The Internal Market & the EU Climate Regime

Interactions and Frictions in the Legal Norm Systems

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AMALIE TOFT BENTSEN

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Interactions and frictions in the legal norm systems

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The Internal Market & the EU Climate Regime

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PhD Thesis by

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Copenhagen Business School,

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Frederiksberg, December 2023,

Amalie Toft Bentsen

Abstract

This PhD thesis investigates the interactions between the European Union's internal market and the European Union's climate regime. The purpose of the thesis is to determine if there are any frictions between the two legal norm systems of the internal market and the EU climate regime. The thesis applies the theory of critical legal positivism to investigate the interactions between the two legal norm systems as well as to determine the frictions between them.

Accordingly, the thesis seeks to answer the following research question:

> *How does the legal norm systems of the internal market and of the EU climate regime interact?*

Additionally, three sub-questions are introduced to guide the analysis towards answering the main research question. These three sub-questions are:

I) *What are the key principles of the internal market and the EU climate regime?*

II) *To what extent do the principles of the internal market influence the principles of the EU climate regime?*

III) *To what extent can the EU climate regime through human rights inform the internal market in the future?*

The thesis is divided into four parts: Part I: Purpose, theory & method; Part II: The internal market & the EU climate regime; Part III: The deeper layers of the internal market & the EU climate regime; Part IV: Discussion and conclusion.

Chapter 1 under Part I introduces the thesis' objective, the research question and the overall structure. Chapter 2 introduces and establishes the framework for the theory that is applied in the thesis. Furthermore, the chapter explains the method applied and the analytical approach for the research design. In Chapter 2, the focus is on the theory c*ritical legal positivism* as formulated by Kaarlo Tuori and how the *multi-layered phenomenon* in this theory is used to analyse and answer the thesis' research question. Furthermore, the theory's multi-layered phenomenon is also reflected in the three sub-questions, which are sought to be answered throughout the thesis. In this line, the multi-layered phenomenon consists of a surface level, which is examined in Part II of the thesis, as well as the deeper layers of the law, which are examined in Part III of the thesis.

Part II consist of Chapter 3 and Chapter 4. Both chapters answer the first sub-question for the thesis: *I) What are the key principles of the internal market and the EU climate regime?* Chapter

3 aims to disclose the principles of the internal market. The chapter consists of an introduction to the internal market and examines its legal construction. Next, the analysis examines the principle of free movement of goods as part of the internal market's key principles, and, in addition, it addresses the internal market's aim for sustainable development. Chapter 4 has a corresponding approach to Chapter 3, however, with a focus on the principles of the EU climate regime. In this chapter, the international climate regime and its development are firstly introduced and examined. Next, the EU climate regime is determined, and, subsequently, four of the regime's central principles are assessed. These key principles include the no-harm principle, the prevention principle, the precautionary principle, and the polluter pays principle. Common for the principles in Chapter 3 and Chapter 4 are that they all constitute normative elements in the legal norm system for the two areas of law.

Part III explore the deeper layers of the law in the multi-layered phenomenon underlying the theory of critical legal positivism. Thus, this part consists of Chapter 5, which deals with the first layer below the surface level—*the legal culture level*. Also, Part III contains Chapter 6, which deals with the *deep structure of the law*.

Chapter 5 examines the second sub-question of the thesis: *II) To what extent do the principles of the internal market influence the principles of the EU climate regime?* The analysis is based on the principles that were found for the internal market in Chapter 3 and for the EU climate regime in Chapter 4. The analysis also takes the free movement of goods as its point of departure to illustrate how the internal market to a high degree is decisive in the relationship between the two legal norm systems. The analysis of Chapter 5 shows that, in general, the Court follows the principles and aim of the internal market. Thus, climate considerations are considered in certain cases as an exception to the principle of the internal market. Consequently, the findings of this chapter are that the internal market is rooted in EU law but also that the EU's climate principles currently influence the internal market although the principles still constitute more normative principles.

In Chapter 6, the last sub-question is answered—namely, *III) To what extent can the EU climate regime through human rights inform the internal market in the future?* Thus, human rights, which are part of the deep structure of the law, are used to illustrate how the EU climate regime can inform the internal market's legal norm system in the future. If climate change proves to be a violation of human rights, this will provide the opportunity for the climate regime to influence the internal market in places where human rights must be considered, as these are captured as an

overall value of EU law that must be respected. Thus, climate change considerations as part of human rights can provide information for the interactions and the frictions between the two legal norm systems in the future.

Part IV is the last part of the thesis. In this part, the findings of the analyses are briefly discussed in Chapter 7. In addition, it is discussed how the findings must be perceived as normative results that are reflected as a consequence of the applied theoretical framework of the thesis.

Chapter 8 concludes the thesis. Thus, the main findings of the thesis are that the two legal norm systems of the internal market and of the EU climate regime interact throughout the different layers of the multi-layered phenomenon. The interaction has shown that the principles of the internal market to some extent inform the principles of the EU climate regime, in particular through the common goal of sustainable development. At the same time, it has been shown that there are fragments of the EU climate regime's principles in the internal market, which at present appear unclear in their normative presence. However, it has also been shown that, in the interaction between the two legal norm systems frictions arise between them, which contributes to legal uncertainty. Therefore, a possible future solution to address that legal uncertainty can be the information that human rights can contribute as part of the common episteme for the two legal norm systems.

Resumé

Denne ph.d.-afhandling med titlen, *Det indre marked & EU klimaregimet: Interaktioner og friktioner i de juridiske normsystemer,* undersøger samspillet mellem EU's indre marked og EU's klimaregime. Formålet med afhandlingen er at afgøre, om der er interaktioner og friktioner mellem de to juridiske normsystemer for henholdsvis det indre marked og EU's klimaregime. Afhandlingen anvender *kritisk retspositivisme* (*critical legal positivism*) til at undersøge interaktionerne mellem de to juridiske normsystemer og til at bestemme friktionerne mellem dem.

Afhandlingen søger at besvare følgende forskningsspørgsmål:

> *Hvordan interagerer de juridiske normsystemer på det indre marked og i EU's klimaregime?*

Dette er således afhandlingens overordnede forskningsspørgsmål. For at besvare spørgsmålet introduceres der desuden tre underspørgsmål til at guide analysen i bestræbelsen på at besvare det overordnede forskningsspørgsmål. Disse tre underspørgsmål er:

I) *Hvad er nøgleprincipperne for det indre marked og EU's klimaordning?*

II) *I hvilket omfang påvirker principperne for det indre marked principperne for EU's klimaregime?*

III) *I hvilket omfang kan EU's klimaregime gennem menneskerettigheder informere det indre marked i fremtiden?*

Afhandlingen er opdelt i fire dele: Del I: Formål, teori & metode. Del II: Det indre marked og EU's klimaregime. Del III: De dybere lag af det indre marked og EU's klimaregime. Del IV: Diskussion og konklusion.

Kapitel 1 under Del I introducerer afhandlingens formål, forskningsspørgsmålene og den overordnede struktur. Kapitel 2 introducerer og fastlægger rammerne for den teori, der anvendes i afhandlingen. Desuden redegør kapitlet for den metode og den analytiske tilgang til forskningen. I dette kapitel er der hovedsageligt fokus på teorien om den kritiske retspositivisme, som er formuleret af Kaarlo Tuori, og hvordan flerlagsfænomenet i denne teori bruges til at analysere og besvare afhandlingens forskningsspørgsmål. Desuden afspejles teorien om flerlagsfænomenet også i de tre underspørgsmål, som søges besvaret undervejs i afhandlingen. Hertil består

flerlagsfænomenet af et overfladeniveau, som undersøges i afhandlingens Del II, samt de dybere lag af loven, som undersøges i afhandlingens Del III.

Del II består af kapitel 3 og kapitel 4. Begge kapitler besvarer det første underspørgsmål til afhandlingen, som er: *I) Hvad er nøgleprincipperne for det indre marked og EU's klimaregime?* Kapitel 3 har således til formål at afdække principperne for det indre marked. Kapitlet består af en introduktion til det indre marked og undersøgelse af dets juridiske konstruktion. Dernæst undersøger analysen princippet om varens fribevægelighed som en del af det indre markeds nøgleprincipper, og derudover behandler den det indre markeds mål om bæredygtig udvikling. Kapitel 4 har en tilsvarende tilgang som i Kapitel 3, dog med fokus på principperne for EU's klimaregime. I dette kapitel introduceres og undersøges først det internationale klimaregime og dets udvikling. Dernæst fastlægges EU klimaregimet og efterfølgende vurderes fire af regimets centrale principper. Disse nøgleprincipper omfatter princippet om ingen skade, forebyggelsesprincippet, forsigtighedsprincippet og princippet om at forureneren betaler. Fælles for principperne i Kapitel 3 og Kapitel 4 er, at de alle udgør normative elementer i det juridiske normsystem for de to retsområder.

Del III omhandler de dybere lag af loven i flerlagsfænomenet, der ligger til grund for teorien om kritisk retspositivisme. Denne del består således af Kapitel 5, som omhandler det første lag under overfladeniveauet - *det juridiske kulturniveau* og Kapitel 6, som omhandler *lovens dybe struktur*.

Kapitel 5 undersøger det andet spørgsmål i afhandlingens underspørgsmål: *II) I hvilken grad påvirker principperne for det indre marked principperne for EU's klimaregime?* Analysen tager således udgangspunkt i de principper, der blev fundet for det indre marked i Kapitel 3 og for EU's klimaregime i Kapitel 4. Desuden er der fokus på varernes frie bevægelighed for at illustrere, hvordan det indre marked i høj grad er afgørende i forholdet mellem de to juridiske normstrukturer. Analysen af Kapitel 5 viser at EU Domstolen generelt følger det indre markeds principper og formål om bæredygtig udvikling. Klimahensyn betragtes således i visse tilfælde som en undtagelse fra princippet om det indre marked. Derfor er resultaterne af dette kapitel, at det indre marked er rodfæstet, men at EU's klimaprincipper på nuværende tidspunkt influere det indre marked, på trods af at de stadig udgør mere normative principper.

I afhandlingens Kapitel 6 besvares det sidste underspørgsmål – nemlig: *III) I hvilket omfang kan EU's klimaregime gennem menneskerettigheder informere det indre marked i fremtiden?* Således bruges menneskerettighederne, som er en del af lovens dybe struktur, til at illustrere, hvordan EU's klimaregime kan informere det indre markeds juridiske normstruktur i fremtiden. Hvis

klimaforandringerne viser sig at være en krænkelse af menneskerettighederne, vil det give mulighed for, at klimaregimet kan påvirke det indre marked på de steder, hvor menneskerettighederne skal tages i betragtning, da disse er en overordnet værdi af EU-retten, som skal respekteres. Klimaforandringer som en del af menneskerettighederne kan således give information til interaktionen og friktionerne mellem de to juridiske normstrukturer i fremtiden.

Del IV er sidste del af afhandlingen. I denne del diskuteres kortfattet de fund, der er fundet i afhandlingens analyser i Kapitel 7, og derudover diskuteres det, hvordan resultaterne skal opfattes som normative resultater, der afspejles som en konsekvens af afhandlingens anvendte teori.

Kapitel 8 konkluderer afhandlingen. Hovedkonklusioner for afhandlingen er således, at de to juridiske normsystemer på det indre marked og i EU's klimaregime interagerer gennem de forskellige lag af det flerlagede fænomen. Denne interaktion har yderligere vist, at principperne for det indre marked til en vis grad informere principperne for EU's klimaregime, især gennem det fælles mål om bæredygtig udvikling. Samtidig har det vist sig, at der er brudstykker af EU's klimaregimes principper i det indre marked, som på nuværende tidspunkt fremstår uklare i deres normative tilstedeværelse. Det har dog også vist sig, at der i interaktionen mellem de to juridiske normsystemer opstår friktioner mellem dem, hvilket bidrager til rets usikkerhed. Derfor kan en mulig fremtidig løsning til at imødegå den retlige usikkerhed være den information, som menneskerettigheder kan bidrage med som en del af det fælles episteme for de to juridiske normsystemer.

List of Abbreviations

AR	Assessment Report (Produced by IPCC)[1]
AR6	Sixth Assessment Report[2]
CO_2	Carbon dioxide
Commission	European Commission
CJEU	Court of Justice of the European Union[3]
COP	Conference of the Parties
EC	European Commission
ECHR	The European Convention of Human Rights
ECtHR	The European Court of Human Rights
EEA	European Environment Agency
ETS	Emission Trading System
EU	European Union
EU Climate Regulation (2021/1119)	Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
EUCFR	Charter of Fundamental Rights of the European Union (Charter) [2012] OJ C326/02.
GHG	Greenhouse gas[4]
ICJ	The International Court of Justice
INC	Intergovernmental Negotiation Committee for a Framework Convention on Climate Change
IPCC	International Panel on Climate Change
NDC	Nationally Determined Contribution
OECD	Organization for Economic Co-operation and Development
Para.	Paragraph

[1] See more about the 'Assessment Report' under the 'The Synthesis Report' in the *Conceptions*.
[2] See more about 'Sixth Assessment Report' under the 'The Synthesis Report' in the *Conceptions*.
[3] TEU Article 19: "The Court of Justice of the European Union shall include the Court of Justice [in the thesis referred as 'the Court'], the General Court and specialised courts. […]".
[4] See more about 'GHG' under *Conceptions*.

Paris Agreement	Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.
SYR	The Synthesis Report[5]
TEU	Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13
TFEU	Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1
UN	United Nations
UNEP	The United Nations Environment Programme
UNCED	United Nations Conference on Environment and Development
UNFCCC	United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.
The Court	The Court of Justice of the European Union (does not include the General Court and specialised courts).[6]
The Union	The European Union
Vol.	Volume
WMO	World Meteorological Organization

[5] See more about 'The Synthesis Report' under *Conceptions*.

[6] See also definition on 'CJEU'.

Conceptions

The terms explained in this section are used throughout the thesis. Thus, they constitute the scientific understanding underlying the terms. Furthermore, some of the definitions are also to be found in legal documents.

Climate change: the anthropogenic global warming of the Earth's surface with its derived effects. In this thesis, climate change is considered to be a direct result of human activity, including greenhouse gas (GHG) emissions. The term is defined in Article 1 of the United Nations Framework Convention on Climate Change in the following way:

> […] means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[7]

See also the definition in the Annex 1 of the Sixth Assessment Report (AR6)[8]:

> A change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent anthropogenic changes in the composition of the atmosphere or in land use.[9]

Greenhouse gases (GHG): gases that trap heat in the atmosphere are called greenhouse gases. The gases include carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and fluorinated gases (hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride).[10] The

[7] Article 1 of United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

[8] IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 184 pp.

[9] IPCC, 2023: Annex I: Glossary [Reisinger, A., D. Cammarano, A. Fischlin, J.S. Fuglestvedt, G. Hansen, Y. Jung, C. Ludden, V. Masson-Delmotte, R. Matthews, J.B.K Mintenbeck, D.J. Orendain, A. Pirani, E. Poloczanska, and J. Romero (eds.)]. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 119-130.

[10] IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, p. 4.

legal definition of greenhouse gases is found in Article 1 of the United Nations Framework Convention on Climate Change:

> […] means those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.[11]

See also the definition in the Annex 1 of the Sixth Assessment Report (AR6)[12]:

> Gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's surface, by the atmosphere itself, and by clouds. This property causes the greenhouse effect. Water vapour (H2O), carbon dioxide (CO2), nitrous oxide (N2O), methane (CH4) and ozone (O3) are the primary GHGs in the Earth's atmosphere. Human-made GHGs include sulphur hexafluoride (SF6), hydrofluorocarbons (HFCs), chlorofluorocarbons (CFCs) and perfluorocarbons (PFCs); several of these are also O3-depleting (and are regulated under the Montreal Protocol).[13]

The Synthesis Report (SYR): is the official synthesis report from International Panel on Climate Change (IPCC) on the final assessment report [AR6].

> The SYR synthesizes and integrates materials contained within the three Working Groups Assessment Reports and the Special Reports contributing to the AR6. It addresses a broad range of policy-relevant but policy-neutral questions approved by the Panel.
>
> The SYR is the synthesis of the most comprehensive assessment of climate change undertaken thus far by the IPCC: Climate Change 2021: The Physical Science Basis; Climate Change 2022: Impacts, Adaptation and Vulnerability; and Climate Change 2022: Mitigation of Climate Change. The SYR also draws on the findings of three Special Reports completed as part of the Sixth Assessment – Global Warming of 1.5°C (2018): an IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the

[11] Article 1 of United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

[12] IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 184 pp.

[13] IPCC, 2023: Annex I: Glossary [Reisinger, A., D. Cammarano, A. Fischlin, J.S. Fuglestvedt, G. Hansen, Y. Jung, C. Ludden, V. Masson-Delmotte, R. Matthews, J.B.K Mintenbeck, D.J. Orendain, A. Pirani, E. Poloczanska, and J. Romero (eds.)]. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 119-130.

> global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (SR1.5); Climate Change and Land (2019): an IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems (SRCCL); and The Ocean and Cryosphere in a Changing Climate (2019) (SROCC).[14]

The latest report being the Sixth Assessment Report (AR6).[15] It summarises the state of knowledge of climate change, its widespread impacts and risks, and climate change mitigation and adaptation.

[14] In the Foreword of the IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 184 pp., p. V.

[15] IPCC, 2023: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, 184 pp.

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PART I

PURPOSE, THEORY & METHOD

CHAPTER 1
INTRODUCTION AND PURPOSE

1.1 Outline

This introductory chapter provides a general overview of the entire thesis and its purpose. The first section 1.2 focuses on the relevance of the thesis' research. The following section 1.3 consists of an introduction to the thesis' objective. The next section 1.4 sets up the thesis' research question as well as its delimitations. Lastly, the final section 1.5 gives a full overview of each chapter in the thesis and explains the connections between the structure of the chapters and the objective of the thesis. The theory, method and analytical framework for the thesis is presented in Chapter 2.

1.2 Research Relevance

In recent decades, a greater focus on climate change has emerged globally. Scientific climate research continues to contribute to this focus sketching out the irreversible threat that climate change poses to the world while calling for immediate action. The call for action has also found its place and is exercised in policies and legislation. And thus climate-related attempts at action have affected the legal situation for both the international community, the EU, nationally as well as for individual citizen.

The international climate actions have resulted in a regime for international climate law and, subsequently a regime for the European Union (hereinafter the EU climate regime).[16] Hence, the EU climate regime is largely based on international conventions and agreements, which also consist of a number of basic norms and principles that form the foundation of the regime. At the same time, these are principles that enter into another regime, namely the well-founded European Union's Internal Market (hereinafter internal market).

The internal market has a much more widespread and well-established legal basis than the EU climate regime. The principles under the internal market have been subject to the legal status of the EU, its Member States, and its citizens for over half a century. Nevertheless, with the entry of

[16] See also the definition of *regime* in this thesis in Chapter 2, section 2.4.1.

the EU climate regime, there has been a slight tremor in the foundations of the internal market, which is expressed in the frictions between the principles of the two regimes.[17] It is precisely these frictions that the thesis wishes to assess with a view to determining how they affect the state of the law.

Thus, the focal point of the thesis is dealing with the legal interaction between the two legal norms systems of the EU climate regime and the internal market as further introduced in this chapter. The thesis consists of a critical legal positivistic analysis of the interaction of the legal norm systems between the internal market and the EU climate regime and contributes to the knowledge within the legal measures and the current legal norm situation in EU law.

1.2.1 Introduction to the Threat of Climate Change

Climate change is one of the greatest threats to the development of modern society. The International Panel on Climate Change[18] (IPCC) states in the Sixth Assessment Report[19] (AR6) that it is unequivocally human activity that has led to the emission of greenhouse gases (GHG) since around 1750. At the same time, the Earth is experiencing an increase in global temperature. The period 1850–1900 represents the earliest period of sufficiently conducted complete observations to estimate the global surface temperature[20], and this period is used as an approximation for pre-industrial conditions. The likely range of the total human-caused global surface temperature rise from 1850–1900 compared to 2010–2019 is 0.8°C to 1.3°C with a best estimate of 1.07°C.[21]

[17] See the elaboration under the literature review in section 1.2.3. See also the definition on frictions in this thesis in Chapter 2, section 2.4.4.

[18] The IPCC's initial task is to prepare a comprehensive review and recommendations with respect to the state of knowledge of the science of climate change as well as the social and economic impact of climate change, potential response strategies and elements for inclusion in a possible future international convention on climate. It aims to be an independent scientific body that provides the public and policymakers with the current scientific knowledge about climate change. See more about the IPCC in Chapter 4.

[19] IPCC, 2023: *Climate Change 2023: Synthesis Report.* Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 35-115, doi: 10.59327/IPCC/AR6-9789291691647

[20] IPCC, 2021: *Climate Change 2021: The Physical Science Basis*. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J. B. R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press, pp. 5-8.

[21] IPCC, 2021: *Climate Change 2021: The Physical Science Basis.* Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.

Accordingly, human activity has been observed to have a possible direct connection to the gradual rise in temperature on the Earth as well as the observed changes in the weather.[22] With the reports from the IPCC, it has been made clear that, to save the planet from rising temperatures and its derivative natural disasters, human society must take action. However, the changes that need to be made have, without doubt, certain consequences for the continued development of modern society as we know it today.

The economic and societal development of society over the last 200 years is a result of the use of coal, oil and natural gases as energy sources and raw materials for essential products—this development is the foundation of modern society.[23] However, a new agenda must be set forth for the development of a society where the Earth's resources are limited to what is necessary and, not least, sustainable as well as where rising temperatures and its accompanying natural disasters must be avoided or accommodated for as far as possible. Many legal areas must undergo some kind of change and rethinking in the coming decades and, preferably, as soon as possible to meet this new agenda, and these changes may have a major impact on the development of law in general.[24]

The challenges of climate change can roughly be divided into two categories. The first challenge is to remove the cause of the problem, while the other is to deal with the consequences that may arise as a result of the evitable changes. This is the foundation of the international work that has been going on since the late 1980s as well as being the goal of the International Climate Convention (UNFCCC)[25] from 1992, the Kyoto Protocol[26] from 1997 and the Paris Agreement[27] from 2015.[28] Although the goals of climate policy are straightforward—the reduction of greenhouse gas emissions to limit global warming to below +2 degrees Celsius relative to the average

B. R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press, pp. 5-8.

[22] In AR6, IPCC defines how likely it is to draw the connection between the observed changes to the emission from human activity.

[23] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 34.

[24] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 31.

[25] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

[26] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

[27] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[28] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 31.

temperature before the time of industrialization, the effort to reduce the maximum increase in surface level temperatures of the Earth to 1.5 degrees Celsius[29] as well as to adapt to these changes in society—climate policy and measures of climate regulation are found to be more complex than this.

The goals of climate policy seem somehow clear, but the road to reach them will require massive changes and rethinking in all sectors depending on innovation and structural changes. At the same time, the focus on the green transition will have great significance for many areas of law. [30] This is why the scope of climate policy and law can be captured in more areas than the explicit goals and objectives. At the same time, this emphasizes that climate law will also have economic consequences for states, authorities and private actors.

1.2.2 The Scope of Climate Policy and Law

Overall, there exists an international climate regime, which consists of several policies, conventions, and agreements. Concurrently, at the EU level, a climate regime is established to actualize international objectives within the European context. While the focus of this thesis is on the EU's

[29] Article 2(1) of Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[30] For the meaning of 'green transition' see for example AR6 Annex I Glossary, "*The process of changing from one state or condition to another in a given period of time. Transition can be in individuals, firms, cities, regions and nations, and can be based on incremental or transformative change*". See also the definition on a 'just transition', "*A set of principles, processes and practices that aim to ensure that no people, workers, places, sectors, countries or regions are left behind in the transition from a high-carbon to a low-carbon economy. It stresses the need for targeted and proactive measures from governments, agencies, and authorities to ensure that any negative social, environmental or economic impacts of economywide transitions are minimized, whilst benefits are maximized for those disproportionately affected. Key principles of just transitions include: respect and dignity for vulnerable groups; fairness in energy access and use, social dialogue and democratic consultation with relevant stakeholders; the creation of decent jobs; social protection; and rights at work. Just transitions could include fairness in energy, land use and climate planning and decision-making processes; economic diversification based on low-carbon investments; realistic training/retraining programs that lead to decent work; gender specific policies that promote equitable outcomes; the fostering of international cooperation and coordinated multilateral actions; and the eradication of poverty. Lastly, just transitions may embody the redressing of past harms and perceived injustices.*". IPCC, 2023: Annex I: Glossary [Reisinger, A., D. Cammarano, A. Fischlin, J.S. Fuglestvedt, G. Hansen, Y. Jung, C. Ludden, V. Masson-Delmotte, R. Matthews, J.B.K Mintenbeck, D.J. Orendain, A. Pirani, E. Poloczanska, and J. Romero (eds.)]. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 119-130, pp. 129-130.

climate regime, it is imperative to comprehend this regime in intimate association with the international framework, a connection that is expounded upon throughout the thesis.

The purpose of the United Nations (UN) climate policy is to protect people and the planet, welfare, prosperity, the economy, etc., as it is set within the 2030 Agenda of the United Nations on Sustainable Development,[31] as well as to fulfil the obligations and goals set in the Paris Agreement.[32] The climate change issue has a broad scope, both in its cause and its effects.[33] Of this, the adverse effects of climate change causes harm to human health and welfare.[34] Moreover, it is now certain that the adverse effects of climate change will threaten a range of fundamental rights, as it is recognized by the Paris Agreement's 11th consideration in the preamble.[35] As such, climate policy and law is a crucial element for protecting these rights.[36]

Additionally, climate change does not respect national borders, which is why climate policy is an area that intersects with other jurisdictions.[37] A joint international approach to climate change is necessary for the goals to be achieved. In order to correct market failures and negative externalities, the key solution lies in a broad international collaboration where agreements and obligations are effective. This must be done on the basis of both legal and economic actions. In this regard, legal actions must be understood in the sense that the international agreements obligate the parties to take measures, while economic actions must be understood in the sense that the international agreements must be effective from an economical as well a sustainable perspective. Accordingly, sustainable development must be part of the international agreements while also ensuring that the market and the competition in the market are stabilized during these. At the same time, it also

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[31] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

[32] See the preamble of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[33] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press., p. 295. Within this scope, it is the area of trade law, the law relating to displacement and migration and human rights.

[34] The human impacts are listed in the reports from the IPCC.

[35] Preamble to Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Consideration (11): "*Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity […]*."

[36] See the analysis of Chapter 6.

[37] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, pp. 32-33.

helps to reinforce the message that legal developments should largely take place at an international level, so that we can solve the problem jointly.

The European Union's climate policy aims for a fair and prosperous society with a modern, resource-efficient, and competitive economy, where, by 2050, there are no more greenhouse gas emissions, and economic growth is decoupled from emissions and resource use.[38] The policy response must be ambitious and comprehensive with the aim of maximizing the benefits in terms of health, quality of life, resilience and competitiveness. However, exploiting the available synergies across all policy areas will require intensive coordination.[39] Overall, the EU's climate law (EU Climate Regulation (2021/1119)) represents a comprehensive framework for tackling climate change and achieving a climate-neutral EU by 2050.[40]

The thesis places itself in the contribution to the paradigm integration between the climate regime and the internal market in a legal and norm-focused context. By identifying the principles of the EU climate regime and the internal market as well as the potential frictions between those principles, this thesis contributes to a structural norm understanding of the EU climate regime, which, in recent years, has become one of the core areas of the European Union's policy and law.

1.2.3 Literature Review of the Thesis' Objective

In the legal literature, there has not yet been made an actual contribution to the interaction and norm frictions between EU climate regime and the internal market, which is the focal point of this thesis.[41] However, it must be understood that this objective is placed in the light of a large number

[38] The introduction of COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[39] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[40] Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[41] It should also be mentioned that de Sadeleer (2014) has dealt with the relationship between environmental law and the internal market in de Sadeleer. N., (2014). *EU environmental law and the internal market.* Oxford University Press. de Sadeleer's study focuses on the connection between EU environmental law and the internal market and presents a comprehensive perspective that is also relevant to the analysis in this thesis. Nevertheless, there are significant differences between the content of this thesis and de Sadeleer's work. This thesis distinguishes environmental

of legal contributions that exist in the integration of international climate law, EU climate law and the internal market. This is elaborated in more detail in this literature review, where it is explained why precisely the aim of the thesis is placed in a relevant context as a contribution to the legal literature.

1.2.3.1 Environmental Law and Climate Law

Even though environmental law is closely related to climate law, there are some significant differences between environmental objectives and climate objectives, and where the objectives of environmental law not fully cover all aspects of climate problems. This elaboration is also due to the fact that the legal literature, to some extent, considers these two areas to be closely related,[42] while they are sometimes combined into the same area of law in the policy.[43] Moreover, the literature within environmental law is also more prominent due to the political development of environmental law and its legal history. Therefore, it is firstly considered what the differences are between these two areas of law if any differences are to be found at all, and, secondly, it is considered whether climate law has its own set of *sui generis principles*.[44] Hence, it must be considered how the principles of climate law are closely related to the principles of environmental law but also how the principles of environmental law have some limits and differences.

In Hilson (2013), '*It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law*' the relationship between environmental law and climate change or climate law is put to question whether environmental law has largely become *all about* climate law, or has climate law drunk too deeply from the well of environmental law? In addition,

law from climate law, treating the latter as an independent regime with its independent system of legal norms. More information on this distinction can be found in section 1.2.3.1 and Chapter 4 of the thesis.

[42] See, for example, Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2. ed.) Bruylant, where environmental law and climate law both are treated in the same book.

[43] TFEU Articles 191-193 are placed under the headline 'Environment', although they also cover the Union policies on climate change.

[44] This relationship and consideration are described by Thieffry, P, "*The European environmental and climate cases are torn apart, even at the supranational level between the courts of the two competing legal orders, namely the Court of Justice and the General Court, the jurisdictional bodies of the EU and the European Court of Human Rights, which belongs to the more developed but less comprehensive system of the Council of Europe. These legal orders have very different approaches to environmental and thus climate conditions*". See Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2. ed.) Bruylant, p. 81.

he asks to what extent climate law is exceptional or unique.[45] Throughout the literature, there are different conceptualizations of climate policy. In the paper by Rietig (2013), on '*Sustainable Climate Policy Integration in the European Union*' it was found the capsulizing to be two folded in her literature review to the paper:[46]

> […] Either by replacing the word 'environmental' with 'climate' in the definitions and conceptualizations of environmental policy integration, or by adapting the existing definitions from environmental policy integration taking into account underlying differences between climate change and the environment.[47]

In the thesis, the inquiry into climate integration will remain unresolved. However, the narrative underscores the inherent interconnectedness of these two legal domains, emphasizing the imperative to address them to comprehend the analytical approach employed in the thesis. This is further justified by the fact that the thesis is based on principles, which are to a large extent both part of environmental law and climate law.

de Sadeleer (2020), has in the book on '*Environmental principles: From Political Slogans to Legal Rules*' determined the principles of polluter-pays, prevention, and precautionary within the construction of environmental law at both the international level as well as at EU level and national levels.[48] de Sadeleer's (2020) contribution provides a comprehensive review of the concepts within the principles, including a contribution to current literature on climate law.[49] The study focuses on evaluating the principles regarding a new era of risk contribution, as the science of climate change is not complete, and assessing how law-makers should take this risk of no complete science into consideration and make more open concepts, particularly, for those principles for which no fixed definition can be found. de Sadeleer (2020) examines the principles of environmental law but in close connection with climate regulation. This research thus largely illustrates how the principles take shape from a legal point of view, and how the application of these

[45] Hilson, C. (2013). "It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law." in *Journal of Environment Law*, 23:3, 359-370.
[46] Rietig, K. (2013). "Sustainable Climate Policy Integration in the European Union." In *Environmental Policy and Governance,* Gov., 23: 297-310.
[47] Rietig, K. (2013). "Sustainable Climate Policy Integration in the European Union." In *Environmental Policy and Governance,* Gov., 23: 297-310, p. 299.
[48] de Sadeleer. N. (2020). *Environmental principles: from political slogans to legal rules*. (2. ed.). Oxford University Press.
[49] Additionally, de Sadeleer. N., (2014). *EU environmental law and the internal market.* Oxford University Press, will also contribute to the analysis of the thesis.

principles can, at times, be characterized by the inability to assess the nature of damages that may occur. This point of departure is extremely relevant in the context in which this thesis is based on, as the literature contributes to the concepts of the principles. As such, the legal division between these principles is based on the fact of what they regulate. Under this, environmental law deals with pollution that takes place on the ground and the instated preventive measures as well as the following liable measures, while climate law deals with pollution in the atmosphere. Tvarnø (2022) makes the same distinction in her book, where environmental law applies to harmful conditions on the Earth's surface, while climate law applies to harmful conditions in the atmosphere.[50] This also complies with Article 1(3) in UNFCCC where the 'climate system' is defined as:

> […] means the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions.[51]

Hence, the primary distinction between climate law and environmental law then lies in the objectives, and the approach to regulation. In environmental regulation, ambient targets are often established for specific environmental parameters, such as water quality or local air quality. In contrast, climate regulation typically sets goals in terms of percentage reductions in greenhouse gas emissions relative to a baseline on a specific date.[52] While environmental regulation focuses on achieving specific targets for environmental parameters, climate regulation has an overarching objective of reducing greenhouse gas emissions to combat climate change. Furthermore, climate regulation often deals with global pollutants for which measuring their local concentrations in the receiving environment is nonsensical, whereas environmental regulation typically addresses pollutants with localized impacts on the environment. However, the regulatory instruments employed

[50] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet., p. 24 and p. 55. The boundary between these two domains appears to be less distinct or generic in certain regulatory contexts. In other words, there are regulatory aspects that involve both environmental concerns and climate-related issues, creating an overlapping field where the regulatory frameworks for environment and climate may intertwine or intersect. For instance, regulations targeting emissions from industrial processes not only aim to mitigate climate change but also seek to reduce air pollutants that can have immediate environmental impacts, such as air quality degradation. In this case, the regulatory measures are addressing both climate-related issues and broader environmental considerations, illustrating the overlapping field where the boundary between environment and climate regulation is not strictly delineated.

[51] Article 1(3) of United Nations Framework Convention on Climate Change (UNFCCC), May 1992, No 30822.

[52] Hilson, C. (2013). "It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law." in *Journal of Environment Law*, 23:3, 359-370., pp. 364-365.

in both domains may overlap and encompass both command-and-control instruments and economic instruments such as emissions standards, cap and trade, or taxes.[53]

Although the principles of environmental law have been part of EU law and climate law is closely connected with these principles, this thesis deals with the content of these principles in the EU climate regime and how they should be viewed in the light of the key principles of the internal market. This approach of the effects of climate law rules on the internal market must be understood in the light of the EU's strategy,[54] which is precisely based on a green transition for the climate and with the overarching goal that the EU must be CO_2 neutral by 2050.[55] This EU strategy therefore differs from environmental law, which goals are placed in another context.

1.2.3.2 The Integration of EU Climate Law in EU Law

The EU's climate goals—the Union achieving climate neutrality by 2050, reducing greenhouse gas emissions by at least 55 % below 1990 levels by 2030, increasing the share of renewable energy, improving energy efficiency, and ensuring a just transition to a climate-neutral economy—are believed to have a major influence on how the internal market is to be approached in the future, as outlined in the European Green Deal where the communication proposes the European Union's strategy for achieving climate neutrality by 2050 and the integration of climate law into the internal market.[56] It also follows that there is an increase in the complexity of EU legislation for climate action—a partial result of increased political desire and industry lobbying.[57]

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[53] Hilson, C. (2013). "It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law." in *Journal of Environment Law*, 23:3, 359-370., pp. 364-365.

[54] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[55] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[56] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[57] Woerdman, E., Roggenkamp, M. M., & Holwerda, M. (eds.) (2021). *Essential EU climate law* (2. ed.) Edward Elgar Publishing.

When looking at Member States' integration of the climate objectives, it is found in the report '*Implementing the European Green Deal: Handbook for Local and Regional Governments*'[58], by Gløersen et al. (2022), that it is a component of the Committee of the Regions' Green Deal Going Local initiative to support the implementation of the European Green Deal at both the local and the regional level. However, it does not represent the official views of the European Committee of the Regions. The report focuses on the implementation of the European Green Deal. However, as it is stated in the report, this implementation can be very complex at the level of local and regional authorities. Depending on the extent of their competences, local and regional systems may be perceived as being largely determined by external factors such as institutional setups, market dynamics and power relations. As such, it must be assumed that there may be legal uncertainty in the relationship between EU law and local and regional authorities, as it is put at the top of the complex list that climate policy entails, but it must also be inferred that the norm structure introduced through the principles can have an influence on this.

At the same time, on a general European level, the European Green Deal also describes how:

> […] there is a need to rethink policies for clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits. […] The Green Deal will make consistent use of all policy levers: regulation and standardisation, investment and innovation, national reforms, dialogue with social partners and international cooperation. The European Pillar of Social Rights will guide action in ensuring that no one is left behind.[59]

Hence, the Commission is also aware of the transformation of the policy—and thus the regulation—in order to achieve this strategy. Hence, the integration of climate law in the European Union is a demanding task on many levels—also for the lawmakers. As stressed out in the communication, the transformation also happens in many policy areas in the Union.

Among these areas is the competition and anti-trust area, which is mentioned as an area of EU policy that should support the transformation. The Commission has focused on how the competition rules in the internal market can have an impact on the green transition as a supportive

[58] European Committee of the Regions, Gløersen, E., Mäder Furtado, M., Gorny, H. (2022). *Implementing the European Green Deal: handbook for local and regional governments*, European Committee of the Regions.
[59] COM/2019/640 final Communication from the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal). Para. 2.1.

instrument to reach the objectives of the EUs strategy.[60] In addition, the energy market, the transportation sector, food production (as well as other areas) in the EU are also some of the major focal points for the EU's strategy towards a CO_2-neutral society.[61]

Several research projects are also emerging in the legal area, including research on the principles of climate law. Among these is a research project on the practical application of EU climate law principles for national courts in the EU and for the European Court of Justice.[62] At the same time, scientific legal books are being written regarding the interface between competition law and climate change in the EU.[63] Accordingly, there is a long list of projects that discuss the role of climate justice and its principles in the EU.

1.2.3.3 Interaction of the Legal Norm Systems

Understanding the legal norm system of the EU climate regime within the EU, including its impact on the internal market and vice versa, is essential to comprehend the interplay of norms and principles and the potential frictions and legal uncertainties that may arise. While norm criticism has not received much attention in the internal market versus climate law debate, certain exceptions exist concerning the relationship between climate law and fundamental principles such as human rights.[64] The debate has also touched upon the connection between responsibility and climate change, as well as the challenges posed by soft law and hard law. These critical legal perspectives on the placement of climate law in the EU and its normative structure serve as inspiration for this

[60] See more in European Commission, Directorate-General for Competition, *Competition policy brief. 2021-01, September 2021*, European Commission, 2021, https://data.europa.eu/doi/10.2763/962262

[61] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[62] Project at European Law Institute "Climate Justice – New Challenges for Law and Judges" (2023) https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/climate-justice/

[63] Holmes, S., Middelschulte, D., Snoep, M. (eds.) (2021). C*ompetition Law Climate Change & Environmental Sustainability*. Concurrences.

[64] See for example: Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights*, 40:1, 153-174; Sandvig. J., (2021). "Menneskerettigheter og klima. Klimarettssaker" in Bugge, C. H., (ed.) *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030* (pp. 190-221). Unversitetsforlaget.

thesis. In this context, Holmes (2020) suggests that it is not the law itself but rather our approach to it that requires change.[65]

Precisely for this reason, the legal principles that apply to climate law must also be considered in the light of the basic principles of the internal market in order to be able to understand the norm frictions that possibly may exist between the principles. It is thus exclusively a legal conflict that is sought to be elucidated through this thesis, but which largely stems from issues in society in the form of the EU's green transition.

The thesis critically examines the interaction between the two legal norm systems, considering the methodological norm approach prevalent in the EU as outlined in Chapter 2. However, it is important to emphasize that the thesis is a scientific contribution to the existing literature on norm hierarchies. Building upon the hierarchical framework introduced by Búrca, G. de., & Craig, P. in '*EU law: text, cases, and materials*' [66], and incorporating the theory of *critical legal positivism*[67] by Kaarlo Tuori, as elaborated in section 2.1 'The Theoretical Framework,' the thesis adopts a standpoint grounded in the theoretical and methodological literature to scientifically analyze and address the frictions that serve as the central focus of the research.

1.3 Objective of the Thesis

The overriding aim of this thesis is to contribute to a legal norm understanding of the EU climate regime within the internal market. Hence, the current state of law is analysed to derive the interface between the legal norm system of the EU climate regime and the legal norm system of the internal market. The thesis focuses on the frictions between the principles of the EU climate regime and the principles of the internal market, and it aims to understand the norm difficulties in these frictions between these two legal norm systems. Accordingly, the thesis functions as a critical analysis of the legal norm systems herein.

The principles in the EU climate regime are perceived as legally formulated principles founded in the EU climate regulation and policy, which are developed through international law and EU

[65] Holmes, S. (2020). "Climate change, sustainability, and competition law" in *Journal of Antitrust Enforcement*, 8, 354-405, p. 355.
[66] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press, pp. 136-154.
[67] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate.

law.[68] The principles constitute a non-exhaustive list of applicable norms in the regime. However, they are considered as the core of the EU climate regime.[69] Under the EU climate regime, *the no harm principle*, *the prevention principle*, *the precautionary principle* and *the polluter pays principle* are all subject to analysis. These principles have been developed through EU climate policy concurrent with international climate policy, and they are placed in an EU legal context in the analysis. The principles must be understood as the basic elements of the EU climate regime, as they manifest the way towards the goals of the EU becoming climate neutral by 2050 and of the rising temperatures not exceeding the two degrees Celsius marker in relation to pre-industrial temperatures as formulated in the Paris Agreement.[70] In the thesis, the principles of the EU climate regime are defined and subsequently compared to the principles of the internal market.

Additionally, the same approach as above is applied to the internal market to determine the content of the principles of the internal market. Here, the current principles are observed and described. The principles of the internal market must be understood as the basic elements that form the foundation of the internal market. The internal market is built on the principles of *free movement*, and furthermore, the internal market strives towards the goal of *sustainable development*. These principles are essential for the EU Member States to ensure a common understanding and acknowledgement of the Union and the internal market.

The principles of the internal market and EU climate regime thus help to determine the normative elements of the two legal norm systems, while, at the same time, revealing the relationship between these. The thesis' analysis thus seeks to assess the interaction between the legal norm systems based on an understanding of the principles. In order to examine the interaction of the two legal norm systems, the thesis makes use of the legal theory *critical legal positivism*, as it allows for a qualified assessment of the legal system and its norms, including how the norms constitute

[68] See Chapter 2, section 2.4.1 on defining *regime* in the thesis.
[69] See Chapter 2, section 2.4.3 on defining *principles* in the thesis.
[70] Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Article 1 of the framework regulation states that: "*This Regulation establishes a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law. This Regulation sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030. […].*"

both a regulatory element as well as a more normative element hereto.[71] The theory further enables the comparison and examination of different legal norm systems, shedding light on the normative elements that contribute to governing the existing legal order. This aspect is further explored and expanded upon in Chapter 2.

The thesis serves as a theoretical contribution to legal research by exploring the interaction between the two regimes and highlighting it as a significant and foundational aspect in the development of norms. It acknowledges that the normative approach, which is required to navigate this interaction, will need to be determined through ongoing legal developments and judicial decisions in the future. As the two legal norm systems continue to evolve, the legal landscape surrounding their interaction will require careful consideration. Legal scholars, practitioners, and courts will play a pivotal role in shaping and defining the normative framework that is necessary to govern this evolving relationship effectively. The thesis recognizes the need for ongoing legal developments and judicial decisions to establish a clear normative approach that addresses the complexities and challenges arising from the interaction between the internal market and the EU climate regime.

By positioning itself as a theoretical contribution, the thesis offers insights and perspectives that can inform and guide future legal developments and court decisions. It aims to contribute to the broader discourse on normative approaches within the legal field, acknowledging the dynamic nature of the interaction between the internal market and the EU climate regime and the importance of adapting legal frameworks to address emerging issues.

1.4 Research Question for the Thesis

The objective of this thesis, as presented in the previous section, can be manifested into the formulation of a single research question. This question serves as the guiding ideal for the entire research endeavour, providing a focused and structured framework for investigation. By distilling the overarching objective into a well-defined question, the research gains clarity and purpose, facilitating a systematic exploration of the subject matter. Thus, the overall research question of this thesis is:

[71] See Chapter 2, for a more thorough description of the analytical framework for the thesis. As well as definition of legal norm system.

How does the legal norm systems of the internal market and of the EU climate regime interact?

In the pursuit of addressing the overarching research question, the investigation is intricately structured with the inclusion of three sub-questions. These subsidiary inquiries are designed to make distinct and valuable contributions towards a comprehensively assessment and answer to the overall research question. These sub-questions are:

I) What are the key principles of the internal market and the EU climate regime?
II) To what extent do the principles of the internal market influence the principles of the EU climate regime?
III) To what extent can the EU climate regime through human rights inform the internal market in the future?

These three questions, in addition to their contribution to answering the research question, are also guiding the theoretical framework of the thesis. This means that, in the application of *critical legal positivism*, *the multi-layered phenomenon* is used to guide the theoretical framework. Particularly, this consists of three different levels—namely, *the surface level, the legal culture level,* and *the deep structure of law*, which are further presented in Chapter 2. Each question will thus be answered in these levels based on the listed order.

Thus, the first question (I) must be asked in connection with the *surface level*. For this, it must be uncovered which principles that are governing and thus part of the internal market and the EU climate regime. The principles must thus be seen as an expression of the cores of the two areas in order for them to be guiding the further analysis of the underlying layers of the law in the multi-layered phenomenon, which is further explained in Chapter 2.

The next question (II) is connected to the level of *legal culture*. Here, it must be assessed how the internal market works with the EU climate regime. Furthermore, this question is based on the hypothesis that the principles of the internal market in the interaction with the principles of the EU climate regime will be governing for these.

The last question (III) is connected to the level of the deep structure of the law. It must thus be investigated how the EU climate regime can inform the internal market in the future. In addition, human rights are included, as they are placed as part of the *deep structure of the law.* Thus, the question is based on the hypothesis that a human rights perspective on the EU climate regime

might inform the internal market, and perhaps help to resolve potential frictions between the internal market and the EU climate regime.

The thesis aims to delve into these questions by answering the overall research question, providing a comprehensive analysis of the interaction between the legal norm systems of the internal market and the EU climate regime. By investigating the relationship and the potential frictions between these two legal norm systems, the thesis seeks to contribute to a deeper understanding of how they may influence each other and what implications their interaction may have for the legal certainty.

1.4.1 Delimitations

As outlined in the preceding sections presenting the thesis's purpose and research question, the emphasis is placed on the interaction occurring between the EU climate regime and the internal market. Consequently, the approach employed is grounded in the theoretical framework expounded in Chapter 2, characterized by critical legal positivism. Moreover, Chapter 2 also contains a review of the methodological approach which must function under this theoretical framework. Hence, natural demarcations are established through the positive delineation that is achieved with the thesis' objectives, questions, methodology, and theoretical framework. However, it is necessary to provide justification for additional delineations that are made throughout the thesis in this context.

Chapter 3 deals with the principles of the internal market. The chapter functions as an introduction to the principles, which are applied in the following chapters of the thesis. For reasons of natural grazing, only the relevant parts of the functioning of the internal market are reviewed. As such, under section 3.3.2 on the legal construction of the internal market, several EU legal concepts are included, which are relevant for understanding the presence and justification of the principles in the internal market. These concepts are thus also part of the EU climate regime. However, in order to avoid repetition, they are only dealt with in Chapter 3. In addition, it is not all the relevant concepts in the legal construction of the internal market that are dealt with in the thesis. The concepts are thus selected in accordance with their relevance for the further analyses. Furthermore, it is stated in this chapter that the principles of free movement are at the core of the internal market. However, in the following analyses, the focus is on the principle of free movement of goods. Additionally, it is important to note that the analysis of the free movement of goods serves merely

as an illustrative example within the theoretical framework established in the thesis. Thus, the principles of free movement of services, capital and persons are not dealt with. [72] The rationale for not including these other principles of free movement is that there is a direct connection between climate law and regulation of goods as well as the Member States' climate change measures that are set up in the internal market, which is emphasized throughout the thesis.[73] By focusing exclusively on this context, the analysis aims to provide a more concentrated and in-depth exploration of the complex interplay between climate concerns, regulation of goods and Member States' climate change measures in the internal market. This targeted approach is to increase the clarity and coherence of the overall theoretical argument, allowing for a more comprehensive understanding of the interactions of the legal norm systems of the internal market and the EU climate regime that are central to the scope of the thesis.

Chapter 4 deals with the EU climate regime and its principles. The chapter thus introduces relevant parts of the international climate regime and relevant parts of the EU climate regime. In this context, it must be stated that emphasis has been placed on the development of these two regimes, and this is done in an effort to present different conditions. Among other things, the development that has helped to create the principles is at the core of these regimes. In addition, this part has been delimited from a large number of bilateral agreements that the EU has entered into in international context, and, at the same time, the analysis has also been delimited from the treatment of sector-specific regulation in the EU climate regime (however, with the exception of a few illustrative examples). This demarcation of the scope of the study has been necessary in order to deal with the core of the EU climate regime's legal norm system.[74] Attention is thus also drawn to the methodical delimitation in Chapter 4, as, in the research of the key principles that is at the core of the EU climate regime, a number of soft law elements, such as the European Green Deal, are included.[75] Furthermore, the central point in the analysis of Chapter 4 is the principles of no-harm,

[72] A distinct correlation exists between the climate regime and other freedoms of movement, exemplified by the Taxonomy Regulation 2020/852. This regulation addresses various aspects, including financial products and services, thereby underscoring the interconnected nature of climate considerations with broader regulatory frameworks. Also note that this Regulation is referred to in section 4.5.1.2 on the no-harm principle in the EU climate regime.

[73] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 229. Products and goods have a natural connection to climate change in the form of their production and distribution, as emphasized by de Sadeleer: "[…] *Throughout their life cycle, all products cause environmental degradation in some way. Depending on their consumption, their production method, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution."*

[74] See more in Chapter 4 on the key principles of the EU climate regime.

[75] See more in Chapter 2, section 2.3 on the method of the thesis.

prevention, precaution and polluter pays. It should be mentioned, however, that in both international climate law and EU climate law, there are several other principles that guide the regulation of the climate, and these are not part of the analysis.[76] The principles of prevention, precaution and polluter pays are selected on the basis that they have a direct connection to the treaty provisions in TFEU Article 191, where they are laid down as part of the objectives of EU environmental policy. The no-harm principle is included, as it generally covers the attempt to regulate climate change between jurisdictions in international climate law. Further, it is a broad principle that acts as a framework for the other principles in its entirety.

In Chapter 5, it is analyzed whether the internal market's legal norm system affects the EU climate regime and its principles. This analysis is thus carried out working from the legal culture level in the multi-layered phenomenon, which also gives rise to a natural demarcation from reviewing the actual legal outcome of this interaction. In the analysis, it is rather the trends in the common presence of the legal norm systems of the internal market and the EU climate regime that are focused on with a particular emphasis on the legal culture's view of these. In addition, the thesis refrains from evaluating the effectiveness of the EU's climate policy with regard to the results of the interaction between the internal market and the EU climate regime.[77] Furthermore, the costs associated with the transformation of the internal market are not addressed in the analysis. This deliberate focus on specific aspects allows for a more in-depth investigation of the selected research questions and ensures a more targeted exploration of the main aims of the thesis. At the same time, this limitation is also offset by the theoretical approach of the thesis, which includes immanent criticism.[78] Chapter 5 also has a special focus on sustainable development, as a result of the exclusion of this as part of the internal market goals stated in Chapter 3. Sustainable development thus covers social, economic, and environmental balance. In the thesis, the focus is mostly on the economic and environmental considerations under this concept. There is thus no actual

[76] Examples of other principles are Equity and Fairness, Common but Differentiated Responsibilities, Just Transition, the principle of energy efficiency first. It is difficult to estimate how many additional principles exist, and at the same time it must also be emphasized that they all have different legal approaches and strengths.

[77] See also Chapter 7, section 7.3 on the discussion of the normative findings.

[78] See Chapter 2, section 2.2.1 where immanent critique is defined: "*Immanent critique is the result found in the analysis of a legal problem analyzed through the legal dogmatic method. Here, the sources of law, methods of interpretation and contradictions in the various layers of the law are included (internal critique). In the autonomous criticism, other normative points of view (sociological, political, economic) are included as part of an external criticism."*

analysis of how this concept should be viewed in relation to social considerations in relation to the interaction between the EU climate regime and the internal market.

In Chapter 6, human rights are applied as they are part of the deep structure of the law. In this regard, it should be noted that the chapter does not include an actual analysis of human conditions. It is rather the trends of the legal information that are considered if climate change can be made a violation of human rights under the European Convention on Human Rights. Thus, the analysis also delimits itself from an in-depth review of how climate change must be taken into account under the human rights convention and how already existing legal practice can contribute to this. Accordingly, the focus is on how climate change, in theory, will have significance for the deep structure of the law in the legal norm systems.

1.5 Structure of the Thesis

The thesis is structured in four parts and eight chapters as illustrated in Table 1 below. By dividing the thesis into different parts, it is the aim to reflect the conclusions to the various analyses throughout with the goal of answering the overall research question.

Initially, in Part I the purpose and starting point of the thesis is presented together with its objectives. In Part II, both the EU climate regime and the internal market must be defined in terms of thesis' perspective and limitations and with a focus on the principles that are the basis for the two legal norm systems. In Part III, the derived principles for the regimes are compared to each other in order to clarify the norm interaction between the two legal systems as well as to make a more theoretical assessment of this interaction to determine the influence of the norm frictions. Finally, in Part IV the results are reflected on, and a conclusion is drawn from the analyses.

Table 1. *The Structure of the Thesis.*

Parts		**Chapters**	
I	Purpose, Theory & Method	**1**	Introduction and Purpose
		2	The Theory, the Method, and the Analytical Framework of the Thesis

II	The Internal Market & the EU Climate Regime	**3**	The Principles of the European Union's Internal Market
		4	The Principles of the European Union's Climate Regime
III	The Deeper Layers of the Internal Market & the EU Climate Regime	**5**	The Internal Market's Influence on the EU Climate Regime
		6	The Deep Structure of the EU Climate Regime and the Internal Market
IV	Discussion & Conclusion	**7**	Discussion on the Findings of the Thesis
		8	Conclusion and Final Remarks

PART I - PURPOSE, THEORY & METHOD

This part of the thesis is the introductory part to the analysis of the thesis. Chapter 1 introduces the aim and objectives of the thesis together with the research question. Chapter 2 provides an introduction to the theoretical framework, the method and the analytical framework of the thesis as well as its approach to pursue its objective. The legal theory is presented as the theoretical foundation for the analysis of the thesis. The legal sources and the methodological approach are represented. In conclusion, the overall theoretical approach of the thesis is assembled as an analytical framework of the interaction between the two legal norm system.

The rest of the structure of the thesis (Part II, Part III and Part IV) reflects the theoretical approach to the objective of the thesis as set up in Chapter 2, where the multi-layered phenomenon is the focal point for the analysis of the interaction between the legal norm systems.[79]

PART II - THE INTERNAL MARKET & THE EU CLIMATE REGIME

Part II defines the internal markets principles and the EU climate regimes principles, which are the focal points of their legal order— hence, their legal norm systems. The two chapters can be read independently of each other and in reverse order. What both analyses have in common is that they delimit each other. This means that the principles of the EU climate regime in Chapter 4 are

[79] See also Chapter 2, section 2.2.1.2 on the multi-layered phenomenon and the structure of the thesis.

written out from the starting point that they must be held up against the principles of the internal market and vice versa.

The European Union internal market's principles are defined in Chapter 3. Therefore, the definition of the internal market depends on a more subjective and delimited formulation of the internal market's goals and core principles. Chapter 3 is structured with an initial brief overview of the internal market's historic development. This is followed by the basic ideas and legal elements that make up the internal market. Thus, the first part of the chapter is more descriptive, but it leads to a conclusion of the core principles in which they are found to be relevant for the internal market in the perspective of the interaction that further examined in Part III. These are the principles of free movement.

The purpose of Chapter 4 is to provide an overview of the EU's climate policy, EU climate regulation, EU environmental law and international climate law under the EU climate regime. This chapter takes a more descriptive approach to EU climate law and builds the foundation for the following analysis in the thesis. Further, it maps out the legal framework for the EU climate regime and determines what the principles of no harm, prevention, precautionary and polluter pays entail. The four principles are analysed to create an overview of their interrelationships, their legal purposes, and their legal contents.

PART III – THE DEEPER LAYERS OF THE INTERNAL MARKET & THE EU CLIMATE REGIME

After defining and delaminating the internal market's principles in Chapter 3 and EU climate regime's principles in Chapter 4, Chapter 5 focuses on the interaction between the two legal norm systems by studying the derived principles of the two areas in a theoretical context. As outline in section 1.2, the starting point is the internal market, as this is considered to be a (more or less) well-established system within which the EU climate regime operates. Together with this statement, the hypothesis about the internal market steering the EU climate regime is approached. The chapter is thus a theoretical contribution that deals with the normative elements of law. Thus, the interaction will be determined based on a normative analysis.

Subsequently, Chapter 6 consists of an analysis based on the deep structure of the law in the multi-layered phenomenon. Here, the EU climate regime and the internal market are considered from the more fundamental elements of law, as human rights are introduced in this context. At the same time, it must be determined what the deep structure of the law contains in terms of perspective for the two legal norm systems.

PART IV – DISCUSSION & CONCLUSION

Chapter 7 will briefly discuss the findings of the thesis. This includes of a discussion of the theoretical approach and furthermore a discussion of the normative findings. The conclusion and final remarks of the thesis are presented in Chapter 8.

CHAPTER 2
THE THEORY, THE METHOD, AND THE ANALYTICAL FRAMEWORK OF THE THESIS

2.1 Outline

This chapter describes the legal theory, legal method and analytical framework that are applied in the thesis. Section 2.2 explains the theoretical framework of the thesis using *critical legal positivism* by Kaarlo Tuori. Subsequently, section 2.3 explains the legal method used in the thesis. The final section 2.4 explains the systematic analytical approach used throughout the thesis.

2.2 The Theoretical Framework

The legality of the legal norm systems and the principles are assessed based on international climate law, EU climate law, and EU internal market law.[80] Hence, it is relevant to define the theory of law in this section, and, in section 2.3, the legal method is defined as the basis for valid law. The various theories of law define *valid law* differently, which results in alternative concepts of valid law as well as distinct views on the doctrine of the sources of law.[81] Hence, this section on the theoretical framework describes the theory of law used in this thesis and determines the criteria for legal validity and the legal source applied in this study.

The theoretical framework is based on the theory of *critical legal positivism* by Kaarlo Tuori and is placed together with the methodology of the thesis as a framework for the analytical approach. Initially, it must be justified the development of a theoretical framework for the thesis, and, subsequently, why it uses critical legal positivism as theory of law in particular (see next section 2.2.1). In this regard, there are different reasons for developing a theoretical framework:

I) The structure and scientific results of the thesis is based on the theoretical legal framework. The thesis seeks to describe the legal norm systems of the EU climate regime and the internal market and their interaction in a normative context, which is why the results should be found at a higher

[80] See definition on legal norm system in section 2.4.2, and definition on principles in section 2.4.3.
[81] Neergaard, U., & Nielsen, R. (eds.) (2013). *European legal method: Towards a New European Legal Realism?* Jurist- og Økonomforbundets Forlag., p. 78.

scientific level than in the applied legal science. Hence, the theoretical position gives the opportunity to formulate the results within this framework, but which, at the same time, gives the opportunity to consider the law and the norm frictions from another (normative) level.[82]

II) The results of the interaction between the EU climate regime and the internal market are set in the context of the theoretical framework and make it possible to develop a more structural understanding of the interaction and integration between the principles of the EU climate regime and those of the internal market.

III) The theoretical framework also enables the use of a reflective normative approach. The findings of the interactions between the two legal norm systems are held up against the theory and point in the direction of the development of the EU climate regime and the internal market.

See also Chapter 7, where the use of the theory and the normative findings of the thesis is discussed.

2.2.1 Critical Legal Positivism

The thesis uses legal positivism as its theoretical base. However, theories of legal positivism often regard the legal system as a complete and frictionless system. That does not leave space for a critical position of legal uncertainty. As this thesis's focal point is the interactions between the internal market and climate law, it will lead to uncertainties when there are frictions between them. Thus, the thesis applies the theory of *critical legal positivism*. Critical legal positivism is Kaarlo Tuori's[83] (2002) further development of Hans Kelsen's[84] and H. L. A. Hart's[85] *legal positivism*.[86] Tuori (2002) describes the theory as an alternative to legal positivism. The theory answers the fundamental questions that traditional legal positivism fails to answer—namely, law which gain importance under the conditions of modern law, culture and society, which are the questions of the limits and the criteria of the legitimacy of the law.[87] The theory is thus regarded as a broader understanding of the legal practitioners' use and recognition of the law, as the legal

[82] Tvarnø, C. D. & Nielsen, R. (2021). *Retskilder og retsteorier.* Djøf/Jurist-og Økonomforbundet, p. 359.
[83] Professor Emeritus Kaarlo Heikki Tuori (1948-). Tuori created the formulation of *Critical Legal Positivism*.
[84] Hans Kelsen (1881-1973) was an Austrian jurist and a legal philosopher.
[85] Herbert Lionel Adolphus Hart (1907-1992) was a British legal philosopher.
[86] Tvarnø, C. D. & Nielsen, R. (2021). *Retskilder og retsteorier.* Djøf/Jurist-og Økonomforbundet, p. 443.
[87] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 8.

practitioners, through their specialized legal practice and legal science, explicitly confront the question of legitimacy and the validity of the law.[88]

Hence, critical legal positivism is positivistic in the sense that it acknowledges the fundamental positivity of modern law,[89] which comes the fact that modern law, as a historical type of law, is based on conscious human actions and that explicit decisions play an integral role in legal change.[90] The theory is critical in the sense that it shows the possibility of an intersubjective and non-arbitrary critique of law—a critique that draws its yardsticks from positive law itself.[91]

Therefore, critical legal positivism is the development of legal positivism. As aforementioned, one of the prominent figures within modern legal positivism was Hans Kelsen. In 1934, he developed the theory of a *pure theory of law* in his work of the same name. Similar to legal positivism, critical legal positivism distinguishes between how the law *ought to be* and how the law actually *is*. Kelsen's theory thus aims to answer the questions of what law is and how law is made and not the questions of what the law ought to be or how the law ought to be made.[92] Therefore, legal positivism is concerned with how law *is*. The pure theory of law is a legal science and not a legal policy. The theory is *pure* in the sense that it aims to eliminate everything that does not belong to the object of cognition, so that the object of cognition only is focused on law.[93] In other words, the pure theory aims to free the legal science of all foreign elements. Hence, legal positivism is a legal theory, which separates law and morality. For Kelsen, the task of legal science is to describe valid legal norms and analyse their (logical) relationships. Furthermore, legal science can formulate possible, alternative interpretations of legal norms (norm formulations). However, what does not lie within its competence is making normative choices, taking a position between these alternatives.[94] With this, critical legal positivism differs from legal positivism. Critical legal positivism aims to build on legal positivism but differs in its normative justification of the law that goes beyond the limited validity requirements of the pure theory of law. The theory of critical legal positivism differs in that law may contain legal uncertainty, which can be criticized on the basis

[88] Tvarnø, C. D. & Nielsen, R. (2021). *Retskilder og retsteorier.* Djøf/Jurist-og Økonomforbundet, p. 444.
[89] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 7.
[90] Tuori, K. (2002). *Critical Legal Positivism.* Ashgate, p. 304.
[91] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 305.
[92] Kelsen, H. (1992). *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. Clarendon, 1992, p. 7.
[93] Kelsen, H. (1992). *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. Clarendon, p. 7-8.
[94] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 286-287.

of the various layers. In the thesis, legal uncertainty can be seen in the frictions (as a result of the interaction between the legal norm systems) between the principles of the internal market and the principles of the EU climate regime.[95]

Tuori (2002) has developed a view of modern law based on two distinctions: a distinction between law as *a legal order*[96] (set of norms) and law as *legal practices* (set of social practices). This is also what Tuori (2002) calls *The Two Faces of The Law*, and it is defined that these two aspects are in constant interaction. Hence, legal practice does not exist without legal norms.[97]

2.2.1.1 The Multi-Layered Phenomenon

Furthermore, Tuori (2002) makes a distinction within the legal order between what he calls *surface level* and its sub-surface levels. This distinction is made to avoid a uni-level conception that traditional legal positivism may lead to. Hence, the modern law does not only consist of regulations that can be read in the collections of statues or court decisions (the surface level). It does also consist of deeper layers, which Tuori has called *legal culture* and *the deep structure of the law*.[98] These sub-surface levels create reconditions for and impose limitations on the material at the surface level.[99] So when acknowledging that law is a legal order, it is not only its visible, discursively formulated surface that is acknowledged, but it is a multi-layered nature of modern law, and that is the key to the solution that this type of law can offer to the problem of its limits and criteria of legitimacy.[100]

At the **surface level of the law**[101], the law is constantly changing due to new policies, regulations, court decisions and scholars' articles and books. This level represents the ongoing change and evolving debate to which the legislator, the judges and the legal scholars all make their

[95] See more about frictions in section 2.4.4.
[96] Tuori describes it as an aspect whit which typical lawyers in their spontaneous positivism equate law, see Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 121.
[97] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 121. See more about *The Two Faces of The Law* in Chapter 2, section 2.2.1.
[98] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 147.
[99] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 147.
[100] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 147.
[101] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 154-161.

contributions.[102] The legal order appears as linguistically formulated norms or norm fragments.[103] It is statements of legal sciences' linguistically objectified contents that are at issue.

Legal culture[104] is described as sedimented practical knowledge in the minds of lawyers and is used as a backdrop in their everyday legal practices.[105] However, Tuori distinguishes between its conceptual, normative and methodical elements.

Deep structure of the law[106] is described by Tuori as consisting of common concepts underlying the legal culture.[107] This level is also the most stable and least chancing level due to the *sedimentation process* and *recursive relationship* of the layers. Furthermore, the deep structure of law vindicates the view of modern law as *a historical type of law.* This means that, when there is a shift at this level, we will see a more fundamental shift in the law.

The layers of the law will thus be in constant interaction over time. There will be *a sedimentation* from the surface layer down through legal culture down to the deep structure of the law.[108] In concrete terms, this means that legal material at the surface level, over time, will contribute to the formation of principles and ideas in legal culture and the deep structure of law.[109] The deeper layers of the law represent common features in legal material at the surface level, which are gradually precipitating into supporting structures at the deeper law levels. Thus, common tendencies in judicial interpretations and general court interpretations will gradually move through the layers and over time become a more general and firm principles of law.[110]

At the same time, as the sedimentation occurs from the surface level through the legal cultural level and down to the deep structure of the law, there will also be an ascent the other way around. Thus, all activities in the field of law and legal science at the surface level will be based on legal

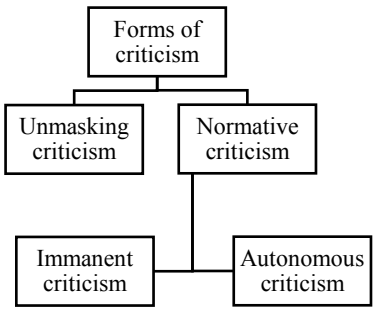
[102] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 155.
[103] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 154.
[104] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 166.
[105] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 166-167.
[106] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 183-186.
[107] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 183-186.
[108] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 200-201.
[109] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 200-201.
[110] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 200-201. The sedimentation process is not as advanced in new legal systems as in old national legal systems. EU law has so far had a major impact on national law, both in terms of the content of individual rules and in terms of more general legal source issues. On the other hand, international law has so far only had a modest impact on national law—not least in a country like Denmark, which has a dualistic tradition. See more in Tvarnø, C. D. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist-og Økonomforbundet, p. 65.

notions found in the legal culture, but, at the same time, these activities will also reproduce and modify those legal notions. This is the *recursive relationship*, where the legal practice at the surface level depends on the legal culture and the deep structure of the law as a prerequisite.[111]

Tuori (2002) provides an example where the position in modern law for fundamental normative ideas, such as *human rights*, should also be approached through the relation of sedimentation.[112] He notices that, even though it is possible to justify human rights with moral arguments, it might not be enough to make them a part of the deep structure of the law. The principles of early modern age could be considered part of the universal norm (independent of time and place) and where their justification lay in the immutable human nature.[113] However, through a long process of sedimentation, Tuori (2002) concludes that human rights are in fact a part of the deep structure of modern law.[114]

Through critical legal positivism, applicable law (on surface level) can be criticized in the light of other parts of the positivist legal system (on deeper levels). Tuori illustrates this criticism in the following figure:

Figure 1. *Forms of Criticism in the Multi-Layered Phenomenon.*[115]



Immanent critique is the result found in the analysis of a legal problem analyzed through the legal dogmatic method. Here, the sources of law, methods of interpretation and contradictions in the

[111] Tuori, K. (2002). *Critical Legal Positivism,* Routledge, pp. 210-211.
[112] Tuori, K. (2002). *Critical Legal Positivism*, Routledge, pp. 201-202.
[113] Tuori, K. (2002). *Critical Legal Positivism*, Routledge, pp. 201-202.
[114] Tuori, K. (2002). *Critical Legal Positivism*, Routledge, p. 202.
[115] Tuori, K. (2002). *Critical Legal Positivism*, Routledge, p. 304.

various layers of the law are included (internal critique). In the autonomous criticism, other normative points of view (sociological, political, economic) are included as part of an external criticism. Although Tuori (2002) makes this rough division, he points out that all criticism is immanent in one form or another, as it is the result of a current cultural resource.[116] The thesis thus includes an internal criticism, which must be particularly involved in the analysis in the light of the frictions that are created between the EU climate regime and the internal market.

Critical legal positivism is used as part of the analytical framework for the thesis. In this thesis, the multi-layered approach to modern law is used to demonstrate the dimension of the law—in this case, for the legal norm systems of the EU climate regime and of the internal market (see next section 2.2.1.2). Climate change and climate policy have a comprehensive impact on the internal market, and the scope of this impact is tremendous. The premise is, when approaching climate law, that we have to look at the different layers of the law to understand *what* climate law *is* today under modern law. A crucial question is what happens if climate law is seen as part of human rights (see the analysis of Chapter 6). As described, Tuori (2002) considers human rights to be a part of the deep structure of the law. Therefore, if climate law is considered to be part of human rights, it may have implications for many of the other layers of the law (and thus implications for many areas of law).

When observing the EU climate regime, we are at the *surface level.* With the knowledge of the constant interaction between the levels as well as both the sediment and the recursive effects, we might be able to understand certain values and gain a conceptual understanding, which might give us an understanding of what climate law *is*. However, at this moment, the relationship between the internal market and the EU climate regime is limited to a certain understanding. Therefore, in the search of an understanding for the structure of law, the surface level (legal material) is very essential. By examining international climate change law, EU climate law, climate judgements, human rights, legal climate science, and in general scientific material about climate change, through the lens of critical legal positivism, the aim is to address the legal structure and critique of the friction between the layer (see section 2.3 on the method of the thesis). In describing the internal market in Chapter 3, it has also seemed necessary to set it in the perspective of the different levels.

[116] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 304-306.

2.2.1.2 The Multi-Layered Phenomenon and the Structure of the Thesis

The structure of the thesis reflects the theoretical framework as well as the multi-layered phenomenon as illustrated in Table 2 below. The analysis that is carried out in the chapters of Part II is placed at the surface level of the multi-layered phenomenon. Hence, the legal material of the internal market and the EU climate regime is presented with a focus on their key principles. In Part III, the deeper layers of the law are unfolded, as the analysis of Chapter 5 is placed at the legal culture level and Chapter 6 at the level of the deep structure of the law. Furthermore, the main research question that is presented in section 1.4 encompasses the entire aim of the project, while the sub-questions are reflected in the structure of the thesis and the multi-layered phenomenon. This is also illustrated in Table 2 (see the middle column, where the sub-questions are inserted in connection with the multi-layered phenomenon). Thus, Part II, Chapter 3 and 4, answers the first sub-question, while Chapter 5 answers the second sub-question, and Chapter 6 answers the third sub-question.

Table 2. *The Multi-Layered Structure and the Sub-Questions of the Thesis.*

<table>
<tr><th colspan="2">Parts</th><th>The Multi-Layered Phenomenon and the Sub-Questions of the Thesis</th><th colspan="2">Chapters</th></tr>
<tr><td rowspan="2">II</td><td rowspan="2">The Internal Market & the EU Climate Regime</td><td rowspan="2">The surface level.

I) What are the key principles of the internal market and the EU climate regime?</td><td>3</td><td>The Principles of the European Union’s Internal Market</td></tr>
<tr><td>4</td><td>The Principles of the European Union’s Climate Regime</td></tr>
<tr><td>III</td><td>The Deeper Layers of the Internal Market & the EU Climate Regime</td><td>The level of the legal culture.

II) To what extent do the principles of the internal market influence the principles of the EU climate regime?</td><td>5</td><td>The Internal Market’s Influence on the EU Climate Regime</td></tr>
</table>

		The level of the deep structure of the law. ***III) To what extent can the EU climate regime through human rights inform the internal market in the future?***	**6**	The Deep Structure of the EU Climate Regime and the Internal Market

2.3 The Method of the Thesis

Within the aforementioned theoretical framework, it is essential to elucidate the legal methodology employed. The methodology adopted by the thesis is crucial in ensuring that its objectives are achieved. Consequently, the legal dogmatic method is employed, as it is recognized that valid law must be determined through the interpretation of the available legal sources. This recognition of the significance of legal dogmatics is prevalent within the field of legal scholarship and academic discourse, particularly among scholars who adhere to the principles of critical legal positivism. Legal dogmatics, in this context, is acknowledged as a valuable analytical approach for interpreting and systematizing legal material in the theory of critical legal positivism.[117]

By employing the legal dogmatic method, the thesis aims to analyze and interpret the legal sources within the context of the EU climate regime and the internal market. This method entails a systematic examination of legal texts, such as legislation, regulations, case law, and legal doctrines, to ascertain the applicable legal norms and principles. Through a rigorous analysis of these legal sources, the thesis seeks to derive insights, identify patterns, and establish a coherent understanding of the normative framework governing the interaction between the two legal norm systems. The utilization of the legal dogmatic method ensures rigorous, clear, and reliable legal analysis of valid law, thereby enhancing the overall scientific rigor of the research.

2.3.1 Law and Sources

The legal dogmatic method is applied in this thesis to which the relevant sources of law are analyzed. The method is the doctrine of norms. Thus, the legal dogmatic method is a systematization,

[117] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 30.

description, interpretation, and analysis of given sources of law in order to arrive at a judgment on what is valid applicable law.[118] Within critical legal positivism, Tuori (2002) divides legal dogmatics into *interpretive legal dogmatics* and *theoretical legal dogmatics*.[119] Interpretative legal dogmatics clearly focuses on law at its surface level. Theoretical legal dogmatic is the general doctrine formulated by fulfilling the systemization, i.e. the legal concepts and the general principles in the different fields of law.[120] Thus, it has the theoretical legal dogmatics as its focus in the legal culture, as this is where we find legal theory, which concentrates on the methodical elements such as the doctrine of the sources of law, the standards guiding legal interpretation, the solution for norm conflicts as well as legal argumentation in general.[121] Based on this categorization, which Tuori (2002) makes under critical legal positivism, it is therefore obvious that it is theoretical legal dogmatics that is applied in this thesis. As a result of the objective of the thesis, the conflict of norms and thus the argumentation are placed at the deeper layers of the law, which are central to the methods applied. It must therefore further be defined how legal dogmatics is used in this thesis.

2.3.1.1 The Hierarchy of Norms

The dogmatic approach divides the legal norms into different categories as part of systematization. This approach, or rationale, is based on the same approach presented in '*EU law: text, cases, and materials'* by Craig and de Búrca , (2020).[122] Prior to the Lisbon Treaty entered into force, there was not a particular hierarchy in the norms but rather a distinction between what was considered *primary* norms and *secondary* norms.[123] With the aim of creating a Constitutional Treaty in the EU, a hierarchy of norms was introduced—hence a hierarchy of the legal acts in the EU. Although this introduction of a hierarchy was, with some modifications, based on the recommendations of the Final Report of the Working Group IX on Simplification,[124] as the report stated that the

[118] Tvarnø, C. D. & Nielsen, R. (2021). *Retskilder og retsteorier.* Djøf/Jurist-og Økonomforbundet, p. 55.
[119] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 284.
[120] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 284.
[121] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 284.
[122] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, pp. 136-154.
[123] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 141.
[124] Final Report of Working Group IX on Simplification of 29 November 2002, CONV 424/02 (at http://european-convention.europa.eu), at pp 1–2.

hierarchy of norms had to attain a number of objectives. The objectives are: simplification, democratic legitimacy, and the separation of powers.[125] In other words, this means:

> […] [to] simplify therefore firstly means "to make comprehensible", but also to provide a guarantee that acts with the same legal/political force have the same foundation in terms of democratic legitimacy. The democratic legitimacy of the Union is founded on its States and peoples, and consequently an act of a legislative nature must always come from the bodies which represent those States and peoples, namely the Council and the Parliament. Procedures must therefore be reviewed to ensure that they respect this simple principle: acts which have the same nature and the same legal effect must be produced by the same democratic procedure.[126]

The recommendations on simplification thus resulted in a proposal of a hierarchy between the acts based on the adoption procedure rather than a being based on the identity of the authors of the acts. In addition, the hierarchy that was recommended was also present in the draft for the establishment of a Constitutional Treaty[127] (however, this treaty was never ratified in the EU). It also failed to be written explicitly into the Lisbon Treaty. However, in the framing of the Lisbon Treaty, there was a desire to meet the objectives of simplification, democratic legitimacy, and the separation of powers—hence, a more definite hierarchy of norms than before. Accordingly, the five hierarchical principles of norms under the Treaty of Lisbon are: constitutive treaties and the EU Charter; general principles of law; legislative principles of law; legislative acts; delegated acts; and implemented acts.[128]

Firstly, the Treaty on European Union[129] (TEU), the Treaty on the Functioning of the European Union[130] (TFEU), the Charter of Fundamental Rights of the European Union (EU Charter)[131], are at the top of the hierarchy of the doctrine of the sources of law. The TFEU and the TEU are the constituted treaties[132] of the EU, and the EU Charter has the same status and legal value as the

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[125] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 141.
[126] Final Report of Working Group IX on Simplification of 29 November 2002, CONV 424/02 (at http://european-convention.europa.eu), at pp 1–2., p. 2.
[127] Draft Treaty establishing a Constitution for Europe. OJ C 169, 18.7.2003.
[128] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 136.
[129] Consolidated Version of the Treaty on European Union [2008] OJ C115/13. (TEU).
[130] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[131] Charter of Fundamental Rights of the European Union (Charter) [2012] OJ C326/02.
[132] In the *Les Verts* case the Court stated that: *"[…] the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether*

Treaties, as stated in Article 6(1) of the EU Charter. Additionally, the provisions of the treaties are constructed in the light of the Charter.[133]

In the thesis, the EU climate regime is presented in the context of the Lisbon Treaty (TEU and TFEU) and the EU Charter. The regime is founded in the TFEU Articles 191-193, under Title XX: *Environment,* which means that the foundation of the regime is to be found in the constitutional provisions of the norms and is placed at the top of the hierarchy. Additionally, the internal market has its starting point in the formation of EU law and the constituent provisions founded in the Treaties. It must also be emphasized that the internal market precedes the climate regime (see TEU Article 3(3)) in which it is established that the aim of the Union is to establish an internal market that must work for the sustainable development).[134] Therefore, the point of departure throughout the thesis is also that the rules of the internal market are located in the entire treaty basis but supplemented by other parts of the hierarchy of the law, as presented hereafter.

Secondly, in the hierarchy of the norms we find the general principles of EU law. Hence, the general principles sit below the constituent Treaties and may be used when interpreting the particular Treaty provisions.[135] The general principle of law has primarily been shaped by the Union Courts, as the Treaties form the starting point for elaborating the grounds of review. The principles are such as the principles of proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle, and procedural justice into the Treaty, and used them as the foundation for judicial review under TFEU Articles 263 and 267.[136] Thus, the TFEU Article 263(2) stipulates that:

> […] [the Court of Justice of the European Union] shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, **infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers**.[137]

the measures adopted by them are in conformity with the basic constitutional charter, the treaty. […]" Case 294/83, *Parti écologiste "Les Verts"* [1986]. ECLI:EU:C:1986:166, para. 23.

[133] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 136.

[134] TEU Article 3(3). See more on the establishment of the internal market in Chapter 3, section 3.4.1.

[135] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 142.

[136] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 142.

[137] TFEU Article 263(2). Author's own emphasis added.

Hence, the role of the Court is to facilitate the grounds for the provision with emphasis on the last part of the provision. There has been some discussion as to the purpose of the Article and its intent.[138] Furthermore, the Court also has the duty to ensure that the law should be observed with respect to the interpretation and application of the Treaty in regards to TEU Article 19. Thus, 'observed law' refers to secondary legislation but also with a broader interpretation of the courts creating a system of general principles where the legality of the Union and its Member States could be determined.[139] In addition, the EU Courts also hold the power to recognize new general principles of EU law and to guide the direction of those principles.[140] Thus, the EU Courts ability to recognize new general principles in EU law and guide their development is also important for the analyses in the thesis. This recognition implies a dynamic and evolving legal framework in which the EU Courts actively contribute to the direction of these principles, which the analyses of the thesis centres around—namely, the key principles of the EU's climate regime and the principle of the internal market.[141]

Part of the objective of the thesis is to derive the foundational principles of the internal market. The sources of the internal market are found in the Lisbon Treaty, the Charter and in the general principles of EU law. Thus, the objective of the Union is to create an internal market in regards to TEU Article 3(3)[142], an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties as stated in TFEU Article 26.[143] Additionally, the internal market analysis is limited to relate to the potential frictions that may exist in relation to the Eu climate regime, which is why large parts of the lower hierarchy of the norms have been deemed unnecessary to include in the analysis. However, in the EU climate regime and in the internal market, the above-mentioned norms do not stand alone but are largely supplemented by other legislations.

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[138] See the discussion in Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 142.
[139] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 143.
[140] See Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00. *Artegodan and Others v Commission* [2002] ECLI:EU:T:2002:283 and Case C-101/08 *Audiolux SA ea v Groupe Bruxelles Lambert SA ('GBL')* [2009] ECLI:EU:C: 2009:626.
[141] See the analysis of Chapter 5, section 5.2.2 where the principles of the EU climate regime and the principle of the internal market as general principles of EU law are further explored up on.
[142] TEU Article 3(3).
[143] TFEU Article 26.

In the TFEU Article 11, it is stated that "*[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*." Furthermore, the objectives of the Union policy on EU climate law are founded in TFEU Article 191. Together with the procedure for the adoption of acts, in the environmental field in TFEU Articles 192 and 193 about a Member State's possibility for maintaining or introducing more stringent protective measures. Hence, the regulation of the climate regime policies is founded in the Treaty, but the legislation and obligations are to be found in the other sources of law (legislative, delegated and implanting acts), as introduced below.

Thirdly, in the hierarchy of the norms in the EU, there are the legislative acts. In the TFEU Article 288, the 'directly applicable' acts are formulated, those are set to be the regulations. Furthermore, the provision of TFEU Article 288 states that directives shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Moreover, decisions shall be binding in its entirety, and recommendations and opinions hall have no binding force.[144] As stated by Craig and de Búrca (2020), there is no formal hierarchy between these provision (regulation, directive, and decisions).[145] Thus, the development of EU policy in a particular area—for example in the area of climate law—will have a regulation as its foundation, while subsequent directives and decisions may be formulated in accordance with it. However, the foundational provision might also be formulated in a directive or decision. It often come down to the form of the act, as the provisions can be both legislative, delegated or implementing acts. Thus, at this level of the hierarchy, the introduction to the legislative act is presented, followed by the delegated acts, and then the implementing acts.[146]

Fourthly, in the hierarchy of the norms in the EU, the delegated acts are placed in the TFEU Article 290, which sets the conditions and controls over those acts. The formulation of this type of norm is rather formal, as they are not legislative acts, meaning that they have not been through the same legislative procedure as the legislative acts.

[144] Note that recommendations and opinion are stated to have no binding force.
[145] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 137.
[146] In TFEU Article 289, the basic premise is that legislative acts are legal acts adopted by a legislative procedure for the purpose of the Lisbon Treaty. Hence, these cannot be regulations, directives or decisions if they are adopted through a legislative procedure. Furthermore, the wording of the provision is stated to be purely formal. Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 145.

Fifthly, the implementing acts are found in the hierarchy of the norms in the EU.[147] They are defined in TFEU Article 291, which specifies that implanting acts can be made pursuant to any legally binding Union act.

Lastly, there is an incomplete categorization, which includes those acts that do not fit into the above-mentioned categorization of norms. Thus, this hierarchy of norms under the Lisbon Treaty is somehow still incomplete. The Union institutes has made frequent use of *soft law* sources. They have no binding force in a formal sense, however, they still have an important influence on the legal work.[148]

Thus, the hierarchy of the norms in the thesis are divided into the Treaties, general principles, legislative law, delegated law, and implementing law. However, the more general division found by legal scholars is the division of *primary law* and *secondary law*. Where primary law is the treaties and secondary law is the legislative, delegated and implementing acts. This division does not acknowledge the general principles in the same way, as the above-presented hierarchy of the norms. However, through the thesis there might be referred to primary and secondary law, though, this is for the sake of simplicity. Hence, the general principles will still be somewhere in between these two categories.

In this thesis, the analysis mostly investigates the two higher norms of the norm hierarchy, as presented above. This must also be justified in the chosen theory of the thesis, which aim to look at the norm frictions. Thus, these are particularly visible in the deeper layers of the law. Furthermore, it is also recognized that there may be hierarchic challenges when deriving the frictions between the EU climate regime and the internal market. It is recognized that the EU climate regime is placed in the internal market and not equated. This is based on the consideration that the basic authority of the EU climate regime is found in the treaties in which it is found to be the internal market. It seems logical then to realize that the constitutional right cannot be rejected as a result of the entry of another area of law, which also follows from the *EU acquis communautaire* (herafter *EU acquis*).[149] Therefore, it must also be emphasized that the starting point is not to deny

[147] See also the discussion about the distinction between delegated and implementing acts in Chapter 5 in Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press.
[148] Stated in Case C-322/88 *Grimaldi* [1989] ECLI:EU:C:1989:646. Confirmed by Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini and Others* [2010] ECLI:EU:C:2010:146.
[149] Neergaard, U., & Nielsen, R. (2020). *EU-ret* (8.ed.). Karnov Group, p. 63.

the hierarchy of the norms but to consider the frictions that there may be between the norms established in the two legal norm system of the internal market and the EU climate regime.

2.3.1.2 The Sources of Law - The International Climate Regime

As described in the introduction of the thesis, the issue of climate change has to be solved jointly, and the international framework convention and agreements are important to combat climate change. International climate law and EU climate law are largely dependent on each other and at times inseparable, which has been the case both to the development of the EU climate regime and to the rules that exist in the regime. Therefore, it is initially relevant to describe the general relationship, which is the basis for the presence of international law in EU law and thus the EU climate regime.

It is necessary to examine the EU climate regime in the context of the international climate regime. Hence, this includes the ratified international agreements such as the United Nations Framework Convention on Climate Change[150] (UNFCCC) and the additional climate agreements relevant to that context. International law is also an integral part of the EU law. TFEU Article 216(1) states that the Union may, within its sphere of competence, conclude international agreements with third countries or international organizations. The Union, as a legal personality,[151] may conclude agreements with one or more third countries or international organizations where the Treaties allow or where the conclusion of an agreement is necessary in order to achieve cf. TFEU Article 216(1). Agreements that are concluded will be binding upon the institutions of the Union and its Member States cf. the TFEU Article 216(2).[152] According to the case law from *Ringe and Werge*[153] (2013), international law takes precedence over (secondary) EU law when international agreements are ratified by the EU. Additionally, the secondary law of the EU must, to the greatest extent possible, be interpreted in accordance with international agreements. Furthermore, it follows from the

[150] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.
[151] Article 47 of TEU explicitly recognizes the legal personality of the European Union, making it an independent entity in its own right.
[152] In the Joined cases C-335/11, *Ring* C-337/11, *Werge* [2013] ECLI:EU:C:2013:222 the European Court of Justice noted that when EU concludes on international agreements are they legal binding for the institutions of the Union cf. TFEU 216(2) and has primacy for the subsequent acts of EU (EU secondary sources).
[153] Joined cases C-335/11, *Ring* C-337/11, *Werge* [2013] ECLI:EU:C:2013:222.

judgment in *Kadi*[154] (2008) that international agreements have to respect the fundamental rights of the EU.

Thus, the international climate conventions are also part of EU law as a result of TFEU 216(2) and are thus binding for the EU institutions and the members. With this, e.g., the UNFCCC or the Paris Agreement are placed in between the EU treaties and secondary law.[155] At the same time, it is emphasized in TFEU Article 191(4) that it aims to strike a balance between the collective actions of the EU and the independent roles of its Member States in international relations. It recognizes the importance of coordination and cooperation while safeguarding the sovereign rights of Member States to engage in international negotiations and agreements within their areas of competence.[156]

In general, international agreements such as the framework convention are not part of the EU sources and are in some ways a category in their own right. However, international agreements can have a direct effect, and their legal force is superior to any secondary sources, which must therefore comply with them. In the case *Demirel*[157] (1987) the Court recognized the direct effect

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[154] Joined cases C-402 + 415/05P. *Kadi et. al v. Council of the EU* [2008] ECLI:EU:C:2008:461. "*In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance… It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community*" from paras 283-284 in the judgment. See Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. p. 412.

[155] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, pp. 166-168. The CJEU thus stated in the Air-Transport judgment Case C-344/04 *IATA and ELFAA* [2006] ECLI:EU:C:2006:10, para. 35 (regarding The Monteral Convention and international air transportation) that: "*Article 300(7) EC provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation. […].*"

[156] It is stated in TFEU Article 191(4) that: "*Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.*
The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

[157] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECLI:EU:C:1987:400. See more about the Demirel Case in Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 138.

of certain agreements in accordance with the same criteria identified in *Van Gend en Loos* (1963).[158]

In addition, international customary law is also important to the relationship between EU climate law and international climate law. The Court has stated that, when the EU adopts an act, it is bound to observe international law in its entirety, including customary international law.[159] In the thesis, it is determined what may be considered the key principles in the EU climate regime. In this regard, it is therefore necessary to address customary law in international climate law, as it is considered to be of a significant nature to the climate regime.

In general, international environmental law can be divided into two main groups: in the first group there are principles of international law that have been developed in international law and are applied to environmental issues.[160] The second group deals with the principles that have been developed specifically within international environmental law to meet the special challenges in this area.[161] Initially, the latter one has been the focus of in this thesis regarding the core principle of the international climate regime and the EU climate regime.

2.4 The Analytical Framework of the Thesis

In the preceding sections, the thesis's theory and method have been expounded upon. In this section, the analytical framework of the thesis is presented. The establishment of an analytical framework serves the purpose of delineating the scope and defining the key concepts employed within the thesis. The boundaries set are designed to align with the thesis's objectives and aims. Simultaneously, the concepts are elucidated to guide the analysis, providing a conceptual compass or thread that runs consistently throughout the thesis.

[158] In this judgement, the Court states that European law not only engenders obligations for EU countries, but also rights for individuals. Individuals may therefore take advantage of these rights and directly invoke European acts before national and European courts. However, it is not necessary for the EU country to adopt the European act concerned into its internal legal system. Case 26/62 Van Gend en Loos [1963] ECLI:EU:C:1963:1.
[159] Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C: 2011:864, para. 101.
[160] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, pp, 63-70.
[161] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, pp. 71-78.

With regard to the terminology used in the thesis, it is pertinent to briefly examine how the terms *regimes, legal norm systems*, *principles*, and *frictions* are employed. These terms form integral components of the thesis's analytical framework and are crucial for understanding the subsequent analyses.

2.4.1 Defining *Regime* in the Thesis

The meaning of *regimes* is perceived as a shorthand and non-legal term, which is why its use in the thesis must be explained. Moreover, the term is often used in international law and with overlapping meanings in the literature.[162] In the task of identifying *regime*, Young (2012)[163] was able to find four sets of assumptions that are embedded in the term's definition after reading the ICL report as well as other literature. These are the assumptions with the typology 'who', 'what', 'when' and 'why'. These four elements provide a better understanding of the different notions of *regime* and the associated study of regime interaction. It is this definition that is used to determine the scope of the climate regime in the thesis.

Regime is, inter alia, used in the legal thesis by Martinez Romera[164], who has investigated regime interaction in the regulation of greenhouse gas emissions from international aviation and maritime transport.[165] In the thesis, Martinez Romera demonstrates that regimes can rightly be placed in a legal context. It should also be noted that Martinez Romera's thesis deals with regime interaction in an international context. As such, it must be explained how this can be justified in this thesis' analysis, which is at EU legal level.

In the thesis, reference is made to the international climate regime and the EU climate regime, and where the analysis in Chapter 4 examines these two regimes, with a focus on the EU climate regime. Here, it must be noted that the international climate regime and the EU climate regime are closely linked in origin and development, which is also presented in Chapter 4. The use of *regime* thus seeks to encapsulate the typology of 'who', 'what', 'when' and 'why'. Thus, the

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[162] Young, M. A. (2012). "*Introduction: The Productive Friction between Regimes."* In M. Young (Ed.), *Regime Interaction in International Law*: *Facing Fragmentation* (pp. 1–20). Cambridge University Press.
[163] Young, M. A. (2012). "*Introduction: The Productive Friction between Regimes."* In M. Young (Ed.), *Regime Interaction in International Law*: *Facing Fragmentation* (pp. 1–20). Cambridge University Press.
[164] Martinez Romera, B. (2015). *Regime Interaction in the Regulation of Greenhouse Gas Emissions from International Aviation and Maritime Transport*. Det Juridiske Fakultet. (PhD thesis).
[165] Martinez Romera, B. (2015). *Regime Interaction in the Regulation of Greenhouse Gas Emissions from International Aviation and Maritime Transport*. Det Juridiske Fakultet. (PhD thesis).

definitions of the various regimes initially consist of an analysis of *de lege lata*, but, in addition, the review of the regimes also contains elements of historical development, political incentives, purposes and decision-making procedures.

The EU climate regime must therefore also be understood as an independent area with its own 'who', 'what', 'when' and 'why'. However, it overlaps with many areas especially in relation to 'who', as the EU climate regime and the internal market come from the same system. Having said that, there is not a further review of this concept in the thesis, as it is not relevant to the scope of the study.

Furthermore, the regimes must also be used in accordance with the theoretical framework of the thesis. The different layers of critical legal positivism are thus reflected differently in the regime and the internal market, as they constitute their own systems of legal norms. The application of the legal norm systems for the EU's climate regime and the internal market is defined in the next section.

2.4.2 Defining *Legal Norm Systems* in the Thesis

The definition of a *legal norm system* must be explicitly outlined, as it serves as a concept throughout the thesis. In this context, a *legal norm system* encompasses the frameworks governing the environment, the EU climate regime, and the internal market. It is essential to note that *legal norm systems* should not be conflated with *legal systems*, as the latter represents a more broadly applicable concept.[166]

In the thesis, a legal norm system must be understood as a system of legal norms. The term is thus used to demarcate *legal orders* from one another, but, at the same time, it is also recognized that these legal norm systems have a common presence in the legal system, and, in this thesis, they have a common presence in EU law.[167] In addition, the norms must also be understood in the context of critical legal positivism and in conjunction with the methods of the thesis. Here, the

[166] A legal system is the framework of rules, procedures and institutions that a jurisdiction uses to interpret and enforce their laws. A legal system is binding on all legal disputes within its jurisdiction. Therefore, EU law is its own legal system, while the Member States also have their own legal system. For example, EU law has a great influence on Danish law and the other national legal systems in the EU, both in connection with the content of individual rules or sets of rules and in connection with, e.g., valid. theory, legal sources, and legal dogmatic issues. See Tvarnø, C. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist- og Økonomforbundet, p. 122.
[167] See about *legal orders* in section 2.4.3.

norms are thus an expression of the systematics of legal dogmatics, but, at the same time, they also contain normative elements, which is elaborated in the next section.

Thus, the concept of legal norm systems in this thesis covers the norms that represent an area of law, while at the same time encapsulating all the layers in the multi-layered phenomenon. This means that both the legal surface, legal culture, and deep structure of the law in a legal area are represented in the concept. Hence, when it is described in the thesis that something influences or infiltrates a legal area's legal norm system, it must be understood as an influence or infiltration on one of the levels of the multi-layered phenomenon. This indicates that, somewhere in the law area's legal norm system, an influence occurs due to the interconnectedness of the layers of the multi-layered phenomenon. However, it is emphasized which layer in the multi-layered phenomenon where this occurs. No direct separation of the layers of the multi-layered phenomenon is made within the concept, as the theory precisely prescribes that there is constant interaction between the layers in this multi-layered phenomenon. Hence, the emphasis on specific layers within the multi-layered phenomenon is facilitated solely through the structural framework of the thesis' overall analysis. The importance lies in highlighting both the indication and systematic approach of the analysis, serving to underscore that an impact on the legal norm system at one level holds the potential to reverberate across other levels within the legal norm system.[168]

2.4.3 Defining *Principles* in the Thesis

In order to provide clarity and understanding, it is essential to define and elucidate the concept of principles as employed in this thesis. As outlined in the methodological framework, within the EU norm hierarchy, general principles hold a significant position just below the constitutional provisions. These general legal principles have largely evolved through the jurisprudence of the EU courts, with the treaties serving as the foundation for their development.

However, for the purpose of this thesis, the definition and understanding of principles are derived from the theoretical framework. It is within this framework that the specific principles relevant to the thesis are delineated and conceptualized. By drawing on the theoretical framework, the thesis establishes a solid foundation for identifying, analyzing, and interpreting the principles that shape the legal landscape under examination.

[168] See also section 2.2.1.2 on the multi-layered phenomenon and the structure of the thesis.

In critical legal positivism, this principle must be available as a normative element (norm) that must govern legal practice—the consideration takes place under what Tuori (2002) calls *The Two Faces of the Law.*[169] Tuori (2002) describes the norm consideration as follows:

> The law has two faces. On the one hand, it can be approached as a set of norms, as a *legal order*; this is the aspect with which typical lawyers in their spontaneous positivism equate the law. However, there is also another aspect to the law: it can also be examined as a set of social practices, as *legal practices*. These two aspects of the law are in constant interaction. Legal practices could not exist without legal norms. Legal norms define certain social practices as legal practices, as, for instance, law-making or adjudication (*constitutive* legal norms), and guide the conduct of the agents of these practices, like that of members of parliament or judges (*regulative* legal norms). But, by the same token, nor could the legal order exist without legal practices, which are responsible for its production and reproduction.[170]

Furthermore, it is recognized that the norm is both how the law 'is', but also how it 'should' be. From this it thus gains an ontological element but will thus only last if it is reconstructed through legal practice.[171] In critical legal positivism, the principle must be available as a normative element (norm) that must be governed by legal practice. Hereby, it is recognized that the norm is both how the law 'is', but also how it 'ought' to be. From this it thus gains an ontological element but will thus only last if it is reconstructed through legal practice. Thus, it is described that the norm only retains its ontological element in the legal order if it continues to be reproduced through legal practice in 'the social reality'.[172] Hence, the norm has an existence as something normative, obliging and inhabitant in both the world for 'is' and the world for 'ought'.[173]

By combining the legal context provided by the EU norm hierarchy with the conceptual understanding derived from the theoretical framework, the thesis effectively incorporates the notion of principles. This comprehensive approach ensures a robust and rigorous exploration of the principles that govern the subject matter of the thesis, enhancing the depth and quality of the analysis conducted.

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[169] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, Chapter 5.
[170] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 121.
[171] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 124.
[172] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 124.
[173] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 124.

Furthermore, it is essential to distinguish between *principles as legal norms* and *principles as sources of law* when approaching the levels of law.[174] Hence, Tuori (2002) describes the perspective as such:

> In the discussion on the conditions for the recognition of legal norms, legal principles are treated as discursively specified norms by the law's surface level. By contrast, when principles themselves are claimed to be sources of law, the focus is not much so on their discursive specifications as their position as sub-surface normative elements supporting the surface-level.[175]

The importance of legal principles within the legal order underlines the positions of judgment and jurisprudence as legal practice.[176] Thus, principles in this thesis must be understood broadly. Firstly, principles are generally recognized as norms. Thus, formulations of the principles might be included as a basis for basic rights and as an institutional support. However, they might also find support in other sources of law than legislation. Principles might have elements found in other *travaux preparatoires*, meaning in government bills, law processes or legal practices, and they are thus also part of the characteristics of a principle.[177] This approach is also in line with the methods used in the thesis, where principles must be seen as a broader norm that is placed at the second level of the norm hierarchy.

General principles can, by their nature, be of a general character. The legal literature highlights that it is the Court in particular that helps to proclaim them.[178] The Cort is thus also the one that defines the concept of a general principle (often negatively).[179] Thus, the literature also prescribes that the principles are more difficult to define precisely. In addition, it comes down to whether the principles are recognized by the Court—for which there is either a wide or narrow possibility for the existence of the principles. The narrow approach attributes that the general principles must be recognized explicitly by the Court, while the broad approach claims that they can be recognized implicitly. In other words, it is generally recognized that the principles can exist in parallel, but

[174] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 179.
[175] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 179.
[176] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 179.
[177] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 179.
[178] Neuvonen, P. J., Moreno Lax, V., & Ziegler, K. S. (eds.). (2022). *Research handbook on general principles in EU law: constructing legal orders in Europe*. Edward Elgar Publishing, p. 14.
[179] Neuvonen, P. J., Moreno Lax, V., & Ziegler, K. S. (eds.). (2022). *Research handbook on general principles in EU law: constructing legal orders in Europe*. Edward Elgar Publishing, p. 11, and Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 142.

that this also can lead to problems according to their codification, which is referred to as *frictions* in this thesis, see next section 2.4.4.

The principles of the EU climate regime and the internal market are determined through this analytical approach.[180] However, critique is not on the principles found in the two regimes but on the frictions between them as presented below.

2.4.4 Defining *Frictions* in the Thesis

In a very complex world with an issue of global concern, it is essential to understand how varying norms create frictions. However, this task might be a risky undertaking for international lawyers.[181] At the same time, there is also a need for scholars and lawyers to understand how different branches of norms and institutions overlap on issues of global concern.

Frictions between the principles of the internal market and the EU climate regime in this thesis must be understood in a normative perspective. Above all, reference is made to structural and systematic frictions between the norm in the two legal norm systems, i.e., the notion that principle placement is valid law may be challenged by these frictions. A friction between the principles might be seen when principles applied in an individual case can demolish coherence and give contrary solutions. This is naturally reflected in the practical legislation (at the sub-surface level) as legal uncertainty.[182]

In the event of a friction between such principles, it must be largely accepted that they can be resolved via the meta norms, namely the lex principles: *lex superior, lex posterior, and lex specialis*. This resolution lies at the sub-surfaces level of the law, whereas the coherence of the legal order stems from its principled nature as different principles of various fields of law gather together substantive normative premises common to individual regulations.[183] However, under the theory of critical legal positivism, conflicting principles can, in some cases, point to different solutions. Therefore, the principles are usually contradictory. In these cases, Tuori (2002) points

[180] See also Chapter 5, section 5.2.2 where the analysis of the norm status of the principles of the two legal norm systems are carried out.
[181] Young, M. A. (2012). "*Introduction: The Productive Friction between Regimes."* In M. Young (Ed.), *Regime Interaction in International Law*: *Facing Fragmentation* (pp. 1–20). Cambridge University Press.
[182] It is noted that in critical legal positivism legal uncertainty can exist, which can be criticized on the basis of the various layers.
[183] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 179.

out that this can necessarily erode what the law promises—namely, that the nature of the principles is straightforward so that the order of the principles is known. Hence, in the case of conflicting principles, Tuori (2002) makes it clear that the solution is not always found in the *lex principles* or can be solved by these but that the acute frictions in such a situation must be considered via the various layers of law. Thus, the frictions might need a systematization of the legal order, which is why this examination lies in the multi-layered nature of the law.

Furthermore, Tuori (2002) argues that the characteristics of law-making is a combination of legal and political practices, meaning that the aim often is to strengthen the moral structures of a law area by conferring on it an institutional confirmation.[184]

> In critical legal positivism, the law is seen as a normative order open to influences from morals. The legal order is engaged with moral norms and ethical values especially in its principles, which have sedimented into the legal culture and the deep structure of the law. However, legal principles cannot be equated with moral ones. The moral acceptability of a principle does not prove it to be a part of the legal order. Legal principles share the positivity of modern law; the positivity is transmitted into the legal culture and the deep structure of the law through the relation of sedimentation.[185]

Thus, the challenge of the relations between morality and law is not so much a part of the surface-level regulations of the law, but the challenge might happen through the principles located at the deeper layers of the law.[186] Tuori (2002) also refers to Dworkin who has used *principles* in two different ways. The first meaning of the term covers political objectives and programs where policies are standards that determine goals concerning the economic, political or social state of the community. The second meaning of term is more narrow and is not attached to states. It is rather a moral expectation or demand, which is why the principles are characterized by their morality and are propositions describing rights.[187] However, Tuori (2002) explains that it is necessary to draw a line when examining the law. Hence, policies do not have any particular connection to morality. Their main field of influence consist of law-making practices, which is part of the surface level. While principles are connected substantively to morality, most principles are part of the sub-surface levels.

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[184] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 181.
[185] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 313-314.
[186] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 181.
[187] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 181.

The objective of the thesis is to determine the frictions between the principles of the EU climate regime and the internal market. Hence, the determination of the frictions is based on a critical analysis of the interaction of the two legal norm systems' principles. As described under the theoretical framework in section 2.2, it is thus a more normative critique of the law. Hence, the definitions and contents of the principles under the two regimes are essential to determine the interactions.

PART II

THE INTERNAL MARKET &

THE EU CLIMATE REGIME

CHAPTER 3
THE PRINCIPLES OF THE EUROPEAN UNION'S INTERNAL MARKET

3.1 Outline

The purpose of this chapter is to establish and describe the European Union's internal market as part of the further analysis of the thesis' research statement and objectives. The definition of the EU internal market and its principles is determined with a view to the EU climate regime. Section 3.2 introduces the purpose of the analysis of the chapter. In the next section 3.3, a short introduction to the internal market's purpose and history is given together with a brief description of the legal construction of the internal market. The following section 3.4 describes the principles found to be the foundation for the internal market. Finally, the last section 3.5 sums up on the overall findings.

3.2 Introduction

This chapter is intended to establish a thorough understanding of the internal market's legal norm system and to elucidate its foundational principles, and thus answer part of the thesis' first subquestion: *What are the key principles of the internal market and the EU climate regime?* This elucidation is intended to lay the groundwork for the subsequent analysis of the interactions between the internal market and the EU climate regime. In this connection, the primary focus is to describe the principles and characteristics inherent to the blueprint of the internal market rather than delving into the broader concept of EU law.[188] It is important to note that this examination is confined within the context of the thesis' objectives and adheres to the theoretical framework outlined at the outset of the thesis.

[188] In the preface of the book '*Understanding EU Internal Market Law*', EU law is referred to as a blueprint for a new house. "*The more the final building conforms to the blueprint, the less one needs to refer to it, but in some cases one must take a hard look on at the blueprint to make sure the final building conforms*." See more in the preface of Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International.

Accordingly, Chapter 3 builds upon the theoretical underpinnings, methodology, and analytical framework that were introduced in Chapter 2. Additionally, this scrutiny of the internal market is directed towards an analysis aligned with the thesis' main objective—namely, exploring the frictions that arise between the legal norm systems of the EU climate regime and the EU internal market.

While avoiding a reiteration of the theoretical context of the thesis as presented in Chapter 2 (see section 2.2 on the theoretical framework and the structure of the thesis), it must nevertheless be determined at the outset what theoretical layer this chapter is on in the multi-layered phenomenon.[189] In Table 3, it is illustrated where the chapter is placed in the theoretical setting of the thesis. Thus, this chapter is at the top layer, i.e., the *surface level* of the multi-layered phenomenon, as it uncovers the legal surface (legal material) of the internal market. Additionally, the same approach is performed in the following Chapter 4 on the EU climate regime.[190]

Table 3. *The Multi-Layered Phenomenon – Focus on the Surface Level.*

EU LAW		
The Multi-Layered Phenomenon	**EU Internal Market**	**EU Climate Regime**
Surface Level *Chapters 3 and 4*	Chapter 3 introduces the legal material of the European Union's internal market. Hence, the analysis is placed at the surface level in the multi-layered phenomenon. Firstly, focus is on the creation and legal construction of the internal market. Next, the focus is on the treaty provisions, establishing the internal market and setting its objectives. Finally, focus is on the principle of sustainable	Chapter 4 introduces the legal material of the EU climate regime—hence, its surface level. Here, the key principles of the EU climate regime—no-harm, prevention, precaution and the polluter pays—are in focus.

[189] See also the beginning of Chapter 3 and Chapter 4 on the multi-layered phenomenon in the context of the sub-levels of the law, and as part of the analysis in Chapter 5 and 6.
[190] See Chapter 4, section 4.2 on the introduction to the analysis of the EU climate regimes principles.

	development, which is the aim of the internal market, and the principle of free movement is examined in conjunction.	
Legal Culture *Chapter 5*	The analysis of the *legal culture* is presented in Chapter 5.	
The Deep Structure of the Law *Chapter 6*	The analysis of the *deep structure of the law* is presented in Chapter 6.	

As introduced in Chapter 2, section 2.2.1, the surface level represents the ongoing change and evolving debate to which the legislator, the judges and the legal scholars all make their contributions.[191] The legal order appears as linguistically formulated norms or norm fragments.[192] It is therefore statements about the linguistically objectified content of legal sciences that are at issue at this level.[193]

3.3 The European Union's Internal Market

The internal market of the European Union, and the European Union as a whole, has been undergoing dynamic development for several decades. Today, the internal market is considered a cornerstone of Europe Union's integration. This section gives a short introduction to the historical development of the internal market in the context of the cornerstone of EU's integration. Furthermore, the legal construction of the internal market is explored in section 3.3.2.

3.3.1 The Creation of the Internal Market

The 'common market' was created in the Treaty of Rome in 1957[194] and was intended to eliminate trade barriers between Member States together with the aim of increasing economic prosperity

[191] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 155.
[192] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 154.
[193] See also Chapter 5, section 5.2.1.
[194] Article 2 of the Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (EEC Treaty or Treaty of Rome).

and contributing to political welfare.[195] It was created by the European Economic Community (EEC)[196]—an organization that was based on the concept to foster economic integration between the different States. The common market was to be established over the next period involving serval stages, and it later became known as the 'internal market', where tariff barriers would be removed and a common customs tariff was set up.

The common market was accomplished by the Court of Justice by boosting the establishing of a market and providing a very wide definition of quantitative goods.[197] Simultaneously, the restrictions of free movement of workers, companies, self-employed persons, goods, and services were abolished together with a strict control of anti-competitive practices.[198] In the case *Gaston Schul*[199] (1982), the common market was described by the Court as follows:

> […] The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market. It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market.[200]

The law of the internal market was further developed under the European EEC law.[201] The Court stated that the provisions of the EEC Treaty that were sufficiently unconditional enough to create rights for individuals and to preclude opposing Member States' law were part of the theories'

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[195] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. pp. 3-4.

[196] European Economic Community (EEC) was created by the Treaty of Rome. Later renamed to European Community (EC). In 1993 it became part of the first pillar of the European Union (EU). See in the Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, 4 Eur. Y.B. 412 (EEC Treaty or Treaty of Rome).

[197] Case 8/74 *Dassonville* [1974] ECLI:EU:C:1974:82.

[198] The Court had insisted that the competition rules prohibited undertakings to partition the market by distribution agreements in *Consten* judgment. Joined cases 56 and 58/64 *Consten* [1966] ECLI:EU:C:1966:41. The Court stated that: *"[…] an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the community. The treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 85(1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process*."

[199] Case 15/81 *Gaston Schul* [1982] ECLI:EU:C:1982:135.

[200] Case 15/81 *Gaston Schul* [1982] ECLI:EU:C:1982:135, para. 33.

[201] See Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

supremacy[202] and *direct effect*.[203] In this connection, these two theories are important in internal market law (EEC law, and now EU law) and a part of the *constitutional acquis* of the community as stated in the *Van Gend en Loos*[204] (1963) case:

> […] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.[205]

As part of the promotion of economic integration,[206] the Court imposed a *direct effect* on the fundamental freedoms as highlighted in the case of *Cassis de Dijon*[207] (1979). This judgment introduced the *mutual recognition principle* for the free movements of goods. The direct effect principle and the mutual recognition principle allowed products to circulate in the common market without any restrictions except for when the affected Member States invoked mandatory requirements such as health, fiscal supervision, fairness of commercial practices and consumer protection.[208]

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[202] In the Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1, the Court declared that the laws adopted by European institutions must be integrated into the legal systems of EU countries, which are obliged to comply with them. EU law therefore has primacy over national laws. It is constitutionally foundational that the EU may do no more than its Member States have authorized it to do under its governing Treaties. Article 5(1) TEU declares that *'[…] the limits of Union competences are governed by the principle of conferral*'. Article 5(2) TEU explains that '*[…] under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'*.

[203] Furthermore, Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1. It affirms that EU law imposes not only obligations on EU Member States but also grants rights to individuals. Consequently, individuals have the prerogative to assert these rights by directly invoking EU law before national and European courts, irrespective of the existence of a national law test, especially in cases where there is no judicial remedy under national law.

[204] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

[205] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1, (Section. B - on the substance of the case)

[206] See more about this in Chapter 3, section 3.3.1 and section 3.3.2.1.

[207] Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon')* [1979] ECLI:EU:C:1979:42

[208] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. pp. 5-6.

The Single European Act of 1986 included the objective of establishing the internal market in the EEC Treaty and defining it as:

> [...] an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured […].[209]

The mutual recognition of the single market plays an important role in ensuring the free movement of goods and services without making it necessary to harmonize with national legislation. As a result, mutual recognition is a powerful factor for economic integration, which respects the principle of subsidiarity.[210]

In 1992, the EEC overcame the 1980's stagnant period with the well-known 1985 White Paper program titled 'Completing the Internal Market'.[211] This program did tremendous work for the community with the aim to strengthen the internal market's objective and to remove trade barriers. In the Maastricht Treaty (1992),[212] the 'single market' is launched with the establishment of the four freedoms, which includes the official creation of the 'European Union' (EU) as we know it today. Additionally, environmental policy gained an important role in the internal market as part of the newly introduced area of competences in which the environment (and its protection) became a part of the *Cassis de Dijon*[213] (1979) exemptions.[214]

In the following period, subsequent treaty reforms (the Treaty of Amsterdam[215], the Treaty of Nice[216] and the Treaty of Lisbon) were adopted, and each of these have altered the institutional and political shape of the European Union. The Lisbon Treaty entered into force 1 December 2009, renaming the 'community' to 'union'. In addition, the Treaty added another step in the

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[209] Single European Act (SEA), 29.6.1987, OJ L 169, today TFEU Article 26(2). Furthermore, the act contained new procedures to facilitate legislation to complete the internal market. See also more on SEA in Craig, P. & de Búrca, G., (2020). *EU law: text, cases, and materials*. (7.ed.). Oxford University Press, pp. 648-654.

[210] COM/1999/299 final. Communication from the Commission to the Council and the European Parliament - Mutual recognition in the context of the follow-up to the action plan for the single market.

[211] Completing The Internal Market: White Paper from The Commission to The European Council (Milan, 28-29 June 1985).

[212] Maastricht Treaty, TEU or Union Treaty: Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

[213] Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon')* [1979] ECLI:EU:C:1979:42.

[214] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. p. 6-7. See also more about the exemption to free movement of goods in Chapter 5, section 5.3.

[215] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. (97/C 340/01).

[216] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001

integration of the internal market by adding the Protocol on 'Internal market and competition',[217] which further develops the internal market as described in TEU Article 3. Furthermore, the Charter of Fundamental Rights came into force at the same legal level as the Treaty.[218] Hence, the Treaty included substantive institutional improvements, and, hence, also had the character of a constitution although without being formulated with the common language of a constitution.[219]

In October 2010, a communication titled 'Towards a Single Market Act'[220] was published by the Commission. The aim of this communication was to boost the internal market and put the public, consumers, and small and medium-sized enterprises (SMEs) at the center of the internal market policy. Additionally, in October 2012, the Commission introduced the 'Single Market Act II'[221] with the aim of advancing the internal market and harnessing its unexplored potential as a catalyst for economic growth.

The policy and legal framework governing the internal market has evolved into a distinct and multifaceted domain. This evolution has given rise to a unique legal norm system as elaborated upon in the norm hierarchy detailed in Chapter 2 as well as in the following elaboration in this section.[222] Its overarching goal remains the elimination of barriers, creating an environment conducive to the free movement of goods, services, capital, and people. Within this specialized sphere, the internal market is not merely a collection of regulations but constitutes a coherent and self-contained legal norm system. This system encompasses a broad spectrum of legislative acts, court rulings, and administrative measures—all of which are intricately interwoven to facilitate the smooth functioning of the internal market.

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[217] Protocol (No 27) on the internal market and competition. Consolidated version of the Treaty on European Union.
[218] Before 2009, the Charter was a non-binding document since 2000. Article 6(2) states that the Charter "shall have the same legal value" as the Treaties. In the Treaty of Amsterdam (1999), Article 6(2) declares that the EU should respect the fundamental rights in the ECHR and in the national constitutions of the Member States. Furthermore, in the Treaty of Lisbon the Union was given power to accede to the ECHR. Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, pp. 8-11. See also Chapter 6 on the deep structure of law, where human rights in EU law and at the internal market are further explained.
[219] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 10. See also Chapter 2 about the method and hierarchy of norms that the Lisbon Treaty introduced.
[220] COM/2010/0608 final. Communication From The Commission To The European Parliament, The Council, The Economic And Social Committee And The Committee Of The Regions. Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another.
[221] COM/2012/0573 final. Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Single Market Act II Together For New Growth.
[222] See Chapter 2, section 2.2.1.1.

This developed complexity reflects the multifaceted nature of the internal market's objectives, which extend beyond the removal of physical barriers. It encompasses economic objectives such as promoting competition, fostering innovation, and enhancing consumer welfare. These objectives are pursued through a network of regulations and policies that govern various aspects of market activities. In essence, the internal market is a dynamic legal and policy framework designed to not only eliminate barriers but also to create a thriving and competitive economic environment within the EU.

3.3.1.1 The European Court of Justice

Although the Court itself did not have a decisive role in the creation of the internal market, it did have great importance in selecting the design and interpretation of the rules and norms in the EU and in the Member States law, and thus also for the principles of the internal market, which is further elaborated in Chapters 5 and 6.

Thus, TFEU Article 263[223] forms the basis for the development of the principles of judicial review. Here, the general principles of law function as a basis for assessments done by the Court. The Court must thus ensure that the law is observed when interpreting and applying the EU Treaties as laid down in TEU Article 19(1).[224] The general principles are thus used in different ways, as they function as an interpretation guide in relation to primary law and secondary law. In addition, they also act as a basis for examination, which is why the EU cannot invalidate primary treaty articles. In addition, they can be used within national measures that fall within the EU's scope of application. In addition, they can also lead to compensation claims if they are ignored.

In the literature, it is commonly emphasized what importance the Court has had for the development of environmental policy in the EU since the early 1970s.[225] As highlighted above in the case *Van Gend en Loos*[226] (1963) the case law form the Court has been important—in the areas that concern environment—in terms of its direct effects on EU law but also the primacy[227] of EU law.

[223] TFEU Article 263.
[224] TEU Article 19(1).
[225] See for example, Jordan, A. & Gravey, V. (eds.). (2021). *Environmental Policy in the EU: Actors, Institutions and Processes*. (4. ed.). Routledge, p. 110; and de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 9.
[226] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.
[227] Case 6/64 *Costa v Enel* [1964] ECLI:EU:C:1964:66.

This might also present individuals with the opportunity to maintain collective climate rights as seen in *Van Gend en Loos*.[228]

In connection with the theoretical considerations for this thesis, it must also be mentioned in this context how the Court has had an influence on the internal market and also the green approach to it. In critical legal positivism, the most extensive dynamics are thus at the surface level of the multi-layered phenomenon. Here, the law is constantly changing based on new policies, rules, and court decisions. The ongoing change is thus a product of the current situation and debate in society at the present time. Thus, this must also be perceived as one of the most explicit layers for the norms—i.e., the linguistic objectified content. The creation of the internal market is thus the result of this preliminary work, including the case law from the Court, which has been of great importance. This also reflects the sedimentation and the recursive relationship that has taken place at the deeper layers of the law in the multi-layered phenomenon—namely, the legal culture and deep structure of the law.[229] For the internal market, it must thus apply that, especially, the principles found in this chapter are a result of this process.

3.3.1.2 Legal Subjects of the Internal Market

The legal subjects of EU law encompass a diverse range of entities and individuals who play pivotal roles within the European Union's legal framework and thus the internal market. These subjects are central to the functioning of the EU, and they include Member States, EU institutions, individuals, businesses and corporations, regional and local authorities, EU agencies, third countries, civil society and interest groups, and legal professionals.

Although the focus of the thesis is on the EU's legal system and is not particularly on the legal subjects and their interconnectedness or roles in the EU, these legal subjects must, nevertheless, be mentioned in the context of the EU legal system, as they undoubtedly play a significant role in the construction of the legal norm systems of the internal market and also for the EU's climate regime. This significant role in the legal system must be understood on the basis that these legal subjects, i.a., have conducted cases at the Court and thereby indirectly have had an impact on the development of the internal market through the Court's practices. In other words, without these

[228] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

[229] See about the process of sedimentation and the recursive relationship between the layers in the multi-layered phenomenon in Chapter 2, section 2.2.1.

cases, the establishing of the internal market would hardly have taken place at the pace that it did. At the same time, these cases were also important in order for the Court to gain its decisive role in the development of law in the EU and for the internal market.

3.3.2 The Legal Construction of the Internal Market

Part of the analysis involves an examination on how the concept and perspectives of the internal market are delineated within the framework of EU law. This entails an exploration of its legal underpinnings and the foundational provisions upon which it is built. Furthermore, Chapter 2, which is dedicated to the theoretical basis, methodology, and analytical framework employed in this thesis, assumes a pivotal role in elucidating the legal construction of the internal market. This section includes an assessment of the legal structure of the basic EU principles surrounding the internal market as well as considerations regarding their interpretation and validity. Consequently, it serves as the cornerstone upon which subsequent analyses are based.

Within the confines of this section, the primary focus is on the *legal construction* of the internal market, as this review must be used to extract the core principles of the internal market. This entails a comprehension of the legal concepts that underlie the internal markets development as outlined in the historical context presented earlier. By enhancing the understanding of the internal market and its legal framework, we not only bolster our capacity to scrutinize it more profoundly but also bolster our ability to grasp the intricacies of the EU climate regime as presented in Chapter 4. Furthermore, this groundwork proves invaluable to the analysis of the deeper layers of the multi-layered phenomenon underpinning this complex landscape as explored in Chapter 5 and Chapter 6.

3.3.2.1 Negative and Positive Integration

The internal market is central to the EU and is still its principal economic rationale.[230] Thus it consists of two types of techniques of economic integration that contribute to the economic dimension of the internal market—namely, *negative integration,* and *positive integration*, also

[230] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press p. 641.

called *market integration,* and *policy integration*.[231] These two techniques represent an economic but also a social dimension to the internal market, which must be a reference point for the understanding of the norms that they influences. Negative integration and positive integration describe the different aspects of the EU's efforts to create an internal market in order to harmonize the laws of its Member States. The EU Treaties are, in principle, the documents relevant to the establishment of the internal market, which include its definition and operation, but they can seem like an unsystematic list of treaty provisions. Therefore, this division between negative integration and positive integration helps to understand the systematization of the mechanisms that regulates and establishes the internal market.

Accordingly, these two concepts determine the structure of the internal market, as they bring different mechanism to the table in the creation of the internal market. Positive integration often deals with positive values of social protection and correction of market failures. Negative integration is better for dealing with social dumping and economic interests. Thus, this view of negative and positive integration is relevant in the further review of the internal market, but also the following analyses in Chapter 4 about the EU climate regime and Chapter 5 about the legal structure of the legal norm systems of the EU climate regime and the internal market.

Negative integration was pushed forward by the Court's interpretation of the rules requiring Member States to abstain from interfering with free trade and free movement where national measures, prohibitions and restrictions can be prohibited, as they have a detrimental effect on the internal market.[232] The negative integration is primarily achieved through the establishment of the four fundamental freedoms. Therefore, as an example of free movement, the provision of free movement of goods must ensure that goods can move freely within the EU holding the consequence that those goods most favoured by consumers will be more successful irrespective to the country of origin and thereby maximizing wealth creation in the EU. [233] In this connection, the aim is to allocate the optimum of resources for the EU.[234]

[231] Craig, P. & De Búrca, G. (Gráinne) (eds.) (2021) *The evolution of EU law*. (3. ed.). Oxford University Press, p. 225.
[232] Craig, P. & De Búrca, G. (Gráinne) (eds.) (2021) *The evolution of EU law*. (3.ed.). Oxford University Press, p. 225.
[233] TFEU Article 34. Also see Chapter 5, section 5.5.3, which relate to the free movement of goods and the climate considerations that can legitimize a member state's measure.
[234] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press p. 642.

Positive integration in the internal market is also necessary in order to sustain the internal market, as it can relate to matters of health, safety, technical specification, and consumer protection.[235] Here, EU action is authorized to promote the accomplishment of the internal market. Positive integration involves the creation of EU-level laws and institutions to harmonize and coordinate national laws in specific policy areas, facilitating the development of a unified legal framework across the EU (positive harmonization). EU environmental policies are examples of positive integration, as, in this connection, the EU is describing a model rather than dismantling national barriers to trade or creating obstacles to competition. Hence, this might also be the case in regard to the EU climate regime.

Positive integration is not considered as thorough as negative integration in EU law. This is because the treaty fits better in relation to the development of negative measures. Nonetheless, today, the Court frequently references positive integration when applied to a specific legal area through regulations or directives, with the support of primacy and direct effect to ensure its effectiveness.[236]

This way of categorizing the norms of EU law may be relevant to the interaction or the frictions between the internal market and the EU climate regime that the thesis wishes to investigate. This must be understood in the light of the internal market's norm justification in relation to the EU climate regime. As an example of the negative integration in EU law and its relationship to social policy, Reich et al. (2015) writes as follows:

> Many authors have criticized the "one-sided", mostly liberal structure of the EU which is more concerned with "market access" than with social protection, e.g. of workers and consumers. The emphasis of EU law in general and the case law of the ECJ is on "fundamental freedoms" – free movement of goods, persons, services, capital […] – leaving social policy objectives of Member States to a more limited area of autonomous decision making due to the working of the proportionality principle. This prevalence of "negative integration", which began with the *Cassis de Dijon* case law […], cannot be counteracted by legislative

[235] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press p. 642.
[236] Craig, P. & De Búrca, G. (Gráinne) (eds.) (2021) *The evolution of EU law*. (3. ed.). Oxford University Press, p. 225.

> measures of the EU because it has only limited competences in the area of social policy (Art. 153 TFEU).[237]

Accordingly, this statement concerns the social policy in the Union. However, the issue might be the same for the climate considerations under EU law. Further, de Sadeleer (2014) addresses that the environmental measures (positive integration) can be in conflict with the freedom of movement:

> At the same time, the process of economic integration which, since the inception of the EU, has been on the principles of free trade within the common market, later renamed the internal market, has been gathering momentum. Given the different product regulatory approaches being developed across the EU, there has been fear of the emergence of new barriers to free trade. For some, a neo-protectionist policy underlies national and regional measures regulating products and services for the protection of the environment through limiting the placing on the market or the use of hazardous products and substances could constitute a plausible motive for reinforcing the competitiveness of national undertakings. Moreover, disparities in the stringency of national environmental regulations frequently lead to demands for protection against 'unfair' competition.
>
> Additionally, such a strategy can become all the more insidious with the use of measures that make no distinction between domestic and imported goods. Should such domestic rules be swept aside by the free movement of goods and services, considered by the Court of Justice as 'one of the fundamental principles of the Treaty' and by most academic authors as a major component of the European integration process? Given that the Treaty provisions of free movement have to be constructed broadly, are the Courts called upon to interpret narrowly those environmental measures caught by the TFEU provisions on free movement of goods and services?[238]

As stated by de Sadeleer (2014) a more detailed question concerning the relationship between the environmental norms and the norms for the internal market thus already appears as part of the economic integration of the internal market. Therefore, this must also be considered as a link in the relationship between the climate norms and the internal market.[239] Hence, this statement is

[237] Fundamental freedoms are free movement of goods, persons, services and capital. Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. p. 16.
[238] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 230.
[239] See Chapter 4, section 4.4 on the development of the EU climate regime and Chapter 1, section 1.2.3.1 relationship between EU environmental law and the EU climate law.

also relevant to consider in regard to the thesis' research aim to uncover the frictions between the two legal norm system of the internal market and the EU climate regime.[240] However, negative and positive integration (harmonization) is not the focal point of the thesis.

3.3.2.2 Direct Effect

Another aspect of the construction of the internal market is *direct effect*. Direct effect is a concept in EU law, which is mainly used in situations of parallel application of two or more legal systems. Direct effect allows certain provisions of EU legislation to be directly applicable and enforceable by individuals in national courts. Hence, the concept is said to enhance the effectiveness of EU law, as it gives individuals rights and contributes to the integration of EU. Furthermore, these rights can manifest in two ways—*vertical direct effect*, which pertains to individuals' relations with states, and *horizontal direct effect*, which deals with individuals' interactions with each other. The latter entails that EU law can have a direct influence on the legal relationship between private parties.

Direct effect is thereby recognized as a concept and principle that must increase the effectiveness of EU legislation (in relation to the Member States and their citizens) and, thus, also the effectiveness of the internal market principles. Consequently, direct effect has become both a constituent element of the *EU acquis* and part of the law which observance the Court has to ensure. In the case of *Van Gen en Loos*[241] (1963), it was only the effects of primary Community law that were of concern. However, later on, it also became a matter for cases concerning secondary law. In the judgment of *Van Duyn*[242] (1974) three different principles were developed to allow for direct effect of EU legal acts. The three different principles are also called the functional approach.[243] These principles are:

1. In establishing rights and obligations, is the Union instrument sufficiently clear and precise?

2. Are these rights and obligations self-executive, that is unconditional?

[240] See the analysis of Chapter 5.
[241] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.
[242] Case 41/74 *Van Duyn n Home Office* [1974] ECLI:EU:C:1974:133.
[243] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. pp. 26-27.

> 3. Are these rights invoked and obligations imposed vertically against the state (in a broad sense) or also horizontally against private individuals?

Direct effect is contingent not on the formal classification of a legal act but on the satisfaction of these three essential functional criteria, which must be met consistently in each case. The direct effect of EU primary law is twofold in the liberal system of the internal market—to protect freedoms and autonomy and to contribute to the opening of markets.[244]

However, this direct effect of provisions and freedoms on a liberal market does not exclude them from being granted in a limited manner or even be subject to restrictions. Such restrictions can be found in public policy protection or in protection of certain societal interests such as culture, environment, consumer interests and social policy. Thus, it is recognized that the internal market only functions with respect to standards as well as rules on accountability and responsibility.[245]

The analysis within the thesis does not directly engage with the concept of direct effect. However, it remains pertinent to acknowledge that direct effect holds significant implications for the normative structure under consideration as well as the potential conflicts expounded upon in Chapter 5.

3.3.2.3 Proportionality in the Internal Market

In TEU Article 5, it is stated:

> 1. The limits of Union competences are governed by the principle of conferral. **The use of Union competences is governed by the principles** of subsidiarity **and proportionality**.
>
> […]
>
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
>
> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.[246]

[244] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU Internal Market Law*. NBN International, p. 28.
[245] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU Internal Market Law*. NBN International, p. 28.
[246] TEU Article 5(1)(4). Author's own emphasis added.

The principle of proportionality is thus a fundamental principle of EU law. The principle require EU to ensure that general provisions and objectives are complied with, including the requirement to maintain applicable law in full and to preserve the balance between the institutions.[247] It thus applies that the adopted measures must follow a legitimate aim or purpose, and it must be weighed how the benefits of measures are compared to the costs that they will entail. In addition, the measures must not be more intrusive than necessary.

The principle of proportionality is also fundamental for the Member States to ensure that their measures are suitable to achieve the desired outcome.[248] Hence, the measures that the Member States adopt must be proportionate to their intended objectives. Furthermore, there have been serval cases dealing with proportionality and Member States actions in regard to free movement.[249]

The principle of proportionality ensures that EU legislation and policies (TEU Article 5) as well as Member States' national measures do not unnecessarily restrict the rights and freedoms of individuals or companies as part of *free movement*. Under these circumstances, a balance is made as to whether the restrictions are significant and thus acceptable.

Accordingly, the principle of proportionality is an essential principle in the implementation of EU policies for the internal market but also according to the EU climate regime. Therefore, it is relevant that the legislator follows the principle of proportionality when implementing climate measures. This applies both to the EU legal measures that are introduced[250] but also to national measures in the individual Member States.[251]

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[247] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 583.
[248] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 583.
[249] For example, the famous Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42, as presented later in this Chapter. See also Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 589.
[250] Preamble no. 40 in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') states that: *Climate change is by definition a trans-boundary challenge and coordinated action at Union level is needed to effectively supplement and reinforce national policies. Since the objective of this Regulation, namely to achieve climate neutrality in the Union by 2050, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.* ***In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective****, […].* Authors won emphasis added.
[251] In the case *Società Italiana Petroli* it was determined that the principle of proportionality does not apply when Member States choose a higher level of protection than required by EU rules that imply minimum harmonization. Case C-2/97 *Società Italiana Petroli* [1998] ECLI:EU:C:1998:613.

The principle of proportionality must always be taken into account when introducing the goals and means that the legislator makes, which is why it is also an important consideration in the legal norm systems that makes up the internal market and the EU climate regime.

3.3.2.4 Effectiveness and Transparency in the Internal Market

The principle of transparency is a general principle in EU law that is important for the structure of all areas of EU law, including the internal market. The principle contains several different functions such as the holding of public meetings, the provision of information and the right to access documents.[252] The principle itself has been through a long journey towards its current state in EU law.[253] However, it has been made into a principle that is general for the Court.[254]

The principle is used as a justification by the Court under the principle of free movement. It is thus based on the fact that there is an important relationship in the interaction with transparency and effective compliance in the EU. Transparency holds significance for Member States concerning free movement, as the articles pertaining to the transparency principle impose an obligation of equal treatment, thereby establishing a corresponding obligation of transparency.[255]

The principle of effectiveness in EU law is intrinsically linked with the principle of transparency, and it extends to encompass another crucial dimension in the internal market. It serves as the linchpin for ensuring that EU legislation and policies attain their intended objectives as set out in the Treaties, ultimately leading to the desired outcomes of the legislation and policies.

Hence, efficiency and transparency stand as fundamental characteristics within the internal market and its legal system. These principles are equally essential when considering environmental legislation and its integration into EU law. They play a pivotal role in fostering the success of climate change measures and in harmonizing climate objectives with the broader goals of the internal market.

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[252] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 600.
[253] See a short review of the development of the principle in Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 600.
[254] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 608.
[255] See Case C-260/04 *Commission v Italy* [2007] ECLI:EU:C:2007:508; Case C-203/08 *Sporting Exhange Ltd v Minister van Justice* [2010] ECLI:EU:C:2010:307; Case T-402/06 *Spain v Commission* [2013] ECLI:EU:T:2013:445. See, Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 601.

3.3.2.5 The Internal Market and International Law

The EU has exclusive competence to enter into international agreements when a conclusion is based on a legislative EU act or when it is necessary to allow the EU to exercise its competence at an internal level, to the extent that it may affect common rules or to the extent that it may change the rang of matters falling within the EU's exclusive competence. This ensures a coherent and unified approach in the external representation of the EU and safeguarding the integrity of its internal legal order.

In addition, there is a dispute as to whether these agreements have direct effect. In short, there are theorists who consider the agreements to have direct effect the moment they are ratified, while other theorists require national implementation for them to have direct effect towards individuals.[256] In this case, the EU court has developed its own criteria that are based on already existing criteria known to EU law. In the case *Meryem Demirel* (1987) [257] the Court recognized the direct effect of certain agreements in accordance with the same criteria identified in the case of *Van Gend en Loos* (1963).[258] Accordingly, international agreements must be precise and unconditional enough to allow rights for individuals.

It must also be emphasized that some of the international agreements may have significance for the internal market when they are ratified in the EU. Thus, it is also of great importance under the EU climate regime in which the EU—with the ratification of the climate agreements, the UNFCCC and subsequent agreements—has made it its goal to be the first mover in this context. [259] Thus, it is clear that objectives that are defined in, for example, the Paris Agreement are directly important for the political objectives of the EU. Below this, sectors in EU will experience being affected by the targets of the international conventions and agreements in the form of new regulations and initiatives at EU level, see more about this in Chapter 4 about the EU climate regime.

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[256] See more about the direct effect of international agreements in Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International. pp. 37-38.

[257] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*. [1987] ECLI:EU:C:1987:400.

[258] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1 In this ruling, the Court affirms that European law imposes obligations on EU Member States while simultaneously conferring rights upon individuals. Consequently, individuals have the prerogative to exercise these rights and directly invoke European regulations before both national and European judicial bodies. Importantly, it is not a prerequisite for the EU Member States to formally incorporate the specific European regulation into their internal legal systems.

[259] See more about the interface between international climate law and EU climate law in Chapter 4, section 4.3.

Finally, this will also implicitly enable predictions to be made about the impact of the internal market. Whether these agreements have a direct impact on the provisions of the EU Treaties is still unclear, as the derivative effect of the agreements may have an impact on the objectives of the internal market as set out in the EU treaties.[260]

3.3.3 Summing Up on the Legal Construction

As delineated in this chapter, the formulation of the internal market is predominantly rooted in diverse EU legal concepts and the overarching principles of EU law. These elements play a pivotal role in shaping the normative framework that underpins the legal norm system of the internal market. It is imperative, however, to contextualize these principles within the deeper layers of the law in order to glean a full understanding. This is explored further in Chapters 5 and 6 in regard to the deeper layers of the law. This exploration serves to elucidate not only the critical components that define the eligibility criteria of the internal market within the ambit of EU law but also their intricate interplay with the broader legal landscape—hence, the EU climate regime. Therefore, this succinct overview seeks to elucidate the key factors that are instrumental in comprehending the rationale behind the internal market in EU law. In the subsequent section, this comprehension forms the bedrock for the analysis of the fundamental principles underpinning the internal market.

3.4 The Principles of the Internal Market

As explored in the previous section, the internal market represents a principle-oriented system rather than a rule-oriented system. Within this context, these principle-oriented concepts have evolved into legally binding rules, primarily through the development of secondary legislation and judicial precedent.[261] Thus, the Court might have gone beyond traditional methods of interpretation when applying EU law.[262] The Court has, in practice, elevated certain provisions and unwritten norms into more broad principles.

[260] See the analysis of Chapter 5.
[261] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 12.
[262] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 46.

This transformation is particularly noteworthy, as it reflects the dynamic nature of EU law with the Court actively shaping and expanding legal norms based on evolving societal and economic realities. Consequently, the Court's approach extends beyond mere textual interpretation. Instead, it involves the progressive development of these principles into overarching legal standards. This shift has broad implications for the legal landscape within the internal market, which accentuates the need for a comprehensive examination of how these principles interact with the evolving EU climate regime, which is the central focus of the analysis of the thesis.[263]

The principles of the internal market ought first to be described in regard to their development over the course of the era of the Union (see section 3.3). However, today, the internal market consists of various aspects that, in harmony, form the basis of the internal market and the fundamental principles of EU law (see section 3.3.2). Some of these aspects are based on liberal principles of an open market and efficient and effective competition (see excerpt of Reich et al. (2015) below).[264] Furthermore, the last principle in the foundation of the internal market is the principle of fundamental rights, which is further analyzed in Chapter 6. Overall, these principles are complementary and dependent on the internal market of the EU.

The term *internal market* itself is largely associated with economic structures.[265] Reich et al. (2015) formulate the concept as follows:

> The concept of the "internal market" is of course mostly related to economic structures and performances, where the liberal elements of EU law are most clearly visible. This is especially true with regard to the basic objectives of *open markets* guaranteed to "economic citizens" […], and of effective and efficient *competition*. This is to achieved in two main ways. Firstly, by the free movement of goods, persons, services and capital […], secondly, by approximation of legislation and by system where competition is not distorted. Union law is at its strongest and clearest where it follows this objective. It enters deeply into the entire yet different legal, administrative and judicial regimes of Member countries […].[266]

[263] This analysis is carried out in Chapters 5 and 6.
[264] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International.
[265] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 11.
[266] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 11.

Hence, the liberalization of the internal market contributes to the understanding of the legal norm system. However, the definition of liberalization is necessary, as it is not a particular part of legal language or scholarship even though it is present in EU law.[267] Dunne (2018) highlights the concept of liberalization as a concept that can be used with two understandings:

> […] [the concept can be described] both as a technical term describing policies and processes of market reorganization and, with a market normative dimension, reflecting views on the optimal operation of markets and society outside.[268]

Liberalization is referenced in the EU Treaties but principally in the context of free movement and with mention of uniformity in measures of liberalization under the common commercial policy in TFEU article 207(1).[269] This provision refers to TFEU Article 3, which establishes competence for the Union to set rules for competition that are necessary for them to function in the internal market.[270] This means that free movement and competition rules are central to the liberalization of the internal market.[271]

Furthermore, in Dunne (2018), it is explored how the normative perspective of liberalization is part of the shaping of the internal market.[272] In relation to liberalization, efficiency, growth and prosperity, it is addressed that the model for market opening cannot be treated in a one-size-fits-

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[267] See Dunne, N. (2018). "Liberalisation and the pursuit of the internal market" in *European Law Review.* E.L. Rev. 43(6), 803-836.

[268] See Dunne, N. (2018) "Liberalisation and the pursuit of the internal market" in *European Law Review*, E.L. Rev. 2018, 43(6), 803-836, p. 805. The concept of liberalization is examined in more detail in the article in relation to what it contains in the presence in the EU Law (primary law).

[269] TFEU Article 207(1). Authors own emphasis added: *The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of* ***uniformity in measures of liberalisation****, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.* See also for reference to liberalization in the provisions on free movement of workers TFEU Article 46(b), free movement of services TFEU Articles 58-60, and free movement of capital TFEU Article 64(3).

[270] There is shared competence between the EU and the Member States in areas stated in TFEU Article 4(2). Hereto, there is shared competence between EU and the Member States on the internal market (Article 4(2)(a)) and on the area of environment (TFEU Article 4(2)(e)).

[271] See Dunne, Niamh (2018) "Liberalisation and the pursuit of the internal market" in *European Law Review*, E.L. Rev. 2018, 43(6), 803-836, p. 808.

[272] Dunne (2018) highlights in this context that: […] *Normative perspectives on liberalisation are important because they help us to understand, in more socially meaningful terms, what an ostensibly successful outcome would entail—thus better enabling us to determine whether, indeed, pursuit of liberalisation is defensible.* […] See Dunne, Niamh (2018) "Liberalisation and the pursuit of the internal market" in *European Law Review*, E.L. Rev. 2018, 43(6), 803-836, p. 818.

all model. To this, it is noted that there are indications that liberalization is carried out from a common market perspective—which, in fact, can be seen through the Court's work.[273] This means that, in some cases, less effective measures are allowed. These permits can also be found explicitly in the Treaty such as in TFEU Article 36, which is reviewed in Chapter 5, section 5.3.3. Thus, it is clear that, in some cases, there is need for a consideration of the social aspect in the efficiency perspective. In this regard, Dunne (2018) notes:

> […] Yet social considerations remain largely outside the purview of the internal market: viewed with skepticism, they are treated as derogations which are the responsibility of the Member States to defend and protect. Such an approach, both as a matter of principle and practice, distorts our understanding of what a social market economy entails, fueling the more normatively charged, problematic perspectives on liberalized markets […].[274]

The social considerations of the internal market must be considered in the establishment of the internal market as a means to drive growth and to increase the overall welfare both in the individual Member States and across the EU. Thus, the social aspect of the internal market must be of importance in its establishment and functioning. At the same time, this approach to social considerations for the internal market can also lead to an awareness for the environment, including climate change. This awareness, as with the social considerations, are not covered by the classic economic structure of the internal market but are, nevertheless, considered part of the internal market in the form of normative considerations. This is further elaborated in Chapter 5, section 5.3.

The economic structure as a central function of the internal market is thus listed in TEU Article 3(3) as a goal or, potentially, a logical consequence of the internal market. However, in this designation, there is also an opening for considerations that lie outside this economic structure. The provision stipulates that the EU should follow the path leading to a highly competitive social market economy when establishing the internal market:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a **highly competitive social market economy**, aiming at full employment and social progress, and a high level

[273] Dunne, N. (2018) "Liberalisation and the pursuit of the internal market" in *European Law Review*, E.L. Rev. 2018, 43(6), 803-836, p. 819.
[274] Dunne, N. (2018) "Liberalisation and the pursuit of the internal market" in *European Law Review*, E.L. Rev. 2018, 43(6), 803-836, p. 836.

> of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.[275]

From this, it should be clear that the internal market as a concept is perceived with a view to economic structures but that, at the same time, there are considerations that go beyond economic considerations, which can be seen in parts of the Treaty and in the Court's practices. These considerations are thus important contributions to the legal norm system that makes up the internal market.

With a brief overview of the internal market as a concept, the next section delves into the aspects that make up the internal market, including the principles that reflect the relationship between the internal market as an economically based concept and the inefficient deviations that are seen in, among other things, environmental considerations.

3.4.1 TEU Article 3(3): the Establishment of the Internal Market

This section will briefly review the treaty provision on the establishment of the internal market found in TEU Article 3(3), which elements have helped in shaping the norms of the internal market.

Firstly, TEU Article 3 contains general provisions on the objectives of the Union. The provisions show the direction and the frames for the Union's activities, and they are decisive guides for interpreting the TEU.[276] The provisions determine the political discretion of the Union institutions within the limits of their competences.[277] If it turns out that they, in a specific case, are found to be in conflict with each other, none of the aims are given primacy *ab initio*.[278] Thus, it is the activities of the Union in such a case that are to be evaluated by taking into consideration all the

[275] TEU Articel 3(3).
[276] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 18.
[277] Case 141/78 *France v United Kingdom* [1979] ECLI:EU:C:1979:225.
[278] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 18.

relevant aims. Hence, it is the activities' direction and limits that are being considered.[279] Usually, this will give the acting institution a wide margin of direction.[280]

The objectives outlined in TEU Article 3 do not possess an autonomous role within EU law. According to the Court, these objectives essentially serve as a programme with the actual realization of these objectives being accomplished through the policies and actions of both the European Union and its Member States.[281] The Court has entrusted the pursuit of the objectives of TEU Article 3 to a range of foundational provisions. These include provisions governing the free movement of goods, services, capital, and people, the concept of Union citizenship, the realm of freedom, security, and justice, as well as competition policy.[282]

While the primary focus is on the internal market, a brief examination of the establishment of the internal market is given below. In TFEU Article 26(2) the legal definition of the internal market is provided.[283] While, the establishment of the internal market is stated in TEU Article 3(3):

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on **balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress**, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. […].[284]

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[279] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 18.

[280] Case 9/56 *Meroni* [1958] ECLI:EU:C:1958:7. and Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 18. Further, see in the same context what the authors highlight: "*The aims (objectives) of the Union had a very important practical relevance as a precondition for admitting activities not specifically provided for in the Treaty in the years before the competences for accompanying policies (e.g. environmental policy) had explicitly become provided for by the Single European Act and the Maastricht Treaty (1992). At the time, the Community could rely on (then) Article 235 TEEC (which has now been converted into Article 352 TFEU) as a substitute legal basis for legislating in areas where only tasks were given, but competences were lacking. For example directives in the spheres of environmental law or concerning equal treatment of men and women could be founded on this substitute. The provision has lost its great significance after the Treaties had been equipped with specific competence norms in such collateral fields.*"

[281] Case C-149/96, *Portugal v Council* [1999] EU:C:1999:574, para 86.

[282] See Opinion 2/13 of the Court, *Accession to the European Convention of Human Rights (ECHR II)*, EU:C:2014:2454, para 172.

[283] TFEU Article 26(2). The internal market is "[…] *an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."* See the examination on the provision in section 3.4.2.

[284] TEU Article 3(3).

In this way, Geiger et al. (2015) emphasize that the establishment of the internal market is based on the economic policy that is a cornerstone of the Union (see also the previous section on the economic structure of the internal market):

> The cornerstones of the 'magic square' of economic policy (price stability, adequate balance of payments, full employment and economic growth) can already be found in the aims of a 'balanced economic growth, price stability and a highly competitive social market economy, aiming at full employment and social progress.' However, due to a negative view in France, there is no reference to a free and undistorted competition within the internal market itself, as it had been expressed in the draft European Constitution Treaty. But this cannot be really considered a gap because Protocol (No 27) 'on the internal market and competition' annexed to the Treaty points out that the internal market, as described in Article 3 TEU includes a system ensuring that competition is not distorted, and that the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 TFEU. **The aim concerning the internal market is supplemented by the objectives of securing a high level of protection of the environment and the improvement of its quality and by promoting scientific and technological advance**.[285]

Thus, the economic policy, which the internal market is based on, is supplemented with the objective to ensure the environment. Hence, it is stated in TEU Article 3(3) that the Union shall establish an internal market and that it has to work for sustainable development based on a high level of protection and improvement of the quality of the environment:

> […] the **sustainable development** of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, **and a high level of protection and improvement of the quality of the environment**. **It shall promote scientific and technological advance**.[286]

With this in mind, the establishment of the internal market surrounds, especially, the economic interests of the internal market, which must be understood from this formulation. However, it is also clear that there are other goals for the internal market such as environmental protection.[287] This has also been emphasized in the previous section (3.4) on the economic structure of the

[285] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 19. Author's own emphasis added.
[286] TEU Article 3(3). Author's own emphasis added.
[287] See also Jordan, A. & Gravey, V. (eds.). (2021). *Environmental Policy in the EU: Actors, Institutions and Processes*. (4. ed.). Routledge, p. 41.

internal market. Here, it was found that other considerations, such as social considerations, contrast with the economic interests of the internal market, which also applies to environmental considerations.

With a focus on environmental protection and other climate considerations herein, the ensuing section expounds upon this perspective in accordance with TEU Article 3(3). As per this provision, the Union has committed itself to work actively towards sustainable development, which is exemplified in its maintenance of a high level of environmental protection. Hence, TEU Article 3(3) underscores the Union's obligation to integrate environmental considerations into its policies and actions. It emphasizes the importance of advancing sustainability, including a pivotal aspect of environmental protection. This principle forms the basis for the Union's endeavours to formulate policies and initiatives that not only foster economic growth but also ensure environmental integrity and the protection of the climate. Consequently, the forthcoming section explores sustainable development as formulated in TEU Article 3(3).

3.4.1.1 The Internal Market Working for Sustainable Development

Sustainable development is found as one of the goals of the Brundtland Commission's report.[288] Here, it is stated that sustainable development is a development that aims to meet the needs of the present without compromising the ability of future generations to meet their own needs.[289] It has become a focal point in the global sphere to approach the issues connected with the environment as well as social and economic aspects of developmental processes.[290]

Additionally, sustainable development is mentioned in the EU Treaties as a basic objective of the EU. In TEU Article 3(3), sustainable development is mentioned in connection to the establishment of the internal market; in TEU Article 21(2)(d),[291] it is mentioned in connection to the external actions of the Union; in TFEU Article 11, it is mentioned in connection to setting out the environmental integration principle; and, in the Charter Article 37, sustainable development as part of

[288] Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/427.
[289] "Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/42, p. 43.
[290] Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/42.
[291] TEU Article 21(2)(d) about the EU external policy: "*foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.*"

environmental protection in the Union. However, none of these primary provisions contain any legal definition on sustainable development.

In Kenig-Witkowska (2017)[292], the concept's definition is elaborated on:

> Attempts to determine the legal status of the concept of sustainable development appeared mainly in the doctrine of international law almost immediately after the announcement of the WCED Report [the World Commission on Environment and Development[293]]. This discussion continues until today. Other disciplines of law, as well as representatives of other disciplines also have taken it up, such as political scientists, geographers, sociologists, or economists. Summarizing the results of the discussions by lawyers, theorists and practitioners, one can say that for the part of the doctrine it is still a political category, while others believe that we are now faced already with the principle of international law, and even the formation of a new branch of law - international law of sustainable development. As it seems, to put forward the thesis about the existence of the rule of law in this matter is not entirely legitimate. **Although the concept of sustainable development is still at the stage of formation of legal arguments for the doctrine of sustainable development, one can already see outlining the policy elements in practice, in the form of a general legal standard of intergenerational and intra-generational equity and integrated approach to development and the environment. From this perspective, the dominant concepts of sustainable development are the requirements of the environment.**[294]

Kenig-Witkowska (2017) wrote that the concept itself constituted a more normative element in the legal doctrine, but there was still a focus on, especially, environmental requirements as an elementary part of the concept. Another elaboration on sustainable development is given by Geiger et al. (2015) who elaborate on sustainable development in connection to TFEU Article 11:[295]

> The inclusion of the requirements of environmental protection shall particularly serve the promotion of sustainable development. The concept of sustainable development

[292] Kenig-Witkowska, M. M. (2017) "The Concept of Sustainable Development in the European Union Policy and Law" in *Journal of Comparative Urban Law and Policy*: Vol. 1 : Iss. 1 , Article 6.
[293] Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/42.
[294] Kenig-Witkowska, M. M. (2017) "The Concept of Sustainable Development in the European Union Policy and Law" in *Journal of Comparative Urban Law and Policy*: Vol. 1 : Iss. 1 , Article 6., pp. 64-65. Author's own emphasis added.
[295] TFEU Article 11 states that: "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to* ***promoting sustainable development.***" Author's own emphasis added.

> ('nachhaltige Entwicklung'/'développment durable') was postulated as an objective with worldwide validity for the first time by the United Nations Conference of Rio de Janeiro on Environment and Development in 1992. It will harmonise a steady development with the protection of natural resources for future generations. **The concept of sustainability is based on an integrative approach, assuming the possibility of a balance between ecological, economic, cultural and social interests**.[296]

Here it is emphasized that the concept is based on a balance between economic, social, cultural, and environmental interests. Thus, it must be stated, in its entirety, that sustainable development contains an element of an integration of economic, social and environmental considerations that must be balanced in their development.

To this, it must be addressed that sustainable development, as laid down in the Treaties, is a legally binding objective and commitment of the EU as confirmed in TFEU Article 352.[297] Furthermore, TEU Article 3(3)'s wording is closely related to the integration clause embodied in TFEU Article 11. Nonetheless, the absence of a clear delineation of sustainable development introduces a degree of uncertainty surrounding the concept, particularly because the two provisions, TEU Article 3(3) and TFEU Article 11, lack a direct linkage to the principle of integrity as articulated in the latter.[298] Lastly, there is no hierarchical dependence on the purposes of the provisions in the EU Treaties. Thus, it is also not clear which goals that the Union intends to pursue and in what order, which is why there must, in itself, be some legal uncertainty as to the consideration of environmental policy and the internal market.

Additionally, in the secondary legislation, sustainable development serves as a framework principle behind the goals of environmental protection, which is found in either specific legislation or has been integrated into other policies.

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[296] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 222. Authors own emphasis added. Also see in de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 14. Here, it is stated that sustainable development is made out of three considerations: *social, environmental and economic.*

[297] However, the goals do not have the same legal binding for the Member States, although it can be stated that the Member States of the EU must ensure that they facilitate and strive to achieve the Union's goals.

[298] Kenig-Witkowska, M. M. (2017) "The Concept of Sustainable Development in the European Union Policy and Law" in *Journal of Comparative Urban Law and Policy*: Vol. 1 : Iss. 1 , Article 6., p. 67.

3.4.2 TFEU Article 26

In addition to the objectives of the Union found in TEU Article 3 and the establishment of the internal market in TEU Article 3(3), the provision for the internal market's function can be found in TFEU Article 26. TFEU Article 26 sets out the framework for the establishment of the internal market as follows:

> 1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
>
> 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
>
> 3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

The legal effects stemming from TFEU Article 26 extend not only against the EU itself but also encompass the potential for legal consequences for the Member States. [299] This dual dimension highlights the complex nature of the provision and its implications on both the EU level and national levels within the EU legal framework. Thus, in relation to the EU, TFEU Article 26(1) establishes a set of legal obligations and principles that directly bind the Union.[300] The provision's language and intent suggest a framework through which the EU is compelled to adhere to specific rules or guidelines, thereby shaping its actions and decisions. The legal effects, in this regard, serve as a mechanism to ensure accountability and compliance within the EU's institutional and legal structure. Furthermore, the provision may also engender legal ramifications for the Member States. The language employed in TFEU Article 26 implies that the stipulations therein may have repercussions on how Member States conduct themselves or formulate their policies. This could manifest in the form of obligations imposed on Member States to align their domestic laws with the principles articulated in the provision. As a result, the legal effects falls down to influence the actions and legal landscape at both the EU and Member State levels.

[299] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, pp. 648-649.

[300] Thus, in the provision it is recognized that the establishment of the internal market is an ongoing process, as the wording was formulated in TFEU Article 26(1) from the prior provision EC Article 14 with the date 31 December 1992.

The legal definition of the internal market is set out in TFEU Article 26(2) and is stated in a two-part formulation:

> […] it was to be an area without internal frontiers **and** where the free movement is ensured.[301]

Hence, the provision of the internal market refers directly to free movement in the EU, but the rules and policies that seek to regulate an open market, such as the competition rules, also apply here. This means that the open market must, first and foremost, be the overriding principle on which the EU is based with free movement as the tangible element of what is meant by an open market. In the next section, it is considered more closely what the principle of free movement contains as well as its importance for the internal market.

3.4.3 The Principle of Free Movement

Free movement has been called the 'fundamental principle of the Community' by the Court.[302] The free movement is part of the idea of a single economic market that will reduce firms' cost of capital, generate higher risk-adjusted returns for investors and benefit EU economics through extensive growth and employment.[303] From this, it must be clear that, today, the principle of free movement is a well-developed element of the internal market. It is crucial to this analysis to assess what the concept of the principle in general consists of i.e., what values and principles that are at stake.

Free movement applies to both people, goods, services, and capital within the European Union. Hence, free movement of people allows citizens of EU Member States to live, work, and travel freely within the EU without being subjected to discrimination based on nationality. It also allows EU citizens to bring their family members with them when they move to another Member State. The free movement of goods allows goods to be traded freely within the EU without any customs duties or quantitative restrictions. Hence, any goods can be traded in any other Member State without any barriers or discrimination. Furthermore, the free movement of services allows any

[301] TFEU Article 26(2). Author's own emphasis added.
[302] Case 222/86 Unctef v Heylens [1987]. ECLI:EU:C:1987:442. Subsequently, this extends to a right ensuring the protection of the family (in conjunction with ECHR Article 8) cf. Case C-459/99 MRAX v Belgium [2002] ECLI:EU:C:2002:461, para 53, which is elaborated on in Chapter 6, section 6.3.2.1.
[303] Segre, Claudio. (1966) The development of a European capital market. Report of a Group of Experts appointed by the EEC Commission. November 1966. [EU Commission - Working Document].

services to be provided freely within the EU without any discrimination or barriers, and businesses can provide their services in other Member States without having to establish a physical presence in that country. At last, the free movement of capital allows capital to flow freely across the internal borders of the EU. This means that individuals and businesses can invest their money, buy and sell property, and transfer funds within the EU without any restrictions or barriers.

The treaty provision on free movement is directed to the Union as a whole. Together with the other treaty provisions, it constitutes a well-formulated basis for the free movement principles. The treaty provisions of free movement of goods are found in TFEU Articles 26 and 28-37. The provisions are divided into the following: prohibition of taxes with a similar effect to customs duty;[304] prohibition of measures having equivalent effect to quantitative restrictions;[305] exceptions to the prohibition of measures having equivalent effect to quantitative restrictions.[306] The free movement of capital is found in the provisions to TFEU Articles 63-66. The freedom of establishment and free provision of services are found in TFEU Articles 26 and 49-55 (right of establishment) and 56 to 62 (services) TFEU.

Free movement must of course have something to do with cross-border activities, which is why it does not relate to internal matters. Furthermore, external limitations on free movement necessitate justification, encompassing scrutiny of discriminatory measures or restrictions. Consequently, the Court has established a straightforward hierarchy of justifications to discern the relationship between legal norms and expectations. In this context, the normative stance asserts that free movement, broadly construed, should be construed as limitations that demand a restrictive shaping of corresponding expectations.[307]

This system, where the justification of the economic four freedoms is undertaken, has been drawn up and modified by the Court. This scheme contains namely: open discrimination that can only be justified in public policy and health (which is expressed in TFEU Articles 36, 52, 62, 65) which is monitored strictly by the Court; indirect discrimination and other forms of discrimination that can be justified in a general interest test, not including economic or administrative considerations. This monitoring is further elaborated on in regards to climate change and the free movement of

[304] TFEU Article 28(1) and Article 30.
[305] TFEU Article 34 and Article 35.
[306] TFEU Article 36.
[307] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 159.

goods in Chapter 5. In addition, any form of discrimination or restriction that fulfills the two previous points must still be justified in the proportionality principle, as it was laid down in the *Gebhard*[308] (1995) judgment.

The free movement principle is also part of negative integration (see the elaboration on EU integration in section 3.3.2.1), as economic interests are fundamental for its purpose and justifications. The case *Cassis de Dijon*[309] (1979) has played a significant role in promoting the free movement of goods within the EU and reducing barriers to trade.[310] It has also been part of shaping the approach to negative integration and the development of the internal market.

However, in the effort of achieving an internal market, the control of EU law over Member State restrictions on free movement cannot guarantee uniform or harmonized conditions.[311] The reason for this is that the free movement provisions are limited to economic activities. In terms of the free movement of goods, this has been defined in *Keck*[312] (1993) and is now part of the market access criteria.[313] For persons and services, it has been defined in the cross-border element. However, internal situations are not caught by primary law, and this can create reverse discrimination that can undermine the unity of the internal market.[314] Furthermore, the exceptions to free movement also have to be assessed on a case-by-case basis.

Finally, the Union must also ensure that there are generous liberal rights to free movement. However, these must, at the same time, ensure that sufficient standards are established for production and marketing. In addition, Member States' national rules can vary significantly in this area, which

[308] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:411.
[309] Case 120/78 *Rewe-Zentral* (‘*Cassis de Dijon’)* [1979] ECLI:EU:C:1979:42.
[310] See more in the next section 3.4.3.1 on Free movement of goods.
[311] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 199.
[312] Case C-267/91 *Keck and Mithouard* [1993] ECLI:EU:C:1993:905.
[313] The Case C-267/91 *Keck and Mithouard* [1993] ECLI:EU:C:1993:905 case is linked to the "market access criteria," which delineated specific types of national regulations exempt from rigorous scrutiny under the free movement rules. If a national measure is categorized as a selling arrangement and does not discriminate against products from other Member States or unduly impede their market access, it might be deemed in compliance with EU law.
[314] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 199.

is why this can create conflict and thus create further obstacles to free movement that complicate the preventive effect.[315]

From this, it is clear that the promotion of an open market—hence, the internal market—is founded on the pillar of free movement. The development of the norms has contributed to a rather exclusive and comprehensive market for goods, services, people and capital. The principle may be found to be a fundamental building block of the EU both due to the historic development of the EU but also due to the benefits of being an open market.[316]

As mentioned above, the fundamental freedoms are the *acquis* of the EU. This also implies that they are found in the deeper layers of the law in the multi-layered phenomenon, as they make up the foundation for the internal market and are part of its historic development, this will be elaborated on in Chapter 5. However, as described throughout this section, it is a principle that has sedimented through the layers, as the development of, especially, the Court has contributed to the principle of free movement. Thus, it must be established that the internal market surrounds free movement, as there are no internal frontiers. Accordingly, free movement must be a fundamental principle of the internal market. In this line, the next section uncovers what free movement of *goods* in the internal market entails. (See Chapter 1, section 1.4.1, for the delimitations of the thesis).

3.4.3.1 Free Movement of Goods

The concept of free movement of goods in the internal market has evolved. Today, it must be said that it is reasonable to determine what the concept entails—at least when it comes to the physical and tangible elements of free movement.

The first preliminary ruling concerning the free movement of goods was *Van Gend en Loos*[317] (1963). Here, it was an obvious duty that was imposed at a border crossing as part of an obvious physical obstacle.[318] In addition, discriminatory practices were also addressed. The case made it clear that, by offering subsidies for the purchase of agricultural machinery, it was not the quality

[315] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, polluter pays principle. 199-200.
[316] See more in Chapter 6, section 6.2.
[317] Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1
[318] Reich, N., Nordhausen Scholes, A., & Scholes, J. (2015). *Understanding EU internal market law*. NBN International, p. 158.

that was decisive for the purchasing decisions but the origins of the goods, which is why the locally produced machinery was pre-diversified, which, in its essence, was contrary to the principle of free movement.

The prohibitions that concern free movement of goods are: TFEU Article 30 on costumer duties and charges having equivalent effect; TFEU Articles 34 and 35 on quantitative restrictions and measures having equivalent effect on imports and exports; TFEU Article 110 on discriminatory and protective taxation. However, it is only the prohibition of TFEU Article 34 is considered in this thesis.[319] The wording of TFEU Article 34 is as follows:

> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.[320]

Quantitative restrictions have been defined broadly in the judgment of *Geddo*[321] (1973), as 'measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit.'[322] Furthermore, the case law on prohibitions of 'measures having equivalent effect to quantitative restrictions' commenced with the Court's judgment in *Dassonville*[323] (1974). Here, it was stated in the judgment on paragraph five:

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[324]

Hence, the Court emphasizes that to establish the equivalence of measures to quantitative restrictions, it is essential to closely examine and evaluate the practical consequences or outcomes of these measures. In other words, the effects of the measures on market access or trade activities are central to determining whether they should be considered as having equivalent effects to quantitative restrictions. Thus, a discriminatory element is not essential. Accordingly, the Court has a rather broad view of measures that hinder the free flow of goods.[325]

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[319] See Chapter 1, section 1.4.1 on the delimitations of the thesis.
[320] TFEU Article 34.
[321] Case 2/73 *Geddo v Ente Nazionale Risi* [1973] ECLI:EU:C:1973:89.
[322] Case 2/73 *Geddo v Ente Nazionale Risi* [1973] ECLI:EU:C:1973:89, para. 3.
[323] Case 8/74 *Dassonville* [1974] ECLI:EU:C: 1974:82.
[324] Case 8/74 *Dassonville* [1974] ECLI:EU:C: 1974:82, para. 5.
[325] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 702.

As the Court did not answer how restrictions could be justified in the judgment of *Dassonville*[326] (1974), this was later answered in the judgment of *Cassis de Dijon*[327] (1979). Thus, the judgment affirmed and developed from the *Dassonville* judgment, as it affirmed in paragraph 5 of the judgment that TFEU Article 34 could apply to national rules that did not discriminate against imported products, but which inhibited trade because they were different from the trade rules in the country of origin.[328] Thus, the assumption was that a good that was sold in one Member State should also be legal to sell in another Member State without restrictions. This was unless the importing state could invoke a mandatory requirement, and, for this, the principle of mutual recognition was put forward by the Court in the case of *Cassis de Dijon*.[329] In addition, the Court also made it clear that a Member State could take reasonable measures that could prevent unfair trading practices if the area was not harmonized:

> […] obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy **mandatory requirements** relating in particular to the **effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer**.[330]

Accordingly, the four matters (highlighted in the paragraph) could prevent that a trade rule inhibited free movement of goods from being caught by TFEU Article 34. Hence, these were the mandatory requirements, and this list was not exhaustive.[331] In Chapter 5, section 5.3, the legitimate considerations in TFEU Article 36 and the mandatory requirements are reviewed with a focus on climate considerations in the EU.

Therefore, the free movement of goods is a fundamental principle within the internal market's legal norm system. The Court has played a central role in both establishing and delineating the

[326] Case 8/74 *Dassonville* [1974] ECLI:EU:C:1974:82.
[327] Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECLI:EU:C: 1979:42.
[328] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 710.
[329] As stated in Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42, para. 14: *"[...] there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules."*
[330] Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42, para. 8. Author's own emphasis added.
[331] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 710.

contours of this principle, notably through its interpretation of Article 34 TFEU and by defining the legitimate measures that Member States can take while imposing restrictions on free movement.[332] This principle is not only embedded in the surface layer of the legal norm system of the internal market, but also warrants a more detailed exploration in the subsequent parts of this thesis.

Moreover, it becomes imperative to examine how this principle works in the context of climate change and its connection with sustainable development. The upcoming parts of the thesis (Part III and Part IV) will delve into the nuanced aspects of this interaction, given the intricate balance required to promote both the free movement of goods and sustainability development.

In addition, a crucial aspect to be addressed is the potential friction arising from the EU climate regime, where climate targets can conceivably impose restrictions on the free movement of goods. Chapter 5 will provide an in-depth discussion of this intersection, highlighting the potential challenges and considerations that arise when the principles of the internal market interact with the principles of the climate regime following a comprehensive review of the EU's climate commitments and the principles behind them as presented in Chapter 4.

3.5 Summing Up on the Principles in the Internal Market

In this chapter, the legal surface of the internal market has been addressed. That is, the legal material that makes up this area. The principles of the internal market have been explored in the sense that, since the beginning of the establishment of the Union, they have had a certain significance for the purpose that has been sought to be achieved with a common market.

The internal market's legal norm system consists of a number of treaty provisions, and principles created by the Court, which are intended to govern the actions of the Union and its Member States in the internal market. The treated concepts in this thesis are thus:

Negative and positive integration. Where negative integration mainly refers to free movement and the maintenance of this, positive integration is used more for the EU areas where a common framework was desired. As highlighted in the chapter, these two forms of economic integration can also be an additional element that can highlight norm frictions between the internal market and the EU's climate regime. This presents an interpretive challenge for the courts, as they have

[332] See also the analysis of Chapter 5, on the legitimate reasons for measures that restricts the free movement of goods.

to balance environmental protection with the requirement of free trade, which is at the heart of European integration. In summary, the key point of this chapter is the complex relationship between economic integration and environmental protection in the EU where the focus has been on potential conflicts and the need for nuanced legal interpretation to reconcile these two essential aspects of EU governance.

The direct effect of EU primary law is twofold in the liberal system of the internal market—namely, to protect freedoms and autonomy and to contribute to the opening of markets. However, this direct effect of regulations and freedoms in a liberal market does not preclude that there can be granted legitimate reasons to limit the internal market to a certain extent. Such limitations can be found in the protection of public order and in the protection of certain public interests such as the environment. It is thus recognized that the internal market only functions in compliance with standards and rules on accountability and responsibility. As described in this chapter, the analysis of the thesis does not carry out an actual analysis of the concept of direct effect in relation to the interaction between the internal market and the EU climate regime. However, it is still relevant to recognize that direct effect has significant implications for the normative structure under consideration as well as the potential conflicts described in Chapter 5.

The principle of proportionality is a fundamental principle of EU law, which require the EU institutions to ensure that general provisions and objectives are respected, including in particular the requirement to maintain applicable law in full and to maintain the balance between the institutions. Furthermore, there have been several cases dealing with proportionality and Member States actions in regard to free movement. These judgments also emphasize the importance of Member States respecting the principle of proportionality. In this connection, the proportionality principle has a decisive importance in the goals set in the EU climate regime, which is why this is also a decisive consideration. As described in this chapter, this principle is thus also significant in the norm structure, but the analysis of the thesis does not deal with this concern any further, as it must be assumed to be a basic prerequisite for the means used by the Union and its Member States.

The effectiveness and transparency principles. The transparency principle in EU law refers to the requirement for clear, accessible, and open legal processes and decisions that ensure that citizens can scrutinize and understand how the Union works. The principle of effectiveness in EU law means that EU legislation and policies should effectively achieve their intended goals and ensure

that the desired results are achieved. These principles are equally important when considering environmental legislation and its integration into EU law. They play a central role in promoting the success of environmental measures and harmonizing environmental objectives with the wider objectives of the internal market. Like the previous concepts, they thus have an important meaning in the understanding of the norm structure and the interaction between the internal market and the EU climate regime. However, this is not dealt with in more detail in the analysis.

Furthermore, the principles of the internal market have also been dealt with in this chapter with a focus on the establishment of the internal market provision TEU Article 3(3) under which sustainable development was dealt with. Subsequently, the internal market objective in TFEU Article 26 with a focus on the free movement of goods was addressed.

Under the review of TEU Article 3(3), it was thus emphasized that the internal market is mainly based on economic integration to which it must work for sustainable development. Moreover, the environment is also highlighted as a central element for which the internal market must work. Furthermore, sustainable development also has a central role in the internal market and the relationship with the environment. It was established that sustainable development reflects a balanced relationship between economic, social and environmental considerations. As an extension of these goals, it is thus not clear how these are perceived to be in balance, which must have an impact on the legal uncertainty that is addressed in the interaction between the internal market and the EU climate regime in Chapters 5 and 6.

Finally, TFEU Article 26, which forms the framework for the objective of the internal market, was reviewed. Here, free movement was found to be a supporting element for the internal market. Therefore, based on free movement of goods, it was described which considerations apply in relation to the application of TFEU Article 34.

Finally, all these findings must all be the starting point for the analysis of the legal culture in the multi-layered phenomenon, which is carried out in Chapter 5 as well as the analysis of the deep structure of the law, which is carried out in Chapter 6.

CHAPTER 4
THE PRINCIPLES OF THE EUROPEAN UNION'S CLIMATE REGIME

4.1 Outline

The purpose of this chapter is to establish and describe the European Union's climate regime as part of the further analysis of the thesis' research questions and objectives. The current chapter is structured accordingly: Section 4.2 introduces the purpose of the analysis of the chapter. The subsequent section 4.3 gives a brief introduction to the development of the international climate regime. The following section 4.4 provides an overview of the policies behind the EU climate regime and the EU Climate Regulation (2021/1119). Section 4.5 describes the principles that are found to be the key principles of the EU climate regime. The last section 4.6 sums up on the overall findings.

4.2 Introduction

The European Union climate regime is a complex web of international agreements, policies and legislation. The purpose of the chapter is to give an overview of the European Union's climate regime (hereinafter EU climate regime) and to describe and define the contents of the principles of the regime. Thus, this chapter is intended to establish a thorough understanding of the EU climate regime and its legal norm system and elucidating its foundational principles. Additionally, this analysis of the EU climate regime will be directed towards an analysis aligned with the thesis's objective, namely, exploring the interaction between the legal norm systems of the EU climate regime and the EU internal market. As in the previously Chapter 3, this chapter builds upon the theoretical underpinnings, methodology, and analytical framework introduced in Chapter 2.

In Table 3 (also introduced in Chapter 3), it is illustrated where the chapter is placed in the theoretical setting of the thesis. Thus, this chapter are at the top layer, also called the *surface level*, of the multi-layered phenomenon, as it will uncover the legal surface (legal material) of the internal market.

Table 3. *The Multi-Layered Phenomenon – Focus on the Surface Level.*

EU LAW		
The Multi-Layered Phenomenon	**EU Internal Market**	**EU Climate Regime**
Surface Level *Chapters 3 and 4*	Chapter 3 introduces the legal material of the European Union's internal market. Hence, the analysis is placed at the surface level in the multi-layered phenomenon. Firstly, focus is on the creation and legal construction of the internal market. Next, the focus is on the treaty provisions, establishing the internal market and setting its objectives. Finally, focus is on the principle of sustainable development, which is the aim of the internal market, and the principle of free movement is examined in conjunction.	Chapter 4 introduces the legal material of the EU climate regime—hence, its surface level. Here, the key principles of the EU climate regime—no-harm, prevention, precaution and the polluter pays—are in focus.
Legal Culture *Chapter 5*	The analysis of the *legal culture* is presented in Chapter 5.	
The Deep Structure of the Law *Chapter 6*	The analysis of the *deep structure of the law* is presented in Chapter 6.	

The analysis will focus on the legal basis of the EU climate regime—TEU, TFEU and the international climate legislation, but also the EU's non-legal climate policies. In addition, the focal point of the analysis is the climate principles, which are examined based on the previously mentioned regulation, but also based on a delimitation in relation to the internal market. This means that the delimitation of the content of the principles of the EU climate regime must be understood to a large extent as a dynamic delimitation of the internal market, which is why nothing is set in stone. In this regard, it is established in Chapter 3 that the thesis' analysis of the internal market

includes the principle of free movement of goods while emphasizing that the internal market must work for sustainable development. In accordance with this, the principles formulated in this thesis are a product of the review carried out throughout the chapter, therefore the principles must also be understood and read in relation to this thesis and with an awareness that these are dynamic principles in the law.

4.3 The Interface of International and European Union Climate Law

In the first Chapter of the thesis, the introduction delves into the pivotal role of climate science in shaping the international climate regime—a theme further explored in section 4.4.4 concerning the EU's climate regime.[333] Additionally, the introduction underlines the inseparable connection between the international climate regime and that of the EU. The subsequent analysis delves deeper into this connection by tracing the evolution of the international climate regime alongside key initiatives that have significantly influenced global climate policies and legislation. Furthermore, this exploration extends to the EU's development of its climate regime, contributing to the definition of the principles governing the EU's climate policies. This review thus forms an integral part of elucidating the foundational elements encapsulated in these principles, as it traces the developmental path that shapes the principles and their formulations within the EU's climate regime.

4.3.1 The Development of the International Climate Regime

In the past 20-30 years, there has been an extensive paradigm shift where the essential role of private business initiatives in achieving climate and environmental goals has been acknowledged and this shift has been reflected in the global regulations.[334] Additionally, the acknowledgment of climate change being a global matter has indeed also been reflected in global regulation. In the 17 UN Sustainable Development Goals[335] (SDGs), including the 169 sub-goals, one of the main focuses is on climate change. However, international climate law does not operate in isolation. It is a part of and included under international environmental law and in the rules of international

[333] See Chapter 1, section 1.2.1.3.

[334] Kingston SC., S. "Introduction" to Holmes, S., Middelschulte, D., Snoep, M. (eds.) *(2021). Competition Law Climate Change & Environmental Sustainability. Concurrences.*, p. IV.

[335] Also called the 'global goals' or the 'SDGs'. See Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly Document A/42/427.

law.[336] Thus, the development of the international climate regime is further explored in the sections below.

4.3.1.1 The United Nations' Climate Regime

The development of the United Nations' (UN) climate change regime is organized into four different phases by Bodansky et al. (2017)[337]; *The first phase in the development starts with the framing of the climate change problem; the second phase went into the negotiation of a constitutional phase; the third phase of the development was regulatory;* and finally*, the fourth phase consists of the period after the first goals have been achieved.*[338]

The first phase begins around 1985-1990.[339] The development of scientific knowledge in this period was significant for laying the foundation for public and political interest.[340] The phase was dominated by environmentally oriented, non-governmental parties and actors leading and pushing the way. The first time that climate change was discussed on a global level was in 1979 when the First World Climate Conference was held. Although the conference did not succeed in attracting policymakers, it was the first time that climate change was acknowledge as an issue to human society, and it was acknowledged that there was a necessity for the nations of the world to address and manage this problem.[341] Accordingly, it was still of more interest to the non-governmental actors than the intergovernmental organs. However, Bodansky et al. (2017) mention that the intergovernmental actions were linked to three additional factors that acted as a direct catalyst for political interest.[342] First, the scientists (with close ties to WMO and the UNEP) acted as knowledge brokers for the emerging scientific knowledge about greenhouse effect through workshops and conferences, and they worked together to promote the issue of the international agenda. Secondly, the Montreal Protocol on Substances that Deplete the Ozone Layer was adopted in 1987. This Protocol was the first step in the international climate change regime together with the

[336] Rules on foundational issues such as sovereignty, law making and state responsibility. Bodansky, Daniel, et al. *International Climate Change Law*. Oxford University Press, 2017, p. 35.
[337] Bodansky, Daniel, et al. *International Climate Change Law*. Oxford University Press, 2017, pp. 96-117.
[338] Bodansky, Daniel, et al. *International Climate Change Law*. Oxford University Press, 2017, pp. 96-117.
[339] The period is referred to as the agenda-setting phase in Chapter 4 in Bodansky, Daniel, et al. *International Climate Change Law*. Oxford University Press, 2017, pp. 96-117.
[340] Since the end of the nineteenth century, scientists have understood the general theory of greenhouse warming.
[341] Bodansky, Daniel, et al. *International Climate Change Law.* Oxford University Press, 2017, p. 97.
[342] Bodansky, Daniel, et al. *International Climate Change Law*. Oxford University Press, 2017, p. 98.

publication of the Brundtland Commission[343] report, called 'Our Common Future'[344], and the UN Conference on Environment and Development[345] (UNCED), also known as the 'Earth Summit' from 1992.

This period was embossed of an increasing concern about environmental issues. In 1985, the Antarctic 'ozone hole' was discovered, and it was confirmed that it was a result of emissions of chlorofluorocarbons (CFCs).[346] Finally, there was a heatwave and drought in North America in the summer of 1988, which increased the concern of global warming especially in the US and Canada.[347] In fact, 1988 became an important year for the emergence of climate change as an intergovernmental issue.

In 1988, the Intergovernmental Panel on Climate Change (IPCC) was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) and endorsed by UN General Assembly.[348] The IPCC's initial task was to prepare a comprehensive review and recommendations with respect to the state of knowledge on the science of climate change, the social and economic impact of climate change, and potential response strategies and elements for inclusion in a possible future international convention on climate change.[349] It aims to be an independent scientific body that provides the public and policymakers with the current scientific knowledge about climate change.[350]

The IPCC has had six assessment cycles (the 6th being in 2022) and has had access to the most recently developed research in climatology. The Assessment reports[351] are the most comprehensive scientific reports about climate change produced worldwide.[352] Additionally, the IPCC has provided methodology reports, special reports and technical papers in response to requests for

[343] The Brundtland Commission was a sub-organization under UN with aim to unite the Parties in pursuit of sustainable development.
[344] Brundtland (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly Document A/42/427.
[345] Brundtland (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly Document A/42/427.
[346] Bodansky, *Daniel, et al. International Climate Change Law*. Oxford University Press, 2017, p. 98.
[347] Bodansky, *Daniel, et al. International Climate Change Law*. Oxford University Press, 2017, p. 98.
[348] Webpage of IPCC: https://www.ipcc.ch/ [16.12.2023].
[349] Outlined in UN General Assembly Resolution 43/53 of 6 December 1988.
[350] Woerdman, E., Roggenkamp, M. M., & Holwerda, M. (eds.) (2021). *Essential EU climate law* (2.ed.) Edward Elgar Publishing., p. 14.
[351] See furthermore under *Conceptions*.
[352] Webpage of IPCC: https://www.ipcc.ch/ [16.12.2023].

information on specific scientific and technical matters from the United Nations Framework Convention on Climate Change (UNFCCC), governments and international organizations.[353]

The IPCC has played a decisive role in the creation of the UNFCCC. In 1990, the First IPCC Assessment Report (FAR) was published, and it underlines the importance of climate change as a challenge with global consequences and requiring international cooperation.[354] It predicted an increase of global mean temperature and sea levels. After the FAR, decisions makers were urged to take part in an international climate plan, and thus it paved the way for the United Nations Framework Convention on Climate Change.[355] Since then, five more reports from the IPCC have been published, which all provide important scientific inputs for international decisions makers.[356]

The agenda-setting phase and the years 1988-1990 were transitional, where governments started to get a bigger role to play, but non-governmental actors did still have a significant influence.[357] The creation of the IPCC was a sign of this blurred distribution of actors. Hence, governments had to reassert governmental control over the climate change issue.[358] This leads us to the next phase of the international climate change regime.

After the agenda-setting period, a new phase started from around 1990-1995. This period was characterized as the phase of negotiation and accession of the Framework Convention. By the end of 1990, the UN General Assembly established the Intergovernmental Negotiation Committee for a Framework Convention on Climate Change (INC). The INC had a mandate to negotiate a convention with *appropriate commitments*.[359] The process of negotiation consisted of different

[353] Webpage of IPCC: https://www.ipcc.ch/ [16.12.2023].
[354] Webpage of IPCC: https://www.ipcc.ch/ [16.12.2023].
[355] Woerdman, E., Roggenkamp, M. M., & Holwerda, M. (eds.) (2021). *Essential EU climate law* (2.ed.) Edward Elgar Publishing, p. 14.
[356] Webpage of IPCC: https://www.ipcc.ch/ [16.12.2023]. "*First IPCC Assessment Report (FAR) published in 1990. Second Assessment Report (SAR) published in 1995 provided important material for governments to draw from in the run-up to adoption of the Kyoto Protocol in 1997. The Third Assessment Report (TAR) (2001) focused attention on the impacts of climate change and the need for adaptation. The Fourth Assessment Report (AR4) (2007) laid the ground work for a post-Kyoto agreement, focusing on limiting warming to 2°C. The Fifth Assessment Report (AR5) was finalized between 2013 and 2014. It provided the scientific input into the Paris Agreement. The IPCC is currently in its Sixth Assessment cycle where it will prepare three Special Reports, a Methodology Report and the Sixth Assessment Report*."
[357] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 99.
[358] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 99.
[359] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, pp. 102-103.

critical factors to secure a treaty. The intergovernmental actors reasserted the control in the negotiation (in contrast to the first phase where the non-governmental actors played a major role). During the negotiation, there was discussion on issues relating to potentially substantial implications for national interests, while simultaneously there was a debate going on another level on the wordings and formulations and their political and legal significance.[360]

On 9 May 1992 an international treaty, the United Nations Framework Convention on Climate Change (UNFCCC) [361], also known as the Rio Convention[362], was adopted, and less than two years later, it came into force on 21 March 1994.[363] In the UNFCCC, it was acknowledged that climate change is an existential threat to humankind, which is forecasted by humans.[364] In the preamble of the UNFCCC, it is stated that the countries should:

> […] enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Accordingly, in the preamble, it is clear that legislation is the key to preventing climate change.[365] Almost all countries agreed that the convention should include the basic elements of a framework convention (as a minimum).[366] The convention ended up reflecting the international climate regime's objective in Article 2 of the UNFCCC:

> The **ultimate objective** of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level

[360] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 104.
[361] UN Earth Summit held in Rio de Janeiro in 1992. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.
[362] The UNFCCC was negotiated at the "Rio Earth Summit" in 1992.
[363] 197 countries have since ratified the convention.
[364] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.
[365] See also working paper by Tvarnø, C. "*Regulating the Climate.*" in SSRN, p. 4. https://research.cbs.dk/da/publications/regulating-the-climate.
[366] The initial baseline for the UNFCCC negotiations was the framework agreement model used in the preceding decades to address the issues of acid rain and ozone depletion. Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 104.

> that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[367]

In the negotiation of the UNFCCC, a notable distinction emerged between developed and developing countries, a division mirrored in the commitments of Annex I and non-Annex I parties. [368] Furthermore, UNFCCC Article 3(1) established that developed countries bear the responsibility of taking a lead in addressing climate change.

> The Parties should protect the climate system for the benefit of present and future generations of humankind, **on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities**. Accordingly, the **developed country Parties should take the lead** in combating climate change and the adverse effects thereof.[369]

Therefore, the commitments to address climate change were stated differently for developed and developing countries. This is also reflected in Article 4(1) where the developing countries have to address the climate issue more generally as a common commitment.[370] In practical terms, this means that developed countries, including EU Member States, are expected to make more significant commitments and contributions to address climate change compared to developing countries. These commitments may involve setting more ambitious targets, providing financial assistance, and taking proactive measures to mitigate and adapt to climate change. The differentiation in commitments between developed and developing countries is a foundational aspect of the UNFCCC and reflects the acknowledgment of historical emissions and varying capacities to address climate challenges. It shapes the international climate regime and influences the expectations placed on countries, including those within the EU, in their efforts to combat climate change.

Following the entry into force of the UNFCCC, states started contending that the commitments outlined in the convention were insufficient and required augmentation with more precise

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[367] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. Author's own emphasis added.
[368] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 103.
[369] Article 3(1) in United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107. Author's own emphasis added.
[370] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 104.

emission targets.[371] Hence, a new period for the international climate regime began. In this regard, the first Conference of the Parties (COP1) led to the adoption of the Berlin Mandate, which was the establishment of an Ad Hoc Group to negotiate new legal measures. This resulted in the adoption of the Kyoto Protocol[372] in 1997 with specific targets for the period 2005-2020.[373] It entered into force in February 2005.[374]

The Kyoto protocol was also a top-down regulatory tool, while the UNFCCC had allowed each country to determine its climate policies nationally, the quantified emission limitation and reduction objectives (QELROs) were negotiated with a focus on strengthening an internationally defined emission target as well as defining its nature.[375] While the EU argued for a 10 % cut in GHG emissions below the 1990 level by 2010, other countries argued for a weaker target (e.g. the US: 7 %). In the end, a differentiated target plan for the developed countries was established by setting individualized QELROs.[376]

The Kyoto Protocol's most important contribution was the Kyoto Mechanisms (called 'market-based mechanisms'); the creation of a non-national emission trading system in Article 17; a clean development mechanism (CDM) in Article 12, which allowed developed countries to receive credit for emission reduction projects in developing countries; and states' allowance to receive credit for special sink activities in Article 3(3)-3(4) and Article 6.[377] The market-based mechanism was a tool in the national measures (set up in the Protocol) to meet the targets jointly by doing this in the most cost-effective way and with the aim of reducing GHG regardless of the place of emission. This made it possible for developed countries to meet their targets of reducing GHG emissions in developing countries. The idea behind the mechanism was to have emission reductions in the developing countries by, e.g., investing in green technology and thereby also investing

[371] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 105.
[372] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162. It is based in UNFCCC Article 4(1)(1)2a.
[373] The first period of obligation was 2008-2012, and the second period was 2013-2020 cf. Conference of the Parties (COP 18) in Doha.
[374] It was ratified by 192 countries, which is five fewer than the UNFCCC ratification. The US did not ratify the protocol, and Canada, New Zealand, Russia and Japan withdrew from the agreement in 2011.
[375] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, p. 105.
[376] Listed in Annex B of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.
[377] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, pp. 76-77; and Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, pp. 106-107.

in green infrastructure.[378] Market-oriented mechanisms, such as emissions trading, remain crucial in international climate policy today. The Paris Agreement expands on the Kyoto principles with a more inclusive approach including all countries that are involved in voluntary emissions-reducing commitments.

In general, this phase was characterized by the difference between developed and developing countries, and it was thus also what caused a split between them. The developed countries became more persistent on addressing the developing countries' GHG emissions and their participation and contribution to the reductions.[379] In the following period, it was thus a central topic that was often taken up[380] while trying to negotiate a new agreement for the subsequent period of the Kyoto Protocol (at that time, the period was 2008-2012). The Kyoto Protocol is no longer in force, and it was replaced by the Paris Agreement in 2020 as explored in the next section.

4.3.1.2 The Paris Agreement

The Paris Agreement has a significantly impact on European climate law.[381] Under international law, the Paris Agreement arises under the UNFCCC from 1994. The Paris Agreement is a successor to the Kyoto Protocol from the Convention. The Agreement represents a remarkable diplomatic achievement, as it represents a political will to reach an agreement with almost 98-99 % of the emissions in total, although it does not solve the climate crisis.[382] The Agreement consists of legal obligations for those countries that have ratified the agreement but also recommendations, principles, process definitions and organizational definitions.[383]

In the Kyoto Protocol, the GHG emission targets were legally binding and imposed in Annex I. However, the parties to the Paris Agreement are now all legally obligated to communicate their own emission reduction targets also called 'Nationally Determined Contributions' (hereinafter

[378] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, pp. 77-76.
[379] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press. p. 109.
[380] The Bali Action Plan in 2007 addresses both the mitigation plan for developed and developing countries and was a shift from the Berlin Mandate approach. However, the two continue to be distinguished.
[381] Council Decision (EU) 2016/590 of 11 April 2016 on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change.
[382] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law.* Oxford University Press, pp. 209-210.
[383] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, p. 86.

NDCs) cf. Article 4(2), with no differentiation between developed and developing countries.[384] Furthermore, the parties are obligated to conduct an expatiation of progression over time as part of the mitigation of the NDCs. The Agreement also establishes a common transparency and accountability framework and an iterative process. Hence, every five years, the parties have to inform what their emission contribution for the next five-year period will be.[385] In the Agreement, the parties are expected to apply to the financial assistance provision and may themselves differentiate their mitigation efforts based on their respective capabilities through developing their NDCs.[386] The legal obligation does not reside in achieving the targets of the NDCs, specifically the reduction of GHG emissions. Instead, the legal binding lies in the obligation to establish the NDCs, as stipulated by the provisions of the Agreement. This approach to the NDCs is different from the Kyoto Protocol's reduction targets, which is why there have also been doubts about the binding part of the Paris Agreement in regard to the NDCs.

The purpose of the agreement is to strengthen the purpose of the UNFCCC and to do this in a sustainable direction and with efforts to eliminate poverty, as it is stated in Article 2(1):

> This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty […][387]

The purpose of the Paris Agreement under Article 2(1) is further to ensure that the global average temperature is well below 2°C above pre-industrial levels and to limit the temperature increase to 1.5°C above pre-industrial levels cf. Article 2(1)(a).[388] Lastly, it is emphasized in Article 2(1)(c) that the economy plays a part in reaching the purposes of the UNFCCC as well as why the

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[384] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, p. 87.
[385] Bodansky, D. Brunnée, J. and Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press, p. 210.
[386] Preston, B. J. (2021). "The influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)" in *Journal of Environmental Law*. 33, 1-32., p. 4.
[387] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 2(1).
[388] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 2(1)(a): "*Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change […]"*. Furthermore, the Agreement is intended to enhance the purposes of the UNFCCC by adapting to the impacts of climate resilience without threatening food production cf. Article 2(1)(b): *"Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; […]"*.

financing towards lower GHG emissions and climate-resilient development has to be consistent.[389] To achieve this common purpose, it is important and necessary to ensure a collective commitment from all parties. Hence, the agreement is implemented based on a principle of equity and differentiated responsibility, as it is stated in Article 2(2):

> This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[390]

As mentioned earlier, the Agreement does not obligate any parties to reach the reduction target set in the NDCs. The legal obligation lies in the communication of the ambitious efforts to achieve the purpose of Article 2 when setting the NDCs, which follows from Article 3:

> As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time […].[391]

Thus, the parties are legally obligated to set and inform about the NDCs although only in relation to mitigation in order to reach the purpose in Article 2, which follows from Article 4(2).[392] An adaptation communication can be submitted as part of a state's NDCs.[393] Furthermore, Article 3 introduces the principle of progression, and thus the national announcements must gradually become more ambitious with each report.

Article 3 also refers to other binding provisions in the Agreement, including Article 4, the due diligence obligation which is essential in ensuring that countries adhere to their commitments, particularly the reduction targets outlined in Article 2. However, it is only Articles 4(2) and 4(9) that impose actual legal obligations on the parties, but they have the intention and purpose based on Article 4(1). According to Article 4(1), the intention is that the parties, in connection to

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[389] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 2(1)(c): *Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*

[390] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 2(2).

[391] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 3.

[392] This is a due diligence obligation. See more about due diligence in section 4.5.1.

[393] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 7(11).

reaching the goal of a long-term temperature target in Article 2, must seek to reach a peak for the emission of GHG as soon as possible. In addition, the aim is to reduce emissions as quickly as possible while, at the same time, stating a number of caveats to the purpose and intent. As mentioned above, Article 4(2) consists of a legal obligation to improve, communicate and maintain successive NDCs. Article 4(9) consists of a legal obligation for the ratified parties to report on the NDCs every five years.

Furthermore, Article 3 refers to Article 7, which deals with adaptation capacity, resilience and vulnerability to climate change. Below, the binding part to be found in Article 7(9) is presented, which requires the ratified parties to commit themselves to planning and implementing climate adaptation plans and to communicate these periodically.[394] Articles 10 and 11 concern supporting technological advance and capacity. Finally, an enhanced transparency framework is established in Article 13:

> In order to build mutual trust and confidence and to promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established […].[395]

The provision thus embraces the non-legally binding areas that are in the Agreement by setting up a transparency mechanism that must hold the parties responsible for acting on their expressed ambitions, so that peer and public pressure can be used as legal obligations in influencing behaviour.[396]

The overall goal of the Paris Agreement was to strengthen global cooperation and the implementation of the UNFCCC. It has since been the subject of criticism, but it is also treated with deep respect due to the fact that the international community after many (almost 25) years of negotiations has found a common solution. Bugge (2021) specifically emphasizes this contrast in the Agreement saying that, even if the agreement does not contain a large number of legal obligations, it is still a political tool that is only made stronger and more robust by effective implementation

[394] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, p. 93.
[395] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Article 13.
[396] Bodansky, D. Brunnée, J. and Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press, p. 242.

but also by support through research and civil society.[397] Conversely, the Agreement becomes less valuable when it is not implemented effectively or is criticized. In addition, Bugge (2021) also emphasizes that the Agreement has been made relevant by non-governmental actors such as companies, cities, municipalities, and research institutions all over the world. In a legal context, the Agreement has also gained high importance for national case law.[398]

4.3.1.3 Summing Up on the International Climate Regime

The international climate regime has gone from being an ambitious strategy to reduce the risk of natural disasters to containing more and more commitments to the parties. It consists of many decisions, accords, guidelines and recommendations, which can be binding, non-binding, voluntary or in between. In this context, it must also be mentioned that the COP decisions in particular are of great importance for the development of the international climate regime today.[399]

In the section above, the main development of the international climate regime and the legal sources have been introduced. The purpose of this introduction is to bring the development of the international climate regime into the understanding and context of the EU climate regime, which is introduced in the sections below.

4.4 The EU's Climate Regime

This introduction of the EU climate regime is presented partly in isolation from EU environmental legislation and policies and thus with a clear focus on the regulation of the climate.[400] The reason for separating these two legal areas in the analysis is due to a desire to provide a clean derivation of the EU climate regime. This means that it is sought to provide an opportunity to separate climate regulation from other regulation in the EU. However, it must also be addressed that this separation can be extremely critical due to the development of climate law and due to the fact that climate law is a subsidiary area under environmental law. In the following section, some of the

[397] Bugge, C. H (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, pp. 152-154.
[398] See for example *Milieudefensie et al. v Royal Dutch Shell plc*. C/09/571932/HA ZA 19-379; *Urgenda Foundation v The State of the Netherlands.* C/09/456689/HA ZA 13-1396; *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20.
[399] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, p. 116.
[400] See Chapter 5, section 5.3.1 on the connection between EU climate regime and EU environmental law.

environmental policies are considered, as they in fact are an important part of the context of the EU climate regime and its foundation.[401]

4.4.1 The Development of the EU Climate Regime

Before the 1980s, the regulation of climate change was far from current in the European Union. In the first treaty of the European Union, the 1957 Treaty of Rome, market integration was the fundamental task.[402] Neither the protection of the environment, decreasing pollution or climate change were part of the Treaty. Environmental protection became part of EU regulation in 1967 with a directive, which organized the classification, packaging, and labeling of dangerous substances.[403]

In 1970, two directives were adopted regulating motor vehicles emissions. In 1973, the Council adopted a declaration on the environment (with the legal basis from the Treaty of Rome).[404] In the directives, the environmental actions were defined so that some were to be carried out at Union level, while others were to be carried out by the Member States.[405] The environmental program was adopted by the Council and committed the Member States to a common environmental policy. The aim was to improve the quality of life, the environment and the living conditions of the population in the Union based on several environmental principles.[406] Here the polluter pays principle

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[401] See Tvarnø, C. (2022) where the author emphasizes that the distinguish on environmental- and climate law is important. Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet.

[402] See Chapter 3, section 3.3. Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed.). Bruylant, p. 1.

[403] Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances. OJ 196, 16.8.1967, p. 1–98 (DE, FR, IT, NL). See also Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed.) Bruylant, pp. 1-2.

[404] 73/C 112/01 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment.

[405] Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet, p. 127.

[406] In the declaration the principle is part of the listed objective of the community environment policy, title I: "*The aim of a Community environment policy is to improve the setting and quality of life, and the surroundings and living conditions of the peoples of the Community. It must help to bring expansion into the service of man by procuring for him an environment providing the best conditions of life, and reconcile this expansion with the increasingly imperative need to preserve the natural environment. It should:*

- *prevent, reduce and as far as possible eliminate pollution and nuisances,*
- *maintain a satisfactory ecological balance and ensure the protection of the biosphere,*
- *ensure the sound management of and avoid any exploitation of resources or of nature which cause significant damage to the ecological balance,*

was mentioned, however, in connection with the principle, special rules and exceptions had to be adopted for the Union to avoid distortions in trade and investments in the common market.[407] Today, this principle can be found in TFEU Article 191(2), see furthermore in section 4.5.4. Thus, the first environmental policy in the Community did not deal with climate change but combating pollution in the environment.

The EU climate policy had its beginnings in the 1980s[408] with its starting point in 1986, when the Commission received a wake-up call from the Parliament.[409] Thus, it was recognized that greenhouse gasses (GHG) and their effects on the climate were a global problem that required action internationally and that the solution to this was a matter of the Union. The environmental matters became a part of the Treaty (under the Single European Act) and was the foundation for the environmental measures afterwards.[410] This was the first action in the direction for institutional framework measures. In 1992, this action was promoted in the Maastricht Treaty[411] to a status of full policy of the Union together with the principle of precautionary.[412] At the same time, the internal

- *guide development in accordance with quality requirements, especially by improving working conditions and the settings of life,*
- *ensure that more account is taken of environmental aspects in town planning and land use,*
- *seek common solutions to environment problems with States outside the Community, particularly in international organizations*."

In 73/C 112/01 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, p. 1.

[407] In 73/C 112/01 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment. Title 2: Principles of a community environment policy:
"*[…] The cost of preventing and eliminating nuisances must in principle be borne by the polluter. However, there may be certain exceptions and special arrangements, in particular for transitional periods, provided that they cause no significant distortion to international trade and investment. Without prejudice to the application of the provisions of the Treaties, this principle should be stated explicitly and the arrangements for its application including the exceptions thereto should be defined at Community level. Where exceptions are made, the need to progressively eliminate regional imbalances in the Community should also be taken into account […]*".

[408] Note that the UN conference of Human Environment was in 1972.

[409] Woerdman, E., Roggenkamp, M. M., & Holwerda, M. (eds.) (2021). *Essential EU climate law* (2. ed.) Edward Elgar Publishing, p. 21.

[410] Single European Act (SEA), 29.6.1987, OJ L 169 see also Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed.) Bruylant, p. 2.

[411] Maastricht Treaty, TEU or Union Treaty: Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

[412] Article 3(k) EEC, see also Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed.) Bruylant, p. 2.

market's aim for sustainable development was set in the Treaty as presented in Chapter 3.[413] In 1997, the Amsterdam Treaty included sustainable economic activities with an explicit reference to environmental protection. In 2000, the EU had its first European Climate Change Programme (ECCP), which was established by the Commission with the purpose of identifying the most efficient and cost-effective ways to reduce GHG emissions in the EU and as a means to help ensure that the EU meets its target for reducing emissions under the Kyoto Protocol.[414] A few changes to the environmental policy were made in 2007 in the Lisbon Treaty.[415] However, some of the policies became part of the general institutional framework of the EU. Thus, these changes were likely to influence the implementation and application of the Treaty.[416]

The establishing of EU climate policy must be understood as a step-by-step and learning-by-doing development.[417] The concept of learning-by-doing is capitalized in the striking example of the EU's emission trading system, as it has shifted from being EU Member States allocating the allowances to private companies to now taking place on the basis of auctioning and EU-wide performance benchmarks.

EU climate law can be defined as all the regulation in the field of climate action, and most of the regulation is achieved through directives and regulations. Thus, the overall aim of the regulations is the intend to reduce GHG emissions and to adapt to climate change. However, it is important to stress that the legislation does not operate in isolation, as other areas within EU law such as environmental law, human rights, competition law and financial regulation, also contributes within the regime.[418] See also the definition on regime in this thesis under section 2.4.1.

[413] See Chapter 3, section 3.4.1.1. This was the first appearance of the 'integration principle' in European law. See also Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. 2nd ed. Bruylant, pp. 2-3.
[414] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.
[415] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[416] Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2. ed.) Bruylant, p. 3.
[417] Delbeke, J. and Vis, P. (eds.) (2015). *EU Climate Policy Explained*. Routledge, p. 1.
[418] Woerdman, E., Roggenkamp, M. M., & Holwerda, M. (eds.) (2021). *Essential EU climate law* (2. ed.) Edward Elgar Publishing., p. 3.

4.4.2 EU Climate Policy from 2007 and Onwards

The European climate strategy encompasses multiple target dates, and each is associated with specific regulations and preliminary impact assessments for their respective deadlines. Below, a concise overview of these is presented, including policy packages for 2020, 2030, and 2050 with each containing distinct targets. Comments regarding these policy packages underscore the aim to achieve the objectives outlined in the international climate agreements.

4.4.2.1 The 2020 Climate and Energy Package

In 2007, The European Union adopted the 2020 climate and energy package. The policy package addresses both the emission reduction and the energy sector reform with different national energy targets and climate targets for the year 2020. The three key targets for the year 2020 were a 20 % cut in greenhouse gas emissions (from 1990 levels), 20 % of the EU's energy being renewable and a 20 % improvement in energy efficiency. These are also known as the EU's 20-20-20 targets for climate change mitigation.[419]

At the same time, the Emissions Trading System (ETS) was improved together with the adaptation of the Renewable Energy Directive (RED I) and the Energy Efficiency Directive – (EED). The Commission's staff working document from 2020 titled 'Stepping up Europe's 2030 climate ambition investing in a climate-neutral future for the benefit of our people'[420] states that the implementation of the legislations in this period improved the transition to a decarbonized energy sector and that EU was on track to overachieve the target under the UNFCCC.[421]

In 2021, the final report from the European Environment Agency (EEA) on the 2020 target was published. The EU's GHG emissions target was reached well before the beginning of the COVID-19 pandemic. Actually, the EU's GHG emissions has been below the 2020 target for seven years

[419] COM/2007/2 final. Communication From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Limiting Global Climate Change to 2 degrees Celsius The way ahead for 2020 and beyond. {SEC(2007) 7} {SEC(2007) 8}.

[420] COM/2020/562 final. Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people.

[421] COM/2020/562 final. Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, p. 4.

(except in 2017).[422] Furthermore, the EEA's preliminary estimates (report from 2021) of the energy consumed from renewable sources was estimated to 21.3%, which is an overachievement of the 2020 target.

The year 2020 was momentous in several ways. It marks the end of the second commitment period for the global climate regime under the Kyoto Protocol as well as the beginning of the five-year period for the Paris Agreement's NDCs cycle (postponed by a year due to the COVID-19 pandemic). At the same time, it is also the year where the 2020-package (20-20-20) ended as the first period for an ambitious climate strategy and when the next period began with the political goals under the 2030 package as well as the long-term goals of climate neutrality in 2050.

4.4.2.2 The 2030 Climate and Energy Package (and the 2050 Long-Term Strategy)

The 2030 package and target were set in 2014 with the objective to reduce emissions domestically by at least 40 % compared to the 1990 level. This target was set as a pre-target in the context of the 2050 target that was set in 2009 with the Union's objective to achieve a reduction on GHG emissions to 80-95% compared to 1990.

The communication document from the Commission from 2020 on *the 2030 climate target plan* under the topic 'Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people'[423], which proposes policies for an EU climate strategy on the implementation of the 2030 target. It has been viewed by some scholars to be a case of leadership on the global stage of international climate policy and in the implementation of the Paris Agreement. However, the criticism has also highlighted that the emission levels of Member States under the joint Nationally Determined Contributions (NDC) are absent [424]

[422] EEA Report No 13/2021 'Trends and Projections in Europe 2021' Trends and Projections in Europe 2021.

[423] COM/2020/562 final. Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people.

[424] See section 4.3.1.2 about the Paris Agreement and the Nationally Determined Contributions (NDC) Article 4(2).

The 40% reduction (2030 package) was later updated and agreed upon by the European Parliament and European Council to a net reduction of 55 % below 1990 levels.[425] Furthermore, the 2050 target was also updated with the aim of a net-zero gas emission economy for the Community.[426]

In order to meet the 2030-target, the European Commission has put forward different legislative proposals covering many policy areas, including climate, transport, energy and taxation. This legislation package is called 'The fit for 55'.[427] The proposals are legislative tools that are aimed to deliver on this target and to communicate the EU's contribution to deliver on the objectives of the Paris Agreement to the UNFCCC. The target has also been written into the EU Climate Regulation (2021/1119)[428] (see section 4.4.3 on EU climate legislation). The 2030 climate and energy package are part of the tools to reach the European Green Deal's objectives. Additionally, the long-term 2050 target is said to be at the heart of the European Green Deal Communication (hereinafter the Green Deal).

4.4.2.3 The European Green Deal and the 2050 Target

The European Green Deal[429] (hereinafter the Green Deal) has been declared a "European man-on-the-moon-moment" by President of the European Commission Von der Leyen.[430] The Green Deal is said to be the answer to the challenges of climate change within the EU, but it is also an action plan for a transformation of the EU. The aim of the communication is to transform the EU into a modern, resource-efficient and competitive economy where there are no net emissions of

[425] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).
[426] Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[427] COM/2021/550 final. Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality.
[428] Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[429] COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions The European Green Deal. Brussels, 11.12.2019.
[430] European Commission – Speech. Press remarks by President von der Leyen on the occasion of the adoption of the European Green Deal Communication Brussels, 11 December 2019.

greenhouse gases in 2050 and to ensure that economic growth is decoupled from resource use.[431] The Green Deal is a roadmap for EU policies and measures needed to achieve the goals set for the EU, where all policies and actions have to contribute to the Green Deal's objectives, as it is very complex challenge with any interlinks. The strategy aims to protect, conserve, and enhance the EU's natural capital and protect the health and well-being of citizens from environment-related risks and impacts.[432] At the same time, it is clear that this must be done in a just and inclusive transformation. Thus, all EU actions and policies will have to contribute to the European Union's green transformation.

However, the communication[433] also states that the transformation and ambition cannot be achieved by Europe acting alone. Climate change and its effects do not have national boarders, and the losses and costs of climate change are global. Thus, the EU will lead internationally, and thus use its influence, expertise, and financial resources to mobilize its neighbours and partners to join the sustainable path. Additionally, the Green Deal is an integral part of the implementation of the United Nation's 2030 Agenda and the sustainable development (SDGs). Even though it is not titled as a new growth strategy, this is defined within the first few lines:

> […] The European Green Deal is a response to these challenges. It is a **new growth strategy** that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. […][434]

Policy reforms (e.g. a possible extension of the European Trading System) will help ensure effective carbon pricing throughout the economy. The Green Deal states that the goal is to encourage changes in consumer behaviour and business behaviour and facilitate an increase in sustainable

[431] COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions The European Green Deal. Brussels, 11.12.2019 *1. Introduction – Turning an urgent challenge into a unique opportunity.*
[432] COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions The European Green Deal. Brussels, 11.12.2019. *1. Introduction – Turning an urgent challenge into a unique opportunity.*
[433] COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions The European Green Deal. Brussels, 11.12.2019. *1. Introduction – Turning an urgent challenge into a unique opportunity.*
[434] COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions. The European Green Deal. Author's own emphasis added.

public and private investment.[435] Also, ensuring that taxation is aligned with climate objectives is essential. Hence, the Commission's deliveries on the Green Deal are separated into different policies, hereto, Climate strategies & targets; EU Emissions Trading System (EU ETS); Effort sharing: Member States' emission targets; Forests and agriculture; International action on climate change; Transport emissions; Carbon capture, use and storage, Protection of the ozone layer; Fluorinated greenhouse gases; Adaptation to climate change; Funding for climate action.

These policies surround the heart of the overall objective in the Green Deal, which is to make EU climate neutral by 2050. A proposition was put forth suggesting that in order to transform these political commitments into legally binding objectives, the EU, as a result, was prompted by the Green Deal to introduce an EU Climate Law as proposed by the Commission. This resulted in the EU Climate Regulation (2021/1119) of 30 June 2021 establishing the framework for achieving climate neutrality by 2050.[436] This regulation is central to the legal context of climate law in EU, which is elaborated on in section 4.4.3.

Furthermore, it must be emphasized that the EU's goal to achieve climate neutrality holds pivotal significance for the overall analysis of the thesis. This aim signifies the necessity to transform conditions within the scope of the internal market to align with climate objectives. Achieving climate neutrality entails substantial adjustments in the production of goods, introducing the prospect of competitive disparities. Notably, if certain EU Member States implement more stringent climate requirements for their producers than others, this divergence may lead to cost differentials among companies. Consequently, an incentive may arise for EU Member States with rigorous climate standards to potentially restrict the importation of goods from producers in countries with

[435] Section 2.1.1. "Increasing the EU's climate ambition for 2030 and 2050" in COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions The European Green Deal. Brussels, 11.12.2019.

[436] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). See the preamble no. 2 to the regulation: "*The Commission has, in its communication of 11 December 2019 entitled 'The European Green Deal' (the 'European Green Deal'), set out a new growth strategy that aims to transform the Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. The European Green Deal also aims to protect, conserve and enhance the Union's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts. At the same time, this transition must be just and inclusive, leaving no one behind."*

less stringent climate requirements.[437] This scenario poses a potential challenge to the free movement of goods within the EU.

4.4.3 The EU's Climate Legislation

The objective of the EU Commission was to codify the objectives of the European Green Deal into EU law. These objectives can be succinctly articulated as achieving climate neutrality for the European economy and society by 2050, accompanied by a 55% reduction in greenhouse gas emissions by 2030 compared to 1990 levels. The preceding sections have elucidated how political agendas have been instrumental in shaping the EU climate regime, culminating in the enactment of the EU Climate Regulation (2021/1119)—also called 'the European Climate Law'—from 30 June 2021. [438]

It is imperative to acknowledge that the EU's climate regime encompasses a diverse array of instruments, including regulations, directives, decisions, announcements, recommendations, statements, and international agreements. These instruments collectively aim either to promote or to curtail various measures geared towards mitigating climate change. However, this thesis specifically concentrates on the framework regulation within the EU climate regime. Consequently, the EU Climate Regulation (2021/1119) serves as a pivotal point of reference for numerous legal initiatives underpinning the regime. Thus, this regulation forms the foundational basis for the subsequent analysis of the EU climate regime in this study.

The regulation has its legal basis in TFEU Article 192[439] concerning the relevant policies to be taken regarding the objectives in TFEU Article 191.[440] It is adopted under TEU Article 5, where the limits of Union competences are governed by the principle of conferral. The justification lies in both the principle of subsidiarity and the principle of proportionality, as climate change is a

[437] See also section 4.5.5 on the potential conflicts between the EU climate regime and free movements of goods.
[438] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[439] TFEU Article 192(1): "*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.*"
[440] In Article 191 TFEU, it is stated that the union shall contribute to pursuit of the following objectives; policy preserving, protecting and improving the quality of the environment; protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

transboundary challenge and as the objective of the EU Climate Regulation (2021/1119) cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects, be better achieved at Union level.[441] In alignment with the principles enshrined in TFEU Article 11, the Regulation in question not only adheres to the EU's commitment to environmental protection but also seeks to address specific challenges or objectives within the regulatory framework:

> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[442]

Furthermore, it has a general application, and it is binding in its entirety and directly applicable in all Member States cf. Article 288 TFEU. The general application means that it is not only applicable to a special addressee, but it is applicable to all objective situations.[443]

The main objectives of the EU Climate Regulation (2021/1119) are listed below.[444] All of these objectives are identified as part of the green transformation for the internal market and are as follows:

- To set the long-term direction of travel for meeting the 2050 climate neutrality objective through all policies in a socially fair and cost-efficient manner
- To set a more ambitious EU 2030 target, to set Europe on a responsible path in becoming climate neutral by 2050
- To create a system for monitoring progress and take further action if needed
- To provide predictability for investors and other economic actors
- To ensure that the transition to climate neutrality is irreversible

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[441] Preamble no. 40 in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'): "*Climate change is by definition a trans-boundary challenge and coordinated action at Union level is needed to effectively supplement and reinforce national policies. Since the objective of this Regulation, namely to achieve climate neutrality in the Union by 2050, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective […].*"

[442] TFEU Article 11.

[443] Tvarnø, C. D. & Nielsen, R. (2021). *Retskilder og retsteorier.* Djøf/Jurist-og Økonomforbundet. Chapter 3.

[444] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

These themes range widely. However, the focus of this thesis is largely on the themes of the first point regarding a socially fair and cost-effective way in which the green transformation must take place in the internal market, but it does also focus on the point two in that the green transformation must be done taking a responsible path. It must thus be understood how the principles of the EU climate regime, which are the focal point of the thesis, reflects these overall goals set in this regulation. At the same time, these goals must also reflect an overall interest in ensuring that the frictions that may exist between the EU climate regime and the internal market do not compress the objectives of the EU climate regime or the internal market. When adopting a regulation, clarity is imperative, as a clear legislative framework is essential for the protection of fundamental principles and rights in the Union, ensuring effective enforcement.

The EU Climate Regulation (2021/1119) primarily establishes a framework, as delineated in Article 1, for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions from sources and an enhancement of removals by sinks, as specified in Union law.[445] Thus, in Article 1(a), it is made to be a binding goal to reach climate neutrality in the Union by 2050 as set out in Article 2(1)(a) of the Paris Agreement. Furthermore, the EU Climate Regulation (2021/1119) provides a framework for achieving the global adaptation goal set out in Article 7 of the Paris Agreement as well as a binding target for a net reduction by 2030. In Article 2, the climate-neutrality objective is set for the Union as:

> 1. Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter.
>
> 2. The relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the

[445] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), Article 1 with author's own emphasis added: "*This Regulation establishes **a framework** for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions by sources and enhancement of removals by sinks regulated in Union law.*

*This Regulation sets out a **binding objective of climate neutrality** in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030.*

This Regulation applies to anthropogenic emissions by sources and removals by sinks of the greenhouse gases listed in Part 2 of Annex V to Regulation (EU) 2018/1999."

climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective.[446]

There are no direct binding objectives for the Union institutions or Member States. As stated in this Article 2, they *just* have to take the right measures to meet the collective achievement. This emphasizes that the binding objectives might only be clear for the Union as a whole but not for the individual Member States and the Unions institutions.

The intermediate Union climate targets in Article 4(1) are the deadline for a 2030 goal and are set in order to reach the binding 2050 climate target set in Article 2(1).[447] This provision is a binding objective for the Union with the target of a domestic reduction of net GHG by at least 55 % compared to the 1990 levels by 2030. The provision determines that the institutions and Member States, when implementing the 2030 climate target, shall prioritize swift and predictable emission reductions and, at the same time, enhance removals by natural side. The objective of a 55% reduction by 2030 is therefore rather clear. However, the measures for the EU institutions and the Member States are not determined. The other part of Article 4(1) is a mitigation effort in order to contribute to net removals of CO_2 equivalent. To meet the 2030 target, the net removal is limited to 225 million tonnes of CO_2, which is equivalent to the Union's need to enhance its carbon sink.

[446] Article 2 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[447] Article 4(1) of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') the intermediate Union climate targets are set:

"*1. In order to reach the climate-neutrality objective set out in Article 2(1), the binding Union 2030 climate target shall be a domestic reduction of net greenhouse gas emissions (emissions after deduction of removals) by at least 55 % compared to 1990 levels by 2030.*

When implementing the target referred to in the first subparagraph, the relevant Union institutions and the Member States shall priorities swift and predictable emission reductions and, at the same time, enhance removals by natural sinks.

In order to ensure that sufficient mitigation efforts are deployed up to 2030, for the purpose of this Regulation and without prejudice to the review of Union legislation referred to in paragraph 2, the contribution of net removals to the Union 2030 climate target shall be limited to 225 million tonnes of CO2 equivalent. In order to enhance the Union's carbon sink in line with the objective of achieving climate neutrality by 2050, the Union shall aim to achieve a higher volume of its net carbon sink in 2030."

However, emission reductions must be the EU's main priority, while removals are only an auxiliary means of climate action.

Both the relevant EU institutions and Member States are obligated to enhance adaptability, ensure adaptability, strengthen resilience, and reduce vulnerability to climate change. This obligation is delineated in Article 7 of the Paris Agreement, consistent with the provisions of Article 5 of the Regulation. The Articles' wordings are very similar to the wording of Article 7 of the Paris Agreement. However, in the Paris Agreement, Article 7 ends with "…with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2 [of the Paris Agreement]." With another direct reference to the Paris Agreement in the provision (also in Article 2 of the regulation), it might be clear how important this Agreement is for the EU climate objectives. The adaptation to climate change might not seem like a first priority to the international community compared to the mitigation of climate change. However, the adaptation might be very close to the fundamental rights (human rights), and therefore, it is also a very important priority.

As previously elucidated in section 4.3.1, climate change mitigation is perceived as a collective concern given that the damage from greenhouse gas emissions cannot be attributed to a specific instance of climate change. However, climate change adaptation could have been an issue for the individual state, but the consequences of climate change might not only affect one state, it can bring accumulative consequences to other states as well.

When the regulation establishes a framework, it might bring legal uncertainty into many areas of EU law. The binding objectives for the Union are somehow clear. However, the following analysis of the principles of the EU climate regime in section 4.5 will also indicate that the objectives of the regulation might be open for a wider understanding of the climate regime, meaning that this framework regulation should be the foundation or an umbrella for further initiatives and legislations.

4.4.4 Climate Change Science in the EU Climate Regime

Outside the scope of the legal material, another important element to the EU climate regime has to be addressed, as the climate change science that contributes to the legal area also have a great influence on the perspective of the formulation of the legal material. However, it might be a bit

controversial to bring this into a legal examination of the EU climate regime, but, as argued below, the science of climate change has greatly contributed to the legal doctrine, and it continues to contribute to the normative element of the legal norm system.

As it generally follows from EU legislation, it can rarely be viewed in a purely legal light but must also be considered from other science perspectives. However, the question is how climate science considerations and the balancing of these are faced in the legislative processes and what significance this also has for future legislation.[448] At the same time, it is also possible to ask the question of what significance climate science has in the initiation of cases as well as in the enforcement of climate change measures. However, this might in fact be a very difficult question to answer due to the lack of actual climate-related cases from the Court.

As highlighted by de Sadeleer (2014), science constitutes the sole instrument for pursuing an environmental policy wherein legislators and society are offered an opportunity to obtain a snapshot of the state of the planet.[449] Concurrently, science also enables the presentation of issues that require resolutions through legal regulation. However, it should be noted that climate science represents a challenging endeavour within the scientific realm. The complexities associated with studying climate phenomena, including intricate interactions between various natural systems, long-term data analysis, and predicting future trends, contribute to the arduous nature of climate science. Researchers in this field encounter numerous methodological, theoretical, and data-related obstacles, which demand rigorous scientific methodologies and interdisciplinary collaborations to surmount. The pursuit of climate science requires dedication, perseverance, and a commitment to advancing our understanding of the complex mechanisms governing our planet's climate system.

In TFEU Article 191(3), one of the criteria to be taken into account when preparing policy measures relating to the environment are the consideration of available scientific and the consideration of technical data.[450] The EU Climate Regulation (2021/1119) emphasizes the significance of climate science in shaping EU climate policies and actions.[451] Accordingly, climate science plays a crucial role in providing the basis for decision making, target setting, and policy

[448] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 178.
[449] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 178.
[450] TFEU Article 191(3).
[451] See Preamble no. 34 in the Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

development within the Union. Specifically, the EU Climate Regulation (2021/1119) recognizes the importance of the best available scientific knowledge, including the findings of the Intergovernmental Panel on Climate Change (IPCC), in understanding climate change and its impact. It highlights the need to align EU policies with the objectives of the Paris Agreement, which is based on the latest scientific evidence and aims to limit global warming well below 2 degrees Celsius above pre-industrial levels by 2050.

Furthermore, the EU climate regime establishes a process for setting long-term climate targets based on scientific data and analysis.[452] It mandates regular assessments of progress towards these targets, ensuring that climate policies and measures are adjusted and updated as necessary to achieve the desired outcomes.[453] However, the role of climate science in regulation can also have consequences, as the constant new scientific advancements can cause complications in relation to the rules, which, if necessary, have to be changed according to the latest scientific results and needs.[454]

Notwithstanding the considerable influence of scientific facts on climate law, its standing as a legal discipline remains unaffected, signifying its role as a mechanism for governing social order and effectively addressing conflicts through its distinctive conceptual tools.[455] The same can be said for the case of climate law and its scientific considerations. This may entail that the regulatory framework does not necessarily follow the scientific facts in their entirety.[456] Moreover, this can also be considered one of the limitations that are found in the climate regime's norm system and in the reviewed principles. The factual science that is largely the subject of enforcement can be compressed by lawmakers and the regulatory boundary of the courts. On the contrary, this also emphasizes that the principles perceived as norms must be broad in their true sense in order to avoid this compression of science. Having said that, we must also be patient at the same time. The legal development of climate law in the EU is in a relatively early stage for which in many cases there is still uncertainty in relation to how science is to inform the set of norms on a legal level.

[452] See for example Article 4(5)(a) and Article 5(4) of Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[453] Preamble no. 1 of Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[454] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 178.
[455] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 179.
[456] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 179.

In summary, climate science does have an important role in relation to the normative interpretation of the legislation in the EU climate regime. In addition, it is also of great importance for the enforcement of the climate regulation. The current science can provide co-implications in relation to the development of the regulation and the legislator's ability to keep up. Simultaneously, the law may not invariably possess the capacity to assume responsibility for climate science, owing to inherent limitations within the formulated norms. Coupled with other sciences such as economics, political science, and sociology, climate regulation is evidently an extremely complex framework.

4.4.5 Summing Up the EU Climate Regime

To summarize the EU climate regime's legal norm system, it is the result of various aspects as presented in this chapter until now. The international climate obligations have helped to shape the European Union's climate agenda. This agenda is particularly prominent in political commitments such as the European Green Deal, and it has also been pivotal in promoting the first European climate regulation as presented above.

The EU climate regime thus consists of legal commitments, which are based on different policies and agendas. However, in this recognition, there must also be legal uncertainty, as many actions are still based solely on political commitments. Therefore, it is also a regime that cannot be based exclusively on legal contributions, but which, at present time, also contains contributions from soft law. Having said that, the next section deals with the core of the EU climate regime in the form of its principles, which have been shaped out of both the international climate regime and the EU's environmental and climate agenda.

4.5 The Key Principles in the EU's Climate Regime

In the preamble to the EU Climate Regulation (2021/1119), the aim of the climate actions of the Union and its Member States are mentioned as part of the context of the United Nations' 2030

agenda for sustainable development[457] and in pursuit of the objectives of the Paris Agreement.[458] In the light of this, it is mentioned in the regulation that climate actions should be guided "[…] by the precautionary and 'polluter pays' principles established in the Treaty on the Functioning of the European Union, and should also take into account the 'energy efficiency first' principle of the Energy Union and the 'do no harm' principle of the European Green Deal."[459]

The legal norm system of the EU climate regime and the measures that the EU must implement in this area are thus governed by some basic principles. These principles must create fertile ground for the actions found in the EU's climate regime, and it is thus necessary to understand the origin and content of the principles. However, it is further noted that these principles act as guidelines for the EU climate regime and the actions hereto, and it must thus be assumed as a starting point that the principles are independent principles with complementary content.

The principles presented below are the *no-harm principle, the prevention principle, the precautionary principle* and *the polluter pays principle*. They are described individually. However, they are all part of the regime where they co-exist.[460] The principles are founded in the EU climate legislation and policies as well as in the international climate conventions and agreements. Since both the international climate regime and the EU climate regime consist of various principles, mechanisms and concepts, the ones analyzed in this thesis are chosen due to their potential effects and information on the internal market as well as due to their very comprehensive effect on the climate regimes.[461] Thus, not all principles are presented, and it is not an exhaustive analysis.

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[457] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

[458] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), Preamble no. 9: "*The Union's and Member States' climate action aims to protect people and the planet, welfare, prosperity, the economy, health, food systems, the integrity of eco-systems and biodiversity against the threat of climate change, in the context of the United Nations 2030 agenda for sustainable development and in pursuit of the objectives of the Paris Agreement, and to maximise prosperity within the planetary boundaries and to increase resilience and reduce vulnerability of society to climate change […].*"

[459] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), Preamble no. 9.

[460] See also the very comprehensive analysis of the principles in de Sadeleer. N. (2020). *Environmental principles: from political slogans to legal rules.* (2.ed.). Oxford University Press.

[461] See Chapter 1, section 1.4.1 on the delimitations of the thesis.

Furthermore, as described in Chapter 2, the principles might be founded on both hard law and soft law.[462] Therefore, the distinction between hard law and soft law is addressed in the review of the principles in the sections below, as the boundary between hard law and soft law can be limiting in the understanding of the principles, and thus might have an impact on the basis of the principles as legal instruments under the regime.

Additionally, in Chapter 5, the principles are set up against the internal market as the key principles for the EU climate regime in order to determine the potential frictions between the internal market and the EU climate regime in the deeper layers of the law.

4.5.1 The No-Harm Principle

The no-harm principle serves as a cornerstone within both the international climate regime and the EU climate regime. Its application and implications are significant in shaping the conduct of states and regional entities concerning environmental protection, particularly in the context of addressing climate change.

4.5.1.1 No-Harm in the International Climate Regime

In the international climate regime, the no-harm principle is a guiding force that emphasizes the collective responsibility of states to prevent activities within their jurisdiction that could cause harm to the environment of other states or to the global climate system.

The no-harm rule is also where the history of international climate regulation begins. In international environmental law, the obligation and rights of states in the management of natural resources are subject to the international fundamental principle of *sovereignty*. This principle is expressed in the Rio Declaration[463] Principle 2 as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities

[462] See Chapter 2, section 2.3.1.

[463] United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations.

> within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[464]

Accordingly, *sovereignty* in international environmental law is the right for states to dispose of the natural resources within its own jurisdictions. However, entities might have a transboundary negative impact on other states' environments. The sovereignty of states and their national policies is in conflict with these kinds of negative externalities, as they are transboundary.[465]

Thus, the no-harm principle builds on states' sovereign right to make use of their own territories and resources, however, the principle finds its limits when significant transboundary harm is inflicted.[466] This means that neighboring states must tolerate harm that remains below that threshold. This was formulated in the *Trail Smelter* case (1941).[467]

The no-harm principle in international climate law can be argued to be part of international customary law. The no-harm principle can be applied as a supplement to the international treaties and their obligations, it can help put pressure on jurisdictions to reduce their GHG emissions.[468] The International Court of Justice (ICJ) has considered the content of the principle in some cases, one of the earliest in regard to international environmental law concerning the legality and threat of nuclear weapons.[469] The Court stated that the Member States have a general obligation in regard to the activities of their jurisdictions to ensure and respect the environment of another state as well as the ocean that is beyond their national control.[470]

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[464] United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations. Principle 2.

[465] Bugge, C. H (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 55.

[466] Bodansky, D. Brunnée, J. & Rajamani, L**.** (2017). *International Climate Change Law*. Oxford University Press, p. 40.

[467] *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 RIAA 1905. The case concerned air pollution originating from a smelter located in the Canadian province of British Columbia that caused damage to livestock and farmland in the US state of Washington. The arbitral tribunal held that no state had '*the right to use or permit the use of its territory as to cause injury by fumes in or to the territory of another'* and specified that the injury in question had to be '*of serious consequence*' in order to '*establish by clear and convincing evidence*'. See more in Bodansky, D. Brunnée, J. & Rajamani, L**.** (2017). *International Climate Change Law*. Oxford University Press, p. 40; and de Sadeleer. N. (2020). *Environmental principles: from political slogans to legal rules*. (2.ed.). Oxford University Press, p. 86.

[468] See Maljean-Dubois, S. (2021) "*Debate 1: Customary Law. The No Harm Principle as the Foundation of International Climate Law"*. In Zahar, & Mayer, B. Debating climate law (Eds.). Cambridge University Press.

[469] *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 1974, p. 253.

[470] However, it was not clear to what extent the obligation was customary in nature or was a general principle of law. In 2010 ICJ clarified in the case concerning *Pulp Mills on the River Uruguay (Argentina v Uruguay*) (Judgment)

Therefore, the no-harm principle is at the heart of international climate law, as it consists of a due diligence obligation—a positive obligation that affects state behaviour.[471] The fact that states must act with due diligence implies vigilance in their enforcement and exercise of administrative control, which also implies control of public and private actors.[472] This has been further clarified by the International Tribunal for the Law of the Sea (ITLOS)'s Seabed Disputes Chamber to be an obligation to deploy adequate means to exercise the best possible effort in order to do the utmost to achieve the result of due diligence.[473] This necessitates compliance with the imperative of a comprehensive state role, extending beyond mere regulation to encompass control and enforcement as well.[474]

Furthermore, the states must send out warning if there will be a risk of transboundary damage to another state, and they may be obliged to advise, consult and negotiate with that state in this context.[475] States are obliged to provide financial compensation or otherwise contribute to mitigating the inflicted damage when transboundary damage has been caused by an entity that is under its jurisdiction. [476] This also indicates that the no-harm rule is not an absolute principle that prohibits all harm. In addition, however, the standard for due diligence may change over time, as knowledge and risk assessment may be different in the future such as it is currently seen with technological developments and creation of new knowledge on climate change. Article 3 of the UNFCCC stipulates that the parties should take precautionary measures (see also about the principle of precaution below) to anticipate, prevent and minimize the causes of climate change and thus mitigate its adverse effects:

[2010] ICJ Rep (20 April 2010) that the obligation in fact is a part of customary law. See more in Bodansky, D. Brunnée, J. & Rajamani, L**.** (2017). *International Climate Change Law*. Oxford University Press, p. 41; and Maljean-Dubois, S. (2021) "*Debate 1: Customary Law. The No Harm Principle as the Foundation of International Climate Law"*. In Zahar, & Mayer, B. Debating climate law (Eds.). Cambridge University Press.

[471] Bodansky, D. Brunnée, J. & Rajamani, L**.** (2017). *International Climate Change Law*. Oxford University Press, p. 41. In any case, it is a strong presumption that there is no objective responsibility in connection with the no harm principle, but that if a state has acted due diligence, then the no harm principle is fulfilled.

[472] Bodansky, D. Brunnée, J. & Rajamani, L**.** (2017). *International Climate Change Law*. Oxford University Press, p. 41.

[473] Maljean-Dubois, S. (2021) "*Debate 1: Customary Law. The No Harm Principle as the Foundation of International Climate Law"*. In Zahar, & Mayer, B. Debating climate law (Eds.). Cambridge University Press, p. 16.

[474] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep (20 April 2010)

[475] Bugge, C. H (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget. p. 65; and Bodansky, D. Brunnée, J. & Rajamani, L**.** (2017). *International Climate Change Law*. Oxford University Press, p. 42.

[476] Bugge, C. H (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget. p. 65.

> The Parties should take precautionary measures to **anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects**. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. […].[477]

The lack of full scientific certainty should not be used as a reason for postponing such measures in case of threats of serious or irreversible damage.

The fact that emissions cause damage in another state might be seen as a violation of the no-harm rule. However, it is (yet) impossible to uncover a clear connection from a particular emission to a particular harm. Emissions contribute to the accumulation of GHG in the atmosphere, and the debate will be whether this qualifies as a violation of the no-harm rule.[478] Thus, the burden of proof for the damage is in the way. However, it is much easier to prove whether a state has complied with and implemented the necessary checks and measures that must be taken to prevent damage.[479] The IPCC's reports form an important base of evidence for the causal relationships that can be drawn from a lack of proper care. The ICJ has determined that it is not necessary for the state to prove the causal connection to have breached the due diligence obligation and the resulting damage hereto. It only needs to be proven that the state has not fulfilled its behavioural obligations, which should have been taken.[480] Additionally, the states' due-diligence obligation to regulate climate change is *erga omnes*.[481]

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[477] Article 3 of United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

[478] Statement from Bugge, C. H (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Universitetsforlaget, p. 65.

[479] See section 4.5.3 on the principle of precaution.

[480] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* [2015] ICJ Rep 2015, 665. "*Costa Rica was under an obligation to conduct an environmental impact assessment* [EIA] *prior to commencement of the construction work*s", even if the construction of the road in question in the case did not cause significant transboundary harm, simply because the activity was creating a risk that some environmental impacts may occur.

[481] The *erga omnes obligation* is based on the fact that every state has the right to invoke an obligation, i.e. all states have the right to invoke an obligation in the event of the breach regardless of where the damage occurred, see more about *erga omnes obligation* in Maljean-Dubois, S. (2021) "*Debate 1: Customary Law. The No Harm Principle as the Foundation of International Climate Law"*. In Zahar, & Mayer, B. Debating climate law (Eds.). Cambridge University Press, p. 21.

Thus, the no-harm principle under the international climate regime entails the duty of due diligence. To determine what the due diligence obligation entails, it is explored how the principles of precaution and prevention are influential in this context, as they are part of the diligence conduct under the no-harm principle under international law. However, it is first explored what the no-harm principle entails in the EU climate regime.

4.5.1.2 No-Harm in the EU Climate Regime

In the EU Climate Regulation (2021/1119), reference is made to the no-harm principle as presented in the green oath under the European Green Deal. [482] No further information is provided in this regard to the meaning of this principle. Under the European Green Deal, point 2.2.5[483], we find an oath to *do no-harm*. This pledge states that all EU actions and policies must be part of the green transition to achieve a just transition towards a sustainable future:

> All EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future. The Commission's better regulation tools provide a solid basis for this. Based on public consultations, on the identification of the environmental, social and economic impacts, and on analyses of how SMEs are affected and innovation fostered or hindered, impact assessments contribute to making efficient policy choices at minimum costs, in line with the objectives of the Green Deal. Evaluations also systematically assess coherence between current legislation and new priorities.
>
> To support its work to identify and remedy inconsistencies in current legislation, the Commission invites stakeholders to use the available platforms to simplify legislation and identify problematic cases. The Commission will consider these suggestions when preparing evaluations, impact assessments and legislative proposals for the European Green Deal.
>
> In addition, building on the results of its recent stock taking of better regulation policy, the Commission will improve the way its better regulation guidelines and supporting tools address sustainability and innovation issues. **The objective is to ensure that all Green Deal initiatives achieve their objectives in the most effective and least burdensome way and**

[482] Preamble no. 9 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[483] Point 2.2.5. *A green oath: 'do no harm'* of COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

> **all other EU initiatives live up to a green oath to 'do no harm'.** To this end, the explanatory memorandum accompanying all legislative proposals and delegated acts will include a specific section explaining how each initiative upholds this principle.[484]

The background to this oath is to collect all inconsistencies that can be found from environmental, social and economic perspectives in the legislation in connection with the green transition.[485] The aim is to ensure that all European Green Deal initiatives achieve their goals in the most efficient and least burdensome way as well as ensuring that all other EU initiatives live up to a Green Oath to *do no-harm*.[486] Embedded in the framework of the EU, this principle permeates various policies and legislation and not only protects the environment in individual Member States, but also actively contributes to overall regional and global sustainability goals. The EU's application of the no-harm principle is an example of a regional cooperative stance that recognizes the interconnectedness of climate welfare among its Member States. It is noteworthy that the no-harm principle in international law typically concerns external relations, with an internal consideration arising if there is a presumption that internal pollution may extend beyond national borders. The principle of prevention, which lies under the no-harm principle, implies that states must assess their internal actions in the light of whether they can pollute across borders.

The scope and meaning of the concept of no-harm must thus be translated to conform to the specific level of special legislations. Nevertheless, the concept of *no-harm* appears to represent a policy commitment wherein the Union is dedicated to avoiding environmental harm in all its actions. This commitment, however, is deemed excessively programmatic when viewed from the perspective of enforceability. Additionally, it does not appear to derive its foundation from references within the primary or secondary law of the EU.[487]

Furthermore, there is not much information in the EU's primary or secondary legal reference about the form and content of the no-harm principle in the EU.[488] The no-harm principle thus lacks a

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[484] Point 2.2.5. *A green oath: 'do no harm'* of COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal). Author's own emphasis added.

[485] See also the definition on sustainable development in the internal market under Chapter 3, section 3.4.1.1.

[486] Point 2.2.5. *A green oath: 'do no harm'* of COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[487] Sikora, A. (2021). "European Green Deal – legal and financial challenges of the climate change." In *ERA Forum* 21, 681–697, p. 689.

[488] Sikora, A. (2021). "European Green Deal – legal and financial challenges of the climate change." In *ERA Forum* 21, 681–697, p. 689.

general form of enforcement characteristics. However, in the area of EU funding, they have come sufficiently close to establishing a fully fleshed character of no-harm—especially in the regulation of 'the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088' ('Taxonomy Regulation').[489] Here it is emphasized that the regulation only considers an investment to be a sustainable investment if it *does not significantly harm* any environmental or social objective as set out in the Regulation.[490]

Hence, the regulation describes the no-harm principle in connection with financial investments. In this connection, the following is listed in the preamble:

> For the criteria [criteria for environmentally sustainable economic activities] to be up to date, based on scientific evidence and input from experts as well as relevant stakeholders, **the conditions for 'substantial contribution' and 'significant harm' should be specified with more granularity for different economic activities and should be updated regularly.** For that purpose, granular and calibrated technical screening criteria for the different economic activities should be established by the Commission on the basis of technical input from a multi-stakeholder platform on sustainable finance.[491]
>
> **An economic activity should not qualify as environmentally sustainable if it causes more harm to the environment than the benefits it brings.** The technical screening criteria should identify the minimum requirements necessary to avoid significant harm to other objectives, including by building on any minimum requirements laid down pursuant to Union law […].[492]

[489] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

[490] Article 3(b) of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. The environmental objectives of the regulation are set in its Article 9: *For the purposes of this Regulation, the following shall be environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems.* And in Article 17 on significant harm to environmental objectives.

[491] Preamble no. 38 in Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. Author's own emphasis added.

[492] Preamble no. 40 in Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

Thus, it has been attempted to define the scope of the green oath and the no-harm principle more precisely in this area, since financial activities and economic activities must not cause significant harm to the environment unless the benefits of these actions overshadow this harm.

The no-harm principle must be understood very broadly in the EU's climate regime. It is far more a political obligation than a principle of law. Therefore, it is secondary and primary legislation that must make up the content of the principle, as it is stated in the Green Oath that the justification accompanying all legislative proposals and delegated acts must contain a specific section explaining how each individual initiative upholds the no-harm principle.[493]

In addition, there is also the international climate regime's definition of the principle, which is largely based on the principle of sovereignty and the due diligence obligation, which ensures that states are vigilant in their enforcement and exercise of administrative control. Additionally, the EU commits itself to the international agreements while at the same time also committing to international customary law.[494] Hence, the principle of no-harm in the EU climate regime consists of the same as it does in the international climate regime. Also, in both regimes, the principle is a positive obligation that affects the behaviour of the Union's actions and not only the result of these. In this line, it must be the case that, in the EU climate regime, there is also a due diligence obligation in the principle of no-harm similar to the international climate regime.

As the no-harm principle in its form is an extremely broad principle with broad content, it must also be interpreted in EU law in the light of the existing legal principles found in the EU treaties. In this thesis, the no-harm principle must be mentioned as an 'umbrella' principle, as it fully incapsulates the other principles of prevention, precaution and polluter pays. Therefore, the legal provisions found in the TFEU Article 191(2) are an important part of the legal basis of the no-harm principle. The following principles are the precautionary principle, the principle of prevention, and the principle that stipulates that the polluter pays.

[493] Point 2.2.5. *A green oath: 'do no harm'* of COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

[494] See Chapter 2, section 2.3.1.2 about international law. The Court has stated that when the EU adopts an act, it is bound to observe international law in its entirety, including customary international law. Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C: 2011:864, para. 101.

4.5.2 The Prevention Principle

As mentioned under the no-harm principle in section 4.5.1.1, the requirement for due diligence is part of the principle in the international climate regime, which ensures that states are vigilant in their enforcement and exercise of administrative control. Bodansky (2017) describes the obligation of no-harm as a growing bridge to the duty to prevent environmental damage.[495] In order to expanding on this, it becomes pertinent to delve into the nuances of the principle of prevention within both the international climate regime and the EU climate regime.

4.5.2.1 The Prevention Principle in the International Climate Regime

The prevention principle is seen as part of the Stockholm Declaration on Human Environment from 1972 in Principle 21.[496] The principle was further set in Principle 2 of the Rio Declaration in 1992:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and **the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction**.[497]

Hence, the principle became a more restrictive obligation for the parties, and a greater emphasis is placed on preventing damage in general rather than damage that is caused to the sovereign rights of other states. The Rio Declaration Principle 2 is incorporated into the preamble of the UNFCCC. In the 1980s and 90s, the principle further developed through soft law under different multilateral

[495] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press, pp. 42-43.

[496] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972). Principle 21: "*States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*."

[497] Principle 2 in the United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations. Author's own emphasis added.

environmental agreements. Today, the principle is widely recognized as part of the reflection of rules under international customary law.[498]

The prevention principle in the international climate regime is explicitly set out in UNFCCC Article 3(3). However, the provision does not establish an obligation of results but an obligation to make an effort to the due diligence rule. Thus, according to the ICJ, the prevention principle, as a customary rule, has its origins in the due diligence obligation that each jurisdiction has within its own territory.[499] However, it is argued that the principle of prevention is more aligned with the concept of due diligence.[500] Regardless, due to the no-harm principle, states are obligated to prevent any damage, as the prevention principle is a core principle of international environmental law.[501]

For a State to be held liable under the prevention principle, the state must have failed to exercise due diligence, where an event on a significant risk has manifested itself. International customary law does not specify what the diligent conduct entails and how States' measures can fulfill their prevention duty.

4.5.2.2 Prevention Principle in the EU Climate Regime

The prevention principle aims to prevent environmental damage rather than to react to it.[502] Thus, the principle requires preventive measures to be taken into account to anticipate and avoid damage before it is inflicted. Furthermore, the prevention principle is closely linked to the principle of precaution as presented in the next section.

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[498] de Sadeleer. N. (2020). *Environmental principles: from political slogans to legal rules.* (2. ed.). Oxford University Press., p. 88. See also Duvic-Paoli, L. (2018) *The Prevention Principle in International Environmental Law*. Cambridge University Press, p. 2

[499] de Sadeleer. N. (2020). *Environmental principles: from political slogans to legal rules.* (2. ed.). Oxford University Press, p. 90.

[500] de Sadeleer. N. (2020). *Environmental principles: from political slogans to legal rules.* (2. ed.). Oxford University Press, p. 90.

[501] See for example *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep. 7, (20 April 2010), para. 204, Here ICJ held that environmental impact assessment (EIA) "*[...] has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."*

[502] Duvic-Paoli, L. (2018). *The Prevention Principle in International Environmental Law*. Cambridge University Press, p. 1.

Some scholars refer to the prevention principle as known as the principle of no-harm.[503] However, as stated in section 4.5.1.2 on the no-harm principle in the EU climate regime, this principle has to be understood more broadly. Hence, both the precautionary, prevention and polluter pays principles are observed in the no-harm principle together with the climate change science and policies. In addition, the principle of no-harm was also stated to be more of a political tool rather than a legal tool in the EU.[504] Therefore, the statement to call the prevention principle for no-harm might conflict with the fact that no-harm entails more than prevention and, as it will be shown below, that the prevention principle has its own more narrow legal perspective in EU law. As held in TFEU Article 191(2), the proclamation about the union policy has to follow the prevention principle. The principle also strengthens the objectives set in Article 191(1), and, in particular, it follows the statement of "prudent and rational utilisation of natural resources" found herein.

The prevention principle is considered to be a natural part of the Climate Regulation (2021/1119) in the EU.[505] The Regulation is assessed to implicitly include the principle although without explicitly referring to it. Article 5 of the Regulation states how adaptation to climate change must be handled in the EU. In this line, Article 5(1) states that:

> […] the relevant Union institutions and the Member States shall ensure continuous progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change in accordance with Article 7 of the Paris Agreement.[506]

Thus, as part of the adaptation process, the principle of prevention must also be inherent. However, without mentioning the principle, the aim of reducing the vulnerability to climate change might fall within the scope of preventing damage as part of the principle.

Furthermore, as part of the goal of a climate-neutral EU by 2050, the aim is precisely to meet the goal of prevention in relation to the rising temperature. At the same time, it is also stated in Article 4(5)(b) of the EU Climate Regulation (2021/1119) that the targets to be set for 2040 in the EU must take into account "the social, economic and environmental impacts, including the costs of

[503] See Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.nd). Bruylant p. 134 and Tvarnø. C. (2022). *Klimaret: almindelig del*. Djøf Forlag, p. 154.
[504] See Chapter 4, section 4.5.1.2.
[505] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[506] Article 5(1) of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

inaction".[507] This means that, if the prevention is not observed in the actions, costs must be expected. At the same time, as previously stated, the prevention principle is a principle that is based on the prevention of environmental damage. However, the limits of this principle are also difficult to observe. As the previously mentioned consideration in relation to the 2040 targets indicated, it is both the social, economic and environmental impacts of climate change that must be acted upon. Thus, it is not clear how the principle of prevention includes other considerations or whether the various non-climate-related considerations influence this principle, and it is not obvious how secondary law contribute to the development of the principle, as the prevention principle is found in various directives in the environmental area.[508]

Thus, the principle of prevention has an immediate straightforward meaning that damage should be prevented rather than treated after it has been caused. The principle of prevention is thus assessed to be a natural part of climate regulation's goal of responding to climate change and avoiding an increase in temperature. Nonetheless, as described above, it may be unclear how the principle is weighted in the EU climate regime in relation to other considerations such as purely social and economic considerations. Another aspect of the principle is the scope of the discretion that is left to the European Commission or the Member States.[509]

4.5.3 The Precautionary Principle

With the no-harm principle as the umbrella principle for the international climate regime, which, in this thesis, is defined as an umbrella principle for the EU's climate regime, the following section examines how the legal principle of precaution helps to fulfil this principle. The principle of precaution is examined in the light of both the international climate regime and the EU climate regime.

[507] Article 4(5)(b) of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[508] See for example: Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ L197/30. See also Chapter 4 in de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed.). Oxford University Press.
[509] This statement is observed by de Sadeleer, as different environmental laws have stipulated a significance threshold above which preventive regulatory action may be taken in order to ward off risks, see more in de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed.). Oxford University Press. pp. 106-107.

The precautionary principle has its origins in the German *Vorsorgeprinzip* from the mid-1980s. Since then, it has been invoked in various international legal circles and legitimated in a number of multilateral environment agreements.[510] The principle has grown into a comprehensive part of international and EU environmental law. de Sadeleer (2020) argues that the principle has grown so much that it overshadows a number of environmental principles, and that the principle is capable of:

> […] slowly but inexorably permeating the numerous crevices of positive law, whether through the declaration of public policy objectives (soft law, preambles to multilateral environment agreements), regulatory acceptance (hard law), or new methods of judicial interpretation (case law).[511]

There exists a multitude of definitions of the principle.[512] However, the key element of the principle includes:

> […] the need for (environmental) protection; the presence of threat or risk of serious damage; and the understanding that a lack of scientific certainty or inconclusive findings should not be used to avoid taking action to prevent that damage.[513]

4.5.3.1 The Precautionary Principle in the International Climate Regime

The principle of precaution was given universal recognition in the Rio Declaration.[514] Here, the following is stated in Principle 15:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible

[510] de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed). Oxford University Press. P. 137.
[511] de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed). Oxford University Press. P. 137.
[512] See more in OECD (2023), Understanding and Applying the Precautionary Principle in the Energy Transition, OECD Publishing, Paris.
[513] OECD (2023), Understanding and Applying the Precautionary Principle in the Energy Transition, OECD Publishing, Paris.
[514] United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations.

> damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[515]

Thus, Principle 15 advocates for a proactive and preventive stance in environmental management, especially when faced with scientific uncertainties and potential harm that could result in serious or irreversible damage. Before the principle of precaution gained widespread recognition in the Declaration, the conventional method for averting environmental damage typically involved considering the existing scientific knowledge indicating the risk.

The principle has since the introduction in the Rio Declaration been taken up in a majority of bilateral and multilateral environmental agreements.[516] At present, the principle is enshrined in approximately sixty multilateral treaties, addressing a broad spectrum of environmental concerns spanning from air pollution to waste management.[517] However, there is still no universally accepted definition of the principle.[518]

However, international courts have, until recently, remained reluctant to accept the precautionary principle, despite its varied recognition in international law.[519] Various decisions highlight the lack of a unified approach to risk assessment under uncertain conditions and the potential invocation of this environmental principle.[520] Hence, the principle does not require full scientific certainty where there are threats of serious irreversible damage. However, as Bodansky et al. (2017) proclaim, the principle is the most commonly invoked version of the precautionary principle in international climate law.[521] However, there is much debate on the content of the principle and whether it has a status as international customary law.[522]

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[515] Principle 15 United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations.
[516] de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed). Oxford University Press, p. 138.
[517] de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed). Oxford University Press, p. 138.
[518] OECD (2023), Understanding and Applying the Precautionary Principle in the Energy Transition, OECD Publishing, Paris.
[519] de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed). Oxford University Press, p. 139.
[520] de Sadeleer. N. (2020). *Environmental principles : from political slogans to legal rules*. (2.ed). Oxford University Press, p. 139.
[521] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press, p. 43.
[522] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press, p. 43.

4.5.3.2 The Precautionary Principle in the EU Climate Regime

The precautionary principle is part of TFEU Article 191 together with the polluter pays principle and the precautionary principle. Hence, it has a constitutional status. The aim of this principle is to ensure a heightened level of protection by employing proactive decision-making in the face of potential risks. Thus, the precautionary principle might be embedded in the prevention principle. The precautionary principle serves to guarantee a robust level of protection in the face of risks, emphasizing proactive decision-making to prevent harm. It can be seen as an integral component of the broader prevention principle, working in tandem to prioritize preemptive measures in safeguarding against potential threats. The literature shows that the prevention principle is one of the most important principles within the climate regime.[523] Additionally, the principle has been under remarkable development since it was recognized in the Maastricht Treaty in 1992 and has been embodied into a number of EU directives.[524]

TFEU Article 191(2) states that the EU policy on environmental sustainability—hence, climate—should be based on the precautionary principle. The precautionary principle, as stated by the General Court of the European Union in the *Artegodan and Others v Commission*[525] (2002) case, is defined as follows:

> […] as a general principle of Community law requiring the competent authorities **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 interests**. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the **precautionary principle can be regarded as an autonomous principle** stemming from the abovementioned Treaty provisions.[526]

[523] Also the principle of proportionality and the cost benefit principle in TFEU Article 191(3) is a very important part, see Thieffry, Patrick, *Handbook of European Environmental and Climate Law*, (2.ed), Bruylant, 2021, p. 135.
[524] Thieffry, Patrick, *Handbook of European Environmental and Climate Law*, (2.ed), Bruylant, 2021, pp. 135-137.
[525] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00. *Artegodan and Others v Commission* [2002] ECLI:EU:T:2002:283.
[526] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00. *Artegodan and Others v Commission* [2002] ECLI:EU:T:2002:283, para. 184. See also para. 121 of Case T-392/02 *Solvay v Council* [2003] ECLI:EU:T:2003:277.

This definition contributes to the no-harm principle in the EU climate regime as stated under the Taxonomy Regulation[527] in which it is stated that an economic activity should not be qualified as environmentally sustainable if it causes more harm to the environment than the benefits it brings. Emphasis under the precautionary principle is on the protection of public health, safety and the environment and giving precedence to the requirements related to the protection of those interests over economic interests. Ergo, the principle contributes with economic benefits on the one hand and the protection of public health, safety, and the environment on the other hand.

Under the climate regime and in EU climate law, the precautionary principle must be used as a guide for the Union's (and Member States') climate actions.[528] Furthermore, the precautionary principle is referred to by the Council in the Sustainable Development Strategy from 2006 in the following way:

> Where there is scientific uncertainty, implement evaluation procedures and take appropriate preventive action in order to avoid damage to human health or to the environment.[529]

Hence, the Council sees the precautionary principle as an obligation to implement evaluation procedures and take appropriate preventive action when there is scientific uncertainty when approaching the reality of a targeted risk. This is also considered valid for the climate regime due to the commitment of the UNFCCC and the Paris Agreement.[530]

EU institutions then have to take precautionary measures before the reality and seriousness of a risk becomes fully apparent.[531] Thus, there are two sides of this risk measure, first they have to determine what level of risk that is deemed unacceptable, and, secondly, conduct a scientific assessment of the risk.[532]

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[527] Regulation (EU) 2020/852. of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088.
[528] Preamble no. 9 of Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[529] Council of the European Union. Review of the EU Sustainable Development Strategy (EU SDS). 10917/06. Brussels, 26 June 2006, p. 5.
[530] Tvarnø, C. (2022). *Klimaret: almindelige del.* Djøf/Jurist-og Økonomforbundet, pp. 152-154.
[531] Case T-392/02 *Solvay v Council* [2003] ECLI:EU:T:2003:277 para. 122
[532] Case T-13/99 *Pfizer Animal Health v Council* [2002] ECLI:EU:T:2002:209, para. 149.

The precautionary principle has to be interpreted under the integration obligation of TFEU Article 11,[533] and the principle has to follow other principles under EU law—hence, the principle of proportionality and the principle of non-discrimination. In case of intervention as part of the use of the precautionary principle, the proportionality principle must be complied with under TEU Article 5.[534] Hence, secondary legislation with a legal basis in the precautionary principle has to have a legal objective and the means has to be suitable and no more intrusive than necessary.[535] Furthermore, the proportionality principle also entails that the risk never can be zero, and a total ban can sometimes be against the proportionality principle, and, at other times, it will be the only possible reaction to a given risk.[536] The non-discrimination principle determines that, with the use of the precautionary principle, comparable situations can never be treated differently, and different situation may never be determined alike unless there are objective reasons for this.[537]

4.5.4 The Polluter Pays Principle

The polluter pays principle is the idea that there is one entity responsible for the infliction of an environmental damage or pollution—hence, finding the one responsible for the pollution and making them bear the burden of the cost. Thus, the principle is a framework for addressing the negative environmental externalities by internalizing them. Negative environmental externalities refer to the adverse impacts on the environment caused by certain activities such as environmental damage. In the context of the polluter pays principle, these externalities become a focal point for accountability and resolution. The polluter pays principle underscores the concept that the party responsible for environmental harm or pollution should bear the financial burden associated with rectifying or mitigating the damage caused. The principle must thus be understood in the same way when it comes to climate change and damage to the atmosphere, the earth, and individuals.

The principle started out carrying the meaning that polluters had to bear the costs associated with the preventive and remedial measures necessary to comply with and ensure an acceptable

[533] TFEU Article 11 "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.*" See also Chapter 5, section 5.4.1.
[534] TFEU Article 5.
[535] Tvarnø, C. (2022). *Klimaret: almindelige del.* Djøf/Jurist-og Økonomforbundet, pp. 152-154.
[536] Tvarnø, C. (2022). *Klimaret: almindelige del.* Djøf/Jurist-og Økonomforbundet, pp. 152-154.
[537] Tvarnø, C. (2022). *Klimaret: almindelige del.* Djøf/Jurist-og Økonomforbundet, pp. 152-154.

environment.[538] Since then, the principle has been expanded to not only deal with preemptive measures but also to deal with preventing pollution and control costs. Today, it also includes the cost for a state to deal with pollution. Finally, the polluter pays principle also covers any costs that the polluter must pay for the damage that they should have foreseen, and this is regardless of whether the damage was below the legal limits or occurred as an accident.[539]

4.5.4.1 The Polluter Pays Principle in International Climate Law

The polluter pays principle was introduced in the recommendation from the OECD Council in 1972[540] as a guideline for national environmental policy. Here, it was stated that the polluter pays principle:

> "[…] constitutes for Member countries a fundamental principle for **allocating costs of pollution prevention and control measures** introduced by the public authorities in Member countries."[541]

An essential political objective was to prevent disparities among OECD member countries that could create uneven competition for industries.[542] Additionally, when dealing with environmental externalities, there is a shortfall in fully internalizing the social and environmental costs associated with the persisting pollution.[543]

Although the principle was already discussed in the OECD at this time, it was not featured in the 1972 Declaration of the United Nations Conference on the Human Environment in Stockholm.[544]

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[538] Bugge, C. H., (ed.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 74.
[539] Tvarnø. C. (2022). *Klimaret: almindelig del*. Djøf Forlag, p. 157.
[540] OECD: Recommendation of the Council of 26 May 1972 on Guiding Principles concerning International Economic Aspects of Environmental Policies [C(72)128].
[541] OECD: Recommendation of the Council of 26 May 1972 on Guiding Principles concerning International Economic Aspects of Environmental Policies [C(72)128]. Author's own emphasis added.
[542] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), *Environmental Law and Justice in Context* (pp. 411-428). Cambridge University Press, p. 414.
[543] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), *Environmental Law and Justice in Context* (pp. 411-428). Cambridge University Press, p. 414.
[544] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972).

The principle was first laid down in international law in the Rio Declaration[545] in 1992 as one of the 27 guiding principles—namely, Principle 16:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that **the polluter should, in principle, bear the cost of pollution,** with due regard to the public interest and without distorting international trade and investment.[546]

The Principle in the Rio Declaration implies that compensation in principle must be paid if the given pollution crosses national borders—this is in accordance with the no-harm principle.[547] However, the principle has been formulated with a rather soft approach in its wording, reflecting a deeper global challenge—i.e., the insufficient resources for addressing pollution in numerous developing nations and the necessity for financial assistance from industrialized countries.[548]

Furthermore, the polluter pays principle in international law is not always clear, as Bugge (2009) states:

> A closer look at the principle reveals that it is even more complex. Many difficult questions appear: Who is the 'polluter' in the many situations where the causes of pollution are several, or in 'chains' of production or uses of a polluting product? When must the polluter pay and on what basis and criteria? Are there exceptions and situations where the polluter is not obliged to pay? What is to be paid or paid for – and to whom? And what is meant by 'principle'? What is its legal meaning and 'strength' relative to other and possible contradictory legal principles and considerations?[549]

Bugge (2009) indicates that, whether explicitly stated or implied, the principle typically addresses the allocation of what can be termed as primary costs—the responsibility to pay preventive or

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[545] United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations.

[546] Principle 16 of United Nations Conference on Environment and Development. 1992. Agenda 21, Rio Declaration, Forest Principles. New York: United Nations. Author's own emphasis added.

[547] Bugge, C. H., (ed.). (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 77.

[548] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), Environmental Law and Justice in Context (pp. 411-428). Cambridge University Press, p. 423.

[549] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), Environmental Law and Justice in Context (pp. 411-428). Cambridge University Press, p. 413.

compensatory measures initially.[550] Thus, the principle can be viewed as an assumption or a guideline for assigning primary responsibility and economic risk. This means that the polluter pays to the extent that the cost cannot be shifted to and borne by the consumer, through insurance, or by another party.[551] Considering these various facets, the principle becomes highly intricate, open to diverse interpretations, and requires amplification and nuance. In this line, Bugge (2009) summarizes:

> When all these various aspects are taken into account, the principle becomes indeed very complex. It may be understood in many different ways, and it has to be amplified and nuanced. It may even be more adequate to describe the principle in plural, as 'polluter pays principles', although with connections and overlaps, and a common core.[552]

Although, the principle is very developed in its form, there is still a lot of debate around it. It is still not part of the customary international norm.[553] However, the Paris Agreement does not refer to the polluter pays principle directly, but it is implied in the objectives of the Agreement that GHG emissions will need to be priced.

In international law, the principle thus provides a broad guideline for environmental policy, and thus also climate change policy. However, it leaves a number of questions that require further clarification, and thus the principle also has its limitations in practice in international law.

[550] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), Environmental Law and Justice in Context (pp. 411-428). Cambridge University Press, p. 413.
[551] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), Environmental Law and Justice in Context (pp. 411-428). Cambridge University Press, p. 413.
[552] Bugge, H. (2009). "*The polluter pays principle: Dilemmas of justice in national and international contexts*". In J. Ebbesson & P. Okowa (Eds.), Environmental Law and Justice in Context (pp. 411-428). Cambridge University Press, p. 413.
[553] Kingston, S. "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, p. 2.

4.5.4.2 The Polluter Pays Principle in the EU Climate Regime

The Polluter pays principle was first introduced in the European Community's First Environmental Action Programme of 1973,[554] and later in the Single European Act (1986),[555] and, today, it is laid down in TFEU Article 191(2):[556]

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that **the polluter should pay.**[557]

Pollution, in this context, is the damage caused by the polluter by directly or indirectly damaging the environment or by crating conditions leading to such damage.[558] Accordingly, the polluter pays principle in EU law states that, in principle, the person or organization that has caused the damage to the environment has to pay for preventive or remedial measures. In this line, the cost must not be paid by the public (otherwise, it will be captured by the principle of common burden).[559] In addition, it is determined in TFEU Article 192(4) that the costs of EU climate policies must be borne by the Member States, which is why it should not be a burden on the EU's budget as such with the exception in TFEU Article 192(5).

The polluter pays principle has a constitutional status, and the principle has had a big influence on EU legislation, as it is enshrined as a fundamental principle in EU law today.[560] Furthermore, Kingston (2020) describes the influence that the principle has in EU law:

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[554] 73/C112/01 Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment.

[555] Single European Act (SEA), 29.6.1987, OJ L 169.

[556] The principle was already well established in EU environmental law before included in EEC Treaty (1987) as it was included in the Environmental Action Programme of 1973 by the European Commission, See more in Kingston, S. "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, DOI: 10, p. 5.

[557] TFEU art. 191(2). Note, that different versions of TFEU states the polluter 'shall' pay, e.g. in the Danish version 'Forureneren betaler'.

[558] Case C-293/97 Standley [1999] ECLI:EU:C:1999:215.

[559] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 722.

[560] Kingston, S. "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, p. 2 and 5.

> […] Its influence has been clear in the EU's embrace of economic, market-based environmental-policy instruments aimed at placing a price on pollution and passing on that price, where possible, to those who have caused the pollution. […].[561]

The constitutional value of the principle is reflected in parts of EU legislation in the form of the economic, market-based environmental policy instruments, which have the option of making the polluter pay. Thus, the economic instruments in EU climate policy are the EU ETS, the rules regulating the grant of subsidies (State Aid), and EU energy law.[562] In spite of having these instruments in EU law, the principle is not fully settled at the Court yet.[563] As Kingston (2020) further states, the role of judges will be important for the principle in the future. At the same time, as soft law hardens into legislation and binding goals, judges will be obliged to answer questions about the implications of the principle.[564] These implications can be seen in the light of a potential strict interpretation of the principle, which can provide solutions that are in conflict with socio-economic efficiency, social justice, and environmental considerations.[565]

Thus, the polluter pays principle is currently an instrument that must guide the EU climate regime, and this must be observed in the context of the no-harm principle, just like the other two principles.

4.5.5 The EU Climate Regime in Conflict with the Free Movement of Goods

Within this section, a brief exploration of issues that arise between the EU climate regime and the free movement of goods is carried out to illustrate the potential impact that the EU climate regime together with the reviewed principles can have on the dynamics of the internal market—hence, the free movement of goods. The principles embedded in the EU's climate regime have the capacity to introduce new considerations within the internal market, necessitating further clarification

[561] Kingston, S. "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, p. 5.
[562] Kingston, S. (2020) "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, p. 5.
[563] Kingston, S. (2020) "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, p. 2. Thus, as Kingston (2020) states it has often been seen as an objective or guiding principle rather than one the Court can justify.
[564] Kingston, S. (2020) "The Polluter Pays Principle in EU Climate Law: An Effective Tool Before the Courts?" in *Climate law* (1) 1-27, p. 25.
[565] Bugge, C. H., (ed.). (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 78.

in the subsequent analyses in the thesis.[566] This section briefly touches upon some of these emerging issues, recognizing that comprehensive elucidation is reserved for future discussions that fall outside the scope of this thesis.

The perception of the principle of free movement of goods can potentially be influenced considering the aim of the no-harm principle. For example, a potential problem could be whether a Member State introduced a measure that prohibited the import of goods in which the measure was justified in the production chain of the goods and not the goods itself. This would occur in cases where there would be no GHG emission harmonization in the EU. However, if the relationship would be regulated, it would only be those relationships or the sectors that fall outside of the areas that are harmonized. Therefore, the Member State would have to rationalize a restriction of the goods in question based on the idea of harmful production in the form of high GHG emissions. It is noteworthy that these emissions originate in a jurisdiction different from the Member State's own and thus necessarily would fall under the no-harm principle. In this context, it is important to recognize that the Member State would not seek to limit the product itself but rather the production processes associated with it. Thus, the issue would be whether this obstacle to the free movement of goods is incompatible with one of the legitimate goals under TFEU Article 36 or under a defense after *Cassis de Dijon*[567] principle (or with a climate principle).[568] Thus, TFEU Article 36 allows Member States to invoke *public morality* as a legitimate reason for introducing a restriction against a product. The question is whether the aim of the principle of no-harm in connection with climate change can be included in public morality when justifying a restriction of goods due to harmful production causing GHG emissions.[569]

Another example of an issue between the EU climate regime and the free movement of goods is in regard to third countries. The Deforestation Regulation (2023/1115)[570] illustrates how the EU

[566] See the analysis of Chapter 5.
[567] Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42.
[568] In the WTO, the EU has made arguments concerning hunting methods in Canada to prohibit seal goods (EC – Seal products, WT/DS400/AB/R and WT/DS401/AB/R). This means that the EU has banned these goods due to the manner that they were produced in another state. The question is whether that argument also can be made in respect to climate consideration within the EU (and TFEU Art. 34-36).
[569] See also Chapter 6 on extra-territorial issues, which may just be part of the issues to be dealt with by the European Court of Human Rights.
[570] Regulation (EU) 2023/1115. of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

climate principles influence the internal market, as it bans specific types of goods due to climate concerns (see preamble of the Regulation). As stated in Article 1 of the Regulation:

> This Regulation lays down rules regarding the placing and making available on the Union market as well as the export from the Union of relevant products, as listed in Annex I, that contain, have been fed with or have been made using relevant commodities, namely cattle, cocoa, coffee, oil palm, rubber, soya and wood, […][571]

Furthermore, the ban is stated in Article 3 of the Regulation:

> Relevant commodities and relevant products **shall not be placed or made available on the market or exported, unless all the following conditions are fulfilled**:
>
> (a) they are deforestation-free;
>
> (b) they have been produced in accordance with the relevant legislation of the country of production; and
>
> (c) they are covered by a due diligence statement.[572]

Thus, the ban on products also concerns the products produced inside the EU. Hence, the EU complies with the non-discrimination principle of WTO law on national treatment, i.e., that third country goods must be treated equally with EU goods. Thus, the Regulation limits the free movement of goods in the EU, as certain goods are now banned. Nevertheless, the Regulation does not mention free movement of goods. However, it refers to third country goods that will get in free circulation in the EU. A third country good that enters the EU will thus get in free circulation after the border check and custom clearance as stated in TFEU Article 28:

> 1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

[571] Article 1 of Regulation (EU) 2023/1115. of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

[572] Article 3 of Regulation (EU) 2023/1115. of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010. Author's own emphasis added.

> 2. The provisions of Article 30 and of Chapter 3 [TFEU Articles 34-37] of this Title [Title II Free movement of goods] shall apply to products originating in Member States and to products coming from **third countries which are in free circulation** in Member States.[573]

Therefore, it is evident that the EU climate regime currently exerts influence on certain products and their associated production processes, thereby placing constraints on the free movement of goods within the internal market.

Consequently, these considerations and issues in the relationship between the free movement of goods and the application of the EU climate regime are also a prerequisite for the analysis in Chapter 5, where the legal culture of the two legal norm systems is dealt with. Thus, it is not directly the issues as presented in this section that are analyzed, but the relationship between the EU climate regime and the principles of the internal market that are under scrutiny.

4.6 Summing Up on the Principles in the EU Climate Regime

From here on in the thesis, when reference is made to the EU climate regime, it must be viewed in the light of the findings in this chapter regarding the listed principles and the reviewed development of the regime. This means that the regime both consists of elements from international climate law, elements from the EU treaties, EU regulations, the key principles that have been reviewed in the sections above, but also partly soft law in the form of, for example, the European Green Deal, which is sometimes used to fill in the gaps that the regime still contains.

The principles in the EU climate regime are ambitious principles, however, they might fall short in terms of their legal content. They are the product of a dynamic relationship between the development of the international climate regime and the EU climate regime. However, their content reflects a necessity to provide more concrete definitions of climate change and the necessary measures to prevent this. Thus, the legal obligations of the principles, the legal enforcement, and the legal sanctions are assessed as extremely uncertain in the EU climate regime. This applies to all the reviewed principles. The missing content of the principles is filled in by the international climate law, and, sometimes, secondary regulations. However, the principles are currently

[573] TFEU Article 28. Author's own emphasis added.

estimated to have a limited content in EU primary law, and this is despite of the fact that the principles must act as guidance for the EU's climate regime.

The principle of no-harm has been defined as the umbrella principle in regard to the regime and the other principles. The principle is rather well defined in international law in which it builds on states' sovereign right to use their territories and resources. In the EU climate regime, however, it is rather unclear what is captured by the principle. The principle must thus be assessed to be based on the same way as in international law, which is why no damage must occur on other jurisdictions. Furthermore, in the EU, the principle has been determined to be a political statement rather than a legal objective, and thus it is also clear that the principle has been determined to be broad.

The principle of prevention has been defined as an element under due diligence in the international climate regime. As established in the obligation of the provision UNFCCC Article 3(3), the states have to make an effort to do due diligence. Under the EU climate regime, the principle of prevention is the idea of preventing damage rather than reacting to it. As the principle might seem straightforward in the EU climate regime, it is still unclear how it might be invoked when taking other considerations than the climate into account.

The principle of precaution was first given international recognition in the Rio Declaration's Principle 15, stating that lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental damage. In the EU climate regime, the principle is part of TFEU Article 191. Here, the purpose of the principle is to ensure a high level of protection when facing risk by having preventative decision-making. Thus, the principle is embedded into the principle of prevention.

The polluter pays principle is found in the international climate regime under the Rio Declaration Principle 16 in which it is stated that states must promote the internalization of environmental costs and the use of economic instruments, which takes into account the approach that the polluter should, in principle, bear the cost of pollution. Thus, the idea behind the principle is to hold the entity causing damage to the climate accountable for the cost. The principle is also part of TFEU Article 191. Its value is reflected in some of the EU's market-based environmental policy instruments. However, at this moment, the principle still lacks a more tangible conceptualization. Therefore, at this moment, it is more of a guiding principle in the EU climate regime.

PART III

THE DEEPER LAYERS OF THE INTERNAL MARKET

& THE EU CLIAMTE REGIME

CHAPTER 5
THE INTERNAL MARKET INFLUENCE ON THE EU CLIMATE REGIME

5.1 Outline

Chapter 5 commences with an introductory section, which lays the foundation for the subsequent analyses. In section 5.2, the theoretical approach for this chapter is described, providing the necessary framework for the ensuing analysis. Section 5.3 is dedicated to an examination of climate change considerations within the framework of the internal market's principle of free movement of goods. Here, the focus is on elucidating how climate considerations intersect with this internal market principle. In section 5.4, the spotlight shifts towards an exploration of the internal market's influence on the EU climate regime and its underlying principles. This section aims to uncover the dynamics and interactions between these two distinct yet interconnected legal domains. Finally, section 5.5 serves as a concluding summary, encapsulating the key findings and insights gleaned throughout the chapter. This concise recap provides a comprehensive overview of the chapter's main contributions and sets the stage for further exploration in Chapter 6.

5.2 Introduction

This chapter examines the principles of the EU climate regime and the internal market within the legal culture level of the theoretical framework of the multi-layered phenomenon.[574] The second sub-question introduced under the research question in section 1.4 is answered by examining the internal market's legal norm system and the legal norm system of the EU's climate regime through the lens of Touri's multi-layered phenomenon theory, which is elaborated on in section 5.2.1.[575]

[574] See Chapter 2, section 2.2.1.1 and the next section for an elaboration on this approach. See also the review about *Critical Legal Positivism* in Chapter 2 of this thesis, and section 5.2.1 in this chapter about the application of the multi-layered phenomenon.

[575] See Chapter 1, section 1.4 on the research question to the thesis: *To what extent do the principles of the internal market influence the principles of the EU climate regime?*

The starting point for this chapter is found in the treaty basis in which it appears that the two legal norm systems can have the same existence in the legal system of the EU. For example, TFEU Article 11 provides:

> Environmental protection requirements **must be integrated** into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[576]

The incorporation of climate considerations into the EU's activities and policies, as stipulated in the constitutional provision, highlights the significance of addressing climate change within the EU. However, it raises an important question regarding the extent to which this provision is fully realized. Specifically, it prompts an examination of whether the consideration of climate change is adequately taken into account within these activities and by policymakers. This consideration also extends to the functioning of the internal market, necessitating an exploration of the extent to which climate change concerns are integrated into its core operations.

Understanding the prioritization and implementation of climate considerations within EU activities, policies, and the internal market is essential for evaluating the effectiveness of the constitutional provision, TFEU Article 11. This understanding provides insights into whether the Union fully embraces its commitments to address climate change and promotes sustainable development as well as whether there are persistent challenges and imbalances in reconciling economic interests with environmental imperatives. By investigating these aspects, a more comprehensive understanding of the normative landscape surrounding climate change within the EU and its internal market can be attained.

It is analyzed whether there are areas in which the EU climate regime's legal norm system is affected by the internal market's legal norm system, and this is also assessed as a hierarchical disparity between the two legal norm systems throughout the chapter. If the legal norm system is influenced by the internal market, it could potentially give rise to norm frictions in cases where climate law and the internal market may be contradictory in their outcomes. However, it must first be emphasized that the internal market and the EU climate regime have different aims by their nature. The internal market is based on the principles of free movement following TFEU Article 26.[577] Meanwhile, climate law is largely focused on regulatory measures but also obligations for

[576] TFEU Article 11. Author's own emphasis added.
[577] See Chapter 3, section 3.4.

the future, which must be assumed to be able to influence legal considerations under the internal market.[578] These conditions might be a result of the legal norm systems of the legal orders and have also been introduced as *frictions* in Chapter 2.[579] Under this approach, the analysis of this chapter is not directly targeted at addressing the frictions, but rather it is a study of the places where the legal norm systems are positioned opposite to each other in the multi-layered phenomenon, and the places where they inform each other.

Accordingly, the analysis of the chapter includes several illustrative examples from practical law (the legal surface) to shed light on these principles. These examples are part of the legal dogmatic analysis, which must help to illuminate the deeper layers of the law, and which thus follow the theoretical framework. In this regard, Tuori (2002) writes the following:

> *Legal dogmatics*, when following the programme of critical legal positivism, can draw on the normative and conceptual reservoir of the law's deeper levels in the interpretation and systematisation of surface-level legal material. This reservoir also provides it with yardsticks which render possible a non-subjectivist criticism of individual regulations and decisions, as well as dominant doctrines systematising the legal 'raw material'. A central part of this critical work consists in the disclosure of the often implicit social theoretical assumptions on which these doctrines are based. *Legal theory*, in turn, can for example question prevailing patterns of argumentation and interpretation in the light of the form of rationality inherent in the deep structure of modern law.[580]

Thus, it follows from the logic of critical legal positivism that the legal surface layer sediments down to the deeper layers of the law, while conversely there will also be an ascent from the deeper layers to the surface level.[581] This can thus be reflected in the examples that are the basis of the analyses in the thesis.

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[578] See the review of the EU climate regulation in Chapter 4.

[579] See Chapter 2, section 2.4.4.

[580] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 320.

[581] See Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 200 and 210-211; and Chapter 2, section 2.1.1.1 where it stated: *At the same time, as the sedimentation occurs from the surface level through the legal cultural level and down to the deep structure level, there will also be an ascent the other way around. Thus, all activities in the field of law and legal science at the surface level will be based on legal notions found in the legal culture, but, at the same time, these activities will also reproduce and modify those legal notions. This is the recursive relationship, where the legal practice at the surface level depends on the legal culture and the deep structure of the law as a prerequisite.*

Overall, Chapter 5 is intended to examine the interaction between the two legal norm systems, and to answer the sub-question: *To what extent do the principles of the internal market influence the principles of the EU climate regime?* The chapter is divided into a two-part analysis that includes sections 5.3 and 5.4 respectively. In section 5.3, the presence of climate change considerations in the internal market is established in order to assess how the internal market's principle of free movement of goods takes into account the climate measures undertaken by the Member States. Furthermore, this part of the analysis may thus reveal the potential frictions that can arise between the internal market and the considerations for climate change that are regulated under the EU climate regime. The second part of the analysis is carried out in section 5.4, where it is assessed how the internal market influences the EU climate regime, and how the EU climate regime adapts into the legal norm system of the internal market. Thus, the starting point for this part of the analysis is mainly focused on sustainable development, which the principles of the internal market are intended to bolster, and it is further established how sustainable development works with regard to the EU climate regime. These two approaches culminate in a normative understanding of the legal culture level for the two norm systems, which can help to address the frictions that may arise between these. Prior to the analysis of this chapter, section 5.2.1 presents an in-depth theoretical description of the multi-layered phenomenon with a focus on the layer of *legal culture* from which this chapter takes its point of departure. Furthermore, section 5.2.2 presents the key principles of the two legal norm systems in order to elaborate on their norm status in the theoretical context of the thesis.

5.2.1 The Legal Culture Level of the Multi-Layered Phenomenon

In the previous chapters, the introduction of the internal market and the EU climate regime was in focus.[582] The aim of the analyses was to determine the principles of the two legal norm systems as part of the core of these two areas of law. Additionally, the prerequisite for this analysis is that the internal market is a well-founded system of norms in the EU and in which the climate regime norms, in the form of EU climate policies, EU climate regulation, and the international climate conventions and agreements, can be found. It is relevant to assess these different norms (legal and non-legal) for the EU climate regime in relation to the theoretical framework, as these must

[582] See Chapter 3 about the internal market and Chapter 4 about the EU climate regime.

express elements of the legal culture of the EU climate regime in the multi-layered phenomenon, this is further elaborated in section 5.2.1.2.

As presented in Chapter 2, the multi-layered phenomenon of law consists of three layers.[583] In Chapters 3 and 4, the legal norm system is formulated with a focus on the principles. These principles are a result of the surface level, the legal culture, and also the deep structure of the law. The analyses of Chapters 3 and 4 are thus mostly focused on the surface level of the two areas of law with the aim of determining the 'linguistically formulated' norms (i.e., *principles*).[584] Thus, no emphasis has been placed on how these principles fit into the theoretical context and why the principles are an essential element in this context. At the same time, the formulated principles are also just a window to the deeper layers of the law—as such, the layer of legal culture must thus be explored in the current chapter.[585] The two legal norm systems are deployed in a theoretical overview in connection to the multi-layered phenomenon.

5.2.1.1 The Surface Level[586]

The surface level represents the formal linguistically formulated norms, regulations and policies that law deals with.[587] Chapter 3 defines the principles of free movement in the internal market, as this represent the core of the formal linguistically formulated norms of law in the thesis.[588] The principles has been formulated with the legal material that has been accumulated over time and has shaped the content of the principles.[589] The same approach has been applied in Chapter 4 in the form of the key principles of climate law.[590] Here, the focus is also on the influence of

[583] See Chapter 2, section 2.1.1.

[584] Tuori describes the surface level as where "[…] *the legal order appears as linguistically formulated norms or norm fragment.*" See the section on 'The turbulent surface of the law' in Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 154.

[585] Hence, the 'window' is a result of the constant interaction between the surface level and the sub-surface levels, and as Tuori describes it "*What is essential is the insight that the law is not exhausted by what is 'visible', by what is received a linguistic expression in, say, statues or precedents. The deeper layers of the law impose conditions on the surface level, delimiting what kind of legal material can be found at this level."* See Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 196.

[586] The surface level as an element of the multi-layered phenomenon has been introduced in Chapter 2, section 2.1.1.

[587] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 154.

[588] Chapter 3, section 3.4.

[589] See the theoretical description of how legal material helps to formulate the principles on the surface level in Chapter 2, section 2.1.1.1. See also the development of the internal market in Chapter 3, section 3.3.

[590] Chapter 4, section 4.5. The key principles were determined to be the no-harm principle, the prevention principle, the precautionary principle and the polluter pays principle.

international climate law on the formulation of these principles.[591] One of the most important findings within this area has been the lack of legal formulation of the relevant legal material for the core principles of the EU climate regime.[592] The lack of a formulation for these principles under the EU climate regime is also addressed in this analysis, as this may contribute to the frictions between the two legal norm systems. Therefore, the examination in Chapter 5 will incorporate consideration for the political agenda's antecedent to the legal material within the EU climate regime. It is imperative to recognize that these political agendas contribute to shaping the content of the underlying principles to a certain extent. Accordingly, the findings of the surface level are the starting point of the analysis of the deeper layers of law, as these findings are used to reconstruct the deeper layers of law.

5.2.1.2 The Legal Culture Level[593]

Tuori (2002) divides the doctrine of the sources of law into a descriptive and normative part, where the descriptive doctrine focuses on the actual application of the law, while the normative doctrine seeks to systematize the legal sources based on normative guidelines for identification and sequence.[594] In the thesis, it is particularly the normative examination of the multi-layered nature of the law that is of interest. Hence, the doctrine serves as an intra-legal guide to assess the weight in the content of the legal order—i.e., that the sources of law provide information for the legal order that applies and where the doctrine of these sources of law divides and classifies the mutual relationship in the system.[595]

The general doctrines of various fields of law are also part of *the legal culture level*.[596] The general doctrines are an expression of the legal culture as well as conceptual and normative elements of the various legal areas.[597] When new areas of law are formed, the general doctrine can give the area its identity and thus give the area an independent character.[598] In addition, the general doctrine assigns the field of law a legal order and thus the systematic character that is a prerequisite

[591] See Chapter 4, section 4.5 about the key principles in the EU climate regime and section 4.3 about the international climate regime.
[592] See Chapter 4, section 4.5.
[593] The legal culture level as an element of the multi-layered phenomenon is introduced in Chapter 2, section 2.1.1.
[594] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 157.
[595] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 157.
[596] See about 'the general doctrine' under Chapter 2, section 2.2.1.
[597] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 169.
[598] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 169.

for the infallibility of the judgment and for the legal protection.[599] The general doctrines are essential for the perception and understanding of the area of law in question, which is thus also a prerequisite for the judges who have to take a position on the actual circumstances but who can also form the normative premise in the case and thus make a legal argument of and conclusion to the case.[600]

Tuori states that, in the systematic nature of the legal order, there is a prerequisite for consistency but that there is also a prerequisite for coherence. Tuori describes the terms as follows:

> **Consistency** refers to the standards like lex superior, lex posterior and lex specialis aim at securing consistency. **Coherence** does not denote mere logical consistency but rather the substantive congruity of the legal order. The assessment of coherence draws attention to the substantive links the legal order maintains with moral norms, ethical values and socio-political objectives. In the appraisal of consistency, the legal order is conceived of mainly as a set of rules, and the above mentioned standards are applicable primarily to the mutual relationship between legal rules. When judging its coherence, the legal order is seen to involve not only rules but even legal principles. Coherence, means first of all, congruity at the level of principles; guaranteeing this congruity – of integrity, is one of the tasks falling on the general doctrines.[601]

These two elements of *consistency* and *coherence* are important within this theoretical review, as they are reflected in the understanding of the two legal norm systems, as it is this coherence (or the lack of it) that is desired to be addressed in the form of the frictions between the EU climate regime and the internal market. In particular, it is an assumption that these frictions in the legal norm system arise as a derivate result of this coherence, which, i.a., is reflected in the claim that the internal market influences the EU climate regime.[602]

The following analyses describe the legal culture level for both the internal market and the EU climate regime. By analyzing the deeper layers of the legal areas, the aim is to be able to explain the hypothesis that the EU climate regime is largely influenced by the internal market. The analysis is thus not intended as a critique of this structure but can be seen as an expression of the

[599] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 169.
[600] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 169.
[601] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 169-170. Author's own emphasis added.
[602] See Chapter 2, section 2.4.4 on 'Defining *Frictions* in the Thesis'.

location of the norms and the legal approach to the interaction between the two legal norms systems—hence, the potential norm frictions that might occur between the two legal systems.

Table 4 is used throughout the thesis to systematize the analysis. This chapter is thus at the level of legal culture in the multi-layered phenomenon:

Table 4. *The Multi-Layered Phenomenon – Focus on the Legal Culture Level*

EU LAW		
The Multi-Layered Phenomenon	**EU Internal Market**	**EU Climate Regime**
Surface Level *Chapters 3 and 4*	Chapter 3 found the principles of free movement to be the key principles of the internal market. Hence, the analysis of the chapter focused particularly on the development and construction of the internal market, the establishment of the internal market, the internal market working for sustainable development, and the framework obligation of the internal market. Additionally, the principle of free movement of goods was outlined.	Chapter 4 found the key principles of the EU climate regime to be the principle of no-harm, the principle of prevention, the principle of precaution, and the polluter pays principle. Hence, the analysis of the chapter focused on the development of the EU climate regime particularly with a focus on the international climate regime, the EU climate policies, and the EU Climate Framework Regulation (2021/1119).
Legal Culture *Chapter 5*	The analysis of Chapter 5 revolves around the principles of the internal market and the EU climate regime. It aims to determine the interaction between the two legal norm systems. Additionally, the chapter delves into the sub-question that explores the influence of the internal market on the EU climate regime.	
The Deep Structure of the Law *Chapter 6*	The analysis of the *deep structure of the law* is presented in Chapter 6.	

5.2.2 The Principles of the Two Legal Norm Systems

This section defines the norm status of the principles found in Chapter 3 and Chapter 4, and it considers whether they in fact can be determined as general principles of law in order to be placed in the second top of the hierarchy in EU Law as introduced in Chapter 2.[603] Hence, if they are determined as general principles of law in the EU, they can be utilised for the integration of the EU climate regime in the internal market. In the thesis, the principles of the two legal areas are established as fundamental principles for the idealistic goals of the two legal areas.[604] It is thus necessary to determine their importance in the legal norm systems and thereby in EU law.

In Chapter 2, it is described how the principles in this thesis were determined, and it is emphasized that there is a particular focus on the principles as a source of law.[605] Hence, under the theoretical framework, the focus is on how the principles act as part of the underground layer of the law, which thus focuses on the principles' position as underground normative elements that support the surface level. Furthermore, it is stated that the general principles can, by their nature, be of a general character. In some parts of the legal literature,[606] it is emphasized that it is the Court in particular that helps to proclaim them.[607] The Court is thus also the one that defines the concept of a general principle (often negatively). Thus, the recognition of the principles is about whether the principles are recognized by the Court—for which there is a wide and narrow possibility for the existence of the principles. The narrow approach attributes that the general principles must be recognized explicitly by the Court, while the broad approach claims that they can be recognized

[603] See Chapter 2, section 2.3.1.1 on 'The Hierarchy of Norms'. As introduced in this section the dogmatic approach, as used in this thesis, divides the legal norms into different categories as part of systematization. This approach, or rationale, is based on the review of the book Craig, P. & de Búrca, G., (2020). *EU law: text, cases, and materials.* (7. ed.). Oxford University Press, pp. 136-154.

[604] See the analysis in Chapter 3, where it is found that the objectives of the internal market are found in the principle of free movement. In addition, part of this principle also consists of a general balance in relation to sustainable development (section 3.4.1.1). In Chapter 4, it was the principles of no-harm, prevention, precaution, and polluter pays that were assessed to be part of the core principles of the EU climate regime. These principles were taken into account from the perspective of international climate law, EU climate policy, and EU climate regulation.

[605] See Chapter 2, section 2.4.2 on 'Defining *Principles* in the Thesis'.

[606] See for example Craig, P. & de Búrca, G., (2020). *EU law: text, cases, and materials.* (7. ed.). Oxford University Press, p. 142, see also Tvarnø, C. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist- og Økonomforbundet, p. 580. These highlight that the question of whether a norm can be considered *valid* in critical legal positivism depends on whether it is accepted as *legitimate* in the legal discourse between legislators, courts and legal researchers—i.e., the actors in the most important forms of legal practice.

[607] See Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press, pp. 142-143.

implicitly. That is, it is generally recognized that the principles can exist in parallel but that this can also lead to problems according to their codification—referred to in this thesis as *frictions*.

The principles of free movement in the internal market are thus recognized norms in the EU norm hierarchy, which includes that they are recognized by the Court in a convincing number of decisions surrounding the internal market.[608] Craig & de Búrca (2020) describes this recognition as follows:

> They [the general principles] sit below the constituent Treaties, and may be used when interpreting particular Treaty Articles. They sit above legislative, delegated, and implementing acts: general principles can be used not only to interpret such acts, but also to invalidate a legislative, delegated, or implementing act if it contravenes these principles.[609]

In addition, it also follows as a confirmation of the fact that the principle of free movement is part of the general norms of the internal market. The provisions of the Treaty directly refer to these as part of the framework for the internal market as set out in TFEU Article 26(2). Furthermore, the principle of free movement is also mentioned in the preamble of the European Union's Charter of Fundamental Rights in which it is emphasized that the Union must contribute to sustainable development as well as should ensure free movement:

> The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and **sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment**.[610]

Accordingly, the question of a recognition of the principle of the internal market at the second top of the hierarchy is thus not immediately relevant for further assessment in the current study. However, it does seem necessary to articulate the relevance of the principles of the EU climate regime and their position in the hierarchy.

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[608] See the analysis of Chapter 3.

[609] See Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press, p. 142.

[610] The preamble of the Charter of Fundamental Rights of the European Union (Charter) [2012] OJ C326/02. Author's own emphasis added.

Thieffry (2021) points out that the legal strength of the principles of the EU climate regime is questionable, partly because the principles can be said to be general and abstract in nature.[611] At the same time, Thieffry (2021) emphasizes that some of the principles can be ambiguous:

> Some of them are not exempt of ambiguity so as to allow compromises which seem to satisfy neither the pro-environment nor the champions of development.[612]

Furthermore, the principles can also contribute to substantive law, in so far as they provide guidance to the EU legislator as emphasized in TFEU Article 192(2).[613] This guidance is also applicable to those institutions that implement measures in connection with climate-related activities when exercising its competence of execution.[614] The EU legislature possesses extensive discretion that is subject to judicial review, which is confined to assessing the effective exercise of this discretion and the consideration of fundamental facts.[615]

The no-harm principle was found to be a rather unclear formulated principle under the EU climate regime in section 4.5.1 for which there does not yet seem to be any legal material in the EU climate regime. Hence, this principle can be seen as a more normative principle than a legal principle. Furthermore, as described in Chapter 4, it might be more of an *umbrella principle* within EU law.[616] However, the principle is a decisive point in the international climate regime. Additionally, as previously determined in Chapter 4[617], the International Court of Justice (ICJ) has helped shaping the no-harm principle under the international climate regime. In this way, the ICJ has also had an impact on the design of the principle in the international climate regime. Whether the principle has the same format and legal strength in EU law as in international law is not clear at present, but the EU and its Member States must deal with the influence of the principle as part of the international climate regime.

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[611] Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed). Bruylant, p. 124. Furthermore, Thieffry emphasizes that there is a discussion about the legal strength of the principles among researchers both in the EU but also at the international level.
[612] Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed). Bruylant, p. 124.
[613] Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed). Bruylant, p. 124.
[614] Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed). Bruylant, p. 124.
[615] C-128/17 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2019:194, paras 73-75, and Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed). Bruylant, p. 124.
[616] Chapter 4, section 4.5.1.
[617] Chapter 4, section 4.5.1.1.

The prevention principle, the precautionary principle and the polluter pays principle are analyzed in Chapter 4. This chapter considers the principles to have a more widespread influence in the secondary law of the EU environmental area than the no-harm principle. The principles are stated as part of the aim of the Union's environmental policy in TFEU Article 191(2), thus, it is emphasized that the principles have an important role in the environmental area and thus also in the EU climate regime (see section 5.3 below).[618] Hence, the principles can be placed in the top of the hierarchy of norms. However, as stated above in the quote by Thieffry (2021), the legal strength of the principles of the EU climate regime is questionable, as the principles currently can be considered a compromise to the aims of the EU climate regime in their design, which allows a wider application of the legislation when these are to interpreted.[619] Thus, it must also be emphasized that they are currently an expression of political considerations rather than concrete legal material—hence, legal development has an impact on the principles of the EU climate regime.[620]

5.3 The Relationship Between the Internal Market and Climate Change

With this section, it is the aim to delve deeper into the normative meaning of the principle of free movement while exploring the dynamic interplay between the internal market and climate change through the lens of the legal culture in the multi-layered phenomenon. This endeavour represents a critical step in unravelling the intricate dynamics between these legal areas. The starting point is thus the integration of the climate change considerations, which is explored in more depth in the internal market's legal norm system throughout this section. Accordingly, this section contributes with an examination of environmental considerations to the analysis of the interaction

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[618] TFEU Article 191(2): *Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the* ***precautionary principle*** *and on the* ***principles that preventive action should be taken****, that environmental damage should as a priority be rectified at source and that the* ***polluter should pay****. […].* Author's own emphasis added.

[619] Thieffry, P. (2021). *Handbook of European Environmental and Climate law*. (2.ed). Bruylant, p. 124. Furthermore, Thieffry emphasizes that there is a discussion about the legal strength of the principles among researchers both in the EU but also at the international level.

[620] See also Chapter 2, section 2.4.3 on *Defining the Principles in the Thesis*. Here it was stated that in critical legal positivism, the principles must be available as a normative element (norm) that must be governed by legal practice. Hereby, it is recognized that the norm is both how the law 'is', but also how it 'ought' to be. From this it thus gains an ontological element but will thus only last if it is reconstructed through legal practice. Furthermore, it was stated that the formulations of the principles might be included as a basis for basic rights and as an institutional support. However, they might also find support in other sources of law than legislation. Principles might have elements found in other *travaux preparatoires*, meaning in government bills, law processes or legal practices, and they are thus also part of the characteristics of a principle.

between the internal market and the EU climate regime. This will be elaborated on in the next section.

5.3.1 The Connection Between Environmental Law and the EU Climate Regime in the Internal Market

It shall be explained how there will be elements of EU environmental law that are involved in analyzing the relationship between the interactions between the EU climate regime and the internal market. Accordingly, the legal norm systems of EU environmental law and of the EU climate regime are, to some extent within this thesis, considered as two different legal norm systems, even though they largely stem from the same provisions in the Treaty.[621] As previously described in the thesis, climate law is considered separately, as it relates to the atmosphere but also as the handling of its overall objective is largely influenced by elements that are not considered in environmental law. In other words, environmental law is largely dependent on considerations for direct pollution on land, air and sea and the handling of this issue, while climate law is about reducing emissions and pollution that can affect anyone without a causal connection.[622]

However, in recognition of this separation, it must be emphasized that the EU climate regime both in international law and in EU law is linked to environmental law (see section 4.4 in Chapter 4). Thus, in EU law, it is clear that the climate norms originate from the provisions of environmental law in the treaty. In addition, this recognition must also imply that the EU's environmental regime is now a well-defined and well-treated element in EU law. Therefore, the rest of Chapter 5 is also based on parts of the well-defined areas of environmental law in the investigation of the impact of the internal market on the EU climate regime is to be considered. At the same time, however, the analyses show how the EU climate regime is dealing with this interaction.

In the interaction between environmental law and the internal market, it is thus already described how economic integration and environmental considerations can give rise to debate.[623]

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[621] See Chapter 2, section 2.4.2 on *Defining Legal Norm Systems in the Thesis*.

[622] As described in Chapter 1, section 1.2.3.1, there is a certain separation between EU climate law and environmental law, which should not be rejected when it comes to the thesis' aim to define the frictions in the norm structure. This separation is evident if you separate the concepts where environment is the harmful effects on the earth, while climate is the harmful effects in the atmosphere. Climate law differs in important respects from environmental legislation in this form. However, it is legally grounded in the same legal approach and constitutional provisions.

[623] See also Chapter 3, section 3.3.2.1 on negative and positive integration.

Specifically, this is debate regarding the relationship between economic integration (the internal market) and the need to protect the environment.[624] Arguments have been made both for and against this economic integration. On the one side, questions have been raised as to whether an open market (trade liberalization) and competition increase the wealth of trading nations and thus their ability to implement environmental considerations.[625] The other side has spoken against this, as the claim has been that economic growth will, at all times, increase the pressure on the environment according to de Sadeleer (2018):[626]

> The relationship between economic integration and environmental protection has always been fraught with controversy. It has been argued that trade liberalization and free competition increase the wealth of trading nations so they are able to implement environmental policies. On the other hand, economic growth at all costs may result in greater pressures on ecosystems. The issue of how international trade and environmental protection could be reconciled has been the subject of an immense amount of writing. As far as the EU is concerned, one of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualized in terms of economic integration. At the core of economic integration lies the internal market based on free movement provisions promoting access to the different national markets and on the absence of distortions of competition.[627]

The debate on the relationship between economic integration in the internal market and the environmental norm considerations thus also reflect the hypothesis that has been put forward for the analysis in this chapter—namely, that the provisions of the internal market are, to a large extent, governing the EU climate regime. Thus, it is emphasized in the quote above by de Sadeleer (2018) that the legal order in the EU is co-conceptualized by economic integration, which thus poses a challenge for environmental protection—and thus also climate change protection.

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[624] See for example: Holmes, S. (2020). "Climate change, sustainability, and competition law" in *Journal of Antitrust Enforcement*, 8, 354-405, p. 366. See also de Sadeleer. (2018). "Environmental Measures as an Obstacle to Free Movement of Goods in the Internal Market." In *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe.* (pp. 125–150). Cambridge University Press, pp. 125-150, p. 148.

[625] See Chapter 3, section 3.3.2.1 on negative and positive integration.

[626] de Sadeleer. (2018). "Environmental Measures as an Obstacle to Free Movement of Goods in the Internal Market." In *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe.* (pp. 125–150). Cambridge University Press, pp. 125-150.

[627] de Sadeleer. (2018). "Environmental Measures as an Obstacle to Free Movement of Goods in the Internal Market." In *Preventing Environmental Damage from Products: An Analysis of the Policy and Regulatory Framework in Europe.* (pp. 125–150). Cambridge University Press, p. 125.

Environmental considerations might in fact be the inspiration for the climate change considerations regarding the interaction with (and integration of) the internal market. However, there is a more progressive and regulative context of the climate regime, which the EU Climate Regulation (2021/1119)[628] sets an overall binding objective for:

> […] climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030 […].[629]

Hence, the international law perspective of the regulation also influences the regulation in another way. Therefore, the EU Climate Regulation (2021/1119)[630] might bring in another perspective on the interaction between the internal market and climate law than the one provided by the environmental objectives and considerations. Furthermore, as stated in Chapter 1, section 1.2.3.3, regulations of the environment and regulations of the climate are different in their area of applicability (climate legislation is about the atmosphere). This also means that the scientific findings of research within climate change are essential for the regulation and the normative element of the regime.[631]

5.3.2 Free Movement of Goods and Climate Change

It has to be assessed how climate change must be integrated as a consideration under the internal market's legal norm system, and which considerations must apply under restrictions on the free movement of goods. Since this chapter's analyses are at the level of the legal culture,[632] it is the EU Courts' approach to the integration of the climate consideration on the internal market that are

[628] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[629] Article 1 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[630] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[631] See Chapter 4, section 4.4.4 on climate change science in the EU climate regime.
[632] See Table 3, section 5.2.1.

the starting point for the analysis. The EU Courts' approach can largely be said to be the clearest example of the practice that is formed at this layer of the law. This is defined in Tuori (2002) as follows:

> The methodical element in the legal culture is represented by the meta-norms determining the normative doctrine of the sources of law; by the standards which are followed in the solution of contradictions between norms (rules) and in the interpretation of ambiguous norm formulations; and finally, by the patterns of argumentation employed in the legal decisions-making and scholarship. The general doctrines of different fields of law, in turn, bring together conceptual and normative elements of the legal culture: legal concepts and principles.[633]

Accordingly, it is these listed conditions that are aimed to be investigated in order to determine the level of legal culture and to answer the sub-question to this chapter of whether the internal market influences the EU climate regime.

The principles of free movement have been found to be a relatively broad principles, which covers both the free movement of persons, goods, services and capital in the EU. These are part of the promotion of an open market—hence, the internal market—and are founded on the pillar of free movement.[634] The development of the norms has contributed to a rather exclusive and comprehensive market for goods, services, persons and capital.[635] Here, the Court has particularly helped to develop or shape all of the principles to include a number of fundamental conditions for the essence of the internal market.[636] Today, as a result of the legal development, the principles must also be clearly formulated in spite of the fact that they can be perceived as broad in their actual provisions.[637]

Furthermore, as stated in Chapter 3, the free movement of goods, people, services, and capital is one of the pillars of the internal market project, and as it is its *acquis*.[638] Thus, it follows the idea

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[633] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 192.
[634] Chapter 3, section 3.4.
[635] See the historical development of the internal market in Chapter 3, section 3.3. Tuori also refers to the historical dimension of law, meaning that sedimentation and development of the principles in the multi-layered phenomenon that will be developed over time through legal practice, etc. See Chapter 2, section 2.2.1.
[636] Craig, P. and Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, pp. 136-154.
[637] See Chapter 3 section 3.3.2.1, on negative and positive integration of the internal market and section 3.4 on the principles of the internal market.
[638] See Chapter 3, section 3.3.1.

of the social market economy of the Union. It also follows from Chapter 3 that the concept of free movement is followed by a case-by-case exemption assessment, which means that when the Court approaches this analysis, it is based on the different cases and practices set out by the Court regarding free movement of goods and climate considerations. Additionally, as stated in section 3.4.2, free movement is highlighted in TFEU Article 26(2)[639] where it is found that the internal market shall comprise of an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties. Hence, the free movement principles have an essential role in the internal market area.

In order to limit the scope of the analysis, the analysis will be based on the principle of free movement of goods, thereby excluding the free movement of services, persons, and capital.[640] As de Sadeleer (2014) points out, the product has taken on an essential role in a growing focus on environmental protection in the EU:

> Focusing since the early 1970s on the regulation of 'point-sources' of pollution (listed installations, discharges into water, landfills, brownfields, etc), environmental policy at both the national and international level gradually shifted through the 1990s towards the control of diffuse pollution. Indeed, there was growing awareness that the traditional focus on production process was no longer appropriate to safeguard the environment. In spite of the fact that industrial and energy production remains an important source of pollution emissions, the growth in emissions has been consumption-related. In effect, the rise in consumption of products and services has increased pressure on the environment. Throughout their life cycle, all products cause environmental degradation in some way. Depending on their consumption, their production method, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution.[641]

Furthermore, the analysis does not determine whether climate-related legal measures fall within or outside of the scope of TFEU Article 34, which could potentially impede the internal market and the free movement of goods. Instead, the focus is on examining the factors considered in the interaction between the EU climate regime and the free movement of goods. This examination is primarily grounded in TFEU Article 36, but it also encompasses supplementary considerations. The goal is to identify potential frictions that may elucidate the balance between these two legal

[639] TFEU Article 26(2).
[640] See also Chapter 3, section 3.4.
[641] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 229.

norm system. This approach aims to provide a clearer indication of whether certain considerations tend to prioritize the internal market over climate concerns in specific instances.

It is necessary to address this consideration in the relationship as desired in this analysis. The increased frequency can be regarded as the indirect friction that arises on the basis of the two legal cultures and their legal norm systems. Therefore, it must be clarified how this is expressed in the relationship of and the considerations that apply between the two areas.

5.3.3 The Environmental Considerations under TFEU Article 36 and Climate Change

There is an increased frequency of invoking the protection of the environment by Member States that is based on climate change commitments in cases where they implement national legislation or practices that may be in conflict with the rules in TFEU Article 34 on the free movement of goods. The opportunity for Member States to introduce measures, prohibitions, or restrictions on imports, exports, or goods in transit are found in TFEU Article 36, as such measures will have to be justified on grounds of public morality, public policy, or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.[642] Member States can thus maintain or adopt quantitative restrictions or measures with equivalent effect as long as they can justify it on the basis of necessity by accommodating these interests in the exhaustive list of TFEU Article 36.[643] Additionally, the Court interprets this list of derogations in TFEU Article 36 narrowly—all of which relates to non-economic interests.[644] In this line, the following was found in the case *Campus Oil* (1984):[645]

> As the Court has previously stated […], Article 36, as an exception to a fundamental principle of the Treaty [EC], must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure and the measures taken pursuant to that article must not create obstacles to imports which are disproportionate to those objectives. Measures adopted on the basis of article 36 can

[642] TFEU Article 36.
[643] Case 46/76 *Bahuhuis* [1977] ECLI:EU:C:1977:6.
[644] Case C-120/95 *Decker* [1998] ECLI:EU:C:1998:167, and case 72/83 *Campus Oil* [1984] ECLI:EU:C:1984:256.
[645] Case 72/83 *Campus Oil* [1984] ECLI:EU:C:1984:256.

> therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-community trade more than is absolutely necessary.[646]

Subsequently, in *Campus Oil*, the Court includes the following point:

> It must be pointed out in this connection that a member state may have recourse to article 36 to justify a measure having equivalent effect to a quantitative restriction on imports only if no other measure, less restrictive from the point of view of the free movement of goods, is capable of achieving the same objective.[647]

Thus, TFEU Article 36 is interpreted restrictively. Another option is to justify the considerations on the mandatory requirements (see section 5.3.3.2 for a further elaboration).

Since the phrasing of the text in TFEU Article 36 does not explicitly encompass the consideration for environmental protection (or climate change protection), the evolution of legal interpretations has additionally resulted in environmental protection being recognized as a valid contemplation within this provision. Simultaneously, this consideration must be contextualized in the acknowledgment that matters pertaining to the environment and environmental damage are encompassed within the treaties. Furthermore, TEU Article 3(3) expressly asserts that the internal market must operate with a commitment to achieving a high level of environmental protection and fostering sustainable development, wherein the environment is an integral component.[648]

The Member States' heightened reliance on environmental protection stems from a growing public consciousness and advancements in the scientific understanding of climate change and its associated legal obligations. Nevertheless, the Court has affirmed that grounds related to public health and environmental concerns do not invariably constitute justifications for obstructing the free movement of goods.[649] In numerous instances, the Court has upheld that the national measures were disproportionate with the aim to be achieved or that there was a lack of evidence

[646] Case 72/83 *Campus Oil* [1984] ECLI:EU:C:1984:256, para. 37.
[647] Case 72/83 *Campus Oil* [1984] ECLI:EU:C:1984:256, para. 44.
[648] See for example Case 302/86 *Commission v Denmark* [1988] ECLI:EU:C:1988:421, para. 8., where the Court recognizes that the protection of the environment as "one of the Community' s essential objectives", which may as such justify certain limitations of the principle of the free movement of goods. Hence, the Court refers to the European Single Act that specifically introduces the protection of the environment in the then treaty, which today is the TFEU.
[649] See further in section 5.3.3.1.

in order to prove the claimed risk.[650] Moreover, in the *Bluhme*[651] (1998) the Court has adeptly addressed the uncertainty inherent in the evidence when determining whether a measure can warrant a restriction of free movement. See section 5.3.3.3.1 on the precautionary principle.

The subsequent analysis focuses on whether the interests of climate change and climate protection have the same recognition as environmental protection under TFEU Article 36 and as part of the mandatory requirement to except Member States' restrictions. The analysis aims to recognize the differences between these two areas, and it considers the fact that climate protection is based on another kind of risk assessment than environmental protection.

5.3.3.1 Climate Change and Grounds of Justification

The first time that climate considerations have been recognized as considerations in relation to the internal market and free movement is in the *PreussenElektra* case (2001).[652] In this case, the

[650] See, for example, Case C-319/05 *Commission* v *Germany* [2007] ECLI:EU:C:2007:678; Case C-186/05 *Commission* v *Sweden* [2007] ECLI:EU:C:2007:571; Case C-297/05 *Commission* v *Netherlands* [2007] ECLI:EU:C:2007:531; Case C-254/05 *Commission* v *Belgium* [2007] ECLI:EU:C:2007:319; Case C-432/03 *Commission* v *Portugal* [2005] ECLI:EU:C:2005:669.

[651] Case C-67/97 *Bluhme* [1998] ECLI:EU:C:1998:584.

[652] Case C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2001:160. This case revolves around a dispute between PreussenElektra, an energy producer, and Schleswag, which is an electricity supply entity operating in the same German region as PreussenElektra. The German Electricity Feed-in Act of 1998 [Stromeinspeisungsgesetz] stipulates that public regional electricity distribution companies such as Schleswag are obligated to purchase electricity generated from renewable sources within their supply area at predetermined minimum prices. These additional costs, stemming from the procurement of renewable energy, are intended to be allocated to upstream network operators (specifically, *PreussenElektra*) through a legal compensation mechanism, effectively constituting a form of State aid. In 2001, *PreussenElektra* brought a case before the Regional Court, contending that the measure was incompatible with European State aid regulations, and thus sought reimbursement for the extra costs it had incurred. Consequently, the Regional Court presented a preliminary reference to the Court of Justice of the European Union posing two fundamental queries. The first inquiry pertained to the conformity of the Electricity Feed-in Act with the concept of State aid under EU law. In the event of a negative response to the first question, the Regional Court sought to ascertain whether the Electricity Feed-in Act was consistent with EC Article 30 [TFEU Article 34] of the EC Treaty, concerning measures tantamount to quantitative restrictions on imports of goods. The second question pertained to the compatibility of a provision akin to the one instituted in Germany, which mandates the acquisition of energy sourced from renewable outlets with Article 30 [TFEU Article 34]. Article 30 [TFEU Article 34] encompasses the prohibition on measures "having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade", in accordance with the *Dassonville* formula [Case 8-74, *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82, para. 5.]. The Court acknowledged the potential for such a measure to fall within the category of measures with an equivalent effect [para. 71].
Finally, the Court concluded that German law was compatible with TFEU Article 34, which implies that distinctly applicable measures were justified in the case at hand.

Court recognized that combatting climate change was part of the Union's and its Member States obligations:

> The use of renewable energy sources for producing electricity, which a statute such as the amended Stromeinspeisungsgesetz [German Electricity Feed-in Act] is intended to promote, is useful for protecting the environment in so far as **it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.** [653]

Furthermore, the Court recognized that the international climate obligations are part of the priority objectives that the Union and its Member States intend to pursue:

> **Growth in that use is amongst the priority objectives** which the Community and its Member States intend to pursue in implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change [UNFCCC] […]. [654]

Additionally, the Court noticed that the policy was designed to protect the health and life of humans, animals, and plants as part of the legitimate considerations under TFEU Article 36:

> It should be noted that that policy is also designed to protect the health and life of humans, animals, and plants.[655]

Accordingly, this is the first time that climate considerations are recognized as considerations in relation to the internal market and free movement where a measure on the energy market is considered to be compatible with Article 30 of the EC Treaty (now TFEU Article 34). Thus, it was recognized that the German law was not only legitimate but also compatible with the EU's principles, laws, and policies for the mitigation of climate change (and the characteristics of the energy market). The case served as a cornerstone in the progression of integrating climate change considerations into the established principles that regulate free movement. This progression holds heightened importance in the contemporary global context, and it is marked by the prominence of pandemics, energy crises, and climate-related disasters.

In the case, it was thus highlighted that the purpose of the policy in question was to protect the health of people, animals, and plants. This fact also indicates that the purpose, then, was not

[653] Case C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2001:160, para. 73. Author's own emphasis added.
[654] Case C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2001:160, para. 74. Author's own emphasis added.
[655] Case C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2001:160. para. 75.

founded in the need to protect the environment or the climate as a directly legitimate purpose but solely with the overriding purpose of protecting people, animals, and plants. In the next section, it is thus analyzed how this legitimate purpose should be viewed in the context of the EU climate regime.

5.3.3.1.1 Protection of People, Animals, and Plants

Following the case of *PreussenElektra*,[656] other cases regarding climate considerations and the protection of people, animals and plants have emerged. In the case *L.E.G.O.*[657] (2018), the Court acknowledged that the protection of renewable energy (see also the *PreussenElektra* case para. 73) was linked to the goals of safeguarding the life and health of humans, animals, and plants:[658]

> As a consequence, national provisions such as those at issue, which promote the use of renewable energy sources, also contribute to the protection of the health and life of humans, animals and plants, which are among the public interest grounds listed in Article 36 TFEU […].[659]

In order to better understand the considerations as applied in environmental cases and their connection to climate regulation and climate policy in the EU, the starting point for this analysis is EU Climate Regulation (2021/1119)[660] in order to consider the similarities that such regulation sets up as compared to the environmental considerations that are already part of the legitimate considerations under TFEU Article 36. In this connection, national measures restricting the free movement of goods will naturally have to be assessed in each specific case. However, this analysis provides a perspective on the scope of the considerations of climate change (such as in *PreussenElektra*). Additionally, the legitimate considerations must also follow the proportionality of their pursued aim.[661]

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[656] Case C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2001:160.

[657] Case C-242/17 *L.E.G.O.* [2018] ECLI:EU:C:2018:804.

[658] See also: Case C-242/17 *L.E.G.O.* [2018] ECLI:EU:C:2018:804, para. 65; Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, paras. 79 and 93; Case C-549/15 *E.ON Biofor Sverige* [2017] ECLI:EU:C:2017:490, para. 89.

[659] Case C-242/17 *L.E.G.O.* [2018] ECLI:EU:C:2018:804, para. 65.

[660] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[661] See Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42.

In the EU Climate Regulation's (2021/1119) preamble, reference is made to this goal in connection with the Union's and its Member States' objectives for climate action:

> **The Union's and Member States' climate action aims to protect people and the planet, welfare, prosperity, the economy, health, food systems, the integrity of eco-systems and biodiversity against the threat of climate change, in the context of the United Nations 2030 agenda for sustainable development and in pursuit of the objectives of the Paris Agreement**, and to maximise prosperity within the planetary boundaries and to increase resilience and reduce vulnerability of society to climate change. In light of this, the Union's and Member States' actions should be guided by the precautionary and 'polluter pays' principles established in the Treaty on the Functioning of the European Union, and should also take into account the 'energy efficiency first' principle of the Energy Union and the 'do no harm' principle of the European Green Deal.[662]

Thus, the preamble makes it clear that the acts to which climate legislations refer to must pursue the goal of securing the lives of people and plants. In addition, the planet must, without further definition, must also relate to animals and plants but also humans among other things. With the citation above, it is clear that the aim of EU climate policy is to protect people and the planet. Hence, this might fall within the scope of TFEU Article 36.

5.3.3.1.2 Public Health

The protection of the environment is related to the objectives of protecting human, animal and plant life.[663] Additionally, health has also been determined to be an objective for the protection of the environment, which the Court has acknowledged in serval cases.[664] In 2011, in the case *Commission v Austria,*[665] the Court affirmed that it is evident from EC Article 174(1) (now TFEU Article 191) that safeguarding human health constitutes one of the key objectives within the framework of the EU's environmental policy:

[662] Preamble no. 9 in the Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[663] See section 5.3.3.1.1.
[664] Case C-242/17 *L.E.G.O.* [2018] ECLI:EU:C:2018:804, para. 65; Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, paras. 79 and 93.
[665] Case C-28/09 *Commission v Austria* [2011] ECLI:EU:C:2011:854.

> **As to the relationship between the objectives of protection of the environment and protection of health, it is apparent from Article 174(1) EC [now TFEU 191] that the protection of human health is one of the objectives of Community policy on the environment** (see, inter alia, Case C-343/09 *Afton Chemical* [2010] ECR I-0000, paragraph 32, and Case C-77/09 *Gowan Comércio Internacional e Serviços* [2010] ECR I-0000, paragraph 71). Those objectives are closely linked, in particular in connection with the fight against air pollution, the purpose of which is to limit the dangers to health connected with the deterioration of the environment. **The objective of protection of health is therefore already incorporated, in principle, in the objective of protection of the environment** (see, to that effect, Case C-524/07 *Commission* v *Austria*, paragraph 56).[666]

Furthermore, it is underscored in the case that the close interconnection between these objectives, particularly in the context of combatting air pollution, are aimed at mitigating health hazards associated with environmental degradation. Consequently, the goal of preserving public health is inherently encompassed in principle within the overarching objective of environmental protection.[667]

Numerous environmental protection measures aim to safeguard *public health*. Consequently, it is evident that such measures readily fall within the purview of TFEU Article 36.[668] This rationale should also be extended to the context of climate change, delineating how a national measure aligns with the parameters of TFEU Article 36. Accordingly, such an alignment will be congruent with the overarching policy outlined in TFEU Article 191(1), which mandates that climate policy shall actively contribute to the overarching goal of "protecting human health."[669]

Considering that human health and lives are accorded paramount significance as "rank[ing] foremost among the assets and interests protected by the Treaty,"[670] and considering the recognition that safeguarding public health is prioritized and "must take precedence over economic

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[666] Case C-28/09 *Commission v Austria* [2011] ECLI:EU:C:2011:854, para. 121. Author's own emphasis added.
[667] Case C-28/09 *Commission v Austria* [2011] ECLI:EU:C:2011:854, paras. 121-122; Case C-67/97 *Bluhme* [1998] ECLI:EU:C:1998:584. See also in C/2021/1457. Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03, p. 49.
[668] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 293.
[669] TFEU Article 191(1).
[670] Case 215/87 *Schumacher* [1989] ECLI:EU:C:1989:111, para. 17; Case C-347/89 *Eurim-Pharm* [1991] ECLI:EU:C:1991:148, para. 26; Case C-62/90 *Commission v Germany* [1992] ECLI:EU:C:1992:169, para. 10; Case C-320/93 *Ortscheit* [1994] ECLI:EU:C:1994:379, para. 16; Case C-322/01 *Deutscher Apotherkerverband* [2003] ECLI:EU:C:2003:664, para. 103; Case C-141/07 *Commission v Germany* [2008] ECLI:EU:C:2008:492, para. 46.

considerations,"[671] the Court has consistently favoured the discretion of Member States when issues of public health come to the forefront in the context of the free movement of goods.[672]

In the preamble to the EU Climate Regulation (2021/1119),[673] the health of the public is also mentioned as part of the aims of the EU's climate policy (found in the European Green Deal):

> The European Green Deal also aims to protect, conserve and enhance the Union's natural capital, and **protect the health and well-being of citizens from environment-related risks and impacts.** At the same time, this transition must be just and inclusive, leaving no one behind.[674]

Furthermore, it is mentioned in the preamble that the connection with protecting the health of people and with mitigating the risk of climate change affecting public health:

> **It is necessary to address the growing climate-related risks to health**, including more frequent and intense heatwaves, wildfires and floods, food and water safety and security threats, and the emergence and spread of infectious diseases. […].[675]

Thus, it is recognized in the preamble of the EU Climate Regulation (2021/1119) that the EU's climate policy largely exists to protect public health due to the growing risks derived from climate change.

Additionally, consideration must be given to how the Member States' individual regulations and practices will turn out. In the preamble to the EU Climate Regulation (2021/1119), it is described in this context that the Member States must strive to protect the public health in their climate actions:

> In taking the relevant measures at Union and national level to achieve the climate-neutrality objective, Member States and the European Parliament, the Council and the Commission should, inter alia, **take into account: the contribution of the transition to climate**

[671] Case C-183/95 *Affish* [1997] ECLI:EU:C:1997:373, paras. 43 and 57.
[672] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 293.
[673] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[674] Preamble no. 2 in the Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Author's own emphasis added.
[675] Preamble no. 5 in the Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Author's own emphasis added.

> **neutrality to public health**, the quality of the environment, the well-being of citizens, the prosperity of society, employment and the competitiveness of the economy; the energy transition, strengthened energy security and the tackling of energy poverty; food security and affordability; the development of sustainable and smart mobility and transport systems; fairness and solidarity across and within Member States, in light of their economic capability, national circumstances, such as the specificities of islands, and the need for convergence over time; the need to make the transition just and socially fair through appropriate education and training programmes; best available and most recent scientific evidence, in particular the findings reported by the IPCC; the need to integrate climate change related risks into investment and planning decisions; cost-effectiveness and technological neutrality in achieving greenhouse gas emission reductions and removals and increasing resilience; and progression over time in environmental integrity and level of ambition.[676]

It is a well-established legal principle that each Member State possesses the autonomy to select its desired level of protection within the confines delineated by TFEU Article 36.[677] In the absence of harmonization efforts by the EU and given the non-harmonized nature of the subject matter, it falls upon the Member States to determine the extent of protection that they intend to afford to their national public health. This determination is employed as a means to realize the goals of public health all while carefully considering the principles underpinning the free movement of goods.

Particularly, given the potential for variations in the level of protection from one Member State to another, it becomes essential to grant Member States a certain degree of flexibility and discretion in defining this level. This allows them to calibrate their approach to public health protection by their respective jurisdictions. This is highlighted by the Court as follows:

> […] Since that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one

[676] Preamble nr. 34 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Author's own emphasis added.

[677] Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para. 83: "*As was noted in paragraph 76 above, in order for the national legislation to be capable of justification, it must nevertheless meet the requirements flowing from the principle of proportionality, that is to say, it must be appropriate for securing the attainment of the legitimate objective pursued and it must be necessary for those purposes.*". See also Case C-242/17 *L.E.G.O.* [2018] ECLI:EU:C:2018:804 para. 68: "*As is clear from paragraph 63 of the present judgment, it is therefore necessary to be sure whether national legislation, such as that in the main proceedings, meets the requirements flowing from the principle of proportionality, that is to say, whether it is appropriate for securing the attainment of the legitimate objective pursued and whether it is necessary for those purposes […].*"

> Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate […].[678]

Hence, at the same time, it is acknowledged that the importance of specific public health goals can vary significantly depending on each Member State and the circumstances that they attach to the legitimate objective under EU law.

The protection of the environment is more and more often being invoked by the Member States, which, e.g., is due to climate commitments, scientific progress on climate change and greater public awareness.[679] Among these, it is, in particular, the link between the protection of human, animal and plant life and health that the Court has recognized as one of the essential objectives of the Union's environmental policy as stated in the Case *Commission v Austria* (2011).[680] Thus, the protection of the environment serves as a good example of the more flexible approach that is adopted by the Court in terms of categorizing the justifications.[681]

The focus on human and public health will probably also grow in the future within the EU, as many cases about fundamental rights and climate change are invoked by individuals at the European Court of Human Rights.[682] The cases might raise new questions about what should be understood as human health in relation to climate change and how, among other things, future generations must be included as part of these consideration. In addition, the goal of sustainable development in the internal market will also be essential for the development of human and public health, as these two considerations are considered to be integrated elements of sustainable development, see more about the aim of sustainable development in section 5.4.

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[678] Case-110/05 *Commission v Italy* [2009] ECLI:EU:C:2009:66, para. 65. (see also the cases mentioned in the paragraph: Case C-262/02 *Commission* v *France* [2004] ECLI:EU:C:2004:431, para. 37, and Case C-141/07 *Commission* v *Germany* [2008] ECLI:EU:C:2008:492, para. 51).

[679] C/2021/1457. Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03.

[680] Case C-28/09, *Commission v Austria*, EU:C:2011:854, para 122.

[681] See also Chapter 3, section 3.3.1.1 on the role of the Court.

[682] See Chapter 6 on the pending cases at the European Court of Human Rights—*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (no. 53600/20); *Carême v. France* (no. 7189/21); *Duarte Agostinho and Others v. Portugal and 32 Other States1* (no. 39371/20).

5.3.3.2 Mandatory Requirements and Climate Change

The pivotal significance of environmental protection is evident in its designation as a compulsory prerequisite as established in the *Cassis de Dijon* case (1979).[683] In the judgment of *Cassis de Dijon*, the Court laid down that other considerations than the ones mentioned in TFEU Article 36 also can be assessed as legitimate (also called 'the principle of *Cassis de Dijon*'):

> […] Obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[684]

Thus, the mandatory requirement is an important part of justifying environmental protection and national measures that do not fall within the scope of TFEU Article 36. This was later confirmed by the Court, as it stated that this is "one of the Community's essential objectives."[685] In this connection, de Sadeleer (2014) recognizes that the mandatory requirement is a powerful tool to justify environmental measures that cannot be justified in the light of the grounds listed in TFEU Article 36.[686] Additionally, de Sadeleer (2014) states the following:

> […] it is difficult to define the line separating Article 36 TFEU from a mandatory requirement regarding environmental protection.[687]

Furthermore, the protection of the environment has been recognized by the Court as a mandatory requirement. The Court also takes this view in the case *Commission v Denmark* (1988):[688]

> […] the protection of the environment is one of the [Union's] essential objectives, which may as such justify certain limitations of the principle of free movement of goods.[689]

Indeed, the notion of achieving a high level of environmental protection has been acknowledged as a fundamental objective serving the broader public interest as far back as the 1980s and

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[683] Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon')* [1979] ECLI:EU:C:1979:42.
[684] Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon')* [1979] ECLI:EU:C:1979:42, para. 8.
[685] Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon')* [1979] ECLI:EU:C:1979:42, para. 8. See also in the *Danish Bottles* case, Case C-302/86 *Commission v Denmark* [1988] ECLI:EU:C:1988:421, para 9, where environmental measures were justified on the basis of such a mandatory requirement.
[686] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 296.
[687] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 296.
[688] Case 302/86 *Commission v Denmark* [1988] ECLI:EU:C:1988:421.
[689] Case 302/86 *Commission v Denmark* [1988] ECLI:EU:C:1988:421, para. 8

1990s.[690] Also during this period, an increasing recognition of the importance of safeguarding the environment emerged, leading to the establishment of various legal and political frameworks that were aimed at promoting environmental sustainability and later also climate change commitments.[691]

However, the EU climate regime might provide another perspective to the mandatory requirements as falling within the scope of protection, since there is no fine line on what the scope of environmental requirements may be considered as.[692] At the same time, this consideration must also be based on the fact that sustainable development, which the internal market strives for, is important for the formulation of the EU climate regime and the regulation of climate change via the regime's principles. Sustainable development in the EU climate regime is further elaborated on in section 5.4.

5.3.3.3 The Future of Climate Change Considerations

With some ambiguity as to the scope of the environmental requirements in the EU climate change regime, it may be questioned whether a legitimate reason regarding climate action can be found within of the scope of the already known environmental considerations–namely, the legitimate reasons under TFEU Article 36, and the mandatory requirement. For example, the precautionary principle might play an even more important role than already established environmental considerations (see section 5.3.3.3.1). With the case *PreussenElektra*,[693] the fact is that the judgment was handed down in 2001. Since then, there has been an increased political focus on and public awareness of climate change and the harm that it causes.[694] In addition, new regulations and targets for a climate-neutral society have been adopted, and this might have an impact on the scope of TFEU Article 36 and the mandatory requirement.

A national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in TFEU

[690] Case 240/83 *Procureur de la République v ADBHU* [1985] ECLI:EU:C:1985:59, paras 12-13, 15; Case 302/86, Commission v Denmark [1988] ECLI:EU:C:1988:421, paras. 8-9; Case C-487/06 British Aggregates v Commission [2008] ECLI:EU:C:2008:757, para. 91. See also C/2021/1457. Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03, pp. 48-49.
[691] See Chapter 4, section 4.4.
[692] The Court tends to incorporate EU policies in relation to the mandatory requirements.
[693] C-379/98 *PreussenElektra* [2001] ECLI:EU:C:2001:160.
[694] See Chapter 4, section 4.4.2 on the European Union Climate Policy from 2007 to Now.

Article 36 or by overriding requirements. This was later confirmed in the Court's judgment in *Ålands Vindkraft* (2012),[695] where the Court answered questions regarding the purpose of promoting renewable energy sources. In the judgment, it follows:

> The Court has consistently held that national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in Article 36 TFEU or by overriding requirements. In either case, the national provision must, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective […].
>
> According to settled case-law, national measures that are capable of hindering intra-Community trade may inter alia be justified by overriding requirements relating to protection of the environment […].
>
> In that regard, it should be noted that the use of renewable energy sources for the production of electricity, which legislation such as that at issue in the main proceedings seeks to promote, is useful for the protection of the environment inasmuch as it contributes to the reduction in greenhouse gas emissions, which are amongst the main causes of climate change that the European Union and its Member States have pledged to combat […]. [696]

Accordingly, the Court confirms that the use of renewable energy sources for the production of electricity is suitable for protecting the environment, insofar as it contributes to the reduction of greenhouse gas emissions, as this is the goal of the Union as previously stated in *PreussenElektra.* Hence, the Court has made exceptions so that a legislation or national practice which constitutes a measure with a similar effect to quantitative restrictions relating to climate-relevant issues (in this case renewable energy) can be justified by one of the general considerations that are listed in TFEU Article 36 or other compelling reasons. Furthermore, national legislation must adhere to the principle of proportionality, as it should be appropriate to achieve its intended purpose and not exceed what is necessary for that purpose to be accomplished. However, the judgment on *Ålands Vindkraft* was like the *PreussenElektra* case based on the already existing legal practice from the Court regarding environmental considerations, even though the Court, in this judgment, stresses that the reduction of emissions in fact is part of the general considerations of environmental protection in EU.

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[695] C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037.
[696] C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para. 76-78.

Nonetheless, the extent to which climate-related issues should be taken into consideration still seems unclear. National emission targets are one thing. However, today, climate actions contain additional goals than the reduction of emissions. They also include the adaptation to and mitigation of potential climate change harms.[697] While the Court has emphasized that the purpose of national measures concerning climate-related matters should be justified based on compelling general considerations as outlined in TFEU Article 36, and these considerations also encompass the protection of human and animal lives and health as well as the preservation of plant growth, the question is whether other considerations can be included in this legitimation of national measures. This is particularly interesting, as risk assessments of national measures seem to be of importance in relation to the EU climate regime, as it is well known that risk assessments are based on future considerations for preventing climate change. Therefore, the precautionary principle may be more important than ever before when approaching the presence of climate change in the internal market.

5.3.3.3.1 The Precautionary Principle

Another important consideration of relevance for climate considerations is the precautionary principle. The precautionary principle under the EU climate regime is laid down in Chapter 4, section 4.5.3. However, the principle might play an important role in the future in the justification of restricting the free movement of goods.

The Court has expressed that the precautionary principle gives the opportunity for the Union and its Member States to take protective measures without having to wait until the reality and the seriousness of those risks has become fully apparent in places where there is uncertainty as to the existence or extent of risks to human health. This is apparent in the judgement of *National Farmers Union* (1998):[698]

> 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.[699]

[697] See Chapter 4, section 4.5.5 on potential conflicts between the EU climate regime and the principle of free movement of goods.
[698] Case C-157/96 *National Farmers Union* [1998] ECLI:EU:C:1998:191.
[699] Case C-157/96 *National Farmers Union* [1998] ECLI:EU:C:1998:191, para. 63.

Hence, the precautionary principle is already part of the legal environmental considerations that are found in the application of TFEU Article 36. Thus, this also has great significance for the climate considerations that can be taken into account for such an application. In the nature of the matter, the consequence of climate change is a question of future risk, which is why this consideration should be a decisive consideration when applying TFEU Article 36.

de Sadeleer (2014) describes the precautionary principle's role in the justification of restrictions on economic freedoms as follows:

> The precautionary principle can lower the scientific hurdles national regulators face while trying to protect environmental values to the detriment of certain economic freedoms, such as the free movement of goods.[700]

However, these measures that are restricting or prohibiting the marketing of certain products cannot be based on a hypothetical approach to risk[701] but can only be adopted following a detailed assessment of the risk alleged by the Member States.[702] Hence, the Court expresses what follows from the precautionary principle and the risk approach:

> According to the case-law of the Court, it follows from the precautionary principle that 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 […].[703]

It is not necessary for the Member States to demonstrate that the risk itself has been proven or has materialized but merely that there is uncertainty given the current scientific research as to the existence and extent of that risk.[704] This also follows from the General Court, as they highlight that the EU institutions have to take precautionary measures before the reality and seriousness of a risk becomes fully apparent.[705]

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[700] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 84.
[701] Case C-236/01, *Monsanto* [2003] ECLI:EU:C:2003:431, para 106.
[702] Case C-249/07 *Commission v Netherlands* [2008] ECLI:EU:C:2008:683, para 51; C Case C-41/02 *Commission v Netherlands* [2004] ECLI:EU:C:2004:762, para 48; Case C-192/01 *Commission v Denmark* [2003] ECLI:EU:C:2003:492, para 47; Case C-24/00 *Commission v France* [2004] ECLI:EU:C:2004:70, para 54.
[703] Case C-236/01, *Monsanto* [2003] ECLI:EU:C:2003:431, para 111.
[704] See more about the precautionary principle in the Communication from the Commission on the precautionary principle, COM/2000/1 final. Communication from the Commission on the precautionary principle.
[705] Case T-392/02 *Solvay v Council* [2003] ECLI:EU:T:2003:277, para. 122.

The scientific development and monitoring of climate change can thus greatly contribute to the risk assessments that should be carried out if the Member States want to justify measures with these today, but this must be done in a timely manner with regard to proportionality as reviewed in Chapter 4, sections 4.4.4 and 4.5.

5.3.4 Summing Up on the Relationship Between the Internal Market and Climate Change

The relationship between the EU climate regime has been approached through environmental protection as part of the legitimate considerations under the free movement of goods. It follows that internal market principles—i.e., the free movement of goods—do not override the EU climate regime. However, environmental protection has found a place in the internal market regarding the free movement of goods, as it is part of the Union's objective— hence, a mandatory requirement and as a legitimate reason under TFEU Article 36.

In addition, de Sadeleer (2014) concludes the following in regard to the relationship between environmental measures and economic freedoms:

> Environmental law and economic law often appear to clash. […], whether they are adopted by the Union or by the Member States, environmental measures must ensure that the economic freedoms enshrined in primary law are not breached. Nevertheless, the EU has become much more than an integrated economic area: due to rebalancing of the objectives pursued by the Treaties, it must be acknowledged that economic law does not override environmental law.[706]

The review in section 5.3 reveals the places where climate change issues have occurred and where the Court has made general deliberations about considerations that must accommodate the climate. With the perspective of environmental protection, it is possible that national measures can be justified—hence, it can hinder the free movement of goods.

However, it is also clear that there are still many considerations that should be taken into account. At treaty level, it is the internal market that is in focus (TEU Article 3(3) and TFEU Article 26) to which the climate must be considered to be regulated underlying the Union's environmental policy (TFEU Articles 191-192). Furthermore, it is also unclear what legal development entails.

[706] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 472.

National measures regarding climate-related issues are still at an early stage. There are many reasons for this,[707] but this should be addressed in relation to the relationship that may arise in the future between national considerations and climate-related considerations.

When these results are considered in the thesis' theoretical framework, it becomes clear that climate considerations are, to a significant extent, shaped by the normative structure that governs the internal market. The legal doctrine is the result of a general consideration of environmental considerations in relation to the internal market, which is why it must mean that the climate regime has not yet taken root at this level of legal culture, resulting in a general imbalance between the internal market and the EU climate regime. In the next section, this is dealt with in how the EU's climate regime in many respects consists of normative elements, which reflect how climate considerations are connected with the norm structure of the internal market.

5.4 The Internal Market's Influence on the EU Climate Regime

In the first part of this chapter (section 5.3), the foundation for examining the presence of climate considerations in the internal market is established with a focus on the free movement of goods. Additionally, in this section the focus of the analysis is on how the internal market influences the EU climate regime, and how the EU climate regime fits into the legal norm system of the internal market. Herein, the centrality of sustainable development within the purview of the internal market's tasks and goals are central for analyzing the influence of the internal market on the EU climate regime. Consequently, the principle of the free movement of goods is not directly assessed, as it does not constitute a primary concern or actionable measure for addressing climate change within the EU climate regime as captured by the aim of the thesis. In contrast, sustainable development has been expressly integrated into the EU climate regime, holding a distinct position within both the regulatory framework and the overarching objectives of the internal market.

As articulated in Chapter 3, sustainable development encompasses economic, social, and environmental considerations, and each of these considerations needs to be evaluated in order for them to be balanced in their development. Therefore, this claim is explained in the subsequent section 5.4.1. Furthermore, the study of sustainable development is extended to include its role as a

[707] See Chapter 1, section 1.2 on *Research Relevance*.

normative element within the framework of the EU climate regime, which is described in section 5.4.2.

In the following section, it is primarily sought to articulate the key principles of the climate regime. This articulation is pivotal in aligning with the overarching purpose of the thesis, which revolves around comprehending the interaction between the climate regime and the internal market. It is especially important to recognize that if the analysis were extended to include sector-specific climate rules (secondary climate legislation) that are observed in EU climate legislation, although these aspects are interesting, they are beyond the scope of the thesis. It would inevitably give different results, as it would mean that EU harmonization could give rise to specific rules for all Member States. This consideration is particularly significant in the light of the escalating intricacy that is observed in EU climate legislation.

5.4.1 Sustainable Development as Part of the EU Climate Regime

An examination of the impact of sustainable development—as stated in the establishment of the internal market according to TEU Article 3(3)—on the EU's climate regime and its underlying principles must be carried out.[708] Therefore, this section will first determine how sustainable development appears in the EU climate regime.

In TFEU Article 11, sustainable development is mentioned in connection to setting out the environmental integration principle. As it is stated that environmental protection mut be part of the Union's policies to promote sustainable development, however, it is not further mentioned what this entails:

> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting **sustainable development**.[709]

Hence, TFEU Article 11 are obligating the EU to integrate environmental protection requirements into the policies and activities of the Union. Thus, this requirement is comprised by the objective of TFEU Article 191 and the aim of sustainable development.[710] However, sustainable

[708] See Chapter 3, section 3.4.1.1 on the internal market working for sustainable development.
[709] TFEU Article 11. Author's own emphasis added.
[710] Nowag, J. (2016). "The Environmental Integration Obligation of Article 11 TFEU." In Nowag, J. Environmental Integration in Competition and Free-Movement Laws. Oxford University Press.

development in this provision does not provide any clarity of the meaning in the context of integration of environmental protection requirements.

In the Treaty's section on environmental policy, TFEU Title XX, it does not appear that environmental policies must relate to sustainable development.[711] Thus, traditional environmental issues must have a wider scope due to the introduction of a social and economic dimension under sustainable development.[712] In this connection, de Sadeleer (2014) stresses the following:

> […], the fact that sustainable development is encapsulated in three different provisions [TEU Article 3(3), TFEU Article 11 and in EUCFR Article 37] situated at the apex of the EU legal order does not mean that its legal is not dogged by controversy. For instance, given that sustainable development has been coined both as an objective and a principle, there was obviously no clear concept of what sustainable development meant from a legal point of view when these various provisions were drafted.[713]

This uncertainty surrounding the legal status of sustainable development extends to the material and procedural aspects of the EU climate regime. However, TFEU Article 11 and TFEU Article 191(1) offer potential insights into certain concepts where the imperative to integrate environmental considerations into other policies becomes evident.[714] This integration becomes particularly pertinent when contemplating the introduction of climate policies within the EU, emphasizing the need to weigh the goal of sustainable development in tandem with climate-related initiatives.

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[711] 'Sustainable development' is for example mentioned in other different provisions in TEU Article 3(3), TFEU Article 11 and in EUCFR Article 37. Additionally, it is mentioned in TFEU Article 191(3), that: *In preparing its policy on the environment, the Union shall take account of: […] the economic and social development of the Union as a whole and the balanced development of its regions.*

[712] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 16. In this section of the book, various comments on 'sustainable development' are raised. This thesis has thus included some of the points from this.

[713] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 16.

[714] See also Chapter 3 section 3.4.1.1. Here it was stated that: *TEU Article 3(3)'s wording is closely related to the integration clause embodied in TFEU Article 11. Nonetheless, the absence of a clear delineation of sustainable development introduces a degree of uncertainty surrounding the concept, particularly because the two provisions, TEU Article 3(3) and TFEU Article 11, lack a direct linkage to the principle of integrity* as *articulated in the latter.*

Additionally, TFEU Article 191(3) names the criteria that must be taken into account when preparing policy measures relating to the environment (hence, climate change) for which it is mentioned that these criteria must be carefully balanced.[715] These considerations are as follows:

> […] available scientific and technical data; environmental conditions in the various regions of the Union; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of its regions.[716]

In addition to the analysis of the thesis, the last two criteria are relevant to address. The criterion of the potential benefits and costs of action or lack of action prescribes that an extremely comprehensive cost-benefit analysis must be carried out when the EU is designing climate policies. In addition, there is disagreement as to how this is a purely economic analysis or whether a comprehensive impact-assessment has to be carried out.[717] Furthermore, the last criterion in TFEU 191(3)—the economic and social development of the Union as a whole and the balanced development of its regions—is a consideration of the economic and social development of the Union as a whole with a balanced development of its regions. In this case, attention has also been raised, as certain environmental measures can lead to negative economic—and thus also social—development.[718]

Thus, these criteria illustrate an awareness of the EU's measures in approaching climate policy. Additionally, it addresses the grey zones of these measures as being part of a greater assessment in relation to the Union. This fact coupled with the context of the creation of an internal market that works for sustainable development (following TEU Article 3(3)) might in fact provide a different view as to what is meant by *sustainable development* and the policy considerations supporting it.[719] As described in Chapter 3, sustainable development is considered as a balance between environmental, economic, and social interests.[720]

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[715] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 722.
[716] TFEU 191(3).
[717] See in Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 723.
[718] See Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 723. Furthermore, it is highlighted by the authors that the cohesion fund allows Union aid in the field of environmental policy to such regions that need particular support.
[719] See Chapter 3, section 3.4.1.1.
[720] In addition the Court had also held that the Union both has an economic and a social purpose, see Case 43/75 *Gabrielle Defrenne v Sabena* [1976] ECLI:EU:C:1976:56, para. 12.

However, the criteria according to TFEU Article 191(3) has given rise to the fact that environmental considerations cannot necessarily be separated from the other elements that belong to sustainable development and that, in the wording and content of the provision, it may raise doubts about genuine environmental considerations in some cases. Additionally, Nowag (2016) states that sustainable development and the lack of clarity in a legal context might in fact support the idea that environmental protection and economic aims are not fundamental opposite.[721] Thus it is the synergies between them that should be achieved. This has also somehow been expressed in ICJ case law as follows:

> […] This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[722]

Furthermore, the international climate regime is an integral part of the EU climate regime, which is why this international climate regime must also be considered in connection with the goal of sustainable development.[723] In the preamble to the EU Climate regulation (2021/1119) in connection with a long-term climate goal in the EU, it is stated what the purpose of the regulation must contribute with:[724]

> A fixed long-term objective is crucial to contribute to economic and societal transformation, high-quality jobs, sustainable growth, and the achievement of the United Nations Sustainable Development Goals, as well as to reach in a just, socially balanced, fair and cost-effective manner the long-term temperature goal of the Paris Agreement.[725]

Therefore, the need to achieve sustainable development is a fundamental component of the EU's climate regime, regardless of its absence as a direct mention in the Treaty's environmental provisions or its inclusion in the provisions of the EU Climate Regulation (2021/1119). Therefore, it

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[721] Nowag, J. (2016). "*The Environmental Integration Obligation of Article 11 TFEU."* In Nowag, J. *Environmental Integration in Competition and Free-Movement Laws*. Oxford University Press, p. 26.

[722] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. 7, 140.

[723] TFEU Article 191(1) stipulates that: *Union policy on the environment shall contribute to pursuit of the following objectives: […] promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.* See also Preamble no 9 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[724] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[725] In the Preamble no. 4 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

can be summarized that, in its overall form, the EU climate regime is to respond to the threat of climate change in the context of sustainable development.[726] Thus, the internal market's goal of sustainable development is an element of the EU climate regime. The following section thus deals with the significance this has for the EU climate regime's legal norm system.

5.4.2 Sustainable Development as a Normative Element of the EU Climate Regime

As it has been stated above sustainable development as an aim for the internal market and as an integrated part of the EU climate regime. However, as sustainable development is not further defined in the EU climate regime, in the theoretical understanding it must be assumed to function as a normative element. Hence, the principle of sustainable development might be seen as a normative element of the law, as it will function as an informative part of the legal doctrine.

The normative influence of the aim and concept of sustainable development must thus be found in the international climate regime and in the political agendas for EU that help to shape the EU climate regime as shown in the previous section. In addition, de Sadeleer (2014) has stressed that sustainable development obliges us to rethink environmental law, although it, in many ways, is more so a political objective rather than a legal principle.[727]

Conversely, sustainable development as a normative element might also expresses limitations in the traditional EU economic integration as presented in Chapter 3, as it must constitute a balance between social, economic, and environmental development.[728] Thus, this section will further elaborate on the normative element of sustainable development in the EU climate regime.

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[726] See ex. Chapter 4 of the thesis, and Article 2(1) in the Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[727] de Sadeleer. N., (2014). *EU environmental law and the internal market*. Oxford University Press, p. 14.

[728] In the Brundtland (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly Document A/42/427. no. 30 it is stated "*Yet in the end, sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful choices have to be made. Thus, in the final analysis, sustainable development must rest on political will.*"

5.4.2.1 The European Green Deal and Sustainable Development in the EU Climate Regime

In elucidating the role of sustainable development within the EU climate regime, section 5.4.1 has underlined the imperative of its incorporation. However, the absence of explicit legal frameworks detailing the nuanced interpretation of sustainable development within the context of the EU climate regime remains conspicuous. As such, it becomes essential to embark upon an analysis rooted in the political foundations of the EU's climate policies. These policies, serving as the genesis of the EU Climate Regulation (2021/1119), lay the groundwork for understanding the overarching principles that guide the integration of sustainable development into the legal norm system of the EU climate regime. Thus, the examination of the political basis for EU climate policies becomes not only a starting point but a pivotal lens through which the regulatory landscape surrounding sustainable development within the climate regime can be explored.

As stated in Chapter 4, one of the fundamental climate policies for the EU climate regime are the European Green Deal. Thus, the European Green Deal agendas are inherent in the EU climate regime and the preparation for the EU Climate Regulation (2021/1119). On this matter, the following definition is found in the Communication from the Commission on the European Green Deal:[729]

> **The Green Deal is an integral part of this Commission's strategy to implement the United Nation's 2030 Agenda and the sustainable development goals**, and the other priorities announced in President von der Leyen's political guidelines. As part of the Green Deal, the Commission will refocus the European Semester process of macroeconomic coordination to integrate the United Nations' sustainable development goals, to put sustainability and the well-being of citizens at the center of economic policy, **and the sustainable development goals at the heart of the EU's policymaking and action**.[730]

Hence, the European Green Deal sets the goal that sustainable development must be implemented as the core for the EU's policies. Specifically, the reference that the Commission makes is to the international climate regime in the form of United Nation's 2030 Agenda for Sustainable Development.[731] Furthermore, the Commission presents the European Green Deal as a project for

[729] COM/2019/640 final. Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions (The European Green Deal).
[730] COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee And The Committee Of The Regions (The European Green Deal). Author's own emphasis added.
[731] A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.

reviving European integration. It is stated that the European Green Deal must function as a growth strategy:

> […] The European Green Deal is a response to these challenges. It is a **new growth strategy** that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use […].[732]

As stated in the quote above is the European Green Deal largely found in the shadows of economic-inspired trends, where growth, in particular, is a core element of the strategy. This is expressed through large parts of the strategy. The excerpt of the Communication below is an example of this:

> The EU has the collective **ability to transform its economy and society** to put it on a more sustainable path. **It can build on its strengths as a global leader on climate and environmental measures, consumer protection, and workers' rights.** Delivering additional reductions in emissions is a challenge. It will require massive public investment and increased efforts to **direct private capital towards climate and environmental action, while avoiding lock-in into unsustainable practices.** […] This upfront investment is also an opportunity **to put Europe firmly on a new path of sustainable and inclusive growth**. The European Green Deal will accelerate and underpin the transition needed in all sectors […] It [EU] also recognises the need to maintain its security of **supply and competitiveness** even when others are unwilling to act.[733]

Furthermore, it is emphasized that, in the event of compromises between economic, environmental, and social objectives—hence, sustainable development—increased attention must be paid to their actions:

> While all of these areas for action are strongly interlinked and mutually reinforcing, **careful attention will have to be paid when there are potential trade-offs between economic, environmental and social objectives.** The Green Deal will make consistent use of all policy levers: regulation and standardisation, investment and innovation, national reforms,

[732] In the introduction to COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).
[733] In the introduction section of COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of The Regions (The European Green Deal).

> dialogue with social partners and international cooperation. The European Pillar of Social Rights will guide action in ensuring that no one is left behind.[734]

With such a demand for increased attention, it can thus be argued that the European Green Deal expresses that the strategy must not compromise the EU economy and the internal market. The justification lies in the fact that the EU can go further in the green transition if economic growth follows suit. This might justify the political approach, but the question that remains is how this can fit into a legal context.

Nevertheless, it can also introduce legal ambiguities, and it is a fact that this compromise can appear contradictory concerning climate change objectives in certain instances. In such cases, it becomes incumbent upon the Court to intervene and delineate the nature of this relationship. It is noteworthy to consider the normative structure that has been established in this context. As mentioned in section 4.5, the principles within the EU climate regime provide a broader and somewhat less precise response to their objectives. Conversely, the liberal tenets of the internal market, such as the principles of free movement may hold a more prominent position. Consequently, the point at which climate considerations and the green transition take precedence becomes less distinct.

5.4.3 The Principles of the EU Climate Regime in Relation to the Aim of Sustainable Development

This section will dive into how the principles of the EU climate regime are used as normative tools in the EU climate legislation, as they are interpreted in relation to the internal market's aim of sustainable development. In essence, this entails examining how these principles contribute to fostering harmony with sustainable development. Furthermore, it involves understanding the implications of these principles within the context of the internal market and their consequential contribution to the overarching goal of sustainable development.

[734] See section 2.1 in COM/2019/640 final. Communication From the Commission to The European Parliament, The European Council, The Council, The European Economic and Social Committee And The Committee Of The Regions (The European Green Deal).

5.4.3.1 The No-Harm Principle and Sustainable Development

Before it can be determined how the no-harm principle relates to the aim of sustainable development in the internal market, it must first be addressed how the principle operates in the legal doctrine. As stated in Chapter 4, the no-harm principle is found to be an overarching principle that is applicable to the regime.[735] The principle has further been inferred to be an element of the regime, which must be largely connected and understood in light of the other climate law principles. This is due to the wording and content of the no-harm principle, which must be assumed to be so broadly formulated that, in its independent form, its content cannot be clearly determined in isolation from the other principles. In addition, the principle is also, to a large extent, a political tool that is intended to comply with the goal in the regime, which is why it does not appear as an actual legal means in other respects than this. Therefore, the no-harm principle must be considered as a normative element in the regime that helps to guide the direction of the regime and its aims.[736]

By considering the no-harm principle from the understanding of the two faces of the law,[737] we must understand this core principle as part of the definition of legal practice in the climate regime. This concerns situations in which the intention is to manage and guide the *social practices* as legal practices, including the constitutive legal norms such as law-making and adjudication. Thus, the principle must contribute to the reconstruction of the legal culture as part of its general doctrine that constitutes a normative approach to the EU climate regime.

As outlined in Article 1 of the EU Climate Regulation (2021/1119), the regulation establishes a framework for the gradual and irreversible reduction of anthropogenic greenhouse gas emissions from sources and enhancement of removals by sinks regulated in Union law.[738] The no-harm principle thus places itself in this context. Furthermore, in the preamble to the EU Climate Regulation (2021/1119), the no-harm principle is referred to as part of the guidance of the Union's actions. In this line, it is stated that the no-harm principle shall help guide climate action as follows:

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[735] See Chapter 4, section 4.5.1.2.

[736] However, as stated in Chapter 4, the no-harm principle has in some ways been defined in the context of the 'Taxonomy regulation' in Article 17, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. Though, it is considered as part of a specific sector, hence, it is not considered as part of the framework regulation.

[737] See Chapter 2, section 2.3.1 on the *two faces of the law*.

[738] Article 1 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

> **The Union's and Member States' climate action** aims to protect people and the planet, welfare, prosperity, the economy, health, food systems, the integrity of eco-systems and biodiversity against the threat of climate change, in the context of **the United Nations 2030 agenda for sustainable development and in pursuit of the objectives of the Paris Agreement**, and to maximise prosperity within the planetary boundaries and to increase resilience and reduce vulnerability of society to climate change. **In light of this, the Union's and Member States' actions** should be guided by the precautionary and 'polluter pays' principles established in the Treaty on the Functioning of the European Union, and **should also take into account the** 'energy efficiency first' principle of the Energy Union and the **'do no harm' principle of the European Green Deal**.[739]

Thus, it is mentioned that the Union and the Member States must strive for sustainable development in their climate actions, and that they must also take the no-harm principle into these considerations. Following this statement, the no-harm principle has a role in the context of sustainable development, as it should be seen as a guide for this concept. However, as stated in Chapter 4, it is considered in the thesis that the no-harm principle largely is the overall principle in the regime of EU climate law.[740] In addition, it was assessed that the principle of prevention, the precautionary principle and the polluter pays principle are part of the overall principle as supplementary norms. Therefore, this also emphasizes the above, which shows how the no-harm principle functions as a normative element in the climate law doctrine, which must thus proclaim the direction of the underlying principles.

However, it cannot be determined how the no-harm principle can reach the goal of sustainable development. The no-harm principle has been determined to serve as a regulatory legal norm—the purpose of which is largely to guide the legislator and the Court. There is nothing to prevent the principle itself from having a broad and unclear content, as long as it is reproduced in legal practice and thus preserves its ontological element in the doctrine. Having said that, it is also currently unclear whether it is being reproduced by legal practitioners at this point. Specifically, its unclear content makes it an inaccurate normative element. This is particularly expressed at the surface level, where it has been difficult to determine its legal content. Here, the reproduction of the norm that is carried out in the surface layer and may potentially be influenced by other

[739] Preamble no 9 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Author's own emphasis added.
[740] See Chapter 4, section 4.5.1 about the no-harm principle.

normative conditions, including the influence of the internal market as a result of unclear content. At the same time, this can also be considered a potential friction of which the doctrine for the climate legal regime is influenced by other legal doctrines. The question is rather about how the underlying core principles—namely, prevention, precaution and polluter pays—can help with clarifying the potential frictions in the legal culture.

5.4.3.2 The Principles of Prevention, Precaution, Polluter Pays, and Sustainable Development

In Chapter 4, the principles of prevention, the principle of precaution and the polluter pays principle were determined to be of slightly more decisive content than the overall framework of the no-harm principle. In this connection, it must be assessed whether the internal market informs the principles of the EU climate regime, including whether sustainable development has an impact on the content of the principles. It must first be clear that the aim of sustainable development accommodates the climate law aspect of the principles, in that sustainable development specifically refers to climate law development, this will also be emphasized at the end of this section.

As previously described in section 4.5.3 on the precautionary principle, it places particular emphasis on the protection of public health, safety, and the environment and prioritizing the requirements in connection with the protection of these interests over economic interest.[741] However, this might not give rise to the exclusion of economic consideration per se, because of the overall aim of sustainable development, that the principles place itself under. This is also confirmed by Calster and Reins (2017):

> Actions or measures have to be: […] based on an examination of the benefits and costs of action or lack of action, meaning that they have to be subject to an economic cost/benefit analysis and negative and positive consequences, and the overall cost has to be taken into account on a short- and long-term basis.[742]

Accordingly, Calster and Reins (2017) state that even though the interests of human health, safety, and environment have priority over economic interests, the precautionary principle does not disregard economic interests. This means that the precautionary principles include in its

[741] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00. *Artegodan and Others v Commission* [2002] ECLI:EU:T:2002:283, para. 184.
[742] Calster, G. van, & Reins, L. (2017). *Eu environmental law*. Edward Elgar Publishing, p. 32.

consideration an assessment whether the economic benefits are higher than the climate risks. At the same time, it is stated in the EU Climate Regulation (2021/1119), which refers specifically to the European Green Deal, see section 5.4.2.1 above, that the market must still be taken into account, which is why the precautionary principle's prioritizing of climate interest never fully will be able to exclude the economic interests. Therefore, the precautionary principle is incorporated within the framework of the internal market and sustainable development and underlines the importance of finding a balance between economic activities and environmental concerns throughout this development.[743] This balance, where climate risks must be weighed against economic interests, also indicates that the principle of sustainable development for the internal market informs the precautionary principle. By aiming towards sustainable development, the precautionary principle cannot be applied as basis for hindering every conduct that potentially can lead to climate harm. Thus, within the context of information concerning sustainable development, there exists a constraint on the extent to which the precautionary principle can be applied. In summary, this indicates that the aim of sustainable development in fact informs the principle of precaution under the EU climate regime.

In the principle of polluter pays, the costs of preventing and removing nuisance must in principle be borne by the polluter. In addition, the principle represents the economic approach of a market, but where the polluter must be held responsible for the damage, they can potentially cause to a third party.[744] This externality thus becomes part of the future development of the internal market, where sustainable development can largely be said to be the governing idea for the polluter pays principle and the balance it seeks to create. It thus also represents a distribution of costs, which for the development of society must be particularly worth considering. Hence, it is embedded in the definition of sustainable development from the Brundtland Commission that sustainable development must ensure future generations.[745] Since part of the polluter pays principle precisely deals with meeting the risks of harmful pollution, future generations must be embedded in this principle. However, it might also create implications that can be seen in the light of a potential

[743] See TFEU Article 11. See also Chapter 3, section 3.4.1.1.
[744] See Chapter 4, section 4.5.4.
[745] Brundtland (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly Document A/42/427.

strict interpretation of the principle, which can provide solutions that are in conflict with socio-economic efficiency, social justice, and environmental considerations.[746]

There is therefore a close connection between the principles of the EU climate regime and the goal of sustainable development. At the same time, it must also be addressed that these principles also inform sustainable development in the internal market. Hence, the principles are all mentioned as part of the principles of the Union's environmental policy in TFEU Article 191(2):

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary principle** and on the **principles that preventive action** should be taken, that environmental damage should as a priority be rectified at source and that the **polluter should pay**.[747]

These principles may justify EU and national measures that are likely to hinder the internal market. Therefore, it is necessary to determine their legal status in the EU climate regime. Thus, the principles of prevention, precaution and polluter pays must guide climate action for the Member States and the EU. In the preamble to the EU Climate Regulation (2021/1119), it is explicitly stated that the precautionary principle and the polluter pays principle must guide climate initiatives.[748] Therefore, the interactions and potential frictions between the EU climate regime and the internal market must be guided by the aim of sustainable development, as it appears that both legal norm systems use the concept as a guiding element for actions.

Moreover, the prevention principle, as expounded in section 5.3.3.3.1, assumes pivotal significance in the context of free movement, as the unimpeded free movement in the internal market cannot unilaterally supersede this principle due to its integral role in sustainable development. It thus appears from Article 4(5)(b), of the EU Climate Regulation (2021/1119), that the goals to be set for 2040 in the EU must take into account "the social, economic and environmental impacts, including the costs of inaction."[749] This means that if prevention is not observed in the actions,

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[746] Bugge, C. H., (ed.). (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, p. 78.

[747] TFEU Article 191(2). Author's own emphasis added.

[748] Preamble no 9 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[749] Article 4(5)(b) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

costs must be calculated, which must be considered precisely the core of the principle of sustainable development.[750] Consequently, if a Member State invokes and substantiates the application of, for instance, the prevention principle in connection with the implementation of a national measure or restriction aligned with climate change objectives, the determinative nature of the prevention principle may dictate the legitimacy of such measures. This assessment is equated with established environmental legal considerations recognized as valid deliberations.[751] However, it is necessary to emphasize that the prevention principle must be interpreted as a normative tenet given the previously acknowledged complexity in understanding its conceptual content regarding climate-related matters. Nevertheless, it remains noteworthy that the prevention principle occupies a special area within the framework of the internal market, especially considering the overall goal of sustainable development. Why sustainable development must be the overall framework for the prevention principle, and thus provide information for this principle.

These three principles are thus based in one form or another on the goal of sustainable development as part of the influence of the internal market. At the same time, it is also established that the principles for the internal market at the present time are largely rooted principles, whereas the principles for the climate regime are still taking root. However, via their normative status, the principles of the climate regime seep quietly into the internal market's legal norm system, which at the same time affects the considerations that are made in the internal market. In this connection, it must be emphasized that in the EU the content of the principles of the climate regime can be a limiting element in relation to how the weighting must be done from climate considerations to the internal market and the principles of free movement.

5.4.4 The International Perspective of the Principles Climate Regime

As stated in the introduction to this thesis climate change is a global problem and not only current in the internal market. Therefore, an important aspect in the doctrine of climate law is estimated to be the international conventions and agreements that, to some extent, govern the EU climate regime. The EU commits itself to the international climate regime and, at the same time, to the

[750] See Chapter 4, section 4.5.2.2.
[751] See Chapter 5, section 5.3.3.1.1.

ambition to be a leading character on the international stage.[752] This also reflects the normative elements of the doctrine, as the international sources have a greater value for the regime and its existence.

In general, international environmental law can be divided into two main groups. In the first group, there are principles of international law that have been developed in international law and are applied to environmental issues.[753] The second group deals with the principles that have been developed specifically within international environmental law to meet the special challenges in this area.[754] Initially, the latter has been of focus in the thesis regarding the core principle of the international climate regime and the EU climate regime.

The principles of the EU climate regime on no-harm, prevention, precaution, and polluter pays are all part of the international regime as well, and they are viewed as a more normative element of the international regime, providing an understanding of important values and direction. Hence, they might not give an unequivocal answer to specific questions in EU law. As described in Chapter 3, there are also discussions about whether these principles can be recognized as legal instruments in international law rather than general principles of law or customary international law.

If we consider the principles in their form as in international law, we must also come to the conclusion that a complaint cannot initially be invoked in the EU if it is only based on these principles, as they do not appear unconditionally and sufficiently precise. This is also what is reflected in the content of the principles at EU level. However, the principles are a large part of the understanding surrounding the principles of the EU climate regime.

Regarding the interpretation of international law and its principles, Lenaerts and Gutiérrez-Fons (2013) mention:

> The relationship between international law and EU law is governed by two opposing tendencies. On the one hand, the EU is an autonomous legal order that seeks to establish its own constitutional space between international law and national constitutions. That is why EU

[752] Preamble no 7 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[753] Bugge, C. H (red.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, pp, 63-70.
[754] Bugge, C. H (red.) (2021). *Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030*. Unversitetsforlaget, pp. 71-78.

> law emphasises its separate identity by distinguishing itself from international law. As the ECJ ruled in the seminal *van Gend & Loos* judgment, 'the Community constitutes a *new legal order*'. On the other hand, whilst preserving its autonomy, the EU legal order does not aim to insulate itself from its international law origins. As the ECJ also ruled in that judgment, 'the Community constitutes a new legal order *of international law*'. Thus, the autonomy of the EU legal order is not absolute, but relative. The ECJ does not try to separate itself from international law entirely, nor does it allow the latter law to call into question its own autonomy. A traditional 'monism v dualism' analysis does not fully express the way in which international law is incorporated into EU law. That incorporation in fact takes places in accordance with a balancing exercise. Provided that international law complies with the basic constitutional tenets of the EU legal order, international obligations binding upon the EU may prevail over secondary EU law.[755]

It is thus an important consideration of the legal doctrine to the climate regime, as it is largely informed by international law and its principles. The quote above describes how secondary law, in particular, can be influenced by the international context in which it is placed for which there may be goals and means that lie above secondary law. In relation to primary law, international law must thus be in accordance with the provisions of the Treaty. This consideration is considered decisive in the understanding of the internal market's influence on the EU climate regime, as it has been established in the previous sections that the principles of the internal market are largely considered to be decisive in the relationship between the two norm systems.

5.5 Summing Up on the Influence of the Internal Market in the EU Climate Regime

This chapter's analysis has centered on the question of the internal market's influence on the EU climate regime. Accordingly, the object of the analysis has been twofold. The first part of the analysis centers around the relationship between the internal market principle of free movement of goods and the climate change considerations that might be taken into account as legitimate reasons to justify Member State measures. The second part of the analysis deals with the presence of sustainable development in the EU climate regime. The purpose of Chapter 5 has been to address the interaction between the two legal norm systems and to address the potential frictions,

[755] Lenaerts, K. and Gutiérrez-Fons, J. A. (2013) "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice" in *EUI Working Paper AEL* 2013/9, pp. 29-30.

which is why the hypothesis has been that the internal market's norm structure influences the EU climate regime.[756] However, the EU climate regime does also, in some ways, inform the internal markets legal norm system, as normative fragmentations are seen in the internal market and especially in the aim of sustainable development.

Thus, by employing the multi-layered phenomenon from Tuori (2002), the analysis of Chapter 5 has its starting point in the layer of legal culture. At this level, it is thus normative teaching (an element of the source of law doctrine) that has been central to the analysis. The normative doctrine and its examination hereto have functioned as an intra-legal guide to assess the weight of the content of the legal order. In addition, the general doctrine has also been relevant to the investigation of the relationship between the internal market and the EU climate regime. This means that, when new areas of law are formed, it is the general doctrine that gives the area its identity and independent character. Hence, it is also the general doctrine that expresses the legal culture, the concepts, and the normative elements. By means of the surface level as analysed in Chapters 3 and 4, the general legal doctrine has thus been formulated in this chapter, starting from the systematic nature of the legal order. Here, the formulation has focused on coherence, which represents the substantive congruence in the legal order.

In the analysis, it is shown that, as a general norm, the Court follows the principle of the internal market. In the thesis, this is the principle of free movement of goods. Thus, climate considerations are considered in certain cases as an exception to the principle of the internal market. On the one hand, these considerations are underpinned by the provisions of the Treaty, including TFEU Article 26, which has a decisive role for the internal market and is highly valued in the legal doctrine of the internal market. The climate principles, on the other hand, are enshrined in TFEU Article 191 with a limited description.

Sustainable development is also an important element of both the internal market and the EU climate regime. It is expressed as a guiding tool for the internal market and thus its legal norm system in TEU Article 3(3). In the EU climate regime, sustainable development is expressed both in TFEU Article 11, EUCFR Article 37, and in the international climate regime, as well as in the

[756] See the definition on *frictions* in Chapter 2, section 2.3.3: "[…] *Frictions between the principles of the internal market and the EU climate regime in this thesis must be understood in a normative perspective. Above all, reference is made to structural and systematic frictions between the norm in the two legal systems, i.e., the notion that principle placement is valid law may be challenged by these frictions. A friction between the principles might be seen when principles applied in an individual case can demolish coherence and give contrary solutions. This is naturally reflected in the practical legislation (at the sub-surface level) as legal uncertainty.* […]."

political agendas that precede the EU climate regulation, and the principles laid down in the regime. Although sustainable development is more of a political tool, it has to follow the underlying idea that there must be a balance between social, economic and environmental developments. Therefore, this inherent idea must also apply in the interaction between the internal market and the EU climate regime. This also makes room for climate actions and climate principles as well as the principle of free movement of goods to be present in the internal market.

As a result of this analysis, it must be addressed that the EU climate regime does have an element of the internal market in its legal norm system, as sustainable development is an integral part of the regime. However, at the same time, the internal market also takes into account the climate actions of the Union and the Member States. Lastly, it must be emphasized that the EU climate regime, at present, does not have the same strength in its principles, as they still appear as normative elements in the legal norm systems.

CHAPTER 6
THE DEEP STRUCTURE OF THE EU CLIMATE REGIME AND THE INTERNAL MARKET

6.1 Outline

Chapter 6 examines the presence of human rights in the internal market and the EU climate regime with the aim of assessing the *deep structure of the law*. Section 6.2 describes the theoretical approach to this chapter, which provides the necessary framework for the subsequent analysis. In addition, clarification is provided along the way in which the analytical discourse of this chapter is intended to function as a normative contribution to the future state of the law. Subsequently, section 6.3 examines the presence of human rights in the internal market and subsequently in the EU climate regime. Here, the focus is on elucidating how human rights in the EU climate regime can be of decisive importance for its legal norm system, which has been determined throughout the thesis. Secondly, it is examined how the pending cases at the European Court of Human Rights (ECtHR) can inform the normative consideration for the legal norm system of EU climate regime. In section 6.4, human rights are inserted into the theoretical understanding of the multi-layered phenomenon in order to uncover how these can have an impact on the interaction and the potential frictions between the internal market and the EU climate regime. Finally, section 6.5 summarizes the results of the analysis.

6.2 Introduction

The interaction and potential frictions between the two legal norm systems is approached in Chapter 5. Here, the aim has been to determine whether the norm structure on the legal culture level consisted of any potential frictions between the two legal systems. Furthermore, the analysis has been approached with the hypothesis that it is the internal market's principles that influence the EU climate regime. It has been concluded that the principles of the EU climate regime have a decisive role in the internal market's legal norm system, however, it is also emphasized that the principles of the EU climate regime do not yet have the same weight as the principles of the internal market, which is why they appear as normative elements in the interaction between the

two legal norm systems. This means that in the interaction there is a certain awareness of climate considerations, and that these considerations function to a greater extent as an exception from the internal market, while at the same time, the principles of the EU's climate regulation are important in the internal market's aim of sustainable development.[757]

Thus, the focus has been on the principles identified in the thesis as part of the core of the two areas and their legal culture. With this chapter, it is the intention to establish how the future legal development of the EU climate regime can influence the internal market in the direction of the principles of climate law—i.e., how to make more room for the EU's climate regime and its principles. By delving deeper into the deep structure of the multi-layered phenomenon, it is examined how the EU climate regime can take on a more convincing role and potentially inform the norms of the internal market and how this can add an extra dimension to the norm structure of the internal market as a result of the sedimentation process and the recursive relationship between the layers in the multi-layered phenomenon.[758] As it is stated in the objective of the thesis, the need for ongoing legal developments in climate law is recognized in order to establish a clear normative approach that addresses the complexities and challenges that arise as a result of the interaction between the internal market and the EU climate regime.[759] Furthermore, as follows from Chapter 2, the principles must be available as a normative element that govern legal practice.[760] Thus, a normative justification in this chapter is a result of the current legal development, but, at the same time, it is also a prediction of future development.

Accordingly, the current chapter focuses on human rights in the EU. This particular consideration is based on a number of different reasons. One reason for focusing on human rights is the fact that Tuori's (2002) theory describes how human rights have a place at the deep structure of the law in the form of normative ideas:

> The deep structure of modern law is defined by basic categories such as 'legal subjectivity' and 'subjective right' and by fundamental principles such as human rights as general normative ideas.[761]

[757] See Chapter 5.
[758] See Chapter 2, section 2.2.1 on *Critical Legal Positivism*, and the process of sedimentation and recursive relationship.
[759] Chapter 1, section 1.3.
[760] Chapter 2, section 2.3 and section 2.4.2.
[761] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 192.

Furthermore, this brings in a perspective of the normative contents of the law as further highlighted by Tuori (2002):

> The reinforcement of human-rights principles at the levels of the legal culture and the law's deep structure has led to a certain homogenization in the normative contents of the law, as can be perceived in a comparative examination of both different legal orders and different fields of law within one legal order. This normative homogenization perhaps constitutes the most effective remedy for the tendencies of fragmentation which have ensued from the loquacity of the lawgiver.[762]

Another reasoning for looking at human rights can be found in the values of the Union. specifically, it is stated in TEU Article 2 that the Union is founded on diverse values:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and **respect for human rights**, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[763]

These founding values are binding for the EU and its Member States.[764] Hence, the values are fundamental for the norms of the Union, and thus they have a comprehensive value in the law of the Union as part of the normative idea of the law. The EU value of human rights is essential to the further analysis of the deep structure of the law such as when used in the context of climate change.

The third reason for examining human rights is the growing attention that surrounds human rights and climate change at the moment. A growing number of cases are coming to light where human rights are invoked as a legal argument for several different conditions in connection with climate regulation. The cases are heard both at the national courts, international courts and at the European

[762] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 203. See also the next section 6.2.1 on the deep structure of law.

[763] TEU Article 2. Author's own emphasis added.

[764] According to TEU Article 7(1) on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. In December 2017, the Commission initiated Article 7 proceedings against Poland, and it was found that, in accordance with Article 7(1) TEU, that there is a clear risk of a serious breach by the Republic of Poland of the rule of law as one of the values referred to in Article 2 TEU. See more in COM/2017/0835 final Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

Court of Human Rights. It is especially the latter Court that is dealt with in the analysis. Several different issues are addressed in these cases, while many of them deal with states' failure to act on climate change. However, the technical aspects and procedure of human rights cases are not directly analyzed in this thesis. Rather, it is the trends regarding the treatment of climate change under human rights and how human rights impact the internal market that are the topics of interest. This analysis thus is intended to address the normative element of the deep structure of law by addressing the tendencies in the application of human rights in the internal market and in the EU climate regime.

Furthermore, the analysis is primarily based on the European Convention on Human Rights (ECHR) as well as the work of the European Court of Human Rights (ECtHR).[765] This is primarily justified by the fact that, at the time of writing, it is expected to be the first place where human rights in the EU climate regime context will be addressed, as there are currently three decisive cases pending in the Grand Chamber.

To summarize, by examining the deep structure of the law, the aim is to find the normative elements that can provide a perspective on how the legal norm systems in the internal market and in the EU's climate regime interact with each other and what the future for the two systems may hold. In this context, the normative element to be examined in this analysis is human rights, as they can bring forth the episteme that informs the internal market and the EU climate regime, which is further elaborated in the next section.

The next section describes the deep structure of the law from the multi-layered phenomenon as part of the analysis. Hence, Chapters 3 and 4 primarily consist of an analysis of the *surface level*, while Chapter 5 includes an analysis of the level of the *legal culture*. The current chapter includes an analysis of the *deep structure* of law. See also Table 4 '*The Multilayered System – Focus on The Deep Structure of the Law'* in the next section.

[765] In addition, it is addressed what the connection between the ECHR and EU law is—i.e., how the ECHR is enforced in the EU. See section 6.3 on the current status of human rights.

6.2.1 The Deep Structure of the Law

Tuori (2002) introduces the concept of the *deep structure of the law*, offering a rather unconventional perspective that may appear distant to many legal professionals and practitioners.[766] This layer, though seemingly less immediately relevant compared to the more visible aspects of the law, holds significance in critical legal positivism. Despite its potential obscurity, Tuori (2002) argues that, by understanding the deep structure, it becomes evident that it is crucial to the multi-layered phenomenon due to its influence on the other layers.[767] In the explication, Tuori (2002) sheds light on the importance of acknowledging this hidden layer, thereby enriching our comprehension of the intricate dynamics within the multi-layered phenomenon:

> From the perspective of legal actors, the deep structure of the law - like the legal culture, too - refers to their *practical knowledge*, which they usually employ in legal practices in an unconscious way. However, the *reflexivity* of modern culture makes it possible to transform even practical knowledge about the deep structure into a discursive shape. This is attested to by the legal philosophical literature aiming at reconstructing the deep structure. But knowledge about the deep structure of the law constitutes in the consciousness of legal actors the most fundamental, deepest sedimented layer, whose excavation and discursive formulation is a more demanding task than the articulation of the legal culture. In this respect, the law's deep structure comes close to what the Freudian psychoanalytical theory, at the level of individuals, calls the subconscious. To what extent the subconscious can be made conscious is a contested issue in the psychoanalytical literature. Correspondingly, the question can be raised as to whether the reflexivity of modern law comes up against its limits in the deep structure. To what extent can we in principle reconstruct the deep structure? The deep structure of the law is in an organic way linked to the general basic epistemological and linguistic structures of modern culture, to the present *episteme*, to use Foucault's term. These structures are the necessary presupposition of all cognition and the discursive formulation of knowledge. A member of modern society always reconstructs the modern episteme from a participant's position, under the influence of this very *episteme*. Hence, at least the kind of objectifying reconstruction that Foucault, in his archaeological phase, strove for seems unattainable from a position inside the *episteme*; this kind of 'blissful positivism' would require the external perspective of another *episteme*.

[766] See also Chapter 2, section 2.2 on *the Theoretical Framework* of the thesis.
[767] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 184-185.

> When legal actors apply practical knowledge related to the deep structure, they do not act as individuals, nor as lawyers defined by their culturally determined habitus. Rather, they appear as typical members of modern society in their legal capacity: *as legal subjects of modern society*. In the exploration of the deep structure and the corresponding level of consciousness, legal actors are stripped not only of their individual traits but also of the features common to them as lawyers. At this level, the borderline which we have drawn between the narrow and the broad legal community disappears.[768]

Accordingly, it must also be recognized that the deep structure is barely manageable in this thesis, as it constitutes a concealed aspect of modern law. However, it is still necessary to determine whether a form of the *episteme,* following Tuori's (2002) definition, can be derived that would make the internal market and the climate regime eligible. This *episteme* should contain an element of truth that is subject to the deep structure of the law. This is because it can affect the norm structure of the legal doctrine, and conflicts may arise between the norm structures for the internal market and the climate regime.

Tuori (2002) describes the deep structure of the law as the place in law that is most stable, but which also reaches so deep into the structure that it may have something in common with other legal cultures.[769] He emphasizes that this layer best can be described as a window into modern law's *historical type of law*. Thus, the different layers are characterized by the pace of change in law:

> In modern law, a distinction can be made between different levels, each characterized by a specific historicity, a specific pace of change.[770]

Hence, the deep structure of the law justifies modern law as a historical type of law where changes take place over time at a slow pace.[771] Furthermore, Tuori (2002) argues that human rights are part of the deep structure of the law in the multi-layered phenomenon due to the sedimentation process:

> The position in modern law of such fundamental normative ideas as *human-rights principles* should be approached through the relation of sedimentation. These principles can be justified with moral arguments, but this is not enough to make them elements of the law's deep

[768] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 184-185.
[769] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 183-186.
[770] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 191.
[771] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 150.

> structure. […] But these principles have established themselves as elements of the deep structure of modern law only as a result of a long process of sedimentation.[772]

Thus, the deep structure is a concealed element of the law, which consists of a limitation in the form of a difficulty in reconstructing the deep structure. It is a kind of awareness that applies to everyone who deals with law and the boundary between what may be classified as the broad legal community and the narrow legal community evaporates.[773] In addition, the deep structure of the law also breaks with national boundaries, which is to say that it represents, to a large extent, what different legal cultures have in common (which is particularly significant in comparative analyses).[774] At the same time, the deep structure also says something in relation to the law's conceptual, normative and methodological elements.[775] In critical legal positivism, the deep structure of the law is described as the basic legal categories of the type of law, its basic normative principles and the form of rationality that permeates it.[776]

In Table 5 below, it is illustrated how the theoretical approach of the deep structure of the law in the multi-layered phenomenon is put into the context of the thesis' analyses from the previous chapters. Note that this is a further development of Table 4 from Chapter 5.

Table 5. *The Multi-Layered Phenomenon – Focus on the Deep Structure of the Law.*

EU LAW		
The Multi-Layered Phenomenon	**EU Internal Market**	**EU Climate Regime**
Surface Level *Chapter 3 and 4*	Chapter 3 found the principle of free movement to be the key principle of the internal market. Hence, the analysis of the chapter focused particularly on the development and construction of the internal market, the establishment of	Chapter 4 found the key principles of the EU climate regime to be the principles of no-harm, the principle of prevention, the principle of precaution, and the polluter pays principle. Hence, the analysis of the chapter focused on the development of the EU

[772] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 202.
[773] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 202.
[774] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 202.
[775] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 183-186.
[776] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 195-196.

	the internal market, the internal market working for sustainable development, and the framework obligation of the internal market. Additionally, the principle of free movement of goods was outlined.	climate regime particularly with a focus on the international climate regime, the EU climate policies, and the EU Climate Framework Regulation (2021/1119).
Legal Culture *Chapter 5*	The analysis in Chapter 5 was centered around the question of the internal market's influence on the EU climate regime. Accordingly, the object of the analysis has been twofold. The first part of the analysis centered around the relationship between the internal market principle of free movement of goods and the climate considerations that might be taken into account as legitimate reasons to justify Member States' measures. The second part of the analysis dealt with the presence of internal market principles and considerations in the EU climate regime. Thus, the findings of the chapter gave that the EU climate regime does have an element of the internal market in its legal norm system, as sustainable development is an integral part of the regime. However, at the same time, the internal market also takes into account the climate actions of the Union and the Member States. Lastly, it must be emphasized that the EU climate regime, at present, does not have the same strength in its principles, as they still appear as normative elements in the legal norm systems.	
The Deep Structure of the Law *Chapter 6*	In Chapter 6, the deep structure of the law is analyzed in the context of the internal market and the EU climate regime. Thus, the deep structure can be reconstructed by looking at the surface level (Chapters 3 and 4) as well as the level of the legal culture (Chapter 5). Particularly, the deep structure of the law is characterized by a longer period of sedimentation of legal norms before these can take root as an element of the deep structure of law. Thus, in critical legal positivism, human rights are in fact an element of the deep structure of law. Therefore, human rights are used in the analysis of Chapter 6 to explore whether they can help informing the interaction and frictions between the internal market and the EU climate regime.	

6.2.2 The *Episteme* of the Law

In Chapters 3 and 4, the development of the internal market and the EU climate regime are briefly presented.[777] In this section, it is briefly outlined why the *episteme* of the historical development is important for the understanding of the deep structure of the law. Thus, it is not the historical context of the law, but the *episteme* of the law in its historical context that is relevant to approach here:

> What is crucial in reconstructing the defining features of historical types of law are not individual concepts and their origin, but the conceptual network, the system of concepts, which determines the significance and function of particular categories.[778]

The development of the internal market, as outlined in Chapter 3, section 3.3, has occurred with a consistent prioritization for free movement with the absence of internal frontiers as a key feature. Furthermore, as stated in Chapters 3 and 5, the fundamental element of the creation of the Union is the internal market. The principles of the internal market must thus be an entrenched part of its legal norm system. In addition, the basic values of the EU are also of great importance. This must indicate that there are elements in the internal market, which have sedimented to and can possibly be located at the deep structure of the law. To further explore this, human rights are included in the analysis as part of the episteme for the internal market, as they are placed as an element of the deep structure of modern law as formulated in Tuori (2002).[779]

Additionally, the development of the EU climate regime is presented in Chapter 4, section 4.4. Furthermore, the principles of the regime are assessed to be broad in their concepts. It must be estimated that the relation between climate and the environment is difficult to separate. EU has made environmental law one of its values (Court practice) as well as an active part of its policies throughout the Union and for the Member States (TEU Article 3(3) and TFEU Articles 191-193). The thesis attempts to separate the two legal norm systems as found in the previous chapters. However, to distinct and separate environmental law and climate law is difficult, as the structure for the regulation of climate change in the EU falls under the constitutional provisions of environmental law. This separation is also a critical point to the thesis' analysis, as it must be assumed that environmental law and climate law basically regulate two separate areas as described in

[777] See Chapter 3, section 3.3 and Chapter 4, section 4.4.
[778] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 189.
[779] Tuori, K. (2002). *Critical Legal Positivism*, Ashgate. p. 192.

Chapter 2.[780] However, this separation is somewhat possible at the surface level of the law, as it has been analyzed throughout the thesis with the EU climate regime, which, in its existence, largely depends on the development and the legal structure of environmental law (see for example the interaction of the internal market and the climate regime in Chapter 5, section 5.3, here, the climate considerations are carried out on the basis of environmental legal considerations). Despite this attempt at separation, it has thus not been possible to make a total separation of environmental law and climate law at the deeper layers of the multi-layered phenomenon. Therefore, the approach of episteme in the deep structure of the climate regime must therefore have a common approach to the episteme as the environmental regime.

The historical development of the two legal norm systems (the internal market and the EU climate regime) and their principles have been developed to varying degrees until now. However, as it has been indicated, there is a more obvious sedimentation at play in the internal market, which has had an impact on the EU climate regime.[781] This influence can be motivated by the recursive relationship of the levels of the law. At the same time, the findings of Chapter 5 have also indicated that there are normative fragmentations from the EU climate regime in the internal markets legal norm system.

It is difficult to assess whether there is a direct independent episteme—i.e., normative truth in the climate regime and the internal market—and thus it appears relevant to treat this phenomenon from a human rights perspective.[782] As formulated by Tuori (2002), human rights are part of the deeper structure of modern law, and thus they are a common episteme for the internal market and possibly also for the climate regime. Therefore, the importance of human rights in the interaction between the internal market and the EU climate regime is considered in the following section.

If human rights can become a common basis, it will perhaps also have an impact on the frictions that arisen between the two legal norm systems. It could provide the possibility that the upper layers (surface level and legal culture level) can be informed by the deep structure and thus that

[780] See also Chapter 1, section 1.2.3.1 where it was states that environmental law deals with pollution that takes place on the ground and the instated preventive measures as well as the following liable measures, while climate law deals with pollution in the atmosphere. Tvarnø (2022) makes the same distinction in her book [Tvarnø, C. (2022). *Klimaret: almindelige del*. Djøf/Jurist-og Økonomforbundet.], where environmental law applies to harmful conditions on the Earth's surface, while climate law applies to harmful conditions in the atmosphere. However, the two areas may also have an overlapping field in their regulation where the boundary between environment and climate is not so generic.
[781] See Chapter 5.
[782] See section 6.4.

the norm structures and the legal doctrines can be informed differently. This context is thus the starting point for the next section concerning human rights, as it is considered how these can be used as an element in the deep structure of the law to develop the EU climate regime and its normative principles.

6.3 The Current Status of Human Rights in the Two Legal Norm Systems

This section explores human rights in the context of the internal market and, nextly, in the context of the EU climate regime. Furthermore, the current cases at the European Court on Human Rights (ECtHR) are briefly examined to address the current status of human rights within the EU climate regime. Additionally, the international perspective on fundamental rights within the international climate regime are treated. Hence, this section serves as the ground examination for section 6.4 on the future of the EU climate regime and the internal market.

Human rights have been part of EU law before they became part of primary law in 1993. The Maastricht Treaty (1993) provided that the Union shall respect the fundamental freedoms as well as the fundamental rights as guaranteed by the European Convention on Human Rights,[783] as both stem from the constitutional traditions of the Member States as general principles of EU law. However, the first time that the Court established human rights to be part of the Union is in the *Stauder*[784] (1969) case. Here, the Court declared:

> […] fundamental human rights enshrined in the general principles of Community law and protected by the Court.[785]

Additionally, in the *ERT*[786] (1991) case, the Court stated:

> […] the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human

[783] Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. In Council of Europe Treaty Series 005. Council of Europe.
[784] Case 29/69 *Erich Stauder v City of Ulm - Sozialamt. ('Stauder')* [1969] ECLI:EU:C:1969:57.
[785] Case 29/69 Erich Stauder v City of Ulm - Sozialamt. ('Stauder') [1969] ECLI:EU:C:1969:57, para. 7.
[786] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others ('ERT')* [1991] ECLI:EU:C:1991:254.

> rights on which the Member States have collaborated or of which they are signatories […].[787]

Thus, the application of human rights and the European Convention on Human Rights in EU law (before the Maastricht Treaty) has been particularly influenced by the Court's use of it in a number of cases. Accordingly, despite of the fact that there were no explicit provisions regarding human rights before the Treaty on European Union came into force in 1993, cases such as *Stauder*[788] (1969) have helped to make human rights a fundamental element of EU law. This also speaks into the argument that human rights are located in the deep structure of the law as presented in the introduction to this chapter.

Today, TEU Article 2 is the cornerstone of the EU's values in which human rights are to be found as a fundamental part. Within the EU, the term *fundamental rights* are used to express the concept of human rights. These rights, which are fundamental to individuals living in the EU, are laid down in the EU's Charter of Fundamental Rights and Freedoms[789] (hereinafter EU Charter**)**. The EU Charter became legally binding across the EU with the Treaty of Lisbon entering into force in December 2009.

Accordingly, TEU Article 6 provides binding effect to the EU Charter and mandates EU accession to the European Convention on Human Rights. As the current state of EU law stands, the Union and its institutions are not directly bound by the European Convention on Human Rights, and even less so by the case law of the European Court of Human Rights (ECtHR).[790] However, TEU Article 6(3) refers to the European Convention on Human Rights as part of the general principles of EU law. Thus, the key provision of the Union's human rights framework is found in TEU Article 6, which provides:

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[787] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others ('ERT')* [1991] ECLI:EU:C:1991:254, para. 41. This was also repeated by the General Court in A v Commission where it noted that the commitment in TEU Article F.2 [now TEU Article 6] to respect the fundamental rights guaranteed by the ECHR.

[788] Case 29/69 *Erich Stauder v City of Ulm - Sozialamt. ('Stauder')* [1969] ECLI:EU:C:1969:57.

[789] Charter of Fundamental Rights of the European Union (Charter) [2012] OJ C326/02.

[790] The ECtHR issues legally binding decisions regarding alleged violations of the ECHR. It is considered readily accessible to individual applicants and its jurisdiction is mandatory for all parties to the Convention. This includes all EU Member States and the EU candidate countries. When ECtHR finds a violation, the responsible parties must take all necessary measures to ensure compliance. This may involve legislative reforms to prevent similar violations and, when necessary, individual measures to remedy the impact of the violation on the affected individuals. The Council of Europe's Committee of Ministers oversees the execution of these judgments.

> 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[791]

Thus, the Treaty provision lists various sources of human rights within EU law—namely, the EU Charter, which has the same status as the Treaties,[792] the European Convention on Human Rights [793], and common national constitutional traditions, which have inspired the general principles of EU law.

The EU is not yet a party to the European Convention on Human Rights. This means that actions by EU institutions, agencies, and other bodies cannot currently be challenged at the ECtHR. However, individuals can file complaints against EU Member States at the ECtHR regarding their actions in implementing EU law, but it is unclear how much the ECtHR can control actions on the part of the EU Member States that deal with their fulfilment of EU law obligations, or whether their actions are justified according to EU law.[794] Accession will enable the EU to participate in such cases together with its Member States. Basically, the EU's accession to the European

[791] TEU Article 6.
[792] See also the hierarchy of the source of law under Chapter 2, section 2.3.1.1.
[793] Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. In Council of Europe Treaty Series 005. Council of Europe.
[794] Neergaard, U., & Nielsen, R. (2020). *EU-ret* (8.ed.). Karnov Group, p. 174.

Convention on Human Rights will mean that the EU is subject to the same rules and the same system of international supervision of human rights as its 27 Member States and the 20 other members of the Council of Europe.

Thus, the European Convention on Human Rights does not carry legal obligations directly for the EU and its institutions. At the same time, it follows from the *Wachauf v Germany*[795] (1988) case that the Union cannot accept Member States' constitutions if these contain measures that may be recognized within the constitutions but which are incompatible with the fundamental rights of the EU.[796] This situation results in an imbalance that can give rise to uncertainty and ambiguity regarding the ultimate responsibility for any violations of European Convention on Human Rights. This complicated relationship is addressed in the EU Charter Articles 52(3) and 53. Thus, Article 52(3) is specifically concerned with the European Convention on Human Rights and strives to encourage harmony between the European Convention on Human Rights' provisions and those of the Charters, all the while allowing the EU to establish even broader protection than what is stipulated in the European Convention on Human Rights.[797] However, these rights do remain applicable to the EU Member States, even when they are enforcing or executing EU law.

Furthermore, it is also stated that the Union must have a global outlook where human rights shall be maintained and promoted as part of the Union's values (TEU Article 2) in TEU Article 3(5):

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and **the protection of human rights**, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.[798]

Thus, the provision is taking the international system into account as it follows from Geiger et al. (2015):

> In Article 3 para. 5 [TEU] the treaty lays down the aims of the Union 'in relations with the wider world'. […]. In the first place, para. 5 refers to the protection and promotion of the

[795] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321.
[796] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321, para. 17.
[797] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7.ed.). Oxford University Press, p. 431.
[798] TEU Article 3(5). Author's own emphasis added.

> Union's values (Article 2 TEU) and interest and its contributions to protecting citizens. The strategic interests for the external actions of the Union are determined according to Article 22 TEU. The next aim mentioned is to contribute to an active peace policy in political, economic and legal context. As a specific contribution to the protection of human rights the Treaty mentions the human rights of the child; as a contribution to the strict observance, but also to the further development of international law the provision accentuates respect for the principles of the United Nations Charter. […].[799]

Hence, it is recognized that human rights and considerations hereto must also look beyond the borders of the EU.

6.3.1 The Current Interaction of Human Rights in the Internal Market

Human rights have played a crucial and important role in the development of the European legal order.[800] Therefore, these values also apply to the internal market, which is presented in this section. The point of departure is the European Convention on Human Rights and its relationship with the internal market.

As described in the previous section, the European Convention on Human Rights does not directly impose legal obligations to the decisions made by the EU and its institutions.[801] However, as the protection of fundamental human rights is an integral part of the general principles of law, it was stated by the Court in the judgment of *Nold v Commission*[802] (1974) that the Union must not deviate from these obligations. This also follows from the *ERT*[803] (1991) case, as mentioned in the previous section, where the Court stated that the commitment of TEU Article 6 to respect the fundamental rights is guaranteed by the European Convention on Human Rights:

[799] Geiger, R., Khan, D-E., Kotzur, M. (eds.) (2015). *Treaty on European Union, Treaty on the Functioning of the European Union*. C.H. Beck, p. 21.
[800] See TEU Article 2 as presented in the introduction to this section, 6.3.
[801] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press, p. 445.
[802] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECLI:EU:C:1974:51.
[803] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others ('ERT')* [1991] ECLI:EU:C:1991:254.

> With regard to Article 10 of the European Convention on Human Rights, […] it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. […].[804]

Thus, human rights form an overall kind of framework, including when they are to be applied to the internal market. In Chapter 3, the key principle of the internal market is stated to be the principle of free movement. Thus, it follows from the EU rules on free movement that Member States can restrict these if they have a legitimate reason, and this is proportional.[805] In addition, it follows from the possibility to limit these rules that the Member States have a duty to ensure that these considerations do not conflict with the human rights (and fundamental rights) in the EU.[806] The Court has had the perspective to the European Convention on Human Rights regarding the internal market in multiple judgments. In the *Schmidberger*[807] (2003) case, the protection of human rights in itself constitutes a legitimate consideration that will justify a restriction of free movement. Thus, the Court states in the judgment:

> 72. The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union [now TEU Article 6] […]. **That provision states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'**
>
> 73. It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community […].
>
> 74. **Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in**

[804] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others ('ERT')* [1991] ECLI:EU:C:1991:254. Para. 41. See also Tvarnø, C. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist- og Økonomforbundet, p. 570.

[805] See Chapter 3, section 3.4.3, and Chapter 5, section 5.3.3.

[806] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press, p. 444.

[807] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 72; and Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ('*ERT*') [1991] ECLI:EU:C:1991:254 para. 41 *"With regard to Article 10 of the European Convention on Human Rights, […] it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. […]"*.

> **principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods**.[808]

Hence, the Court held that both Austria (the Member State in question) and the EU are required to respect the fundamental rights (human rights) even under the fundamental freedoms of EU law.

Accordingly, the Court has determined that the access for goods to markets in other Member States as founded in TFEU Article 34 is a right that can be enforced directly subject to the exceptions in TFEU Article 36. Furthermore, it follows that such a fundamental right must be compatible with human rights and is guaranteed by the European Convention on Human Rights. In this way, human rights must thus constitute an ultimate consideration, which thus guarantees free movement but can also justify an obstacle to this. This also confirms that, at the deep structure of the law, we see human rights as rooted as an element of the *episteme* that exists here. Thus, the internal market is also strengthened in the view of human rights if these confirm either a legitimate consideration or if conversely can reject legitimate considerations.

6.3.2 The Current Interaction of Human Rights in the EU Climate Regime

With some margin of uncertainty, this section deals with the relationship between the EU climate regime and human rights. The uncertainty must be addressed in relation to the relatively limited legal material that exists in this regard and due to the lack of existing court decisions from the ECtHR regarding human rights and climate change. This is elaborated on in the next section.

In the Paris Agreement, it is stated that the parties of the Agreement should respect, promote, and consider their respective obligations to human rights:

> *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, **respect, promote and consider their respective obligations on human rights**, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable

[808] Case C-112/00 *Schmidberger* [2003] ECLI:EU:C:2003:333, para. 72-74.

> situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity, […][809]

The EU Climate Regulation (2021/1119)[810] makes a reference to the EU Charter of Fundamental Rights in the preamble:

> **This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Article 37** thereof which seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development.[811]

Thus, environmental protection is mentioned in Article 37 of the EU Charter. The provisions state:

> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.[812]

The provision is interlinked with the provisions of the Treaty, TEU Article 3(3), and TFEU Article 11 and TFEU Article 191. While EU Charter Article 37 itself doesn't explicitly mention climate change, it seems to derive its relevance in the context of climate change from the interconnectedness with these broader treaty provisions. In other words, even though climate change is not directly mentioned in EU Charter Article 37, its significance arises from the broader principles and objectives outlined in TEU Article 3(3) and TFEU Articles 11 and 191. Therefore, the use of EU Charter Article 37 in connection with climate change is associated with a certain level of uncertainty. This uncertainty may arise because Article 37 does not explicitly mention climate change, leading to a need for interpretation and analysis to establish its relevance in this context. Throughout the thesis, the text emphasizes the challenge of distinguishing between environmental law and climate law. The difficulty in making a clear separation between these two legal areas indicates

[809] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. Author's own emphasis added.
[810] Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').
[811] In the Preamble no. 6 of Regulation (EU) 2021/1119. of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). Author's own emphasis added.
[812] Article 37 of Charter of Fundamental Rights of the European Union (Charter) [2012] OJ C326/02.

that, within primary law (the foundational legal texts of the European Union), there isn't a distinct and unequivocal delineation between environmental law and climate law.

The legal norm system of the EU climate regime is partly different from the legal norms system of the EU environmental regime.[813] Therefore, this separation must also be sought at the deeper layer of law. This consideration also applies, as the separation between environment and climate is discussed when it comes to human rights in particular.

The European Convention on Human Rights also lacks explicit provisions pertaining to fundamental rights related to a clean environment or climate change. Despite this absence, the application of environmental law principles within the framework of the European Convention on Human Rights has been observed in several instances by the ECtHR.[814] This interpretation of environmental law under the European Convention on Human Rights might also be relevant in the context of climate change issues, as the European Convention on Human Rights is interpreted on the basis of the existing wording and in accordance with the customary principles of the convention interpretation found in the Vienna Convention Articles 31-33.[815] Therefore, the jurisprudence of the ECtHR is also central to climate change issues.[816] Furthermore, it is central, as the ECtHR especially uses interpretations that are purpose-oriented. The ECtHR undertakes this dynamic approach to ensure the adaptability of its judgments to the ever-evolving contemporary context in which they are rendered. The judgments from the ECtHR must thus correspond to the current developments of society. In addition, the convention is also interpreted by the ECtHR in accordance with international rules and consensuses.[817] Thus, the international agreements under the international climate regime, as presented in Chapter 4, and the general interpretation of international law might become important in cases about climate change that are decided by the ECtHR.

Article 1 of the European Convention on Human Rights applies to states' obligations to anyone within that state's jurisdiction. Therefore, this concept of jurisdiction is primarily territorial. Territorial climate emission, which predicts territorial damage, will thus be within the jurisdiction.

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[813] See also Chapter 2 section 2.4.2 on defining the legal norm systems in the thesis.

[814] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 192.

[815] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[816] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 198.

[817] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 198.

Sandvig (2021) suggests, however, that the concept also includes territorial effect from *exported* greenhouse gas emissions from a jurisdiction, as the jurisdiction itself is responsible for these.[818] The ECtHR has also given room for a jurisdiction's emissions that are made in another jurisdiction to be included in the exercise of the territorial concept:

> The Court has recognised that, as an exception to the principle of territoriality, acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention. […].[819]

Whether or not a jurisdiction is held responsible for emission effects that cause damage in another convention state has not yet been decided.[820]

In the same turn, it is highlighted by Keller and Heri (2022)[821] that it is no longer a question of whether human rights legislation will be involved in regard to the climate change issues, but how this will be done so.[822] Keller and Heri (2022) also make it clear that the human rights bodies are facing their first climate cases, where the applicants are largely turning to human rights in order to fill in the political gaps.[823] In accordance with the scope of this thesis, this statement must be understood as the normative coverage of the norm structure that is sought to be covered. This must be further addressed in section 6.3.2.2 regarding the pending climate change cases at the ECtHR.

6.3.2.1 Climate Change and the Relevant Provisions of the European Convention on Human Rights

In this section, a brief overview is given of the particular provisions within the European Convention on Human Rights that necessitate consideration and may hold relevance in discussions about

[818] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 199.
[819] *M.N. and others v. Belgium* [GC] no. 3599/18, § 101.
[820] See section 6.3.2.2 for a further elaboration on the pending cases.
[821] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights*, 40:1, 153-174.
[822] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights*, 40:1, 153-174, p. 154.
[823] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights*, 40:1, 153-174, p. 154.

climate change. Notably, Article 2 of the European Convention on Human Rights protects the right to life, as it states:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.[824]

The provision thus obliges states to refrain from taking life but also to ensure life:

> The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction […].[825]

This obligation thus applies to any public or private activity where the right to life may be at stake.[826] The ECtHR has applied Article 2 of the European Convention on Human Rights in connection with environmental cases to protection against life-threatening pollution, industrial risk, environmentally dangerous activities and natural disasters.[827] The ECtHR has also highlighted that in Article 2 of the European Convention on Human Rights there is an obligation to ensure that lives are not unnecessarily lost.[828] Thus, this duty takes the form of a general preventive duty for the authorities:

> […] the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. […].[829]

Several aspects have been developed under Article 2 of the European Convention on Human Rights, both knowledge requirements, individualization requirements and requirements for risk

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[824] Article 2(1) of Council of Europe. (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms*. In Council of Europe Treaty Series 005. Council of Europe.
[825] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC] no. 47848/08, § 130.
[826] *Öneryildiz v. Turkey* [GC], no. 48939/99 § 71 See also Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 201.
[827] *Guerra and others v. Italy* [GC] no. 116/1996/735/932, §§ 60-62; *Öneryildiz v. Turkey* [GC], no. 48939/99 § §§69-74; *Budayeva and others v. Russia,* no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 § 146; See also Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 201.
[828] *Case of Mccann And Others V. The United Kingdom* [GC], no. 18984/91.
[829] *Osman v. The United Kingdom,* no. 87/1997/871/1083.

prevention. Sandvig (2021) emphasizes that the knowledge requirement must be considered fulfilled, as a scientific consensus has been established on the impact of climate emissions.[830] The requirement for individualization implies a general protection of society in life-threatening situations.[831] In relation to the requirement for risk, the ECtHR has stated in a few environmental cases that the risk must be serious or in places where the danger of contamination will materialize in the future, i.e., in the long term.[832] It is emphasize that, at the present time, the risk in connection with climate change must be considered to be ongoing—i.e., that it can currently be verified that there is an effect in the atmosphere due to GHG emissions.[833] In addition, Sandvig (2021) highlights the preamble of the Paris Agreement in which it is stated that there is an urgent threat to the climate.[834] This urgent threat emphasizes that the risk of climate change must be sufficiently qualified according to Article 2 of the European Convention on Human Rights after which it can materialize through Articles 3 and 8.[835]

In court practice, there is a close connection between Article 2 of the European Convention on Human Rights and Article 8 of the European Convention on Human Rights. The ECtHR has employed a combined consideration of the right to life and the right to home and private life in environmental cases involving hazards.[836] Article 8 of the European Convention on Human Rights protects the right to a home and private life:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests

[830] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget. p. 201.
[831] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget. p. 201.
[832] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.
[833] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget. p. 201. See also Niska, T., K. "Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?" in *Journal of World Energy Law and Business*, 13 (2020), 331-342., pp. 334-335.
[834] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104. In the preamble it is stated: *"[…] Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge, […].*
[835] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., pp. 202-203.
[836] *Budayeva and others v. Russia,* no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

> of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[837]

Article 8 of the European Convention on Human Rights thus positively obliges states to protect against environmental pollution, which may negatively affect the complainant's home, family or private life.[838] A relative assessment of the specific situation is made, as the risk of pollution in an environmental case must preferably exceed a minimum level.[839] In addition, the ECtHR requires that a *direct* and *immediate* or *serious* and *substantial* risk of negative impact on the quality of life or health must be observed in the case of a pollution hazard that has already occurred.[840] In the case of future and potential pollution danger, the ECtHR requires a sufficiently close link to private and family life.[841] A greater degree of uncertainty for future environmental hazards can also be seen in the light of the precautionary principle.[842] As stated in Chapter 4, this implies that scientific uncertainty does not exempt jurisdictions from a positive obligation to prevent risk.[843] It is emphasized by Sandvig (2021) that the future risk of climate emissions is already existing and latent, which is why it cannot necessarily be considered only as hypothetical.[844]

In connection with Articles 2 and 8 of the European Convention on Human Rights, there might also be an overlap with Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.[845]

The provision has been invoked in some environmental cases but has not been used in a climate change context. Therefore, the ECtHR has taken the initiative to take up Article 3 of the European

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[837] Article 8 of Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms. In Council of Europe Treaty Series 005. Council of Europe.
[838] *Hardy and Maile*, no. 31965/07 § 187.
[839] *Hardy and Maile*, no. 31965/07 § 188.
[840] *Jugheli and others v. Georgia*, no. 38342/05; §§ 67; *Brincat and others v. Malta*, no. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 § 82.
[841] *Hardy and Maile*, no. 31965/07 § 189.
[842] *Tătar v. Romania,* no. 67021/01 § 107.
[843] Chapter 4, section 4.5.3, on the precautionary principle.
[844] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget., p. 204.
[845] Article 3 of Council of Europe. (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms*. In Council of Europe Treaty Series 005. Council of Europe.

Convention on Human Rights Article 3 in the ongoing *Duarte Agostinho*[846] case. Article 3 of the European Convention on Human Rights protects, among other things, against real risk for situations that can arouse feelings of fear, anxiety and inferiority, which exceed a certain minimum level.[847] Once again, this assessment is relative and concrete. As with Article 2 of the European Convention on Human Rights, it implies that there is a positive preventive obligation in places where appropriate steps have been taken to protect individuals against dangers that their authorities should already know about.[848]

Article 14 of the European Convention on Human Rights prohibits direct and indirect discrimination in the exercise of the other rights in the European Convention on Human Rights:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[849]

Furthermore, it is not a prerequisite that other rights must be violated, even when these are interpreted broadly. Indirect discrimination may stem from a situation with disproportionately harmful effects, specifically having a discriminatory impact on a particular group.[850] In addition, according to the ECtHR's practice, age is a prohibited basis for discrimination. In this context, it is stated in several climate cases that children and young people are discriminated as a result of climate change. At the same time, it is also stated that climate change can discriminate on the basis of age of birth, as it will hit younger generations harder over the course of their lives and not just at a certain age.[851] This will damage the future generations and affect individuals born in more recent years disproportionately negative compared to older generations.[852]

Article 1 of the Protocol No. 1 to the European Convention on Human Rights, applies to property rights and obliges states, among other things, to protect the effective realization of property rights.

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[846] *Duarte Agostinho and Others v. Portugal and 32 Other States* no. 39371/20. Presented in section 6.3.2.2.
[847] *Budina v. Russio* no. 45603/05.
[848] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget. P. 204
[849] Article 14 of Council of Europe. (1950). *Convention for the Protection of Human Rights and Fundamental Freedoms*. In Council of Europe Treaty Series 005. Council of Europe.
[850] *Biao v. Denmark* [GC] no. 38590/10.
[851] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget. P. 209.
[852] *Zarb v. Malta* no. 16631/04 § 76; *DH v. Czech Republic* [GC] no. 57325/00 § 209.

The provision applies to existing property and property benefits that a person has a well-founded expectation of obtaining. However, it does not apply to heirs, i.e., future generations' potential acquisition of the right to property.[853] Several national courts have recognized on a general level that climate change threatens property and built-up areas.[854] However, damage, as a result of climate change, can only materialize in the long term.[855] Therefore, Article 1 of Protocol No. 1 only protects the current owner of the property against damage during the relevant lifetime.

In summary, the reviewed provisions in the convention have an impact on how climate change can possibly be made an element of human rights. In addition, there are also other provisions that can be made relevant such as Article 6 of the European Convention on Human Rights on a fair trial and Article 13 of the European Convention on Human Rights on effective remedy.[856]

As it has already been seen in a number of environmental cases, these articles have been used precisely to address breaches of the authorities' actions. In addition, court practice in the environmental field may also help to clarify a large number of matters such as the fact that a risk does not have to be materialized but that it must simply be known. Secondly, the demonstrated scientific risk is also decisive for the treatment of these cases. However, there are still many technical questions that have not been clarified in connection with the application of the European Convention on Human Rights in relation to climate change. Hopefully, these are some of the questions that the ECtHR will have to decide on in the coming period. In the next section, it is addressed what the three cases that will be heard at the Grand Chamber of the European Convention on Human Rights deal with and what hopefully needs to be clarified in these.

6.3.2.2 Pending Climate Change Cases at the Grand Chamber of the ECtHR

In this section, the three pending cases that are currently taken up by the ECtHR in the Grand Chamber[857] are the starting point of the analysis of the current issues and the questions that must

[853] *Wysoske v. Poland* no. 12792/13 § 48.
[854] *Urgenda Foundation v The State of the Netherlands*. C/09/456689/HA ZA 13-1396 section 4.2.
[855] Sandvig. J., (2021) *"Menneskerettigheter og klima. Klimarettssaker"* in Bugge, C. H., (ed.) (2021). Klimarett: Internasjonal, europeisk og norsk klimarett mot 2030. (pp. 190-221). Unversitetsforlaget. P. 209.
[856] Article 6 on right to a fair trial and Article 13 on right to an effective remedy in the *Convention for the Protection of Human Rights and Fundamental Freedoms*. In Council of Europe Treaty Series 005. Council of Europe.
[857] Grand Chamber of the European Court of Human Rights: Where the case raises a serious question affecting the interpretation of the Convention or there is a risk of inconsistency with a previous decision of the Court, the Chamber to which the case was allocated may relinquish jurisdiction in favour of the Grand Chamber.

be clarified by ECtHR in connection with human rights and climate change.[858] It is sought to be derived what issues that the cases in the relationship between climate change and human rights may entail—i.e., there will be more focus on the trend of these cases rather than the technical legal aspects in regards to the admissibility. However, the admissibility issue is of decisive importance for these trends, as it is first and foremost above all must be decided whether the European Convention on Human Rights applies to these cases. However, since judgment has not yet been delivered in any of the cases, it will be their influence that must be observed—i.e., what importance they will obtain, as they will help in shaping the future of human rights protection in the Member States as well as the ECtHR's institutional future. Simultaneously, justification for this approach stems from the consideration that, within the deep structure of the law, the focus is primarily directed towards the episteme rather than the legal material. Consequently, the methodology involves a more specific engagement with a truth that can significantly contribute to further comprehending the normative structure of the EU climate regime and its influence on the internal market.

The cases taken up by the ECtHR are *Duarte Agostinho and others v. Portugal and 32 Other States*,[859] *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*,[860] *Carême v. France*.[861] Common to the cases is that they have been taken to the Grand Chamber of the Court, which indicates that they require an immediate response, but it also indicates the importance of the legal assessment that must be made in relation to whether human rights can be invoked.

The following reports of the pending cases before the Grand Chamber have been presented in a Factsheet by the ECtHR.[862] In connection to *Duarte Agostinho and others v. Portugal and 32 Other States*,[863] it is noted:

> This case concerns the polluting greenhouse gas emissions from 33 member States which, in the view of the applicants – Portuguese nationals aged between 10 and 23 –, contribute

[858] Please note that other cases have been brought before the ECtHR but have been postponed at the time of writing.
[859] *Duarte Agostinho and Others v. Portugal and 32 Other States* no. 39371/20. Other states: Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Spain, Estonia, Finland, France, United Kingdom, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Norway, Poland, Romania, Russia (N.B.: on 16 September 2022 the Russian Federation ceased to be a Party to the European Convention on Human Rights), Slovakia, Slovenia, Sweden, Türkiye, and Ukraine.
[860] *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* no. 53600/20.
[861] *Carême v. France* no. 7189/21.
[862] European Court of Human Rights (Press Unit): *Factsheet – Climate change*. February 2023. (This factsheet is not exhaustive and does not bind the Court).
[863] *Duarte Agostinho and Others v. Portugal and 32 Other States* no. 39371/20.

> to the phenomenon of global warming, resulting, among other things, in heatwaves affecting the applicants' living conditions and health. The applicants complain in particular that the 33 States concerned are failing to comply with their positive obligations under Articles 2 (right to life) and 8 (right to respect for private and family life) of the Convention, read in the light of their undertakings under the 2015 Paris Agreement on climate change (COP 21). They also allege a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 2 and/or Article 8 of the Convention, arguing that global warming affects their generation particularly and that, given their age, the interference with their rights is greater than in the case of older generations.[864]

In connection to *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*,[865] it is noted:

> This case, which has been brought by a Swiss association and its members, a group of elderly people concerned with the consequences of global warming on their living conditions and health, relates to a complaint of various failings of Swiss authorities in the area of climate protection. The applicants submit in particular that the respondent State has failed to fulfil its positive obligations to protect life effectively (Article 2 of the Convention) and to ensure respect for their private and family life, including their home (Article 8 of the Convention). They further complain that they have not had access to a court within the meaning of Article 6 (right to a fair trial) of the Convention, and of a violation of Article 13 (right to an effective remedy) of the Convention, arguing that no effective domestic remedy is available to them for the purpose of submitting their complaints under Articles 2 and 8.[866]

In connection to *Carême v. France*,[867] it is noted:

> This case concerns a complaint by a resident and former mayor of the municipality of Grande-Synthe, who submits that France has taken insufficient steps to prevent climate change and that this failure entails a violation of the right to life (Article 2 of the Convention) and the right to respect for private and family life (Article 8 of the Convention).[868]

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[864] European Court of Human Rights (Press Unit): *Factsheet – Climate change*. February 2023. (This factsheet is not exhaustive and does not bind the Court).
[865] *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* no. 53600/20.
[866] European Court of Human Rights (Press Unit): *Factsheet – Climate change*. February 2023. (This factsheet is not exhaustive and does not bind the Court).
[867] *Carême v. France* no. 7189/21.
[868] European Court of Human Rights (Press Unit): *Factsheet – Climate change*. February 2023. (This factsheet is not exhaustive and does not bind the Court).

There are a number of key questions that the ECtHR must decide on within these cases. These are highlighted by Keller and Heri (2022) in their article 'The Future Is Now: Climate Cases Before the ECtHR'[869] in which they examine whether *the applicant has victim status*; *the non-exhaustion problem*; *extra-territorial jurisdiction*; and different substantive issues as *affected rights and future harms attribution and shared responsibility*; *the precaution, due diligence and ´no harm´ principles*; *and ECtHR's approach to evidence*.[870]

In the following, it is reviewed which technical issues that the ECtHR must review in these cases with a focus on the substantive issues as presented above, as these are considered essential for the understanding of the legal norm systems in the thesis. However, the other technical questions are of course also of decisive importance since they must be clarified in relation to whether climate change issues can lead to a violation of the European Convention on Human Rights.

Victim status: In the three cases, the complainants have alleged that they are the victim of a risk of future harm on the basis of insufficient action by the states. However, it is with different forms that they are made victims. Any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the convention can bring a claim before ECtHR.[871] Hence, the complainants consider themselves to be victims of a potential violation of the European Convention on Human Rights. For example, in the *Duarte Agostinho* case, the claim made by a group of children and young people is that they are victims of past and future damage as a result of climate change that is causing forest fires in Portugal.

The non-exhaustion problem: Furthermore, in connection with the climate cases, it must first be discovered whether there are domestically equivalent national acts that can clarify the case. If there is a national mediator who can decide the case, it can be rejected at the ECtHR.[872] In the *Verein KlimaSeniorinnen* case, the *actio popularis* claims are not admissible according to the

[869] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174. In the 2020 article, the authors focused on the four cases of: *Duarte Agostinho and Others v. Portugal and 32 Other States no. 39371/20*, and *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* no. 53600/20, and *Greenpeace Nordic and Others v. Norway* no. 34068/21, and *Müllner v. Austria* no. 18859/21 (the authors mentions that the case was not yet communicated at the time of their publishing). However, as the two last cases has not been relinquished in favour of the Grand Chamber.

[870] See also Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174.

[871] Niska, T., K. (2020). "Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?" in *Journal of World Energy Law and Business*, 13, 331-342, p. 332.

[872] See more in Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, pp. 158-159.

national rules in Switzerland, and thus the claimants had to show that they are particularly affected for admissibility.[873]

Extra-territorial jurisdiction: In some of the cases, there is not a predominantly extraterritorial framework. In the *Verein KlimaSeniorinnen* case, the complainants claim that their home state, Switzerland, is violating their rights by not taking adequate measures to limit domestic emissions. In contrast, the complainants in the *Duarte Agostinho* case have raised claims against 33 states, claiming that they are all responsible for the climate impacts that Portugal is exposed to. In the nature of the matter, most of the cases that come before the court will therefore relate to extra-territorial elements, as there will be an element of impact on the global climate.[874]

Keller and Heri (2022) assess whether certain requirements allow ECtHR to employ a dynamic approach in its interpretation. Specifically, the focus is on understanding whether the ECtHR can be flexible and evolving in its interpretation when assessing the admissibility of cases or if it is obligated to adhere strictly to the intention expressed by states when they accede to the European Convention on Human Rights. [875] In other words, the assessment examines whether the ECtHR has the freedom to dynamically interpret and adapt its understanding of the Convention's provisions over time, especially in the context of evaluating the admissibility of cases. Alternatively, it questions whether ECtHR is constrained by the initial intentions or expectations of the states. This distinction is crucial in determining the extent of the ECtHR's interpretative flexibility and whether it evolves its approach in response to changing circumstances or remains more tethered to the original intentions of the states that are party to the Convention.

The focal point of this chapter's analysis is not whether the potential problems that previous questions regarding the admissibility test have given rise to. Instead, the primary focus is on determining under what circumstances relevant and future climate change can be claimed to be a breach of the European Convention on Human Rights. Hence, if the European Convention on Human Rights can be invoked based on the above criteria, it is the substantive issues that must be decided

[873] Niska, T., K. (2020). "Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?" in *Journal of World Energy Law and Business*, 13, 331-342, p. 337.
[874] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 159.
[875] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, pp. 160-161.

on by the ECtHR. Accordingly, it is these substantive questions that can have an impact on the normative structure that is considered and that might be relevant to the question of this thesis.

The affected rights and future harms: If climate change is made a violation of human rights under the European Convention on Human Rights, it will affect a large number of rights in this turn.[876] In particular, it will be important for the European Convention on Human Rights Articles presented in the previous section.[877] At the same time, environmental law issues that have already been ruled on also have significance, including those where it is stated that certain risks within environmental law require preventive action to meet future harmful activity.[878]

Attribution and joint responsibility: In the *Duarte Agostinho* case, it is the joint responsibility of several states that the complainants are suing for. Thus, this issue on attribution and joint responsibility is an extension of the admissibility question regarding extra-territorial jurisdictions. However, whereas the admissibility test above dealt with whether the European Convention on Human Rights can be relied on in a given case, this issue concerns who that is to be held responsible for a given conduct.[879] It can be difficult to make a direct causal connection from a state's emissions to the damage that occurs as a result of climate change.[880] Keller and Heri (2022) thus emphasize that it will possibly be less effective if one seeks to find the responsibility of the individual state in connection with making European Convention on Human Rights rights applicable. Conversely, they also draw attention to the fact that shared responsibility can make it more diffuse and create gaps in responsibility.[881]

The principles of precaution, due diligence and no harm: Keller and Heri (2022) consider how these principles can have an impact on the outcome of climate cases. Here, they state that the ECtHR's assessment of the substance of climate cases can be guided by these principles as stated in international environmental law.[882] The same consideration has also been the subject of the

[876] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 163.
[877] Chapter 6, section 6.3.2.1.
[878] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 164.
[879] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 166.
[880] See Chapter 4, section 4.5.1.
[881] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 167.
[882] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 167.

thesis' analysis of the EU climate regime, where these principles have helped shape and inform the norm structure of the regime.[883] In the thesis, the key principles of the EU climate regime have been the principles of *no harm, precautionary, prevention and polluter pay,*[884] as they are assessed to be a key element of the regime. Moreover, these principles are also a result of international and EU legal aspects as presented in Chapter 4. At the same time, it has been shown that these principles consist of a more unclear legal formulation, which must also be with reservations so that the content of information can be limited to a certain extent. Keller and Heri (2022) also articulate a lack of clarification of their reviewed principles as an element that can be made concrete by ECtHR. Hopefully, these principles can thus be further informed by the practice that ECtHR will adopt if they have to judge the material content of the cases.

The ECtHR's approach to evidence: As highlighted by Keller and Heri (2022), in the ECtHR's environmental practice, there is already a willingness to accept the existence of risks of environmental damage where there is clear scientific evidence for this.[885] However, the factual part of the climate cases can contain several challenges due to the complexity of climate change. Therefore, the ECtHR is now faced with having to deal with the science presented in the cases.

It can thus be determined from the pending cases at the ECtHR that they, first and foremost, must be dealt with in terms of admissibility. Next, it is the material part that ECtHR must decide on in these cases, and precisely this part must be taken into account in the multi-layered phenomenon, as the treatment of the cases can help to inform the EU climate regime and the basic underlying principles that help to shape this regime. At the same time, it will also give importance to the norm structure if it is decided that these cases do not pass the admissibility test, which would result in the European Convention on Human Rights not being invoked.

Hence, regardless of the outcome of the cases, these will have an impact on the interaction that takes place between the internal market and the EU climate regime in the multi-layered phenomenon, which is elaborated on in section 6.4.

[883] See about the sedimentation process and recursive relationship of the layers in Chapter 2, section 2.2.1.
[884] See Chapter 4, section 4.5 on the *Key principles of the European Union Climate Regime*.
[885] Keller, H. & Heri, C. (2022). "The Future is Now: Climate Cases Before the ECtHR" in *Nordic Journal of Human Rights,* 40:1, 153-174, p. 168.

6.3.2.3 The International and National Aspects of Climate Change and Human Rights

As formulated in Chapter 2, section 2.4.1, on the definition of the regime, and throughout Chapter 4 regarding the EU climate regime, it is clear that the regime must be observed in the light of the international perspectives in most cases. This also applies in the understanding that can be applied in the human rights relationship to the regime. At the same time, as described in section 6.2, it is also the sedimentation that has taken place through the development of modern law that determines the episteme that prevails in the deep structure of the law. Thus, international legal development also has an impact on the normative understanding that has taken root in the EU climate regime, which is why it must also be observed how this can contribute to violations of the European Convention on Human Rights that can occur in terms of climate change issues.

Moreover, as delineated in section 6.3.2, the role of international provisions and consensuses is instrumental in shaping the interpretation of the European Convention on Human Rights. The interconnectedness between climate change and human rights is explicitly underscored in the preamble to the Paris Agreement, where acknowledgment is given to the universal significance of climate change and the imperative for Parties to consider human rights obligations:

> […] *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and **consider their respective obligations on human rights**, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity […].[886]

In light of the international agreement, it becomes evident that a human rights perspective is not only recommended but imperative for jurisdictions undertaking actions to address climate change. This acknowledgment in the global agreement underscores the intrinsic link between climate action and the protection and promotion of human rights.

At the same time, the human rights approach plays a central role in influencing the development at national courts. A significant illustration of this impact is observed when national courts render decisions with careful consideration of the scientific context.[887] Moreover, some national courts

[886] In the preamble of the Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

[887] An exceptional case, such as *Duarte Agostinho and Others v. Portugal and 32 Other States* no. 39371/20 stands out as the matter is directly brought to the ECtHR instead of being brought before the national courts first.

have applied key principles derived from the EU's climate regime in their decisions, further emphasizing the link between international human rights considerations and national legal developments.[888] This multifaceted influence highlights the dynamic and far-reaching impact of the human rights approach, not only at the international level but also in shaping the discourse and decisions at the national legal framework. These considerations also emphasize how human rights in the EU climate regime must gain importance in the future.

6.4 Climate Change as a Human Right and the Future of the Interaction Between the Legal Norm Systems

Within the internal market and the EU climate regime, the entrenched framework of human rights as an integral component of the episteme necessitates careful consideration in conjunction with the prospective of interactions between the two legal norm systems. The focus when approaching the two legal norm systems should be on how information on human rights can help to contribute to the systematic structure of the norms, and secondly, it should also be considered how this approach can balance the potential frictions between the principles that have been addressed in Chapter 5.

In this chapter, it is thus established that human rights in the internal market are fundamental rights, and they act as a kind of framework for the principle of free movement. This means that human rights are used to protect the internal market, but, at the same time, they can also be used to deviate from the principle of free movement.[889] Further, it has also been established in Chapter 5 that the internal market also takes environmental and climate considerations into account in the internal market. Thus, climate considerations can, in some cases, be used as justification for a restriction of free movement, for which the starting point in this thesis is the free movement of goods. In addition, it should be noted that these considerations in essence only function as exceptions to the main rule (in this case, TFEU Article 34) in the internal market. However, no matter

[888] See for example the judgment form the Netherlands: *Urgenda Foundation v The State of the Netherlands.* C/09/456689/HA ZA 13-1396.

[889] The Court has ruled that national laws may be contrary to the internal market if they restrict free movement or if they are contrary to fundamental rights and freedoms. See for example Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag.* [1997] ECLI:EU:C:1997:325 para. 34.

what, human rights cannot be deviated from and thus must constitute an *episteme* for the internal market.

Furthermore, in this chapter, it has been argued that it must be recognized that human rights can bring legal arguments to the table when approaching climate change issues. This is reiterated in Heri (2022) in which it is stated that climate cases hold a great potential in transforming aspects of human rights:

> Ultimately, climate cases hold the potential for reassessing and transforming various aspects of ECHR rights. Especially in the environmental context, the ECtHR's case law is ripe for such reassessment: it has been critiqued because it is too procedural or supervisory, because it prioritizes economic considerations over environmental ones, because it takes an overly liberal approach that focuses on providing information about risks instead of on risk avoidance and because it is overly individualistic. At the same time, authors have expressed hope about the potential of the ECHR to play a role, and perhaps even a leading one, in contesting current approaches to climate regulation and in formulating a human rights-based case for climate action.[890]

Furthermore, Heri (2002) states that the ECtHR has largely had an economic priority in environmental cases, while there is hope that future cases can help to have a leading role when it comes to climate justice cases. This follows the key finding in this chapter that, if human rights can handle climate issues, there is perhaps the possibility that this can help to inform the regime further. In addition, climate change as part of human rights also provides the opportunity to inform other areas of law and legal doctrines such as the internal market, as part the sedimentation process and the recursive relationship.

At the same time, Bodansky et al. (2017) questions whether climate change should be treated as a human rights issue and whether the outcome would be different if it were treated as an environmental, economic or scientific issue.[891] Regardless of what the answer is to the last part of the question, it cannot be ruled out that there is now a massive awareness of how the issue of climate change should be understood under human rights. As described in this chapter, this applies both nationally, in the EU, and internationally. This attention is compared with the legislator's approach

[890] Heri, C. (2022). "Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability" in *European Journal of International Law*, Volume 33, Issue 3, Pages 925–951, p. 948.
[891] Bodansky, D. Brunnée, J. & Rajamani, L. (2017). *International Climate Change Law*. Oxford University Press., pp. 296-297.

to the legal material of climate law in which human rights are listed first as part of the protection sought to be maintained. At the same time, it is argued in this thesis that part of the solution to the interaction and frictions that take place between the EU climate regime and the internal market must be sought to be addressed in the deep structure of the law to which human rights are placed. Therefore, it is natural that human rights must help to address climate change, regardless of the outcome of such an endeavour.

The consideration of the current role of human rights in the internal market must also be addressed, as the EU's focus, at present, is still largely on economic integration. This is formulated by Craig and Búrca (2020) as follows:

> […] For many years the European Economic Community was primarily focused on the creation of a common market, even if efforts to broaden the integration project were never entirely off the agenda. It was until 1970s the human rights concerns regained formal institutional recognition by the European Community, including the ECJ and the Member States. The most significant developments came throughout the 1990s with the adoption of the Maastricht and Amsterdam Treaties and the drafting of the EU Charter of Fundamental Rights, followed by the enactment of the Lisbon Treaty. Yet the legacy of the EEC's roots in the common market project retains its significance since, despite the EU's constantly changing nature and the recognition of human rights as part of its law and policy, the EU's dominant focus today remains economic.[892]

Whether the EU is most focused on economic growth or not is not the issue in this section. The consideration for human rights is merely an underpinning of the argument made throughout the thesis regarding the dominant effect of the internal market and its economic integration. This must also be seen as an extension of the claim that the internal market is precisely governing the interaction that currently takes place between these two areas, as it has been assessed throughout Chapter 5. From this, the question rather becomes whether the inclusion of human rights in the EU climate regime helps to inform the internal market's legal norm system via the deep structure of the law.

If climate change can be made part of the European Convention on Human Rights, it will have an impact on the normative structure that has been uncovered in the previous chapters. This must be understood as such that, if the EU climate regime with an integration of human rights

[892] Craig, P. & Búrca, G. de., (2020). *EU law: text, cases, and materials* (7. ed.). Oxford University Press, p. 416.

considerations can be made part of the understanding of the deep structure of law, the reconstruction that takes place on the upper layers of the multilayered phenomenon will be characterized by this. Thus, this will also push the understanding of the interaction and the potential frictions between the internal market and the EU climate regime. As demonstrated in this chapter, the importance of human rights and their potential violation have a decisive significance for the legal outcome of such interactions. On a theoretical level, this must mean that human rights are the *episteme* needed to give the two areas' perspectives in relation to their legal norm system.

6.5 Summing Up on Human Rights as an Element of the Deep Structure of the Law

This chapter's analysis has been based on the idea that the principles of the EU's climate regime have found their way into the internal market, especially in light of the internal markets aim of sustainable development. However, at the same time, the principles of the EU climate regime, in relation to the principles of the internal market, do not yet have any clear weight in the interaction between the two norm systems. Therefore, this chapter has dealt with the result of the analysis as it was presented in Chapter 5, via the deep structure of the law. Thus, human rights as an element of the episteme in the deep structure of the law have been used to assess the normative element of the legal norm system for the internal market and the EU climate regime. As such, human rights are presented as a common episteme for the two areas of the law.

In addition, it must be emphasized that this shared episteme can have an impact on the future legal development where the frictions are present. This is presented through the theoretical approach of *sedimentation* and *recursive relation* as described by Tuori (2002):

> When examining the relation of sedimentation, our view is directed from the law's surface towards its deeper layers. What is at issue in the relation of sedimentation is the contribution of the surface level to the formation of the legal culture and the deep structure. The relation of sedimentation brings the idea of the law's multi-layered nature into harmony with the fundamental positivity of modern law.
>
> The immediate outcomes of the legal practices of law-making adjudication and legal science find their location at the law's surface as discursively formulated status and other regulations, court decisions and scholars' statements. At the same time, however, these outcomes have at least potential impacts on the sub-surface levels of the legal culture and the deep

> structure. Legal practices not only employ resources provided by these levels. They have a *recursive* relation to the legal culture and the law's deep structure: they reproduce and perhaps even modify their own cultural and deep structural presuppositions. Such a recursivity marks all the interventions at the surface level of the law, and not only those which explicitly thematise elements of the legal culture or the deep structure, transforming knowledge of these deeper layers from a practical into a discursive state.[893]

Accordingly, if climate change becomes a violation of the European Convention on Human Rights introduces a novel perspective into the deep structure of the law and the perpetuation of the EU climate regime. Within this context, the evolution and comprehension of the substantive aspect of human rights offer a distinct lens through which to reevaluate the EU climate regime. This, in turn, contributes to an enhanced understanding of the shared episteme within the deep structure of the law as an integral element of sedimentation.

Consequently, as this process unfolds the comprehension of the multi-layered phenomenon, the evolution of the EU climate regime assumes a role in reshaping the episteme and facilitating lateralized impacts across the various layers of the phenomenon. This transformative development not only influences the deep structure but also contributes to informing other layers of the legal framework. In this intricate interplay, human rights emerge as a source of insight into the dynamics, potential conflicts, and informational contributions within the interaction, thereby offering valuable perspectives between the legal norm system of the internal market and the legal norm system of the EU climate regime.

[893] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 200-201.

PART IV

DISCUSSION & CONCLUSION

CHAPTER 7
DISCUSSION ON THE FINDINGS OF THE THESIS

7.1 Outline

This chapter briefly discusses the findings of the analyses throughout the thesis. Section 7.2 discusses the use of critical legal positivism and the multi-layered phenomenon in the thesis. Section 7.3 discusses the normative findings of the thesis.

7.2 Discussion on the Use of Critical Legal Positivism and the Multi-Layered Phenomenon

In this section, it is reflected what elements in the application of critical legal positivism as formulated in Tuori (2002) that have contributed to answering the main research question of the thesis, which is to uncover the interaction between the legal norm systems of the internal market and the EU climate regime. Critical legal positivism has also provided a theoretical framework that has been applied to derive the results of the analyses. By using critical legal positivism, it has been possible to give a normative perspective of the law and its uncertainty from the different layers of the multi-layered phenomenon. As stated in Chapter 2, critical legal positivism aims to build upon the framework of legal positivism but differs in its normative justification of the law that goes beyond the limited validity requirements of the pure theory of law.[894] Thus, the law may contain legal uncertainty, which can be criticized on the basis of the various layers.[895]

Through the multi-layered phenomenon, it is thus investigated how the internal market and the EU climate regime, in their interaction, can lead to potential frictions. Thus, the frictions are not the result of current erroneous law, but rather they point to the fact that there is a tendency for the EU climate regime to be informed by the internal market and its principles. At the same time, the

[894] See also Tvarnø, C. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist- og Økonomforbundet, pp. 527-528. The author's states that Tuori includes the normative and practical aspects of law as a multi-level phenomenon and assumes that modern law is created through human decisions and actions and is not something 'given from above' and defines law as objects of jurisprudence, both as a normative phenomenon in the world of should and a social, empirical fact.

[895] See Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, pp. 286-287 and Chapter 2, section 2.2.1 on *Critical Legal Positivism.*

analysis of Chapter 5 has also shown that the EU climate regime's principles have influenced the internal market, as it has infiltrated parts of the internal market's legal norm system. Despite observations of the fragments of the climate regime in the internal market, it must still be recognized that the principles of the EU climate regime do not yet have the same weight as the principles of the internal market. This is assessed from the fact that the principles, even though they are considered to be legally binding, largely act as guiding tools—i.e., they are normative principles. Furthermore, the understanding of the multi-layered phenomenon has thus also provided the opportunity to investigate how these frictions could be informed anew by introducing human rights. Human rights, which can be conceptualized as the common episteme of the deep structure of the law for the two legal norm systems, has the opportunity to inform the upper layers. This must be understood in the case where Member States' policies on climate change can be made a violation of human rights, which is why the common episteme is informed anew and why the principles of the EU climate regime and the principles of the internal market are informed from this.

In this recreation of the different layers, it has thus been the reproduction of the law's deeper layers that has been central to the study. In addition, it has been necessary to address the fact that the law has been examined with a critical view of its normative elements. In the analyses, the substantive part of the law has thus not been criticized due to the objective of thesis. The results of the thesis are rather a prediction of the norms of the internal market and the EU climate regime than an actual explanation for these. In Chapter 6, the *episteme* has been the focal point in the analysis of the deep structure of the law—i.e., a truth that exists at the deeper layer, but which, in isolation from the theory of critical legal positivism, must be assessed to be more or less intangible. It is only with the inclusion of human rights in Chapter 6 that this epistemology can be made into a tangible element that can be assessed and applied for concrete law (at the surface layer).

In the book review by Bergo (2004) on Tuori's (2002) critical legal positivism, Bergo is critical of the uncomplicated character of this legal theory.[896] Thus, a number of critical points in the theory and its views are addressed, and the theory is described as a less successful theory. Among other things, it is emphasized that the multi-layered phenomenon via depositions of the normative principles at the deeper layers can result in and inspire free legal tendencies in courts and administrations, which is why Bergo (2004) is not an immediate supporter of normative meaning being

[896] Bergo, K. (2004). "Karlo Tuori: Critical Legal Positivism." in *Tidsskrift for Rettsvitenskap*, Volume 117, Issue 1-2 Sep 2004

founded in the deep structure.[897] Precisely this is also part of one of the other points of criticism by Bergo (2004) in which it is problematized that Tuori (2002) more so constructs an imagined reality rather than reveals reality.[898] This point is also made in the next section in regard to the normative results of the analyses. However, the point of normative results is either to create awareness of the law's functions or of the immanent normative criticism. However, this criticism is not apparent in the theory of legal positivism.[899] In this regard, Tuori (2002) points out the following:

> If we can define the limits and the criteria of validity of the law from within its positivity, we have demonstrated the possibility of an immanent legal criticism which employs intersubjectively acceptable substantive criteria. Such a criticism was unthinkable in Kelsen's pure theory of law. The pure theory of law allows only for a formal criticism, focusing, first, on the procedure in which norms have been established, and, secondly, on the logical consistency of the norms (or the legal propositions describing them): if a norm does not fulfill the formal criteria concerning the procedure of enactment and consistency, it is not a valid legal norm. In the pure theory of law, there is no possibility for any other internal normative criticism of the law than that shielding its logical consistency. In Kelsen's view, a substantive normative criticism would require a moral position outside the law. In his moral theory, Kelsen advocate a relativistic standpoint according to which no objective moral yardsticks could be vindicated (Kelsen 1970, pp. 63-65). Hence, for Kelsen, substantive normative criticism of the law was inevitably not only external but also subjective and in this sense arbitrary in character.[900]

Accordingly, it must be understood that critical legal positivism consists of the same elements as legal positivism but differs in that it differentiates between *is* and *ought*.[901] This approach to legal positivism is precisely what is captured in the results of the thesis, where the immanent criticism of the law is reflected in the frictions between the EU climate regime and the internal market. Thus, the application of critical legal positivism has allowed for the conditions in the norm

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[897] Bergo, K. (2004). "Karlo Tuori: Critical Legal Positivism.**"** in *Tidsskrift for Rettsvitenskap*, Volume 117, Issue 1-2 Sep 2004, p. 241.
[898] Bergo, K. (2004). "Karlo Tuori: Critical Legal Positivism.**"** in *Tidsskrift for Rettsvitenskap*, Volume 117, Issue 1-2 Sep 2004, p. 245.
[899] See also in Tvarnø, C. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist- og Økonomforbundet, p. 444. Tvarnø and Nielsen recognize critical legal positivism as being a theory that has a broader definition of legitimacy than legal positivism. This broader definition of legitimacy is given through legal practitioners who, through their specialized legal practice and jurisprudence, explicitly confront the question of legitimacy and the validity of law.
[900] Tuori, K. (2002). *Critical Legal Positivism*. Ashgate, p. 28.
[901] See also Chapter 2, section 2.2.1.

structure to be addressed, while the same conditions would not necessarily be possible to address with a positivist approach to the relationship between the two norm structures.

7.3 Discussion on the Normative Results

The key principles of the internal market and the EU climate regime have been used as foundational elements for the establishing of the two areas.[902] At the same time, it must be stressed that these principles are used as guiding principles for the analysis of the deeper layers in the multi-layered phenomenon, which means that they represent a guidance for the normative elements of the two legal norm systems rather than a linguistically formulated element or norm.[903] The normative elements have been applied in order to observe the frictions between the two legal norm systems in the layers of the law. However, if it is only the linguistically formulated norms that were used in the analyses, this might not have been possible, as the frictions only could have been approached at the surface level, resulting in the possibility to use the *lex principles* to solve the frictions.[904] Thus, the normative perspective and criticism hereto has provided the opportunity to address the law from a different angle and the opportunity to answer the research question of the thesis in regard to the normative fragmentation of the law.

Thus, it has been possible to criticize the relationship between the internal market and the EU climate regime with the claim that the principles of the internal market are governing the principles of the EU climate regime. It has thus been shown that, in the relationship between these two legal norm systems, there is a presumption that the internal market's legal norm status is positioned as an overarching goal for the EU whereby the principles of the climate regime constitute an exception rather than an actual overall goal for the EU to attain. This result is thus based on the analysis of Chapter 5 regarding the considerations made in the internal market in relation to the EU climate regime. At the same time, the hypothesis that the internal market is governing is also partially rejected, since the influence of the principles for the EU's climate regime have positioned themselves as normative principles in the internal market. In particular, the goal of sustainable

[902] As highlighted by Tvarnø, C. & Nielsen, R. (2021). *Retskilder og retsteorier*. Djøf/Jurist- og Økonomforbundet, p. 580. The question of whether a norm can be considered 'valid' in critical legal positivism depends on whether it is accepted as legitimate in the legal discourse between legislators, courts and legal researchers, i.e. the actors in the most important forms of legal practice.
[903] See also the discussion in Chapter 2, section 2.2.1.
[904] See also Chapter 2, section 2.4.4.

development in the internal market has been a common market for the two legal norm systems. Since it is only a partial rejection of the hypothesis of Chapter 5 that the internal market is governing the EU climate regime, this must also be understood as the EU climate regime's principles, which, as emphasized, are broad guiding principles—i.e., they are normative principles. Thus, it is with the introduction of human rights in the analysis that these can be made more tangible.

Based on these presented results, it must also be emphasized that the thesis does not assess how this situation is effective for the internal market or the EU climate regime. Thus, the thesis does not relate further to the immanent criticism that has been undertaken, but only seeks to visualize it. Thus, normative criticism and its results hereto also finds a limitation in relation to how far it can go to assess the outcome of the findings of thesis—i.e., whether this outcome is specifically *good* or *bad*. Therefore, the results of the analyses must be understood as a contribution within the legal uncertainty that exists precisely between the two legal norm systems, and it is found that the solution to this can be found in the deep structure of the law.

CHAPTER 8
CONCLUSION AND FINAL REMARKS

8.1 Outline

This chapter contains an overview of the findings of the analyses and answers the research question of the thesis. Section 8.2 introduces the findings of the analyses and briefly answers the sub-questions in relation to the findings. In section 8.3, the conclusion for the main research question of the thesis is stated.

8.2 Analytical Findings for Answering the Sub-Questions of the Thesis

The thesis has investigated the interaction and frictions between the internal market and the EU climate regime. It has focused on the frictions between the principles of the EU climate regime and the principles of the EU internal market, and it has aimed to understand the norm difficulties in these frictions between these two legal norm systems. Thus, the main research question has been formulated accordingly:

> *How does the legal norm systems of the internal market and of the EU climate regime interact?*

The research question has been analysed throughout the thesis with three supporting questions. These questions were introduced in Chapter 1 together with the purpose of the thesis. Following the main research question, the purpose of the thesis has been to examine the interaction that takes place between the legal norm systems for the EU climate regime and the internal market. Therefore, it has only been the legal frictions between these two systems that has been illuminated. However, these legal frictions can be said to stem from current issues in society in the form of the EU's green transition. The interaction between these legal norm systems were found to be relevant to investigate, since it has not yet been studied in the legal literature how the two legal norm systems interact and how frictions can arise and create legal uncertainty.

Simultaneously, the thesis recognizes the well-established nature of the internal market in the EU. It also acknowledges that the EU climate regime is relatively new, having gained increased attention in recent decades, especially with a heightened focus on climate change. This increased focus

on climate change has created an extremely comprehensive action plan in the EU, where the political agendas set comprehensive goals for the development of law and including the internal market. By positioning this thesis as a theoretical contribution, it has provided the opportunity to gain insights and new perspectives that can inform and guide future legal developments and legal decisions. The overall analysis of the thesis aims to contribute to the wider discourse on normative approaches in the legal field, recognizing the dynamic nature of the interaction between the internal market and the EU's climate regime and the importance of adapting legal frameworks to address emerging issues.

In order to shed light on this issue and provide a scientific result, the theory of critical legal positivism has been applied as presented in Chapter 2. Critical legal positivism is Kaarlo Tuori's extension of legal positivism, which differs in its critical approach to the law from its inherent normative perspectives. In addition, the multi-layered phenomenon is an integral element in the theory with its division of law into three layers: the surface level, the legal culture level and the deep structure of the law. These layers represent different elements of law, where the surface level consists of the material norms of the law, the legal culture consists of the daily application of the law, and the deep structure of the law contains the underlying epistemology of modern law. The multi-layered phenomenon thus contains a more normative perspective on law and provides the opportunity to criticize law through its various layers. Thus, this phenomenon has also provided an opportunity to examine the relationship between the two legal norm systems for the internal market and the EU climate regime in their interactions. In this line, the results of the thesis are presented below together with this theoretical understanding of law.

8.2.1 The Principles of the Internal Market and the EU Climate Regime

In Chapters 3 and 4, the first sub-question was answered. I) *What are the key principles of the internal market and the EU climate regime?* This question thus centered around the surface level of the two legal norm systems in the multi-layered phenomenon. At this level, it has thus been possible to derive the linguistically formulated norms and principles for the norm systems. At the same time, the principles of the two norm systems were also treated with the starting point of delimiting each other. This means that, for the principles of the internal market, there was a particular focus on their connection to climate law, while, with the EU climate regime, there was a particular focus on the perspective of the internal market.

In Chapter 3, the core principles for the internal market were determined to be the principles of free movement for which the internal market must work for the goal of sustainable development. In addition, the internal market's legal construction was also reviewed in order to elucidate which mechanisms, among other things, that help to govern the internal market and which that may be considered relevant for understanding the internal market precisely in relation to the EU climate regime. It was found that the mechanisms include negative and positive integration, direct effect, proportionality, efficiency, and transparency, and, in addition, perspective was given to the relationship between the internal market and international law. These mechanisms were found to be central to the understanding of the internal market's principle of free movement as they construct and govern the internal market's legal norm system. At the same time, there was also a focus on the development of the internal market, which has particularly focused on the economic aspects for which the liberalization in the form of an open market of the EU has been central. In addition, this very aspect of the internal market was treated in relation to the opposition to the objective of environmental legislation, which does not generate the same economic considerations.

The principle of free movement was thus assessed to be a core principle of the internal market's legal norm system, and the principle was treated with special focus on the treaty provision on the establishment of the internal market—namely, TFEU Article 3(3)—and the provision on the purpose of the internal market—namely, TFEU Article 26. Simultaneously, the significance of sustainable development was underscored in this context. TEU Article 3(3) explicitly mandates that the EU's internal market should operate in line with the principles of sustainable development. Sustainable development was assessed to include considerations about development with a balance between economic, social, and environmental considerations. It was emphasized that the absence of a clear demarcation of sustainable development in the EU introduces uncertainty around the concept. Thus, it was found that the concept of sustainable development itself constitutes a more normative element in the legal doctrine. At the same time, the principle of free movement in the internal market was also narrowed down in this chapter to only include an examination of the principle of the free movement of goods, as analyzed further in Chapter 5. This is due to the reason that the dependency on product consumption, their production method and how they are transported, used, consumed, reused, recycled, or discarded, products can become a source of pollution. Thus, the free movement of goods might naturally be subject to the green transition that is being pursued in the EU climate regime.

In Chapter 4, the principles of the EU climate regime were deduced. These include the principle of no-harm, the principle of prevention, the principle of precaution and the polluter pays principle. These principles are thus the result of the development of the EU climate regime for which the international climate regime, in particular, has had an influence on the integration of these principles. The international climate regime was thus found to be fertile ground for the goals and principles of the EU's climate regime. Therefore, the principles were also presented in the chapter on the basis of both the international legal formulations and the EU's legal formulations. The political obligations that the EU has developed were also estimated to be a large part of the regime, as they represent the normative goals for the EU climate regime and its objectives. These political agendas have particularly focused on the European Green Deal, which is often referred to in the framework regulation, and which has thus been an interpretive contribution to the analysis of the EU climate regime's principles. As a result of the obligations in the international climate regime and the political agendas for the EU, the EU climate regime has developed a framework regulation—EU Climate Regulation (2021/1119)— which has been central to the formulations of the principles and parts of the analyses in thesis.

In addition to the legal obligations and rules that underlie the regime, there are also non legal sources that contribute normatively to the regime. Non-legal science about climate change, referred to as *climate science*, has also been shown to have a significant role in the principles of the EU climate regime, where they constitute a central element for a regulation that is carried out via the principles of the EU climate regime. This includes risk assessments, climate measures, climate adaptation, etc., which are the result of a political consequence of climate change. Therefore, climate science must also be recognized as an important normative perspective on the principles of the regime.

The no-harm principle, which is rooted in the sovereign rights of states, is less elaborated in the EU climate regime and serves more as a political statement. In both the EU climate regime and in the international climate regime, the principle is a positive obligation that affects the behaviour of the Union’s actions and not only the results of these. In this line, it must be the case that, in the EU climate regime, there is also a due diligence obligation in the principle of no-harm that is similar to the international climate regime. Thus, it was also established that the no-harm principle serves as an umbrella principle for the three other principles that were reviewed in the thesis.

The prevention principle, which is derived from international due diligence, was found to focus on damage prevention in the EU while lacking clarity regarding considerations for climate matters. The principle of prevention was found to have an immediate and straightforward meaning, specifying that harm must be prevented rather than treated after it has been caused.

The prevention principle is inherently regarded as an integral component of the overarching objective of climate regulation, which seeks to effectively address climate change and prevent a rise in global temperatures. Nevertheless, it was assessed that it may be unclear how the principle is weighted in the EU's climate regime in relation to other considerations such as purely social and economic considerations. Another unclear aspect of the principle is the extent of discretion left to the European Commission and the Member States.

The precautionary principle further guarantees a robust level of protection against risks, emphasizing proactive decision-making to prevent harm. It can be seen as an integral component of the prevention principle, working together to prioritize preventive measures to safeguard against potential threats. Thus, emphasis is placed on protecting public health, safety, and the environment, and prioritizing the requirements relating to the protection of these interests over economic interests. Ergo, the principle contributes with economic benefits on the one hand and with protection of public health, safety, and the environment on the other hand. Under the climate regime, it was decided that the precautionary principle is used as a guideline for the EU's and the Member States' climate actions. If there is scientific uncertainty, evaluation procedures should be implemented, and appropriate preventive measures taken into account to avoid harm to human health and the environment.

The polluter pays principle was found in the international climate regime under which it is imposed on states that they must promote the internalization of environmental costs and the use of financial instruments in this regard. The principle stipulates that the polluter must, in principle, bear the costs of pollution. The idea behind the principle is thus to hold the entity that causes damage to the climate responsible for the costs. The principle is also part of the EU climate regime. Its value is reflected in some of the EU's market-based environmental policy instruments. However, at this moment, the principle still lacks a more tangible conceptualization. Therefore, it is currently more of a guiding principle in the EU climate regime.

Common to the four principles it was found that they are broadly formulated principles, which, to a large extent, function as guiding principles following the goal of the Paris Agreement to attain

a climate-neutral EU by 2050. Further, they are all developed from both the international climate regime and the EU's political green agendas.

Chapters 3 and 4 were focused on the multi-layered phenomenon's surface level, where it is mainly the legal material for the two legal norm systems that was determined while considering their core principles. At the same time, the development of these two legal norm systems has also provided the opportunity to give indications of the deeper layers of the law, which were examined in Part III of the thesis. This is the result of the sedimentation process and the recursive relationship between the deeper layers of the law in the multi-layered phenomenon.

8.2.2 The Internal Market's Principles' Influence on the EU Climate Regime

In Chapter 5, the analysis was concentrated on sub-question II) *To what extent do the principles of the internal market influence the principles of the EU's climate regime?* Chapter 5 has thus its starting point in the legal culture layer of the multi-layered phenomenon. At this level, the normative doctrine seeks to systematize the sources of law that are based on normative guidelines for identification and order. In the thesis, it has been the normative investigation of the multi-layered nature of the law that has been of interest in particular. The doctrine thus served as an intra-legal guide to assess the weight of the content of the legal order—i.e., to assess whether the sources of law provide information for the legal order, and to assess where the doctrine of these sources of law divides and classifies the mutual relationship in the system.

In order to answer the aforementioned sub-question, the analysis in Chapter 5 was divided into two parts. On the one hand, climate change was analysed as a consideration under the internal market, and on the other hand, the influence of the internal market on the EU climate regime was analysed in the second part of the chapter. This two folded approach was intended to lay the groundwork for testing the hypothesis that the principles of the internal market were governing the principles of the EU climate regime.

In Chapter 5, the further analysis of climate change considerations in the internal market was initiated by examining how Member States potentially create barriers under the principle of free movement of goods. In order to shed light on this, the already existing environmental considerations were included. The relationship between the environmental regime and the climate regime was thus also addressed, as climate law largely stems from environmental law, but the two regimes

nevertheless differ in their different areas in which they regulate. Therefore, parts of the information on which the EU regime was built has also been based on considerations for environmental law. It was concluded that climate-related issues have been surfacing, prompting the Court to engage in broader deliberations on the need to accommodate to climate considerations. Finally, it was concluded that the perspective of environmental protection introduces the possibility of justifying national climate change measures, potentially impeding the free movement of goods.

This review highlighted the intricate relationship between national considerations and climate-related concerns, and it underscored the need for a nuanced understanding of their evolving dynamics. The theoretical framework of the thesis illustrated that climate considerations are significantly influenced by the normative structure that governs the internal market. In this regard, it was found that the prevailing legal doctrinal stage reflected a general integration of environmental concerns with the internal market, highlighting the apparent lack of firm roots for the EU's climate regime within this layer of legal culture. This imbalance between the internal market and the EU's climate regime became apparent, setting the stage for the subsequent section's exploration of how the EU's climate regime incorporates normative elements that delineate its coherence with the internal market's legal norm system.

The second part of Chapter 5 stated that sustainable development plays a central role in both the internal market and the EU's climate regime in accordance with TEU Article 3(3), as a guiding principle for the legal norm system of the internal market. Within the EU climate regime, sustainable development is expressed in TEUF Article 11, EUCFR article 37, and various international climate agreements that have shaped the political agendas and influenced the regulatory principles. It was noted that, while sustainable development is inherently political, it adheres to the concept of balancing social, economic, and environmental dimensions, which extends to the interaction between the internal market and the EU climate regime. Further, it was found that this interaction includes climate actions, climate principles and free movement of goods within the internal market.

This analysis revealed that the EU climate regime incorporates elements of the internal market into its legal norm system through the inclusion of sustainable development. At the same time, the internal market takes into account the climate measures of both the EU and its Member States. It thus appeared crucial to note that the principles of the EU climate regime currently lack the same robustness, as they appear as normative elements in the legal norm systems.

The analysis of the layer of the legal culture in Chapter 5 could thus not clearly confirm the hypothesis that the internal market is governing the EU climate regime. The legal norm systems for the internal market and the EU climate regime were characterized to share a dynamic where climate change is highly considered. At the same time, however, it was also emphasized that these considerations are characterized by a normative approach for which the principles of the EU climate regime do not yet have the same legal force as the principles of the internal market.

8.2.3 The EU Climate Regime as Informed by Human Rights

Finally, Chapter 6 answered sub-question III) *To what extent can the EU climate regime through human rights inform the internal market in the future?* Accordingly, this chapter had its starting point in the deep structure of the law, where there is a common episteme for the legal norm systems, which helps to inform the two upper layers through a recursive relationship. Human rights are placed at the level of the deep structure of the law. Therefore, human rights were also the starting point for the analysis, where it was desired to investigate whether climate change can become part of human rights. As there is still no practice in this area in the EU, the analysis focused on the pending cases that are before the European Court of Human Rights, and the matters that must be clarified from it. At the same time, it was determined how the relationship between the European Convention on Human Rights and EU law, including the internal market and the EU climate regime, must be observed. In conclusion, the chapter established that the outcome of these cases must provide new information to the common theme that exists for the two legal norm systems. This means that, if insufficient climate action by a Member State can be considered a human rights violation, it will provide the opportunity to provide information to the EU's climate regime's legal norm system for the other two layers while, at the same time, also giving the opportunity to reconcile frictions between the internal market and the regime as a result of their interactions. This follows from the process of sedimentation and the recursive relationship that the layers in the multi-layered phenomenon have.

8.3 Conclusion on the Interaction Between the Legal Norm Systems of the Internal Market and of the EU Climate Regime

Finally, it can be concluded from the research question that the two legal norm systems of the internal market and of the EU climate regime interact throughout the different layers of the multi-layered phenomenon. The interaction has shown that the principles of the internal market to some extent inform the principles of the EU climate regime, in particular through the common goal of sustainable development. At the same time, it has been shown that there are fragments of the EU climate regime's principles in the internal market, which at present appear unclear in their normative presence. However, it has also been shown that, in the interaction between the two legal norm systems frictions arise between them, which contributes to legal uncertainty. Therefore, a possible future solution to address that legal uncertainty can be the information that human rights can contribute as part of the common episteme for the two legal norm systems.

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