

The Legal Significance of Sustainable Development in EC Law

Implications From a Perspective of Article 6 EC

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Table of contents

1. Introduction	4
1.1 Background	4
1.2 Purpose, Research Questions and Delimitations	5
1.3 Method and Outline	7
1.3.1 Some Remarks About Denominating Sustainable Development	7
1.3.2 Sources, Structure of Method and Outline	8
2. History of the Sustainable Development Concept	9
2.1 A Creation of International Law	9
2.2 The Evolution of the Sustainable Development Concept in the EC/EU	16
2.3 Summary	17
3. Article 6 EC: The Integration Principle	18
3.1 Introduction	18
3.2 To Whom is the Article Addressed?	20
3.2.1 Summary	22
3.3 What Area of Activity Does Article 6 Apply To?	23
3.3.1 Summary	25
3.4 When is Article 6 Employed?	26
3.4.1 Summary	28
4. Article 6 and the Link to Sustainable Development	28
4.1 Introduction	28
4.2 Sustainable Development in International Law Revisited	29
4.2.1 Summary	32
4.3 Article 6 EC and its Ultimate Objective or Reason	33
4.3.1 Summary	37
4.4 Some Final Remarks and two Alternative Views	39
4.4.1 Summary	42

5.	Sustainable Development and its Transition From International to EC/EU Law - A Change in Content?	43
5.1	Introduction	43
5.2	The Three-pillar Structure of Sustainable Development	43
5.3	Synergies Between the Lisbon Strategy and Sustainable Development	46
5.4	Summary	47
6.	Conclusions	48
6.1	The First Research Question	48
6.1.1	Recapitulation	48
6.1.2	On the Chosen Facets of Normativity	49
6.2	The Second Research Question	52
6.2.1	Recapitulation	52
6.2.2	Sustainable Development in a European Dress	52
6.3	Some Additional Remarks	54
	Table of Abbreviations	57
	Bibliography	58

1. Introduction

1.1 Background

In June 2006 the Council of the European Union agreed on the review of the EU sustainable development strategy (EU SDS).¹ As a continuation to several other official documents,² this renewed strategy voices a commitment to sustainable development that includes a diverse list of safeguarded interests. According to the text, sustainable development is not only a question of assuring a stable future for our planet's capacity to support life in an ecological sense. Sustainability is also to be attained in the spheres of democracy, solidarity, the rule of law, gender equality and at the same time it is to promote a dynamic economy.³

Since the late 1980's sustainable development has been explicitly referred to in European Community (EC) policy documents, although it existed before as a phenomenon in environmental debate.⁴ The 1997 Treaty of Amsterdam brought about changes that meant multiple inclusions of it in treaty text. However, none of these instances contain a definition of sustainable development.⁵

Anyone who looks deeper into the concept of sustainable development is soon to find a labyrinthine complex of ideas, expressions and opinions.⁶ On the one hand, the concept is embraced by many as being a useful bridge to facilitate public debate. On the other hand, its definition and actual value remains unclear. Given this inherent vagueness and the differing views of its meaning, curiosity may soon give rise to various questions. What is the legal significance of the concept? Is it to be considered a general principle of Community law? And can it be used as an instrument in adjudication and legal reasoning?

¹ See European Council Doc 10117/06 of 9 June 2006.

² See e.g. COM(2001) 264 final, COM(2005) 37 final, COM(2005) 218 final and COM(2005) 658 final.

³ See European Council Doc 10117/06 of 9 June 2006, p. 2.

⁴ See chapter 2.

⁵ See amendments in the Treaty of Amsterdam (ToA) 1997 that included sustainable development in the Preamble, Article 2 EU Treaty (TEU), Article 2 and 6 EC.

⁶ I consistently refer to 'sustainable development' as a *concept*. See this chapter section 1.3.1.

1.2 Purpose, Research Questions and Delimitations

After a brief background, the purpose of this essay has perhaps already been hinted. As mentioned above the concept of sustainable development is far from precise in definition or meaning. However, it is all the same frequently included in various legal sources that originate from both outside and within the boundaries of the EU.⁷

The broad purpose of this essay is to explore the significance of sustainable development as a concept of European Community law. Naturally, such a general purpose must be narrowed down to fit the boundaries of a master thesis. My aim is nevertheless to keep this broad formulation in mind as a connecting thought throughout this essay. When it comes to more specific research questions that will guide my analysis, I have chosen the following:

- *Does sustainable development have a normative significance for EC law?*
- *Has the concept of sustainable development changed in the transition between international law and the EC/EU legal order, in particular relating to its content?*

These questions deserve some further comments for the sake of clarity. First, I briefly want to explain some assumptions I have made in relation to ‘norms’.⁸ A contemporary conception in legal theory of a norm holds that a norm is legal when it is a part of a *legal system*. This legal system can also be described as a *normative system* which has *particular identifying features*.⁹ For the first question, the given normative or legal system for my research is with some exceptions solely the ‘normative system of EC law’.¹⁰ Put differently, my intention of posing the question is to explore what degree of normativity the concept of sustainable development possesses within European Community law. In my opinion this also implicitly includes defining sustainable development as for example a concept, long-term objective or perhaps even a general principle of Community law.

The second question should be seen as a follow-up to the first one. In attempting to answer the first question, some kind of categorisation or definition of the content of sustainable development is to be part of the end result. This content will then be compared in the second question to what the international conception of sustainable development encompasses.

⁷ See chapter 2 and chapter 4 sections 4.2-3.

⁸ See Berry Gray, C. (ed.) - *The Philosophy of Law: an encyclopedia*, 1999, Vol. II (K-Z), p. 596-598, for various examples of conceptions or approaches to norms.

⁹ See Berry Gray, C. (ed.) - *The Philosophy of Law: an encyclopedia*, 1999, Vol. II (K-Z), p. 597. These identifying features may be for example coerciveness or effectiveness of a normative system.

¹⁰ See my delimitations, where some exceptions from this scope are motivated.

Inevitably, mentioning international law brings me to my delimitations. To keep this study at more than a superficial level I have chosen to set some, although interesting, aspects aside. Therefore, I disregard aspects of sustainable development relating to the second and third pillar of the EU.¹¹ My aim is to focus on *EC law* in relation to sustainable development. Even with this focus, further delimitations have to be done. The concept of sustainable development at an EC/EU level is nowadays commonly considered to consist of three sub-divisions.¹² I will centre my attention to one part, which is the ecological/environmental one. Given this delimitation I have chosen to analyse sustainable development starting within the limits of Article 6 EC, which has an environmental protection purpose.¹³ The main reason for choosing this article is its explicit mentioning of sustainable development.¹⁴ But my choice has also been based on the assumption that it has a high degree of importance for the EC environmental policy and thus also for sustainable development.

For the second comparative research question delimitations will be necessary, as there are practically an unlimited amount of definitions of the content of sustainable development. I will therefore keep discussions within the frame of definitions and categorisation of sustainable development used in the first research question. However, an exception will be made in bringing forth the modern conception of a ‘three-pillar structure’ of sustainable development. This naturally fits better under the second research question, as it embraces more than just the ecological dimension.¹⁵

Admittedly, the discussed delimitations have some effects for the validity of my analysis. Thus my conclusions must be seen against the background of choosing to analyse only some features of sustainable development and disregarding others. Consequently, the completeness of a content definition of sustainable development built only on investigating environmental aspects can be questioned.

Finally, contrary to my stated delimitations, some areas outside these boundaries will occasionally be included. The motivation for this is unavoidable necessity. In order to answer research questions investigating the content of the sustainable development concept a historical and

¹¹ I.e. the common foreign and security policy and the cooperation in justice and home affairs.

¹² See chapter 5 section 5.2.

¹³ See Treaty of Nice 2001 (article unchanged since ToA). Unless otherwise indicated, all articles referred to below are European Community (EC) Articles. The denotation EC will only be used in connection to articles for clarifying purposes.

¹⁴ As already has been stated, sustainable development is also mentioned in the Preamble, Article 2 TEU and Article 2 EC since the Treaty of Amsterdam 1997. However, I found Article 6 EC to be the most interesting Article for deeper studies.

¹⁵ See chapter 5 section 5.2.

political walkthrough starting outside the EC/EU is essential, as the concept stems from legal sources of international law. Furthermore, Treaty amendments associated with Article 6 must include some comments on Article 174 as both of these articles can be said to have descended from former Article 130r.¹⁶ Lastly, it is impossible to make the comparative analysis in the second question without including aspects of international law.

1.3 Method and Outline

1.3.1 Some Remarks About Denominating Sustainable Development

A conscious choice made for this essay is to refer to sustainable development as a *concept*. This choice originates both from the unsure nature of sustainable development and the fact that there is no consensus on how to denominate it. Looking at some of the denominations used by different scholars, everything from concept to principle or meta-principle can be found.¹⁷ The overarching purpose of this essay is to explore the significance of sustainable development as a concept in European Community law. By choosing the denomination ‘concept’, my aim is to use a somewhat neutral expression in order not to categorize sustainable development already in the beginning of the essay. For instance, choosing to call sustainable development a ‘principle’ could imply that it already has the legal status of for example a principle of international law or a general principle of Community law.¹⁸ Therefore, my starting point in answering the first research question is to see sustainable development as something general which has perhaps gradually come to acquire a certain degree of normativity.

Apart from what has just been explained, observing the distinction concept/principle will have at least two other functions for this essay. Firstly, it hopefully helps to illustrate the slipperiness and inconsistent use of sustainable development in both international and EC/EU legal sources. As will

¹⁶ See chapter 3 section 3.1.

¹⁷ See for the denomination ‘concept’ e.g. Jans, J. H. - *European environmental law*, 2000, Krämer, L. - *EC environmental law*, 2000 and Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003. For ‘principle’ and ‘meta-principle’ see e.g. Sands, P. - *Principles of international environmental law*, 2003 and Lowe, V. - *Sustainable Development and Unsustainable Arguments in: International law and sustainable development: past achievements and future challenges*, 2001.

¹⁸ See Winter, G. - *The Legal Nature of Environmental Principles in International, EC and German Law in: Principles of European Environmental Law: Proceedings of the Avosetta Group of European Environmental Lawyers*, 2004, pp. 13-4 for a discussion about the definition of (environmental) principles. ‘A principle is undoubtedly a candidate for legal effect, if it is contained in a law or sublegal norm. This distinguishes principles from policies. Policies may also be mentioned in a law, but if so, they are not intended to be binding’. Thus the denomination ‘principle’ points to a direction of legal effect compared to for example ‘policy’. However, there are certainly other factors deciding if a denomination holds true. It is for instance also relevant to study how and when a ‘principle’ is employed and what content it is given in case law.

be shown later, the chosen denomination for sustainable development in for example European Commission documents can give some important guidance about the intended legal significance of the concept.¹⁹ Secondly, the discussions about sustainable development in these sources would probably look different if the International Court of Justice (ICJ) had referred to sustainable development as a ‘principle’ and not merely a ‘concept’ in the much discussed ‘Gabčíkovo-Nagymaros (Hungary/Slovakia)’ case.²⁰

1.3.2 Sources, Structure of Method and Outline

The main sources used for answering the research questions are official documents from the EU, such as treaty texts, environmental action programmes, sustainable development strategies, case-law, as well as articles and books by prominent scholars. My point of departure for answering my questions can probably best be described as a legally dogmatic one. For this essay it means that the first stepping-stone is chosen from law in force, to be more precise Article 6 EC in its current form.²¹ As will be explained further on,²² this article not only hosts the concept of sustainable development but is rather known for stipulating the ‘integration principle’ of the European Community. However, it is exactly this inclusion in Article 6 of both the principle of integration and the sustainable development concept, and how they coalesce that makes the article an interesting choice for deeper studies.

From a structural point of view, the actual method for investigating the normative significance of sustainable development in EC law is going to be guided by a set of questions and chosen viewpoints. As Article 6 will be the primary centre of attention I will focus on examining what this article can tell us about sustainable development. To this end I aim to keep my research within EC/EU legal sources that in some way relate to the purpose of Article 6. Some questions that will be answered are how sustainable development is expressed in these sources? And what content does the concept encompass?

¹⁹ I.e. The supposed intention of the EC/EU legislator derived from a literal interpretation of such a document.

²⁰ In my opinion, the importance of how the ICJ majority statement denominates sustainable development and what effect it could potentially have for (legal) sources discussing the concept should not be underestimated. The significance of denomination also appears to be underlined by the explicit distinction between concept/principle made in the separate opinion of Vice-President Weeramantry. See chapter 2 section 2.1.

²¹ See Treaty of Nice (unchanged since ToA) Article 6 EC. My personal conception of legal dogmatics includes choosing a point of departure in any of the following sources: legal acts (in force), case-law, pre-legal acts such as drafts or for example Commission proposals or legal doctrine relating to the subject.

²² See chapter 3.

I also intend to consider the following important facets of legal norms to decide what normative significance sustainable development has: the degree of binding force or prescriptive intensity, the universal or individual nature of the class of actions they discipline or the class of their addressees, and the function of sustainable development. Is it for example directly affecting human behaviour, duty-imposing or permissive?²³

In collecting an analytical base for these viewpoints, four more concrete questions associated with the nature of Article 6 are posed: To whom is the article addressed? What area of activity does it apply to? When is it employed? What is the ultimate objective or reason of the article?²⁴

The outline of this essay is as follows. The second chapter gives an introductory account of the development of the concept 'sustainable development' and comments on its evolution at an EC/EU level. The third chapter introduces the integration principle in EC law and analyses Article 6 with three questions. To whom is Article 6 addressed? What area of activity does it apply to? And when is it employed? Chapter four poses the question of what the ultimate objective or reason of Article 6 is, and a deeper examination is done in revisiting the international conception of sustainable development as well as the EC/EU conception. The fifth chapter attempts to answer if the international conception and EC/EU conception of sustainable development are essentially the same. The final part summarises and offers some conclusions and reflections about the future of sustainable development in the EC/EU.

2. History of the Sustainable Development Concept

2.1 A Creation of International Law

Arguably, a need for reconciliation between human development and the surrounding environment can be traced back to early civilisations. George Perkins Marsh, considered as one of the first environmentalists, already in 1864 asserted that the collapse of past civilisations often showed the common trait of using natural resources faster than they could be replenished.²⁵

Marsh's assertions were however ahead of time. In order to find the roots of sustainable development, it is essential first to look at the evolution and recognition of international

²³ See Berry Gray, C. (ed.) - *The Philosophy of Law: an encyclopedia*, 1999, Vol. II (K-Z), p. 597.

²⁴ See Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, that applies this structural method to her investigation of article 6 EC.

²⁵ See Marsh, G. P. - *Man and Nature – or Physical Geography as Modified by Human Action*, 1864, later republished as *The Earth as Modified by Human Action – A new Edition of Man and Nature*, 1878. The latter publication is available as a work in the public domain via Project Gutenberg at: <<http://www.gutenberg.org/etext/6019>>. See also Rao, P. K - *Sustainable development: economics and policy*, 1999, p. 5 for a discussion about early environmentalism.

environmental law. The creation of international legal obligations in the environmental field was originally triggered by matters concerning state sovereignty.²⁶ A principally important event initiated by the clash of one state's sovereign use of territory affecting another sovereign state's territory is the "Trail Smelter Arbitration".²⁷ The case arose in the 1920's from a dispute between the United States and Canada about airborne sulphur dioxide emissions from a smelter situated in the city of Trail, British Columbia. The fumes harmed among other things trees and agriculture in the state of Washington after passing the border of the United States.²⁸ In the 1941 arbitral decision settling the dispute, the tribunal held that:

'Under the principles of international law ... no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'.²⁹

The decision was and still is important for a number of reasons. Firstly, it seems to confirm a new attitude in the relation between states concerning environmental harm. The effects of such harm could not anymore solely be considered as a question of domestic concern. Secondly, the arbitral award described by Sands as a 'crystallising moment for international environmental law' inspired, as we shall soon see, the inclusion of the principle of 'no appreciable harm' in subsequent international environmental declarations.³⁰ Furthermore, the decision is held to be of considerable importance for the early establishment of other international environmental principles.³¹

The understanding of transboundary effects of environmental damage increasingly led to more international cooperation in the environmental field.³² But it was not until the 1960's when several environmental disasters in industrialized countries were given much attention, that international environmental law seems to have undergone a renaissance. The first popular environmental

²⁶ See Ebbesson, J. – *Internationell miljö rätt*, 2000, p. 37.

²⁷ See *Trail Smelter (US v. Canada)*, 3 RIAA (1907), 1941. See also *Bering Sea Fur Seals Fisheries Arbitration (Great Britain v. United States)*, Moore's International Arbitration (755), 1893. This earlier arbitral award also involved jurisdictional matters. The event was however different because it concerned the conservation of non-stationary natural resources (migrating seals) partially outside the exclusive jurisdiction of a state. The core of the dispute was whether the United States unilaterally could adopt regulation to protect seals outside national jurisdiction binding other seal fishing states. See Sands, P. - *Principles of international environmental law*, 2003, p. 561-6, for further discussions.

²⁸ See Sands, P. - *Principles of international environmental law*, 2003, p. 318, for a reiteration of the events of the Trail Smelter Arbitration.

²⁹ See *Trail Smelter (US v. Canada)*, 3 RIAA (1907) at p. 1965, 1941.

³⁰ See Sands, P. - *Principles of international environmental law*, 2003, p. 30. See also Sadeleer, N. de - *Environmental principles: from political slogans to legal rules*, 2002, p. 62.

³¹ See Sadeleer, N. de - *Environmental principles: from political slogans to legal rules*, 2002, p. 62. Where the principle of prevention is discussed in detail.

³² See Sands, P. - *Principles of international environmental law*, 2003, p. 3.

pressure groups like 'Friends of Earth' and 'Greenpeace' were formed and several industrialized countries created special environmental authorities.³³

In 1972 the 'United Nations Conference on the Human Environment' was held in Stockholm. This first global environmental conference with 113 represented states may be seen as a run-up to the modern sustainable development concept. Discussions were held that made important linkages between environmental degradation and protection on the one side, and the economic and social development of third world countries on the other side.³⁴ The results of the meeting ended up with the 'Stockholm Declaration on the Human Environment'.³⁵ In this particular declaration 'sustainable development' as such is however not mentioned.

Although some earlier documents that introduces the 'basic thinking' and the term 'sustainable development' exist, it was not until the late 1980's that the concept got its real breakthrough.³⁶ In 1987 the United Nations (UN) 'World Commission on Environment and Development' (WCED), presented a report entitled 'Our Common Future'.³⁷ This non-binding document, widely referred to as the 'Brundtland report' after its chair Gro Harlem Brundtland, is a milestone in the evolution of sustainable development. Apart from its introduction of the term 'sustainable development' into global policy discourse, it probably contains the most commonly accepted definition of sustainable development as '*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*' (emphasis added).³⁸ Additionally, the report also identifies two key concepts within that definition:

³³ Examples of environmental disasters in industrialized nations in the 1960's can be found worldwide. In Japan, the Chisso corporation's release of industrial wastewater caused severe mercury poisoning leading to the so-called 'Minamata disease' claiming victims for decades. Official counts of affected added up to over 2000 people as late as March 2001, see <<http://www.nimd.go.jp/archives/english/index.html>>. Other examples are oil pollution catastrophes such as the Torrey Canyon oil tanker crash causing coastline devastation in England and France in 1967 and the Santa Barbara oil well blowout of 1969 in the USA. For information about these two events, Friends of Earth and Greenpeace see <<http://www.environmentalhistory.org/>>. See also Ebbesson, J. - *Internationell miljö rätt*, 2000, p. 41.

³⁴ See Ebbesson, J. - *Internationell miljö rätt*, 2000, p. 41.

³⁵ The United Nations Environment Programme (UNEP) was launched the very same year. For the declaration text see <<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>>. It can be noted here that Principle 21 of the declaration handles the sovereign right of nations to exploit their own resources coupled with a responsibility to ensure that these activities do not damage the environment of other nations. Thus principle 21 repeats the principle of 'no appreciable harm' invoked by the tribunal in the 1941 *Trail Smelter (US v. Canada)* arbitration commented above, although Principle 21 also includes a responsibility for environmental harm done outside national jurisdiction.

³⁶ See Sands, P. - *Principles of international environmental law*, 2003, p. 47. For example, Sands describes the 1980 'World Conservation Strategy' as a document that 'gave currency to the term "sustainable development"'. See also Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, p. 57.

³⁷ See WCED - *Our common future*, 1987.

³⁸ See WCED - *Our common future*, 1987, p.54. See also Redclift, M. - *Sustainable Development (1987-2005): An Oxymoron Comes of Age*, 2005, p. 212.

- * the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- * the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs’.³⁹

In essence, the aim of the report is to propose a global agenda for change. This not only includes changing ecological thinking, but also societal and economical values.⁴⁰

The next important step that can be mentioned is the famous global Rio conference of 1992 or the ‘UN Conference on Environment and Development’ (UNCED). It was attended by 172 states as well as many corporations and intergovernmental and non-governmental organisations.⁴¹ The conference resulted in the adoption of three soft law instruments and two conventions ready for signature.⁴² One of these instruments known as the ‘Rio Declaration’, is basically a set of compromises between developed and developing countries that reaffirms and builds upon the earlier Stockholm 1972 Declaration.⁴³ The document has been significant for the evolution of sustainable development, probably mostly because its attraction of worldwide attention and that it connects the term ‘sustainable development’ to different situations in many of its principles.⁴⁴ However, even though authors have claimed that the declaration offers a ‘basis for defining sustainable development’ the Rio Declaration doesn’t provide a new clear definition of the concept in comparison with the Brundtland report.⁴⁵ The declaration’s 27 principles instead contain general guidelines of how states and people must work in unity to ensure the further development of the field of sustainable development in international law.⁴⁶ Notably, ‘Principle 4’ of the Rio Declaration

³⁹ See WCED - *Our common future*, 1987, p.54.

⁴⁰ Already in this report, sustainable development thus bears the stamp of a so-called ‘three-pillar’ approach. See chapter 5 section 5.2.

⁴¹ See <<http://www.un.org/geninfo/bp/enviro.html>> for some more information about participants.

⁴² These three non-binding instruments were: The Rio declaration, Statement of Forest Principles and Agenda 21. The conventions were: Framework Convention on Climate Change and the Convention on Biological Diversity. See <http://www.un.org/esa/sustdev/documents/docs_unced.htm> for more information about these UNCED documents.

⁴³ See Sands, P. - *Principles of international environmental law*, 2003, p. 54.

⁴⁴ 12 out of 27 principles include the term ‘sustainable development’. See text of Rio Declaration on Environment and Development 1992, available at: <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>>.

⁴⁵ See Sands, P. - *Principles of international environmental law*, 2003, p. 54. See also Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, p. 58.

⁴⁶ In these general guidelines some well-known international environmental principles are discernible. For instance, Principle 2 repeats and slightly amends Principle 21 of the 1972 Stockholm Declaration. This principle is also known as the principle of ‘no appreciable harm’ invoked by the tribunal in the 1941 *Trail Smelter (US v. Canada)* arbitration commented above. Further, a version of the precautionary principle can be found in Principle 15. It can also be noted here that Principle 27 simply assumes that sustainable development already exists in the field of international law.

with its commitment to the integration of environmental protection in order to achieve sustainable development, has similarities with Article 6 EC.⁴⁷

Another of the non-binding instruments adopted at the Rio Conference is Agenda 21.⁴⁸ In its preamble it is presented as ‘a global partnership for sustainable development’ and forms an action plan calling for participation by the entire international community. The responsibility for implementation of the plan rests at governments, but the United Nations is to play a key role and other actors are also called to contribute.⁴⁹ The preamble text also states that this instrument is flexible, and it can thus ‘evolve over time in the light of changing needs and circumstances’.⁵⁰ According to one author, the actual effects of Agenda 21 directly following from the text are limited. However, it recommended the forming of a Commission on Sustainable Development as well as new mechanisms in the UN institutional framework.⁵¹

There are numerous examples of other documents and meetings at an international level that have followed since the Rio Conference involving and using the term ‘sustainable development’. Up to present date among the most well-known are probably the ‘Kyoto Protocol’ to the ‘Framework Convention on Climate Change’ and the 2002 World Summit on Sustainable Development (WSSD) as a follow-up to the Rio Conference.⁵² The Framework Convention on Climate Change was one of the important documents of the Rio conference. Its framework structure allows additional protocols like the Kyoto Protocol to specify further obligations for its signatories.⁵³ Both the Framework Convention on Climate Change and the Kyoto Protocol

⁴⁷ Principle 4 reads: ‘In order to achieve sustainable development, *environmental protection* shall constitute an *integral* part of the development process and cannot be considered in isolation from it’ (emphasis added). It is probably no coincidence that the article has similarities with Article 6 EC, as the EU member states were all signatories to the 1992 Rio Declaration.

⁴⁸ See text of Agenda 21 at: <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>>.

⁴⁹ These other actors are for example international and regional organizations, public participants and non-governmental organizations (NGO’s). See Agenda 21 Preamble, Chapter 1, para. 1.3.

⁵⁰ See Agenda 21 Preamble, Chapter 1, para. 1.6.

⁵¹ See Sands, P. - *Principles of international environmental law*, 2003, pp. 57-9. This Commission on Sustainable Development is responsible for the follow-up of UNCED 1992 and the review of progress for the Rio Declaration and Agenda 21. See also Agenda 21 Chapter 38, para. 38.11.

⁵² See Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 available at: <<http://unfccc.int/resource/docs/convkp/kpeng.pdf>> and the Declaration on Sustainable Development from the World Summit on Sustainable Development Johannesburg 2002 available at: <http://www.un.org/jsummit/html/documents/summit_docs/1009wssd_pol_declaration.htm> and the Plan of implementation at: <http://www.un.org/jsummit/html/documents/summit_docs/2309_planfinal.htm>.

⁵³ See Article 17 of the United Nations Framework Convention on Climate Change.

expresses an ambition to promote sustainable development.⁵⁴ However, neither of the documents contains a clear and generally applicable definition of the sustainable development concept.⁵⁵

Finally, another important step for the sustainable development concept is that it has been treated in case law of the ICJ. Often cited is the ‘Gabčíkovo-Nagymaros (Hungary/Slovakia)’ case.⁵⁶ It arose from a dispute concerning a 1977 treaty which covered among other things a joint project to build hydroelectric facilities and to better the flood control on the Danube. The agreed project was abandoned by Hungary in 1989 by motivation of environmental impacts. Later on in 1991, Slovakia acted on its own and continued an alternative to the project which drastically reduced the Danube water flow. After protests from Hungary the two states eventually filed an agreement for the reference of the dispute to the ICJ.

In its judgement, the Court mainly focused on addressing other issues than sustainable development. However, the available comments about the concept were entered by the Court through an interpretation of some articles in the original 1977 ‘Joint Contractual Plan’ to build hydroelectric facilities. The articles in question sought to protect the quality of water in the Danube and to protect nature, simultaneously taking new environmental norms into consideration when the parties carried out these obligations. As the articles themselves didn’t comment specifically on what obligations the parties had to fulfil to observe these objectives, the Court used this fact to emphasize the flexible character of the 1977 Treaty. Accordingly, the parties were held to be free to incorporate new environmental norms into the Joint Contractual Plan.⁵⁷

⁵⁴ See Article 3 (4) of the United Nations Framework Convention on Climate Change and Article 2 (1) of the Kyoto Protocol.

⁵⁵ It could be argued that the specific obligations of the parties to the Framework Convention and the Kyoto Protocol to withtake measures, give sustainable development some tangible content. However, if this is true it is hard to see a general application of sustainable development with this content as it is particularly defined to achieve the specific goal of the Framework Convention according to Article 2 - ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.

⁵⁶ See ICJ 1997 – CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA). See also advisory opinion of the ICJ 1996 - LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS para. 30. Here the Court invokes Principle 24 of the Rio Declaration and recalls that ‘Warfare is inherently destructive of *sustainable development*. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary’ (emphasis added).

⁵⁷ See ICJ 1997 – CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA) para. 112.

After this initial discussion by the Court about environmental norms, the central passage relating to the sustainable development concept reads:

‘The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the *concept of sustainable development*’ (emphasis added).⁵⁸

In this frequently discussed passage the ICJ mentioned sustainable development for the first time in its case law. Nevertheless, some commentaries imply that the way sustainable development was used is a missed opportunity for international environmental law. As Sadeleer puts it, ‘in referring to sustainable development as a *concept*, the Court left unanswered the question whether this was an embryonic principle or at best a political objective’ (emphasis added).⁵⁹ Also often cited in this particular context is the separate opinion of Vice-President Weeramantry, which goes further than the majority in treating sustainable development.⁶⁰

From the last sentence in the passage above the Court seems to consider that the sustainable development concept is a tool for reconciling economic development with protection of the environment. In the same context, the Court mentions that new norms and standards have to be taken into consideration and be given proper weight. As Lowe comments it however, the delicate formulation doesn’t clearly tell us if these norms or standards include *sustainable development* in particular, as it is mentioned in a separate sentence.⁶¹

⁵⁸ See ICJ 1997 – CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA) para. 140.

⁵⁹ See Sadeleer, N. de - *Environmental principles: from political slogans to legal rules*, 2002, p. 67.

⁶⁰ See Separate opinion of Vice-President Weeramantry in ICJ 1997 – CASE CONCERNING THE GABCÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA), ‘I consider ... [sustainable development] to be more than a mere *concept*, but as a principle with normative value’ (emphasis added).

⁶¹ See Lowe, V. – *Sustainable Development and Unsustainable Arguments* in: *International law and sustainable development : past achievements and future challenges*, 2001 p. 20 ‘The Court affirms the “development” of “new norms and standards” and asserts that the norms have to be taken into consideration and the standards given proper

Finally, even though the legal status of sustainable development is far from thoroughly clarified and discussed in the majority statement, the concept must still be said to have gotten recognition in international customary law when the Court considered it in relation to future plans between the states.⁶²

2.2 The Evolution of the Sustainable Development Concept in the EC/EU

Almost a decade before the concept of sustainable development appeared explicitly in EC/EU Treaty text it was openly discussed and referred to at European summits. In 1988 the EC heads of government in their ‘Declaration on the environment’ stated that ‘sustainable development must be one of the overriding objectives of all Community policies’.⁶³ A path towards an increasing importance of sustainable development seemed to have been laid out. Nevertheless, when the Treaty of Maastricht entered into force in 1993 and ‘environment’ finally received a formal place in key Articles 2 and 3 of the EC Treaty, the wording ‘sustainable growth’ was used in Article 2 instead of ‘sustainable development’.⁶⁴ This wording was criticized as deviating and perhaps being weaker than the more well-known formulation that had recently appeared in the limelight at the Rio Conference. Nonetheless, in contrast to primary law, non-binding policy documents like the ‘Fifth Environmental Action Programme’ conceived in the aftermath of the Rio Conference quotes the Brundtland report and even spells out a definition of the word ‘sustainable’.⁶⁵

By the time that the Treaty of Amsterdam entered into force, the drafters had reconsidered the ‘sustainable growth’ formulation in the Treaty of Maastricht. To this end, the Amsterdam treaty not only meant an important change to the formulation, but also to the insertion of ‘sustainable development’ in the Preamble and Article 2 of the EU Treaty, as well as in Article 2 EC and the brand new Article 6 EC. Still, some commentators expressed concerns about the wording of Article

weight – phrasing that suggests that the norms do not bind as rules of law bind, and that the standards are not mandatory. But *the reference to sustainable development follows in a separate sentence ... It is not at all clear that [it] is among the norms and standards to which the previous sentence refers*’ (emphasis added).

⁶² See Sands, P. - *Principles of international environmental law*, 2003, pp. 254-5. According to Sands (who incidentally represented Hungary in the case) the treatment of sustainable development shows at least three important things: First, sustainable development is confirmed to be part of international law. Second, it seems to have a procedural/temporal aspect in the fact that the parties were asked to reconsider environmental consequences of the dam project. Thirdly it had a substantive aspect because of the obligation to see to it that a certain amount of water was released into the main river of the Danube.

⁶³ See Bull. EC No. 12/1988, p.12. See also Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, p. 54 for other examples.

⁶⁴ Article 2 EC of the Treaty of Maastricht (Treaty on European Union) reads: ‘The Community shall have as its task ... to promote throughout the Community a harmonious and balanced development of economic activities, *sustainable* and non-inflationary *growth* respecting the environment ...’ (emphasis added).

⁶⁵ See OJ C 138, 17.5.1993, p. 12.

2 EC, as sustainable development doesn't stand alone in the formulation, but is linked to economic activities and surrounded by other adjectives such as 'harmonious' and 'balanced'. Further, neither the EU nor EC Treaty makes a reference to a principle or a concept of sustainable development with a definition like in the Brundtland report.⁶⁶

Some more straightforward inclusions of both sustainable development and definitions of it may be found in secondary law documents of the EC/EU. For instance, in regulation 2494/2000 concerning 'measures to promote the conservation and sustainable management of tropical forests ...' the following definition of sustainable development can be found:

'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'.⁶⁷

Later, in policy documents like a 'European Union Strategy for Sustainable Development', 'Ten years after Rio' and the 'Sixth Environmental Action Programme' sustainable development is often used and these documents maintain the same course as the earlier 'Fifth Environmental Action Programme'.⁶⁸ Even though these documents show a more forthright commitment to sustainable development than the treaty text discussed above, it should be remembered that they are policy documents and action programmes and thus do not bear a legally binding status.⁶⁹

2.3 Summary

The concept of sustainable development has originally evolved from international environmental law. The first important steps towards the introduction of the modern sustainable development concept were taken at the 1972 Stockholm Conference. Since that conference sustainable development steadily gained momentum into the 1980's, well on its way to becoming popularized. This momentum owed a great deal to the commonly cited Brundtland report of 1987 which

⁶⁶ See Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, p. 56.

⁶⁷ See Article 2 (4) in Reg. 2494/2000, OJ L 288, 15.11.2000, p. 7. See also Article 2 in Reg. 2493/2000, OJ L 288, 15.11.2000, p. 2 which contains the exact same definition.

⁶⁸ See COM(2001) 264 final, and COM(2001) 53 final and Decision No 1600/2002/EC of the EP and Council laying down the Sixth Community Environment Action Programme. See chapter 4 section 4.3 for further discussions about what content sustainable development is given in these and other documents.

⁶⁹ The lack of binding status of these documents doesn't imply that they are legally insignificant though. As the ECJ held in *Grimaldi (Salvatore) v. Fonds des Maladies Professionnelles* (Case C-322/88) [1989], non-binding Community acts (in this case recommendations) can have indirect or interpretative effect on national measures and Community provisions.

probably also provided the most popular definition of sustainable development as to yet.⁷⁰ Following this trend in the 1980's, which some have called a 'mainstreaming' of the debate,⁷¹ such meetings as the Rio Conference 1992 encouraged further interest for discussing sustainable development on a global scale. This in turn led to the concept being explicitly included in a vast number of documents and declarations and it became the centre of attention for many following conferences. Lastly, the ICJ seems to have recognised sustainable development as a concept by invoking it in the 'Gabčíkovo-Nagymaros' case.⁷²

At EC/EU level the evolution of sustainable development appears to have followed the process at the international level. Lately in the process, the EU has shown an attitude to spearhead the progress of sustainable development.⁷³ The concept is included in many documents today like policy documents, action programmes and some binding documents which may give an impression that it is strong. However, important legal sources like treaty text still leave the concept apparently weak and undefined. It took almost a decade to put it into treaty text and this coincided with the gradual inclusion of non-economic interests in the different treaties. According to one scholar the expression 'sustainable' has consequently more or less reached an inflationary level of use, as all activities that have been subject to 'greening' are associated with it.⁷⁴

3. Article 6 EC: The Integration Principle

3.1 Introduction

Described as one of the single most important principles for environmental protection, the integration principle is currently set out in Article 6 EC.⁷⁵ This places it among the provisions in the opening chapter of the EC Treaty under the title 'Principles'. The article is one of many so-called 'horizontal' or external integration provisions, which refers to the integration of fundamental objectives into all policy sectors. There are various examples of 'horizontal' provision formulations. Article 151(4) EC for example states that the Community and its Member States '*shall take cultural aspects into account* in its action under other provisions of this treaty ... ' (emphasis added). This

⁷⁰ See chapter 5 section 5.2, where another modern and popular definition of sustainable development with a 'three-pillar structure' is discussed.

⁷¹ See Redclift, M. - *Sustainable Development (1987–2005): An Oxymoron Comes of Age*, 2005, p. 218.

⁷² See section 2.1.

⁷³ See e.g. 'On the review of the Sustainable Development Strategy', COM(2005) 658 final p. 49 where it is stated that the 'EU will reconfirm and strengthen its commitment to take a *leading role* in driving the sustainable development agenda at global level' (emphasis added).

⁷⁴ See Krämer, L. - *EC environmental law*, 2000, p. 7.

⁷⁵ See Jans, J. H. - *European environmental law*, 2000 p. 17.

can be contrasted with Article 152(1) EC which states that ‘A *high level* of human health protection *shall be ensured* in definition and implementation of all Community policies and activities’ (emphasis added)⁷⁶.

The integration relating to environmental protection has according to one author been around since the inception of the Community environmental policy in documents from the early 1970’s.⁷⁷ From a state of being repeatedly mentioned as an important idea in every environmental action programme, the integration principle was finally codified with the Single European Act (SEA) in 1986.⁷⁸ Subsequent amendments with the Treaty of Maastricht in 1993 made the integration principle more powerful in its wording and mode of operation.⁷⁹ The final step leading up to its current wording was made with the Treaty of Amsterdam 1997. This not only meant that the integration principle was placed in Article 6 ‘in the front’ of EC provisions, it also added the phrase ‘in particular with a view to promoting *sustainable development*’ (emphasis added).⁸⁰ For the sake of completeness, it should be added that the former Article 130r containing an integration clause was at this point split up to leave two descendants: One being the new slightly reformulated integration principle in Article 6 EC and the other being Article 174 EC.⁸¹ In the following sections case law that refers to the integration principle will therefore also include questions linked to Article 174.

Before going any further, the relevant parts of Article 174 for this essay will shortly be presented.⁸² The article is situated in the EC Treaty under Title XIX – Environment. According to the European Court of Justice (ECJ), Article 174 together with Article 175 and 176 forms part of ‘the framework within which Community environmental policy must be carried out’.⁸³ In being the opening article of this trinity, Article 174’s first paragraph spells out a list of general objectives to be followed with the Community environmental policy. These objectives include among others

⁷⁶ See for other examples of ‘horizontal’ provisions Articles 159, 157(3), 153(2), 127(2), 3(2) all EC.

⁷⁷ See Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, p. 16.

⁷⁸ See Single European Act 1986 Article 130r(2) EC. The article states that ‘Environmental protection measures shall be a component of the Community’s other policies’ (emphasis added).

⁷⁹ See Treaty of Maastricht 1993 Article 130r(2) EC. The article now stated ‘Environmental protection requirements *must be integrated into the definition and implementation* of other Community policies’ (emphasis added).

⁸⁰ This placement has been said to imply a strengthening of the sustainable development concept. See chapter 4 section 4.3.

⁸¹ This is not an official Treaty interpretation. The EC Treaty refers to Article 174 EC as ex Article 130r and Article 6 EC as ex Article 3c. However, sources considering the integration principle explicitly or implicitly regard ex Article 130r to be represented both by Article 6 and 174 EC today. See e.g. Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003, p. 31, Krämer, L. - *EC environmental law*, 2000, p. 14 and Jans, J. H. - *European environmental law*, 2000 p. 17.

⁸² See also discussion about the content of Article 174 in section 3.3.

⁸³ See *Commission of the European Communities v Council of the European Union* (Case C-176/03) [2005] para. 43.

‘preserving, protecting and improving the quality of the environment’ but also ‘protecting human health’. The second paragraph mentions important environmental principles which form a base for the European environmental policy. These are among others the ‘precautionary principle’, the ‘prevention principle’ and the ‘polluter pays principle’ all mentioned in Article 174(2) EC. A concrete example of how these form a base for European environment policy is that they are translated into obligations for Member States which will sometimes enable the interpretation of directives and regulations in the light of these principles.⁸⁴ Notably, sustainable development is not mentioned among the important environmental principles in Article 174(2). If this had been the case, the inclusion could have added some strength to arguments embracing sustainable development as an environmental *principle*. The third paragraph includes a list of additional criteria that the Community ‘should take account of’ when preparing its environmental policy like ‘available scientific and technical data’.⁸⁵

3.2 To Whom is the Article Addressed?

Is Article 6 addressing Community institutions only or does its wording imply that the responsibility for environmental integration should also be carried by Member States? A sensible starting point for examining potential addressees of treaty provisions is to look at their wording. This literal method of interpretation which is among the principles used by the ECJ in case law may provide a good starting point for an analysis.⁸⁶ Article 6 states that:

‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development’.⁸⁷

Looking strictly at its wording, the article refers to Community policies and activities in Article 3 EC and it doesn’t openly mention the Member States. A predominant view in literature concerning Article 6 suggests that if the ratifying states would have wanted to include themselves among the addressees, these would have been explicitly mentioned. What is more, the integration principle, like

⁸⁴ See Jans, J. H. - *European environmental law*, 2000 p. 31. See also joined cases *Criminal proceedings against Paolo Lirussi (C-175/98) and Francesca Bizzaro (C-177/98)* [1999] in which the ECJ interprets waste Directive 75/442/EC using the precautionary and prevention principle.

⁸⁵ See also further comments about the ‘criteria’ in section 3.3.

⁸⁶ See Bengoetxea, J. - *The legal reasoning of the European Court of Justice: towards a European jurisprudence*, 1992 pp. 233-4.

⁸⁷ Current wording of Article 6 EC, unchanged since the ToA 1997.

other environmental Community principles seems to be considered to form a starting point rather than an actual basis for Member State policies.⁸⁸

The view stated above looks convincing at first glance, but it must nevertheless be nuanced. A comparison of Article 6 with other Community provisions and relevant case law tells another story. Article 33(1) EC, a founding article for policy objectives of the common agricultural policy (CAP), has been held to bind Member States even though they are not directly mentioned in this respect.⁸⁹ Conclusively, the wording of a Treaty provision isn't always decisive for whom it is directed to. In addition, the Community has a wide discretion in matters concerning the CAP, which also appears to be the case in relation to Article 6.⁹⁰ Therefore it is all the more important to further examine settled case law before drawing conclusions from the wording of Article 6.

The outcome of ECJ case 'Peralta' further clarifies the addressees of Article 6.⁹¹ The legislation then in force, Article 130r EC (now Article 6 and 174 EC), was stated to be restricted to the definition of general objectives of Community environmental matters. Moreover, the Council is mentioned as the decision-maker for what action is to be taken.⁹²

Furthermore, the opinion of Community institutions as addressees seems to be dominant in national courts.⁹³

Nevertheless, this doesn't exclude that national implementation of for example a directive emanating from Articles 6 or 174 can indirectly impose Member States to take action. Should such a directive contain provisions that express the objectives or principles of these articles while at the same time being sufficiently clear, precise and unconditional, these provisions could potentially be

⁸⁸ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003, p. 31 for an extensive list of authors that express this opinion.

⁸⁹ See *Jongeneel Kaas BV and others v State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole* (Case 237/82) [1984] para. 13, where the ECJ states that in the absence of Community rules in connection to Article 33 (ex Article 39) matters *Member States* can still apply relevant rules for the achievement of CAP objectives (emphasis added).

⁹⁰ See Craig, P., Búrca, G. de – *EU law: text, cases and materials*, 2003 p. 513 for a discussion about discretionary matters of the CAP. See Krämer, L. - *EC environmental law*, 2000 p. 16 for a discussion about the broad discretion for Community institutions in applying Article 6.

⁹¹ See *Criminal proceedings against Matteo Peralta* (Case C-379/92) [1994].

⁹² See *Criminal proceedings against Matteo Peralta* (Case C-379/92) [1994], at para. 57-8. Notably, in the same paragraphs the Court expresses that this shall not hinder Member States to introduce or maintain stricter environmental measures as long as they are not incompatible with the Treaty.

⁹³ See High Court, Queen's Bench Division, *R. v. Secretary of State for Trade & Industry, ex parte Duddridge & Others*, 1994. In this case the English High Court was of the view that Article 130r(2) (now Article 174(2)) spells out principles that are fundamental for the Community's environmental policies. Further, the Member States were not viewed to be obliged to take particular action. See also Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 32 and Jans, J. H. - *European environmental law*, 2000 p. 23.

used to challenge national legislation before a national court.⁹⁴ However, this doesn't automatically lead to the conclusion that Member States are also the addressees of Articles 6 and 174. This is because the obligation is not derived from the Articles per se but from a secondary Community act.⁹⁵

When it comes to non-binding acts the already mentioned environmental action programmes promote integration both at a Community and national plane. For instance, the 'Fifth Environmental Action Programme' states that when fully incorporating the environmental dimension into other Community policies '*Member States should undertake similar integration by applying environmental impact assessments to their own plans and programmes*' (emphasis added).⁹⁶

Lastly, yet another argument that nuances the division of responsibility for environmental policy integration is the potential effect of Community loyalty emanating from Article 10 EC. This argument builds on a combination of Articles 6, 174 and 10 EC. Read in conjunction, these articles could at least create an obligation for Member States *not to withtake* measures frustrating the future achievement of Community policies.⁹⁷

3.2.1 Summary

To sum up the discussion it can be concluded that the wording of Article 6 seems to indicate that Community institutions are the subjects primarily responsible for environmental protection integration. This is also the predominant view in literature. Looking at Article 7 EC, which lists the Community institutions in the formal sense, the responsible bodies are probably the ones entrusted to be involved in making legislation: the European Parliament, the Council and the Commission. Considering case law of the ECJ in connection with this, in particular case 'Peralta',⁹⁸ the Community institutions are confirmed as addressees of Article 6. However, some other sources like secondary law and non-binding policy documents, as well as the obligation of Community loyalty in Article 10 EC must in a sense be said to alter the distribution of responsibility. To this end the

⁹⁴ See Craig, P., Búrca, G. de – *EU law: text, cases and materials*, 2003 pp. 178-229 for discussion about direct effect (and more) of Community law. See for an example of secondary law expressing environmental protection integration Directive 89/552, OJ L 289, 17.10.1989 amended by Directive 97/36/EC, OJ L 202, 30.7.1997 Article 12 'Television advertising and teleshopping shall not encourage behaviour prejudicial to the protection of the environment'.

⁹⁵ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 34.

⁹⁶ See OJ C 138, 17.5.1993, p. 81.

⁹⁷ See for examples of cases with Article 10 read in conjunction with other articles *Inter-Environnement Wallonie ASBL v Région wallonne* (Case C-129/96) [1997] and *Commission of the European Communities v French Republic* (Case C-265/95) [1997].

⁹⁸ See *Criminal proceedings against Matteo Peralta* (Case C-379/92) [1994].

Member States are not totally free from obligations to ensure the integration of environmental protection requirements.

3.3 What Area of Activity Does Article 6 Apply To?

After considering the addressees of Article 6 it is relevant to look at what area of activity it applies to. A basic thought underlying the environmental integration idea in Article 6 must be that the Community's environmental policy doesn't exist as a separated entity. What happens in the sector of for example transport, agriculture or energy is bound to affect the environment in one way or another. Thus it is fair to say that the Community's environmental policy is somewhat naturally linked to other policy areas. Since the 1998 European council meeting in Cardiff the so-called 'Cardiff process', launched to set Article 6 into practice, has requested different sectors of the Community to prepare programmes and strategies for the integration of environmental concerns. According to the Commission's homepage nine sectors have as to yet produced integration strategies.⁹⁹

Looking at what Article 6 spells out this explicitly refers to Article 3 EC. Here the aims of the Community from Article 2 EC are specified through a more concrete list consisting of policies and activities. Judging from what is described in the list one broad conception is that environmental protection requirements must be integrated into all activities under the EC Treaty.¹⁰⁰ Another more elaborate conception identifies corresponding titles in Part III of the EC Treaty to the policies and activities in Article 3. These separate titles in Part III are more thorough in treating the specified Article 3 policy areas and activities.¹⁰¹ Some activities like those relating to energy, tourism, civil protection plus the association of overseas countries and territories don't have dedicated separate titles in Part III of the EC Treaty. Due to this fact, it has been discussed whether they are included in the scope of Article 6 integration or not.¹⁰² The latter conception has a point when compared to other horizontal provisions. If environmental integration was intended for the entire EC Treaty, the Community legislator could have chosen a formulation like in Article 152(1) EC. This states that

⁹⁹ See list provided at: <<http://ec.europa.eu/environment/integration/integration.htm>>, it includes among other sectors agriculture, transport and energy.

¹⁰⁰ See Krämer, L. - *EC environmental law*, 2000, p. 15.

¹⁰¹ See for example Article 3(1) 'a policy in the sphere of the environment;' which corresponds with 'Title XIX Environment'.

¹⁰² See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 pp. 40-3.

human health protection should be ensured in ‘*all* Community policies and activities’ (emphasis added).

What difference does it make if the former or latter conception is chosen? It has been stated that strictly speaking the difference would lie in matters concerning Article 308 EC residual competence. If action is taken to achieve Community aims in Article 2 and this action cannot be categorised or linked to the list of objectives in Article 3, it would fall out of the demands of the integration principle. At the same time, it is suggested that this limitation is not devastating for the principle as the tendency of using Article 308 as a legal basis in Community acts has declined.¹⁰³

The above discussion has not yet commented on the scope of Article 6 EC and its environmental policy requirements in connection to the EU Treaty. It has already been stated above that the integration principle covers the EC Treaty, but some observations can still be added. Besides what can be derived from the literal interpretation of Article 6, its context confirms the Community scope. It is placed under Title II of the EU Treaty which encompasses the European Community. Thus it appears that the scope of the integration principle does not cover the second and the third pillar of the EU.

Finally, after examining the scope of Article 6 yet another question can be posed. What is really to be integrated when the article refers to ‘environmental protection requirements’?¹⁰⁴ Looking at the EC Treaty, it seems logical to start searching under Title XIX dedicated to the Environment. Indeed, the fundamental Article 174 EC gives some further guidance. The first indent of Article 174(1) states that Community environmental policy shall contribute to the preservation, protection and improvement of the quality of the environment. However, recalling the wording of Article 6, this only refers to ‘environmental *protection* requirements’ (emphasis added). In literature it has been discussed if this affects a possible link between the two articles. It is fairly reasonable to assume that ‘environmental protection’ is a broad term including both ‘preservation’ and ‘improvement’. Article 176 EC seems to confirm such an interpretation as it refers to all measures taken under the environment title as ‘protective’ measures.¹⁰⁵

The debate surrounding a link between Article 6 and 174 also divides the latter Article into three parts. These are: the environmental ‘objectives’ in 174(1), the ‘principles’ in 174(2) and the

¹⁰³ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 42.

¹⁰⁴ As we shall see further on in chapter 4 section 4.3, this may be an important anchor point in deciding what legal weight sustainable development has.

¹⁰⁵ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 74 which also gives some further guidance to other sources on this interpretation.

‘criteria’ in 174(3).¹⁰⁶ The predominant view as to what is included in the phrase ‘environmental protection measures’ is at least the content of the ‘objectives’ in Article 174 (1).¹⁰⁷ It has convincingly been proposed that Articles 174(2), (3) should also be included in as much as the objectives, principles and criteria together form an entity. This entity serves as a starting point for the creation of Community environmental policies. To concentrate on just one of three parts of the entity could be seen as a focus on only a single feature of a certain policy.¹⁰⁸

3.3.1 Summary

An underlying thought about Article 6 as a ‘horizontal’ provision seems to be that the Community environmental policy cannot be seen as an isolated concept. Instead, it appears quite natural that the definition and implementation of other policies in for example transport, agriculture or energy should take environmental protection into account.

According to the wording of Article 6 the policies and activities in Article 3 are affected by the environmental policy requirements. It is disputed whether this means that these requirements cover the entire EC Treaty or just certain parts it. A comparison with other horizontal clauses shows that the Community legislator has used a different formulation than the one found in Article 6 when the intention appears to be coverage of the entire EC Treaty.¹⁰⁹ What looks certain from the formulation and the context of the Article is that it doesn’t cover the second and third pillar of the EU Treaty.

Lastly, the meaning of ‘environmental protection requirements’ is disputed. Some leading authorities on the subject are of the view that at least Article 174(1) under the environmental title of the EC Treaty is included. However, there are convincing suggestions in literature that also includes Article 174(2) and (3) in the ‘environmental protection requirements’.

¹⁰⁶ See e.g. Jans, J. H. - *European environmental law*, 2000, p. 21, Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 76. The ECJ has used the same terminology commenting Article 174 EC (then 130r EC) in *Gianni Bettati v Safety Hi-Tech Srl* (Case C-341/95) [1998], para. 3.

¹⁰⁷ See Krämer, L. - *EC environmental law*, 2000, p. 15, Jans, J. H. - *European environmental law*, 2000, p. 18, Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 77, 79.

¹⁰⁸ Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 77, 79. See also Jans, J. H. - *European environmental law*, 2000, p. 18.

¹⁰⁹ I.e. when comparing the formulation in for example Article 152(1) EC and Article 6 EC.

3.4 When is Article 6 Employed?

This section regards temporal aspects of Article 6. By looking at what point in the policy process the integration principle has to be taken into account some information about the strength and importance of Article 6 can be attained.

Starting again by looking at the wording of Article 6 it is stated that ‘environmental protection requirements must be integrated into the *definition* and *implementation* of the Community policies and activities ... ’ (emphasis added). This reference to the definition and implementation of environmental protection requirements in Community policies has been present since the Maastricht Treaty version of the integration clause in Article 130r(2) EC. By including both of these elements a means of affecting other sectors than the environmental one through the whole policy process seems to have been provided. In other words, this can be seen as a ‘guarantee’ for environmental consideration not only in the initial formation of policies and activities under the titles in Article 2 EC but also when the acts are implemented.

Looking at what the term ‘definition’ in Article 6 encompasses a closer look has to be taken at the formation of Community policies and activities. There are different stages that can be described as for instance an ‘initial defining’, followed by ‘redefining’ or ‘reforming’ of policies and activities.¹¹⁰ Some examples of what constitutes these stages can be found when looking at how the Commission works.

According to its rules of procedure it is incumbent on the Commission to present annual priorities and to adapt a work programme for each year.¹¹¹ The work programme explains the annual policy strategy in the form of policy objectives and an operational programme of the decisions to be adopted by the Commission. Among the parts of the work programme are political priorities accompanied by legislative initiatives and other acts that are to be adopted by the Commission to realise these prime concerns. The work programme is presented to among other institutions the Parliament and the Council for debate and follow-up.¹¹² The discussion and ‘political arbitration’ between the different institutions leading to the adoption of various

¹¹⁰ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 46.

¹¹¹ See Article 2 of the Commission’s rules of procedure, OJ L 347/83, 30.12.2005. Available at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_347/l_34720051230en00830090.pdf>.

¹¹² See European Commission homepage at: http://ec.europa.eu/atwork/programmes/index_en.htm.

Community acts are supposedly all parts of what is included in the ‘definition’ of Community policy and activities.¹¹³

When talking about ‘implementation’ of Community policies and activities, national implementation by Member States is perhaps what first comes to mind. Article 6 doesn’t in itself mention who is going to implement an act related to the Article. However, recalling the conclusions from literature and supportive case law above, the addressees of Article 6 primarily seem to be the Community institutions.¹¹⁴ Consequently, other facets of implementation have to be examined.

Community acts often need additional implementing acts of the Council or the Commission. This can be the case when the Council according to Article 202 EC has delegated power of implementation.¹¹⁵ According to settled case law ‘implementation’ relating to Article 202 (ex Article 145 EC) means ‘both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application’.¹¹⁶ It has been proposed that various delegation measures for implementation should be included, be it acts of the CAP or implementing acts of other institutions, agencies or bodies conferred with power to apply primary or secondary law.¹¹⁷

Furthermore, the Commission in the role as the ‘guardian of the treaties’ could mean that ‘implementation’ of policies and activities in Article 6 also includes the ‘enforcement’ of Community law. Thus the principle of integration could affect the determination of starting infringement procedures or not according to Article 226 EC.¹¹⁸

Finally, other decisions have been mentioned as ‘implementation’. For instance, the Commission has to take environmental aspects into account when using Article 81(3) and (1) or Article 87(3) EC.¹¹⁹ Moreover, committees assisting the Commission through delegation of implementing powers

¹¹³ The adoption of these Community acts should include all the different procedures in the transformation of policies to more concrete proposals and the possible adoption of acts, i.e. consultation, cooperation, co-decision or assent procedure.

¹¹⁴ See chapter 3 section 3.2.

¹¹⁵ Article 202 (third indent) states that ‘The Council may impose certain requirements in respect of the exercise of these powers ... [and] may also reserve the right, in specific cases, to exercise directly implementing powers itself’. See also Article 211 EC (fourth indent).

¹¹⁶ See *Commission of the European Communities v Council of the European Communities* (Case 16/88) [1989], para. 11.

¹¹⁷ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 49.

¹¹⁸ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 50.

¹¹⁹ See Jans, J. H. - *European environmental law*, 2000 p. 20.

are supposedly also bound by the obligation to take the integration principle into account when they implement acts as they are not independent of the Commission.¹²⁰

3.4.1 Summary

To sum up the temporal aspects of Article 6 it can generally be said that the integration principle covers various stages in a process connected to the development and implementation of Community policies and activities in Article 3 EC. Not only does the principle apply to the initial stages when the policies or activities are defined, refined or redefined, it also applies to the implementation of these objectives. In remembering the primary addressees of Article 6, it can be assumed that integration of environmental concerns in the ‘definition’ of Community policies foremost applies to the work of the Commission, the Council and the Parliament. Moreover, a great deal of different ‘implementation’ situations can be found where for example the Council delegates powers of implementation, and also perhaps even when the Commission ‘enforces’ Community acts through the ECJ. The important conclusions that can be drawn about the strength of Article 6 are that it has to be taken into account in a wide range of institutional work, and it should be applied to the whole process of policies and activities in Article 3 from their forming to implementation.

4. Article 6 and the Link to Sustainable Development

4.1 Introduction

This part of the essay takes on the task to unveil and examine the link between Article 6 and the sustainable development concept. The following subsections try to answer the last of the four concrete questions posed in the beginning of the essay; ‘What is the ultimate objective or reason of Article 6?’. In approaching the ‘core’ of my first research question the next subsections will scrutinize the content of sustainable development further.

Before getting deeper into the legal aspects of sustainable development in international law, it is worth mentioning that this concept doesn’t only puzzle legal scholars and lawyers. Commentators from other sciences including economy, sociology and biology have also had their say in what sustainable development means and what impact it should be given. Thus it seems clear that

¹²⁰ See the ‘Comitology decision’, OJ L 184/23, 17.07.1999. See further Craig, P., Búrca, G. de – *EU law: text, cases and materials*, 2003 pp. 150-3 and Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 52.

sustainable development can be approached from many scientific disciplines. Some valuable criticism of the concept comes, as we shall see, from non-legal sources and thus other sciences simply cannot be disregarded when the concept is studied. I will therefore provide some short remarks here about how it has been regarded by some other sciences.

Studying non-legal sources, one finds a division of ‘strong’ and ‘weak’ versions of sustainable development.¹²¹ Although this area of the debate mostly seems concerned with environmental aspects of the concept it is interesting. Whereas the core of ‘weak’ versions of sustainable development tend consist of the reliance on technology to solve present and future problems with environmental degradation and fading natural resources, ‘strong’ versions criticise this view by pointing out that man-made resources cannot substitute what Earth can provide. As it has been aptly expressed ‘For these analysts, the “weaker” versions of sustainable development ... are much more about “sustaining development” rather than sustaining environment, nature, ecosystems or the Earth’s life support systems.’¹²² There are many other definitions of sustainable development in non-legal sources but it would be going beyond the scope of this essay to describe them here. However, what should be kept in mind when reading the following subsections on the legal value of sustainable development is that other sciences, without greater success, have tried to define the concept and seems to have ended up discussing it in terms of ‘strong’ and ‘weak’ versions.¹²³

4.2 Sustainable Development in International Law Revisited

It is probably undisputed that the conception of sustainable development in international law has influenced the EC/EU legal order. In revisiting the sustainable development concept here I attempt to sort out information to later on be able to compare its international legal status with the status in Community law and Article 6. Surely, the task of pinpointing the exact legal status on an international level is over-ambitious. However, there are theories that may offer some enlightenment.

One basic assumption when examining the legal implications of sustainable development in the light of international law is that the concept is an accepted part of international law and thus has some legal effect in this area. The proponents of such a view usually refer to the ICJ ‘Gabčíkovo-

¹²¹ See e.g. Hopwood, B. et al. - *Sustainable Development: Mapping Different Approaches*, 2005, p. 40 where further references are also given.

¹²² See Williams, Colin C. and Millington, Andrew C. - *The diverse and contested meanings of sustainable development*, 2004, p. 102.

¹²³ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 60.

Nagymaros' case to show the recognition for sustainable development in international law.¹²⁴ Further, it is suggested that sustainable development derives its status from wide and general acceptance at an international level in other ways. The manifestation of such an acceptance is said to be found in for example multilateral treaties, declarations and various founding documents of international organizations that recognize the importance of sustainable development.¹²⁵

Given the multitude of documents that include the concept of sustainable development without defining it, and an equally generous amount of speculations of what it means expressed in other documents, it is hard to tell what legal effects that really can be derived. Nevertheless, attempts have been made to assemble what could be considered as common denominating elements of the concept in international agreements.

An often cited authority that has sorted out a theory on the common legal elements of sustainable development is Sands. As well as in the works of other renowned legal scholars, his theory on the legal status of sustainable development seems to accept the Brundtland report as a starting point for discussion.¹²⁶ According to Sands' theory, the following four discernable elements are said to comprise the common legal base for sustainable development:

1. the need to preserve natural resources for the benefit of future generations (*the principle of intergenerational equity*);
2. the aim of exploiting natural resources in a manner which is "sustainable", or "prudent", or "rational", or "wise" or "appropriate" (*the principle of sustainable use*);
3. the "equitable" use of natural resources, which implies that use by one state must take account of the needs of other states (*the principle of equitable use, or intragenerational equity*); and
4. the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (*the principle of integration*).¹²⁷

¹²⁴ See chapter 2 section 2.1. Even though the Court's majority decision showed reluctance to enter into deeper discussions about the concept, proponents consider the mere mentioning of the concept to be enough. The separate opinion of Vice-President Weeramantry discussing sustainable development as a *principle* and not just a *concept* could provide some further arguments for legal strength.

¹²⁵ See Lowe, V. – *Sustainable Development and Unsustainable Arguments in: International law and sustainable development : past achievements and future challenges*, 2001 p. 21. See also the International Law Association's *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (2002) also published as UN Doc. A/57/329.

¹²⁶ See Sands, P. - *Principles of international environmental law*, 2003 p. 252. See also Krämer, L. - *EC environmental law*, 2000, p. 7.

¹²⁷ See Sands, P. - *Principles of international environmental law*, 2003 p. 253 (emphasis added).

The first element considering future generations builds on the idea of resource allocation between generations. The present generation must preserve Earth in a sensible way for future ones. This idea seems to have been included in legal documents as early as 1893.¹²⁸ International declarations promoting sustainable development frequently contain descriptions of this way of thought and it is sometimes expressed as the idea or principle of ‘intergenerational equity’.¹²⁹

A second element in international agreements is that of ‘sustainable use’ of natural resources. What seems different with this element from the aforementioned is that it focuses more on specific natural resources rather than generally aiming to save them for coming generations. Some examples of documents here are conventions preserving marine life forms like North Pacific fish or Antarctic seals, but there are also agreements for other resources like tropical timber.¹³⁰ Moreover, the idea of ‘sustainable use’ has also been expressed in an appellate body report of the World Trade Organisation (WTO) in terms of ‘*optimal use* of the world’s resources ... ’ (emphasis added).¹³¹ Finally, there are according to Sands also other terms used in conservation and preservation programmes like ‘wise, ‘rational’, ‘prudent’ or ‘appropriate’ which express the idea of ‘sustainable use’.¹³²

The third discernable element in the list above is ‘equitable use’ or ‘intragenerational equity’. Compared to ‘intergenerational equity’ this principle or idea focuses, as the term implies, on questions within the present generation. Basically, it can in practice be described as the obligation of one state to take account of the needs of other states when it uses shared natural resources. The already cited ‘Gabčíkovo-Nagymaros’ case provides an illustrating example.¹³³ Hungary can in this case be said to have been deprived of the ‘equitable use’ and control of the shared resources the Danube offers.

The fourth element mentioned in many international documents is ‘the principle of integration’. Recalling the discussion above about Article 6 EC which contains a parallel equivalent at the

¹²⁸ The idea is said have been relied on by the United States in the Pacific Fur Seals Arbitration. See Sands, P. - *Principles of international environmental law*, 2003 p. 256.

¹²⁹ The idea of ‘intergenerational equity’ is described in for example Principle 1 of the Stockholm 1972 Declaration, or Principle 3 of the Rio Declaration on Environment and Development 1992, see chapter 2 section 2.1.

¹³⁰ See the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean, Preamble and Article IV(1)(b)(ii) which expresses the ‘sustainable use’ idea by limiting catches to ‘maximum sustained’ productivity. Similarly the 1972 Antarctic Seals Convention’s Preamble includes a required standard of harvesting that doesn’t exceed the ‘optimum sustainable yield’. Lastly, the 1983 International Tropical Timber Agreement Article 1(h), includes ‘sustainable utilization and conservation’.

¹³¹ See Shrimp/Turtle case, para. 152, where the Preamble of the WTO Agreement, first paragraph is discussed. The preamble mentions both ‘optimal use’ and the ‘objective of sustainable development’. WT/DS58/AB/R, 1998.

¹³² See Sands, P. - *Principles of international environmental law*, 2003 p. 260.

¹³³ See chapter 2 section 2.1.

European Community level, this idea or principle encompasses the commitment to integrate environmental concerns into for example economic and social development. Sands holds this principle to be the most important and legally viable element of sustainable development. Partly because the formal use of the integration principle demands the acquiring and presentation of environmental data and environmental impact assessments.¹³⁴ It has also been used to include 'green' requirements in multilateral and bilateral programmes granting overseas development assistance, something that has also induced renewed debate about 'the right to development' for developing countries.¹³⁵

4.2.1 Summary

The international legal status of sustainable development is far from undisputed. Nevertheless, proponents that are convinced it is not just a 'political mantra' claim that its legal content can be derived from a wide and general acceptance as well as its invocation in case law. In an attempt to clarify the legal value of sustainable development, Sands has proposed that four discernable legal elements can be found in international agreements. If scrutinized however, these elements seem as unsure and opaque as 'sustainable development'. Sands admits that 'these four elements are closely related and often used in combination (and frequently interchangeably), which suggests that they do not yet have a well-established, or agreed, legal definition or status'.¹³⁶ This could in turn suggest that these elements have no absolute meaning and can therefore depend on the application in each agreement where they are used. Despite these weaknesses, the strongest legal value of Sands elements seems to rest with the 'integration principle' as it shows some strength in demanding requirements to undertake actions like for example impact assessments.

Some critical views of Sands four legal elements deem them to be too vague to have a normative value. As Lowe comments 'it must be possible to phrase a norm in normative language'. For Lowe sustainable development seems to be more of a convenient umbrella term for a group of components used in international treaties to describe policy goals.¹³⁷

¹³⁴ See Sands, P. - *Principles of international environmental law*, 2003 p. 263. See similarly Jans, J. H. - *European environmental law*, 2000 p. 17 where he considers the integration principle to be one of the most important principles for environmental protection in Community law.

¹³⁵ For an example of a multilateral development programme demanding environmental integration, see the Fourth Lomé Convention Article 4. See e.g. Sands, P. - *Principles of international environmental law*, 2003 p. 263. See similarly Jans, J. H. - *European environmental law*, 2000 pp. 264-6 for a discussion about 'the right to development'.

¹³⁶ See Sands, P. - *Principles of international environmental law*, 2003 p. 254.

¹³⁷ See Lowe, V. - *Sustainable Development and Unsustainable Arguments in: International law and sustainable development : past achievements and future challenges*, 2001 p. 26, 30.

4.3 Article 6 EC and its Ultimate Objective or Reason

As noted above, the Amsterdam Treaty brought changes in the wording of the Community integration principle.¹³⁸ Looking once again at Article 6 EC the added phrase ‘in particular with a view to promoting sustainable development’ is by some claimed to give some ‘legal weight’ to the sustainable development concept.¹³⁹ This follows because sustainable development must take a real form by the integration of environmental protection requirements in the Article 3 EC policies. The argument further continues that this is an indication of how sustainable development should be achieved and thus it is not just a goal but a duty conferred on EC institutions to take sustainability into account.¹⁴⁰

The normative strength of this argument can be questioned, but the added new text to the integration principle also seems to add a new dimension. It is as if this addition indicates that integration of environmental interests is not an independent aim but instead a method intended to lead to sustainable development. Surely, the words ‘in particular’ in Article 6 appear to indicate that there are also other goals to be achieved than sustainable development, but the main focus is specified. Thus sustainable development can perhaps be regarded as a larger concept or objective of which the principle of integration forms an important part?

The legal meaning of sustainable development in EC law and Article 6 can only be further unveiled by studying EC/EU documents. Starting with the documents that explicitly mention sustainable development there seems to be a somewhat inconsistent method of reference. For instance, the current preamble of TEU actually refers to ‘the *principle* of sustainable development’ (emphasis added),¹⁴¹ and so does Article 37 of the December 2000 ‘Charter of Fundamental Rights of the European Union’.¹⁴² Still, in Article 2 TEU sustainable development is described as an ‘objective’ and Article 2 EC under the heading ‘PRINCIPLES’ mentions it as a ‘task’. The result of this inconsistent method of denomination in Treaty text has led some legal scholars to assume that sustainable development is better off referred to as an idea/ideal or a concept/objective.¹⁴³

¹³⁸ See section 3.1.

¹³⁹ See Jans, J. H. - *European environmental law*, 2000 pp. 17-8 and Bär, S., Kraemer, A. – *EUROPEAN ENVIRONMENTAL POLICY AFTER AMSTERDAM*, 1998 p. 318.

¹⁴⁰ See Bär, S., Kraemer, A. – *EUROPEAN ENVIRONMENTAL POLICY AFTER AMSTERDAM*, 1998 p. 318.

¹⁴¹ An interesting point of comparison here is that sustainable development is not mentioned among the important environmental principles in Article 174(2) EC. If this had been the case, the inclusion could have added some strength to arguments embracing sustainable development at least as an environmental *principle*.

¹⁴² See OJ C 364, 18.12.2000.

¹⁴³ See e.g. Winter, G. – *Environmental Principles in Community Law in: The European Convention and the Future of European Environmental Law: Proceedings of the Avosetta Group of European Environmental Lawyers*, 2003 p. 21 and Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 71.

Studying some secondary sources containing references to and definitions of sustainable development that I have found, it can be concluded that there is not much to be derived in terms of denominating the concept. For example, the already mentioned regulations 2493/2000 and 2494/2000 which contain the exact same definition of sustainable development are silent about if the concept should be regarded as a principle or objective.¹⁴⁴ Likewise, the ‘EU Water Framework Directive’ mentions sustainable development, but without defining or giving it a certain denomination.¹⁴⁵

In policy documents sustainable development is more frequently used than in secondary sources. However, the confusing attitude towards the concept expressed in primary law is reconfirmed. Some of the policy documents which have already briefly been mentioned above, denominate sustainable development in yet other ways. For instance, the ‘Fifth Environmental Action Programme’ sets out that the use of the word “sustainable” is intended to reflect a *policy* and *strategy*.¹⁴⁶ Moreover the programme is organized to specify certain long-term objectives leading to a path of sustainable development. To this end, sustainable development is described both with the word ‘goal’ and ‘objective’, words that are probably to be perceived as synonymous in the document.¹⁴⁷ In the end, the overall impression seems to be pointing to that sustainable development should be perceived as a long-term objective. In the following ‘Sixth Environmental Action Programme’ nothing much new can be derived in terms of denomination. Instead the programme discusses how certain objectives, priorities and actions of the programme can lead to sustainable development.¹⁴⁸

One of the documents preceding the ‘Sixth Environmental Action Programme’ gives some further indication though. The first EU SDS states that sustainable development should become ‘the central objective of all sectors and policies’ and later it also adds that ‘sustainable development is by its nature a long-term objective’.¹⁴⁹ A selection of other documents published later in 2005 seems to support this expression. The most frequently used wording in these documents is with some variations ‘overarching objective’ and this is most probably what is to be finally

¹⁴⁴ See chapter 2 section 2.2. The definition of ‘sustainable development’ is found in Article 2 (4) in Reg. 2494/2000, OJ L 288, 15.11.2000, p. 7 and Article 2 in Reg. 2493/2000, OJ L 288, 15.11.2000, p. 2.

¹⁴⁵ See Article 4(7)(c) in OJ L 327, 22.12.2000.

¹⁴⁶ See OJ C 138, 17.5.1993, p. 12 (emphasis added).

¹⁴⁷ See OJ C 138, 17.5.1993, p. 97, 52, 80 and 98 compared.

¹⁴⁸ See Decision No 1600/2002/EC of the EP and Council laying down the Sixth Community Environment Action Programme, p. 1 at (11).

¹⁴⁹ See COM(2001) 264 final, p. 6 and 14 respectively.

communicated in terms of denomination.¹⁵⁰ The latest renewed EU SDS classifies sustainable development as an ‘*overarching objective* of the European Union ... governing all the Union’s policies and activities’.¹⁵¹ Notably, the ‘Constitutional Treaty’ rejected by France and the Netherlands, puts sustainable development under ‘Title I: DEFINITION AND OBJECTIVES OF THE UNION’ in Article I-3 (ex Articles 2 TEU, 2 EC) with an additional subheading that spells out ‘The Union’s objectives’.¹⁵² From this it can perhaps be said that former differences in denomination were supposed to merge into a vision of sustainable development as an objective.

In terms of coherence in description of the content of sustainable development, the following conclusion can be drawn. Starting with the ‘Fifth environmental programme’ of 1993, all of the following documents seem to describe sustainable development, with some slight differences, as an overall objective to be achieved by the EU in a long-term period. Thus the denomination does not only confirm sustainable development as an ‘objective’ but also the organization of the documents. They contain plans and indications of how the EU is best to act in order to reach this goal or objective.

To finalize this section some additional comments are necessary. A literal method of interpretation is not the only way to look deeper into sustainable development in Article 6. For example, there are also contextual interpretations that may further nuance the discussion about its legal value. Generally, it could probably be said that the placement of the integration principle in Article 6, including sustainable development, in the front of Community provisions signals some degree of increased importance of the concept. Winter asserts that even though sustainable development rather should be seen as a goal than a principle, it attains some legal significance through Article 6. Furthermore, its legal value can be anchored by the link between Article 6 and Article 174 EC.¹⁵³

Another aspect that could be discussed is if case law of the ECJ provides some legal strength. As to yet, the ECJ has not used sustainable development in a manner that would grant it a status of a

¹⁵⁰ For ‘overarching objective’ see COM(2005) 37 final p. 4, COM(2005) 218 final p. 2. Some variations like ‘fundamental objective’, ‘core objective’ and ‘overarching long term goal’ may also be found. See COM(2005) 37 final p. 3, COM(2005) 218 final p. 2 and COM(2005) 658 final p. 4 respectively.

¹⁵¹ See European Council Doc 10117/06 of 9 June 2006 p. 2 (emphasis added).

¹⁵² See Treaty establishing a Constitution for Europe. Later in the Treaty, a practically identical formulation of current Article 6 EC can be found in Article III-119. Thus, the latter article mentioned contains no changes implying a different attitude towards sustainable development. Instead, clarifications in connection to the concept seem to have focused on change in the beginning of the Treaty in Article I-3.

¹⁵³ See Winter, G. – *Environmental Principles in Community Law in: The European Convention and the Future of European Environmental Law: Proceedings of the Avosetta Group of European Environmental Lawyers*, 2003 p. 21.

legal principle.¹⁵⁴ All the same, I have found a few instances where sustainable development has been discussed within proceedings before the ECJ. In the case ‘First Corporate Shipping’ Advocate General Léger comments on the linkage between environment and economy:

‘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 emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled’.¹⁵⁵

Although this view on sustainable development was proposed in the Advocate General’s opinion, the ECJ chose to disregard it in its judgement. All the same, it could be argued that case law concerning the integration principle strengthens the potential legal effect of sustainable development even though the concept is not mentioned. This follows the thought that the integration requirements of Article 6 in the long run serve the bigger purpose of achieving sustainable development.

It has been discussed back and forth in literature to what extent the integration principle can be used in adjudication. Available case law suggests that that the principle fills an important function when choosing legal basis for environmental measures. In the so-called ‘Chernobyl I’ case, Greece claimed that regulation 3955/87 was incorrectly based on Article 113 EC (now Article 133 EC) and that it should have been based on Articles 130r and 130s instead.¹⁵⁶ The argument brought forth was that the regulation was exclusively concerned ‘with protection of the health of the general public’ and not the common commercial policy.¹⁵⁷ As I understand it, the ECJ held that if 130r and 130s EC would have been the correct legal basis, these would have required more from the regulation to be placed among ‘Community measure[s] ... of Community action on environmental matters’.¹⁵⁸ Further, the earlier version of the integration clause in Article 130r(2) confirmed this conclusion

¹⁵⁴ It can be noticed here that the ECJ actually refers to ‘the *principle* of sustainable development’ (emphasis added) in *Kingdom of Spain v Council of the European Union* (Case C-36/98) [2001] para. 35. However, sustainable development is not further defined in the case and its mentioning gives little direction if and how it should be used as a legal principle in EC law.

¹⁵⁵ See Opinion of Mr Advocate General Léger delivered on 7 March 2000: *The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust* (Case C-371/98) [2000] para. 54.

¹⁵⁶ See *Hellenic Republic v Council of the European Communities* (Case C-62/88) [1990] para. 6.

¹⁵⁷ See *Hellenic Republic v Council of the European Communities* (Case C-62/88) [1990] para. 6.

¹⁵⁸ See *Hellenic Republic v Council of the European Communities* (Case C-62/88) [1990] para. 20. See also Jans, J. H. - *European environmental law*, 2000 pp. 19-20 comments on the case.

because a correct legal base required more than just taking into account some of its environmental requirements.¹⁵⁹

Moreover, there also seems to be a possibility to use the integration principle in actions for annulment or invalidity of secondary Community acts although under rather limited circumstances. For example, in case 'Bettati' the ECJ comments that legal review based on Article 130r EC is limited to circumstances where a 'manifest error of appraisal regarding the conditions for the application of Article 130r' has been committed.¹⁶⁰

A related question that also concerns case law is if the integration principle and sustainable development can display legal strength by taking priority when environmental aspirations of the Community conflicts with for example the free movement of goods?

As far as I can tell, there is no case law where the ECJ employs the sustainable development concept in a conflict between environmental requirements and the free movement of goods. However, in a supposed conflict between protection of the environment and market interests, a possible ECJ way of reasoning is that the conflict will be settled in the light of previous case law and the proportionality principle. If the functions of the internal market are affected by some kind of environmental requirement it is likely that these restrictions will only be permitted if they keep within measures that are not discriminatory and do not go beyond what is strictly necessary for environmental protection.¹⁶¹

4.3.1 Summary

So what does all this add up to in terms of Article 6 EC? What can surely be claimed from a literal point of view is that the denomination in several official (non-binding) documents points to a direction where sustainable development is seen as 'something bigger'. The ultimate reason of Article 6 EC indeed appears to be this bigger objective. Also, the content of sustainable development seems to be coherently confirmed as that of an objective. The following question is what legal implications this has for sustainable development in Community law?

If compared to what was said about sustainable development in international law, the attitude in mentioned EC/EU documents doesn't give the impression of granting it a status of a principle.

¹⁵⁹ See *Hellenic Republic v Council of the European Communities* (Case C-62/88) [1990] para. 20. Later this view was confirmed by the ECJ in case *Commission of the European Communities v Council of the European Communities* (Case C-300/89) [1991].

¹⁶⁰ See *Gianni Bettati v Safety Hi-Tech Srl* (Case C-341/95) [1998] para. 35.

¹⁶¹ See Jans, J. H. - *European environmental law*, 2000 p.19 and 256.

Looking again at the four legal elements that sustainable development comprises according to Sands,¹⁶² only the integration element is included in Article 6 EC. That is, the integration principle and its ‘green’ effect on policies and activities in Article 2 EC can be seen as only one part of the sustainable development equation.

It is true that the integration principle has the power to affect the initial formation of policies and activities in Article 2 EC as well as when these acts are implemented. It is equally true that the ECJ has mentioned environmental protection as one of the essential objectives of the Community,¹⁶³ but this doesn’t automatically mean that sustainable development in Article 6 attains the status of a legal principle. It has been proposed that all four of Sands’ elements can be found within Treaty text and secondary law.¹⁶⁴ However, this doesn’t provide a particularly strong argument for considering sustainable development to be a principle. It therefore still seems more sensible to see it as an objective.

There have been some contextual attempts to interpret sustainable development as having legal effect. It is implied that this effect comes from the placement of the concept in Article 6 coupled with the environmental requirements of Article 174 EC. Speculations about a potential legal effect induced from case law can also be mentioned. An application of the sustainable development concept in case law can perhaps be recognized if the application of the integration principle can be seen as fulfilling the ultimate goal of sustainable development even without mentioning it. However, available case law seems to limit the use of the integration principle to legal base matters for environmental measures and in rare circumstances annulment or invalidity of secondary Community acts. Finally, there seems to be no indication that action pursuing environmental aims of the integration principle could show legal strength by simply taking priority over for example the free movement of goods in a conflict between the two. Restrictive environmental measures will instead undergo normal scrutinizing procedures in the ECJ with possible necessity and proportionality review.

¹⁶² See chapter 4 section 4.2.

¹⁶³ See *Procureur de la République v Association de défense des brûleurs d’huiles usagées (ADBHU)* (Case 240/83) [1985], para. 13.

¹⁶⁴ See Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 68 where Article 174(1) EC is mentioned as an example including the ‘sustainable use’ element. Furthermore, the other elements can be found in for example ‘relevant secondary legislation (concerning sustainable development in developing countries)’. The referred legislation is probably documents like Reg. 2494/2000, OJ L 288, 15.11.2000 concerning ‘measures to promote the conservation and sustainable management of tropical forests ...’.

4.4 Some Final Remarks and two Alternative Views

A common reason for rejecting sustainable development as a legally normative principle in literature stems from the inherent vagueness of the concept.¹⁶⁵ It is claimed that such an unclear concept lacks the properties to have normative significance. There are however reasons to look at the vagueness from the opposite view. An ‘artful vagueness’ could perhaps also be considered an important asset?

As for listing the pros and cons of the vagueness at least two positive traits can be identified. From the view of the ECJ potentially invoking sustainable development, it could be practical with a flexible concept. This allows an evolution of the concept that might well be compared to the introduction of such tools as the ‘Cassis doctrine’ and its subsequent re-thinking in the ‘Keck’ judgement.¹⁶⁶ Besides, a flexible concept can be used to decide each legal dispute in the light of the circumstances of each case. The second positive side is that sustainable development with its unclear meaning may be palatable to anyone. This argument is often accompanied by the statement that sustainable development receives its widespread support internationally exactly because of its vagueness.¹⁶⁷

The negative aspects of vagueness are at least three. A too flexible concept could result in unacceptable legal uncertainty. Legal certainty is an important general principle of EC law and cannot be ignored. The second downside is that unclearness, although allowing for widespread support, can lead to a situation where sustainable development means just about anything to anyone. It is up to each person or entity that uses the concept to decide what it means. There is thus a risk of using the concept in agreements that only results in ‘window dressing’. Krämer expresses that this aspect deprives sustainable development of its legal content, leaving us instead with a concept ‘void of sense ... [that] is given political content according to the political actor who uses it’.¹⁶⁸ The third aspect is that the few common traits of the ‘core’ that may be derived from a comparative study of

¹⁶⁵ See e.g. Krämer, L. - *EC environmental law*, 2000 p. 7 and 262, Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 71.

¹⁶⁶ See cases *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (Case 120/78) [1979] and *Criminal proceeding against Keck and Mithouard* (Joined cases C-267 and 268/91) [1993]. The Court’s decision to extend Article 28 EC to cover indistinctly applicable rules led litigants to challenge all sorts of national trade rules. The subsequent jurisprudence in the Keck judgement, introducing the idea of making discrepancies between rules concerning goods and selling arrangements, was an effort to limit the inflow of these challenges.

¹⁶⁷ See e.g. Dhondt, N. - *Integration of environmental protection into other EC policies legal theory and practice*, 2003 p. 61 and Lee, M. - *EU environmental law: challenges, change and decision-making*, 2005 p. 25.

¹⁶⁸ See Krämer, L. - *EC environmental law*, 2000 p. 262.

sustainable development in international law can deteriorate. This would result in even smaller chances of reaching a common definition of the concept in the future.¹⁶⁹

Other views on sustainable development connecting to the discussion about its vagueness have been proposed in non-legal sources. One view builds upon the term of ‘essentially contested concepts’ originally introduced by Gallie.¹⁷⁰ Some typically contested concepts that can be mentioned are democracy, liberty or social justice. From Gallie’s categorisation such concepts share five common traits. Firstly, they refer to something generally considered valuable. Secondly, this valuable something has a multidimensional structure coupled with an internal complexity. Thirdly, the concepts have an open-ended nature that carries with it unpredictable changes and allows for different interpretations. Fourthly, different definitions of the concepts are already available in the initial phase of discussing them. Finally, users are aware of the disputed nature of the concepts and are willing to defend their own conceptions.¹⁷¹ If these traits are then applied to sustainable development, it could be argued that this concept refers to among other things ecological values such as the conservation of natural resources, which indeed seems to be something generally considered valuable. At the same time however, social and economical values are also part of modern sustainable development and this makes the concept multidimensional and complex.¹⁷² The complexity leads to an open-ended nature which allows for different aspects of the concept to be more or less emphasized. For example, commentators from developing countries tend to show more interest in emphasizing the social values of sustainable development than developed countries, which put more weight on ecological values.¹⁷³ Finally, the different users of sustainable development, be it politicians, non-governmental organisations or biologists are aware and can take advantage of the unsure nature of the concept as well as defend their personal views on what the concept means. As already mentioned, the view on sustainable development as an essentially contested concept may be non-legal, but it is all the same an argument that underscores the

¹⁶⁹ It can be discussed whether reaching a common definition is even desirable. See chapter 6 section 6.3.

¹⁷⁰ See Gallie, W. B. - *Essentially Contested Concepts*, 1956 pp. 167-198, the term is later used in discussions about sustainable development in Jacobs, M. - *Sustainable Development as a Contested Concept in Fairness and Futurity – Essays on Environmental Sustainability and Social Justice*, 1999.

¹⁷¹ See Olsson, Jan – *Forskningsperspektiv på hållbar utveckling* in: *Hållbar utveckling underifrån – Lokala politiska processer och etiska vägval*, 2005 pp.81-2.

¹⁷² See chapter 5 section 5.2.

¹⁷³ An example of this situation can be seen in the debate about ‘the right to development’ of developing countries on the one hand and the ‘green requirements’ of investing developed countries on the other hand.

difficulties of using the elusive sustainable development concept as something legally enforceable.¹⁷⁴

This difficulty is also underlined by some criticism from legal environmentalist Bergkamp. As I understand it, he points out a considerable weakness with the inter- and intragenerational equity elements in sustainable development. Looking at the ecological aspect, these elements are founded on resource allocation in and between generations. However, it is fundamentally difficult to decide what should be allocated within this generation and be saved for coming generations.¹⁷⁵ To surely evaluate what should be allocated, we must be able to predict future environmental scenarios by looking at our present impacts. As long as we keep to the near future evaluations, we may be successful as important factors probably don't change over night, but in the long run it is obviously difficult to predict with good accuracy. Besides, long term effects on the environment may quickly change for example by aid of new technology and knowledge.¹⁷⁶ Further, the problems of allocation can in turn be linked to difficulties of quantifying advances in sustainable development. Some attempts have been made through 'structural indicators' linked to the 'Lisbon strategy', but at the same time there are examples of EU documents that admit the complicated task of quantifying progress.¹⁷⁷

Lastly, another personal observation from the use of the concept in EC/EU policy documents may be added. The difficulty of defining sustainable development seems to have led to a negative definition of the concept in some documents. The result is lists of what is *unsustainable*. For example, global warming and severe threats to public health are included in these lists.¹⁷⁸ As a working method, such a negative definition may prove useful in order to make progress towards sustainable development and it can perhaps be considered better than nothing at all. Still, if we are

¹⁷⁴ See Lee, M. - *EU environmental law: challenges, change and decision-making*, p. 25 for similar arguments from a legal perspective. Sustainable development is not explicitly mentioned as an essentially contested concept but it is all the same compared to such notions as justice, liberty and truth.

¹⁷⁵ See Bergkamp, L. - *Corporate Governance and Social Responsibility: a New Sustainability Paradigm?*, 2002 p. 144.

¹⁷⁶ See Bergkamp, L. - *Corporate Governance and Social Responsibility: a New Sustainability Paradigm?*, 2002 p. 144.

¹⁷⁷ For structural indicators see e.g. COM(2003) 585 final. The 'Lisbon strategy' and its synergy with sustainable development is further discussed in chapter 5 section 5.2. For an example of a document admitting difficulties of quantifying sustainable development see European Commission, Directorate-General Health & Consumer Protection – *Guidelines for the Assessment of Environmental Claims*, 2000 p. 7, 'Although the European Union has accepted the concept of sustainability and turned it into a guiding principle for its environmental policy, through the Fifth Environmental Action Programme ("Towards Sustainability"), *no methods have been defined to measure it*. For this reason claims to sustainability are vague, and are not to be made' (emphasis added).

¹⁷⁸ See e.g. COM(2001) 264 final, p. 4 where some unsustainable trends are listed. Among them are global warming, severe threats to public health and transport congestion.

to believe Krämer's opinion it could be yet an addition to the difficulty of grasping and applying the slippery concept as the content of these lists can probably change easily.¹⁷⁹

4.4.1 Summary

To sum up these final remarks, it can be stated that the vagueness of sustainable development bears with it both strengths and weaknesses. Generally, it appears that the positive sides of the vagueness are more suited for justifying sustainable development from a political perspective than from a legal one. Indeed, flexible concepts may also be valuable in legal discussions and adjudication, but there is a border when flexibility transforms into unacceptable uncertainty.

Further, the two alternative views presented; an application of Gallie's term 'essentially contested concept' and Bergkamp's criticism of the inter- and intragenerational elements of sustainable development exemplifies that the vagueness of the concept is not only questioned from a legal point of view. Additionally, in practice one effect of the vagueness of sustainable development seems to have led to a negative definition of the concept. For instance, examples can be found in policy documents that provide lists of what is *unsustainable*. Considering the vague content and definition of sustainable development, it may be better than nothing at all to define what is unsustainable. Still, much of the vagueness of the concept seems to persist.

¹⁷⁹ Krämer claims that sustainable development is a concept 'void of sense ... [that] is given political content according to the political actor who uses it'. See Krämer, L. - *EC environmental law*, 2000 p. 262.

5. Sustainable Development and its Transition From International to EC/EU Law - A Change in Content?

5.1 Introduction

My quest for legal content and effects of sustainable development in EC law started off by studying international law. Undoubtedly, the EC/EU incorporation of the sustainable development concept in treaty text was boosted by such events as the 1992 Rio Conference.¹⁸⁰

In a sense, there has been a transition of the concept from an international to a European level. One example of this transition is that some EU-documents refer to or even quote the Brundtland report when mentioning to the concept.¹⁸¹ The question is if sustainable development at an international level compared to the EC/EU conception of sustainable development is essentially the same? The following sections will shortly investigate if this seems to be the case, in particular relating to the content of the concept.

Earlier in this essay, both the historical evolution and content of sustainable development has been discussed to some extent.¹⁸² To this end, the immediately following section about the ‘three-pillar structure’ of sustainable development perhaps gives an impression of being somewhat misplaced. However, as it concerns matters outside the scope of the first research question, it is more reasonable to discuss it here. Therefore, the following section should be seen as a broadened supplementary perspective to what has already been stated about sustainable development.

5.2 The Three-pillar Structure of Sustainable Development

Notwithstanding the many different available definitions of sustainable development existing today, it is probably fair to say that the Brundtland report’s definition still remains one of the most commonly accepted.¹⁸³ However, the three-pillar approach to sustainable development is steadily gaining recognition and can be described as a modern competitor to the Brundtland definition.¹⁸⁴

Basically, the idea of a three-pillar structure is a widening of the sustainable development concept’s scope. Instead of just concentrating on ecological concerns, the three subdivisions also

¹⁸⁰ See chapter 2 section 2.1.

¹⁸¹ See e.g. COM(2001) 53 final p. 5, OJ C 138, 17.5.1993 p.12 and COM(2001) 264 final p. 2.

¹⁸² See chapter 2 and 4.

¹⁸³ See chapter 2 section 2.1.

¹⁸⁴ See Lee, M. - *EU environmental law: challenges, change and decision-making*, 2005 p. 26. Here the three-pillar structure is described as reflecting the ‘dominant contemporary understandings of sustainable development’.

include economic and social concerns.¹⁸⁵ According to the theory it is to be recognised that ecological, economic and social matters are interrelated and interdependent. On the one hand, it is clear that these three subdivisions are prone to conflict with each other. An example of this conflict is the debate about the right to development through economic exploitation of own resources in developing countries restrained by ‘green’ or ‘democratisation’ requirements of investing developed countries. On the other hand, a reconciliation of these three inherently conflicting areas is exactly what the theory is about. It can for example also be argued that a successful economy in the long run requires stable social conditions and the ability to use natural resources for an extended period of time, thus a reconciliation of these interests becomes a vital interest.

Historically, the origins of a three-pillar approach can be spotted in the Brundtland report. Even though the well-known definition about the needs of the present and future generations has attracted most of the attention, the proposed global agenda for change not only includes changing ecological thinking, but also societal and economical values.¹⁸⁶ Furthermore, in the 2002 Johannesburg declaration on sustainable development, the three-pillar structure is explicitly mentioned:

‘5. ... we assume a collective responsibility to advance and strengthen the *interdependent* and *mutually reinforcing pillars* of sustainable development – *economic* development, *social* development and *environmental* protection – at local, national, regional and global levels’ (emphasis added).¹⁸⁷

From an EC/EU perspective, the foundations of the thinking that would later on lead to a more elaborate three-pillar approach may be found in the early documents concerning sustainable development.¹⁸⁸ The first EU SDS refers to the Brundtland report but it also openly states that the ‘EU strategy must fully integrate the economic, environmental and social *pillars* of sustainable development’ (emphasis added).¹⁸⁹ Interestingly, the Commission’s preparation document ‘Ten years after Rio’ for the 2002 sustainable development summit in Johannesburg takes an explanatory attitude and asserts that since the Brundtland report and the 1990’s sustainable development has

¹⁸⁵ A related subdivision is that used in ‘triple bottom line’ accounting. An approach where ‘the overall performance of a company should be measured based on its combined contribution to economic prosperity, environmental quality and social capital’. See COM(2001) 366 final p. 26.

¹⁸⁶ See e.g. WCED - *Our common future*, 1987, pp. 48-9, where it is stated that environmental stress is linked to economic development and furthermore that problems in these areas are in turn linked to social and political aspects.

¹⁸⁷ See Declaration on Sustainable Development from the World Summit on Sustainable Development Johannesburg 2002 available at: <http://www.un.org/jsummit/html/documents/summit_docs/1009wssd_pol_declaration.htm>.

¹⁸⁸ See for an example of recognition of the linkage between environment, economy and social interests ‘Fifth Environmental Action Programme’ OJ C 138, 17.5.1993, p. 24. ‘continued human activity and further economic and social development depend on the quality of the environment and its natural resources ...’.

¹⁸⁹ See COM(2001) 264 final p. 2 and 10 respectively.

been refined and ‘is now viewed as having three pillars, economic development, social development and environmental protection’.¹⁹⁰

Additionally, documents from 2005 dealing with sustainable development makes references to the Brundtland definition without mentioning the Brundtland report and now seems more focused on the three-pillar structure. It is stated that the basic message of the EU SDS is that ‘ultimately, the economic, social and environmental dimensions of sustainability must go hand-in-hand and mutually reinforce one another ... Understanding the importance of and the interrelationships between these three pillars of sustainable development is crucial’.¹⁹¹

Finally, in discussing the three-pillar conception of sustainable development which Dhondt has called the ‘core meaning’ of the concept, she has also addressed if these pillars should be given the same weight or meaning?¹⁹² Even though this discussion revolves around the *political* meaning of sustainable development in EC law and policies it is interesting to see how connections between the three pillars may be found in the evolution of the EC/EU. As Dhondt explains it, ‘non-economic’ interests have gradually found their place in EC Treaty text, beginning with the insertion of for example policies on environmental protection in the Single European Act. Moreover, since the Amsterdam Treaty in 1997 she argues that the inclusion in Article 2 EC of for example ‘a high level of employment and of social protection ... equality between men and women ... [and] a high level of protection and improvement of the quality of the environment’ next to and independently from the original economic objectives indicates that ‘non-economic’ objectives are at the same level as these. Conclusively, it is stated that the introduction and strengthening of the sustainable development concept with its three pillars can be seen as a confirmation that the EC has shifted its view from the sole dominance of economic integration objectives.¹⁹³

¹⁹⁰ See COM(2001) 53 final pp. 5-6.

¹⁹¹ See COM(2005) 658 final pp. 39-40 for references to needs of the present and the future generations and p. 41 for the explanation of the three-pillar structure.

¹⁹² See Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, p. 68.

¹⁹³ See Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, pp. 69-70.

5.3 Synergies Between the Lisbon Strategy and Sustainable Development

Launched in March 2000, the Lisbon Strategy set the goal of making the EU ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’.¹⁹⁴ Simultaneously focusing on economic and social renewal, this decade long strategy also includes environmental renewal.¹⁹⁵ At the European Council in Göteborg 2001, the conclusions about the Lisbon process coincided with the adoption of the first EU SDS and accordingly it was stated that this ‘added an environmental dimension to the Lisbon process for employment, economic reform and social cohesion’.¹⁹⁶

In later documents, the synergy between the Lisbon strategy and the EU SDS is further worked out. In one document on the 2005 mid-term renewal of the Lisbon strategy, it is stated that ‘The Lisbon Strategy is an essential component of the overarching objective of sustainable development’ and that the Lisbon and EU SDS are ‘mutually reinforcing ... target complementary actions, use different instruments and produce their results in different time frames’.¹⁹⁷ Moreover, the latest EU SDS from 2006 states that ‘The EU SDS forms the overall framework within which the Lisbon Strategy, with its renewed focus on growth and jobs, provides the motor of a more dynamic economy’.¹⁹⁸

Conclusively, the first EU SDS seems to have been presented in 2001 as an environmental dimension to a recently incepted Lisbon strategy. However, judging from later commentaries about the synergy between the two, the impression is rather that the Lisbon strategy forms a part of the broader long term objective of sustainable development. They are mutually reinforcing strategies, but they work in different time frames. From what I can understand, this suggests that the Lisbon strategy has a shorter time frame and the overarching objective of sustainable development has a long term focus.

¹⁹⁴ See conclusions of the Lisbon council available at <http://www.europarl.europa.eu/summits/lis1_en.htm>. See also <http://ec.europa.eu/growthandjobs/key/index_en.htm> for an extensive list of documents relating to the Lisbon Strategy.

¹⁹⁵ See e.g. statement in COM(2003) 5 final p. 2.

¹⁹⁶ See SN 200/1/01 REV 1 - PRESIDENCY CONCLUSIONS - GÖTEBORG EUROPEAN COUNCIL 15 AND 16 JUNE 2001, p. 1.

¹⁹⁷ See COM(2005) 24 pp. 4-5.

¹⁹⁸ See European Council Doc 10117/06 of 9 June 2006 p. 6.

5.4 Summary

Considering the influence of important international events such as the 1992 Rio Conference, one can talk about a transition of the sustainable development concept from an international to a European level. At an international level, the Brundtland definition of sustainable development seems to have been increasingly challenged by a more modern definition, which approaches sustainable development with a three-pillar structure.

With the importance confirmed internationally by the Johannesburg 2002 Declaration on sustainable development, these three pillars have also moved more explicitly into a central position in EC/EU documents. At first, the three-pillar structure appears to have existed in some documents supplementing the Brundtland definition, but it has eventually become an obviously included independent element when sustainable development is discussed.¹⁹⁹

The launching of the Lisbon strategy in 2000 was followed by the adoption the first EU SDS in Göteborg 2001. A link was made between the two emphasising that the latter strategy brought an environmental dimension to the former. However, later official commentaries on the synergy between the two suggest a reversed relationship. Although reinforcing each other, the Lisbon strategy for growth and jobs instead appears to form an essential part of the even broader long term objective of sustainable development.

Finally, in whatever way the link and synergy between the two strategies is perceived, a specially tailored European version of the three-pillar structure has been spawned by their relationship. Because of this, it seems reasonable to state that sustainable development has moved into an even more delicate and specific direction at a European level when compared to the concept at an international level. Therefore, a comparison between the international and EC/EU conception of sustainable development leads to the conclusion that the concept was more or less essentially the same when it was first introduced, but with time the EU skilfully adopted it and let it evolve into a distinct European version.

¹⁹⁹ This is clear when earlier and later documents are compared. See e.g. 'Fifth Environmental Action Programme' OJ C 138, 17.5.1993, p. 24 and COM(2005) 658 final p. 41.

6. Conclusions

6.1 The First Research Question

6.1.1 Recapitulation

Before this section is worked out and any final conclusions are drawn, it is suitable to recapitulate to the beginning of this essay. Initially, the broad purpose of this thesis was set to explore the significance of sustainable development as a concept in European Community law. For this objective, two more specific research questions were chosen and the formulation of the first stands as follows:

- *Does sustainable development have a normative significance for EC law?*

In order to offer some sensible comments and eventually answer this question we must also recapitulate to the clarifying assumptions and additional questions that were fleshed out in the beginning of this essay.²⁰⁰

One of the first assumptions made was that a norm is legal when it is part of a legal system. This legal or normative system has distinct features such as for example coerciveness or effectiveness. The legal system at the centre of attention for this essay has been the ‘normative system of EC law’. By looking at this, an attempt to sift the degree of normativity in EC law of the sustainable development concept has been made. However, delimitations were set to looking only at the ecological/environmental aspects of sustainable development starting within the boundaries of Article 6 EC. This article was in turn chosen as a point of departure because it explicitly mentions sustainable development and was assumed to have a high degree of importance for environmental policy, thus also for sustainable development.

Finally, four important facets of legal norms to be considered were mentioned in the beginning of the essay. To aid the investigation of the normative significance of sustainable development these facets were stated as follows:

‘the degree of binding force or prescriptive intensity, the universal or individual nature of the class of actions they discipline or the class of their addressees, and the function of sustainable development. Is it for example directly affecting human behaviour, duty-imposing or permissive?’²⁰¹

²⁰⁰ See chapter 1 section 1.2.

²⁰¹ See chapter 1 section 1.3.2.

In the next section I attempt to consider these overlapping facets by reconnecting to my findings in chapters 2-4 which served to answer the four more concrete questions: To whom is Article 6 EC addressed? What area of activity does it apply to? When is it employed? What is the ultimate objective or reason of the article?

6.1.2 On the Chosen Facets of Normativity

Taking into account the chronological order of the four concrete questions concerning Article 6 EC, the first facet of normativity to be discussed is appropriately if sustainable development in Article 6 has a universal or individual nature or what is its class of addressees?

Chapter 3 section 3.2 examined the addressees of Article 6 closer. From what was brought forth here it seems like the responsibility for environmental integration, in particular to serve sustainable development, primarily lies on Community institutions. Using the formal sense of Article 7 EC these institutions are probably the ones entrusted to be involved in legislation-making: the European Parliament, the Council and the Commission. However, this is only the indication given by a literal interpretation of Article 6.

Considering case law of the ECJ in connection to this, in particular case ‘Peralta’,²⁰² the Community institutions, are acknowledged as addressees. Furthermore, national case law like ‘Duddridge’ from the English High Court is often also mentioned in this context because its outcome holds Member States free from obligation to take particular environmental integration action.²⁰³ E contrario this can be said to confirm the Community institutions as addressees. Nevertheless, a nuance may still be added. It has on the one hand been argued that the national implementation of for example a directive that emanates from Article 6 can indirectly impose Member State action. On the other hand, it can also be argued that this potential obligation is not derived from a particular article per se, but from a Community act. Likewise, a certain Member State responsibility *not to withtake* measures could arise from Community loyalty emanating from Article 10 EC.

All in all, the class of addressees in Article 6 points to the direction that the responsibility for environmental integration serving to promote sustainable development primarily lies on

²⁰² See *Criminal proceedings against Matteo Peralta* (Case C-379/92) [1994].

²⁰³ See High Court, Queen’s Bench Division, *R. v. Secretary of State for Trade & Industry, ex parte Duddridge & Others*, 1994.

Community institutions. As such, the responsibility is therefore not universal but rather specific even though some nuances exist.

The next normative facet to be studied is what degree of binding force or prescriptive intensity sustainable development has when it is seen through the lens of Article 6?

From what can be concluded by looking at the addresses of Article 6 there indeed seems to exist a duty for Community institutions to integrate environmental requirements promoting sustainable development. The intensity of or how binding this duty is, clearly is affected by what area of activity and when in time Article 6 is to be employed. By reason of what was presented in chapter 3 section 3.3 and 3.4, the intensity of the duty can be described as extensive. According to Article 6, which in turn refers to Article 3 EC, the duty to integrate environmental protection requirements covers all policies and activities under the EC Treaty.²⁰⁴ It has been argued that sustainable development takes a real form through the integration of environmental protection requirements into the Article 3 EC policies. This argument also further holds that Article 6 includes an indication of how sustainable development should be achieved and that it thus is not just a goal but a duty conferred on EC institutions to take sustainability into account.²⁰⁵

What can further be said about the prescriptive intensity is that Article 6 temporally affects EC legislation in all its stages.²⁰⁶ The article's text states that environmental protection requirements must be integrated in the definition and implementation of the Community policies and activities. As such, not only does the integration principle apply to the initial stages when the policies or activities are initially defined, refined or redefined, it also applies to the implementation of these objectives. In remembering the primary addressees of Article 6, it can be assumed that integration of environmental concerns in the 'definition' of Community policies foremost applies to the work of the Commission, the Council and the Parliament. Moreover, a great deal of different 'implementation' situations can be found.²⁰⁷

So far, the degree of binding force or prescriptive intensity derived from the study of Article 6 seems extensive. It at least affects all the policies and activities mentioned in Article 3 EC and it also shows lengthy temporal significance. The integration requirement follows legislation from its

²⁰⁴ There are different views of what is included through the reference to Article 3 in Article 6 EC. Dhondt has proposed a more elaborate version of what is included in the obligation to integrate environmental protection requirements. This view doesn't just refer to the entire EC Treaty. Moreover the question of what environmental protection requirements should be taken to mean is also disputed. For details about both matters see chapter 3 section 3.3.

²⁰⁵ See chapter 4 section 4.3.

²⁰⁶ See chapter 3 section 3.4.

²⁰⁷ E.g. when the Council delegates powers of implementation, and also perhaps even when the Commission 'enforces' Community acts. See chapter 3 section 3.4.

initial creation phase to the actual implementation. However, is it really sustainable development that possesses the rather extensive normative influence just discussed?

There is one very important part not yet addressed in connection to prescriptive intensity or degree of binding force. This inevitably overlaps another facet, which is what function sustainable development has in EC law?

As explained in chapter 2 section 2.2 and chapter 4 section 4.3, Article 6 doesn't itself define sustainable development. Moreover, other available references to the concept in both the EU and EC Treaty text give a rather confusing picture. The absence of clarifying case law from the ECJ also excludes an important interpretational source. Still, recourse to interpretation of policy documents offers some enlightenment.

A fact that has decisive impact on the normative significance of sustainable development in EC law is the way it is described in many of these documents. Namely, the rather coherent reference to the concept as a long-term 'goal' or 'objective'. Moreover, the overall impression from the most important policy documents until present date, of which some deal with sustainable development in detail, denominates it as an 'overarching objective'.²⁰⁸

In summary, the degree of binding force or prescriptive intensity of sustainable development in EC law is heavily diminished when the concept's function is discussed. It seems like the normative significance that could possibly be derived from Article 6 EC instead belongs to the *integration principle* and not sustainable development itself. That is, the normative influence arising from the integration principle must not be confused with the normativity of sustainable development.

Sustainable development has been described as one of the fundamental objectives of both the EC and EU. As such it has a political function as an overarching goal, but its legally normative significance remains weak due to several reasons.²⁰⁹

Firstly, even though flexible concepts may sometimes prove useful as they can evolve or adjust to the specific circumstances of each case, sustainable development appears too vague to be used as a legal tool. As Lowe has remarked 'it must be possible to phrase a norm in normative language'.²¹⁰ Considering the vagueness surrounding the present definition and content of sustainable development, it is probably not daring to say that its use in adjudication today would result in severe legal uncertainty.

²⁰⁸ See chapter 4 section 4.3.

²⁰⁹ In this sense Krämer has aptly expressed that the vagueness of sustainable development deprives it of its legal content, leaving us with a concept 'void of sense ... [that] is given *political content* according to the political actor who uses it' (emphasis added). See chapter 4 section 4.4.

²¹⁰ See chapter 4 section 4.2.1.

Secondly, not only is the sustainable development concept vague, even the most ambitious attempts to prove it has normative strength must be considered to be failing. For instance, Sands embarked on the project to compare different international definitions of sustainable development to prove its legal content, but the results end up with elements just as opaque as the sustainable development concept itself.²¹¹

Finally, it is probably no coincidence that sustainable development has mostly been defined in non-binding EC/EU documents. As to yet, the supposed intention of the EC legislator therefore doesn't seem to support the judicial employment of sustainable development. What is more, when it comes to adjudication, the ECJ has avoided elaborating the concept in its case law. Conclusively, based on a study of Article 6 EC limited to the ecological dimension of sustainable development, the normative significance of this concept in EC law is arguably weak. It should rather be seen as an over-arching objective to be aimed for in the pursuit of policies and activities within the EC Treaty.

6.2 The Second Research Question

6.2.1 Recapitulation

As a short recapitulation, the second research question widens the scope to comparing the international conception of sustainable development with the EC/EU conception.²¹² More specifically, the formulation of the second research question is:

- *Has the concept of sustainable development changed in the transition between international law and the EC/EU legal order, in particular relating to its content?*

As appears from the formulation, the question builds on the assumption that there has been a transition of sustainable development from international law to the EC/EU legal order. Put in another way, the question serves to answer if the international and EC/EU conception of the sustainable development concept is essentially the same? Simultaneously, the discussion above

²¹¹ See chapter 4 sections 4.2 and 4.2.1. Personally, I also consider other serious attempts to prove the normativity of sustainable development as efforts to 'force' the concept into invented categories of normativity. One example can be found in Lowe, V. – *Sustainable Development and Unsustainable Arguments in: International law and sustainable development: past achievements and future challenges*, 2001, p. 31 where sustainable development is discussed as a 'meta-principle' possessing *another kind of normativity*: 'it [sustainable development] is a meta-principle, acting upon other legal rules and principles – a legal concept exercising a kind of *interstitial normativity*, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other' (emphasis added).

²¹² See chapter 1 section 1.2.

included reflections about the modern ‘three-pillar structure’ of sustainable development, which makes an additional commentary to what was stated about the concept in chapters 2-4.²¹³

6.2.2 Sustainable Development in a European Dress

As a result of the 1992 Rio Conference, sustainable development was given considerable thrust into the political agenda of countries worldwide.²¹⁴ The European efforts following this event included among others the adoption of the ‘Fifth Environmental Action Programme’ which in particular focused on sustainable development.²¹⁵

Even though the famous Brundtland definition was and still is frequently used in various documents to explain sustainable development, another parallel definition existed before. The latter explicitly builds on the linkage between environmental, economical and social matters and has become known as the ‘three-pillar structure’ of sustainable development.

Originally existing implicitly side by side with the Brundtland definition, the three-pillar structure emphasizes the interrelation and interdependence of ecological, economic and social matters instead of mainly focusing on the ecological part of sustainability. In the 2002 Johannesburg follow-up to the 1992 Rio Conference this definition was openly acknowledged as one of the principles of the Johannesburg declaration.²¹⁶

Lately, most EC/EU documents concerning sustainable development imply that the three-pillar structure is a preferred choice of reference compared to the Brundtland definition. For example, the document ‘Ten years after Rio’ states that sustainable development has been refined and ‘is now viewed as having three pillars, economic development, social development and environmental protection’.²¹⁷

Dhondt suggests that the gradual acceptance of ‘non-economic’ interests by the EC/EU coincides with the introduction and strengthening of the sustainable development concept. Further, the concept’s acknowledged (political) importance seems to confirm that the EC has shifted its view from the sole dominance of economic integration objectives.²¹⁸

²¹³ See chapter 5.

²¹⁴ See chapter 2 section 2.1.

²¹⁵ See ‘Fifth Environmental Action Programme’ OJ C 138, 17.5.1993.

²¹⁶ See Principle 5 of the Declaration on Sustainable Development from the World Summit on Sustainable Development Johannesburg 2002 available at: <http://www.un.org/jsummit/html/documents/summit_docs/1009wssd_pol_declaration.htm>.

²¹⁷ See COM(2001) 53 final pp. 5-6. See also other examples of later documents in chapter 5 section 5.2.

²¹⁸ See Dhondt, N. - *Integration of environmental protection into other EC policies*, 2003, pp. 69-70.

Down the same line of reasoning, the synergies between sustainable development and the the ‘Lisbon strategy’ mutually reinforcing each other seems to confirm what Dhondt has suggested.²¹⁹ The Lisbon strategy focusing simultaneously on economic, social as well as environmental renewal makes an excellent example of modern sustainable development thinking adapted to EC policies.

In summary, the clear synergies between the modern three-pillar structure of sustainable development and such specific European agendas as the Lisbon strategy can only lead to one conclusion. The EU and the EC has gradually incorporated the sustainable development concept starting with the international conception and has by time let it evolve into a specially tailored European version aptly fitting into specific EU political agenda. Therefore, the content of sustainable development must be said to have changed in the transition between international law to the EC/EU legal order.

6.3 Some Additional Remarks

What we have seen, is a concept stemming from international law evolving into something now linking specifically to the present European political agenda. In retrospect, the journey of a contextual nomad like sustainable development gives rise to even further reflections.

Particularly interesting in retrospect is the milestone laid down by the ‘Gabčíkovo-Nagymaros (Hungary/Slovakia)’ case.²²⁰ Although held by many as an important recognition of sustainable development internationally, the case nevertheless left much to wish for in terms of explanation as the court left only a reference to a *concept*.²²¹ Personally, I am convinced that a more valiant majority judgement in terms of elaborating sustainable development could have meant a lot for the concept’s legal value today. Besides, providing clearness could perhaps minimize some worrying tendencies at a European level of increasingly including more and more under the umbrella of the concept.²²²

Because of its vagueness, sustainable development is in the end both a winner and loser. It has gained much popularity in political rhetoric exactly because of its unclearness. To this end, Lee has

²¹⁹ See chapter 5 section 5.3.

²²⁰ See ICJ 1997 – CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA).

²²¹ As Sadeleer puts it this leaves us uninformed as to whether sustainable development should be seen as an ‘embryonic principle or at best a political objective’. See Sadeleer, N. de - *Environmental principles: from political slogans to legal rules*, 2002, p. 67.

²²² One example that could ‘dilute’ the concept can be found in the latest EU SDS. See European Council Doc 10117/06 of 9 June 2006, p. 2. Here it is stated that sustainable development means protecting Earth’s capacity to support life and diversity, but also that the concept is based on ‘the principles of democracy, gender equality, solidarity, the rule of law and respect for fundamental rights, including freedom and equal opportunities for all’.

made a good observation in remarking that ‘a single, all-embracing definition of sustainable development is probably not possible or desirable. The crucial aspect of sustainable development, which allows it to be more than fashionable jargon ... is its embrace of different areas of concern that may otherwise be thought of as distinct and even conflicting’.²²³ Moreover, the same could probably be said about sustainable development seen as an essentially contested concept. It may be difficult to use because of its vagueness, but there are a lot of other essentially contested concepts that we don’t reject even though they are utterly vague.²²⁴ Still, in its present state sustainable development seems to have many weaknesses to be dealt with before it could be of legal use. The vagueness of definition and content would definitely have to be cured if it is to be used in such a manner.

In the end, at a European level, it would probably be possible for the ECJ to get rid of the unclarity problem of sustainable development. As the Court has already shown willingness to review the validity of a secondary Community act in the light of former Article 130r, there may be room for an interpretation of the sustainable development concept.²²⁵ Two possible situations are worth mentioning in this respect. The first probable situation is a validity challenge of a secondary Community act through a *direct* challenge by privileged applicants pursuing Article 230(2) EC.²²⁶ As stated in Article 230, these applicants are Member States or any of the European Parliament, the Commission or the Council. A second possible situation is an individual challenge of validity. However, instead of using Article 230, a natural or legal person will have greater chances for successful action through an *indirect* challenge in a national Court pursuing Article 234 EC.²²⁷

In whichever manner action is brought, besides fulfilling such conditions as for example *locus standi* and reference within the time limit of Article 230, a validity review must also involve an act open to challenge and a proper ground of review must be put forth.²²⁸

²²³ See Lee, M. - *EU environmental law: challenges, change and decision-making*, 2005 p. 27.

²²⁴ ‘Freedom’ is a good example. See also chapter 4 section 4.4.

²²⁵ See case *Gianni Bettati v Safety Hi-Tech Srl* (Case C-341/95) [1998]. Former Article 130r EC can be held to have two descendants: the present Article 6 and 174 EC. See chapter 3 section 3.1.

²²⁶ The chances for a successful validity challenge by non-privileged applicants (a natural or legal person) pursuing article 230(4) are rather minute because of the ‘Plaumann test’ laid down by the Court in *Plaumann & Co. v Commission of the European Economic Community* (Case 25-62) [1963]. See also Craig, P., Búrca, G. de – *EU law: text, cases and materials*, 2003 p. 503.

²²⁷ I.e. if the ‘TWD doctrine’ doesn’t block Article 234 action if it could have been originally pursued by an applicant with *locus standi* and within the time limit of Article 230 instead. See *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* (Case C-188/92) ECR [1994]. See also Craig, P., Búrca, G. de – *EU law: text, cases and materials*, 2003 p. 530.

²²⁸ According to Article 230 the acts open to review are ‘other than recommendations and opinions ...’. This certainly includes regulations, decisions and directives mentioned in Article 249 EC but in some cases also acts which are *sui*

Suppose a directive is challenged due to its infringement of Article 6 EC. An infringement of an article in the EC Treaty is among the four grounds of review mentioned in Article 230 EC. Thus a review including an interpretation of the directive in the light of Article 6 EC could be made by the ECJ. In examining the compatibility of the Community act with the demands of Article 6, sustainable development as such could also be scrutinized and clarified by the Court. This could in turn answer the question if the concept should be seen as a superior obligation that secondary Community acts must respect. Indeed, it would however require a brave Court to take on the task of reviewing an act with this intensity.

Until such time of Court braveness, we will probably have live with the vagueness of sustainable development and be satisfied with lists of what is *unsustainable* development, because the concept is here to stay.

generis given that these have binding force or produce legal effects. See *Commission v Council* (Case 22/70) [1971]. See also Craig, P., Búrca, G. de – *EU law: text, cases and materials*, 2003 p. 483.

Table of Abbreviations

Bull. EC	Bulletin of the European Communities
CAP	Common Agricultural Policy
COM	Communication (from the Commission)
Doc.	Document
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
EU	European Union
EU SDS	European Union Sustainable Development Strategy
FAO	Food and Agriculture Organization
ICJ	International Court of Justice
IUCN	International Union for the Conservation of Nature
OJ	Official Journal of the European Communities
Para.	Paragraph
Reg.	Regulation
RIAA	Report of International Arbitral Awards
SEA	Single European Act
TEU	Treaty on European Union
ToA	Treaty of Amsterdam
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCED	World Commission on Environment and Development
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation
WWF	World Wide Fund for Nature

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