

PRINCIPLES OF EUROPEAN ENVIRONMENTAL LAW

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It is not an exhaustive list of principles.

There are, for example:

Stand still principle, which means that you cannot reduce the quantity and quality of the protected environments.

Non-regression principle, a more recent one, saying that you cannot draw back existing environmental regulation.

Restoration principle, which sort of obliges you to restore the environment once it has been damaged and degraded.

The selection here is justified because those are the ones that you can find in EU primary sources.



Principles of environmental law

Principles of environmental law

- Give further direction to environmental policy
- Can be further elaborated in law and applied in judicial decisions
- Can help interpretation and application of environmental rules
- Gap filling function in light of ongoing and rapidly changing environmental, political, economic, social conditions

- Many EU environmental law principles originate from international environmental law principles

Sustainable development

Sustainable development

- Definition in Brundlandt report (1987):
 - ▣ Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs
- Concept of sustainable development:
 - ▣ Triple bottom line model
 - ▣ Bullseye model (strong sustainability model)

The report “Our Common Future” is also known as the Brundtland report, because the World Commission on Environment and Development, that wrote the report, was chaired by Gro Brundtland, the former prime minister of Norway.

Most of the time, if you see an image of what this definition means, emphasis is placed on a balance between the economy, social aspects, and the environment. Or the so-called 3Ps: planet, profit, people.

According to one approach, the sustainable development can be conceptualized in a “triple bottom line model”, which has been criticized.

According to a strong sustainability approach, the Bullseye model with the three concentric circles emphasizes the supremacy of the environment, without which neither society nor economy can exist. In other words, by destroying the environment, you destroy society and the economy.

Sustainable development

- Sustainable development has been included in several international instruments
- Rio Declaration (1992):
 - 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 1)
 - The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations (principle 3)

Where do we find sustainable development? For the very first time that it really was used and talked about was at the UN Conference on Environment and Development, which took place in Rio de Janeiro in 1992.

There, a number of conventions were concluded.
For example, the convention on climate change.

And at the end of the Convention, the Rio Declaration was concluded, where you see that a number of principles are talking about sustainable development. You see that the elements of the definition on the Brundtland report are coming back into the Rio Declaration.

Sustainable development

- UNFCCC (1992):
 - In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:
 - The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof (art. 3 § 1)

Looking at the UNFCCC, also concluded in Rio1992, we also see that they refer to the presents and future generations of humankind. These elements are coming back in legally binding documents as well (the previously mentioned Rio Declaration is what we call soft law).

Sustainable development

- United Nations Sustainable Development Summit 2015, New York
 - ▣ Transforming our world: the 2030 Agenda for Sustainable Development + Sustainable Development Goals (SDGs) (Resolution UNGA A/RES/70/1)
 - ▣ 17 Goals to 2030

The SDGs go beyond the environment, including the economy and the people.

Sustainable development

□ International case law:

▣ ICJ, Gabcikovo-Nagymaros Case, Hungary v. Slovakia (1997):

- The ICJ recognizes 'sustainable development' as a concept to reconcile economic development with protection of the environment
- However the ICJ does not refer to sustainable development as a principle of international law nor as a legal concept
- In his separate opinion, judge Weeramantry believes that the principle of sustainable development is part of modern international law and state practice

In that case there was a reference made to sustainable development.

Sustainable development

□ TEU:

- DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields. (preamble)
- 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. (...). (art. 3, § 3)
- In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. (art. 3, § 5)

Sustainable development

- TEU (in General provisions on the Union's external action):
 - ▣ The Union shall 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:
 - foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
 - 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 (art. 21, § 2, d & f)

Sustainable development

- TFEU:
 - ▣ Environmental protection requirements must be integrated into the definition and implementation of the EU's policies and activities, in particular with a view to promoting sustainable development (art. 11 TFEU)
 - ▣ Is part of Title II of the TFEU (provisions having general application)

Sustainable development

- Charter of fundamental rights:
 - ▣ 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. (art. 37)

Sustainable development

- None of the provisions in TEU, TFEU, Charter have direct legal consequences
- No legal clarity
- No definition of sustainable development
- Difficult to enforce

Sustainable development

- Secondary law:
 - ▣ Regulation 2493/2000 of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries (no longer in force):
 - "sustainable development" means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations. (art. 2)

There was once a definition in the EU law, but that is no longer in force. It was quite similar to the one formulated in the Brundtland Report.

Sustainable development

- Case law CJEU: sustainable development mentioned in several cases
- E.g. Case C 43/10 (Acheloos river, Greece):
 - ▣ Directive 92/43, and in particular the first subparagraph of Article 6(4) thereof, interpreted in the light of the objective of sustainable development, as enshrined in Article 6 EC, permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem provided that the conditions referred to in that provision of the directive are satisfied.



Integration principle

This one is very closely linked to the Sustainable Development Principle.

Integration principle

- Rio Declaration (1992):
 - ▣ 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 4)

Integration principle

- TFEU:
 - ▣ Environmental protection requirements must be integrated into the definition and implementation of the EU's policies and activities, in particular with a view to promoting sustainable development (art. 11 TFEU)
- Charter fundamental rights: art. 37 (see before)
- Integration can be procedural or substantive integration (e.g. procedural integration in Environmental Impact Assessment)
- Few cases for the CJEU

Despite its initially ambitious theoretical context, its practical implementation has been limited.

Integration principle

- Is principle strong enough in the EU policies?
- E.g. EU Green Deal & EU Biodiversity Strategy v. new Common Agricultural Policy

For example, although we have a comprehensive area of EU environmental law, when we look at other fields of EU law, environmental concerns are not fully integrated.

There are very concrete examples of a lack of integration. Scientific reports point to a worse situation of nature in EU than we had 6 years ago.



Preventive principle

When we look at international law, very closely related to the preventive principle is what we call the no-harm principle.

No harm principle

- It is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States (= no harm principle)
- Confirmed in several international conventions and documents (Stockholm & Rio Declaration, Biodiversity Convention,...)
 - ▣ Example: "States have, ... 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 2, Rio-Declaration)

No harm principle

- International case law:
 - ▣ Trail Smelter arbitration, US v. Canada, 1941
 - No damage to territory of another state
 - ▣ Confirmed by ICJ (Advisory opinion on legality nuclear weapons, 1996)

Principle of prevention

- The principle requires the prevention of damage to the environment
- Closely related to the no harm principle (but can also relate to environmental harm within a state)
- Requires a due diligence of states
- Requires states to take appropriate measures (including international and national environmental legislation)
- Rio Declaration (1992):
 - States shall enact effective environmental legislation (Principle 11)

Principle of prevention

- International case law:

- ICJ in Pulp Mills Case (2010):

- the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory

Principle of prevention

- TFEU:
 - ▣ EU policy on the environment shall be based on the principle that preventive action should be taken (art. 191, § 2)
- Numerous EU secondary legislation is based on the preventive principle (Environmental Impact Assessment Directive, Waste Directive...)

If we look at the EU law, we see that all environmental legislation is trying to apply this principle.

Principle of prevention

- European Court of Justice:
 - Confirmed this principle in several cases
 - E.g. species protection under Habitats Directive 92/43/EEC:
 - The system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (case C-518/04, Commission v. Greece & case C-383/09, Commission v. France)

There was one case against Greece, about the protection of a kind of viper. It is one of the protected species in Europe.

And another example is one of the best well-known cases of EU nature protection law. France was convicted for not taking sufficient measures to protect the European hamster.



Precautionary principle

There is still a lot of criticism against the precautionary principle, mainly saying that it could prevent technological advances.
But, obviously, there are criteria that can be used so that it applies in a balanced way.

Precautionary principle

- States should not wait to take preventive measures in case there is no clear or convincing scientific evidence of a cause-result relationship between an activity and its effects to the environment (or health) or between the input of substances and energy in the environment and their effects (environment or health)
- Precaution v. prevention: prevention is part of precaution, but precaution has to be applied earlier

Precautionary v. preventive principle

Precautionary

- Ambiguous cause/effect relation
- Risk cannot be calculated
- Acting before proof of a future damage
- Aims to avoid emergence of an uncertain damage

Preventive

- Unambiguous cause/effect relation
- Risk can be calculated
- Acting before occurrence of damage
- Aims to avoid emergence of damage

Precautionary principle

- Application of precautionary principle: leading to reversal of burden of proof?
- What in cases of scientific uncertainties?
- Is precautionary principle slowing or stopping technological progress or innovation?

Precautionary principle

- Precautionary principle has been included in many international documents
 - ▣ Instruments for the protection of the marine environment
 - ▣ In other conventions and instruments (Rio-Declaration, Biodiversity Convention, Climate Change Convention...)
 - In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (principle 15, Rio-Declaration)
 - The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects (art. 3, Climate Change Convention)

Precautionary principle

- Reversal of burden of proof ?
- ICJ in Pulp Mills Case (2010):
 - From the precautionary approach does not follow that it operates as a reversal of the burden of proof
 - The ICJ refers to the principle of *onus probandi incumbit actori*: it is the duty of the party which asserts certain facts to establish existence of such facts

In this case, the court took a very conventional approach.

Precautionary principle

- WTO: Hormones case (Canada/US v. EC, 1997-1998):
 - ▣ No acceptance of precautionary principle by WTO Dispute Settlement Body
 - ▣ According to the US: EC import prohibition of American beef treated with hormones is contrary to the Agreement on Technical Barriers to Trade (TBT) & the Sanitary and Phyto- sanitary Agreement (SPS)
 - ▣ Dispute Settlement Body (DSB) of the WTO: the EC import ban is violating the SPS Agreement since EC can not prove that using these hormones will cause special risks; studies so far indicating certain risks are not specific for the hormones at stake; the EC has to prove the risks

Precautionary principle

- TFEU:
 - ▣ EU policy on the environment shall be based on the precautionary principle (art. 191, § 2)
- Numerous EU secondary legislation is based on the precautionary principle (regulatory framework for chemicals (REACH); regulation on food law; legal framework on GMOs...)
- Communication from the Commission on the precautionary principle (2000)

Precautionary principle

- European Court of Justice: examples:
 - ▣ In a judgment concerning the transmissibility of 'Mad cow disease' to humans, the ECJ specified that the precautionary principle also applied to the protection of human health (case C-180/96)
 - ▣ In judgments concerning the transfer of resistance to antibiotics from animals to humans and the authorisation of medicines for human use, the General Court found that the competent public authorities could be obliged to actively adopt precautionary measures (case C-T-13/99)
 - ▣ The ECJ applied a broad interpretation of the precautionary principle to nature conservation (Waddenzee case) (case C-127/02)

The EU Court is using the precautionary principle in a more progressive way. One example of this was with the case of the mad cow disease, that affected many countries in the EU.

Another example was the Wadden Sea case, in The Netherlands. There was a question about a permission that was asked by a fisheries industry. There was a preliminary reference to the Court, and one of the questions focused on the application scope of the precautionary principle.

At this point, the Court of Justice held that the competent national authorities can only authorize such activity if they have made certain that will not adversely affect the integrity of that protected site. Here you see clearly a reverse of the burden of proof, that allows the government to take measure even when there is no scientific certainty about the impact that the activity will have on the environment.

Rectifying damage at source

Rectifying damage at source

- TFEU:
 - ▣ EU policy on the environment shall be based on the principle that environmental damage should as a priority be rectified at source (art. 191, § 2)
- Strongly related to preventive principle
- In secondary legislation through imposing emission standards
- Case law by CJEU:
 - ▣ E.g. waste must be disposed of as close as possible to place where it is produced (case C-2/90)

Emissions by vehicles (or industries) is a good example of the Rectifying Damage at Source Principle.

Pollution pays principle

Polluter Pays Principle

- OECD (1972):
 - ▣ The polluter should bear the expenses of carrying out pollution prevention and control measures decided by public authorities to ensure that the environment is in an acceptable state
- Polluter pays principle has been included in several international instruments (Rio Declaration; London Dumping Protocol;...)
 - ▣ Rio Declaration (1992): National authorities should endeavour to promote the internationalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment (principle 16)

Polluter Pays Principle

- TFEU:
 - ▣ EU policy on the environment shall be based on the principle that the polluter should pay (art. 191, § 2)
- Applied in many secondary sources of EU environmental law
- Example: Environmental Liability Directive (Directive 2004/35/EC)
- Broad understanding of terms 'polluter' (e.g. 'operator' in ELD); 'pollution' (e.g. Water Framework Directive 2000/60/EC) and 'pays' (e.g. ELD)

In the EU law, we see quite a broad interpretation of this principle (such as in the examples in this slide). And paying may not only be paying a fine, but also, for instance, pay for the restoration costs.