly relevant here (manifest error of assessment, and breach of proportionality and the precautionary principle), all 'in essence' concern alleged misapplication of the precautionary principle, and so were all considered by analysing the application of that principle, understood as a two-step process of risk assessment and risk management.[260] The CFI addressed alleged errors in risk assessment and risk management in turn,

[254] Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007) 229.

[255] See ch 3, text accompanying nn 153–163.

[256] *Pfizer* (n 31) will here be addressed in detail; *Alpharma* (n 253) only where relevantly different.

[257] Council Regulation (EC) 2821/98 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/224/EEC concerning additives in feeding stuffs [1998] OJ L351/4.

[258] *Alpharma* (n 253) involved a similar challenge to EC Council Regulation 2821/98, which also banned the use of antibiotic bacitracin zinc as a fattening agent in animal feed.

[259] Regulation 2821/98 (n 257) recital 29.

[260] *Pfizer* (n 31) [108].

applying the various grounds of review that are legal tests (manifest error of assessment and proportionality) within this structure. With the reasoning so structured around the approach to the precautionary principle laid down in the Commission's Communication, it is complicated to understand precisely what legal tests the CFI applied and, more significantly for this mapping exercise, how it treated the precautionary principle. This is best understood in four steps.

First, the CFI found that, in cases of scientifically uncertain risk to human health, the precautionary principle permits EU institutions to take preventive measures without waiting for the reality or seriousness of those risks to become fully apparent.[261] As in *BSE*, the Court relied on ex-Article 130r EC (now Article 191)[262] to mark out this defined scope of policy discretion in which EU institutions might lawfully act. In particular, the Court relied on this Treaty prescription that Community environmental policy should pursue the objective of protecting human health on the basis of the precautionary principle and the integration principle.[263] The latter principle was important since Regulation 2821/98 was an internal market harmonisation measure, and not based on the environmental title.

Second, and unlike in *BSE*, the CFI examined closely the circumstances in which there exists such a scientifically uncertain risk.[264] At this stage, the CFI generated a new legal test: an adequate scientific risk assessment must be carried out before any preventive measures can be taken in the name of the precautionary principle, to ensure that no arbitrary measures are adopted.[265] While a full scientific risk assessment cannot be carried out, since by definition we are in the territory of imperfect scientific information, the purpose of the risk assessment was 'to assess the degree of probability of a certain product or procedure having adverse effects on human health and the seriousness of any such adverse effects'.[266] This process was scrutinised in *Pfizer*, introducing another dimension of legal inquiry on the basis of the precautionary principle, shaping the test of adequate scientific evidence here developed by the CFI: 'as thorough a scientific risk assessment as possible', founded on the principles of 'excellence, transparency and independence', must be carried out to give the institutions 'sufficiently reliable and cogent information' on which to base their policy decision.[267] This risk assessment requirement was influenced by Community policy, as set out in the Communication and other Commission policy documents.[268] The CFI here generated a legal test, based on EU policy guidance.

[261] ibid [140]–[141], [385]–[386].
[262] At this stage the integration principle was still contained in art 130r EC: see ch 3(III)(A).
[263] *Pfizer* (n 31) [114], [140].
[264] This is in response to Pfizer's argument that the Community institutions did not correctly assess the scientific risk in this case, and adopted the Regulation 'for reasons of political expediency without a proper scientific basis': ibid [127].
[265] ibid [155], [162].
[266] ibid [148].
[267] *Pfizer* (n 31) [162], [172].
[268] ibid [158].

Third, the CFI identified two aspects of this risk assessment exercise: determining the level of risk to human health deemed unacceptable for society, and then conducting a scientific assessment of the risks.[269] With respect to the former, which involves deciding political objectives, EU institutions enjoy a broad discretion, and any decision taken can only be vitiated by judicial review on the grounds of manifest error, misuse of powers or clear excess of discretion.[270] Unhelpfully, the CFI did not elaborate these tests, but the result of the case helps to illuminate them, since no such vitiation was found on the facts. In relation to the second aspect of risk assessment, which the Court spent considerably more time examining on the facts, the same limited tests are applicable in judicially reviewing the scientific risk assessment undertaken by the institutions. In this case, since the Community institutions were required to 'evaluate highly complex scientific and technical facts', their discretion is broad and it was not the place of the CFI to substitute its assessment of the facts.[271] Again, the result of the case demonstrates the breadth of the institutions' discretion in drawing conclusions from the scientific material to which they have access. Even when the CFI came close to suggesting that inadequate (scientific) reasons were given by the Community institutions for taking a certain position with respect to the scientific evidence—concerning their refusal to adopt the conclusions drawn by the Scientific Committee on Animal Nutrition (an advisory EU scientific body) that no immediate risk was posed by virginiamycin to human health—the Court deferred to the institutions, finding that they adequately explained their divergent opinion by relying on the precautionary principle![272] No manifest error was committed, since the institutions have the political responsibility and entitlement to adopt measures in the interests of human health protection, notwithstanding scientific uncertainty. In essence, and after much analysis, the CFI found that sufficient reliable and cogent scientific evidence (including international scientific reports and a Danish study on live rats) existed for the institutions to conclude that a risk to human health was posed, albeit an uncertain one, by the use of virginiamycin in animal feed.[273] In the midst of this reasoning, verging on circularity, the precautionary principle, operating on multiple levels, both generated a review test (of scientific adequacy/cogency of the risk assessment carried out by the Community institutions) and informed the manifest error standard applied to meet that test. At the same time, it was also a

[269] ibid [149].
[270] ibid [166].
[271] ibid [169], [323].
[272] ibid [204]–[205], [208], [382]–[389].
[273] In *Alpharma*, the CFI similarly held that the Community institutions had sufficiently objective and cogent scientific evidence on which to adopt preventive measures, despite their failure to obtain a SCAN opinion or to wait for a relevant forthcoming scientific report. It was in keeping with the precautionary principle, 'in the context of their broad discretion and their responsibility for defining the public health policy', not to await more detailed scientific research: *Alpharma* (n 253) [317]–[318].

principle that informed the policy discretion of the Community institutions and their discretion in applying this principle had to be respected.

Fourth, in the second section of its reasoning engaging the precautionary principle, the CFI was concerned with the risk management decisions made by the Community institutions. It examined whether imposing a total ban on the use of virginiamycin in animal feed, as a response to the identified uncertain risk, was vitiated by manifest error, again in light of the broad discretion of the institutions in adopting such a scientifically complex political decision. At this point the manifest error and proportionality review tests collided in the Court's reasoning, with the CFI applying a four-pronged proportionality test to determine whether any manifest error was committed by the institutions.[274] The precautionary principle was employed by the Court to inform all four aspects of the proportionality inquiry, expanding its role as identified in *BSE* and reinforcing the role of the precautionary principle in informing legal review tests.[275] As in *BSE*, the suitability test was met since the ban was a preventive measure appropriately adopted on the basis of the precautionary principle.[276] In determining that a less onerous measure need not have been adopted, applying the second limb of proportionality, the CFI found that the ban was consonant with the precautionary principle, which can 'require' a public authority to act before any adverse effects have become apparent.[277] Another dimension to the precautionary principle informed whether the ban was 'disproportionate' in a strict sense, under the third limb of proportionality identified earlier. The CFI concluded that 'the protection of public health … must take precedence over economic considerations' to find that the measure was lawful.[278] This policy assertion by the CFI did not necessarily follow from the elaboration of the precautionary principle so far (in this case or in *BSE*): it is an aspect of the principle that is adopted in some later case law and represents a new marginal definition of the precautionary principle.[279]

In summary, from *Pfizer*, the discretionary latitude afforded to EU institutions to act on the basis of the precautionary principle is triggered by 'adequate' scientific assessment, which gives the institutions a broad discretion to take preventive measures. This trigger is a legal test of adequate scientific objectivity and cogency in the identification of (uncertain) risk, which is *generated* by the precautionary

[274] The same three tests of proportionality as identified above (see above, text accompanying n 233) are applied, along with an additional test of whether the disadvantages caused by Regulation 2821/98 are disproportionate to the advantages if no action were taken (on a cost-benefit analysis): *Pfizer* (n 31) [413]. Note that this collision of the tests of manifest error and proportionality does not occur consistently in the case law, eg in *Alpharma*, the CFI undertakes a proportionality inquiry separately from its inquiry into manifest errors of assessment: *Alpharma* (n 253) [320]–[369].

[275] *Pfizer* (n 31) [419], [444], [456], [471].

[276] ibid [417], 419].

[277] ibid [444]; cf Joined Cases C-11/04, C- 12/04, C-194/04 & C-453/03 *ABNA Ltd v Secretary of State for Health* [2005] ECR I-10423.

[278] *Pfizer* (n 31) [456], [471].

[279] *Artegodan* (n 168) [184]; *Solvay* (n 124) [121].

principle. The resultant discretion, also an aspect of the principle, *informs* the judicial review tests of manifest error and proportionality that are applied (here together) to monitor the lawful limits of policy decisions taken by EU institutions. When 'breach of the precautionary principle' was pleaded in argument in *Pfizer*, the legal plea was thus interpreted by the CFI as raising some combination of these tests. The precautionary principle both prompted deference by the Court to the discretion exercised by the Commission, and also operated doctrinally (generating and informing legal tests) to the extent that the Court was charged with reviewing the limits of the principle's application. *Pfizer* represents a landmark turn in the doctrine of the EU courts concerning the precautionary principle and has continued to influence the development of EU legal doctrine concerning the principle. The review cases that follow pick up on the different aspects of the judicial treatment of the principle in *Pfizer* in reviewing EU and Member State action taken on the basis of the principle. While the reasoning in these subsequent cases is often conflated, these doctrinal elements are further developed and refined within an evolving body of EU administrative law doctrine.

*iii. The Precautionary Principle Post-*Pfizer *in the CFI/General Court: The Evolution of EU Administrative Law*

Since *Pfizer*, the CFI has reviewed public health measures adopted by EU institutions on the basis of the precautionary principle on many occasions. This body of case law shows three trends. First, there is further refinement of the definition of the precautionary principle in these cases, developing lengthy paragraphs of reasoning that are like 'boilerplate' definitions of the principle. In the field of public health law at least, it looks as though there is an increasingly common definition of the precautionary principle, although there are still notable variances between cases. Second, the administrative review applied by the Court in determining whether EU institutions have lawfully taken action on the basis of the principle has become increasingly robust. This robustness is seen in the Court developing further tests for reviewing factual assessments made by the EU institutions, and in its increasing willingness to find failures of scientific assessment on the part of the EU institutions. Third, there is some ambiguity about whether the precautionary principle is being applied as a test of review in its own right in these cases. The reasoning in some cases suggests this doctrinal shift has occurred, which is consonant with holding the precautionary principle out as a general principle of EU law. However, other cases make clear that, whilst the precautionary principle is the (sometimes obligatory) basis for the institutional discretion that has been exercised, judicial review of this discretion is limited by more specific tests, which are sensitive to the Court's constitutional role. Overall, the increased scrutiny of EU institutional discretion that comes with the enhanced administrative law review applied in these cases reveals the CFI adopting an increasingly robust constitutional role, through deepening the doctrinal role of the precautionary principle.

This sub-section examines a number of CFI cases to demonstrate these trends. It starts by reviewing another relatively early case in detail—*Artegodan v Commission*[280]—in which the CFI concluded there was a breach of administrative law by the Commission in its application of the precautionary principle. The sub-section then considers more recent cases involving challenges to EU measures adopted on the basis of the precautionary principle in the public health arena, some for being insufficiently precautionary, most for being too precautionary. The reasoning of these cases becomes increasingly confident, building a body of precedent around the precautionary principle that is increasingly predictable.

Artegodan, briefly discussed in Chapter Two,[281] is a decision in which the CFI found that there was inadequate objective scientific evidence to justify, on the basis of the precautionary principle, the challenged exercise of Commission discretion. In this case, various pharmaceutical manufacturers challenged Commission decisions withdrawing marketing authorisation for medicinal products containing particular amphetamines used in the treatment of obesity.[282] The legal grounds adduced to challenge the decisions were, as in *Pfizer*, numerous and overlapping, and notably they did not include 'infringement of the precautionary principle'. The CFI introduced the precautionary principle in its reasoning to inform the permissible scope of the Commission's discretion in making decisions to withdraw marketing authorisations under Article 11 of Directive 65/65 relating to medicinal products.[283] The logic of its approach was different from that in *Pfizer*—in particular, it identified the precautionary principle as having been *implicitly* relied on by the Commission and as a 'corollary' of the 'general principle' that the requirements of the protection of public health are to prevail over economic interests.[284] The CFI found that the provisions of Directive 65/65 must be interpreted in accordance with this precautionary principle, which 'requires' (rather than allows) Community institutions to take measures to prevent specific potential risks to public health, safety and the environment.[285] In this way, the CFI defined the precautionary principle (and the policy discretion based on it) slightly differently in this case.[286]

As in *Pfizer*, however, the precautionary principle was identified as deriving from ex-Article 174(2) EC (now Article 191(2) TFEU), applying generally in the

[280] *Artegodan* (n 168).

[281] See ch 2, text accompanying nn 200–203.

[282] *Artegodan* (n 168). See also Case T-147/00 *Les Laboratoires Servier v Commission* [2003] ECR II-85.

[283] Authorisation could be withdrawn where it is harmful in its normal use, lacking in therapeutic efficacy, or misleading as to its qualitative and quantitative composition: Council Directive (EC) 65/65 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products [1965-6] OJ Spec Ed 20 (as amended) art 11.

[284] *Artegodan* (n 168) [174].

[285] ibid [184]. For a similar approach to the precautionary principle: see *Solvay* (n 123) [121].

[286] Note *Artegodan* (n 168) was decided by a different chamber of the CFI shortly after *Pfizer* (n 31) and *Alpharma* (n 253) were handed down.

public health domain to guide the discretion of the Commission,[287] and on which the Commission implicitly based its decisions in this case.[288] Further, as in *Pfizer*, the precautionary principle generated a (slightly differently formulated) test of adequate scientific evidence: the Commission could only rely on the precautionary principle in exercising its discretion to withdraw authorisation if 'a new potential risk or the lack of efficacy is substantiated by new, objective, scientific [evidence]'.[289] On the facts, the CFI found that there was no such new, objective evidence and the Commission decisions were thereby vitiated. As in *Pfizer*, the CFI set out the manifest error test in framing its inquiry, so that the test of adequate scientific evidence generated by the precautionary principle in turn informed the manifest error test more broadly (although the Court does not put it so neatly).

Unlike in *Pfizer*, however, the CFI did not defer (on the basis of the precautionary principle) to the assessment of complex scientific material made by the Commission, possibly because the Commission in this case relied on the advice of the scientific body that it was bound to consult under Directive 65/65—the Committee for Proprietary Medicinal Products ('CPMP')—rather than forming its own view in light of the available evidence.[290] Instead, the Court strictly applied its test of adequate scientific evidence to the CPMP Opinion, finding that there was an unsatisfactory basis for the Commission's exercise of discretion based on the precautionary principle, since the Opinion disclosed no new scientific evidence but merely a change in clinical practice with respect to the contested medicines. Strictly, the CFI's reasoning based on the precautionary principle was superfluous since the Court had already found that the Commission was not competent to adopt the contested decisions on other grounds.[291] However, *Artegodan* was an important step in the CFI's, and more recently the General Court's, developing case law in reviewing institutional discretion exercised on the basis of the precautionary principle.

A notable feature of the subsequent case law is the increasing clarity around what the precautionary principle means and requires in public health decision-making. *France v Commission* is an exemplary case in which the Court's reasoning includes increasingly standard paragraphs 'defining' the precautionary principle:[292]

> Precautionary principle
>
> *Definition*
>
> The precautionary principle is a general principle of European Union law arising from Article 3(p) EC, Article 6 EC, Article 152(1) EC, Article 153(1) and (2) EC and Article 174(1)

[287] As a 'general principle of Community law': *Artegodan* (n 168) [184].
[288] ibid [174].
[289] ibid [194]. Although such evidence does not need to '[resolve] the scientific uncertainty': [192].
[290] *cf Pfizer* and *Alpharma*, in which the Commission departed from relevant SCAN opinions: above nn 272–273 and accompanying text.
[291] *Artegodan* (n 168) [155].
[292] *France v Commission* (n 252) [66]–[69] (emphasis added and citations omitted). Similar statements are found in *Dow AgroSciences* (n 125) and *Du Pont* (n 125).

> and (2) EC, *requiring* the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic …
>
> [W]here there is scientific uncertainty as to the existence or extent of risks to human health, the precautionary principle *allows* the institutions to take protective measures without having to wait until the reality and seriousness of those risks become fully apparent … or until the adverse health effects materialise …
>
> Within the process leading to the adoption by an institution of appropriate measures to prevent specific potential risks to public health, safety and the environment by reason of the precautionary principle, three successive stages can be identified: firstly, identification of the potentially adverse effects arising from a phenomenon; secondly, assessment of the risks to public health, safety and the environment which are related to that phenomenon; thirdly, when the potential risks identified exceed the threshold of what is acceptable for society, risk management by the adoption of appropriate protective measures.

This is a much more comprehensive statement of the principle, building on its early incarnation in *BSE* and decided cases since, which highlights that the precautionary principle affords EU institutions a discretion, and responsibility, to act in cases of scientific uncertainty and that a particular decision-making process is to be followed. As *Pfizer* showed, the Court has a role in defining and policing that process in determining whether institutions act lawfully on the basis of the precautionary principle. Building on the reasoning in *Pfizer*, the Court has also developed a tighter articulation of the processes of risk assessment and risk management involved in applying the precautionary principle, which it elaborates as follows:[293]

> Risk assessment
>
> *Introduction*
>
> Assessment of the risks to public health, safety and the environment consists, for the institution required to cope with potentially adverse effects arising from a phenomenon, in scientifically assessing those risks and in determining whether they exceed the level of risk deemed acceptable for society. Thus, in order for the European Union institutions to be able to carry out a risk assessment, it is important for them, firstly, to have a scientific assessment of the risks and, secondly, to determine what level of risk is deemed unacceptable for society …
>
> *Scientific risk assessment*
>
> A scientific risk assessment is a scientific process consisting, in so far as possible, in the identification and characterisation of a hazard, the assessment of exposure to that hazard and the characterisation of the risk.

[293] *France v Commission* (n 252) [70]–[83] (emphasis added and citations omitted).

In its communication of 2 February 2000 on the precautionary principle (COM(2000) 1), the Commission defined those four components of a scientific risk assessment as follows (see Annex III):

'Hazard identification means identifying the biological, chemical or physical agents that may have adverse effects …

Hazard characterisation consists of determining, in quantitative and/or qualitative terms, the nature and severity of the adverse effects associated with the causal agents or activity …

Appraisal of exposure consists of quantitatively or qualitatively evaluating the probability of exposure to the agent under study …

Risk characterisation corresponds to the qualitative and/or quantitative estimation, taking account of inherent uncertainties, of the probability, of the frequency and of the severity of the known or potential adverse environmental or health effects liable to occur. It is established on the basis of the three preceding [components] and closely depends on the uncertainties, variations, working hypotheses and conjectures made at each stage of the process.'

As a scientific process, the scientific risk assessment must be entrusted by the institution to scientific experts …

Moreover, … the scientific risk assessment is to be based on the available scientific evidence and undertaken in an **independent, objective and transparent manner**. It is important to point out in that regard that the duty imposed on the institutions to ensure a high level of protection of public health, safety and the environment means that they must ensure that their decisions are taken in the light of the best scientific information available and that they are based on the most recent results of international research …

The scientific risk assessment is not required to provide the institutions with conclusive scientific evidence of the reality of the risk and the seriousness of the potential adverse effects were that risk to become a reality. A situation in which the precautionary principle is applied by definition coincides with a situation in which there is scientific uncertainty …

[A] preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be **adequately backed up by the scientific data available at the time** when the measure was taken … In such a situation, 'risk' thus corresponds to the degree of probability that the acceptance of certain measures or practices will adversely affect the interests safeguarded by the legal order …

Finally, it must be noted that it may prove impossible to carry out a full scientific risk assessment because of the inadequate nature of the available scientific data … It is important, in such a situation, that scientific experts carry out a scientific risk assessment notwithstanding the existing scientific uncertainty, so that the competent public authority has available to it **sufficiently reliable and cogent information** to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts …

Determination of the level of risk

> The responsibility for determining the level of risk which is deemed unacceptable for society lies, provided that the applicable rules are observed, with the institutions responsible for the political choice of determining an appropriate level of protection for society …
>
> In determining the level of risk deemed unacceptable for society, the institutions are bound by their obligation to ensure a high level of protection of public health, safety and the environment. That high level of protection does not necessarily, in order to be compatible with that provision, have to be the highest that is technically possible … Moreover, those institutions may not take a purely hypothetical approach to risk and may not base their decisions on a 'zero risk' …
>
> The level of risk deemed unacceptable for society will depend on the assessment made by the competent public authority of the particular circumstances of each individual case. In that regard, the authority may take account, inter alia, of the severity of the impact on public health, safety and the environment were the risk to occur, including the extent of possible adverse effects, the persistency or reversibility of those effects and the possibility of delayed effects as well as of the more or less concrete perception of the risk based on available scientific knowledge …
>
> Risk management
>
> Risk management corresponds to the body of actions taken by an institution faced with a risk in order to reduce it to a level deemed acceptable for society having regard to its obligation to ensure a high level of protection of public health, safety and the environment. Where that risk exceeds the level of risk deemed acceptable for society, the **institution is bound, by reason of the precautionary principle, to adopt provisional risk management measures** necessary to ensure a high level of protection.
>
> [T]he provisional measures in question must be **proportionate, non-discriminatory, transparent, and consistent with similar measures** already taken.
>
> Finally, it is for the competent authority to review the provisional measures in question within a reasonable period. It has been held that, when new elements change the perception of a risk or show that that risk can be contained by measures less restrictive than the existing measures, it is for the institutions and in particular the Commission, which has the power of legislative initiative, to bring about an amendment to the rules in the light of the new information …

This is a lengthy extract but it demonstrates the level of detail in which the General Court has now articulated and structured the lawful exercise of discretion based on the precautionary principle.[294] This articulation includes the test of adequate scientific evidence as developed in *Pfizer* and *Artegodan*. It also contains a number of other benchmarks and requirements that define this area of policy discretion

[294] Notably there are still variations on how the precautionary principle is defined in some cases, depending on the regulatory context: see eg *Solvay* (n 124).

in EU law by structuring decision-making within it. As Elizabeth Fisher argues, this legal articulation of the principle serves to 'constitute, limit and hold public decision-making to account' in the context of EU risk regulation.[295] The Court is constructing a norm of good administration within EU legal culture through its articulation of the precautionary principle.[296] Thus when there is an argument that the EU institutions have 'breached' or 'infringed' the precautionary principle and produced an unlawful measure or decision, this is referring to a failure to respect one or more of these benchmarks and requirements that define good decision-making in this regulatory context.[297] When the General Court is required to determine whether there has been such a failure, this is a process of administrative review, rather determining the breach of a substantive rule. Furthermore, in undertaking this review, the Court does not simply look for naked breaches of the risk assessment and management processes above; rather, it applies tests of administrative law that limit the scope of its review, in light of its proper constitutional role. These include the tests of manifest error of assessment and proportionality, as applied in *Pfizer* and *Artegodan*, but they also include a now more elaborated group of administrative law tests, as set out by the CFI in *France v Commission*:[298]

> In matters concerning the common agricultural policy, the institutions enjoy a broad discretion regarding definition of the objectives to be pursued and choice of the appropriate means of action … In addition, in the context of their risk assessment, they must carry out complex assessments in order to determine, in the light of the technical and scientific information which is provided to them by experts in the context of the scientific risk assessment, whether the risks to public health, safety and the environment exceed the level of risk deemed acceptable for society.
>
> That broad discretion and those complex assessments imply a limited power of review on the part of the Courts of the European Union. That discretion and those assessments have the effect that review by the Courts as to the substance is limited to verifying whether the exercise by the institutions of their powers is vitiated by a **manifest error of appraisal**, whether there has been a **misuse of powers**, or whether the institutions have **manifestly exceeded the limits of their discretion** …
>
> As regards the assessment by the Courts of the European Union as to whether an act of an institution is vitiated by a **manifest error of assessment**, it must be stated that, in

[295] Fisher (n 254) 23.

[296] ibid 24. See also ibid ch 6 for Fisher's examination of the precautionary principle through the lens of administrative constitutionalism in the EU courts.

[297] This is how one can understand the reasoning in cases where the General Court considers 'breach of the precautionary principle' as a standalone ground of argument: see text accompanying nn 123–125.

[298] *France v Commission* (n 252) [84]–[89] (emphasis added and citations omitted). This approach is supported by the Court of Justice on appeal, although the CJ succinctly articulates a more overarching list of review tests (manifest error of assessment, misuse of powers and whether the legislature has manifestly exceeded the limits of its discretion): Case C-601/11 P *France v Commission* [2013] ECLI:EU:C:2013:465.

> order to establish that that institution committed a manifest error in assessing complex facts such as to justify the annulment of that act, the **evidence adduced by the applicant must be sufficient to make the factual assessments used in the act implausible** … Subject to that review of plausibility, it is not the Court's role to substitute its assessment of complex facts for that made by the institution which adopted the decision …
>
> The abovementioned limits to the review by the Courts of the European Union do not, however, affect their duty to establish **whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it** …
>
> Moreover, it must be recalled that, where an institution has a wide discretion, the review of observance of guarantees conferred by the European Union legal order in administrative procedures is of fundamental importance. The Court of Justice has had occasion to specify that those guarantees include, in particular for the competent institution, the **obligations to examine carefully and impartially all the relevant elements of the individual case and to give an adequate statement of the reasons for its decision** …
>
> Thus, it has already been held that a **scientific risk assessment carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence** is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures)…

All these requirements above highlighted in bold now make up the administrative law tests that need to be met in order for the precautionary principle to be lawfully applied as an act of institutional discretion. These tests are partly generated by the principle itself—such as requiring a scientific assessment that is as thorough as possible—and others are part of the developing corpus of EU administrative law more generally. While these tests have been repeated and applied in a series of cases that are building a body of precedent, there are also some variations in the case law. For example, in *Animal Trading Company v Commission,* the General Court framed its inquiry into the adequacy of the scientific evidence underpinning a risk assessment as a 'duty of diligence'.[299] The General Court has not shied away from applying these tests to find that the EU institutions have in some cases unlawfully applied the precautionary principle in their decision-making relating to public health risks.[300] Equally, in some cases, where no infringement of these review tests has been found, the Court has deferred to the institutions exercising their discretion on the basis of the principle.[301]

[299] Case T-333/10 *Animal Trading Company (ATC) BV v Commission* [2013] ECLI:EU:T:2013:451 [84]–[94].

[300] *eg* Case T-456/11 *ICdA and others v Commission* [2013] ECLI:EU:T:2013:594; ibid.

[301] eg *Solvay* (n 124); *Gowan* (n 125); *Dow AgroSciences* (n 125); *France v Commission* (n 252) (note this was a case where the Commission was found to have lawfully relaxed preventive health measures on the basis of the precautionary principle); *Du Pont* (n 125); Case T-539/10 *Acino v Commission* ECLI:EU:T:2013:110 (upheld on appeal in Case C-269/13 P); Case T-446/10 *Dow AgroSciences v Commission* [2015] ECLI:EU:T:2015:629.

In light of this analysis, what does it mean for the General Court to say that the precautionary principle has become a 'general principle of EU law'? This characterisation reflects the fact that the principle is an established framework for decision-making in the field of public health risk regulation, which transcends discrete regulatory schemes. Thus, in *Gowan*, the General Court states:[302]

> it must be accepted that … the precautionary principle is an integral part of the decision-making process leading to the adoption of any measure for the protection of human health.

It also reflects the fact that this framework is subject to close administrative review by the General Court according to an increasingly predictable set of tests. The characterisation as a 'general principle' is however also misleading in EU law terms,[303] since the precautionary principle does not represent a singular substantive norm that universally guides and can be relied on to challenge the lawfulness of all EU action, akin to a fundamental right, the principle of equal treatment, or the proportionality principle in EU law.[304] Rather, it is a principle that demarcates an area of substantive policy discretion, which crosses over areas of EU policy competence, and which is defined by a set of decision-making processes that are subject to administrative review by the courts. Its doctrinal treatment by the General Court demonstrates a process of reasoning by which the principle's policy prescription is defined by the courts, with this definition serving to generate and inform the various administrative review tests that monitor the exercise of this prescribed policy competence.

*iv. The Precautionary Principle Post-*Pfizer *in the Court of Justice: Less Intensive Review of EU Institutions*

In contrast to the General Court's case law involving the precautionary principle, the Court of Justice has also continued to develop its reasoning involving precautionary principle in reviewing the acts of EU institutions,[305] but with less intensive factual review. This is because different legal questions are asked, and different arguments are made, before both courts, which have differing jurisdictions. In particular, the General Court hears most annulment actions that involve the finding and evaluation of complex facts.[306] The Court of Justice hears appeals from all

[302] *Gowan* (n 125) [74].

[303] See ch 2(III)(B).

[304] See Tridimas (n 15) 5. This explains why, in *Solvay*, the CFI found that the applicant's argument that the contested regulation 'infringes' the precautionary principle was incorrectly put in isolation: *Solvay* (n 124) [120].

[305] And, in at least one case, the polluter pays principle: see *Poland v Commission* (n 244).

[306] TFEU, art 256; Protocol (No 3) On The Statute Of The Court Of Justice Of The European Union [2010] OJ C83/210.

General Court judgments, but this is on points of law only,[307] as well as most preliminary references and certain annulment actions. In terms of the legal treatment of the precautionary principle, this jurisdictional distinction is demonstrated by the Court of Justice conducting a lighter touch of administrative review in reviewing acts of discretion based on the precautionary principle. In particular, the Court does not get involved in lengthy analysis of the quality of factual evidence supporting decisions or acts based on the precautionary principle.

In this vein, there has been a group of Court of Justice cases since *Pfizer*, in which the precautionary principle has been used doctrinally to inform legal tests in reviewing EU measures, but in which the Court has not tested the adequacy of the scientific evidence relied upon by the EU institutions in adopting measures based on the precautionary principle.[308] The Court acknowledges that actions based on the principle must be based on a 'comprehensive risk assessment' of health risks determined by the most recent and reliable scientific data available,[309] but does not question this information or interrogate its credibility in any detail. In these cases involving the review of EU institutional discretion, the Court of Justice has employed the precautionary principle to inform the test of proportionality. Thus the grounds of review pleaded in argument (or framed in the preliminary reference) focus on the issue of proportionality, in relation to the lawfulness of measures in various respects, and most do not directly raise the questions of manifest error of factual assessment or 'infringement' of the precautionary principle.[310] In reviewing acts based on the precautionary principle through the legal lens of proportionality, the Court of Justice also respects a wide margin of discretion in reviewing institutional action. The Court recognises that it is reviewing action taken in areas where the EU institutions have to make 'political, economic and social choices …, and in which it is called upon to undertake complex assessments'.[311] Thus the Court will look for 'manifest' errors in the application of the precautionary principle to inform the relevant limb of proportionality at issue.

[307] '[T]he General Court has exclusive jurisdiction to establish the facts, except where the substantive accuracy of its findings is apparent from the documents submitted to it, and to assess the evidence relied on. The establishment of those facts and the assessment of that evidence do not therefore, save where they are distorted, constitute a point of law which is subject as such to review by the Court of Justice': Case C-358/14 *Poland v Parliament & Council* [2014] ECLI:EU:C:2016:323 [34].

[308] Joined Cases C-154/04 & C-155/04 *Alliance for Natural Health v Secretary of State for Health* [2005] ECR I-6451; Case C-504/04 *Agrarproduktion Staebelow v Landrat des Landkreises Bad Doberan* [2006] ECR I-679; Case C-343/09 *Afton Chemical Ltd v Secretary of State for Transport* [2010] I-07027; Case C-157/14 *Neptune Distribution SNC v Ministre de l'Économie et des Finances* [2015] ECLI:EU:C:2015:823; Case C-477/14 *Pillbox 38 (UK) Ltd v Secretary of State for Health* [2016] ECLI:EU:C:2016:324.

[309] *Afton* (n 308) [60]; cf *Neptune Distribution* and *Pillbox 38* (n 308) in which the Court of Justice does not even mention the need for a thorough risk assessment. In these cases, the identification of a public health risk was sufficient to justify the adoption of precautionary measures.

[310] *cf* ibid [9].

[311] *Pillbox 38* (n 308) [49].

Agrarproduktion Staebelow is a good example of this kind of reasoning.[312] In this case, the ECJ found that Article 13(1)(c) of Regulation 999/01,[313] which required animals at risk of contracting BSE to be slaughtered, was not invalid in light of the proportionality principle. In resolving the proportionality inquiry, the ECJ used the precautionary principle to resolve the first limb 'appropriateness' test, as in *BSE*. The measures adopted by the Community legislature were found to be appropriate to the objective of the protection of human health, in light of the policy discretion afforded to Community institutions to take preventive measures in cases of scientific uncertainty.[314] In the subsequent case of *Afton Chemical*,[315] the ECJ used the precautionary principle to inform the third limb of the proportionality inquiry, finding that there was no lack of proportionality in a narrow sense in a provision of Directive 2009/30,[316] which introduced an upper limit of a particular chemical in fuel. The uncertainty in relation to the environmental and health damage caused by the chemical meant that the limit was not manifestly disproportionate in relation to the economic interests of the producers of the chemical.[317] More recent cases have concerned EU measures that prevent misleading advertising in relation to product claims that were contestable in terms of their scientifically accuracy,[318] and a specific EU regime introduced for electronic cigarettes in light of the potential health risks of 'vaping'.[319] Again, in both these cases, the Court of Justice accepted that a relevant risk to public health existed and justified the adoption of restrictive measures on the basis of the precautionary principle, which in turn justified the proportionality and legality of the relevant measure.

In contrast to General Court case law, the Court of Justice in these cases does not test the current state of knowledge and scientific uncertainty at issue in these cases to determine whether the precautionary principle was justifiably exercised by the Community institutions. Rather, the Court accepts their identification of that uncertainty and the limited scientific assessment so far undertaken in relation to the relevant health risks.[320] By virtue of its jurisdictional remit, the Court of Justice has adopted a different jurisprudence from that of the General Court

[312] *Agrarproduktion* (n 308).

[313] Council & Parliament Regulation (EC) 999/2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies [2001] OJ L147/1.

[314] *Agrarproduktion* (n 308) [38]–[43].

[315] *Afton* (n 308).

[316] Council & Parliament Directive (EC) 2009/30 regarding the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions [2009] L140/88.

[317] *Afton* (n 308) [68].

[318] *Neptune Distribution* (n 308) (notably the EU consumer protection measures at issue were argued to compromise Charter rights of freedom of expression and information in limiting how producers can describe their products, and the proportionality principle was applied in determining infringement of these Charter rights).

[319] *Pillbox 38* (n 308).

[320] *Afton* (n 308) [58]–[59]; *Agrarproduktion* (n 308) [41]–[42].

with respect to the precautionary principle, involving a doctrinal approach that is more deferential to the discretion of EU institutions. The Court of Justice treats the principle as marking out an area of permissible policy discretion and thus informing the review test of proportionality, rather than as a principle that generates tests of administrative review and intrudes more deeply into decision-making by EU institutions. This reflects a self-conscious constitutional position adopted by the Court of Justice in relation to the powers of other EU institutions. As will be seen from the Article 34 cases discussed in the following sub-section, the Court of Justice has not shied away from treating the precautionary principle as a principle that requires close scrutiny of institutional action in all cases.

v. Expanding the Doctrinal Reach of Environmental Principles: Informing the Review of Member State Discretion under Article 34 TFEU

The Court of Justice has engaged in more robust scrutiny of institutional discretion based on the precautionary principle when it comes to Member States acting within the scope of EU law. This is seen in cases where Article 34 TFEU is prima facie infringed by Member States taking precautionary measures on public health grounds, bringing this action within the scope of EU law. In these cases, the Court of Justice scrutinises the purported exercise of environmental competence by Member State institutions to determine whether there has been any breach of the rules that allow Member States to derogate from Article 34. The judicial techniques involved in this scrutiny involve both generating and informing legal tests on the basis of the precautionary principle.[321] These cases are inspired by the CFI's approach in *Pfizer*, with the ECJ (deciding these cases prior to the Lisbon Treaty) using a test of adequate scientific evidence—again inspired by the Commission's Communication on the precautionary principle and its focus on risk assessment, also enshrined in EU secondary legislation[322]—to inform the legal review test of proportionality. As a matter of EU law, these cases involve review of Member State action through the prism of substantive legality review (determining whether Member States have infringed Article 34) but they are nevertheless public law review cases, reviewing the competence of Member States to take unilateral action in the field of environmental and health policy.

In terms of the substantive law at issue, these cases are similar to the review of Member State discretion (relying on the principle of rectification at source) analysed in *Walloon Waste* above.[323] The difference is that these cases do not involve

[321] In Case C-473/98 *Kemikalienspektionen v Toolex Alpha* [2000] ECR I-5681, the ECJ also relied on the 'substitution principle' to inform the second limb of the proportionality test in assessing a Swedish public health measure that infringed art 34 of the TFEU, expanding the range of 'environmental principles' that are used doctrinally in these cases.

[322] Council & Parliament Regulation (EC) 178/2002 laying down the general principles and requirements of food law [2002] OJ L31/1, arts 6 and 7.

[323] See above, text accompanying nn 221–226.

the 'rule of reason' justification for infringing Article 34, but the public health justification in Article 36 TFEU. In these public health cases, the ECJ has focused on interpreting the Article 36 exception strictly, since it allows deviation from a fundamental rule of the internal market.[324] The Court has employed the proportionality principle to qualify reliance by Member States on Article 36, as informed by the precautionary principle, requiring that a current and detailed scientific assessment of the risk alleged by the Member State must demonstrate a real risk to public health and thus the 'necessity' of the contested measure.[325] The precautionary principle, which generates this test of adequate scientific evidence (in a formulation that focuses on adequate risk assessment),[326] is thus treated as informing the first limb of the proportionality inquiry in these cases. Only by satisfying the review tests so generated and informed can Member State discretion, relying on the precautionary principle, be compatible with Article 36. In these cases, the precautionary principle expresses lawful Member State policy discretion within the prescribed policy framework of the Treaty—expanding the area of EU environmental competence defined by environmental principles to include Member State environmental actions within the scope of EU law—and also informs and generates the legal tests applied by the ECJ to monitor the limits of that discretion.

Commission v Denmark is the seminal Article 34 case that involves this doctrinal treatment of the precautionary principle,[327] and its reasoning is followed by later cases.[328] In this Article 258 infringement action brought by the Commission, the Danish government argued that its administrative practice of banning nutrient-enriched foods lawfully marketed or produced in other Member States unless they met a need in the Danish population, which infringed Article 34, was justified on public health grounds. In particular, it argued that this practice was justified since the risks of overexposure to vitamins and minerals were uncertain and so danger to human health could not be excluded.[329] The ECJ had previously dealt with similar cases, in which products lawfully marketed in some Member States were refused marketing authorisation in others ostensibly on public health grounds, in the light of uncertain risks to health. In those cases, the ECJ had consistently held that Member States, while scientific uncertainties persisted, and in the absence of

[324] Case C-24/00 *Commission v France* [2004] ECR I-1277 [87].

[325] *Commission v Denmark* (n 245) [45]–[46].

[326] This ECJ reasoning echoes the definition of the precautionary principle now adopted most commonly by the General Court: see above nn 292–293 and accompanying text. Thus in *Commission v France*, the ECJ held that 'a correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health … and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research': *Commission v France* (n 324) [92].

[327] *Commission v Denmark* (n 245).

[328] Case C-95/01 *Criminal Proceedings Against Greenham and Abel* [2004] ECR I-1333; Case C-41/02 *Commission v Netherlands* [2005] ECR I-11375; Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgische Staat* [2008] ECR I-4475; *Commission v France* (n 324).

[329] *Commission v Denmark* (n 245) [29].

Community harmonisation, had discretion to limit the marketing of such products, so long as they demonstrated that their marketing constituted a serious risk to human health.[330]

In *Commission v Denmark*, the ECJ adopted the same approach, but explicitly on the basis of the precautionary principle. Denmark had raised the precautionary principle in argument, asserting that its measures complied with the principle, as laid down in the Commission Communication.[331] The ECJ responded by finding that the scope of discretion accorded to Member States in these cases reflected the precautionary principle,[332] and went on to consider what constituted a 'proper application of the precautionary principle' for the purposes of testing the limits of Denmark's discretion in this case.[333] Relying on similar reasoning to that in *Pfizer*,[334] the ECJ found that lawfully applying the precautionary principle presupposed a detailed scientific risk assessment based on the most recent international research and the most reliable scientific data available, which showed real likelihood of harm—that is, it generated a test of adequate scientific evidence demonstrating a relevant risk to public health. Once this test was satisfied, Member State institutions enjoyed a wide discretion to adopt restrictive measures in the face of scientific uncertainty.[335]

The ECJ thus engaged in more comprehensive scientific inquiry in *Commission v Denmark*, and in the Article 34 cases that followed.[336] This case law was inspired by the CFI's tests of review based on the precautionary principle, although the ECJ still does not investigate the robustness of scientific evidence to the same degree as the General Court. Even so, in the majority of cases, the ECJ finds that the scientific risk assessments relied on by the Member States to justify their infringing measures are inadequate, demonstrating a greater willingness to hold Member State institutions to account in acting on the basis of the precautionary principle.[337] The inadequacy of risk assessments informs the test of proportionality applied. Thus, in *Commission v Denmark,* the Court found that the contested practice was disproportionate, since it systematically prohibited the marketing of all enriched foods, without distinguishing them according to the particular vitamins and minerals

[330] Case 174/82 *Sandoz* [1983] ECR 2445 [22]; Case 227/82 *Van Bennekom* [1983] ECR 3883 [40]; Case 178/84 *Commission v Germany (Beer Purity law)* [1987] ECR 1227 [46]; Case C-228/91 *Commission v Italy* [1993] ECR I-2701 [27].

[331] Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, Opinion of Advocate-General Mischo (12 December 2002) [16].

[332] *Commission v Denmark* (n 245) [49].

[333] ibid [51].

[334] *Commission v Denmark, Opinion of Advocate-General Mischo* (n 331) [96].

[335] *Commission v Denmark* (n 245) [49] (drawing on the reasoning in *NFU* (n 236)).

[336] *Commission v France* (n 324); *Commission v Netherlands* (n 328); *cf Greenham and Abel* (n 328), in which the ECJ did not analyse the detail of the scientific assessment relied on, leaving the issue to be resolved by the French referring court.

[337] Exceptions are the findings in *Sandoz* (n 330) and concerning one of the contested measures in *Commission v France* (n 324).

added or according to the level of public risk that their addition might pose.[338] The Danish practice was an unlawful application of the precautionary principle, since no adequate risk assessment was carried out, and this failure informed the proportionality inquiry, vitiating the Dutch government's reliance on Article 36. It could not be said that the practice was 'necessary' for the purpose of protecting public health.

These Article 36 cases contribute to a body of EU law in which the judicial treatment of the precautionary principle is increasingly connected, with resonances across different types of action, different legal questions, and across the reasoning of the CFI and ECJ. However, despite the connections, it is not a unified body of doctrine. In particular, there is a schism in the case law of the Court of Justice in that it reviews EU and Member State precautionary measures with different levels of intensity.[339] This can be explained by the fact that Article 34 cases are derogations from one of the fundamental rules of the EU internal market, prompting the Court to be more rigorous in its scrutiny of Member State measures. Through the application of a substantive rule of EU law, this difference in approach again reflects a constitutional position adopted by the EU courts. They show less deference to Member State institutions on points of substantive EU law, in relation to which the Court's rulings are supreme;[340] whereas they are more deferential in reviewing EU precautionary action, reflecting a different and delicate balance of power between the CJEU and other EU institutions. Overall, these constitutional nuances are fundamental features of EU legal culture that are driving the legal role of the precautionary principle in the reasoning of the Court of Justice.

C. Conclusion

This Part has examined how environmental principles are employed by the EU courts doctrinally to inform legal tests of review. Through this body of case law, the scope of EU environmental competence in which EU and Member State institutions might act on the basis of environmental principles, thereby triggering such doctrinal roles, has been expanded in two ways. First, and reflecting legal

[338] *Commission v Denmark* (n 245) [55].

[339] Case C-41/02 *Commission v Netherlands* [2005] ECR I-11375, Opinion of Advocate-General Maduro (14 September 2004) [30]: different consequences flow from 'recourse to the precautionary principle' depending on whether it is invoked by EU institutions or the Member States.

[340] The primacy of EU law (*Costa v ENEL* (n 16)) is not uncontroversial in the EU multilevel constitutional order, particularly in how Member State legal orders receive and accept this doctrine (Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011)). Furthermore, the primacy of EU law has been constitutionally transformative through the Court's role in promoting the penetration of internal market rules across wide areas of regulatory control in Member State legal orders: Maduro, *We the Court* (n 19).

developments in Parts III and IV above, the integration principle expands this area of competence both within the Treaty's environmental title (to include, for example, criminal matters) and beyond it to include agricultural and public health matters, the internal market and the EU's common commercial policy. In the latter sense, the use of the precautionary principle, in particular, in informing and generating legal tests within the area of public health is now a matter of routine for the EU courts. Some case law suggests that it could extend and take a foothold in the reasoning of the courts in areas of policy even further removed from environmental concerns.[341] Second, through the Court of Justice's Article 34 case law, EU environmental competence has expanded to include unilateral Member State action, when implementing national environmental measures within the scope of EU law, so that environmental principles inform legal tests applied to review the legality of such Member State action. Overall, there is an ever-increasing area of EU competence, and thus EU law, in which environmental principles have legal roles in prescribing and delimiting lawful acts of decision-making and exercises of policy discretion.

In sum, environmental principles—particularly the precautionary principle—have generated a complex and detailed body of legal reasoning in this treatment category, which is dependent and focused on the competence of EU and Member State institutions to adopt environmental measures, broadly understood, in EU law. This reasoning also reflects the courts' perception of their proper constitutional role in reviewing institutional action. In early informing legal test cases, such as *Walloon Waste* and *BSE*, the ECJ employed environmental principles to mark out an area of policy discretion in which EU and Member State institutions could properly act (defining environmental principles marginally in doing so), thus to inform the relevant legal review test applied. In later cases, particularly post-*Pfizer*, the EU courts have become more penetrating in their scrutiny of EU and Member State institutional discretion exercised on the basis of environmental principles, although the Court of Justice remains more deferential to EU institutions in carrying out such scrutiny. This reflects a bolder constitutional role for the courts, and a more complex doctrinal role for environmental principles that is co-evolving along with bodies of EU law doctrine.

As a result, the doctrinal roles for environmental principles in this Part are highly contingent on EU legal culture, and particularly on the scope of EU environmental competence, the openness of its existing legal doctrine to influence by environmental principles, and the proper constitutional role of the EU courts in reviewing the discretion of EU and Member State institutions respectively. Environmental principles, in EU law, thus do not neatly meet the high scholarly

[341] Case C-348/12 *Council v Manufacturing Support & Procurement Kala Naft* [2013] ECLI:EU:C:2013:470, Opinion of AG Bot (suggesting an extension of precautionary principle to inform the judicial review of EU asset freezing measures under the Common Foreign and Security policy, since the case involved restrictive measures of a preventive nature).

hopes of resolving legal and environmental problems set out in Chapter Two. It is difficult to say that environmental principles might unify EU environmental law. While they might be said to influence the extent of EU environmental law, due to their doctrinal connection to the scope of EU environmental competence, this connection also demonstrates that EU environmental law overlaps with other areas of EU law, particularly by virtue of the integration principle. Environmental principles also do not look like Dworkinian legal principles in this treatment category, nor are they are embraced by the EU courts as guiding a new body of substantive law akin to the law relating to EU fundamental rights. In terms of solving environmental problems, environmental principles do not provide freestanding legal grounds for challenging, or compelling, environmental action (to be) taken by EU or Member State institutions under EU law. Rather, they inform and generate legal tests for reviewing environmental action first taken by those institutions, and also preserve an area of discretion within which the institutions may lawfully act on the basis of the principles without judicial interference or legal compulsion to act in any particular way.

VI. Principle of Sustainable Development

This Part is a much shorter one, highlighting that the legal treatment of one environmental principle—the principle of sustainable development—by the EU courts is not constrained within the doctrinal patterns identified so far in the chapter. Sustainable development is an even more amorphous legal concept than other EU environmental principles, and has significant transnational dimensions, complicating any exercise to isolate its legal identity in the EU legal context. As explained in Chapter Three, sustainable development has a dual character in EU law, with both internal and external aspects.[342] In particular, its links to the international sustainable development agenda mark it out as a principle or concept of a different order from the other environmental principles in Article 191(2) TFEU. It is both broader and more ambiguous as a concept, and its 'identity' as a principle with some legal character in EU law is quite tenuous in light of the extensive EU policy agenda implementing sustainable development.[343] Sustainable development is a concept that frames a policy domain, or a policy paradigm shift, rather than establishing or informing any bright-line legal rules. Even as a policy idea, sustainable development is a complex concept in light of its heavily contested meaning. A legal inquiry about sustainable development in EU law is however a valid one, in light of the prominent place of sustainable development in

[342] See ch 3, text accompanying nn 169–180.
[343] See ch 3, text accompanying nn 181–190.

the EU Treaties, and its articulation as a 'principle' in Article 37 of the Charter of Fundamental Rights. The limited case law concerning the principle to date shows that the sustainable development principle is different from other EU environmental principles in terms of its legal treatment.[344] This is seen in two respects. First, its breadth and definitional ambiguity undermines any clear or consistent doctrinal influence the concept might have. In particular, while it is similar to the integration principle in being overarching in EU law, embracing other environmental principles and crossing different areas of EU policy competence, its doctrinal role is more uncertain, in light of its extension to policy areas beyond even an expanded notion of EU environmental competence.[345] Second, its links to international norms mean that sustainable development incorporates, or has the potential to incorporate, transnational norms into the reasoning of the Court, although this potential has not been realised to any significant extent.

A. Sustainable Development: Definitional and Doctrinal Uncertainty in EU Law

When relied on in CJEU cases, sustainable development is often mentioned in ambitious terms, particularly in Advocate General opinions, or in argument by parties, representing a forceful position that assumes a certain definition for sustainable development and pursues a particular legal outcome. The definitions of sustainable development adopted are however not consistent, and the legal implications of these suggested definitions are diverse. For example, in *First Corporate Shipping*, Advocate General Leger suggested that sustainable development is a 'fundamental concept of environmental law', deriving from the international sustainable development agenda, which finds specific expression in the Article 11 TFEU integration principle.[346] He drew on the Brundtland Report to find that sustainable development 'means that the conduct of [EU] policies must, at the very least, not endanger the natural systems which give us life, the atmosphere, water, earth and living creatures'.[347] He then defined the concept as requiring development and environmental protection to 'evolve in a coordinated fashion', thus concluding that the Commission's procedure for selecting Sites of Community Interest under the Habitats Directive should involve assessing whether human activities can be reconciled with environmental protection objectives. By contrast, in a case involving the interpretation of the EU waste shipment regime, Advocate General Leger presented

[344] This is not to say that other EU environmental principles have equivalent doctrinal roles to one another. The integration principle and precautionary principle, in particular, have distinctive roles in the reasoning of the EU courts: see Parts IV–V.

[345] As in Case C-91/05 *Commission v Council (Small Weapons)* [2008] ECR I-03651, discussed further below in this Part.

[346] *First Corporate Shipping, Opinion of Advocate-General Leger* (n 155) [56].

[347] ibid.

sustainable development as an approach that prioritises environmental protection. In *EU-Wood-Trading*, sustainable development was an 'objective' of the EU of such importance (including sustainable development of 'Europe, and even of the Earth') that the other EU principles 'framing environmental law' were suggested to take on ever-increasing importance in the future of EU law, and in interpreting the EU waste shipment regime in this case.[348]

Other cases further highlight how the legal role of the sustainable development principle is complicated by its definitional ambiguity. In *Spain v Council*, Advocate-General Leger suggested that the 'objective' of sustainable development inherent in EU environmental policy must be understood in light of the 'rule that natural resources must be used in a rational manner' that defines EU environmental competence in Article 191(1) TFEU.[349] The case concerned the scope of environmental decision-making competence under Article 192(1) and whether the correct decision-making procedure was used to support the Convention on cooperation for the protection and sustainable use of the river Danube, adopted by the EU Council.[350] Sustainable development, or sustainable use, was seen to be a fundamental objective of the Convention and thus relevant in determining its proper legal basis. In understanding this objective, the Advocate General indicated that the notion of sustainable development in this context was constrained by the EU's articulated environmental competence in the TFEU, rather than being informed by international norms of sustainable development. The ECJ, whilst reaching the same legal outcome as the Advocate General (that the Convention was properly adopted by the EU institutions), relied on the principle of sustainable development differently, finding that the sustainable development objective of the Convention was informed by its international character in the context of treaties relating to water resources, but that it was a secondary objective of the Convention and could thus be discounted as defining its essential EU competence. This reasoning was necessary because the international water conventions relating to sustainable development, which are characterised by 'an attempt to reconcile the interests of protecting water and the interests of users', concern water management, which would require a different decision-making procedure under the TFEU.[351] This case again shows that lack of definitional clarity compounds the uncertain legal role of sustainable development.[352]

[348] Case C-277/02 *EU-Wood-Trading v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz* [2004] ECR I-11957, Opinion of Advocate-General Leger (23 September 2004) [9].

[349] Drawn from TFEU, art 191(1) (ex-art 174(1) EC): Case C-36/98 *Spain v Council* [2001] ECR I-779, Opinion of Advocate-General Leger (16 May 2000) [77].

[350] If the convention was primarily concerned with the 'management of water resources', then it would need to be adopted on the basis of unanimous voting in Council: TFEU, art 192(2) (ex-art 130s(2) EC).

[351] Case C-36/98 *Spain v Council* [2001] ECR I-779 [34]–[35].

[352] This is different from cases in the treatment categories considered in Parts IV and V above, in which environmental principles are given varying marginal definitions across cases, but consistent and doctrinal patterns are discernible.

The normative ambiguity of sustainable development in EU law is further reflected in a range of other legal arguments and forms of reasoning concerning the principle. In *Poland v Commission*, the Polish government (unsuccessfully) argued that the Commission's 'benchmarking' decision for the third phase of the EU emissions trading scheme was unlawful for 'breach of the principle of sustainable development'.[353] This was essentially an argument that the decision failed to recognise the state of the Polish economy and how it could reasonably adapt to environmental incentives to reduce reliance on coal-based energy sources. This argument prioritised the economic aspect of sustainable development, which must be ensured along with environmental concerns. By contrast, through its most recent legal incarnation in Article 37 of the Charter, the principle of sustainable development has been presented in a quite different conceptual sense, with Advocate Generals suggesting that it raises the importance of environmental protection to the 'status of a European target',[354] and reflects 'a recent process of constitutional recognition in respect of protection of the environment'.[355] In the *Environmental Crime case*, Advocate-General Ruiz-Jarabo Colomer described sustainable development differently again, as a 'legal interest the protection of which inspires other [EU] policies, a protective activity which may be clarified, furthermore, as an essential objective of the [EU] system'.[356] What these various statements indicate about the legal nature of sustainable development in terms of EU law doctrine is uncertain on the current state of the law, but they all indicate that the overarching and highly contestable nature of sustainable development gives this 'principle' a different complexion in EU law.

This legal distinctiveness can be seen even where the doctrinal treatment mirrors one of the techniques already discussed in this chapter. An example of this is seen in *Commission v Council (Small Weapons)*,[357] in which sustainable development informs a legal basis test. As in other cases where environmental principles inform legal review tests in Part V above, the case involves action first taken by EU institutions on the basis, inter alia, of sustainable development, which then takes on a doctrinal role in determining the legality of that action under EU law. However, this case does not involve the boundaries of EU environmental competence; it concerns the boundaries of what was then Community competence more generally.[358] The contested EU measures in this case were aimed at reducing the accumulation and spread of small arms and light weapons in West African States, and the question for the ECJ was whether these measures should have been based on Article 209 TFEU (ex-Article 179 EC), within the Community's Development

[353] *Poland v Commission* (n 244) [108].

[354] Case C-195/12 *IBV v Région Wallone* [2013] ECLI:EU:C:2013:293, Opinion of Advocate General Bot (8 May 2013) [82].

[355] Case C-120/10 *European Air Transport SA v Collège d'Environnement de la Région de Bruxelles-Capitale* [2011] ECR I-07865, Opinion of Advocate General Cruz Villalón (17 February 2011) [74].

[356] *Environmental Crime, Opinion of Advocate-General Colomer* (n 66) [59].

[357] *Small Weapons* (n 345).

[358] And is, to that extent, out-of-date, as in *Environmental Crime* (n 74) above.

Cooperation Policy ('DCP'), or were properly introduced outside the scope of Community competence under the former Common Foreign and Security Policy pillar.[359] The ECJ found that the aim and content of the contested measures were intimately connected with, inter alia, sustainable development, a central objective of the Community's DCP, and so were properly within the scope of Community competence. Notably, however, the Advocate-General, following a similar line of reasoning, reached the opposite conclusion, attributing a narrower meaning to sustainable development, thereby limiting its doctrinal influence. By adopting a broad definition of sustainable development—so that the aim to reduce small arms and light weapons was found to be concerned with promoting peace and security and the prospect for sustainable development[360]—the ECJ expanded the scope of Community competence. Advocate General Mengozzi, by contrast, adopted a narrower definition of sustainable development, finding that it was relevantly concerned with improving living conditions and/or social and economic conditions, which in this case was a remote objective or indirect consequence of preserving regional security in West African States.[361]

Small Weapons shows how different marginal definitions of environmental principles determine their doctrinal influence, and demonstrates particularly the ambiguous nature of sustainable development. It also shows how sustainable development is distinct from other environmental principles in that it can inherently concern matters beyond environmental protection. This case is not one of the broad scope of EU environmental competence, but of the competence of EU institutions generally, as informed by the principle of sustainable development.

B. The Transnational Influence of Sustainable Development in EU Law: Legal Complexity and Potential

The lack of settled normativity for sustainable development is not only a product of its definitional ambiguity. It is also a result of its link to other realms of law. As Chapter Three outlined, sustainable development has a strong presence in international law, albeit with a normatively unsettled character in that legal sphere as well. The connection to international environmental law does not bring any legal clarity in terms of its role in EU law, but it helps also to explain its uncertain doctrinal status in the case law of the EU courts. The previous section showed a number of ways in which Advocate Generals have referenced sustainable development in an international context. Advocate General Leger, in *First Corporate Shipping*,

[359] Ex-TEU, Title V.
[360] *Small Weapons Case* (n 345) [93].
[361] Case C-91/05 *Commission v Council (Small Weapons)* [2008] ECR I-03651, Opinion of Advocate-General Mengozzi (19 September 2007) [206].

referred to sustainable development as a fundamental concept of environmental law in an international sense. In *Commission v Council (Environmental Crime)*,[362] Advocate General Ruiz-Jarabo Colomer considered the nature of sustainable development in the previous EC Treaty, in light of the overall 'globalisation' of environmental policy concerning sustainable development, in order to '[illustrate] the importance which "ecological consciousness" has acquired in recent decades'. These references suggest that the normative role of sustainable development, in driving both international environmental law and policy, adds weight to the legal importance of the concept in EU law.

Whilst the case law to date does not clarify what this legal importance looks like doctrinally (and arguably clarity might not be attainable for such an amorphous concept as sustainable development),[363] this normative connection to the international legal order is a particular feature of this 'principle' of EU environmental law. This kind of transnational connection sparks suggestions that a global legal order of environmental law is developing,[364] but this Part—and this Chapter—show that any such connections still need to settle within the EU legal order for them to have an identifiable legal impact as a matter of EU law. The normative openness of the EU legal order to transnational influences in relation to sustainable development is however an interesting area of potential legal development. An example of this can be seen in relation to Article 37 of the Charter, which brings the principle of sustainable development into the EU legal order as part of a 'principle' of integrating a high level of environmental protection and improving the quality of the environment into all EU policies.[365] Article 37 has not yet taken on any significant legal roles in the case law of the EU courts[366]—it is often referred to in the same grand, overarching way as references to sustainable development discussed in the previous section,[367] or to support other arguments.[368] However, there has been at least one interesting suggestion that Article 37 could be a vehicle for incorporating legal developments and guarantees from the European Court of Human Rights into EU law. This is because the Charter specifies that the meaning and scope of its 'rights' are to be the same as those provided for in the European Convention

[362] *Environmental Crime, Opinion of Advocate General Ruiz-Jarabo Colomer* (n 66).

[363] *cf* Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008).

[364] See ch 3, text accompanying nn 42–53.

[365] These requirements are to be 'ensured in accordance with the principle of sustainable development': Charter (n 51) art 37.

[366] This is partly because art 52(5) of the Charter limits its justiciability. See further Sanja Bogojević, 'EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Human Rights Law* (Edward Elgar 2016); Eloise Scotford, 'Environmental Rights and Principles in the European Context' in Sanja Bogojević and Rosemary Rayfuse, *Environmental Rights—in Europe and Beyond* (Hart 2017, forthcoming).

[367] See eg nn 355–356 and accompanying text.

[368] Eg Case C-28/09 *Commission v Austria* [2011] ECR I-13525 [121].

of Human Rights. Advocate General Cruz Villalon suggested in *European Air Transport* that this legal connection could allow for ECHR case law to influence how Article 37 is used to interpret EU legislation.[369] This suggestion shows that the normative links between ideas of sustainable development across legal orders can be crystallised doctrinally. Time will tell whether we see more of this kind of transnational norm development spurring doctrinal change within the EU legal order in relation to the concept of sustainable development or other principles of environmental protection.

VII. Conclusion

This chapter has mapped the judicial treatment of EU environmental principles to identify the roles played by environmental principles in EU law. Three main treatment categories were identified: policy cases, interpretive cases, and informing legal test cases. This mapping categorisation is not meant to be definitive, especially since the same case may fall within more than one category, and the categories are themselves not qualitatively equivalent in generating a taxonomy of judicial reasoning. Rather, it demonstrates that the principles perform particular legal functions in EU law, which are shaped and constrained by influences of EU legal culture. In policy cases, environmental principles have no role in influencing the legal outcome of the cases, showing there are limits to the doctrinal roles of environmental principles, and to the role of the EU courts in accepting arguments based on environmental principles. Environmental principles do not act as freestanding legal principles on which the courts might draw to resolve all or any of the legal issues before them. EU (or Member State) institutions must first act on the basis of the principles within the scope of EU environmental competence, and this action may then be called into question legally, either in terms of its interpretation or in reviewing its legality. In both these legal senses, environmental principles are employed by the EU courts doctrinally, constituting the two main treatment categories—interpretive cases and informing legal test cases—in which environmental principles have legal roles.

There are other EU law contextual influences that affect the mapping of this case law. First, environmental principles will only have doctrinal roles where the applicable EU law doctrine is open-textured enough to allow this. Thus arguments based on environmental principles, in defending unilateral Member State actions on environmental grounds, are rejected in Article 114(4) and (5) cases but accepted in Article 34 cases. Second, the constitutional role or limits of the EU courts fundamentally define the case law. In particular, the courts generally

[369] *European Air Transport* (n 355) [78]–[81].

require prior action by EU or Member State institutions before the courts will employ environmental principles doctrinally. This is because environmental principles represent policy positions that are for political institutions to adopt, with the courts having a role to interpret or police the permissible boundaries of this policy discretion once exercised.[370] At the same time, the courts must allow decisions to be made, and so they employ principles both to scrutinise such policy discretion closely for its meaning and legality (giving marginal definitions to environmental principles to do so), and also to defer to policy decisions made within the legally identified ambit of discretion. The European courts are thus involved in a delicate exercise of constitutional balancing in reviewing and defining environmental principles, and this balancing is carefully, and differently, calibrated in relation to EU and Member State institutions acting within the scope of EU environmental competence. Within a framework of multilevel governance, constitutional norms are being articulated and acting as constraints in the CJEU's case law concerning environmental principles. Thus, as the case law has evolved post-*Pfizer*, the courts have strengthened their constitutional authority through their more developed doctrinal use of the precautionary principle. This is seen both in the jurisdiction of the General Court, which now has a highly developed body of administrative law based on the principle for reviewing EU institutional action, and in the Court of Justice in reviewing derogations from internal market rules by Member States acting on precautionary environmental and health grounds.

Third, the size of the EU law map in which environmental principles have legal roles has been extended as the case law has progressed, particularly by virtue of the integration principle expanding the scope of EU environmental competence, and by the inclusion of Member State action within this area of competence. At the same time, doctrine has developed around some environmental principles more than others, in certain regulatory areas, whether it is the extensive body of public health cases involving the precautionary principle, or involving the polluter pays principle in relation to schemes of environmental regulation. Furthermore, the grouping of environmental principles that have doctrinal roles has been extended in some cases, particularly involving the principle of a 'high level of protection' and other principles of environmental policy beyond those included in the EU Treaties.

[370] Note this limit reflects that prescribed for 'principles' of the Charter: art 52(5) provides that '[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'. Academics disagree on whether this provision should have a narrow or broad interpretation (see eg Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *ECL Rev* 375), but the doctrinal mapping in this chapter supports the so-called narrow reading in the context of EU environmental principles. See further Scotford, "Environmental Rights and Principles' (n 366).

Finally, there are some anomalous cases in this doctrinal map, which demonstrate that the chapter's legal analysis is but one way of viewing the case law, and that the case law is in a state of evolution. In particular, case law involving the sustainable development 'principle' is doctrinally ambiguous and opens channels for transnational legal influence in the development of EU doctrine. There are also some outlying cases in which the doctrinal uses of the precautionary principle extend well beyond the scope of EU environmental competence, or in which environmental principles appear to constitute freestanding grounds of review. These anomalies suggest how EU case law might develop, but also indicate the basic point that environmental principles take on a variety of roles in the case law.

This is a conclusion for environmental law scholarship more broadly—it is not possible to state definitively and generally how environmental principles should and do operate legally across legal systems. Not only are the legal roles of environmental principles contingent on EU legal culture in this chapter, but those roles within this legal context are not doctrinally fixed, although trends in reasoning can be observed. This variance in the legal roles of EU environmental principles can also be seen in the range of marginal definitions given to environmental principles in the case law, which arise as an aspect and consequence of their particular doctrinal treatment[371]—a result possible because of the open and imprecise definitional nature of environmental principles generally.

This variance in the legal treatment and definition of environmental principles in EU law undermines one of the key hopes for environmental principles in solving legal problems in environmental law—that they might unify environmental law. While environmental principles have a high profile in EU environmental law, the doctrinal picture presented in this map of the case law suggests something much more legally complex than coherence. Similarly, a Dworkinian notion of legal principles fails to account for the diversity of doctrinal roles for environmental principles in EU law mapped in this chapter. Neither does the chapter's doctrinal map indicate that environmental principles are promoting a new body of EU law centred on an environmental ethical philosophy. This is because there is a complex constitutional and administrative law framework that is co-evolving with the policy norms expressed in legal applications of EU environmental principles. And while the integration principle pushes doctrinal boundaries in EU environmental law so that environmental law requirements are stretched into a range of EU policy areas, it is EU law doctrines, the jurisdictional and constitutional limits of the EU courts, and the central concepts of attributed and shared competence in EU law, which fundamentally shape EU environmental law, and the roles

[371] In the case of the precautionary principle, its 'definition' has developed beyond a discrete substantive definition in a body of case law where it now generates and informs legal review tests, as seen in Part V(B). It is cast as a guide to exercising policy discretion, embodying legally required procedures of decision-making as well as policy ideas.

of environmental principles within this, rather than any unifying environmental philosophy.

In terms of the potential of environmental principles to solve environmental problems in EU law, this is undermined by the constitutional limits on the EU courts to hear freestanding actions based on environmental principles, and in second-guessing institutional discretion by relying on environmental principles. Environmental principles are at base policy ideas, and not legal concepts, which are for EU and Member State institutions to implement within a wide discretion. This is reinforced by the ambiguous case law concerning sustainable development principle, which shows the awkwardness of ascribing grand 'legal' identities to environmental principles, no matter how important they are in policy terms. Environmental principles cannot simply be imbued with legal force to solve environmental problems, no matter how important the policy idea they represent. In short, any legal roles for environmental principles can only be determined by a close contextual analysis of legal developments within, and on the terms of, a particular legal culture, as done in this chapter with respect to EU case law developments.