Three Conceptions of the Integration Principle in International Environmental Law

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Preliminary Remarks

In April 2000, almost 28 years after the first formulation of the integration principle in the 1972 Stockholm Declaration and 13 years after its entry into European Community (EC) law through the Single European Act, the legal meaning and significance of the environmental integration principle remains yet to be defined. Is integration only an objective to be achieved? Or is it also a principle of law? And if so, what does that mean? Furthermore, how would such a principle be related to more specific legal obligations set forth in treaties, regulations and directives?

This chapter explores the legal dimensions of the integration principle and distinguishes between three different conceptions of the principle. It argues that in dominant thought, the principle is intended to develop into the third conception: an autonomous normative principle that seeks to provide closure to the otherwise incomplete normative system of European and international environmental law. It further argues that, in practice, this conception is not easily achieved. While normative space beyond existing law can be found, there is as yet little practice that suggests that the integration principle will fill that space.

The prime objective of the chapter is to provide doctrinal clarity on the meaning and significance of the integration principle in the already dense normative field of European and international environmental law. But the chapter also has a pragmatic relevance. It often has been said that one of the major stumbling blocks encountered in implementing the integration principle is its uncertain legal status. There is some circularity in the critique, as the lack of efforts to implement the principle certainly have contributed to the alleged uncertain legal status and meaning of the principle. Yet, it may also be true that the incidence and effect of such efforts may be enhanced by prior clarity on meaning and status of the principle. That, indeed, is an additional reason for exploring the legal meaning of the integration principle.

Two descriptions of the scope of the chapter are in order. Firstly, the observations in this chapter generally are relevant to both the integration principle in EC law and in public international law. While most of the illustrative examples are taken from EC law, the conceptual aspects of the chapter apply equally to public international law. Therefore, no strict separation between the two fields will be observed. Secondly, to the extent that the chapter refers to EC law, the principle will be used as one that applies to individual states rather than one that applies (only) to Community institutions. In its most limited meaning, the principle addresses only the Community institutions. This is the meaning adhered to in Article 6 of the Treaty on the European Community. There is also a broader construction, however. In this broader construction, the principle goes beyond the Community institutions and addresses Member States. There is sufficient authority for this broader meaning to make this the starting point of our inquiry. The Commission stated in its fourth Environmental Action Programme (EAP) that it aspires to apply the integration principle to Member States. The action programme formulated the ultimate goal that ‘all economic and social developments throughout the Community [obviously including activities of Member States] ... would have environmental requirements built fully into their planning and execution’. The Commission’s ambitions have been buttressed by legal developments outside of the Community. Principle 4 of the 1992 Rio Declaration on Environment and Development, accepted by all Member States of the Community, proclaims, ‘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’. Clear authority for the proposition that the integration principle applies to Member States can be found in treaties that bind the Community and its Member States. For instance, Article 3(4) of the Climate Change Convention stipulates that: ‘Policies and measures to protect the climate system against human-induced change ... should be integrated with national development programmes’. Finally, the ongoing so-called Cardiff process on environmental policy integration (see Chapter 1) clearly addresses both Community institutions and the Member States.

The Integration Principle as a Part of International Environmental Law

As a first step in analysing the principle, some observations need to be made on the focus of this chapter on the legal dimensions of the integration principle. The problem of environmental integration may not strike the interested observer as a quintessentially normative problem. The divide between environmental policy, on the one hand, and policies that pursue economic progress by bolstering transport, tourism, energy and industrial policy, on the other, indicates primarily problems of public management, coordination and political will. Indeed, it is no
mishap that most contributions to this book will deal with these matters, rather than with the legal dimensions of the integration principle.

Yet, the fact of the matter is that the drafters of the 1987 Single European Act, the 1992 Maastricht Treaty and the 1997 Amsterdam Treaty did perceive the lack of environmental integration as a normative problem. They attempted to solve it in the archetypal 'integration-through-law' manner that has characterized the Community throughout its history. The law-making powers proclaimed that environmental requirements 'must be integrated in sectoral policies'. Integration through law, once again. Likewise, numerous treaties now have incorporated, either expressly or implicitly, the integration principle.

This does not necessarily mean that the integration principle is a general principle of international law. It is noticeable that the International Court of Justice in its judgement in the Gabcikovo-Nagymaros (Hungary/Slovakia) case referred to the principle of sustainable development as a 'concept' rather than as a principle. This appraisal invoked a critical dissent by Judge Weerymantry, who considered the word 'concept' to be something of an understatement. Judge Weerymantry argued that authority and precedent do allow us to speak of sustainable development as a principle. The court apparently disagreed. It may well be that the court would take a similarly reluctant position when asked to apply the integration principle. After all, authority for the integration principle is hardly stronger than that for the more general principle of sustainable development.

Nevertheless, in this chapter I will not draw hard and fast lines around the legal status of the integration principle. Modern international legal scholarship has substantially qualified the significance of the positivist characterization of law that seems to underlie the statement of the court. It portrays a much more diffuse model of normativity. Writers such as Reisman (1988), Baxter (1980) and Fastenrath (1993) have deformed the distinction between law and non-law in favour of informal sources of law. They argue, rightly so, that for most practical purposes the positivistic divide between law and non-law is simplistic. It is a matter of fact that principles that do not pass the sources test play an important role in determining the decision-making of states and other actors. It also is a matter of fact that principles that do pass the sources test, and that properly can be called 'legal principles', can be meaningless.

In view of the variety of sources in which the integration principle has been included, partly legal and partly non-legal, Phillippe Sands in his textbook on international environmental law characterizes the integration principle as a principle of international environmental law (1995, pp205–206). This chapter argues later that the integration principle fulfils a variety of legally relevant functions, which do not seem to hinge on a formal legal status of the principle. The assumption is made that the principle is part of international and European law and the most difficult problem is enforcing the principle.

While it may be easy to gloss over the uncertain legal status of the integration principle, this is less easily done with the substance of the principle. There is not one integration principle. The integration principle acquires different meanings depending upon the context in which it is invoked. Three possible constructions of the integration principle are presented.

**THREE CONSTRUCTIONS OF THE INTEGRATION PRINCIPLE**

The integration principle can be construed as an objective, a rule of reference or an autonomous principle.

**The Integration Principle as an Objective**

It is unobjectionable to consider the integration principle as an objective or, as Dworkin would call it, a 'policy' (1978, p22ff). Most, if not all, everyday policies pursue the integration of something into something else. We talk about integration of safety in transport policy; integration of minorities in housing policy; integration of disabled persons in the private sector; integration of Russia in the North Atlantic Treaty Organization's (NATO) structures; and so on. Similarly, we can talk about integration of environmental protection in development policy as an objective.

As a policy or objective, the integration principle fulfils an important function. Arguments of policy provide reasons for legislative bodies to develop the law in order to further the objective. As such, we can assume that the integration principle as a policy has co-informed more particular legal rules. Indeed, the entire body of European Community environmental law can be perceived as a means to achieve the policy of environmental integration and, beyond that, of sustainable development. Similarly, one could consider many provisions of international environmental law as a form of application or implementation of the integration policy.

Yet, from the perspective of a legal analysis this is not a helpful way of construing the integration principle. For one thing, lawyers generally are not very interested in policies, unless they are involved in determining the competence of legislative bodies that have to fulfil certain policies. Courts or other bodies empowered to review activities with harmful effects generally do not review activities in the light of 'policies'. It may be a valid question whether various parts of Community law, such as the policy on structural funds, properly worked towards the objective of the integration principle. It is arguable that they do not. However, as long as integration is only an objective, courts are unlikely to invalidate any decisions that have not brought that objective any closer.

There is also a more conceptual problem with this first construction of the integration principle. Constructing the integration principle as a policy is little else than saying that the environment should be protected. If we want to protect the environment, we should impose constraints on those activities that are harmful. This is simply another way of saying that environment should be integrated into the formulation and implementation of these activities. The integration principle then does not have any distinct conceptual meaning. Furthermore, it adds little to our understanding to say that environmental protection should be integrated in development policy when what we really mean is that the environment should be protected from the harmful effects of development – except for the fact that due to the foggy word 'integration', the
first statement is far less clear and less likely to mobilize the forces that are necessary to realize the aspired degree of protection.

The Integration Principle as a Rule of Reference

The integration principle can be construed in a second way. This second construction portrays the integration principle as a rule of reference. The principle does not have any autonomous normative meaning, but refers to other applicable rules. For a proper understanding of this construction, it is necessary to distinguish between situations where the principle addresses the Community and where it addresses states.

This construction has its prime application to the Community and finds its source in what essentially was a problem of interpretation raised by the original text that was to be inserted in the EC treaty by the Single European Act. The question was: would the objectives and principles of environmental policy, which were to be formulated in Article 130r (old), only be applicable to those policies that could be qualified as ‘environmental policy’ in terms of Article 130r-t (old)? Or would they also apply to the so-called sectoral policies, such as policies on transport and agriculture? It was fairly plausible that the better interpretation was that the objectives and principles did apply to other policies. However, there was room for legitimate legal dispute on this point.

The Single European Act introduced the integration principle as a solution to this potential interpretation problem. After the Single European Act, and in any case after the Maastricht and Amsterdam treaties, it now is clear that the requirements of Article 174 (ex-Article 130(1-3)) do not only apply to measures adopted as environmental policies proper. They also apply to sectoral developmental policies with potential environmental effects. This has been implicitly recognized by the court, among other cases in Case 300/89 (Titanium-Dioxide).6

In this construction, the integration principle does not have any autonomous normative meaning. Rather, it essentially is a rule of reference. That is, it refers to ‘environmental protection requirements’ that are defined by other norms — not by the integration principle itself.

This construction of the integration principle is also found in secondary legislation, such as the Regulations on Trans-European Networks and Structural Funds. Article 7 of Regulation 2052/88 provides: ‘Measures financed by the Funds ... shall be in keeping with Community policies, including those concerning ... environmental protection’.7 Likewise, Regulation 2236/95, laying down general rules for the granting of Community aid in the field of trans-European networks, states that projects financed under the regulation will comply with Community law and Community policies in relation to environmental protection.8 Furthermore, in these legal instruments, the integration principle itself does not have an autonomous normative meaning. It refers to norms defined elsewhere.

What are these norms? There are various answers to this question. Probably the best answer is that the clause ‘environmental protection requirements’ in Article 6 of the treaty refers to the objectives, principles and criteria applicable to development policies.

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174 (ex-Article 130r). The integration principle makes these objectives, principles and criteria applicable to development policies.

Another interpretation is that the integration principle means that secondary legislation must be complied with. But this interpretation should be rejected since it would be wholly tautological: what is obligatory is obligatory. This interpretation of the integration principle as a rule of reference would not add anything to the existing legal situation.

Yet another interpretation of the integration principle as a rule of reference holds that ‘environmental protection requirements’ do not only refer to Community legal rules but also to Community policies — a category that apparently is meant to be broader than existing legal requirements. This interpretation is supported by Article 7 of Regulation 2052/88 that provides: ‘Measures financed by the Funds ... shall be in keeping with Community policies, including those concerning ... environmental protection’. This interpretation would open the door to a legal obligation to apply norms that in themselves are not legally binding — such as policies contained in action programmes or resolutions. This raises important normative problems. It would undermine in the field of environmental policy any distinction between legal and non-legal norms. This would have substantial consequences. An interpretation that would make non-binding norms become directly binding by virtue of a rule of reference would undermine the already limited powers of democratic control vested in national parliaments and the European Parliament. This chapter does not explore these issues.

What is important here is that in this meaning the rule referred to would be a written and prior agreed norm, so that the integration principle itself would not add any normative requirements.

The integration principle possesses in none of these interpretations of the integration principle as a rule of reference applicable to the Community any autonomous normativity, since it derived the norm from other rules and principles, not from the integration principle itself. It does not require anything more, nor does it solve problems relating to the interpretation and enforceability of the objectives and principles of Article 174, secondary law and possibly non-legal instruments. The integration principle in itself does not force any other change in the balance between environmental protection and economic development than the requirements of Article 174 and secondary legislation do.

If we approach this from the perspective of enforcement, the question is not whether the integration principle can be administered before a court of law — it is whether the objectives, principles and criteria of Article 174 can be enforced.

This section deals with the construction of the integration principle as a rule of reference as it applies to the Community. The construction can also be applied to individual states. The same analysis then applies. The integration principle would mean that states have to incorporate requirements presented by other environmental rules in their development policies. Such an interpretation would likewise be meaningless. It would add nothing to the existing normative situation. States would be obliged to comply with the norms of international law that apply to them. The integration principle cannot change this and surely does not render applicable norms that otherwise would not apply.
The Integration Principle as an Autonomous Principle

There is also a third and broader meaning of the integration principle. In this construction the integration principle is not only an objective but also a principle, and is not only a rule of reference, but also a principle that carries autonomous normativity.

The construction differs from the first construction since it is not only an objective but a principle. What does it mean to argue that the integration principle is a legal principle? The Longman Dictionary of Contemporary English tells us that a principle is 'a belief that is accepted as a reason for action' (1995, p1122). Dworkin defines a principle as 'a standard that is to be observed' (1978, p22). When we say that a particular principle is a principle of our law, we mean that 'the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or the other' (Dworkin, 1978, p26). This clearly is different from a policy; a policy may justify regulatory action, but in itself does not constitute a norm that the regulatory action should be taken and does not provide a basis for review of that action.

The third construction differs from the second construction since it does not not only constitute a rule of reference, but has an autonomous normative meaning. It does not ask the Community or the Member States to apply prior agreed norms to their development policies, but to integrate 'the environment', or 'environmental interests' into development policies. This is the form in which the integration principle was incorporated in Principle 4 of the Rio Declaration. This states, 'environmental protection shall constitute an integral part of the development process'. In contrast to the first meaning, this construction has an autonomous normative identity. It requires integration of environmental interests that in themselves are not contained in legal principles or norms. In this respect, the integration principle goes beyond the normative structure of existing international law.

Interesting in this context are the proceedings in Case 321/95 (Greenpeace versus Commission) concerning the legality of decisions taken by the Commission pursuant to Council Regulation 1787/84 on the European Regional Development Fund. In these decisions, the Commission granted Spain financial assistance for the construction of two electricity power stations in the Canary Islands. A number of plaintiffs, including Greenpeace, argued that the decisions of the Commission were in keeping with Community law, in particular the requirements for environmental impact assessment. The court held that in the absence of such a principle or of a specific rule to which it had expressly consented, the authority of a state could not be limited.

This holding is often implicitly extrapolated to other areas of law, including environmental law. The argument is then that the discretionary authority of states is only limited when there is a specific rule of law that curtails their authority. If there were no such rule, freedom would reign.

While the Lotus holding has often been critiqued, it appears that it correctly depicts the normative structure of European and international environmental law. States have accepted many more or less specific environmental norms. Yet, these have not fully occupied the normative space. Directives, regulations and treaties govern certain activities and do not govern others. For instance, the Habitat Directive protects certain species and habitats but not other species and habitats. Even if its general provisions apply to all species and habitats, it does not apply to the trade in all species. And while the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the EC's CITES regulation cover many species, they do not cover all species. The Environmental Impact Assessment Directive requires impact assessments for a variety of activities, but not for others. And so on. In short, European and international environmental law leaves gaps that are not, or not expressly, governed by special norms. In such gaps, the Community and Member States can make their policy decisions unhindered.

Environmental Integration and the Aspiration of Normative Closure

In this third and most ambitious construction, the integration principle seeks to close the normative spaces that are left open by the otherwise fragmented norms of European and international environmental law.

In international law, the basic authority of states is governed by what commonly is called the Lotus principle. In the 'Lotus' decision, the Permanent Court of International Justice addressed its inquiry to the question: 'whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons'. The court held that in the absence of such a principle or of a specific rule to which it had expressly consented, the authority of a state could not be limited.

This holding is often implicitly extrapolated to other areas of law, including environmental law. The argument is then that the discretionary authority of states is only limited when there is a specific rule of law that curtails their authority. If there were no such rule, freedom would reign.
The emergence of and support for the integration principle can be seen as an attempt to close the normative space that is left open by special norms. Together with the precautionary principle, the principle of sustainable development and other principles, the integration principle constitutes an attempt to fill pre-existing gaps and to function as a 'closing norm' in the normative system of international and European environmental law.

Implications of Reaching Normative Closure

In the third meaning, the integration has a procedural and a more substantive component. With regard to the procedural function, the principle requires, at a very minimum, that interests of environmental protection are considered in decision-making procedures. Of course, this requirement overlaps with the already applicable requirement of environmental impact assessment. It can, however, have a procedural significance in those cases where these requirements do not apply. Whereas the question to what extent such interests should be protected generally lies beyond judicial scrutiny (that is, if only the integration principle would apply), the requirement that such interest should be considered in a procedural sense is a requirement that can be applied by courts and other supervisory mechanisms.

The European Court of Justice has showed itself prepared to review policies in the light of general principles of autonomous normativity, such as the principle of prevention at source. There does not seem to be a reason why this would be different for the integration principle – it is vague and undefined, but vagueness has never been a sufficient reason for courts or other reviewing bodies not to apply a principle.

There is also a more substantive dimension to the integration principle in this third conception. Even where specific substantive or procedural norms do exist (and, as such, there is no gap), these often may collide or conflict and leave a normatively ambiguous situation. The integration principle provides a means of balancing two competing norms. Consideration of conflicting norms that protect development, on the one hand, and the environment, on the other, can be aided and given focus by introducing the integration principle in that consideration. In this respect, the principle can fulfil a similar function as the principle of sustainable development. As Lowe observes: principles such as the principle of sustainable development 'are free agents, which may in principle be combined with any other rule, modifying that rule... Modifying norms establish the relationship between other, primary norms' (1999, p33).

It is in this sense that the International Court of Justice used the term of sustainable development in the Gabcíkovo case. The court argued that 'the need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development', and subsequently formulated a way to achieve that reconciliation. The court used the reference to sustainable development as a means and a perspective to reconcile development and environment. Some have criticized the reference to the concept as being vague and meaningless, but this critique would appear to miss the function of the principle as a principle that has a normative direction and is linked and attached to other norms. The principle of integration can likewise fulfil a role in finding solutions in cases where the applicable norms point in different directions.

CONCLUSIONS

It appears that the integration principle may play three distinct roles in international and European environmental law. Firstly, it will serve as an objective that underlies and inspires more specific environmental law. As such, the principle is unobjectionable, though not distinguishable from environmental policy proper.

Secondly, the integration principle can, as a rule of reference, be used as a vehicle to encourage the Community and other international institutions to comply with relevant norms of international law in their various activities.

Thirdly, the integration principle may come to play as an autonomous normative principle. Whether it will play that role depends upon the identification of normative space and the development of criteria to evaluate integration. This will be an area where much will depend upon the energies and activities of interested actors to make the principle effective and practicable.

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NOTES

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