Sustainable Development and the Legal Protection of the Environment in Europe

Luis A Aviles
Sustainable Development and the Legal Protection of the Environment in Europe

The concept 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 since it was coined in the mid 1970s, not 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 would be able to establish the balance called for by the concept by taking into account in a measurable way the environmental externalities, which are the by-product of economic development. They also hoped that the concept of sustainable development would make its way into the judicial order by way of legal rules and principles that would influence the adjudication of legal disputes between development and the environment in a zero-sum fashion. This hope has not materialized and there are environmentalists that now think that sustainable development has become simply a euphemism for naked development.² In this work, I intend to trace the incursion of the concept of sustainable development as adopted by the United Nations in the Rio 92 Declaration into the legal order of the European Community and the European Union from its primary and secondary law to the handling of the concept by the Court of Justice of the European Union (CJEU). The analysis of the public record leads me to conclude that sustainable development has become a general principle of law in the European legal order in the field of environmental protection via a

¹ See, Our Common Future, infra, Note 3.
set of sub-principles of environmental protection. I conclude by proposing that the European legislature and the CJEU need to provide more coherence amongst the principles of environmental protection in their legislative acts in order to establish more clearly the balancing between economic development and environmental protection that sustainable development calls for.

From the very moment of its debut in the international scene, the concept of sustainable development has perplexed the community of actors in the development arena principally for its definitional elusiveness. The international importance of the concept arises from its development within the United Nations, specifically its World Commission on Environment and Development. The Commission issued in 1987 a Report entitled Our Common Future, where for the first time it recommended as a frame of reference for tackling the increasingly complex relationship between development and environmental damage and the divide between rich and poor countries: The Report defined the concept in heuristic terms as follows:\(^3\):

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; 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.
The true impetus to the establishment of the concept of sustainable development, however, came for the United Nations 1992 Declaration on Environment and Development, where it proclaimed 27 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 the concept of sustainable development⁴. The first 4 principles shed new light into the phenomenology of defining the concept. These are:

Principle 1  Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2  States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 3  The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

---

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.

Principle 1, in using the word “entitled,” could be understood as part of the State’s duty or positive obligation to protect the human right 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 imposing on them the responsibility of ensuring this exploitation does not cause damages to the other States. Principle 3 limits the State’s right to development (“must”) by imposing and 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 momentous announcement by the Community of Nations of these principles has led to an immense debate\(^5\) in all fields of human inquiry associated with the idea of development: international cooperation, human rights, trade, economics\(^6\), urban and strategic planning,\(^7\)

\(^5\) Gregory A. Daneke, Sustainable Development as Systemic Choices, 29 Policy Studies Journal 514 n. 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.""

\(^6\) 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.)

architecture, engineering, technology, ethics, and of course, law, including environmental law:

“Sustainable development has become a key concept in the field of international environmental law and it is gaining increasing importance in the context of international trade law and human rights law. However, it is not always easy to grasp its normative content and its practical implications. Nevertheless, there is ample consensus that sustainable development involves the idea of an integration of environmental protection and economic development.”

Europe’s Commitment to Sustainable Development

The evolution of environmental protection in the EU has been a long and tortuous road that commenced in the 1970s with the Commissions First Communication on Environmental Policy:

“In July 1971, the EEC Commission delivered the “First Communication on Environmental Policy”, focusing on the necessary enactment of a program concerned solely with environmental protection. The Communication brought up the strongly debated issue of whether environmental problems had to be solved at Community level or by reaching intergovernmental agreements and coordinating internal policies of the Member States. The European Commission, sustained by the European Parliament, was favorable to the first option, and the Member States eventually agreed to the adoption of community legislative measures. This was solemnly stated in the Paris Summit in

---

October 1972, which many authors see as the official birth date of European Environmental Law. It was at this summit that the Chiefs of the Member States affirmed that economic growth should lead to an improvement in life standards and in the general welfare.”

Just a year after the release of the Report on Our Future, the European Council commenced its gyration from just environmental protection to sustainable development:

“The beginning of the shift of policy focus from general environmental protection measures to the promotion of sustainable development can be dated from the 1988 Rhodes European Council Declaration which stated that sustainable development must be one of the overriding objectives of all Community policies (EC 1988). Commitment to the promotion of sustainable development was subsequently enshrined in the Maastricht Treaty (1993) and was reinforced by the Amsterdam Treaty (1997).”

Sustainable development was first incorporated into the European legal order with its introduction as one of the objectives of the European Community in the Treaty of Amsterdam. The Treaty did not provide a definition of the concept although it referred to it as a “general principle” with the implications that connotation has for the European legal order. The concept was disassociated with the environment, although the member states incorporated the “high level

---

of protection” to the environment principle. As one author puts it:

“The general principle of a “balanced and sustainable development” was inserted by the Amsterdam Treaty in Article 2 (ex Article B) 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 definitively preclude 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.”\textsuperscript{11}

Given the newly incorporated thematic of sustainable development in the Maastricht Treaty, the EU institutions commenced an aggressive legislative program based on its Fifth Environmental Program on “on the review of the European Community programme of policy and action in relation to the environment and sustainable development "Towards sustainability".\textsuperscript{12} Despite big hopes for that program, the European Commission in its \textit{Communication from the Commission:}

\textsuperscript{11} Vardi & Zeno-Zencovich, \textit{supra} note 7, at 236-237.

found that little progress had been achieved since the 1992 Rio Agenda. One author describes it as:

“The EU’s Strategy for Sustainable Development, following the approach of the Fifth Environmental Action Programme, is more accurately described as a strategy for ‘environmental sustainability’. Environmental sustainability is the overriding aim of sustainable development and provides for the sustainable use of natural resources in the economic development process. Environmental sustainability can be distinguished from the traditional concept of environmental protection by the shift in 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. Environmental sustainability is a simple concept in theory, but there will be many uncertainties in achieving this goal in practice. Therefore, it is widely accepted that the way forward for the achievement of sustainable development should be to adopt a number of organising principles for the development process. The term ‘sustainable development’ is, consequently, best understood in a descriptive sense as a process of development that follows these key principles.”

A few months before, the Commission had unveiled its Sixth Environmental Action Program
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 TFEU as the main tool to incorporate the Union’s environmental goals into the secondary legislation. The Program “it also acknowledged the importance of transparency, access to environmental information and public participation in environmental decision-making.”

A 2010 Report released by the European Institute for Environmental Policy draws less than optimistic conclusions on the achievements and future of the 6EAP.

Member States of the EU have also attempted to incorporate the concept of sustainable development into their national legal systems and give it some legal teeth. The United Kingdom provides on such example, where the concept has been incorporated into the urban planning domain and its application in the planning process raised to the level of a legal obligation:

“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 i) Central Government's primary statement of the purpose of the urban planning system (ODPM, 2005). Even more significant is the choice of subtitle for PPS 1 Delivering Sustainable Development. The focus, then, is on implementation. We will see that this policy

---


16 Jenkins, supra, note 12 at 263.

statement is not just a formalisation 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, 2005) and to act proactively to deliver results rather than as a regulatory agency.”

Concurrent with these policy developments, the principle of sustainable development has progressively increased its presence in the subsequent treaties reforming the original Treaty of Rome up until its current form in the Treaty of Lisbon, and continues to have a prominent role in the objectives of the EU. An author has tracked the movement of the concept of sustainable development as follows:

“[T]he objectives of the Union (Article 2 EU) have been extended to incorporate what are now the objectives of the EC. This means that Article 3 TEU now includes a third paragraph that contains a slightly differently worded version of what is now Article 2 EC combined with Article 2 EU. This basically reiterates the Union's commitment to sustainable development and a high level of protection and improvement of the quality of the environment. Interestingly, Article 2 EC refers to the sustainable development of economic activities, whereas Article 3 TEU states that the European Union ‘shall work for the sustainable development of Europe’. This makes sustainable development an ever more crosscutting or horizontal objective that is not just confined to economic development but may also relate to technological development. 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 []

18 Batty, *Supra*, note 5
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.”

As mentioned, the objective of sustainable development has been incorporated into a host of secondary legislation issued in the form of Directives to Member States. One such Directive is the Water Framework Directive (WFD), which incorporates the “river basin approach” to environmental water management and clearly attempts to incorporate the multi-sided approach of sustainable development in its structure. Commentators have applauded such approach to secondary legislation:

---

“[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 introduction 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.20

The concept or principle of sustainable development continues to elude environmental lawyers who long for a command and control system of regulations that affords effective legal protection to the recipients of environmental damage. The fact is that sustainable development (in whatever legal form it takes) is part of the EU primary and secondary law and legal tribunals are must determine the proper legal category it occupies in interpreting disputes where the EU objectives of economic development, social development and environmental protection clash.

Sustainable Development: Policy Goal, Legal Principle or Legal Rule?

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 all all-or-nothing fashion” and principles have “the dimension of weight or
importance.” Judges use legal principles to justify their reasons for deciding a case in a given way and principles are always weighted against other principles in the legal system. Principles are “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.” 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.” Policies are the realm of legislatures and government agencies, legal principles are to be used by courts in weighting their decisions of cases and controversies. Principles and policies are more often than not intermingled by legal observers, thus producing confusing analysis.

Much discussion about the “vagueness” of sustainable development concept as a producer of tangible results in the balancing of economic development and environment has been attributed to: 1) failure as a mechanism to strike a concrete balance amongst these when applied to actual situations and 2) to the difficulty of deriving legal norms or legal rules that creates duties or obligations subject to legal review by courts.

With regards to the first observation, an author has framed the dilemma in these terms:

“What is sustainable development? To the disappointment of many resourcists and environmentalists, sustainable development is neither resourcism, nor environmentalism, nor a Solomonic compromise between the two. Rather, …sustainable development defines all social problems in terms of three parameters--environment, economy, and

---

20 Schrijver & Weiss, Supra, note 6, at 574.
equity--and projects them in the dimensions of geographic scale and time. The fusion of the three parameters--the three E's--prevents sustainable development from cascading back into the resourcism-environmentalism dichotomy, and ensures that social equity has equal footing with environmental and economic goals. The geographic scale dimension requires that sustainable development solutions span from local to global approaches with no “one size fits all” mentality. The time dimension forces sustainable development solutions to optimize in both the short-term (intragenerational) and long-term (intergenerational). Each of these parameters and dimensions is firmly established in the sustainable development literature, albeit seldom in as tightly-knotted fashion as I contend they must exist. There is little for me or anyone else to add at this level, except further proselytizing.

Die-hard resourcists and environmentalists attack sustainable development for failing to prescribe how to distribute environment, economy, and equity both spatially and temporally. Sustainable development is not helpful if it offers no answer to that question. Thus far the response to such attacks has been to cast sustainable development as a “philosophy” and not a cookbook set of recipes. But what is the philosophy, other than to describe all problems in terms of the three E’s optimized over space and time?22

A frequent commentator of EU environmental law expresses the same lament when he says: “environmental protection and sustainable development continue to occupy a

prominent place in the objectives of the European Union. An issue that remains unresolved is the exact weight to be given to the various objectives where they are at odds with each other.”

With regards to the second observation, one author theorizes that the interface of sustainable development and the legal order could produce three levels of legal roles, namely the role of a standard of behavior, a guiding principle decision-makers must use actively in the motivation of a legally-binding decision and a general optic under which to interpret a given law.

“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 behaviour; 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.”

Most of the legislation aimed at achieving sustainable development use the concept in the second and third acceptations described by the author. The main problem with making sustainable development a rule of behavior lies in the perennial question: where do you draw the line? In

other words, as Ruhl mentioned, sustainable development is a function of the balancing of economic, environmental and equity considerations and there is no agreed upon scientific model to perform such function that depends in a multiplicity of interconnected variables and whose informational quality may vary considerably.

Another author states that “…while sustainable development does have established status as a principle of international law within an evolving environmental jurisprudence, it has very little status in the resolution of international disputes. This anomaly exists for normative, empirical, and institutional reasons.” 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 what we will call in this Article 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.”25

Thus for Gillroy, the legal principle of sustainable development is a meta principle of law comprised of a series of substantive and procedural sub-principles that may be in competition or in contradictions to one another. For him,

“[S]ustainability originates in at least eight other sub-principles; four are substantive and four are procedural.

The four substantive principles, defining material ends for the law, combine (1) the prevention principle and (2) the precautionary principle, which represents the protection of environmental quality, with (3) sovereignty over internal resources combined with a duty not to pollute across territorial borders, and (4) the right to equitable development, which represents the resource economics definition of sustainability.

The four procedural principles 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. These procedural principles can neither be classified as environmental nor development-oriented. Nevertheless, by focusing on the ways in which the substantive principles of the law are achieved, they focus on the ways in which sustainable development remains both “sustainable” and oriented toward “development.”

Gillroy contends that these sub-principles make the principle of sustainable development ineffective in the resolution of international legal disputes. But, can we draw the same conclusion when the legal principle of sustainable development is applied to the resolution of disputes in a supranational court such as the Court of Justice of the European Union (ECJ)? Next, we shall see how the ECJ has articulated the slippery and elusive legal principle of

---

sustainable development in the resolution of disputes under the Treaties.

The ECJ and the Principle of Sustainable Development

The Treaty on the European Union (TEU), in its Article 3(3) mandates the establishment of an internal market based on the “sustainable development of Europe,” which shall in turn be based in the achievement of three objectives: 1) balanced economic growth and price stability, 2) a highly competitive social market economy, aiming at full employment and social progress, 3) a high level of protection and improvement of the quality of the environment. Thus, the main historical objective of the EU, the creation of an internal market, must be accomplished based on a principle of sustainable development that strives to incorporate the goals of balanced economic growth, a social market economy and a high level of protection of the environment. This is a paradigm shift from the ordo-liberal principles that provided the impetus for the original Treaty of Rome. In fact, Article 3(3) defines what sustainable development is for the EU.

Sustainable development is not only the paradigm for the internal market. Article 3(5) TEU mandates that the EU shall contribute to “the sustainable development of the Earth” in its international relations and Article 21(2) TEU mandates the EU in its external action to:

“…define 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

26 Id. at 12.
“(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.”

In this Article we can hear echoes of the Rio Declaration, with the emphasis of pursuing a sustainable development strategy in order to eradicate world poverty and for management of the natural resources of the world.

Article 6(1) TEU incorporates into the EU legal order the recognition of the rights, freedoms and principles of the Charter of Fundamental Rights of the European Union, “which shall have the same legal value as the Treaties,” although such incorporation does not give any explicit or implicit competences to the EU. Article 37 of the Charter provides, in turn, 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 ensured in accordance with the principle of sustainable development.” The European citizens are entitled to partake in the benefits of EU legislation which integrates in its policies (not its actions) the sub-principle of high level of environmental protection.

Procedurally, the high level of environmental protection sub-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.” The Treaty on the Functioning of the European Union, provides the
institution specific guidance as to what objectives of its environmental policy must aim. 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 utilisation of natural resources,
   - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Article 192(2) TFEU establish 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.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to
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 in accordance with Article 3(3) TEU, must incorporate the: precautionary principle, the source principle, the polluter pays principle, the prevention principle and the safeguard clause. Any EU policy must integrate in its formulation and execution policy elements that correspond to the high level of protection principle as shaped by its corresponding sub-principles. Otherwise, that policy and therefore, the secondary legislation that articulates it, infringe the Treaties.

The ECJ has not been shy in providing meaning to these principles in its interpretation of questions of European law related to the transposition and correct interpretation of Directives and other secondary legislation. Insofar as these principles become the subject of interpretation and clarification by the ECJ, the “high level of protection” principle being an integral part of the EU’s sustainable development of Europe principle of Article 3(3) TEU becomes deeply entrenched in the European legal order. The ECJ has given life to the principle of environmental protection even when the Treaties did not even mention the environment. We must remember the *Danish Bottles* case, where the ECJ declared that “environmental protection” could be a mandatory requirement that could be used by Member States to limit the free movement of...
goods under the *Cassis de Dijon* doctrine. Nowadays, the principle is assured a position in EU legislation and action via the integration principle of Article 11 TFEU, environmental legislation has a firm legal basis in Article 192 TFEU and environmental objectives must be accomplished within the boundaries of the principles of 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 and the precautionary principle.

In the 2010 Grand Chamber decision of *Raffinerie Mediterrane*, the Court dealt with the interpretation of the ‘polluter pays’ principle in the Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. There, the Italian competent authority imposed on the polluter parties remedial action that went beyond and was a substantial change from the remedial action established under the consultative process established by the Directive. The new remedial action was implemented “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.” (Par 28)

In addition, the Italian competent authority 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, which is not prohibited by a literal reading of Article 193 TFEU. The

---

29 Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 662 (*Cassis de Dijon*)

30 Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 ECR 0000.


32 "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."
Court went on to hold that the polluter pays principle could be incorporated into more protective national measures. 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:

– 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. 33

Therefore, the national competent authorities could impose a higher protection measure that
originally devised by the Directive, provided it gave the relevant parties the opportunity to be heard, invited the participation and comments of adjacent landowners and the national measure was a grounded one. With regards to the measures against the landowners whose lands were not polluted, it validated the measures under the precautionary principle, after finding that the measure 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.”

In another case decided in the same year, Afton Chemical Limited, the ECJ, restated the level of judicial review it will afford to acts of the institutions dealing with complex problems and it further clarified the role of the precautionary principle in the fashioning of European legislation. As to judicial review, the ECJ restated in Afton that the tests are manifest error or abuse of

---

33 Joined Cases C-379/08 and C-380/08, at paragraph 67
34 Joined Cases C-379/08 and C-380/08, at paragraph 92
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.

***

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 exercised 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 Court in Afton 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

---

35 Case C-343/09, Afton Chemical Limited v. Secretary of State for Transport, Judgment of the Court (Fourth Chamber) of 8 July 2010. (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.)
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).

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 materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (see Commission v France, paragraph 93 and case-law there cited).

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 went on to hold that the temporary limitation of the concentration of the additive MMT in combustion fuels on the ground of the precautionary principle, pending a full scientific assessment was objective and non-discriminatory and therefore, the EU institutions has made correct use of the precautionary principle.

Even though the Court of Justice has embraced its mission of adjudicating European law on the basis of the principles of environmental protection, the articulation of these environmental protection principles as the application of the general principle of sustainable development
remains diffused. The European legislature would help “put flesh to the bones” of the environmental protection general principles by stating that the interplay of these principles in a particular act or legislation of the Institutions represents the balance called for by the principle of sustainable development established in the Treaties. In other words, sustainable development calls for environmental protection via the application of the environmental protection principles in a vertical or horizontal hierarchy that is for the Court of Justice to determine. The Court of Justice would then need to provide more coherence amongst the principles of environmental protection in their legislative acts in order to establish more clearly the balancing between economic development and environmental protection that sustainable development calls for. The consistent application of this proposal will ensure that sustainable development as a legal principle will continue playing a key role in the development of European environmental law and will perhaps inspire other legal systems to follow suit.

In conclusion, the acquis communitaire demonstrates that the principle of sustainable development occupies a privileged position in the European legal order. It comprises the principle of high level of protection of the environment, which encompasses the sub-principles known as the precautionary principle, the source principle, the polluter pays principle, the prevention principle and its balanced against the economic growth imperative of sustainable development by means of the safeguard clause of Article 192 TFEU. The European institutions have incorporated these principles in the secondary legislation of the EU and the Court of Justice of the European Union has commenced the long process of embroidering these principles into the legal fabric of the EU and establishing its order in the hierarchy of legal principles that guide the evolution of the European Union in its quest for “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.”36

36 Article 1 of The Treaty of the European Union, 2008 OJ (C 115) 16