Chapter 10
A Comparative Law Approach to the Notion of Sustainable Development: An Example from Urban Planning Law

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Abstract 'Sustainable development' is a multifarious and multidisciplinary notion. The research project for this book is concerned with pointing out the balancing of a variety of objectives—including that of economic progress, environmental protection, individual rights, and collective interests—that is often shielded by this notion. In that sense, it surely has normative implications for lawmaking and legal application. However, from a legal point of view, the definitions of sustainable development in legal texts are often too vague and in legal literature it is commonly recognised that there is no accepted legal definition. What is more, a 2015 UN General Assembly Resolution acknowledges that 'there are different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development'. Against this backdrop, the primary aim of the present chapter is to focus on the problems concerning the legal definition of sustainable development. Secondly, this chapter intends to present some methodological reflections on the comparative approach in the process of defining the field of application of the notion of sustainable development. In this respect, it has been argued that an international commitment to sustainable development requires the use of comparative law in order to find, develop and apply solutions to the problems that the imprecise notion of sustainable development engenders. Lastly, this chapter contends that the aims and methods of comparative law transcend the mere assessment of the differences between the rules in force across the various legal systems.

Keywords Sustainable development · Normative effect · Comparative law · Urban planning · Environmental protection

10.1 Introduction

This chapter aims at investigating the concept of 'sustainable development', defined as development which 'meets the needs of current generations without compromis-

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ing the ability of future generations to meet their own needs' (Brundtland Report). Whilst the notion of sustainable development is deployed across a variety of fields and for a variety of needs, its legal relevance is often questioned; being claimed to be an oxymoron, consisting in the juxtaposition of two words involving arguably antithetical meanings (namely, those of *economic development* and *environmental sustainability*).[1] It is often remarked that even if sustainable development has an evocative conceptual value, from a legal point of view it lacks effectiveness.[2]

Yet, elusive as it may appear, the term is often used in legal texts, both at an international level and in the legislation of the various domestic legal systems. Further to the foregoing, after a short account of the historical background to the emergence of the notion under review (par. 2), a focus on the legal dimensions of sustainable development shall follow, through a survey on the use of the term in statutory provisions, both in the law of the European Union and in the principal European legal systems (par. 3). This shall be followed by an examination of the concrete relevance of sustainable development in the specific field of urban planning law, through a comparative study of recent judgments in the English, French and Italian experience (par. 4). Lastly, some conclusive remarks shall be presented, arguing that sustainable development remains a challenge that jurists need to address (par. 5).

10.2 The Emergence of the Notion of Sustainable Development

The notion of 'sustainable development' marks a new approach within the environment-related literature. Since the late 19th century the main concern of environmental studies has been whether and how to preserve or conserve natural areas, with different suggested options: some have favoured the preservation of natural areas in their original form; others, on the contrary, have stressed the importance of conserving land and resources for later human use. In the 20th century, particularly after WWII, the advent of new concerns required that they be perceived in all their importance; that is to say, in tandem with issues of pollution, non-renewal resource depletion, and population growth.

Against this backdrop, the idea of sustainable development emerged in the mid-1980s 'as an attempt to bridge the gap between environmental concerns about the increasingly evident ecological consequences of human activities and socio-political concerns about human development issues.'[3]

More specifically, in 1987 the World Commission on Environment and Development issued the well-known Brundtland Report. It focused attention on social and economic conditions in developing countries and on their connection to environmental degradation. The report argued that ecological sustainability cannot be achieved if the problem of poverty is not successfully addressed around the world. Sustainable

[1] On this aspect, *see* Cafagno [1].

[2] Ferrara [2].

[3] Robinson [3].

development was defined as development that 'meets the needs of current generations without compromising the ability of future generations to meet their own needs.'[4] That definition essentially rests on two basic pillars: on the one hand, the needs of future generations and of the global poorest people of our planet; on the other, the limits in the use of natural resources and in the capacity of the biosphere to absorb the negative effects of anthropogenic activities.

Since its emergence, the notion of sustainable development has been accompanied by a veil of scepticism. This has largely been due to its vagueness and polysemy, and due to its occasional use to promote *un*sustainable activities. As mentioned earlier, the notion under review has been seen as an oxymoron, considering that economic development may stand in contradiction with the safeguard of environmental issues.[5]

Critics seem not to take in due account that in the Brundtland Report sustainable development is not conceived as 'a fixed state of harmony.'[6] Rather, it is a dynamic process of change, characterised by the need to strike a balance between socio-economic development and environmental protection. Be that as it may, it is undisputable that after thirty years since the publication of the Brundtland Report the precise meaning of sustainable development remains undetermined.

In recent times, the situation is complicated by the fact that there has been a progressive change in the understanding of this notion. Without going into great detail, it is worth noting that in 2002 at the Johannesburg Summit a tripartite definition was adopted which rested on three pillars, namely, economic, social, and environmental, which, however, are treated unequally given the relegated status of the last. This tripartite definition was restated at the 2012 Rio Conference, which led to the signature of the Declaration 'The Future We Want', § 3 of which reads as follows: 'We therefore acknowledge the need to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions'. This formulation may be suggestive of the environmental dimension standing in a lower hierarchical order with respect to the economic and social interests.[7]

The debate around the meaning and the implications of sustainable development has received a new boost as a result of three key events which took place in 2015, namely, the publication of Pope Francis's Encyclical Letter "*Laudato si*'—On care for our common home'; the approval of the UN Sustainable Development Goals and the related 2030 Agenda for sustainable development by the UN General Assembly; and the Paris Agreement on Climate Change in the framework of the Paris Climate Conference. It is beyond of the scope of the present chapter to examine these in details. However, it should be noted that these three crucial events demonstrate that—notwithstanding the critics and the elusiveness of the concept of sustainable

[4]U.N. World Comm'n on Env't & Dev., Our Common Future 8 (1987).

[5]For an in-depth account, see again Robinson, *supra* note 3, at 373.

[6]Cf. U.N. World Comm'n on Env't & Dev, *supra* note 4, at 9.

[7]In this sense, see Montini and Volpe [4].

development—its use persists, from different perspectives, as a tool to polarise the need to take account of the consequences of such uncontrolled development that fails to consider the needs of the poorest and to address ecological and environmental concerns.

10.3 The Use of Sustainable Development in Statutory Provisions

Against the backdrop of the foregoing, any trepidation on the part of jurists in identifying the legal dimension of such a concept is understandable. Scholars agree on the point that the definitions of sustainable development in legal texts are vague, too long and not functional. Consequently, the normative value of the notion of sustainable development is difficult to ascertain, given that a clear and precise definition is lacking.[8]

Yet, many statutory provisions, albeit not exhaustively listed herein, make great use of the term.

As far as European Union law is concerned, it is worth considering that art. 37 of the European Charter of Fundamental Rights prescribes 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 Charter has the same normative value as the Treaties, as provided by art. 6 of the Treaty on the Functioning of the European Union (TFEU), according to which 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'. Moreover, sustainable development has been considered by numerous initiatives at the EU level, including the Communication from the Commission 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' adopted in 2011,[9] and many other related documents. Amongst the most recent is the 'New European Consensus on Development—'Our world, our dignity, our future", signed by all Member States in June 2017.[10] It constitutes a comprehensive common framework for European development cooperation and, for the first time, it is applicable to all EU Institutions and to all Member States per se.

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[8] See Salardi [5].

[9] *Communication from the Commission A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development* (*Commission's proposal to the Gothenburg European Council*), COM (2001) 264 final (May 15, 2001).

[10] *New European Consensus on Development—'Our world, our dignity, our future*', Joint Statement by the Council and the Representatives of the Governments of the Member States: Meeting within the Council, the European Parliament and the European Commission, http://www.consilium.europa.eu/media/24004/european-consensus-on-development-2-june-2017-clean_final.pdf (last visited 11 September 2018).

Moving to the main European legal systems, it should be stressed that an acknowledgement of the notion of sustainable development is often witnessed at a constitutional level. For instance, art. 45 of the Spanish Constitution, albeit not explicit, refers to the notion of sustainable development when it prescribes that public authorities have a duty to ensure rational use of natural resources in line with environmental concerns and with collective solidarity.[11]

In relation to France, the *Charte de l'environnement*—enacted in 2005 by way of constitutional statute (*Loi constitutionnelle n° 2005-205 du 1er mars 2005*)—integrates with the Preamble of the French Constitution to mandate that the French Republic respect human rights and the right and duties set in the *Charte*. Art. 6 of the *Charte* prescribes that public policies must promote sustainable development, recurring to the terminology considered earlier (that is to say, in order to reconcile the protection and valorisation of the environment, economic development, and social progress).[12] It is worth noting that, in this manner, sustainable development has now acquired constitutional recognition in France.[13]

In Germany, the *Grundgesetz* has recently been amended by the addition of article 20a, soon after art. 20 ('*fixing the basic German constitutional principles*'). This provision reads as follows: '[m]indful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.'[14] Again, this wording clearly echoes the language used in sustainable development discourse.

In relation to Switzerland, art. 73 of the Swiss Constitution is explicitly dedicated to sustainable development: '[t]he Confederation and the Cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population'.[15]

Similar provisions can be found in the Polish Constitution (art. 74) and in the Portuguese Constitution (art. 66).

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[11] '*Todos tienen el derecho a disfrutar de un medio ambiente adecuado para el desarrollo de la persona, así como el deber de conservarlo. Los poderes públicos velarán por la utilización racional de todos los recursos naturales, con el fin de proteger y mejorar la calidad de la vida y defender y restaurar el medio ambiente, apoyándose en la indispensable solidaridad colectiva. Para quienes violen lo dispuesto en el apartado anterior, en los términos que la ley fije se establecerán sanciones penales o, en su caso, administrativas, así como la obligación de reparar el daño causado*'.

[12] '*Les politiques publiques doivent promouvoir un développement durable. A cet effet, elles concilient la protection et la mise en valeur de l'environnement, le développement économique et le progrès social*'.

[13] The constitutional value of the *Charte* is recognised by the French *Conseil constitutionnet* [CC] [Constitutional Court] decision No. 2014-394, QPC, May 7, 2014. For an in-depth account of the progressive recognition of the concrete legal value of sustainable development by French courts see François-Guy Trébulle, *Droit Du Développement Durable*, JPC 55 ff. (2017).

[14] For an English translation of the German Constitution see https://www.btg-bestellservice.de/pdf/80201000.pdf.

[15] For an English translation of the Swiss Constitution see https://www.admin.ch/opc/en/classified-compilation/19995395/201709240000/101.pdf.

In Italy, there is no explicit reference in the Constitution, even though some authors argue that the principle can be inferred interpretatively.[16] In reality, several ordinary statutes make reference to sustainable development, the most important of which being the '*Codice dell'ambiente*' (i.e., Environmental Code), approved in 2006, considered in the next paragraph. The same could be said for most, if not all, European legal systems, where several norms are dedicated whether expressly or not to sustainable development.

10.4 The Legal Relevance of Sustainable Development in the Field of Urban Planning Law

The survey carried out in the previous paragraph, albeit incomplete, demonstrates that the term 'sustainable development' is well documented in the law and policy of the European Union and in those of the major European legal systems, both at a constitutional level and in ordinary legislation. Against this backdrop, the real issue is whether such wide recognition of the notion of sustainable development in legal texts is merely a formal tribute to a fashionable principle, or, on the contrary, whether it is in fact indicative of its concrete legal relevance.

In addressing such questions, it is necessary to move from general perspectives to an investigation of how the notion under review is deployed in specific areas of law, as this is a concrete manner in which to gauge the normative implications of the notion of sustainable development by its application to a specific area of policy/social activity. To that end, urban planning law is one of the main areas to explore, given that it is at the juncture of many competing interests, including the need to provide housing, to stimulate economic growth, and to address the consequences of the exploitation of the environment.

Our methodological choice of a comparative approach to this question chimes with a 2015 United Nations General Assembly Resolution (namely, the Resolution adopted by the General Assembly at its seventieth session on 25 September 2015 'Transforming our world: the 2030 Agenda for Sustainable Development' (A/Res/70/1)) which acknowledges that 'there are different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development' (p. 15, para. 59). A comparative analysis is well-suited to providing meaningful insights into the implications of the notion under review.

[16] Porena [6].

10.4.1 English Law: The Role of the 'Presumption in Favour of Sustainable Development'

The English system (i.e., that which applies the law of England and Wales, which is itself one of the separate jurisdictions of the United Kingdom) of urban planning law requires that applications for planning permission be determined in accordance to the geographically relevant development plans—which may include the Local Plan and neighbourhood plans made in relation to the relevant area—unless material considerations indicate otherwise.[17] In the development of local and neighbourhood plans, public authorities are under the obligation to take into account the National Planning Policy Framework (NPPF), which is a material consideration in planning decisions.[18] In relation to neighbourhood plans, the independent examiner will consider whether, having regard to national policy, it is appropriate to make the plan.[19] Planning policies and decisions must reflect, and, where appropriate, promote relevant EU obligations and statutory requirements. The NPPF was issued by Government in March 2012 and updated in July 2018.[20] In the part entitled 'Achieving sustainable development' para. 2.7 states that the 'purpose of the planning system is to contribute to the achievement of sustainable development[…] meeting the needs of the present without compromising the ability of future generations to meet their own needs' and para. 2.10 provides that 'at the heart of the Framework is *a presumption in favour of sustainable development*' (emphasis in the original).

A recent case decided by the Court of Appeal (of England and Wales) clarifies the meaning of this presumption.[21] The case concerned the grant of planning permission for 150 dwellings. The Borough Council and the appellant agreed that the proposed development was contrary to the strategic policies of the up-to-date Local Plan and that there was a five-year supply of housing land, both of which assumptions were accepted by the Inspector. However, the Inspector concluded that the proposed development accorded with the three aspects to sustainable development as per the NPPF at para. 7 (NB., NPPF citations in the court decision are in relation to the 2012 version) and therefore satisfied the sustainable development requirement as defined in the NPPF. Subsequently, the Inspector concluded that the NPPF presumption in favour of sustainable development was to be given such weight as to rebut the presumption of refusal arising from the conflict with the Local Plan. In other words, and without entering into details of very technical issues, the presumption in favour

[17] Section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.

[18] This is provided in sections 19(2)(a) and 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990.

[19] See section 38B and C and paragraph 8(2) of new Schedule 4B to the 2004 Act (inserted by the Localism Act 2011 section 116 and Schedules 9 and 10).

[20] See the latest version at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733637/National_Planning_Policy_Framework_web_accessible_version.pdf (last accessed 11 September 2018).

[21] Barwood Strategic Land II LLP v. East Staffordshire Borough Council [2017] EWCA Civ 893.

of sustainable development was interpreted in such manner as to enable to grant permission even though the project of development was not consistent with the local plan. The main outcome of the Court of Appeal's decision is that it clarifies that where a proposed development is in conflict with an up-to-date development plan, and the local planning authority can demonstrate that a five-year supply is unlikely to benefit from the presumption in favour of sustainable development within the meaning of paragraph 14 of the NPPF, there may be no presumption in favour of granting planning permission.

It may be reasonably deduced from this case that sustainable development is a relevant consideration that local authorities must take into account when adopting local plans, and that the presumption in favour of sustainable development, as set by the NPPF, cannot be an argument used by property developers in order to supersede the planning decisions of local authorities.[22] This suggests that not only has sustainable development concrete implications, from a legal point of view, as guidance for specific options to be set in planning schemes, but also that the presumption in favour of sustainable development cannot be used as a way of evading the provisions in the local plans limiting urban development.

10.4.2 The French Experience: The Pre-eminence of Plans of Sustainable Development in Respect of Local Urban Plans

Let us now consider the French experience: very briefly, art. 151-8 of the *code de l'urbanisme* provides that the local plan of urban development ('*Plan Local d'Urbanisme*', PLU) must be coherent with the *project of sustainable development* ('*Projet d'Aménagement et de Développement Durable*', PADD),[23] which is, in its turn, a document issued by the local authority, setting the general objectives of the development of the local area in accordance with the principle of moderation in the use of space and against the urban sprawl.[24]

The specific content and coherence of this obligation has been questioned. In particular, given that the PADD is essentially a generic instrument setting the direction of policy, it is not clear in instances of contradiction between the PLU and the PADD whether judges are entitled to intervene.

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[22] '*Sustainable development is highly valued in the Framework, and there is a "momentum" in favor of it'* [7].

[23] '*Le règlement fixe, en cohérence avec le projet d'aménagement et de développement durables, les règles générales et les servitudes d'utilisation des sols permettant d'atteindre les objectifs mentionnés aux articles L. 101-1 à L. 101-3*', introduced by the *ordonnance No. 2015-1174* of Sept 23, 2015).

[24] Art. 151-5 Code de l'urbanisme.

This issue was recently settled in an important judgment of the Nantes Court of Appeal in 2016.[25] This case concerned the decision of the local authority to approve a PLU which permitted the expansion of building activities in an area located near the coast, whereas the PADD set the objective of valorising natural patrimony through the localisation of new urban expansions outside the areas located near the coast. An environmental organisation challenged the local authority decision on grounds that the PADD was unambiguous in prohibiting new buildings near the coastal area, and that the local plan contradicted the PADD, compromising the requirement of sustainable development. The Court allowed the appeal and annulled the relevant provision of the PLU as it violated the law [i.e. art. Loi 123-1-5 *Code de l'urbanisme* (Code of Planning)] by approving a PLU in contrast with the provisions of the PADD.

This judgment is considered a clear recognition of local plans of sustainable development as being hierarchically superior to local plans of urban development.[26] It is another example demonstrating that, despite its nebulous character, in practice the notion of sustainable development may play a deciding role to the extent that judges afford it such concrete value.

10.4.3 The Italian Experience: Sustainable Development as a Limit of the Discretionary Powers of Public Authorities

In the Italian legal system, the '*codice dell'ambiente*' (i.e., the environmental code) approved in 2006[27] promulgates a general principle: every human activity concerning the fields covered by its provisions must be in accordance with the principle of sustainable development, in order to guarantee that the needs of present generations do not compromise the quality of life and the possibilities of future generations (art. 3-quater/article 3.4). More specifically, the activity of public administrations must achieve the aim of allowing the best application of the principle of sustainable development. This means that in the exercise of their discretion public authorities must prioritise environment protection. As it has been observed, the implications of these provisions is that the principle of sustainable development is the means by which judges assess the reasonableness of the outcomes of the use of discretionary powers on the part of public authorities.[28]

There is a series of recent key cases of administrative courts (TAR) making clear that the perspective of sustainable development implies that the right of private property itself must be concretely shaped according to the needs of harmonic territorial growth in the light of preserving the integrity of the natural landscape. In this respect, for instance, Italian administrative judges have confirmed the decision of a local

[25] Cour d'appel (CA) (i.e., the regional Court of Appeal) de Nantes, 5ème chambre, Jul 27, 2016, 14NT02815.

[26] In this sense, see de Baleine [8].

[27] D.Lgs. 3 april 2006, n. 152 (It.).

[28] Porena, *supra* note 16, at. 14.

authority not to permit any possibility of expansion to an area where a quarry had been located.[29]

Similarly, a regional statute providing that local plans should be drafted in accordance with the principle of sustainable development has been interpreted to mean that they have to avoid new territorial exploitation, should this be in contrast with the rights of future generations, asserting that the growth of the population does not mean that new buildings can be allowed, given that the interest of preservation of the environment and the landscape has to be prioritised.[30] In another case, it has been asserted that local authorities are entitled to consider environment and landscape issues in assessing every project having an impact on the environment.[31]

It has been argued that sustainable development is shaping anew the very content of private rights, through their instrumentalisation for the achievement of environmental protection objectives. This, however, is an argument that has presently received much criticism and has attracted controversy—that said, in Italy no one could seriously claim that sustainable development discourse is merely confined to the sphere of policy declarations. On the contrary, it assumes a concrete relevance as a parameter in the decisions of public bodies when considering the permission of the exercise of private activities.[32]

10.5 Sustainable Development as a Challenge for Jurists

There is no doubt that sustainable development is quite an elusive and vague notion, lacking precise content and a universal legal definition, therefore, it is unsurprising that jurists may feel disoriented.

Omnis definitio in iure periculosa est (i.e., any legal definition is dangerous), warned the Roman jurist Javolenus. Yet, the problem of 'definition' is a thorny issue from a legal point of view. Technical notions and an apparatus of terms and categories for the concrete application of rules are essential.[33] This need cannot be underestimated and is universally felt. In this respect, it can be useful to allude to Confucian theory that attaches social (and moral) value to the precision/correctness of language in designating things. This theory is expounded in the *Analects of Confucius* under the heading of the 'rectification of names' (*zheng ming*). Master Confucius was once called to assist the ruler of Wei in the administration of his reign. During the journey to his destination, one of his disciples asked: 'The ruler of Wei [is] waiting

[29] Tribunale amministrativo regionale (TAR) (Regional Administrative Court of Appeal) Firenze, sez. I, Jun 12, 2017, No. 790.

[30] Tribunale amministrativo regionale (TAR) (Regional Administrative Court of Appeal) Milano, sez. II, Sept 23, 2016, No. 1696.

[31] Tribunale amministrativo regionale (TAR) (Regional Administrative Court of Appeal) Sardegna, sez. V, Jul 11, 2016, no. 3059.

[32] For an in-depth discussion, see Fracchia [9].

[33] *See* Moccia [10].

for you, in order to administer the government. What will you consider the first thing to be done?'. Confucius replied: 'What is necessary is to rectify names'. But that answer left the poor disciple so confused and dissatisfied that he dared to reply: 'So! indeed! You are wide of the mark! Why must there be such rectification?'. Then the Master severely rebuked his disciple with the following words: 'How uncultivated you are! A superior man, in regard to what he does not know, shows a cautious reserve. If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success'.[34]

What one can conclude, therefore, is that establishing the content of terms should not be an exercise done in a manner than either appeals to teleological dogmatism or to unbridled relativism. To this respect, sustainable development presents a real challenge to jurists. The debate around the elusiveness and vagueness of the notion of sustainable development—understandable and well-grounded as it may be—cannot lead to the conclusion that it has no legal value. The examples in the field of urban planning law illustrate how, on the contrary, it does have concrete implications, to the extent of bringing to the fore the need to re-interpret traditional legal institutions such as that of property rights. Therefore, the challenge is to ascertain the concrete role that the notion of sustainable development plays in a variety of fields where it is used and applied.

To this end, the preceding remarks aim to contribute to that task, and to solicit further reflections, recurring to all the possibilities offered by a comparative approach which appears to be essential in casting light on such a controversial yet fascinating topic.[35] After all, what is at stake is the need to reconcile development and sustainability for our world, and jurists must not fail to play their role in this respect.

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[34]The Sayings of Confucius, Bk. 13, v. 3 (James R. Ware trans., Mentor book, new ed. 1980), *quoted in* Moccia, *supra* note 33, at 761.

[35]In the sense that an international commitment to sustainable development requires the use of comparative law, see Dernbach [11].

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