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SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL LEGAL PROTECTION IN THE EUROPEAN UNION: A MODEL FOR MEXICAN COURTS TO FOLLOW?

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Abstract. *Over the past several decades, sustainable development as a paradigm for balanced development has made its way into the constitutional regimes of many nations. The justiciability of sustainable development, however —particularly in the context of environmental legal protection— remains problematic for many legal systems, including Mexico. This article traces the evolution of sustainable development within an international context; analyzes its influence on treaties that led to the European Union; and evaluates the use of environmental protection by the European Union's Court of Justice (referred to hereinafter as "ECJ"). An analysis of the interplay of the concept of sustainable development in the primary and secondary legislation of the European Union as interpreted by the ECJ leads us to the following conclusion: regarding the legal protection of the environment in the European Union, sustainable development may be viewed as a general principle of law that articulates a series of sub-principles contained in the treaties. These sub-principles include the precautionary principle and the "polluter-pays" principle. We also conclude that the unsystematic use of these sub-principles in the secondary legislation of the European Union weakens the ECJ's coherent handling of the concept in its decisions. This article also suggests that Mexican judges would be well advised to carefully study sustainable development as employed by the ECJ in cases involving constitutional and international collective environmental claims which may arise under the recent amendments to the Amparo Law.*

Key Words: *Sustainable development, environmental protection, justiciability, European Union, Mexico, Amparo, general principle of law.*

Resumen. *El concepto de desarrollo sustentable como paradigma para el desarrollo balanceado se ha arraigado en los regímenes constitucionales de diversos sistemas jurídicos nacionales durante las pasadas décadas. No obstante, la seguridad jurídica del concepto de desarrollo sustentable, particularmente en*

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el contexto de la protección legal del ambiente, continúa siendo problemática para muchos sistemas jurídicos, incluyendo el mexicano. Este artículo traza la evolución del concepto de desarrollo sustentable en el orden jurídico internacional y estudia su incursión en los tratados que han dado paso a la Unión Europea, antes de enfocarse en el manejo del concepto en el contexto de la protección legal del ambiente por el Tribunal de Justicia de la Unión Europea. El análisis de la interacción del concepto de desarrollo sustentable entre la legislación primaria y secundaria de la Unión Europea, según interpretada por el Tribunal de Justicia de la Unión Europea, nos lleva a la conclusión de que, respecto a la protección legal del ambiente, el desarrollo sustentable puede visualizarse en el orden jurídico europeo como un principio general de derecho que articula una serie de sub-principios enunciados en los tratados, tales como el principio de precaución y el principio de que el contaminador paga. Concluimos también que la compleja utilización de esos principios en la legislación primaria y secundaria ha dado lugar a un problema de incoherencia en la formulación de la legislación secundaria que debilita el manejo coherente del concepto por el Tribunal de Justicia en sus decisiones. Este trabajo sugiere además que el estudio cuidadoso de la articulación del concepto de desarrollo sustentable por el Tribunal de Justicia de la Unión Europea podría ser de ayuda a los magistrados mexicanos que tengan ante sí reclamos medio-ambientales colectivos de corte constitucional o internacional, que por vez primera podrían ser acogidos en razón de las enmiendas recientes a la Ley de Amparo.

Palabras clave: *Desarrollo sustentable, protección del ambiente, seguridad jurídica, Unión Europea, México, Amparo, principio general de derecho*.

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I. Introductory Remarks

The idea of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[1] became widely accepted when coined in the 1970s, not

[1] U.N. World Commission on Environment and Development, *Our Common Future: Report of*

only by environmentalists but also by supranational organizations such as the United Nations and the European Community. Environmentalists hoped that the new generation of policy and lawmaking could help establish the balance called for by sustainable development by factoring environmental externalities into the economic development decision process.[2] They also hoped that sustainable development could impact legal rules and principles and influence the adjudication of legal disputes calling for a balancing of interests between economic development and environmental protection in a zero-sum fashion.[3] In other words, the justiciability of sustainable development, particularly in the context of environmental protection, remains problematic for many legal systems. This hope has not materialized, and some environmentalists now believe that sustainable development has just become a euphemism for naked development.[4] In fact, many Latin American countries including Mexico as well as supranational organizations such as the European Union have attempted, with varying degrees of success, to adjudicate sustainable development in their own tribunals.

Many parallels can be drawn between Mexico and the European Union (hereinafter, the "EU") regarding the role of sustainable development in the legal protection of the environment. The EU places sustainable development at the heart of its core mandate: the establishment of an internal market. Article 3(3) of the Treaty of the European Union states:

> 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[5] (Emphasis added).

As we will see later, the Treaty does not explicitly define the concept of sustainable development; the concept was incorporated into the secondary legislation and the ECJ has assumed the task of defining its boundaries.

The Mexican Constitution mandates that: (1) "[t]he State shall lead national development and guarantee that it is integral and sustainable,"[6] and (2) "[u]nder the criteria of social equity and productivity, the State shall sup-

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the World Commission on Environment and Development, chap. 2, paragraph 1, Annex to U.N. Doc. A/42/427 (Aug. 4, 1987) [Hereinafter Our Common Future or Brundtland Report].

[2] *See, e.g.*, David Barnhizer, *Waking From Sustainability's "Impossible Dream": The Decisionmaking Realities of Business and Government*, 8 Geo. Int'l Envtl. L. Rev. 595 (2006); James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 Mont. L. Rev. 425(1994).

[3] *Id.*

[4] *Id.*

[5] Treaty of the European Union, 2008 O.J. (C 115) 16, article 3(3) [hereinafter TEU].

[6] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 25, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

port and encourage both private sector and non-profit enterprises, subjecting them to the rules dictated by the public interest and to the use of productive resources for the benefit of all, ensuring both their conservation and the environment."[7] That constitutional mandate is implemented in Mexico's General Law of Ecological Equilibrium and Protection of the Environment (the "Ecology Law").[8] Article 1 of the Ecology Law establishes that the object of the Law is to "foster sustainable development"[9] and defines the term.[10]

Furthermore, Article 4 of the Mexican Constitution states in no uncertain terms that: "Every individual has the right to live in a healthy environment for her development and welfare."[11] This fundamental right is articulated in the provisions of the Ecology Law.[12] In this way, the Mexican Constitution firmly establishes every individual's fundamental right to a healthy or wholesome environment, thus making it susceptible to *amparo* under Mexican law.[13] The *amparo* action is Mexico's unique legal action that gives its citizens the right to remedy harm caused by governmental violations of the constitutional rights afforded to them by the Mexican Constitution.[14] The Amparo Law was recently amended to incorporate not only basic rights granted by the Constitution, but also to redress violations of individual human rights established under international treaties and signed by Mexico.

As such, some commentators have argued that the constitutional right to an adequate environment as well as all environmental human rights recognized by Mexico as part of its international obligations are now justiciable

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[7] *Id*.

[8] Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[9] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 1, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[10] Sustainable development is "the process, measurable by concrete criteria and indicators of environmental, economic and social character that tends to improve the quality of life and the productivity of people, and that is based on appropriate measures for the preservation of ecological equilibrium, environmental protection and the advantageous use of natural resources in such a way as to not impair the needs of future generations ". *Id.* at article 3(XI).

[11] *Id.* article 4 (our translation). We must note that the 2012 reform of Article 4 of the Mexican Constitution refers to *medio ambiente sano,* which can be translated into English as "healthy " or "wholesome " environment.

[12] Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, art. 1, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[13] *See,* Juan Pablo Guñido Gual, *La seguridad jurídica: un componente de la sustentabilidad. El Poder Judicial, el teorema de Coase y la eficiencia en el derecho ambiental*, 11 Medio Ambiente & Derecho, Revista Electrónica de Derecho Ambiental (2004) *available at* http://huespedes.cica.es/aliens/gimadus/11/seguridad.htm.

[14] Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicano [L.A.] [Amparo Law], *as amended*, Diario Oficial de la Federación [D.O.], 10 de enero de 1936 (Mex.).

under the amended Amparo Law.[15] Moreover, the use of foreign precedents in the *amparo* action is not new under Mexican law, as commentators have pointed out an increased tendency by Mexican courts to use such precedents in the adjudication of constitutional disputes.[16] For this reason, we believe that present conditions are ripe for Mexican constitutional courts to benefit from the ECJ's experience in handling the difficult task of incorporating the principle of sustainable development into its legal framework.

This article traces the integration of sustainable development as adopted by the United Nations in the Rio 92 Declaration into the EU's legal framework, with particular emphasis its reception by the ECJ. First, we will analyze its integration into primary and secondary legislation; next we will explore the handling of sustainable development by the ECJ in the context of environmental legal protection especially with respect to how the ECJ makes it justiciable. In sum, sustainable development has become a general principle of European law by means of sub-principles of environmental protection such as the "polluter-pays" and the precautionary principle. We also propose that EU institutions and the ECJ need to more coherently articulate environmental protection principles in their legislative and judicial acts in order to achieve the finer balance between economic development and environmental protection called for by sustainable development.

II. Sustainable Development: From Stockholm 1972 to Rio 1992

Since it first appeared, the concept of sustainable development has perplexed development professionals, mainly because of its ambiguity. The international importance of the concept arises from its development in the UN's Stockholm Declaration on the Human Environment and the establishment of the World Commission on Environment and Development.[17] In 1987, the Commission issued a Report entitled "Our Common Future" (also known as the Brundtland Report), which for the first time recommended the use of sustainable development as a means of tackling the complex relationship between development and environmental damage, as well as the gap between

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[15] *See,* E. García Ibarra et al., *Reforma constitucional al "Juicio de Amparo ". ¿El medio ambiente como derecho humano fundamental?*, Contribuciones a las Ciencias Sociales, diciembre 2011 (Spain), *available at* www.eumed.net/rev/cccss/16/. We must note, however, that article 180 of the Ecology Law requires that the affected parties exhaust the administrative remedies by invoking the revision procedure established in article 176 of the Ecology Law. Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, article 176, 180, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[16] *See,* Eduardo Ferrer Mac-Gregor & Rubén Sánchez Gil, *Foreign Precedents in Mexican Constitutional Adjudication*, 4 Mexican Law Rev. 293 (2011).

[17] *See*, United Nations Conference on the Human Environment, *Declaration on the Human Environment,* U.N. Doc. A/CONF.48/14 Corr. 1 (June 16, 1972).

rich and poor countries. The Brundtland Report defined sustainable development as follows:[18]

> 1. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
>
> • the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given;[19] and
>
> • the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[20]

However, the true impetus for the establishment of sustainable development came in the UN's 1992 Declaration on Environment and Development, which stipulated twenty-seven principles with "the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people" around the articulation of sustainable development.[21] The first four principles shed new light on the definition of the concept:

> Principle 1. Human beings are at the center of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature.[22]
>
> Principle 2. States have, in accordance with the UN Charter 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.[23]
>
> Principle 3. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.[24]
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> Principle 4. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[25]

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[18] U.N. World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, chap. 2, ¶ 1, Annex to U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter, Brundtland Report].

[19] *Id.*

[20] *Id.*

[21] General Assembly, *Report of the United Nation Conference on Environment and Development*, U.N. Doc. A/CONF. 151/26 (June 13, 1992); 31 I.L.M. 874 (1992).

[22] *Id.* at 1.

[23] *Id.*

[24] *Id.* at 2.

[25] *Id.*

In Principle 1, the word *entitled* could be understood as part of the State's duty or positive obligation to protect humans' rights to health and life. Principle 2 articulates a *good neighbor policy* inasmuch as it recognizes the State's sovereign right to exploit its natural resources, but imposes the responsibility of ensuring their exploitation does not cause damages to the other States. Principle 3 limits the State's right to development (hence the use of the word *must*), by imposing an inter-generational equitable duty to balance current needs with the needs of future generations. Finally, Principle 4 announces the principle of integration of environmental protection into the *development process*.

The announcement by the community of nations of these principles has led to a major debate[26] in all fields of human inquiry that incorporate the idea of development, including the fields of international cooperation, human rights, trade, economics[27] and urban and strategic planning.[28] The adoption of these principles by policy makers has been less successful; even when the idea of sustainable development as a balancing act between economic development and environmental protection seems logical, "it is not always easy to grasp its normative content and its practical implications."[29] Nonetheless, both the European Union (in the treaties and secondary legislation) and Mexico (in its Constitution and the Ecology Law)[30] have made serious efforts to utilize sustainable development as a legal principle in the resolution of legal disputes that mediate conflicts between development and environmental protection.

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[26] *See*, Gregory A. Daneke, *Sustainable Development as Systemic Choices*, 29 Policy Studies Journal 514, note 3 (2001) ("Recent years have witnessed a significant re-conceptualization of the perennial problem of environment vs. economics, known as "sustainable development" [SD]. While this basic notion has generated governmental enthusiasm, some institutional development [especially in Europe and Canada] and a good deal of intellectual activity, it remains more a vague agenda rather than a serious set of policy mechanisms. To advance the discussion in the direction of viable processes, sustainability is explored as an issue of "strategic choice").

[27] *See*, Lawrence Wai-Chung Lai & Frank T. Lorne, *The Coase Theorem and Planning for Sustainable Development*, 77 The Town Planning Review 1 (2006). This paper argues that with qualification and modification, the Coase Theorem, as a specific way of modeling transaction costs in the discussion of aspects of market failure, can be applied to a discussion of planning for sustainable development as a desirable and benign human goal through a "win-win" approach. *See also*, David W. Pearce & R. Kerry Turner, Economics of Natural Resources and the Environment 24 (The Johns Hopkins University Press, 1990) (defining sustainable development as maximization of the net benefits of economic development, subject to maintaining the services and quality of natural resources over time, where economic development is broadly construed to include all elements of social welfare).

[28] *See*, Susan E. Batty, *Planning for Sustainable Development in Britain: A Pragmatic Approach*, 77 The Town Planning Review 29 (2006) [hereinafter, Batty].

[29] Nico Schrijver & Friedl Weiss, International Law and Sustainable Development: Principles and Practice 7 (Martinus Nijhoff, 2004) [hereinafter, Schrijver & Weiss].

[30] As already discussed in the Introductory Remarks.

III. European Union's Commitment to Sustainable Development

The evolution of environmental protection by means of law and policy in the EU has been a long and winding road. It started in the 1970s with the Commission's First Communication on Environmental Policy.[31] Just a year after the release of the United Nations Brundtland Report *Our Common Future*, the European Council commenced its shift from mere environmental protection towards sustainable development.[32] It took almost a decade, however, before sustainable development was formally integrated into the European legal order. In 1997, sustainable development became one of the objectives of the European Community in the Treaty of Amsterdam.[33] Although the Treaty did not define the concept, it referred to it as a *general principle* with the implications that connotation may have in the European legal order. Although the concept was not directly associated with the environment, Member States included in the Treaty a separate, *high level of protection principle* in relation to the environment. As one author put it:

> [t]he general principle of a "balanced and sustainable development" was inserted by the Amsterdam Treaty in Article 2… of the Treaty on the European Union without any explicit reference to the environment. The widely accepted interpretation of this principle, which remains quite vague from a legal point of view, is that natural resources should be used in a careful way in order to take into account the economic and environmental interests both of the present and the future generations. The principle of "a high level of protection and improvement of the quality of the environment" was inserted in Article 2 of the Treaty establishing the European Community, thus becoming part of the objectives of the Community. This seems to preclude definitively the adoption of measures aiming at the minimum common denominator of environmental protection, often justified by invoking the safeguard clause allowing Member States to adopt stricter measures, since the insertion in Article 2 of the Treaty implies that the high level of protection must be attained at Community, not at the national level.[34]

Given the formal incorporation of sustainable development in the treaties, the EU institutions commenced an aggressive legislative program[35] based on

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[31] Noah Vardi & Vincenzo Zeno-Zencovich, *From Rome to Nice: A Historical Profile of the Evolution of European Environmental Law*, 12 Penn St. Envtl. L. Rev. 219, 221-222 (2004).

[32] William M. Lafferty & James Meadowcroft, Implementing Sustainable Development: Strategies and Initiatives in High Consumption Societies 307 (Oxford University Press) (2000).

[33] Treaty of Amsterdam, Article 2, Oct. 2, 1997, O.J. (C 340) 1, 37 I.L.M. 56.

[34] Vardi & Zeno-Zencovich, *supra* note 31, at 236-237.

[35] Under this Program, the European Union issued a series of important "framework directives "such as Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management. The new regulation model called for the issuance of framework

their Fifth Environmental Program "on the review of the European Community programme of policy and action in relation to the environment and sustainable development 'Towards Sustainability'."[36] Despite big hopes for this program, the European Commission in its Communication entitled *Ten Years After Rio: Preparing for the World Summit on 'Sustainable Development' in 2002*,[37] found that little progress had been achieved since the 1992 Rio Agenda. The European Union had shifted from the concept of *environmental protection* to that of *environmental sustainability* by shifting its "focus from the *effects* of the use of natural resources in the development process that are environmentally damaging to the sustainable *use* of natural resources as a whole."[38]

Perhaps knowing that the news coming out of the Rio + 10 Report was not going to be flattering, a few months before issuing the Report the Commission had unveiled its Sixth Environmental Action Program (6EAP),[39] which also focused in the concept of *environmental sustainability* as opposed to *sustainable development*. This Program emphasized the use of the *integration principle* of Article 11 of the Treaty on the Functioning of the European Union (TFEU)[40] as the main tool to incorporate the Union's environmental goals into its legislation. The Program "also acknowledged the importance of transparency, access to environmental information and public participation in environmental decision-making."[41] A 2010 Report released by the European Institute for Environmental Policy draws less than favorable conclusions regarding the achievements and prospects of the 6EAP. The Report questioned whether the initiatives taken at the Member State level were more responsible than the

directives to revise and codify older directives and to leave the technical details of implementing such directives to a series of "daughter directives." One such daughter directive is Council Directive 1999/30/EC of 22 April 1999 laying down limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulates and lead in the ambient air.

[36] Decision No. 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development "Towards sustainability," 1998 O.J. (L 275) (Oct. 10, 1998).

[37] *Communication from the Commission: Ten Years After Rio: Preparing for the World Summit on 'Sustainable Development' in 2002*, COM (2001) 53 final (June 2, 2001).

[38] Victoria Jenkins, *Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development (Commission's Proposal to the Gothenburg European Council) COM (2001) 264 final (May 15, 2001)*, 14 J. Envtl. Law 261, 262-263 (2002).

[39] *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environmental Action Programme of the European Community: 'Environment 2010 Our Future, Our Choice'*, COM (2001) 31 final (Jan. 24, 2001) and Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, O.J. (L 242), 10.9.2002.

[40] *Consolidated version of the Treaty on the Functioning of the European Union*, Dec. 13th, 2007, 2008/C 115/01 [hereinafter TFEU.]

[41] Jenkins, *supra* note 38, at 263.

Commission's 6EAP for the few paradigmatic changes to the legal protection of the environment implemented since the Rio + 10 report.[42]

As it stands at present, the Treaty on the European Union[43] (TEU), in its Article 3(3), mandates the establishment of an internal market based on the *sustainable development of Europe*. Such development shall in turn be based on three objectives: 1) balanced economic growth and price stability, 2) a highly competitive social market economy, aiming at full employment and social progress and 3) a high level of protection and improvement of environmental quality.[44] This is a paradigmatic shift from the ordo-liberal market principles that provided the impetus for the original Treaty of Rome.[45]

Sustainable development is not only a paradigm for the internal market. Article 3(5) TEU mandates that the EU shall contribute to "the sustainable development of the Earth"[46] in its international relations. Furthermore, Article 21(2) TEU mandates that the EU, in its external actions,

> …[d]efine and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: … (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty [and]… (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.[47]

To some extent, Article 3(5) TEU echoes the Rio 1992 Declaration in referring to sustainable development as a strategy to eradicate world poverty and conserve natural resources.

In addition, Article 6(1) TEU integrates into the EU legal order the recognition of the rights, freedoms and principles of the EU's Charter of Fundamental Rights. The Charter "shall have the same legal value as Treaties,"[48] although its incorporation does not give any explicit or implicit legislative competences to the EU.[49] Article 37 of the Charter further provides that "[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 en-

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[42] Sirini Whithana et al., Strategic Orientations of EU Environmental Policy under the Sixth Environment Action Programme and Implications for the Future Final Report (Institute for European Environmental Policy) (May 2010), *available at* http://www.ieep.eu/assets/556/Strategic_Orientations_of_6EAP_-_Revised_report_-_May_2010.pdf.

[43] TEU, *supra* note 5.

[44] *Id.* Article 3(3).

[45] C. Barnard, The Substantive Law of the EU: The Four Freedoms 21 (2007).

[46] TEU, *supra* note 5, article 3(5).

[47] *Id.* article 21(2).

[48] *Id.* article 6(1).

[49] *Id.*

sured in accordance with the principle of sustainable development."[50] Thus, European citizens are entitled to partake in the benefits of EU legislation, which integrates in its policies (*but not in its actions*) the high level of environmental protection principle.

Procedurally, the high level of environmental protection principle is to be achieved in the policies and activities of the EU institutions by means of the integration clause of Article 11 TEU: "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."[51] The Treaty on the Functioning of the European Union (TFEU) stipulates the institution-specific guidance regarding its environmental policy objectives. Article 191 (1) TFEU establishes that:

> 1. Union policy on the environment shall contribute to pursuit of the following objectives:
> — preserving, protecting and improving the quality of the environment,
> — protecting human health,
> — prudent and rational utilization of natural resources,
> — promoting measures at an international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[52]

Article 191(2) TFEU establishes the sub-principles under which these environmental policies shall be formulated *and measured against*:

> 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*.[53]
>
> In this context, harmonization measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for noneconomic environmental reasons, subject to a procedure of inspection by the Union.[54]

Thus, the *high level of protection and improvement of the quality of the environment principle* that defines the sustainable development of the EU's internal market according to Article 3(3) TEU must incorporate: (1) the precautionary

[50] Charter of Fundamental Rights of the European Union, proclaimed by the Commission, Article 37, 7 December 2000, Proclamation and Text, 2000 O.J. (C 364) 1.

[51] TEU, *supra* note 5, article 11.

[52] TFEU, *supra* note 40, article 191(2).

[53] *Id.*

[54] *Id.*

principle;[55] (2) the source principle; (3) the polluter-pays principle; (4) the prevention principle; and (5) the safeguard clause. Any EU policy must integrate, in its formulation and execution, elements that correspond to the high level of protection principle as shaped by its corresponding sub-principles. Otherwise, that policy, and the secondary legislation that articulates it, will infringe the Treaties.

The European Union's sustainable development mandate is not only limited to Europe; it is part of the EU's international agenda.[56] We should also note that, in addition to the EU's efforts, EU Member States have also attempted to incorporate sustainable development into their national legal systems and make it subject of judicial review. For instance, the United Kingdom incorporated sustainable development into its urban planning domain, where its application in the planning process was raised to the level of a legal obligation.[57]

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[55] Marko Ahteensuu, *Defending the Precautionary Principle against Three Criticisms*, 11 TRAMES 366 (2007). "The so-called precautionary principle… that calls for early measures to avoid and mitigate uncertain environmental damages (and health hazards) in the future has come to the fore in risk discourses. A standard formulation of the principle, which was introduced at a conference organized by the Science and Environment Health Network (SEHN) in 1998, states that "[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically)."

[56] Hans Veeder, *The Treaty of Lisbon and European Environmental Law and Policy*, 22 J. ENV. L., 285, 287-288 (2010) ("The objectives of the Union have also been updated to include the agenda for relations between the European Union and the world. According to this agenda the European Union shall 'contribute to the sustainable development of the earth, free *and fair* trade' [emphasis added]. The latter is particularly important in view of the important role that developing countries may play in achieving sustainable development. The international agenda for the European Union contains another reference to sustainable development in the Title containing General Provisions on the Union's External Action. According to Article 21 TEU, this action shall 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; [and] help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. These objectives shall guide external action in general but also the common foreign and security policy of the European Union. This is reinforced by the inclusion of an integration clause in article 21(3) TEU").

[57] Batty, *supra* note 28 ("The delivery of sustainable development is now written directly into the newer constitutions of British government such as those of the devolved Welsh and the Greater London Assemblies. Significantly, sustainable development also appears as the 'core principle underpinning planning' in Planning Policy Statement 1 (PPS 1) Central Government's primary statement of the purpose of the urban planning system (ODPM, 12005). Even more significant is the choice of the subtitle for PPS 1, "Delivering Sustainable Development." The focus then is on implementation. We will see that this policy statement is not just a formalization of the current concern for sustainable development in planning, *but it also imposes on the urban planning system a duty to implement the Government's strategy for sustainable development* (DEFRA,

The objective of sustainable development has also been incorporated into the EU's secondary legislation, particularly in Regulations and Directives issued to Member States.[58] Regulations are directly applicable in Member States. They become national law without the need to pass legislation at the Member State level.[59] Directives, on the other hand, need to be transposed into the national law of each Member State.[60] One well-known Directive is 2009/147/EC on the conservation of wild birds.[61] The Preamble of the Wild Birds Directive asserts that the "[c]onservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community's objectives regarding the improvement of living conditions and sustainable development."[62] Another important directive anchored in the principle of sustainable development is the Water Framework Directive (WFD).[63] The WFD incorporates the *river basin approach* to environmental water management and clearly attempts to incorporate the multi dimensional approach of sustainable development in its structure. Commentators have applauded this approach to secondary legislation, while continuing to lament Member States' apparent lack of political will to embrace such legislation more quickly.[64]

2005) and to act proactively to deliver results rather than as a regulatory agency" [emphasis added]).

[58] The principal forms of legislation issued by the EU comes in the forms of Regulations, which are directly binding on Members States and Directives, which are binding on the Member States as to the result sough by the Directive. Directives must be properly transposed into the national laws of Members States within the time frame provided in the Directive. *See*, TFEU, *supra* note 40, article 288.

[59] *See, e.g.*, Regulation 1013/2006 on waste shipments, 2006 O.J. (L 190) 1. Note that some Regulations rely on Member States for the enactment of certain rules. For instance, paragraph 50 of Regulation 1013/2006 mandates that "Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented."

[60] Transposition is the process where Directives are implemented into enforceable national law. The transposition of environmental Directives into national law has produced significant litigation regarding whether the intention of the Directive is achieved by national legislation. See, *e.g.*, Case 236/85 Commission v. Netherlands (Wild Birds Directive), 1987 E.C.R. 3989 (whether derogation under Article 9 of Directive 79/409/EEC only "where there is no other satisfactory solution" was met by the Dutch national legislation.)

[61] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds (codified version), 2010 O.J. (L 20) 7 [the Wild Birds Directive].

[62] *Id.* at para. 5 of the Preamble.

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

[64] SCHRIJVER & WEISS, *supra* note 29, at 574 ("[T]he WFD provides a tangible example of a regional law which seeks to take the concept of sustainable use, a key component of sustainable development, from principle to practice within a particular context. The introduc-

As these Directives demonstrate, the principle of sustainable development (in whatever legal form it takes) is deeply ingrained in the European Union's secondary law. The principle of sustainable development, however, continues to elude environmental lawyers, who still long for a regulatory system that afford effective legal protection for environmental damage. That, notwithstanding, it is ultimately for the courts to determine the proper legal category sustainable development occupies in interpreting disputes where the EU objectives of economic development, social development and environmental protection clash. We shall now consider how the ECJ has articulated the legal principle of sustainable development in the resolution of certain disputes under the Treaties and secondary legislation.

IV. The Reception of Sustainable Development as a General Principle of Law by the Court of Justice of the European Union

Before discussing the ECJ's articulation of the principle of sustainable development in recent decisions, we will examine the role of legal principles in judicial adjudication. Any modern discussion about the difference between legal rules and legal principles must consider the ideas advanced by legal philosopher Ronald Dworkin. For Dworkin, rules are "applicable in al all-or-nothing fashion,"[65] whereas legal principles have "the dimension of weight or importance."[66] Judges use legal rules to justify their reasons for deciding a case in a given way, while principles are always weighted against other principles judicial adjudication. A principle is "a standard to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality."[67] Policy, on the other hand, is a "kind of standard that sets out the goals to be reached, generally an improvement in some economic, political, or social feature of the community."[68] Legal principles are to be used by courts in weighting their decisions of cases and controversies; policies are decided by legislatures and government agencies. Principles and policies are more often than not intermingled by legal observers, thus producing confusing analysis.

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tion of a number of innovative approaches, such as a river basin approach and a combined approach to pollution, should be applauded as a positive step towards the sustainable use of EU water resources. It is, however, disappointing that a clear commitment by Member States to achieve 'good' status in all EU waters is lacking. The result is that compliance with the main objective of the WFD will perhaps rely more on uncertain political and public pressure than clear legal commitments").

[65] Ronald Dworkin, Taking Rights Seriously 24 (1978).

[66] *Id.* at 26.

[67] *Id.* at 22.

[68] *Id.*

Much discussion about the *vagueness* of sustainable development and its inability to produce tangible results in the balancing of economic development and environment protection is attributed to: 1) its failure as a mechanism to strike a concrete balance amongst these when applied to actual situations, and 2) the difficulty of deriving legal norms or legal rules that create duties or obligations subject to legal review by courts.

Regarding the first observation, one author rejects the "either-or" dichotomy between developers and environmentalists. He argues that a third variable —social equity— must be included in the logic of the sustainable development decision-making process.[69] It should provide the much sought after balance between development and environmental protection.[70] A less theoretical, but more pungent lament comes from a frequent commentator of EU environmental law when he lays the claim that while "[e]nvironmental protection and sustainable development continue to occupy a prominent place in the objectives of the European Union… *[a]n issue that remains unresolved is the exact weight to be given to the various objectives where they are at odds with each other*."[71]

As to the second observation, one author theorizes that the interface of sustainable development and the legal order could produce three types of legal roles: 1) a standard of behavior; 2) a guiding principle decision makers must use actively in the motivation of a legally-binding decision; and 3) a general optic under which to interpret a given law. He states that:

> There are at least three legal roles that sustainable development could play in a statute. From strongest to weakest, they are the following. First, sustainable development could be used as a general standard of behavior; that is, it could define a limitation that applies to everybody, everywhere. Anyone who acted contrary to the rule could be subject to civil liabilities or criminal penalties. Second, sustainable development could play a narrower, and therefore more limited, role as a factor for administrative decision makers to consider when exercising their discretion and making their decisions. Third, in its weakest form, sustainable development could be neither of these things, and instead function merely as a guide to interpretation of the rest of the statute.[72]

Most legislation aimed at achieving sustainable development uses the concept in the second and third roles described by the author. The main problem with using sustainable development a guideline for real world behavior lies in the perennial question: where does one draw its limits? As Ruhl mentions,

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[69] J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 Stan. Envtl. L. J. 31, 36 (1999).

[70] *Id.*

[71] Hans Veeder, *The Treaty of Lisbon and European Environmental Law and Policy*, 22 Journal on Environmental Law 285, 287-288 (2010) (Emphasis added).

[72] Bruce Pardy, *Sustainable Development: In Search of a Legal Rule*, 28 Journal of Business Administration and Policy Analysis 391 (2001).

sustainable development is a function of balancing economic, environmental and social equity considerations; there is no agreed-upon scientific model to perform such function that depends in a multiplicity of interconnected variables.[73]

Another author states that even though sustainable development is widely accepted as a principle of international law, it has not crystallized into the actual resolution of international disputes. The reason being that:

> First, normatively, for a legal principle to be dispositive in international dispute resolution, it must not only be a legal principle, but [also] a rule-generating adjudicatory norm. This has not occurred for sustainability because the "principle" of sustainable development itself is not of a sufficiently definitive rule-creating character; it contains a number of competing and even contradictory sub-principles which dilute and dissipate its normative power to command the construction and operation of an institutional dispute resolution regime of its own.[74]

Thus, for Gillroy, the legal principle of sustainable development is a meta-principle of law comprised of four substantive and four procedural sub-principles that may be in competition or contradiction to one another. The four substantive principles are: (1) the prevention principle; (2) the precautionary principle; (3) the sovereignty over internal country resources combined with the duty not to incur in cross-border pollution; and (4) the right to equitable development.[75] The four procedural principles he identifies are "(1) the integration of environment and development; (2) a concern for future generations and their welfare; (3) the principle of common but differentiated responsibility; and (4) the polluter-pays principle."[76]

Gillroy contends that these sub-principles make the principle of sustainable development ineffective in the resolution of international legal disputes because it is impossible for any new principle in international law "to gain *norm* status within any existing regime [of international adjudication] without destroying the normative character and therefore identity of the regime."[77] Can we draw the same conclusion when applying the legal principle of sustainable development to the resolution of disputes in a supranational court such as the ECJ? We will see how the ECJ has articulated the slippery and elusive legal principle of sustainable development in the resolution of disputes under the Treaties.

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[73] Ruhl, *supra* note 69.

[74] John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of "Environmental Sustainability" in International Jurisprudence*, 42 Stan. J. Int'l L. 1, 12 (2006).

[75] *Id.*

[76] *Id.*

[77] *Id.* at 12, 49-50.

The ECJ has not been shy in applying the principles of environmental protection dispersed in the Treaties. Most of the time, the ECJ deals with these principles while interpreting questions of EU law related to the transposition and correct interpretation of Directives and other secondary legislation by Member States. Insofar as these principles become the subject of interpretation and clarification by the ECJ, the *high level of protection principle*, has consistently emerged in its decisions and has thus become deeply entrenched in the EU legal order.

We must point out that the ECJ gave life to the principle of environmental protection even before the Treaties even mentioned the environment. In the 1988 *Danish Bottles* case,[78] the ECJ declared that *environmental protection* could be a mandatory requirement asserted by the Member States in order to limit the free movement of goods under the *Cassis de Dijon*[79] doctrine. The high level of protection principle is currently assured a position in both EU legislation and actions via the integration principle of Article 11 TFEU. In addition, environmental legislation has a firm legal basis in Article 192 TFEU; and the environmental objectives of the EU must be accomplished within the boundaries of the principles announced in Article 191 TFEU. Two recent cases demonstrate the ECJ's approach in interpreting these principles; in this case, the interplay between the polluter-pays and the prevention principle, on the one hand, and the precautionary principle, on the other.

In the 2010 *Raffinerie Meditarranee* Grand Chamber decision,[80] the Court dealt with the interpretation of the *polluter-pays* principle as implemented in Directive 2004/35/EC on "environmental liability with regard to the prevention and remedying of environmental damage."[81] In this case, an Italian

[78] Case 302/86, Commission v. Denmark, 1988 E.C.R. 4627. *See also*, Case 240/83, Procureur de la République v. Association de Defense des Bruleurs d'Huiles Usagées (Waste Oils Case), 1985 E.C.R. 531 (environmental protection is an "essential objective" of the Comunnity policy and the Waste Oils Directive complied with this objective in a proportionate and nondiscriminatory manner). *See generally*, Mathew L. Schemmel & Bas De Regt, *The European Court of Justice and the Environmental Protection Policy of the European Community*, 17 B. C. Int'l & Comp. L. Rev. 53 (1994).

[79] Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 662 (*Cassis de Dijon*). This case introduced the concept of "mandatory requirements," a judge-made exception to the free movement of goods. In paragraph 8, the ECJ stated that "[o]bstacles to movement within the community resulting from disparities between the national laws relating to the marketing of products in question must be accepted insofar 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."

[80] Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 E.C.R. 0000.

[81] Council Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, 2004 O.J. (L 143) 56.

agency imposed on the defendants a remedial action that both went beyond and was a substantial change from the remedial action established under the consultation process mandated by the Directive. The Italian agency implemented the new, remedial action "without that authority having carried out any assessment, before imposing those measures, of the costs and advantages of the changes contemplated from an economic, environmental or health point of view."[82] In addition, the Italian agency directed preventive orders to parties whose lands were not polluted or had been decontaminated before the effective date of the Directive. In essence, the Italian measures afforded a higher level of environmental protection than the one required by the Directive, an interpretation not inconsistent with a literal reading of Article 193 TFEU.[83] The Court went on to hold that Member States could incorporate the *polluter-pays* principle into national legislation affording more protection than that afforded by the Directive. It held that:

> …Articles 7 and 11(4) of Directive 2004/35, in conjunction with Annex II to the directive, must be interpreted as permitting the competent authority to alter substantially measures for remedying environmental damage [,] which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned [,] and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision, that authority:
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> — is required to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;
>
> — is also required to invite, inter alia, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and
>
> — must take account of the criteria set out in Section 1.3.1 of Annex II to Directive 2004/35 and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.[84]

For this reason, national authorities can impose a higher standard of protection than that stipulated by the Directive, provided it gives the relevant

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[82] Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 E.C.R. para. 28.

[83] "The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission." TFEU, *supra* note 40, article 193.

[84] Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 E.C.R. para. 67.

parties an opportunity to be heard, invites the participation and comments of adjacent landowners, and the national measures are grounded in law.

With regards to measures taken against landowners whose lands were not polluted, the ECJ validated the national laws under the *precautionary principle*, after finding that the legislation complied with the general principle of proportionality. The Court held that:

> …Directive 2004/35 does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.[85]

In another case decided in the same year, *Afton Chemical Limited*,[86] the ECJ restated the level of judicial review it will afford to acts of the EU institutions dealing with complex problems. It also clarified the role of the precautionary principle in the fashioning of European legislation. Regarding judicial review, the ECJ restated in *Afton* that the tests it will use to invalidate such acts are manifest error or abuse of powers:

> 28. [I]n an area of evolving and complex technology…, the European Union legislature has a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which it adopts, whereas review by the Community judicature has to be limited to verifying whether the exercise of such powers has been vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion. In such a context, the Community judicature cannot substitute its assessment of scientific and technical facts for that of the legislature on which the Treaty has placed that task.
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> 34. However, even though such judicial review is of limited scope, it requires that the Community institutions which have adopted the act in question must be able to show before the Court that in adopting the act they actually exer-

[85] *Id.* at para. 92.

[86] Case C-343/09, Afton Chemical Limited v. Secretary of State for Transport, Judgment of the Court (Fourth Chamber) of 8 July 2010, 2010 E.C.R. ___ (Afton intended to declare invalid the limits imposed by Directive 2009/30 to the additive MMT on grounds of the precautionary principle, pending a full assessment of its health and environmental impact).

> cised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate.

With regards to the precautionary principle, the *Afton* Court prescribed its correct application as follows:

> 60. A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of MMT, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research (see Case C-333/08 Commission v. France [2010] ECR I-0000, paragraph 92 and case-law there cited).
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> 61. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of restrictive measures, provided they are nondiscriminatory and objective (see Commission v France, paragraph 93 and case-law there cited).
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> 62. In those circumstances, it must be acknowledged that the European Union legislature may, under the precautionary principle, take protective measures without having to wait for the reality and the seriousness of those risks to be fully demonstrated (see Commission v France, paragraph 91).

The Court then held that, pending a full scientific assessment, the temporary limitation of the concentration of the additive MMT in combustion fuels on grounds of the precautionary principle was objective and nondiscriminatory and therefore, the EU institutions had made correct use of the precautionary principle in proscribing its use.

Even though the ECJ has embraced its mission of adjudicating EU law on the basis of the principles of environmental protection, the episodic and dispersed articulation of these environmental protection principles cannot be considered a coherent application of the general principle of sustainable development. The EU legislature would help *add flesh to the bones* of the environmental protection by systematically stating in its legislative acts that the interplay of these environmental principles represents the balance called for by the principle of sustainable development established in the Treaties. Absent that announcement, the legal principle of sustainable development calls for environmental protection via the interplay of the environmental protection principles in a scheme that is for the ECJ to determine. In doing so, the ECJ needs to provide a coherent application of the principles of environmental protection spelled out in the legislative acts in order to establish the balancing between economic development and environmental protection called for by sustainable development. The consistent application of this proposal will ensure that sustainable development, as a legal principle, will continue to play

a key role in the development of European environmental law. Perhaps it may inspire other legal systems, including that of Mexico, to follow suit. Unfortunately, the same cannot be said regarding sustainability and the environmental legal protection of the environment in the United States of America.[87]

As mentioned above, Mexico may have established new legal tool for environmental protection with the recent amendments to the *Amparo* Law. In fact, before reaching the *Amparo* law remedies, the affected parties may first attack the particular legislation, rule or administrative decision by first asking for a revision process under Articles 180 and 176 of the Ecology Law.[88] Under the revision procedure, the parties may claim that a particular measure did not comply with sustainable development procedures as set forth in Article 3(XI) of the Ecology Law. According to this provision, sustainable development is "the process, measured by concrete criteria and environmental, economic and social indicators that helps improve life quality and human productivity, and is based on appropriate measures for the preservation of ecological equilibrium, environmental protection and the advantageous use of natural resources in a way that does not impair the needs of future generations."[89] On the other hand, litigants may claim that the measure in question does not comply with substantive principles of environmental policy pursuant to Article 15 of the Ecology Law that include, among others, the polluter-pays principle, prevention principle and the intergenerational equity principle. Once the administrative remedies set forth in the Ecology Law are exhausted, litigants may opt for the *Amparo* action discussed above. Even when no measure is taken, individual human rights recognized by Mexico in international treaties may be the subject of *Amparo* action under the recent amendment to such law.

The almost-certain increase in environmental protection litigation that will arise under the new possibilities afforded by the amendments to the *Amparo* law will present a new challenge to the Mexican judiciary handling these cases. We humbly suggest that a careful study of the articulation of sustainable development by the ECJ might be helpful to Mexican judges dealing with these new cases.

V. Conclusions

The European Union was an early adopter of sustainable development advanced by the United Nations in the Rio 92 Declaration. Sustainable de-

[87] The status of sustainable development in the United States legal system is embryonic at best. *See*, James R. May, *Not at All: Environmental Sustainability in the Supreme Court*, 10 Sustainable Dev. L. & Pol'y 20 (2009).

[88] *See,* Ibarra et al., *supra* note 15.

[89] Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, art. 3(XI), Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

velopment has decisively made its way into the legal order of the European Union since its appearance in the Treaty of Maastricht.[90] In fact, its hierarchical position within the treaties shows that the principle of sustainable development occupies a privileged position in the EU legal order. The EU principle of sustainable development comprises the principle of high level of protection of the environment, which in turn encompasses the sub-principles known as the precautionary principle, the source principle, the polluter pays principle and the prevention principle, and it is balanced against the economic growth imperative of sustainable development by means of the safeguard clause of Article 192 TFEU.[91] European institutions incorporated these principles in the secondary legislation of the EU, and the ECJ initiated the long process of embroidering these principles into the legal fabric of the EU. The ECJ has begun to place sustainable development in the hierarchy of legal principles that guide the evolution of the European Union, thus fulfilling the larger objective of "creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."[92] However, we suggest that much work remains to fulfill this objective. Both the European institutions and the ECJ need to more coherently articulate the principles of environmental protection in their legislative and judicial acts in order to achieve a better balance between economic development and environmental protection pursuant to the principle of sustainable development. We further suggest that the advances made by the EU in positing sustainable development as a paradigm for environmental legal protection may serve to inspire and guide other legal systems, including that of Mexico. Mexico's recent amendments to the Amparo Law will, for the first time in its history, allow in principle the adjudication of collective claims seeking redress for environmental harm. Those claims may be based on either alleged violations of Mexico's basic constitutional rights or human rights to the environment stemming from those treaties where Mexico is a signatory. Mexican courts will soon encounter the need to articulate sustainable development as a justiciable principle; further study of the experience of legal systems such as that of the European Union may prove valuable in such adjudication.

[90] Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

[91] TFEU, *supra* note 40, article 192.

[92] TFEU, *supra* note 40, article 1.

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