THE LEGAL NATURE OF ENVIRONMENTAL PRINCIPLES IN INTERNATIONAL, EUROPEAN COMMUNITY AND GERMAN LAW

Gerd Winter

Much has been said about the semantic content of environmental principles, but there is less clarity about their legal nature. This article shall contribute to the related discussion. I will propose a general concept of principles that can be applied to all levels of the law, national, regional as well as international. I will begin with a short overview of basic propositions called Principles and proceed with an analysis of their legal nature.

1. OVERVIEW OF ENVIRONMENTAL PROPOSITIONS CALLED PRINCIPLES

In general international law two environmental propositions are widely recognized as customary law, namely the procedural duty between states to co-operate in mitigating environmental risks and emergencies, and the substantive duty to prevent, reduce and control imminent and serious environmental harm.[1]

Precaution, meaning the duty to take measures even in situations of uncertain but possibly serious risks, has much been discussed as a candidate for a third norm of international law. However, neither **the** International Court of Justice[2] nor other international dispute

Professor of Environmental Law & Director, European Center for Environmental Law, University of Bremen, Bremen, Germany.

P. Birnie, and A, Boyle, *International Law and the Environment* (2nd ed., **Oxford,** 2002).

" **1CJ,** Judgement of Sept. 25, 1997, Case concerning the Gabcikovo-Nagymaros **Dam,** at paras 111-114.

settlement bodies like the WTO Appellate Body[3] have yet been bold enough to take this step. Although many scholars call precaution a principle,[4] few are prepared to call it a rule because the requirements of the three sources of international law recognized in Art. 38 of the ICJ Statute - treaty law, customary law and general principles of law - set the hurdle of recognizing a binding rule very high. It is true, there is ample treaty law citing the precautionary principle,[5] but treaties only apply inter parties. Precaution is neither customary law because although *opinio necessitatis sive juris* may be widespread it is not at all consuetude. Nor is it a General Principle of Law (as long as by 'law' it is understood national law) because not many domestic environmental law systems have as yet ventured into precautionary legislation.

More environmental propositions have been established by issue-related treaties and named principles, such as, notably, the polluter-pay principle, the principle of transparency and participation, the principle of joint but separate responsibility, and the principle of sustainability.[6] Equitable access to natural resources and the duty of the state to effective management are significant complementary principles emphasized by those authors who write on the background of societies where inequality is tremendous and the administration is widely ineffective.

On the level of the EU environmental propositions have been codified in the EC treaty, Art. 174. Some of them - precaution, prevention, rectification at source, and polluter-pay - are called principles; others - preserving, protecting and improving the quality of the environment at a 'high level' - are called objectives.

These objectives and principles may seem to be uncompromising. However, Art. 174 III puts them on a more realistic footing.

[3] WTO Appellate Body, Report of Jan. 1998, WT/DS26/AB/R and WT/DS48/AB/R (Measures concerning meat and meat products) at paras. 120-125 and fh. 93.
[4] Cf. Birnie and Boyle, *op. cit,*. p. 120.
[5] For an overview, see N. de Sadeleer, *Environmental Principles* (Oxford, 2002) p. 94 *et seq.*
[6] Cf. Birnie and Boyle, *op. cit.* p. 79 *et seq.;* N. de Sadeleer, *op. cit,* p. 23 *et seq.*

According to Art. 174 III in preparing its policy the Community law shall take account of, *inter alia,* the available scientific and technical data, advantages and drawbacks, regional factors, and the economic and social development of the Community.

Environmental protection requirements do not only shape genuine environmental policies but shall also be integrated into the other policies of the Union. This often so-called integration principle is established in Art. 6 of the EC Treaty but also find place, with slight variations, in Art. 37 of the Charter of Fundamental Rights. As will be explained later in this paper, integration is not a principle in the definition of the term here proposed but rather a rule, because in building a bridge between opposing principles it is strictly to be followed.

It is noteworthy that sustainability is not directly named as a principle of environmental policy but is seen as both a task of the Community (Art. 2 EC) and a qualification of the 'principle' of integration (Art. 6 EC).

The draft treaty submitted by the Convention retains the principles and objectives as listed above. Only slight changes have been made. The integration principle stages even twice, namely as a basic right (Art. 11-37) and as a principle (Art. III-4). Sustainability has been included in the objectives of the relations of the EU with the wider world. The new somewhat pretentious formula is that the Union shall 'contribute to the sustainable development of the earth'.[7]

On the national level Germany and Brazil may be cited as two opposing cases, Germany being parsimonious and Brazil rich in constitutional principles of environmental protection. In the German constitution, disregarding the rules on competences there is only one article referring to the environment. In Art. 20a it is provided that the state must protect the natural conditions of life. In addition, jurisprudence of the Federal Constitutional Court has developed an objective duty of the state to protect human health

Part I Title I Art. 3 paragraph 4.

and a subjective right of the individual to ask for such protection. There is however no subjective right to a livable environment. German law does also rarely lay down principles by ordinary legislation. The principles are mostly doctrinal constructions abstracted out of more precise norms of specific laws. For instance, precaution is part of a complex norm of the German Federal Emission Prevention Act which carefully circumscribes how far precaution can go and what other interests must be considered. The same is true with regard to laws concretizing the principles of rectification at source, polluter pays, and sustainable use of natural resources. In contrast, Art. 225 of the Brazilian constitution establishes a much greater number of propositions which are called principles by legal doctrine, including everyone's right to an ecologically balanced environment, prevention and precaution, the duty of public authorities to defend the environment and to preserve it for future generations, the duty to prepare environmental impact assessments, the duty of the polluter to repair environmental damage, and precautionary management of risks.[8]

Considering that on the levels of international, regional and national law the term 'principle' is used in a variety of ways, we will now attempt to clarify the legal nature of principles. We shall do this consulting legal philosophy.

2. THE LEGAL NATURE OF ENVIRONMENTAL PRINCIPLES

Definitions of 'principle' abound in legal and philosophical discourses. In such situation it is advisable to build a definition which best suits the hermeneutic context in which the term shall be used. That context can be characterised by the following questions:

1. What distinguishes 'principles' from 'policies', and what is the source of their binding force?

2. What is the difference between 'principles' and 'rules'?

[8] Although precaution is not explicitly mentioned, jurisprudence has read it into Art. 225. See P.A. Leme Machado, *op. cit.* p. 67.

3. How do principles range in the hierarchy of norms, and what follows from any positioning in the hierarchy?

4. How is governmental action applying principles reviewed by the courts?

I shall discuss these questions in turn.

2.1. Principles and policies

A principle is undoubtedly a candidate for legal effect if it is contained in a law or sub-legal norm. The legislator must however have intended to give the principle such effect. This distinguishes 'principles' from 'policies'. Policies may also be mentioned in a law but if so they are not intended to be binding. The policy character of a propositions contained in a law text can be deduced either from its express wording (e.g. if a postulate is called a task, a value, an objective, or else) or from the vagueness of the language expressing it. For instance, sustainable development is called a task of the Community in Art. 2 EC, and if understood in the broadest sense of bridging ecological, social and economic concerns it lacks determinable content. For these two reasons it is not a 'principle'. It may rather be called a 'policy' or an ideal.[9]

Besides legislation, principles of legal value can also emerge from legal practice, i.e. the common sense of the legal profession and broader societal discourse based on the experience derived from cases. This is the very source of principles in the common law systems, but it is also well known in the civil law systems as a corollary to statutory law.[10] Many land-mark judgements, which have created new principles, have based their arguments on experience and common sense rather than on the text of laws. It is

For distinction between 'ideals' and 'policies', see J. Verschuuren, *Principles of Emrironmental Law*, (Baden-Baden Nomos, 2003) 19 *etseq.*

For an in-depth analysis of the relationship between principles and codified **taw,** see Josef Esser, Grundsatz und Norm, Tuebingen (Mohr) 1964, p. 141 et «eq_ See also his observation (p. 223) that there has emerged a convergence of **continental** axiomatic and Anglo-American topical thought.

true that judges, like policy-makers, may have a vision of good policies. To establish a principle of legal value they must however reason that the principle shall be binding as law.[11]

Sometimes, principles will emerge, like a phoenix from the ashes, in full development and clarity. This is the case when they appear in constitutions and codifications, or in landmark decisions of courts. More often principles emerge incrementally, being carved out of a number of small steps taken in more specific legislation or case law. For instance, precaution was introduced into German law by one specific statute in 1974. Later on, other laws were gradually also orientated towards precaution. Only if one takes all of the laws together one can say that German legislation is characterised by the precautionary principle, and that it should be interpreted in that way.

Ronald Dworkin, an English philosopher, suggests that the content of principles can only be individual rights, not public interests. According to him principles are to be distinguished from 'policies' that **serve** not individual but collective goals. He observed:

> Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals.[13]

However, there is ample evidence that legal practice has also established principles of respect for the public interest. For instance, the public interest in occupational and consumer health protection has for long been accepted as a counter-principle to economic freedoms. Public interests in environmental protection are more recent examples.

[11] Esser, *op. cit.* 137.

[12] Like e.g. the principle of strict liability in the famous judgement *Rylands* v. *Fletcher,* (1868) LR 3 HL 330. *Cf.* Stuart Bell, Ball & Bell, *Environmental Law,* (4* ed. 1997, Blackstone, London), p. 193 *etseq.*

[13] *r^-" Moht* Seriously,* (Cambridge,1977),atp. 90.

The question of sources of environmental principles is particularly difficult in relation to international law. The traditional categories - treaties, customary law and general principles of domestic law -are too conservative to adequately respond to the demands of worldwide environmental change. The sources of rules and principles of international law - *consuetude* and *opinio juris sive necessitatis,* common features of domestic law, and consensus for international treaties - lack the proactive dynamism needed today.[14]

Some international lawyers react by using the term 'principles' in a looser form. Discussing 'principles' of sustainability, precaution, **etc.,** they do not imply that these have any legal effect.[15] Rather, **such** ambitious 'principles' are regarded as a kind of proto-law. It seems to me that the terminology is somewhat confused. The term 'principle' should be reserved for principles of law. Non-legal principles should rather be called ideals, objectives, policies, etc.

2.2. Principles and rules

Principles and rules have often been opposed as different compositions of the law. There is a wide agreement among legal philosophers that principles are open for balancing against other principles whilst rules have to be applied in any case. Whilst principles are committed to one objective or value and must be compromised if conflicting with opposing principles, rules are conclusive.[16]

Rules may, however, provide that exceptions are possible. Often such exceptions will be door-openers for concerns which represent a counter principle to the principle which primarily stands behind

[14] G. Winter, Anachronien von Gesellschaft, Natur und Recht, in: H. Faber, G. Frank (ed.) *Demokratie in Staat und Wirtschaft, Festschrift fur Ekkehart Stein zum 70.* (Geburtstag, Tubingen, Mohr, 2002), p. 327.
[15] Epiney/ Scheyli, *op. cit.* p. 75 et seq.
[16] R. Alexy, *Theorie der Grundrechte,* (Suhrkamp, Frankfurt, 1994), p. 71 *et seq.;* Martin Borowski, *Grundrechte als Prinzipien,* (Baden-Baden, Nomos, 1998), p. *67 et seq.*

the rule. For instance, according to the German Federal Immission Prevention Act (Bundesimmissionsschutzgesetz) the competent authority is entitled to order a firm to take improvement measures if after the issuance of the primary authorisation scientific progress has revealed new environmental risks. The order is, however, not allowed if the economic burden involved is unproportional. Here, the rule reflecting the principle of environmental protection is relativised by an exception representing the principle of economic freedom.

Rules can even be formulated in a way which allows the balancing of opposing concerns within the scope of the rule. For instance, fundamental rights such as the right to economic freedom are constructed to include first the *prima facie* protection of certain activities (such as economic undertakings) and second the possibility of interference with the protected realm if resaons of public interest (such as environmental concerns) so require.[18] Sometimes principles can be uncompromising. This is the case if they are of extremely high value, and if the core of the principle is at stake. For instance, according to the German constitution the essential requirements of human dignity are absolute. They may not be relativised by other principles. In international law principles with peremptory effect (such as the prohibition of apartheid, of torture, of aggression, etc.) are of this kind. The uncompromising principles should at the same time be conceived as rules, because they have to be strictly applied.

Alexy, *op. cit.,* p., 88. [18]This is very controversial in the German debate on the doctrinal constructior of basic rights. Many authors understand a basic right as a conglomerate o principles. They regard basic freedoms as principles which can be balance* against public concerns and conflicting basic rights. They speak of rules onl; with regard to those specific propositions which case law develops for certai categories of cases. *Cf.* U. Ruehl, Tatsachen, Interpretationen - Wertunger (Baden-Baden, Nomos 1998), p. 384 *et seq.* 1 believe that this conceptio neglects the specific terms of balancing constitutions often provide. There is ri reason why rules should not be conceived to be open for balancing if th« circumscribe the kind of conflicting interests to be considered and give directic on how to do the balancing. There is also room for distinguishing more genet and open rules from more concrete and closed rules.

Principles stand in the background of rules and influence their interpretation and application. They enhance the normative power of rules, advise how to interpret them, help to fill regulatory gaps, guide discretionary powers, and inform about necessary exceptions to a rule.[19] For instance, according to the German Federal Law on Soil Protection the authorities have discretion to deal with past land contamination. They have the choice of making one or more out of the following persons responsible: the original polluter, his or her legal successor, the owner of the land, and the holder of physical control of the land. The polluter-pay principle, which is regarded as a principle although not explicitly stated by the law, has been used to fetter this discretion to the effect that the original polluter if still available should primarily be addressed.

If two or more principles contradict each other, rules solving such conflict are often available or could be established. This is, I believe, the core characteristic of rules: that they are made in order to solve conflicts of principles in relation to more specific issue areas.

There is, however, no rule establishing absolute cardinal or even ordinal ranks between principles. The law may nevertheless characterise a principle to be of particular importance. If so, the principle has, in the concrete case, a *prima facie* priority. over conflicting principles. [20] In consequence the burden of proof is shifted to the defender of the counter-principle. [21] For instance, German land use planning law prescribes that the authorities must consider and adequately balance all interests affected by a zoning plan. Those interests include interests of housing, of trade and industry, of transportation, of environmental and nature protection, **etc.** The law says that some of the interests are to be respected 'as **far** as possible'. For instance land used for agriculture, forestry, or housing shall only if unavoidable be converted for other uses.[22] This means that to destine such land for e.g. industrial or

For more functions of principles, e.g. in relation to extra-legal negotiation and **jrif-regulation,** see Verschuuren, *op. cit.* 38 *etseq.* * Alexy, *op. cit.,* p. 88 *et seq.* [s] **Alexy,** *op. cit.,* p. 146. ** **Art.** 1 para 5 sentence 3 of the Construction Code

transportation purposes would be a *prima facie* violation of the principle. The burden of proving that in the case of industrial use will be shifted to the development interests. .

Absent legal prioritisation of all principles are equal in an abstract sense. The relative weight of principles will then change with the given individual circumstances and can therefore only be determined in the concrete case. One rule recognized in such circumstances is that the more one principle will be impaired by a solution the weightier must the prevailing principle be.[2]

An example of a quite sophisticated rule of balancing opposing principles is contained in Art. 6 para. 4 of the Habitat Directive 92/43/EEC: As a starting point the protected demands of the rare species and habitats are given priority over interests in their use. However compelling public interests in the project can overcome this protection. Such interests must again give way if the affected species or habitats are listed as prioritary. The priority is again reversed if the public interest in the project is particularly indispensable (such as the interests of public health and safety).

2.3. Principles and the hierarchy of norms

2.3(a) General remarks

Principles and their corresponding rules can be situated on the same level of a hierarchy of norms. This is the normal situation where principles play their proper role by serving as a source for interpreting rules, filling -up of gaps in the rules, guiding the use of discretion, etc. For instance, as mentioned before, the precautionary principle stands behind its more precise and complex emanation laid down in the German Federal Immission Prevention Act.

Principles and rules can also be situated on different hierarchical levels of the law. There are internal hierarchies of the levels of national, regional and even international law between ordinary law

Alexy, *op. cit.* p. 146.

and higher ranked law controlling the ordinary law, i.e. constitutional law prevailing over national ordinary laws, EC primary law commanding EC secondary law, and international peremptory law commanding international 'ordinary' law. This internal 'constitutional' hierarchy within each level is to be distinguished from the external hierarchy between levels which we might call the federal hierarchy: EC law has supremacy over national law, and depending on certain conditions international law can also have supremacy over national or regional law. The higher level can be one of constitutional law or one of EC or international law. I have mentioned examples of such higher ranked principles earlier, for instance, the protection of the natural conditions of life contained in Art. 20a of the German Constitution, the achievement of a high level of environmental protection in Art. 174 EC, and the prevention of serious harm as a principle of international customary law.

If a principle has been laid down on a higher 'constitutional' or 'federal' level the crucial question is whether these principles have the power to render rules ranked on a lower level in the hierarchy inapplicable if they contradict the principle. I suggest that the answer is: not directly. The constitutional, supranational or international principle must first have been transformed into a rule. Only rules can be attributed the effect of invalidating lower rank principles and rules.[2]

International peremptory law	Principles Rules
International ordinary law	Principles Rules
Regional constitutional law	Principles Rules
Regional ordinary law	Principles Rules
National constitutional law	Principles Rules
National ordinary law	Principles Rules

* Contrastingly, R. Alexy proposes to directly apply principles if only in a more •**pen** way which allows for the balancing of principles with colliding other principles. I do not follow Alexy because his theory would hinder the emergence «f principles out of common sense and common practice. The discourse about ■r» principles would be loaded with the 'threat' that all what is accepted would **dbady** be applicable law. The dynamic potential of principles is, I believe, **tend** on their somewhat elusive status behind the scene.

This implies, first of all, that we must be more careful with calling propositions rules or principles. The higher the level in the norm pyramide the more willing we are to call a proposition a principle although upon closer look it may be framed as a rule which already contains the balancing of different opposing principles.

2.3 (b) German law

For instance, Art. 20a of the German Constitution (GG) contains a qualification saying that the principle of environmental protection is binding only 'in the framework of the constitutional order'.[25] This is generally understood to mean that environmental protection must be balanced against other principles such as property and economic freedoms. Art. 20a GG is therefore a rule, an open one, for sure, but not a principle. Basic rights can also be understood to establish rules on balancing opposing principles. For instance, the basic right to health may be relativised by other principles of public interest. The fact that one principle (the protection of human health) was made a basic right has the effect that the protected freedom has a *prima facie* priority over the principles protecting public interests. The latter bear the burden of proving their *secunda facie* preponderance.

2.3. (c) EC law

In relation to the principles contained in Art. 174 EC I submit that they too can only become operative if transformed into rules. This means that they must be formulated in a more complex way than by merely restating the principle. Opposing principles must be integrated into the rule, such as the principles of proportionality and the principles representing economic freedoms. Only via a complex and more precise rule a principle can render a national law inapplicable. This can be shown if we consider ECJ jurisprudence on fundamental rights under Art. 6U and basic economic freedoms under Art. 28 EC.

[25] 'Constitutional order' meaning the entirety of the constitution.
[26] Hans D. Jarass, *Grundgesetz fur die Bundesrepublik Deutschland,* (5th ed., Munchen, 2000) Art. 20a n.9.

> As for basic rights it is true that European courts have only rarely had the opportunity to express themselves on rules combining the basic right principle with environmental protection principles. In comparison to the frequent opposition of basic rights and environmental protection in German domestic law (in particular guaranties of economic freedom and property), it is astonishing to know how seldom fundamental rights in the Community have been invoked as a bulwark against Community environmental measures (though this can sometimes be explained by the restrictive standing requirements of Art. 230 para. 4 EC).

The *Standley* case however can- be seen as a case which does oppose fundamental rights and Community environmental principles. One Standley, a farmer, brought an action against British laws which were founded upon a Community Directive. That Directive prescribed that the Member States must designate bodies of water with high levels of nitrate and limit intensive animal husbandry in the corresponding zones. Standley argued (unsuccessfully) that this was an interference with his property right. In response, the EC J stated that the exercise of basic property rights could be subjected to limitations in so far as 'those restrictions in fact correspond to objectives of general interest t pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed' .[27]

> The protection of public health can be such a goal. The Directive serves these ends, as the Court briefly indicated, in a way that Mlows the principle of proportionality.[28] Thus, the principle of protection of public health was integrated into the basic right to private property. This right was constructed as a complex rule on balancing property and human health interests. In the *Standley* case *tas* rule was not considered to be violated by the incriminated Directive.

> As for basic freedoms since Danish Bottles the principle of environmental protection has been recognised as a justification for

[ff] **ECJ** C-293/93 *Standley [* 1999] E.C.R. I 2603 (para. **54).**
***8>*cl.*. para. 54 & 56.**

encroachments by Member States on the basic freedom of movement of goods.[29] The same is true of the principle of the protection of human health. The *Toolex* case shows this in particular as human health is affected there is not directly through products but indirectly through environmental causal chains such as air and water pollution.[30] In the *Bluhme* case the protection of biodiversity as a legally protected interest was recognised.[31] In *PreussenhElektra* the climate was similarly recognised. With respect to the principles of Art. 174 para. 2 EC, there is case law as to the rectification-at-source principle. This served in *Walloon Waste* as an admissible justification for Belgian import restrictions on waste.[33]

However, in other cases the opportunity to corresponding recourse was missed. For example in *Dusseldorp,* which addressed Dutch export restrictions for waste intended for recycling,[34] the ECJ could have relied on the effectiveness of recycling in domestic or foreign installations as a criterion for allowing or disallowing export restrictions; this criterion could have been derived from the principle of rational use of resources provided by Art. 174 para. 3 3rd indent EC.[35]

In relation to the doctrinal construction of principles and rules we can conclude that the Court has used principles in order to form a complex rule on the admissibility of trans-border trade restrictions. The rule is about the following: Trade restrictions are prima facie

[29] ECJ 302/86 *Commission* v *Denmark* [1988] E.C.R. 4607 (No. 9). For an overview *see:* H. Temmink, From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection - a case law analysis (2000) *Yearbook of European Environmental Law,* vol.1, pp. 61-102.
[30] ECJ C-473/98 *Chemical Inspections* v *Toolex* [2000] E.C. R. (No. 38). The case concerns with the prohibition of Trichlorethylen which also spreads via environmental processes.
[31] ECJ C-67/97 *Ditlev Bluhme* [1998] E.C.R. 1-8033 (para. 33).
[32] ECJ C-379 *Preussen Elektra* [2001] E.C.R. I 2099 (para. 73).
[33] ECJ C-2/90 *Commission* v. *Belgium* [1992] E.C.R. 1-4431 (para. 34).
[34] ECJ C-203/96 *Dusseldorp* [1998] E.C.R. I 4075.
[35] The Dutch government did not raise the issue of recycling effectiveness. As a consequence the court was not compelled to invoke that criterion. See G Winter, Die Steuerung grenztiberschreitender Abfallstrome, Deutsche; Verwaltungsblatt 2000, 657 ff.

prohibited but can- *secunda facie* - be justified if based on environmental protection principles.

2.3(d) International law

On the level of international law the distinction between principles and rules can also play a clarifying role. International lawyers have not yet adopted a clear distinction between principles and rules. Often the term 'principle' is used but in fact what is discussed is a 'rule'. This is true for the general principles of international law some of which have the character of rules, and in particular those which even have the status of peremptory norms.[36] For the sake of clarity they should better be called 'general rules (or norms) of international law'. Even the 'general principles of law' in the sense of Art. 38 (1) (c) of the ICJ Statute if consulted as a source of international law will not lead to a principle but to a rule based on those principles.[37] The environmental propositions cited earlier as recognised international law, i.e. the duties to prevent serious harm and to cooperate, are also not principles but rules. By contrast, precaution is certainly not yet a rule. It can however be regarded as a principle, if by principle we mean a proposition which is open for balancing against conflicting principles. Based on such principle we may even consider precaution to be part of a rule of international law which also takes opposing principles such as economic freedoms into account. If so it could be stated as follows[38]:

> States cannot rely on scientific uncertainty to justify inaction when there is enough evidence to establish the possibility of a risk of serious harm, even if there is as yet no proof of harm. In determining whether and how far to apply precautionary measures, states may take account of their capabilities, their economic and social priorities, the cost-effectiveness of preventive measures, and the nature and degree of the environmental risk.

* **See** e.g. Ian Brownlie, *Public International Law* (Oxford, 1998), p. 19.
[r] Esser, *op. cit.* p. 140.
[M] **The** phrasing is based on Birnie & Boyle, *op. cit.*, p. 120.

If specified in this way precaution may be more easily acceptable as a rule of international law. Of course, it does not have a peremptory character in relation to treaty law. But it can influence domestic legislation depending on how the national constitutions decide on the relationship between international and national law.

In consequence, environmental principles as distinct from rules would be able to play their proper role also in international law, i.e. to inform the interpretation of rules and to fill possible gaps in the body of treaty and customary law. They can emerge out of world-wide public discourses and experiences. They are transmission belts between common experience and common sense on the one side and rules of international law on the other. If widely accepted by international doctrine and court practice they can instigate *opinio juris sive necessitatis* and *consuetudo* in order to bring about new customary law. They can even be regarded as general principles of the law if by 'law' we do not only understand national but also international law.[39] In conclusion, principles can be a genuine source of rules also on the international level and may as such accelerate the process of international law-making. In that respect, they show the same potential of the self-creation of law which is well known from common law systems.[40]

2.4 Judicial review of principles

We have seen that there is a difference between policies, principles and rules. Principles are legally binding. They inform the interpretation and development of rules. They may be built into rules by which they may also be assigned a specific legal weight in relation to possible countervailing principles. For instance, as we have seen the rules of the EC treaty on basic freedoms provide that environmental concerns may prevail over the concern for free transborder movement of goods.

See on the history and potential of this source of international law A. Cassese, *International Law* (Oxford, 2001) 155 *et seq.* [40]Esser, *op. cit.,p.* 139.

There is one more dimension to the legal value of principles, i.e. the way how densely the courts will review governmental action applying environmental principles. If the governmental body has actually made use of a principle the courts will tend to have a close look at the case. In other words: If the principle is used to empower an authority the review will be dense. By contrast, if the governmental body has refused to act although the principle may oblige it to go ahead the courts will tend to tolerate such passivity. In other words, if the principle would compell an authority to act the courts will not impose their own understanding of the principle. The reason for this reaction is the following: If the governmental body has already applied the principle it will normally have already weighed it against opposing principles in its decision. The courts have then cultivated ground to check if the balance was correctly struck. If on the other hand the governmental body has desisted from action it is undecided what opposing principles would have to be taken into consideration. As this is widely a political matter reserved to the democratically legitimated bodies, the courts will normally defer to their attitude.

We shall prove this hypothesis by recalling some ECJ judgements.

2.4 (a) The context of providing powers

Principles can inform rules empowering governmental activities
- when a competence basis is required
- when a member state wishes to go further than a Community measure provides.

***2.4(a)** (i) Empowering the exercise of community competences*

ID the BSE (mad cow disease) Case the Community had taken ! **legal** measures directed against the export of British beef to other I **Member** states. The ECJ was asked by Britain to check if the competence basis, namely that for agricultural policy, had duly **been** applied. Referring to the environmental policy principles and ■e principle of integration of these principles into other policies fe court pronounced itself quite precisely on the legal concept of '**acting** under uncertainty'. It said:

> Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.[41]

Secondary legislation can however also exceed the margin of competence rules, and the principles of the treaties including the environmental principles can then serve as guidance on when the Community organs exceed the competence. One example of this given by the ECJ is the already cited the *Standley* case. [2] *Standley* invoked the polluter^pay principle against an EC Directive which limited his animal husbandry. On this point the ECJ stated:

> As regards the polluter pays principle, suffice it to state that the Directive does not mean that farmers must take on burdens for the elimination of pollution to which they have not contributed.[43]

From this one can interpolate that the court would have appreciated the act as a violation of the polluter-pay principle if the Directive had burdened the person who was not the source of the pollution.

2.4 (a) (ii) Empowering member states to go further than secondary law

[41] ECJ, C-l80/96 *United Kingdom* v. *Commission,* [1998] E.C.R. I 2265 (No 99). The phrase was again invoked in *Artegodan* v. *Commission,* Court of Firs Instance, Joint Cases T-74/00, T- 76/00, E.C.R. 2000 11-327, at no. 184.
[42] ECJ, C-293/93 *Standley* [1999] E.C.R. I 2603. The relevant passage is ii paragraphs 55 and 56 which read: 'It is true that the action programs which an provided for in Article 5 of the Directive and are to contain the mandator measures referred to in Annex III impose certain conditions on the spreading c fertilizer and livestock manure, so that those programs are liable to restrict th exercise by the farmers concerned of the right to property. However, the systei laid down in Article 5 reflects the requirements relating to the protection < public health, and thus pursues an objective of general interest without tl substance of the right to property being impaired.'
[43] ECJ C-293/93 *Standley* [1999] E.C.R. 12603 (para. 51).

In the area of secondary law, member states can, according to Art. 95 paras. 4 and 5 EC and/or Art. 176 EC, under certain circumstances, enact law that goes further than Community law. The particular preconditions are of no interest here. The only relevant point for our consideration is the question of the applicability of environmental principles. They come into play as specifying the direction into which complementary member state action can move. Thus, Art. 95 paras. 4 and 5 EC allow for complementary action 'relating to the protection of the environment'. The same is implicit in Art. 176 EC. Thus, any complementary action must result in greater environmental protection. The principles contained in Art. 174 para. 2 EC are drawn into Art. 95 paras. 4 and 5 EC by the integration clause and into Art. 176 EC through direct reference to Art. 174 EC. They open up the potential space for but also mark the limits of complementary acts. For example, a member state making use of Art. 176 EC can draw upon the precautionary principle when the Community legal act is limited to defense against imminent and serious danger.

Environmental principles can also guide the making use of safeguard-clauses established on the ground of Art. 95 para. 10 EC. This was expressed by the Court of Justice in the *Monsanto case.*[44] The court, once again going into some details said that the safeguard clause introduced by legislation on novel food could be used for precautionary measures but that such measures had to be based on a risk assessment, observed:

> Nevertheless, those measures can be adopted only if the Member State has first carried out a risk assessment which is as complete as possible given the particular circumstances of the individual case, from which it is apparent that, in the light of the precautionary principle, the implementation of such measures is necessary in order to ensure that novel foods do not present danger for the consumer, in

> accordance with the first indent of Article 3(1) of Regulation No. 258/97.[45]

2.4 (b) The context of commanding action

2.4 (b)(i) Triggering action by Community organs

A commanding function can be attributed to the principles when they make specifications for the exercise by Community organs of a rule on competences, thereby encouraging rather than limiting action. The obligations that the commanding function imposes is even more marked when, in a situation of otherwise complete passivity or even political resistance, it constitutes a rule compelling the Community's organs to act.

The ECJ gives the Community organs wide discretion in such cases. In the *Safety High Tech* case, following its usual jurisprudence, it stated:

> In view of the need to strike a balance between certain of the objectives and principles mentioned in Article 13 Or and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a manifest error of appraisal regarding the conditions for the application of Article 13 Or of the Treaty.[46]

The judicial self-restraint exposed in this rule is explained by the necessity to strike a balance between opposing principles and the complexity of the implementation of those principles. In more

[45] No. 107 of the judgement.
[46] ECJ C-2B4/95 *Safety High Tech* [1998] E.C.R. 1-4301 (No. 37). The German Federal Constitutional Court has expressed in a similar way. See, for instance, the case where die neighbor of an airport complained that the authorities had not taken appropriate protection, measures. The court ruled that there was no 'evident' violation of the constitutional duty of the state to protect the individual (BVerfGE 56, 54 et seq., at 80).

general terms, we can conclude that if the rule is very open, i.e. if it is only providing for a fair balancing of principles without giving specific guidance, the courts allow very wide legislatory discretion thereby avoiding to replace the legislator's appreciation by their own.

Nevertheless, some more guidance than the mere arbitrariness test may be derived from a closer look at the meaning, aim and conditions of the principles. A core and a penumbra of the principles may be distinguished the core fettering the discretionary margin of the legislator. The core could be defined somewhat in **the** way *ofamaiore ad minus:* when measures combating uncertain risks may be regarded as an extension of the principle of environmental protection measures to defend against imminent and serious dangers should be taken as a legal obligation. If in this way **the** core of principles is identified it can also be taken to already constitute the relevant rule. For if the core is affected there will hardly remain space for bringing opposing principles into the shaping of the rule.

Genuine cases, in which a Community measure is absolute and not only in relation to others and remained below an attainable level of protection, have not yet found explicit treatment by the European Courts. However the EC J in the case of *Safety High Tech* does imply the possibility that afi environmental protection measure can **fail** to attain the high level of environmental protection required by **Art.** 174 EC. In the case the court found the required standard was in fact met as a comparison with the laxer measures of a pertinent mlemational agreement (the Montreal Protocol) showed. Because me court treated this issue only implicitly the question cannot however be considered as decided.

The ECJ has expressed itself on commanding functions mostly in Be somewhat ironical cases where it was the addressee of a Community measure who complained that the Community measure did not go far enough. The plaintiffs in such cases, whose environmentally injurious acts were enjoined by Community law, **argued** that the Community failed to also~*(or* instead) punish the **other** 'sinners'. The argument can be designated as a version of the

NIMBY ('not in my backyard') - principle. The more normal case - where a Community organ, a member state or a third party who would benefit from the Community measure but deems it insufficient files the complaint - has not yet been decided by the courts.

Safety High Tech is particularly relevant as an example of the NIMBY situation. A regulation for the protection of the stratospheric ozone layer prohibited the use of partially halogenated CFCs. The producer, Safety High Tech, argued that CFCs could not be singled out and forbidden without also forbidding halones, for halones which (without controversy) have a higher potential than CFCs for destruction of the ozone layer and, in addition, (unlike CFCs), also have a green house effect. Because of the failure to consider the green house potential of halones the general command of the protection of the environment was violated; further, because of the failure to consider halone's higher potential to destroy the ozone layer the specific command of a 'high level of protection' was also violated. The ECJ replied, on the basis of ex-Art. 130r (now Art. 174), that 'it does not follow from those provisions that Article 130r(l) of the Treaty requires the Community legislature, whenever it adopts measures to preserve, protect and improve the environment in order to deal with a specific environmental problem, to adopt at the same time measures relating to the environment as a whole.'[4]

Although this answer is basically reasonable, the court could hav< gone somewhat further by making use of a German legal construct namely the *Konzeptgebot* (planned approach). The *Konzeptgebol* which was introduced by the Federal Administrative Coui (Bundesverwaltungsgericht - BVerwG), may be invoked i: situations in which a complex set of problems must urgently b solved but are difficult to handle because of limited instruments and administration capacity. Due to this complexity the issues d not have to be solved in one stroke. Rather, the public authoritic may go step-by-step singling out individual actors if this is base

[47] ECJ C-284/95 *Safety High-Tech* [1998] E.C.R. 1-2603 (para. 44).

on a broader plan providing for systematic further action in the future.

In *Safety High Tech* the application of the *Konzeptgebot* would have meant to ask for an overall plan for the phasing out of both CFCs and halones. It seems that in fact there was such a plan in fulfillment of the obligations of the Montreal Protocol. It was defensible to first tackle CFCs, where ready substitutes exist, and then to address the thornier question of halones (which have since indeed been banned).

In *Standley* the *Konzeptgebot* would have required to ask whether the Directive stood in the framework of a general concept of combating all nitrate sources in order to judge the burdens which arose there from on agriculture. Instead the Court of Justice satisfied itself with an isolated consideration of the contribution of farming to nitrates.

2.4 (b)(ii) Directing member states

Directive functions of the environmental principles *vis-a-vis* the member states are less apparent than commanding functions. Certainly the member states are not bound in so far as their own area of competence is concerned. However, in so far as they apply Community secondary legislation and thereby have a certain margin of appreciation they are also under a duty to pay proper heed to the environmental law principles of the Community. [8] This would be a consequential application of the case law in *Wachauf* (which is also codified in Art. 51 of the charter of fundamental rights), namely that the member states when applying Community law are bound by the fundamental rights and principles of the Community.[49] That the integration principle of Art. 6 is nowhere anchored in the national constitution of any member state is of particular interest in this regard. This could lead to the consequence that the member states when applying Community **law** outside the realm of environmental law (say for example

* See: Jans/von der Heide, op. cit. p. 23.

* ECJ 5/88 *Hubert Wachauf* v *Bundesrepublik Deutschland* [1989] E.C.R. 2609 (para. 19).

energy law) would have to respect the environmental principles of Art. 174 EC, including e.g. the principle of rational use of natural resources.[50]

3. CONCLUSION

My reflections about the legal nature of environmental principles can be summed up as follows:

1. Principles should be understood to have a legal value. Non-legal principles should be called policies, ideals, objectives, etc.

2. The legal valueis derived from legislation or court jurisprudence. In the firs

3. Principles are to be distinguished from rules. Principles can be balanced against conflicting principles, rules are conclusive even though they may provide for exceptions or for the balancing of conflicting concerns.

4. Rules providing for the weighing of principles may give one principle *a prima facie* or even conclusive priority over countervailing principles.

5. Principles help to interprete rules, fillgaps in rules, and develop new rules.

   The distinction between principles and rules can be applied to all levels of the hierarchy of norms, be the hierarchy internal to one level or related to different levels.

[50] Similar suggestions have been made by R. Macrory in his paper captioned 'Environmental integration and the European Charter of Fundamental Rights' and presented to the Avosetta Group, in January 2001. See www.avosetta.org. and by N. de Sadeleer in his paper 'Les fondements de Taction communautaire en matiere d'environnement' published in *L' Europe et ses citoyem, Peter Lang 2000,* p. 112.

7. If applied to international law the distinction between principles and rules may help to accelerate the development of the law. Principles can serve as a transmission belt between common experience and common sense on the one side and rules on the other. Rules may more readily be accepted if formulated more precisely as bridges between conflicting principles.

8. Judicial review of governmental action applying or not environmental principles is of different scrutiny depending on whether a principle was used by an authority to empower it to act or whether the authority desists from action although the principle may oblige it to act. The courts tend to apply a closer checking in the first case and defer to the authority's attitude in the latter. The reason for this is to be found in the separation of powers between the judiciary and democratically legitimated governmental bodies.