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ARTICLE

Sustainable development in EU law: still a long way to go

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Abstract One of the European Union's fundamental objectives is sustainable development. It has been enshrined in various provisions of the founding treaties and is encapsulated in different regulatory schemes. While significant uncertainties remain regarding its meaning, it is doubtless that sustainable development is a normative concept rather than a mere policy guideline. That being said, the gap between the legal and political recognitions of sustainable development and the numerous EU policies that are unable to revert unsustainable trends is widening. Whether the concept is likely to add teeth to environmental policy remains to be seen.

Keywords EU legal order · Sustainability · Hierarchy of core values · Principle of integration · EU case law

1 Introduction

Sustainable development occupies a prominent position in the European Union (EU). Before embarking on this discussion, it must be remembered that the EU is a union of twenty-eight independent states. It follows that the EU is neither a state[1] nor a typical international organization. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established "a new legal order, possessing its own institutions, for the benefit of which the Member

[1] Opinion 2/13, EU: C: 2014: 2454, ¶ 156.

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States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals”.[2]

Accordingly, the EU is known to be a unique international organization that is endowed with its own system of government that has been allocated by its 28 Member States. EU has a constellation of competences ranging from international trade to energy with its own legal system that differs from both domestic and international law. The powers and responsibilities conferred to the EU institutions are laid down in the Treaties, which are the constitutional foundations of the EU.

Account must also be made of the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States,[3] and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[4] These essential characteristics of EU law have given rise to:

> [A] structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a process of creating an ever closer union among the peoples of Europe.[5]

As a result, a new kind of legal order, the nature of which is peculiar to the EU has emerged.[6]

Care should be taken to distinguishing the different sources of EU law. Traditionally, academics distinguish two key sources of law within the EU legal order, i.e. primary and secondary law. Primary law is in the form of the treaties such as the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights (EUCFR). These treaties are carving out a specific constitutional framework. Secondary law is made up of different binding instruments—regulations, directives and decisions—non binding instruments—opinions and recommendations.

Primary law originates from the 28 Member States in their role of *Masters of the Treaty* whereas secondary law is the product of the EU institutions (European Commission, Council, European Parliament). What is more, the fact that both primary and secondary law of this autonomous legal order take precedence over 28

[2] *See*, Case 26/62, NV Algemene Transport-En Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] E.C.R.1, ¶ 12 [hereinafter Van Gen den Loos Case]; Case 6/64, Costa v. ENEL, [1964] E.C.R. I-585 [hereinafter Costa Case]; Opinion 1/09, 2011 E.C.R. I-01137, ¶ 65 [hereinafter Opinion 1/09].

[3] Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] E.C.R. I-1161; Case C-399/11, Stefano Melloni v. Ministerio Fiscal, [2013] 2 C.M.L.R. 43, ¶ 59. See also ECJ, Opinion 1/91, European Economic Area Treaty [1991] ECR I-6079, ¶ 21.

[4] Van Gen den Loos Case, *supra* note 2, at 12; Opinion 1/09, *supra* note 2, ¶ 65.

[5] Opinion 2/13, EU: C: 2014: 2454, ¶ 167.

[6] *Id.,* ¶ 158.

national legal orders[7] emphasizes the key role played by the EU in Europe regarding an array of subject-matters.

Besides, the Court of Justice of the EU plays a key role in ensuring that EU law is observed "in the interpretation and application" of the treaties (Article 19(1) TEU). The Court reviews the legality of the acts of the institutions of the European Union, ensures that the Member States comply with their obligations under treaty law, and interprets EU law at the request of the national courts and tribunals.

Sustainable development came into limelight with the entry into force of the Treaty of Lisbon that amended the TEU as well as the treaty of the European Community that was renamed as the TFEU. As mentioned above, both treaties are forming the constitutional basis of EU. The Treaty of Lisbon was signed by the Member States on 13 December 2007 and entered into force on the 1st of December 2009. The three pillars of sustainable development—environment, social policy, economic policy—were recognized simultaneously in the amended TEU as well as the principle of a high level of environmental protection. In addition, sustainable development was encapsulated in the EUCFR, which, under Article 6(1) of the TEU, has the same legal value as the other Treaties. Accordingly, the EU's goals are no longer solely economic, but also environmental.

Against this background, we have attempted in this chapter to capture where sustainable development stands in both primary and secondary EU law in the light of other environmental requirements.

2 Inception of sustainable development

The European Economic Communities (EEC), during the first three decades of its existence sought to curb impacts, contamination and pollution through the harmonization of administrative regulations and practices. In this regard, the law governing listed installations and industrial pollution occupied a core position within this branch of the law. In that context, the first generation of directives harmonized national regulations on the operation of industries as well as industrial waste management.

However, this initial approach sidelined issues concerning, first, the extraction of natural resources—since the potential for exploitation appeared to be unlimited—and second the incessantly growing consumption of goods and services. However, the availability of natural resources is not unlimited and the absorption capacity of sinks may quickly be exceeded. The record of environmental policy remained modest precisely as a result of its inability to regulate the exploitation of natural resources and the consumption of goods and services. What indeed is the point of equipping cars with new technologies such as catalytic converters[8] if the number of

[7] Costa Case, *supra* note 2, at 585.

[8] Catalytic converters became mandatory in all new cars with petrol engines at the beginning of the 90s. *See* Council Directive 91/441/EEC, art.1, 1991 O.J. (L 242). This technology has reduced the nitrogen oxide,hydrocarbon, carbon monoxide and particle emissions to a fraction of their former quantities. *See* ELLI LOUKA, CONFLICTING INTEGRATION: THE ENVIRONMENTAL LAW OF THE EUROPEAN UNION 135 (2004).

cars and of kilometres travelled is constantly on the increase? What interest is there in subjecting aviation to a regime of greenhouse gas emissions quotas[9] if air transport continues to grow? What interest is there to designate nature sanctuaries around cities if land planning policies fall short of preventing urban sprawling?[10] Conversely, environmental protection measures have been criticised on the account that they are at best indifferent, and at worst hostile to economic development and social aspirations.

At the outset, the concept of sustainable development has been forged in an attempt to reconcile the needs of development with environmental protection. Sustainable development has been defined by the WCED as 'a development that meets the needs of the present without compromising future generations to meet their own needs'.[11] The underlying idea was to strike a balance between, on the one hand, the social and economic advantages of development projects providing jobs and amenities for the present generation and, on the other, the need to conserve a sufficient amount of natural resources for future generations. Since its proclamation in 1987, sustainable development has been gathering momentum from a swathe of international declarations and academic writings. Since then, it has been encapsulated into a flurry of international and national laws.[12] Given the challenges related to energy security, rising climate change, food safety, biodiversity loss, illegal immigration prompted by natural disasters, the limited amount of natural resources that are heavily exploited, the importance of sustainable development is even more obvious today than when the concept was coined in 1987.

Sustainable development obliges us to rethink environmental law, though according to the academic literature, this concept bears in international law a greater resemblance to a political objective than a legal principle.[13]

Since it is made up of three heads (social, environmental and economic), sustainable development represents a delicate balancing of the competing social, economic and environmental interests. Indeed, according to International Court of Justice's case-law, "this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[14] As a result, sustainable development requires commercial law, competition law, consumer law, environmental law and worker protection law to interact. Similarly,

[9] *See* Council Directive 2008/101/EC, 2009 O.J. (L 8/3) (amendment includes aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. *See* Case C-366/10, Air Transport Association of America and Others, [2011] ECR I-13755.

[10] EEA, URBAN SPRAWL IN EUROPE. THE IGNORED CHALLENGE (2006).

[11] WCED, OUR COMMON FUTURE 86 (1987).

[12] MARIE-CLAIRE CORDONIER SEGGER ET AL., SUSTAINABLE DEVELOPMENT LAW (2011).

[13] V. Lowe, *Sustainable Development and Unsustainable Arguments*, *in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 19 (Alan Boyle & David Freestone eds., 1999); Duncan French, *Sustainable Development*, *in* HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 56 (Malgosia Fitzmaurice et al. eds., 2010).

[14] Gabcikovo-Nagymaros Project (Hungary v Slovakia), 1997 I. C. J. 7, ¶ 140 (Sept.1997). *See also* Arbitration Regarding the Iron Rhine Railway (Belgium v. Netherlands), I.C.G. J. 373, ¶ 222 (May 2005) [hereinafter Iron Rhine Railway Case]; Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I. C. J. 14, ¶ 177 (April 2010).

the dialogue between law and science, economic development and the preservation of natural resources, the regulation of access to resources and our consumer society must find the green shoots of a solution under the aegis of this kind of rule that is dedicated *par excellence* to the reconciliation of competing interests. What is more, given that "environmental law and the law on development stand not as alternatives but as mutually reinforcing", there is a duty under international law "to prevent, or at least to mitigate" significant harm to the environment.[15]

We are taking the view that acting under the impetus provided by sustainable development, environmental law should intervene at times more upstream and at other times more downstream. We shall consider first upstream interventions. Since the exploitation of natural resources is not infinite, it is necessary to exploit them in a sensible manner. It is senseless to squander precious resources. Accordingly, Article 191(1) of the TFEU requires the EU institutions when they carry out environmental action to pay heed to "a prudent and rational use of natural resources". Turning now to downstream issues, unfettered consumption of goods and services is the cause of an over exploitation of natural resources and the succession of negative impacts on the environment which this exploitation engenders. Accordingly, sustainable development impinges upon consumption of goods and services, which can be traded freely within the internal market.

3 The rise of sustainable development in treaty law

Despite the success in international circles, the concept of sustainable development has encountered difficulty establishing itself under treaty law. The EU started off as a markedly economic project, reflected in the names of the three integration organisations created in the 1950s, the European Coal and Steel Community, the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). In particular, the 1957 Treaty of Rome establishing the European Economic Community (EEC) was drafted at a time when environmental questions did not arise as such. Whereas the original objectives of that treaty emphasized an essentially economic project (customs union, common market, common agricultural policy, common transport policy),[16] it contained no general reference to consumer, health and environmental protection. The absence of such provisions in treaty law reflected the unimportance of these issues at the time the treaty was drafted. Given that many of the contemporary environmental problems—acid rain, transboundary watercourses management, eutrophication, conservation of migratory species, ozone depletion—are transboundary in nature, it came as no surprise that the EEC became in the 1970s the most relevant regional organisation to address these issues. The absence of explicit competence in the Treaty of Rome to carry out an environmental policy did not prevent in the 1970s the EEC institutions

[15] Iron Rhine Railway Case, *supra* note 14, ¶ 58.

[16] Pursuant to Article 2 EEC, the European Economic Communities were aiming at "an harmonious development of economic activities, a continuous and balanced expansion, … an accelerated raising of the standards of living".

to adopt a number of directives and regulations (secondary law) aiming at harmonising the national regulations with a view to protect the environment.[17] The success of this policy seen against the background of the 1972 Stockholm Conference on the Human Environment, which demonstrated that environmental concerns also began to be seen as a universal challenge.

Though there was already in the course of the 1980s extensive secondary legislation covering water and air, noise, chemicals, waste and nature protection, an environmental policy was enshrined in treaty law only with the adoption of the Single European Act (SEA) in 1987.[18] For the first time, environmental obligations were encapsulated in the former EEC treaty. Nonetheless, the SEA's major achievement was the establishment of a "single market", defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the [t]reaties". Accordingly, the environmental policy lagged behind the internal market.

The 1993 Treaty of Maastricht on European Union was a very different treaty from the SEA on the account that it was streamlining a new political project. That treaty introduced sustainable development as an objective of the Community, without defining it. Under the Maastricht Treaty, the Union was called on to promote "sustainable and non-inflationary growth" rather than "sustainable development" in its own rights. From an environmentalist perspective, the concept of "sustainable growth" sounds weaker than the concept of sustainable development adopted at UN level a few years earlier.

The 1997 Amsterdam Treaty was less concerned with major political issues. However, that treaty improved considerably the status of sustainable development in proclaiming that "the Community shall have as its task promoting a harmonious, balance and sustainable development of economic activities". According to Jans and Vedder, that formulation was much more in line with the internationally accepted definition.[19] That being said, the concept was still linked to economic activities. No changes were made to that definition by the Treaty of Nice. Sustainability was still linked to economic growth.

With the entry into force of the Treaty of Lisbon in 2009, which substantially amended the EU Maastricht Treaty, and the Treaty of Rome establishing the EEC (1958),[20] the concept of sustainable development was recognised on as an objective in its own. The concept is currently enshrined in various treaty provisions: Article 3(3)–(5) TEU, Article 21(2)(d)–(f) TEU, Article 11 TFEU as well as Article 37 of the EUCFR.[21] A detailed examination of the ways in which these provisions are drafted should be made.

[17] Before the Single European Act, the EEC Treaty did not contain any explicit legal basis for environmental protection. Accordingly, the European lawmaker resorted to an internal market legal basis and a gap-filling provision (Article 235 EEC, now Article 352 TFEU) to adopt environmental legislation.

[18] Title XX of the TFEU on the environment policy authorizes the legislature to take action within a context delineated by objectives, principles, and criteria.

[19] JAN H. JANS & HANS H.B. VEDDER, EUROPEAN ENVIRONMENTAL LAW 10 (4th ed., 2012).

[20] At Lisbon, the Treaty of Rome was renamed as the Treaty on the Functioning of the EU (TFEU).

[21] *See* also the 6th recital of the preamble of the TEU.

The third paragraph of Article 3 of the TEU reiterates the commitment to sustainable development and to achieve a high level of environmental protection. However, this obligation is framed differently:

> [t]he Union … shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

That definition does not refer anymore exclusively to the development of economic activities. As discussed below, it encapsulates much clearly the three pillars of sustainable development.[22] However, sustainable development, and hence the objective of environmental protection, cannot be dissociated from the internal market. Given that the third paragraph places these objectives on an equal footing, they must be analysed more in terms of reconciliation than of opposition.[23]

Moreover, pursuant to paragraph 5 of Article 3 as well as Article 21(2)(d) of the TEU, sustainable development is one of the corner stone of the EU external policy.[24] This provision reads as follows:

> [t]he 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.

Again, the three pillars of sustainable development are set forth. The obligation to take into consideration sustainable development in the EU international relations is of utmost importance. As global interdependence through international trade expands, the EU consumption patterns impinge through its ecological footprint upon other countries' environment. Accordingly, the EU has an obligation to look outside its borders. It also has the obligation to promote sustainable development at the global level given the fact that many developing countries are still suspicious that environmental requirements shall undermine their economic development.

In addition, sustainable development is also encapsulated in both Article 11 of the TFEU and Article 37 of the EUCFR, without however being defined. Under these two provisions, sustainable development is set out as the objective the environmental policy must pursue.

Article 11 of the TFEU provides that: "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and

[22] However, new economic treaties are not enshrining sustainability requirements. For instance, Article 9 of the inter-governmental treaty adopted on 1 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union refers to "economic growth through enhanced convergence and competitiveness".

[23] NICOLAS DE SADELEER, EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET (2014).

[24] GARCIA MARIN-DURAN & ELISA MORGERA, ENVIRONMENTAL INTEGRATION IN THE EU'S EXTERNAL RELATIONS (2012).

activities, in particular with a view to promoting sustainable development”. By the same token, in virtue of Article 37 of the Charter “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”. A minor difference must be stressed: the Charter mentions “policies” and not “activities”.

What is more, sustainable development goes hand in hand with a number of other key provisions that are encapsulated in the TFEU, such as the principle of a high level of environmental protection, integration clauses, policy principles, and other fundamental rights enshrined in the EUCFR.[25] That said, it must be stressed that the European Convention on Human Rights (ECHR) does not enshrine any environmental rights nor the objective of sustainable development.[26] These changes have made it possible to take stock of the path followed since the adoption of the 1957 Treaty of Rome. It follows that environmental issues are not isolated within the traditional boundaries of an officialised policy. These issues are called on to interact with social and economic objectives within the framework of sustainable development.

4 Legal status of sustainable development in treaty law

Six issues arise for comment here.

4.1 The impact of the three pillar structure on the hierarchy of values

In contrast to the dissipation and lack of precision in the references to sustainable development in the previous treaties, this third paragraph of Article 3 of the TEU expresses the tripartite nature of the concept in much clearer terms: a “balanced economic growth and price stability”, a “highly competitive social market economy, aiming at full employment and social progress”, a “high level of protection and improvement of the quality of the environment”. Account must be made of the fact that these objectives are placed on equal footing. Given the economic nature of the European integration project, this is of utmost importance.

So far, one of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualized in terms of economic integration. At the core of economic integration lies the internal market that is based on the free movement provisions promoting access to the different national markets and on the absence of distortions of competition. The internal market and environmental policy have traditionally focused on apposite, albeit entangled, objectives: deregulation of national measures hindering free trade, in the case of internal market, and protection of vulnerable resources through regulation, in the case of environmental policy. In other words, whereas the internal market is

[25] SADELEER, *supra* note, at 3.

[26] Nicolas de Sadeleer, *Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases*, 81 NORDIC J. INT’L L. 39 (2012).

concerned with liberalizing trade flows, environmental policy encourages the adoption of regulatory measures (regulating through authorization and restriction schemes the placing on the market of hazardous products, bans, restrictions placed on the use of hazardous products, inspections, controls, penalties, etc.) that are likely to impact on free trade. In addition, the internal market favours economic integration through total harmonization (setting up a common playing field) whilst environmental law allows for differentiation.

These differences play themselves out in concrete disputes ranging from the use of safeguard clauses in order to ban GMOs to restrictions placed on additives in fuels.[27] In these clashes, internal market has an advantage based on its seniority. Freedoms of trading in services and goods are ingrained in the EU DNA. By way of illustration, the principle of free movement of goods flowing from Articles 34 and 35 of the TFEU[28] has been proclaimed by the CJEU as a fundamental principle of EU law. It follows that the environmental and health exceptions to this fundamental principle must be interpreted restrictively. What is more, traders can invoke the economic rights enshrined in the EU treaties before their domestic courts whereas the victims of pollutions are deprived of a right to environmental protection stemming from the EU treaties.[29] The relationship is thus asymmetrical. In addition, internal market law empowers the European Commission to control the Member States wishing to adopt specific or more stringent environmental standards (prior notification and authorisation procedures under Article 114 of the TFEU). By contrast, national authorities are known to be reluctant to implement genuine environmental EU instruments. Here it is necessary to face hard facts: the main weakness of EU rules is, as recognized by the Commission, their lack of efficacy, with directives appearing as paper tigers due to the hesitancy, criminal activities, or even bad faith, on the part of certain national authorities and the difficulties encountered by the European Commission in pursuing infringements before the Court of Justice.

To conclude, the relationship between the internal market law backed by a powerful business constituency and the environmental policy supported by a diffused public is somewhat asymmetrical. Needless to say, in placing upon equal footing sustainable development with the internal market, the master of the treaties have been reshaping somewhat differently the traditional hierarchy of values that has been so far detrimental to environmental interests.

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[27] For a comprehensive understanding of the EU case law on environment and trade disputes, *see* Nicolas de Sadleer, *Trade v. Environment in EU Law*, (2012), http://www.tradevenvironment.eu/documents-case-law/ (last visited Feb 20, 2015).

[28] Articles 34 and 35 TFEU prohibit Member States to adopt quantitative restrictions or measures having an equivalent effect that are likely to impair the import or export of goods within the internal market. Concerning all "goods taken across a frontier for the purposes of commercial transactions […], whatever the nature of those transactions". *See* Case C-324/93, Evans medical, [1995] E.C.R. I-563, ¶ 20 (the concept of goods is interpreted broadly and can thus cover wildlife, chemicals, hazardous substances, etc).

[29] However, rights are likely to stem from secondary law obligations, for instance regarding air pollution. *See* Case C-237/07, Dieter Janecek v. Freistaat Bayern, [2008] E.C.R. I-6221; Case C-404/13 Client Earth v. The Secretary of State for the Environment, Food and Rural Affairs [2014] E.C.R. I-805, ¶ 22.

Last, insufficient attention has been given to the fact that Article 3(3) as well as the other provisions proclaiming sustainability are silent as regard the equitable allocation of resources both within the present generation[30] and between the present and future generations as well as other duties such as the right to development.

4.2 A status dogged by controversies but far from being meaningless

The fact that sustainable development is encapsulated in three different provisions situated at the apex of the EU legal order—primary law—does not mean that its legal status is not dogged by controversies.[31] For instance, given that sustainable development has been coined both as an objective and a principle, there was obviously no clear concept of what sustainable development meant from a legal point of view when these various provisions were drafted. By definition, the term "principle" implies a higher normative content than "objective".[32] However, we doubt that the concept of sustainable development is akin to general principles of EU law, such as proportionality and subsidiarity, that enable the EU courts to review the powers of the institutions. However, it may be akin to the concept of constitutional objective found under French and Belgian constitutional law.[33]

It goes without saying that this concept is characterized by a strong degree of indeterminacy.[34] Though few institutions and Member States will contend with the proposition that development should be sustainable, they might disagree on how to flesh out this proposition in individual cases. Given the significance of the social, economic and environmental value judgments involved in deciding on what is sustainable, EU institutions are indeed endowed with broad discretion in giving effect to Article 3(3) of the TEU, Article 11 of the TFEU and Article 37 of the Charter. That being said, generality is inevitable because sustainability must provide guidance and inspiration to policy-makers in a wide variety of contexts ranging from agriculture to external trade.[35] Accordingly, the concept must be fleshed out into more precise political programs and regulatory schemes.

Moreover, the concept is far from being meaningless. Whilst the third paragraph of Article 3 of the TEU is not imposing clear-cut obligations, it nevertheless spells out a

[30] With respect to the implementation of the Nagoya Protocol that provides for a fair and equitable sharing of benefits arising from the use of genetic resources, the EU institutions have adopted Regulation (EU) No 511/2014 of the European Parliament and the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.

[31] PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 214 (3rd ed., 2009).

[32] Daniel Barnstow Magraw & Lisa D. Hawke, *Sustainable Development*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 623 (Daniel Bodansy ed., 2008).

[33] 1994 CONST., art. 7bis (Belg.); Charter for the Environment, art.1 (France).

[34] Magraw & Hawke, *supra* note 32, at 621.

[35] *Id.*

political imperative: the "high level of protection and improvement of the quality of the environment" now has the same status as the objective, for example, of "economic growth and price stability" (economic pillar) as well as with that of "full employment and social progress" (social pillar of sustainable development). Given that these three components must be seen as interdependent and mutually reinforcing, the main objective of promoting economic growth and social progress must be viewed from a balanced and sustainable perspective. Since no hierarchy is provided for between these different pillars, they constitute an inseparable whole and cannot therefore be interpreted in isolation from one another. Accordingly, economic growth can't be achieved without the promotion of the two other components and environmental protection should constitute an integral part of development. By the same token both environmental and labour protection requirements are likely to reinforce each other. By way of illustration, energy from biofuels shall be taken into account only if they fulfil different sustainability criteria.[36]

This interpretation appears to be consistent with settled case law. Account must be taken of the fact that the Court of Justice of the EU (CJEU) has already held that the Union has not only an economic but also a social purpose.[37] Accordingly, the rights under the provisions of the treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy.[38]

4.3 Fleshing out sustainable development

The treaty provisions don't determine the substantive and procedural components of sustainable development. Nonetheless, it could be argued that Articles 11 and 191(1) of the TFEU already encapsulate some elements, such as the duty to integrate environmental concerns into other policies and the "rational" utilizations of natural resources.[39] In the next section, we shall discuss the obligation to integrate environmental concerns into others policies with the aim of enhancing sustainable development.

4.4 Broadening the scope of the environmental policy

It should be stressed that sustainable development does not appear in title XX of the TFUE on the environmental policy but in different provisions of the TEU, in Article 11 of the TFUE and in the EUCHR. By introducing a social and economic dimension, sustainable development thus broadly moves beyond traditional

[36] Both for third countries and Member States that are a significant source of raw material for biofuel consumed within the EU, the Commission is called on to issue a report addressing the respect of land use rights and the implementation of various ILO conventions. See Council Directive 2009/30/EC, art. 7(b) (7), [2009] O.J. (L. 140/88).

[37] Case C-43/75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, [1976] E.C.R. I-455, ¶ 12.

[38] *See* Case C-438/05 Viking Line, [2007] E.C.R. I-10779, ¶ 79; Case C-341/05, Laval un Partneri Ltd v Svenska [2007] E.C.R. I-11767, ¶ 105; Case C-319/07, 3F v. Commission, [2009] E.C.R. I-000, ¶ 58.

[39] See the discussion below in section 6.

environmental issues.[40] What is more, whereas environmental protection involves a defensive stance against the depletion of natural resources and pollution, sustainability entails a proactive approach in requiring the integration of environmental requirements into economic growth.

4.5 Is sustainable development environmentally friendly?

The fifth issue to be addressed is whether sustainable development does necessarily enhance environmental protection. As a matter of fact, the main attraction of this concept is that "both sides in any legal argument will be able to rely on it".[41] The interpretation given by AG Léger to sustainable development in its opinion in *First Corporate Shipping,* a case on development taking place in protected birds habitats, is testament to a conciliatory approach. Indeed, the AG stressed that

> the concept "sustainable development" does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community… On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled.[42]

In addition, the manner in which Article 3(3) of the TEU has been drafted does not reflect the postulate that each pillar has to be oriented towards the needs of future generations. As a result, these needs don't necessarily trump the right to economic development. It follows that environmental concerns risk being laid aside in the name of reconciliation stemming from the three-pillar structure.[43] By way of example, in case of conflict between growth and environmental protection, compromise must be found and necessary environmental measures could be discarded. That being said, our view is that sustainable development should not water down the basic environmental requirements. In effect, pursuant to Article 3(3) of the EU and Article 191(2) of the TFEU, the tasks of the EU include the requirement to attain a "high level of protection and improvement of the quality of

[40] The somewhat confusing dividing line between sustainable development and traditional economic development is likely to impinge upon the choice of legal bases. By way of illustration, the Council granted a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community. In a case regarding the legal base of that Council decision, the Court of Justice held that the act at issue fostered the sustainable economic and social development of developing countries, notwithstanding the fact that other components of that act concerned economic, financial and technical cooperation with third countries other than developing countries. As a result, the Decision fell under Article 179 EC (Article 208, TFEU) as well as under Article 181a EC (Article 212 TFEU). *See* Case C-155/07, Parliament v. Council, [2008] E.C.R. I-8103, ¶ 67.

[41] Under Article 12 of the Kyoto Protocol, Clean Development Mechanisms (CDM) project have to fulfil a sustainability test set out by the receiving State. In spite of their significant environmental impacts, large hydroelectric projects in China and India made up more than a quarter of all CDMs and accordingly were deemed to be sustainable. *See*, ALEXANDER VASSA, THE EFFECTIVENESS OF THE CLEAN DEVELOPMENT MECHANISM: A LAW AND ECONOMIC ANALYSIS 142 (2012).

[42] Case C-371/98, First Corporate Shipping, [2000] E.C.R. I-9235, ¶ 54 (opinion of AG Léger).

[43] Gerd Winter, *A Fundament and Two Pillars, in* SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 28 (Hans Christian Bugge & Chirstina Voigt eds., 2008).

the environment". In Section 7, we shall indeed provide a detailed analysis of the legal status of the obligation to achieve a high level of environmental protection.

5 Integrating environmental concerns into other policies

Environmental protection does not take place in a vacuum but is very much related to other subject-areas, such as the internal market, transport, energy, agriculture and fisheries, health protection, etc. Accordingly, environmental concerns overlap constantly with other policies. On the one hand, the consumer, the health and the environmental policies share a range of common features with environmental policy, which have been gathering momentum in EU treaty law, up to the point that one may speak of a cross-fertilisation between them. On the other hand, environment requirements are also liable to counter the goals of different EU policies fostering economic integration, such as the internal market, the industrial, the agricultural policy, etc.

Roughly speaking, environmental protection has more often given way to socio-economic considerations. For instance, in cases involving the overlap of administrative regulations, the solutions adopted by the EU and national courts generally lean in favour of economic development rather than the conservation of natural resources. Nature has thus paid a heavy tribute to the absence of any incorporation of environmental requirements into other policies.

It follows that curbing unsustainable trends thus requires the integration of environmental requirements across policies such as energy, agriculture and fisheries, forestry, industry, transport, regional development, land use, and land planning. Needless to say, the need to integrate social, economic and environmental policies is a logical outgrowth of the three aspects of sustainable development.[44]

It was thus indispensable, alongside the recognition of sustainable development, to make provision for the decompartmentalization of different policies in line with environmental considerations. In that connection, the EU recognised relatively early the need to integrate environmental requirements in all policies. Against this background, a number of treaty provisions require the integration of environmental concerns.

As discussed above, Article 3(3) and Article 21 of the TEU promote sustainable development, a concept calling for reconciliation of the economic, social and environmental objectives pursued by the EU. In addition, in virtue of Article 13 and 21(3) of the TUE as well as Article 7 of the TFEU, the Union ensures consistency between all its policies and activities. In particular, Article 11 of the TFEU requires that:

> [e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. Moreover, Article 11 of the TFEU must be read in combination with Article 37 of the EUCHR that in

[44] Magraw & Hawke, *supra* note 32, at 620.

much the same vein requires the integration of 'a high level of environmental protection and the improvement of the quality of the environment….

Besides, Article 194(2) of the TFEU encapsulates another environmental integration clause for the Union's energy policy. However, the other EU policies, no regardless of their impact on the environment, do not refer in any way to environmental objectives or to sustainable development.

It goes without saying that these TEU, TFEU and EUCHR provisions foster a more holistic approach. That being said, nothing is said as to the ways in which the EU should integrate environmental protection requirements into the other policies. It seems difficult to make this requirement operational. Does it follow from these treaty obligations that the level of protection integrated into the agricultural or the transport policy must be calculated at the highest conceivable level? Or should lawmakers make do with an intermediate level of protection? The uncertainty within the scope of this obligation does not however mean that the EU institutions enjoy absolute discretion in this regard. It is beyond question that a non-existent or low level of protection would violate this treaty law obligation.

Given that environmental requirements have to be fleshed out into a number of other policies, a number of legal bases are accordingly likely to be considered for adopting environmental measures.[45] The obligation contained in Article 11 of the TFEU to take environmental considerations into account within other policies exacerbates the proliferation of rules of any kind which are more or less directly related to environmental protection. However, this debate is not neutral since the choice of legal basis is not simply a question of form but, instead, a question of substance, given that it has a considerable impact on the degree of harmonization which can be achieved; as a result, residual competences are deeply affected.

6 Secondary law

At the outset, it must be stressed that secondary legislation is made up of all binding and non-biding acts which enable the Union to exercise its powers. Three main institutions are involved in the adoption of EU legislation: the European Parliament, which represents the EU's citizens and is directly elected by them; the Council of Ministers, which represents the governments of the individual member countries. The Presidency of the Council is shared by the member states on a rotating basis; the European Commission, which represents the interests of the Union as a whole. In particular, secondary law comprises of the legal instruments listed in Article 288 of the TFEU: the binding regulations, directives, decisions, and the non-binding opinions and recommendations. It also comprises of soft law instruments not listed in Article of the TFEU, i.e. "atypical" acts such as communications and recommendations, and white and green papers.

[45] Nicoals de Sadeleer, *Environmental Governance and the Legal Bases Conundrum*, 31 Y.E.L. 1-29 (2012).

Thanks to a sheer number of directives and regulations,[46] environmental law is not without teeth. Of importance is to emphasize the different features of these two legal instruments. Regulations have general application, are binding in their entirety and directly applicable in all Member States. They bind the institutions, the Member States, as well as the individuals to whom they are addressed.

In contrast, the directive is deemed to be a very flexible tool mainly used to harmonise national legislations. It obliges the Member States to achieve a certain result but leaves them free to choose how to do so. While a regulation is applicable in Member States' internal law immediately after its entry into force, a directive must first be transposed by the Member States. Thus, a directive does not contain the means of application; it only imposes on the Member States the requirement of a result. Accordingly, national authorities are free to choose the form and the means for applying the directive.

Finally, we have to give careful consideration to the EU case law on sustainable development. As a result of the tangled web of contradictory rules aiming at protecting the environment, which is riddled with ambiguities, the EU courts (the Court of Justice and the General Court) are not only the guardian of the temple of law, but they have also turned into the architect. Indeed, the protection of the environment today plays a key role within EU litigation.

6.1 Soft law instruments

Since 1992, sustainable development issues have become prominent on the policy agenda. For instance, the Europe 2020 Strategy[47] is geared towards a green vision of the economy. With respect to climate and resource challenges, the strategy requires "drastic action". Accordingly, a flurry of communications are dealing with strategies on sustainable development.[48]

The 6th Environmental Action Programme in 2002 identified natural resources and waste as one of four key priority areas for the next decade. With the aim of fleshing out the 6th EAP objectives, in 2005, the Thematic Strategy on the Sustainable Use of Natural Resources (COM/2005/0670 final) was adopted by the Commission alongside a Thematic Strategy on Waste Prevention and Recycling, to take forward these aims. These thematic strategies form the cornerstone of EU natural resources policy to date. More recently, the EU's economic strategy, "Europe 2020", focuses on resource efficiency ("Resource Efficient Europe"). However, this strategy falls short of explaining how efficiency is to be understood or how it can be achieved.

Given that a number of major environmental challenges still remain, and "serious repercussions will ensue if nothing is done to address them", the European Parliament and of the Council adopted in 2014, the 7th Environmental Action

[46] SADELEER, *supra* note 23, at 175-224.

[47] *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final (Mar. 3, 2010).

[48] *Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development,* COM (2009) 0400 final (Jul. 24, 2009).

Programme[49] entitled "Living well, within the limits of our planet". The following merit special note:

(a) to protect, conserve and enhance the Union's natural capital;
(b) to turn the Union into a resource-efficient, green and competitive low-carbon economy;
(c) to enhance the sustainability of the Union's cities

However, despite much debate and a flurry of political initiatives, the EU still lacks a clear political and legal approach regarding the use of natural resource.

6.2 Binding instruments

It should be stressed at the outset that EU environmental legislation is stretching over a broad range of issues such as pollution and climate change, waste and hazardous substances management, the protection of wildlife as well as assessment and participation procedures, and the recognition of procedural rights (information, participation and access to justice).

Although the establishment of the concept amounts to an important step forward in the taking of ecological imperatives into account, it still needs to be endowed with a content that measures up to its ambitions and which can actually be applied within the various EU policies likely to contribute to the deterioration of the environment. As far as secondary legislation is concerned, sustainable development and its offshoot, the integration clause, tend to favour the establishment of rules intended to protect the environment beyond the confines of environmental law in more peripheral domains such as public procurements,[50] research, agriculture,[51] competition,[52] energy, transports as well as internal market.[53] So far, the approach endorsed by the EU institutions is somewhat patchy.

To make matters worse, since it is not defined under treaty law, few secondary laws define this concept. For instance, with regard to the conservation of tropical forests, sustainable development is defined as "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".[54]

Moreover, even where the concept is proclaimed, its content has hardly been fleshed out. Though the Water Framework Directive 2000/60/EC stresses that water management must promote "… sustainable water use based on a long-term

[49] Decision No. 1386/2013/EU, 2013 O.J. (L 354/171).

[50] SUE ARROWSMITH & PETER KUNZLIK, SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW (2009).

[51] BRIAN JACK, AGRICULTURE AND EU ENVIRONMENTAL LAW (2009).

[52] Suzanne Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special,* 6 EUR. L.J. 781 (2010); SUZZANNE KINGSTON, GREENING EU COMPETITION LAW AND POLICY (2012).

[53] SADELEER, *supra* note 23, at 175.

[54] *See* Commission Regulation 2494/2000, [2000] O.J. (L 288/6), art. 2(4). Needless to say that such a definition is extremely broad.

protection of available water resources”,[55] it does not impose on the Member States any specific method of defining what is sustainability. With respect to waste management, when applying extended producer responsibility, Member States shall take into account the three pillars of sustainable development, e.g. “the overall environmental, human health and social impacts” as well as “the need to ensure the proper functioning of the internal market”.[56]

What is more, the manner in which some of environmental provisions were drafted or are implemented are testament to the ambiguous nature of sustainable development. For instance, Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources provides a striking evidence of this ambiguity. On one hand, the directive establishes mandatory national targets consistent with a 20 % share of energy from renewable sources and a 10 % share of energy from renewable sources in transport in EU energy consumption by 2020. On the other hand, it sets out sustainability criteria ensuring that biofuels and bioliquids can qualify for the incentives only when it can be guaranteed that they do not come from land with high biodiversity value or with high carbon stock.[57] The question is whether these criteria will be sufficient to ward off the negative social and environmental impacts of biofuels production. In effect, the increased production of biofuels is likely to compound deforestation in developing countries and to increase intensive agriculture of biomass crops.

By the same token, the Common Fisheries Policy (CFP) also illustrates the inherent ambiguity of sustainable development. Pursuant to Article 2(1) of the Council Regulation (EC) 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources, the general objectives of the CFP consist of ensuring “…exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions” and that the environmental impact of fishing shall be limited.[58] The tri-dimensional aspect of sustainable development and the simultaneous character of the pursuit of those aspects are thus underscored. Though nobody would contend with the interdependency of these three pillars of sustainable development in the management of fisheries, disagreements about what they concretely require arise constantly. Needless to say, the fixing of total allowable catch proposed by the Commission on the basis of scientific data have generally been raised by the Council on the account that the different interests at sake had to be balanced in the context of sustainable development, among others safeguarding of jobs and food security.[59] At first glance, the Council’s argumentation seems compatible with the three-pillar structure of sustainable

[55] Council Directive 2000/60/EC, art. 1(b), 2000 O.J. (L327/1) (establishes a framework for Community action in the field of water policy.

[56] Council Directive 2008/98/EC, art. 8(3), 2008 O.J. (L 312).

[57] Council Directive 2009/28/EC, art.17, 2009 O.J. (L140/16).

[58] Council Directive 2002/45/EC, 2002 O.J. (L 358).

[59] *See*, NICOLAS DE SADELEER & C.-H. BORN, DROIT INTERNATIONAL ET DE L’UE DE LA BIODIVERSITÉ 684 (2004); Jill Wakefield, *Fisheries: A Failure of Values* 46 COMMON MKT. L. REV. 439, 440 (2009); Winter, *supra* note 43, at 28; Ludwig Krämer, *Sustainable Development in EC Law*, *in* SUSTAINABLE DEVELOPMENT IN INTERNATIONAL AND NATIONAL LAW 379-381 (Hans Christian Bugge & Chirstina Voigt eds., 2008).

development. Given that the conflicting interests must be weighed, biodiversity concerns are deemed to be merely one aspect of the problem. Admittedly, such a short-termed vision has been downgrading environmental concerns at the expense of an ecosystemic approach and a sustainable exploitation of fish stocks.[60] Indeed, reconciling the conservation of natural resources, the growth of fishing fleet, as well as the social welfare of fishermen and consumers is a tall order, that is likely to entail the spectacular collapse, as seen in a recent past, of fish stocks.

Another piece of evidence for this are the objectives of the Regional Fund, the Social Fund and the Cohesion Fund setting out that these funds "must be pursued in the framework of sustainable development…".[61] However, no indication is given as to how this should be achieved. For instance, the question arises as to what "sustainable tourism"[62] means as regard land planning, water and energy consumption, ecotourism, transport, coastal zonal management, and a flurry of other indicators.[63] That being said, the fund promotes sustainability in supporting projects related to energy or transport, as long as they clearly benefit the environment in terms of energy efficiency, use of renewable energy, developing rail transport, supporting intermodality, strengthening public transport, etc. To sum up, there has been no serious attempt to operationalize this popular piece of EU political jargon and to take measures with a view to reversing unsunstainable environmental trends.[64]

6.3 Case law

The protection of the environment today plays a key role within EU litigation. Evidence of this can be found in the significant number of landmark judgments dealing with environmental protection. So far, in contrast to other EU Treaty environmental provisions, the judicial control of compliance with sustainable development provisions has not yet taken place. The CJEU has not yet ruled on whether this new objective authorizes public authorities to impose policing measures liable to restrict the scope of economic rights or even of fundamental rights. It is fair to say that the CJEU hardly refers to sustainable development. The few cases handed down so far are not very instructive.

By way of illustration, according to the Court of Justice, preventing further accumulation of small arms and light weapons in Africa permits to promote the sustainable development of this region.[65]

[60] TILL MARKUS, EUROPEAN FISHERIES LAW. FROM PROMOTION TO MANAGEMENT (2009).

[61] Commission Regulation 1083/2006, Laying Down General Provisions on the European Regional Development Fund, The European Social Fund and the Cohesion Fund, 2006 O.J. (L 210/25). *See also* Commission Regulation 1080/2006, European Regional Fund, 2006 O.J. (L 210), art. 4, 5(2) (d), 6(2)(b)(d), 9 and 10; Commission Regulation 1081/2006, European Social Fund, 2006 O.J. (L 210), art. 3(1) (b) (c); Commission Regulation 1084/2006, European Cohesion Fund, 2006 O.J. (L 210), art. 2(1).

[62] European Regional Fund, *supra* note 61, art. 6(2) (b) & 10(1).

[63] Krämer, *supra* note 59, at 392; Winter, *supra* note 43, at 28.

[64] Krämer, *supra* note 59, at 392.

[65] Case C-91/05, Commission v. Council, [2008] E.C.R. I-3651, ¶ 98.

The CJEU case law on nature protection is a case in point. Biodiversity is passing through a period of major crisis. Most natural or semi-natural, continental and costal ecosystems are now subject to significant modifications as a result of human activity (land use changes, intensification of agriculture, land abandonment, urban sprawl, climate change, etc.). In order to reverse these negative trends, in 1979 the EU enacted the Birds Protection Directive,[66] and in 1992 a sister directive, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive"). Pursuant to these two directives, Member States are called on to designate and to protect the most appropriate natural sites as Special Protection Areas (SPAs) and Special Areas of Conservation (SACs). Both SPAs and SACs are the backbone of the so called Natura 2000 network of protected sites. Being the biggest ecological network in the world, the Natura 2000 network has become the cornerstone of EU nature conservation policy. Today, nearly 22.000 sites are designated under the Habitats Directive covering some 13.3 % of EU territory. In total, the Natura 2000 network contains over 25.000 sites (Birds and Habitats Directives combined) located on a diverse range of land use types—agriculture, forests, wilderness areas and covering 17 % of EU territory. Accordingly, this network has been hailed as the key instrument that aims to effectively prevent Noah's Ark from sinking.

Among the different provisions of the Habitats Directive, Article 6—that applies to both SPAs and SACs—has been given rise to a steady flow of cases. It requires Member States to protect designated habitats, and provides for specific procedural requirements whenever projects or plans are likely to threaten those protected habitats. Accordingly, this provision has not only halted ill-conceived development projects but has also encouraged developers to find ways to reduce damaging effects of their projects.

The interpretation given by Advocate General Léger to sustainable development in his opinion in *First Corporate Shipping*, a case on development taking place in protected birds habitats, is testament to a conciliatory approach. Indeed, the Advocate General stressed that:

> the concept "sustainable development" does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community… On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled.[67]

Against this backdrop, some scholars have been taking the view that nature conservation law facilitates sustainable development on the ground that Article 6 requires "merely a dogmatic approach focusing on ecological criteria".[68]

[66] Council Directive 79/409/EEC, 1979 O.J. (L 103) replaced by Council Directive 2009/147/EC, 2010 O.J. (L 20/7).

[67] Case C-371/98, First Corporate Shipping [2000] E.C.R. I-9235, ¶ 54.

[68] F.H. Kistenkas, *Rethinking European Nature Conservation Legislation: Towards Sustainable Development,* 10 J.Eur.Env.Plan.L. 75 (2013).

Recently, the impact of sustainability on the procedural requirements set out under Article 6 has been gathering momentum. In *Nomarchiaki Aftodioikisi Aitoloakarnanias*, the Greek Council of State sought to ascertain whether the Habitats Directive, interpreted in the light of the objective of sustainable development, could allow the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem, irrespective of the negative impacts on the integrity of sites that are part of the Natura 2000 network. The CJEU took the view that the Habitats Directive, and in particular its Article 6(3)(4) interpreted in the light of the objective of sustainable development, permits such project.[69] Nonetheless, the CJEU stressed that such a project can be authorized inasmuch as the conditions for granting the derogation were satisfied—conditions which have so far been interpreted rather narrowly.[70]

Our view is that sustainable development cannot water down basic environmental requirements. As noted previously, the assessment and decision-making procedures are framing the balance between the competing interests. Moreover, pursuant to Article 3(3) of the TEU and Article 191(2) of the TFEU, the manners in which these procedures apply include the requirement to attain a "high level of protection and improvement of the quality of the environment".

7 Conclusion

Today, thanks to the changes brought to the original treaties by the 2009 Treaty of Lisbon, a broad range of objectives and obligations—sustainable development, high level of protection, integration clauses, policy principles, and fundamental rights—are enshrined in the TEU, the TFEU, the Charter of Fundamental Rights and thus occupy a high place in the hierarchy of EU norms. In particular, sustainable development as an essential objective of the EU has been gathering momentum. Such a change is not neutral. Combined with the requirements of integration, a high level of protection, and the different principles of environmental law (prevention, precaution, polluter-pays, etc.),[71] sustainable development had become a normative concept. Accordingly, it is more than just a simple policy guideline; it is a binding constitutional objective. Its prominent position within the legal order must be hailed on the account that the EU is better placed to deal with a number of transnational issues than its 28 Member States.

Although sustainable development does not give absolute priority to environmental protection, given that it favours reconciliation over conflict, it nonetheless reckons upon a high level of protection. In other words, by obliging both the EU institutions and the 28 Member States to display a particular sensitivity to environmental protection, sustainable development limits their room for manoeuvre. Moreover, the scope of the obligations under secondary law and of national

[69] Case C-43/10, Nomarchiaki Aftodioikisi Aitoloakarnanias [2012] O.J. C-355/2, ¶ 134–9.

[70] Case C-538/09, Commission v Belgium [2011] O.J. C211/5, ¶ 53.

[71] NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES (2005).

provisions transposing this secondary law must be interpreted with reference to sustainable development laid down in the EU Treaties.

However, one cannot discuss the scope of sustainable development in EU law without facing hard facts. So far, economic integration in the EU has meant spiralling consumption; the greater affluence of EU consumers and the growing demand for goods and services have been aggravating the pressures on ecosystems. The internal market succeeded at the expense of the environment. Albeit the progresses in integrating environmental concerns into other policies, the EU did succeed hitherto to get rid of unsustainable trends (urban sprawl, overharvesting of fish stocks, intensification of agriculture, greater dependency on private transport, etc.). On the contrary, threats have grown both within Europe and globally. Whether the EU economy would become more sustainable thanks to innovation, new technologies, more efficient production and resource use, the substitution of fossil fuels by renewables remains to be seen.

So far, the EU institutions have not paid more than lip service to the need to revert the numerous unsustainable trends that undermine the quality of the environment.[72] From a policy perspective, economic integration is ingrained in the EU DNA. Against this background, EU internal market is by its very nature not particularly susceptible to strong environmental state regulation, which generally calls for the implementation of policies with the goal of protecting vulnerable environmental media such as aquatic ecosystems undergoing radical changes due to eutrophication, or species threatened with extinction. What is more, the new Commission is not ready to adopt any concrete strategy with a view to fleshing out into ambitious political programs and regulatory schemes the objective of sustainable development. In fact, the new political agenda aims exclusively at reinvigorating growth and creating jobs rather than at operationalizing its objective of sustainable development. To make matters worse, in December 2014, as part of its Better Regulation policy, the European Commission announced its intention to curtail significantly a number of important environment related legislative proposals already in the pipeline. The Commission's decision to withdraw several key environmental proposals regarding the circular economy and air pollution is based on the assumption that the two legislative packages would be unrealistic and would be too burdensome for the industry.[73] Needless to say, the costs and consequences

[72] LUDWIG KRÄMER, EUROPEAN ENVIRONMENTAL LAW 10 (6th ed., 2007).

[73] One of the legislative initiatives that the Commission wishes to delay concerns the circular economy, the aim of which being to turn waste into valuable secondary raw materials. In a nutshell, the circular economy proposal is designed to increase recycling thresholds for a broad range of wastes. Expected benefits include the decoupling EU's faltering economic growth from its dependency on natural resources imported from third countries, boosting growth and jobs creation, and improving the state of the environment. The existing proposal is to be withdrawn because it is claimed there is "no foreseeable agreement" between member states and the European Parliament, and that the new Commission could do better. The Commission wants to replace it with new proposals next year. The second proposal on the danger list concerns national reduction commitments for reducing air pollutants, including Nox and fine particulates, and directly relates to new international commitments adopted under the 2012 Goteborg Protocol agreed under the framework of the 1979 Geneva Convention on Long-Range Air Pollution, despite the fact that it has already been negotiated for three years. The Commission now wants to block this proposal in order to take the opportunity to merge it better with long expected legislative proposals on the 2030 climate and energy package.

of inaction are colossal, in economic, cultural, human, and ecological terms.[74] Sad to say, sustainability does not appear to be the overarching paradigm of the numerous EU policies.

However, environmental performance is an incentive to performance rather than an obstacle to economic progress. Sustainable economic growth goes hand in hand with the conservation of natural resources to the benefit of future generations, the improvement of living standards, the protection of workers against industrial nuisances, consumer awareness of their ecological impact, as well as the conservation of biodiversity. From this perspective, environmental protection ends up providing an incentive for more responsible economic growth, thereby averting the risk of apocalypse announced by significant fringes of the scientific community.

[74] OECD, ENVIRONMENTAL OUTLOOK TO 2050: THE CONSEQUENCES OF INACTION (2012).