THE INTEREST OF INTERNATIONAL COMMUNITY IN THE EU ENVIRONMENTAL LAW

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RESUMEN:

Los principios de la legislación ambiental de la UE no están suficientemente definidos en la legislación primaria de la UE. Su significado sustantivo ha sido objeto de una discusión notable, y en su mayoría son incapaces de una definición clara. El objetivo del artículo es mostrar el desarrollo del concepto de los principios de la legislación ambiental a nivel internacional, su expresión específica del tratado a nivel de la UE y los problemas respectivos relacionados con su aplicación. A los efectos de este artículo, se ha planteado la hipótesis de que los principios de la legislación ambiental de la UE son instrumentos flexibles, intencionalmente imprecisamente definidos y que su naturaleza ambigua permite la implementación efectiva del interés de la comunidad internacional.

ABSTRACT:

The principles of the EU environmental law are not sufficiently defined in the primary legislation of the EU. Their substantive meaning has been the subject of notable discussion, mostly concluding that they are incapable of clear definition. The aim of the article is to show the development of the concept of environmental law principles at the international level, their treaty-specific expression at the EU level and the respective problems referring to their application. For the purposes of this article it has been hypothesized that the principles of EU environmental law are flexible, intentionally imprecisely defined instruments and that their ambiguous nature allows for the effective implementation of international community interest.

PALABRAS CLAVE: *Legislación ambiental, Unión Europea, Legislación primaria UE.*

KEYWORDS: *Environmental law, European Union, Primary legistlation of EU.*

INTRODUCTION

Legal norms are created under conflicting interests. International law is characterized by the absence of a central legislative apparatus that could authoritatively decide whose interest is more and whose is less important. The universal international law is created decentrally, through the interaction of individual states and it generally does not work against their explicit will. The interest of the international community that is understood as a community of states would seem to be a logical section of the interests of each of these states. However, despite the fact that the interest of the international community basically lies in the interests of individual states, it is possible that some of them

oppose it in order to obtain their own temporary benefits[1].

As B. Simma observed, the existence of common interests does not derive from scientific abstraction but rather flows from the recognition of concrete problems.[2] The increasing importance of the protection of community interests transcends interests of particular states. At the normative level, the community interests seem to be reflected in such legal concepts[3] as *ius cogens*,[4] obligations *erga omnes*,[5] invocation of responsibility by a state other than an injured state,[6] individual criminal responsibility,[7] etc. The interest of the international community is the reason why a special status under international law is provided for specific instruments.

The concept of the environment derives from the international law. The meaning of the term «environment» has not been clarified until the UN considered environmental issues in 1968 when it recommended in a resolution[8] that the General Assembly should consider convening a UN conference on problems of the human environment.

The aim of the article is to show the development of the concept of environmental law principles at the international level, their treaty-specific expression at the EU level and the respective problems referring to their application. For the purposes of this article it has been hypothesized that the principles of EU environmental law are flexible, intentionally imprecisely defined instruments and that their ambiguous nature allows for their effective implementation of international community interest.

1.- THE DEVELOPMENT OF THE INTERNATIONAL ENVIRONMENTAL LAW

The process of shaping the international environmental law began in the mid-twentieth century with the elaboration of the principles of good neighbourliness, which broke the unlimited powers of the State over the national territory. According to this principle, no state can benefit from its

[1] More to this topic: HERMIDA DEL LLANO, Cristina: *La universalidad racional de los derechos*, [w:] BANASZAK, B.; JABŁOŃSKI, M.; and JAROSZ-ŻUKOWSKA, S.: (red.), *Prawo w służbie państwu i społeczeństwu. Prace dedykowane Profesorowi Kazimierzowi Działosze z okazji osiemdziesiątych urodzin*, Wydawnictwo Uniwersytetu Wrocławskiego 2012, pp. 320–334.

[2] SIMMA, B.: *From Bilateralism to Community Interest in International Law*, vol. 250, in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law 1994*, p.* 233.

[3] TANAKA,Y.: *Protection of Community Interests in International Law*, in: A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, vol. 15 (2011), p. 333.

[4] United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980, Article 53, http://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/ (2016-07-02).

[5] *The Barcelona Traction*, ICJ Reports 1970, 3 et seq. (paras 32-34). The Institut de Droit International defines an obligation *erga omnes* as «an obligation under general international law that a state owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all states to take action. »

[6] Art. 40, 41 and 48 of the *ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts,* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (2016-07-02).

[7] Rome Statute of the International Criminal Court, document A/CONF.183/9 of 17 July 1998, Preamble, para. 4, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (2016-07-02).

[8] 45th session of the Economic and Social Council (ECOSOC), Resolution 1346 (XLV) of 30 July 1968, http://www.un.org/en/ga/search/view_doc.asp?symbol=e/res/1346(XLV) (2016-07-02).

territory, or allow its use to private parties in such a way that would result in injury to persons or property on the territory of another state. As the source of this rule is regarded the arbitral award *Trail Smelter*[9]. It concerned pollution with sulphur dioxide that was emitted by the Canadian smelter situated near the US border, and caused damage in the territory of the United States. The principle has been adopted to the overall international level with a judgment in the *Corfu Channel*[10]. For international law, the effect of this rule was not only to allocate damages suffered in this way within international torts, but also to confirm the possibility to use its classical instruments (diplomatic protection) for possible claims in the event of failure of domestic remedies.

In the second half of the twentieth century, however, this standard proved to be insufficient. At that time there was in fact a systematic environmental degradation involving the pollution of air, seas and oceans, and soil. That was because of the strengthening of economic relations between states, and, as a result, the emergence of new areas of activity of national economies (nuclear energy, chemical fertilizers), industrial and technical development, resulting in an increase in global demand for oil and coal. This led to new environmental challenges, which exceeded the previous territorial scope, losing its bilateral nature and becoming regional, and subsequently, global problems.

Another problem was the diverse economic development of the world and the related diversified access to modern technologies. States in Africa and Asia wanting to compensate their delay in economic development caught risky solutions, expecting success even at the cost of impairments in the environment that often affected not only their neighbours[11]. At the same time, in developed states a social awareness in the area of ecology began to grow[12]. The public opinion started to expect from their states mitigating damage and taking into account the interests of mankind to preserving nature. In this way, the process of changing paradigms of global politics and redefining a new axiology was introduced.

In these circumstances, international law faced the necessity of change. The exclusivity of territorial governance was in fact on the road to take account of emerging needs in economic development. Facing the new format of cross-border and global (sea water, air) damages, the mechanism of compensation upon traditional international law based on diplomatic

[9] *Trail smelter case (United States, Canada),* 16 April 1938 and 11 March 1941, Reports Of International Arbitral Awards, vol. III pp. 1905-1982, http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (2016-07-02).

[10] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 25 March 1948, ICJ Reports 1949, p. 249: «as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances has described as the true measure of compensation and the reasonable figure of such compensation», http://www.icj-cij.org/docket/files/1/1569.pdf (2016-07-02).

[11] See for example: OVIASUYI, P. O.; and UWADIAE, J.: *The Dilemma of Niger-Delta Region as Oil Producing States of Nigeria, Journal of Peace*, Conflict and Development 16, 2010, p. 110 ff; EJIMS, O. *The impact of Nigerian Petroleum Contracts on Rights of Communities*, African Journal of International and Comparative Law, vol. 21/3 (2013), p. 347 ff.

[12] On social paprticipation in environmental protection: CIECHANOWICZ-MCLEAN, J.: *Prawo ochrony i zarządzania środowiskiem,* Warszawa, 2015, pp. 103-105.

protection were no longer sufficient[13]. A prior obligation to exhaust the courts in the state deemed responsible would limit the real possibility of redress. Even then a number of unresolved issues related to the further activities of the polluter and the division of responsibilities between the entity and the state would remain. For damages in areas beyond the sovereignty of a state, mechanism for their disposition, as well as for forcing polluters on appropriate action lacked completely. There was therefore a need to introduce *a priori* - regulations.

In this way began the process of formation of the international environmental law[14]. The starting point for its creation was the Declaration of the United Nations Conference on the Human Environment (1972)[15]. In its political foundations layes a report of the Secretary-General U Thant (1969) «The Problems of the Human Environment. [16]» It was prepaired in response to the resolution 2398 (XXIII) of 3 December 1968 in which the General Assembly decided to convene a United Nations conference on the human environment and requested the Secretary-General to submit a report concerning, inter alia, the nature, scope and progress of work being done in the field of human environment, the main problems arising in this area, and the possible methods of preparing the Conference[17]. The author defined the risk of environmental pollution as a threat to the future of mankind and stressed to the need of active participation of the entire international community. The Stockholm Declaration addressed the issue of the environment as a whole. It referred in particular to the condemnation of nuclear weapons tests and the adoption of an action plan on recommendations for further international action and decided to convene a new conference in future. It contains a number of principles intended to have effect on the conduct of states in respect of their activities influencing the environment. Its essence is art. 21, where it is stated that states «the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction».

In 1992 in Rio de Janeiro, there was a subsequent conference on environment and sustainable development that due to its scope was called «The Earth Summit». It continued the achievements of the Stockholm Conference. The main effects of the Rio conference were: the Agenda

[13] More on the activity of international courts in this area: GAWŁOWICZ, I.: *Some reflections on modern subsidiary law-making processes in public international law with special regard to diplomatic international law*, Dipartimento Jonico in Sistemi Giuridici ed Economici del Mediterraneo: Societa, Ambiente, Culture, 2015, pp. 179–189.

[14] BEYERLIN, U.: *Rio-Konferenz 1992: Begin einer neuen Umweltschutzordnung?* Zeitschrift fur auslandisches offentliches Recht Und Volkerrecht 5, 1994, p. 124.

[15] Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972 by the United Nations Conference on the Human Environment at the 21st plenary meeting as the first document in international environmental law to recognize the right to a healthy environment http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503 (2016-06-25).

[16]https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement (2016-06-25).

[17] UN General Assembly Resolution 2398(XXIII) of 3 December 1968, *Problems of the human environment*,https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/243/58/IMG/NR024358.pdf?OpenElement (2016-06-25).

21[18], the United Nations Framework Convention On Climate Change[19], the Convention on Biological Diversity [20], the Statement of Forest Principles[21] and the Rio Declaration on Environment and Development[22]. This latter document contains a catalogue of rules of conduct, whereas the key principle is to place the mankind at the centre of sustainable development (No. 1). The process itself must equally take into account the needs of present and future generations (No. 3). Finally, the protection of the environment must be linked permanently to the economic development (No. 4). At the First Preparatory Committee meeting, known as Prepcom1, a level of consensus emerged amongst delegations that all states need to enhance efforts and concrete actions to achieve sustainable development.

Both declarations contain in principle similar rules that are generally accepted by the international community, despite the fact that they use undefined terms. They impose obligations relating to the pollution of the environment on both the developing and the developed countries. The Stockholm Declaration and the Rio Declaration became effective in international law as a regime mainly because the basis for their negotiations was the so-called «framework approach». It intends to define the scope of the legal obligations in the general document, and then to formulate the details in the protocol. This approach results in a progressive arrangement of liabilities, to the extent acceptable by states and allows them to influence the content of the commitments. Treaties and the practice of states have further developed general principles contained in the Stockholm Declaration. The Rio Declaration emphasized then the obligations of states based on this development. Its acceptance is also partly due to the balance between the policies of the developed and the developing countries. The developing countries recognized it because of its «precautionary principle» and «polluter pays principle». On the other hand, the developed countries agreed to «common but differentiated responsibilities» and the «right to development». The framework approach helped, moreover, in creating soft law. States created the specifics of principles of international environmental law, whereas the resolutions, protocols and treaties adopted on their basis, led to the creation of the legal system consisting of a combination of formal instruments of law and the soft law[23].

The increase in scientific knowledge on the functioning of the environment and on the effects of environmental destruction was of fundamental importance for the development of international environmental law. The

18 https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (2016-06-29).

19 United Nations Framework Convention On Climate Change, FCCC/INFORMAL/84 GE.05-62220 (E) 200705, https://unfccc.int/resource/docs/convkp/conveng.pdf (2016-06-29).

20 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, https://www.cbd.int/convention/text/default.shtml (2016-06-29).

21 A/CONF.151/26 (Vol. III), Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests

22 A/CONF.151/26 (Vol. I), http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (2016-06-29).

23 GUNTRIP, E.: *The Common Heritage of Mankind: an Adequate Regime for Managing the Deep Seabed?*, Melbourne Journal of International Law vol. 4, 2003, p. 26.

activity of the international community resulting in lawsuits against states violating obligations regarding the environmental protection generated jurisprudence, which promoted the development of international environmental law. 1996 the International Court of Justice (ICJ) issued two advisory opinions: «Legality of the Use of Nuclear Weapons in Armed Conflict» and «Legality of the Threat or Use of Nuclear Weapons». In its opinion of 8th June 1996 on Legality of the Threat or Use of Nuclear Weapons in Armed Conflict[24], the ICJ stated, «the environment is not an abstraction but represents the living space, the quality of life and the health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. » 1997 the ICJ ruled on the Gabčíkovo-Nagymaros project (Hungary v Slovakia), in an interstate dispute arising from transboundary environmental damage[25]. The judgment concerned rather the general international law matters, than strictly environmental matters, however, it enlightened on how environmental law could impact on a project's management. In 1977, Hungary and Czechoslovakia concluded a Treaty in Budapest in order to construct a major hydroelectric dam on the river Danube as a joint investment. The aim of the project was to produce hydroelectricity, improve navigation on the relevant section of the Danube and open it up for trade, as well as to protect the areas along the banks against flooding, to protect the environment and to develop irrigation systems in the area. However, after 1977, the economic, political and environmental positions within both countries changed significantly. In response to domestic pressure, 1989 Hungary abandoned its works at Nagymaros because of serious doubts on the economic viability and the environmental impact of the project. The Court was asked to answer three questions: whether Hungary was entitled to suspend and subsequently abandon its part of the project; whether the then Czechoslovakia was entitled to proceed with a 'provisional solution' involving damming the river at another location and thus arguably causing environmental damage: what were the legal effects of the notification by Hungary in 1992 of the termination of the Treaty. 1997, the Court found that both Hungary and Slovakia breached their legal obligations. Hungary was not entitled to suspend and subsequently abandon the operation on the Project in 1989. Czechoslovakia was not entitled to put the 'provisional solution' as described in the terms of the Special Agreement into operation, from October 1992. The Court called on both states to negotiate in good faith and, unless Parties would have agreed otherwise, Hungary had to compensate Slovakia for the damage sustained by Czechoslovakia on account of the suspension and abandonment of works for which it was responsible. Furthermore, Slovakia had to compensate Hungary for the environmental damage it

24 http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95 (2016-06-29).

25 http://www.icj-cij.org/docket/index.php?p11⁄43&p21⁄43&code1⁄4hs&case1⁄492&k1⁄48d (2016-06-29). The summary of the judgment: http://www.icj-cij.org/docket/files/92/7377.pdf (2016-06-29).

had sustained on account of putting into operation the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia.

In this way, gradually developed a system whose foundation is the precautionary principle that was derived the following Principle No. 15 of the Rio Declaration: «In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. » However, the beginning of the XXI century was the period when the states were withdrawing from the process of achieving exorbitant protection standards, because of their significant economic and political costs not only for poor states but also for the existing economic powers. In addition, after 2005, has come the time of a deteriorating economic situation, and, in the end, the financial crisis. Major industrial countries, it is the United States, China, Russia, were not likely to lead to additional braking of economies by binding environmental standards. The intended process of establishing regional provision for universal solutions also failed.

Accepting obligations under international law by state, especially in areas that are regarded as sensitive and detrimental to the sovereignty and national interests, proved to be effective only in extreme situations, forced by other interests[26]. This was confirmed by the adoption of the Kyoto Protocol[27]. It was to be the first significant step in the international community in the field of climate protection. But already its entry into force was associated with difficulties. An important issue was to meet the high threshold (ratification by the 55% of states that emit 55% of greenhouse gases). As a result of this it came into force in 2005, only when Russia ratified it (2004) counting on the benefits of emissions trading[28]. The climate summit in Copenhagen in 2009, which was to supplement the Kyoto Protocol with concrete commitments to reduce emissions, ended in failure. After the conference in Durban, Canada withdrew from the Protocol (2011). The European Union failed to reduce emissions significantly, while China and India even increased them. The United States did not join the Protocol[29].

The collapse of the process completed in June 2012 in Rio de Janeiro the

[26] BEYERLIN, U.: *Rio-Konferenz 1992: Beginn einer neuen Umweltschutzordnung?* Zeitschrift fur auslandisches offentliches Recht und Volkerrecht, 1994, nr 1, p. 131.

[27] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Adopted: 11 December 1997 (Kyoto, Japan). Entered into force: 16 February 2005, http://unfccc.int/resource/docs/convkp/kpeng.pdf (2016-07-02).

[28] SZYMCZYK, J.: *Problemy związane z wprowadzaniem do praktyki Protokołu z Kioto w Polsce oraz w krajach Unii Europejskiej,* Rynek energii ,Febr. 2006, p. 2, http://www.cire.pl/pliki/2/protokol_kioto.pdf (2016-06-29).

[29] The Treaty had been operating since February 16, 2005 and expired on 31 December 2012. The European Union and Norway, Iceland, Monaco, Switzerland and Liechtenstein affiliated to the European Economic Area committed to extend their obligations under the Treaty by the year 2020. The new Doha amendment to the Kyoto Treaty as proposed by the European Commission on November 6, 2013 has not yet been ratified by the European Union; *Kyoto Protocol: 10 years of the world's first climate change treaty,* Published on 16/02/2015 http://www.climatechangenews.com/2015/02/16/kyoto-protocol-10-years-of-the-worlds-first-climate-change-treaty/ (2016-07-02).

conference known as Rio + 20[30]. Its purpose was to review the implementation of the principle of sustainable development and to support its new mechanisms. The impasse, which the process suffered by the Kyoto Protocol, however, failed to terminate. The outcome document entitled «The Future We Want»[31], although signed by 193 countries, had meagre impact. States confirmed their commitment to sustainable development and stressed the need to strengthen international cooperation in the field of finance, trade, technology transfer, innovation, etc. They emphasized the necessity for cooperation between public and private sector. They did not fall, however, outside the realm of wishful thinking. They referred to the green economy in the context of sustainable development and poverty eradication, which should be a response to the deterioration of the environment and the current economic crisis. For its adoption, however, no mechanism was created.

The international meeting United Nations Framework Convention on Climate Change, at which the 21st Conference of the UNFCCC Parties (COP21) and the 11th Meeting of the Parties to the 1997 Kyoto Protocol (CMP11) took place, was held in Paris from 30 November to 12 December 2015[32]. Among the key issues, there were: long-term objectives, finance of adaptation to climate change in developing countries by the developed countries, as well as reviews of the implementation of the obligations. The climate agreement will be legally binding if at least 55% of the states that are members of the Convention, producing a minimum of 55% of global greenhouse gas emissions wishes to become a party to it. It is planned that the regulations should come into force from 2020.

2.- FORMAL ASPECTS OF THE EU ENVIRONMENTAL LAW

The competence of the European Union in the area of environmental protection is shared with the Member States. That means that if the EU fails to take action to protect a given environmental objective, the Member States retain their power to legislate and to decide what they find a reasonable degree of environmental protection. The European Union is competent to pursue any environmental policy in view of achieving the objectives pursued under the first paragraph of Article 191 TFEU[33]. These are: (1) preserving, protecting and improving the quality of the environment; (2) protecting human health; (3) prudent and rational utilization of natural resources; and (4) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. The actors are the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. The term «action» includes not

[30] United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, on June 20-22, 2012.

[31] http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf (2016-06-30).

[32] http://unfccc.int/meetings/paris_nov_2015/session/9057.php (2016-06-30).

[33] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

only the adoption of legislation according to Art. 288 TFEU, the greatest importance of which is attached to the Directive, but also political instruments, such as resolutions and conclusions of the Council, and setting political goals[34]. Article 192 (1) and (2) TFEU do not specify the criteria for selecting the form of these actions, therefore the EU generally has freedom of choice[35].

According to the case law of the Court of Justice of the European Union (CJEU, Court) [36], Art. 192 (2) TFEU is an exception to the ordinary legislative procedure of Art. 192 (1) TFEU and must be interpreted strictly. The CJEU found that the respective provision refers to sensitive areas affecting the territorial governance of the Member States. The common feature of these areas is either a lack of EU powers beyond the policy in the field of the environment, or the need to take unanimous decisions in the Council[37]. In accordance with Art. 192 (2) TFEU, the Council shall act in a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. However, the Council may make the ordinary legislative procedure applicable to the matters referred to in this paragraph. This procedure of «small footbridge» refers to fiscal measures; measures affecting town and country planning; measures affecting the quantitative management of water resources (either directly or indirectly affecting the availability of those resources); measures affecting land use (with the exception of waste management); measures affecting significantly the choice of the Member States between different energy sources and the structure of their energy supply.

Some legal problems may be inducted through the two-step procedure of art. 192 (3) TFEU[38], according to which the general action programs setting out priority objectives shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, and the measures necessary for the implementation of these programs shall be adopted under the terms of Art. 192 (1) or (2) TFEU as appropriate. In the literature, there is a dispute as to the treatment of this provision: whether it is a procedural provision[39], or contains a rule of jurisdiction[40]. It also shows that this provision is only of declaratory importance, aiming to make aware the recipient that for the realization of action programs it is necessary to undertake specific implementation measures on the basis of the relevant standards of competence provided in the treaty, including Article 192 (1) and (2) TFEU[41].

[34] FRENZ, W.: *Europäisches Umweltrecht*, C.H. Beck, München 1997, p. 24.

[35] EPINEY, A.: *Umweltrecht in der EU*, Cologne et al. 2005, p. 56.

[36] CALLIES, Ch. in: Ch. Callies, M. Ruffert (ed.), EUV/AEUV. *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtcharta. Kommentar, Beck Juristischer Verlag*, München 2011, Art. 192 AEUV, p. 28.

[37] Comp. CJEU C-36/98 (Kingdom of Spain v Council of the European Union), Reports of Cases 2001 I-00779, para. 46 and 49.

[38] CALLIES, Ch., in: Ch. Callies, M. Ruffert (ed.), *op. cit.*, Art. 192 AEUV, para. 36.

[39] EPINEY, A.: *Umweltrecht…*, *op. cit.*, p. 27.

[40] BREIER, S.: *Die Organisationsgewalt der Gemeinschaft am Beispiel der Errichtung der Europäischen Umweltagentur*, «Zeitschrift für Umweltrecht» 1995, p. 303.

[41] Por. BREIER, S, dz. cyt., s. 304.; W. Kahl, w: R. Streinz (wyd.), dz. cyt., Art. 174 EGV, nr akap. 38; Ch. Callies, w: Ch. Callies, M. Ruffert (red.), dz. cyt., Art. 192 AEUV, nr akap. 36.

According to Art. 11 TFEU, environmental regulations can also be found in other EU policies, in particular the provisions concerning the internal market, agriculture and transport. The delimitation between environmental policy and other policies should take place with regard to this area, which the respective regulation focuses mostly on.

3.- MATERIAL ASPECTS OF THE EU ENVIRONMENTAL LAW

The primary legislation of the EU does not provide any definition for environment. However, it follows from Articles 191(1) and 192(2) TFEU that environment includes human beings, natural resources, land use, town and country planning, waste and water. The secondary legislation further refined the notion: «human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage; the interaction between the factors mentioned in the first, second and third indents»[42].

The Treaty of Amsterdam introduced the concept of sustainable development without defining it[43]. The concept has customarily focused on striving for balance between economic development goals and environmental protection efforts. More recently, the idea of 'social' development has been added to the equation.[44] The concept has international origins since it goes back to the Brundtland Report which an ad hoc World Commission on Environment and Development had made in 1987 for the United Nations and which was entitled Our Common Future[45]. In that report, sustainable development was described as a «development, which meets the needs of the present without compromising the ability of future generations to meet their own needs». However, the precise meaning of the notion remains unclear[46], although, on the contrary, a policy of economic growth, which disregards environmental considerations, will not meet the criterion of sustainable development[47]. There is also some criticism in the doctrine, that the notion is being more and more used as a substitute for positive, favourable development, losing all its environmental content[48]. The concept of sustainable development gives rise to an obligation to balance industrial development and economic progress with the need to protect the environment and resources for current and future generations and is nowadays mostly intended to safeguard present and future generations from the adverse consequences of global warming.

Article 3(3) of the Treaty on the

42 Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Official Journal L 175, 5.7.1985, p. 40–48.

43 Article 2 of the Treaty of Amsterdam; Articles 2 and 6 TEC; Article 3(3) TFEU and Article 11 TFEU.

44 SANDS, P.: *Principles of International Environmental Law*, Cambridge, 2nd edn. Cambridge University Press, 2003, p. 9.

45 Report of the World Commission on Environment and Development, G. A. Res. 42/187, 96th plen. mtg, U.N. Doc. A/RES/ 42/187 (11 December 1987), also in book form: Our Common Future, World Commission on Environment and Development, Oxford Paperbacks, 1987, ISBN 978-0-19-282080-8.

46 KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 9.

47 BIRNIE, P.; BOYLE, A.; and REDGWELL, C.: *International Law and the Environment,* Oxford 2009, p. 45.

48 KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 11.

European Union (TEU)[49] states that the Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. The notion of sustainable development consists of four main elements:[50] principle of sustainable use; inter-generational equity; intra-generational equity; principle of integration. The first one refers to the fact that certain limits should be imposed on the exploitation of natural resources, which should be «rational». Principle 8 of the Rio Declaration[51] refers to the need to 'reduce and eliminate unsustainable patterns of production and consumption'. This principle of sustainable use is reflected in a number of international treaties through the employment of terms such as «sustainable utilization', 'wise use', 'rational use', 'optimum sustainable yield' and 'optimum sustainable productivity'[52]. Inter-generational equity refers to the exploitation of natural resources that should be conducted and planned taking into account not only the needs of the present generation but also the future ones[53]. The notion of inter-generational equity is intended to strike a balance between successive generations: the current generation should pass the world to the future ones in no worse condition than it was received[54]. The principle of integration, as indicated in Principle 4 of the Rio Declaration[55] provides for that environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. The purpose of this principle is to ensure the consideration of diverse environmental needs and concerns, e.g. through dissemination of and access to environmental information and conducting environmental impact assessments[56]. The 2002 New Delhi Declaration on the Principles of International Law Related to Sustainable Development[57] enlisted principles that were considered to be closely connected to sustainable development: the duty of states to ensure sustainable use of natural resources; the principle of equity and the eradication of poverty; the principle of common but differentiated responsibilities; the precautionary approach to human health, natural resources and the ecosystem; the principle of public participation and access to information and justice; the principle of good governance; the

[49] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2010/C 083/01.

[50] Sands, 253.

[51] A/CONF.151/26 (Vol. I), *op. cit.*

[52] MAKUCH, K.; and PEREIRA, R.: *Environmental and energy law*, Wiley-Blackwell 2012 p. 39, referring to: the 1982 United Nations Convention on the Law of the Sea; the 1992 Convention on Biological Diversity (CBD); the 1997 Kyoto Protocol and the 1997 Convention on the Non-navigational Uses of International Watercourses. It also appears in soft law instrument such as the World Charter for Nature (1982).

[53] *Ibid., op. cit.*, p. 40.

[54] BOYLE, A.; and FREESTONE, D. : *Introduction*, in: Boyle, A. and Freestone, D. (eds.) *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford, Oxford University Press, p. 12.

[55] A/CONF.151/26 (Vol. I), *op. cit.*

[56] The principle of integration has been incorporated in the text of international treaties such as the UN Convention to Combat Desertification, UN GA A/AC.241/27, http://www.unccd.int/Lists/SiteDocumentLibrary/conventionText/conv-eng.pdf (2016=06-30).

[57]http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf (2016-07-02).

principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. All of them are regarded as elements of sustainable development or as falling under one of the four elements analysed above.

Other principles of EU environmental law are regulated in Art. 191 (2) TFEU[58]: the precautionary principle, the preventive principle, the principle of rectification at source and the polluter pays principle.

The precautionary principle advocates that the lack of scientific certainty is not an excuse for inaction against an environmental threat and should not be used as a reason for postponing measures taken against any threats of serious or irreversible environmental damage[59]. It is thus possible to undertake environmental regulatory controls despite the lack of scientific consensus regarding the nature and seriousness of the potential threat to the environment or human health[60]. The precautionary principle has its origins in German administrative law and was first introduced in the late 1970s as *das Vorsorgeprinzip* (the 'precautionary' or 'foresight' principle), even though the precise content of the principle was unclear[61]. In the judgement of *Leatch v. National Parks and Wildlife Service and Shoalhaven City Council*, the court confirmed that it is necessary to prevent serious or irreversible harm to the environment in situations of scientific uncertainty.[62] Also in the *Pulp Mills* judgment of the ICJ there was stated that the burden of proof lies with the Claimant State, and that the precautionary approach could not be used to reverse the burden of proof in cases where serious risk cannot be established by the Claimant State.[63] Moreover, the judgment established a duty on states to undertake environmental impact assessment in transboundary situations[64].

It is unclear, however, to what extent the content of the prevention principle is independent from that of the precautionary principle that is also mentioned in Art. 191 (2) TFEU. In practice, both principles are used together and there is no definition of either of them in the Treaties[65]. The judgments in cases C-157/96 and C-180/96[66] are good

[58]Art. 191 (2) TFEU, «Union policy on the environment shall aim at a high level of protection taking into account the diversity of situati- ons in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. »

[59] Compare: Art. 3 (3) United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84 GE.05-62220 (E) 200705, https://unfccc.int/resource/docs/convkp/conveng.pdf (2016-06-30).

[60]MAKUCH, K.; and PEREIRA, R.: *Environmental and energy law*, Wiley-Blackwell 2012, p. 8.

[61] KRÄMER, L.: EC Environmental Law, Sweet & Maxwell, 2012, p. 12.

[62] Director-General of National Parks & Wildlife Service v. Shoalhaven City Council, judgment of the Land and Environment Court of New South Wales, 23 November 1993, NSWLEC 191, http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWLEC/1993/191.html?stem=0&synonyms=0&query=~%20leatch (2016-06-30).

[63] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 14.

[64] For a commentary see MERKOURIS, P.: *Case concerning pulp mills on the river Uruguay (Argentina v. Uruguay): of environmental impact assessments and «phantom experts»,* 15 July 2010, http://www.haguejusticeportal.net/eCache/DEF/11/878.html (2016-06-30).

[65]KRÄMER, L.: *EC Environmental Law*, Sweet & Maxwell, 2012, p. 25.

[66] Case C-157/96, R. v Minister of Agriculture, [1998] ECR, 2211, 63–64; Case C-180/96, United Kingdom v Commission, [1998] ECR 2265, 99–100.

examples to underline the fragility of the unity of the two concepts, given the fact that the English version of the judgments refers to the prevention principle only, and does not make distinctions between the two notions, while the Spanish (principios de cautela y de acción preventive), German (Grundsätze der Vorsorge und Vorbeugung), Danish (forsigtighedsprincippet og princippet om forebyggende indsats) and French (principes de précaution et d'action preventive) use a phrase meaning both: precautionary and prevention principle[67]. The principle of prevention is regarded to require preliminary action against known and expected impacts, while, in connection with the idea of precaution; it states that unexpected consequences must also be avoided.[68] The meaning of these terms is concretized through their implementation in sectorial environmental regulations. In the field of waste policy, the principle of prevention of waste generation as enshrined in Art. 4 of Directive 2008/98/EC [69] was further elaborated through the rulings of the Court[70].

The general idea underlying the principle of rectification at source is that environmental damage should be rectified by targeting its original cause and by requiring preventive action at source. It must be stressed, however, that some of the language versions of the Treaty use a word meaning 'damage' (for example SV, SL, SK, CS, DE, RO, HU, IT) and the other half 'impairment' (for example FR, BG)[71]. In the *Wallonia Waste*[72] judgment, the Court interpreted the Waste Directive utilising the principle that environmental damage should as a priority be rectified at source. Wallonia, a region of Belgium, imposed a ban on the tipping of waste imported from other regions and Member States because it faced an abnormal large-scale inflow of waste from other regions[73]. The Court decided that the ban was legal as far as general

[67] SOMSSICH, R.; VÁRNAI, J; and BÉRCZI, A.: *Study on Lawmaking in the EU Multilingual Environment*, European Commission Directorate-General for Translation, 1/2010, Luxembourg: Publications Office of the European Union, p. 115.

[68] BÁNDI,G.; CSAP, O.; KOVÁCS, L.; STÁGEL, B.; and SZILÁGYI, S.: *The environmental jurisprudence of the European Court of Justice*, Budapest, Szent István Társulat, 2008, p. 102.

[69] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), OJ L 312, 22.11.2008, p. 3–30.

[70] Joined cases 418/97 and 419/97*, ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (C-418/97) and *Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland* (C- 419/97), European Court Reports 2000 I-04475, para 39; Opinion of Mr Advocate General Ruiz-Jarabo Colomer delivered on 30 November 2004, Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz.
Reference for a preliminary ruling: Verwaltungsgericht Koblenz - Germany. Case C-6/03. European Court Reports 2005 I-02753, para 28–30; Judgment of the Court (Third Chamber) of 18 December 2007, *Commission of the European Communities v Italian Republic*. Failure of a Member State to fulfil obligations - Environment -Directives 75/442/EEC and 91/156/EEC - Concept of 'waste' - Excavated earth and rocks intended for re-use.
Case C-194/05, European Court Reports 2007 I-11661, para 33, 20.

[71] SOMSSICH, R.; VÁRNAI, J; and BÉRCZI, A.: *Study on Lawmaking in the EU Multilingual Environment*, European Commission Directorate-General for Translation, 1/2010, Luxembourg: Publications Office of the European Union, p. 117.

[72] Judgment of the Court of 9 July 1992, Commission of the European Communities v Kingdom of Belgium.
Failure to fulfil obligations - Prohibition of tipping waste originating in another Member State. Case C-2/90, European Court Reports 1992 I-04431.

[73] *Ibid.*, p. 31.

waste was concerned, but illegal as far as it banned the import of hazardous waste, as it violated the free movement of goods. The Court also indicated that the principle of rectification at source is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal[74], to which the Community was a signatory. There should be stressed, however, that a strict application of this principle is capable of infringing the preventive principle according to which environmental damage should be prevented rather than cured [75]. Undifferentiated applications of this principle in relation to waste management, requiring waste to be disposed of as close to its source as possible could harm efficient, environmentally friendly facilities in favour of arbitrary geographical solutions of an environmental problem. This possible intertwining may undermine environmental protection and demonstrates the contested nature of environmental protection in the EU. In addition to that ambiguity, it is not clearly settled what rectification means[76].

The polluter-pays principle[77] was first defined in 1972 by the OECD [78]. There are four aspects of this principle: promoting efficiency; promoting justice; harmonization of international environmental policies; defining how to allocate costs within a State[79]. The normative scope of the polluter-pays principle has evolved to include also accidental pollution prevention, control and clean-up costs, in what is referred to as extended polluter-pays principle[80]. This principle has been introduced with the Environmental Liability Directive[81]. However, problems with its implementation[82] show that there is no clear definition and a single approach to this principle. There is also an ambiguity from a linguistic point of view, because English, being the source language, uses a noun + verb phrase structure in an adjectival position to denote an abstract notion, which is quite challenging especially for agglutinating languages where it is hard to place such a structure

[74] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
Basel, 22 March 1989, http://archive.basel.int/text/con-e-rev.pdf (2016-07-01).

[75] HEYVAERT, V.: *Balancing Trade and Environment in the European Union: Proportionality Substituted?,* Journal of Environmental Law No 13, 2001, p. 405.

[76] KRÄMER, L.: EC Environmental Law, Sweet & Maxwell, 2012, p. 26

[77] Case C-293/97, The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others [1999] European Court Reports 2603, 43–44, 51–53; Case C-378/08, Reference for a preliminary ruling by the Tribunale amministrativo regionale della Sicilia [2010] ECR, 0000 20

[78] Organization of Economic Cooperation and Development (OECD), *Recommendation of the council on guiding principles concerning international economic aspects of environmental policies*. May 1972. Council Document no. C(72)128.

[79] BUGGE, H.: *The principles of polluter pays in economics and law*, in: EIDE, E. and VAN DER BERGH, R. (eds) «Law and Economics of the Environment», Oslo, 1996, pp. 73-74.

[80] VENKAT, A.: *'Polluter Pays' Principle: A Policy Principle,* 2012. Available at SSRN: http://ssrn.com/abstract=2458284 (2016-07-01).

[81] Art. 1 of the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage,

[82] SOMSSICH, R.; VÁRNAI, J; and BÉRCZI, A.: *Study on Lawmaking in the EU Multilingual Environment*, European Commission Directorate-General for Translation, 1/2010, Luxembourg: Publications Office of the European Union, p. 113.

into such a position. Solutions in particular languages range, therefore, from a mirror translation (most languages, e.g., SV, MT, LV, BG, etc.), through a form which could be translated back into English as 'polluter-payer', that is, two nouns are put into adjectival position (e.g., FR, PT), to the German version which, instead of respecting the original grammatical form, expresses the concept as the 'principle of causation' (Verursacherprinzip)[83].

4.- CONCLUSIONS

The environmental law principles are not sufficiently defined in the primary legislation of the European Union. Their substantive meaning has been the subject of noticeable discussion, mostly concluding that they are incapable of clear definition[84]. Their application in environmental secondary law and their interpretation by the CJEU contributed to the further clarification of their meaning. Although according to the case-law of the CJEU, Art. 192 (2) TFEU must be interpreted restrictively, it must be admitted that, on the formal level, a considerable scope of discretion is accorded to the EU institutions.

It is possible to identify general ideas underlying the EU environmental principles, but defining them with precision as well as their application are not an easy assignment. The environmental protection is of the contested nature: this contest lies at the heart of its definitional complications in relation to environmental principles. Therefore, environmental principles can be regarded as multi-meaning normative statements, representing a political agreement that is reached in the form of words whereas there is no agreement on what the words mean.[85] In the result, the undefined nature of environmental principles leaves room for manipulation of the ambiguities that they embody, in particular as to their substantive policy nature and relating to the sharing of environmental competence between the EU and the Member States.

In spite of the ambiguities in their content, general concepts and principles of EU environmental law provided a positive contribution to the effectiveness of international community interests by giving rise to academic, social and political debates and establishing enforcement measures with their indeterminate terminology. At the global level, these problems cannot be currently solved better.

83 *Ibid.,* p. 114.

84 SCOTFORD, E.: *Mapping the Article 174 (2) EC Case law: a first step to analysing Community Environmental Law principles*, in: ETTY, T.; and SOMSEN, H.: *The Yearbook of European Environmental Law*, Oxford, 2008, p. 3; DE SADELEER, N.: *Environmental principles: From Political Slogans to Legal Rules,* Oxford, 2002, pp. 2, 37–44, 60, 72–79, 92; KRÄMER, L.: *The Genesis of EC Environmental Principles,* in: MACRORY, R. et. al. (eds.): *Principles of European environmental law*, Groningen, 2004, pp. 31–47, 47; KRÄMER, L.: *EC Environmental law*, London 2007, pp. 25-27; LEE, M.: *EU Environmental law: Challenges, change and decision making*, Oxford, 2005, pp. 97–98; SCOTT, J.: *The Precautionary Principle before the European Courts* in: MACRORY, R. et. al. (eds.): *Principles of European environmental law*, Groningen, 2004, pp. 51–72, 54; EPINEY, A.: *Environmental Principles*, in: MACRORY, R. (ed.): *Reflections on 30 Years of EU Environmental Law*, Groningen 2006, pp. 19–39, 30– 31.; TRIDIMAS, T. *The General Principles of EU Law*, Oxford, 2006, pp. 25–35; CALLIES, Ch., in: Ch. Callies, M. Ruffert (ed.), *op. cit.*, Art. 192 AEUV, para. 27.

85 HARTLEY,T.: *Five Forms of Uncertainty in European Community Law*, Cambridge Law Journal 55, 1996, p. 273.