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# SUSTAINABLE DEVELOPMENT AND THE LEGAL PROTECTION OF THE ENVIRONMENT IN EUROPE

by Luis A. Avilés\*

Sustainable development has gained considerable attention from environmental and supranational organizations, including the United Nations and the European Union (“EU”), since the concept was first discussed in the mid 1970s<sup>1</sup> and then defined by the United Nations as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>2</sup> Environmentalists hoped for a shift in policy and lawmaking that would balance present and future needs by accounting for environmental externalities resulting from economic development.<sup>3</sup> They also hoped that the concept of sustainable development would spawn legal rules and principles that would resolve legal disputes without sacrificing the interests of either the environment or development.<sup>4</sup> This hope has yet to materialize and environmentalists now think sustainable development has become a euphemism for naked development.<sup>5</sup> This article traces the adoption of sustainable development principles by the United Nations in the 1992 Rio Declaration and by the European Community and the European Union. Specifically, the article analyzes the concept of sustainable development under the primary and secondary law along with its treatment in the Court of Justice of the European Union (“CJEU”). The review illustrates that sustainable development has become a general principle in the European legal order, incorporated into the field of environmental protection via a set of sub-principles. The European legislature and the CJEU could further strengthen these principles by striking a balance between economic development and environmental protection, the dual underpinnings of sustainable development.

## SUSTAINABLE DEVELOPMENT: FROM STOCKHOLM 1972 TO RIO 1992

Sustainable development has eluded concrete definition since its inception. Nonetheless, its importance is evident from its inclusion by the United Nations in the Stockholm Declaration on the Human Environment and in the establishment of the World Commission on Environment and Development (“CED”).<sup>6</sup> In 1987, the CED issued a report entitled *Our Common Future* (also known as the “Brundtland Report”), recommending “sustainable development” as a perspective for addressing the relationship between economic development, the environment, and the divide between rich and poor countries.<sup>7</sup> Under this definition,<sup>8</sup> the report identified two key priorities in making sustainable development decisions: assuring the needs of the poor<sup>9</sup> and protecting natural resources to ensure present and future growth of civilization and technology.<sup>10</sup>

The United Nations 1992 Rio Declaration on Environment and Development clarified the two priorities of sustainable

development. The Declaration proclaimed twenty-seven principles in the hope of forming an “equitable global partnership” among international stakeholders.<sup>11</sup> The first four principles are of particular importance in defining sustainable development:

Principle 1: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.<sup>12</sup>

Principle 2: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental 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.<sup>13</sup>

Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.<sup>14</sup>

Principle 4: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.<sup>15</sup>

In Principle 1, the word “entitled” could be understood as part of the State’s duty or positive obligation to protect the human right to health and life. Principle 2 articulates a “good neighbor policy,” recognizing the State’s sovereign right to exploit its natural resources, while also imposing a responsibility to ensure that this exploitation does not damage other States. Principle 3 limits the State’s development right with an inter-generational equitable duty to balance current needs with the needs of future generations. Finally, Principle 4 integrates environmental protection and development into a single process, insinuating the necessity for environmental regulation at all steps — from planning to execution — in the development process.

The Community of Nations’ announcement of these principles led to immense debate<sup>16</sup> among policy makers considering international cooperation, human rights, trade, economics,<sup>17</sup> and urban and strategic planning.<sup>18</sup> As a result, policy makers have been unsuccessful in adopting sustainable development principles, even when balancing development and environmental

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concerns appears logical.<sup>19</sup> Translating ideology into practice is not an easy task.<sup>20</sup>

### SUSTAINABLE DEVELOPMENT: POLICY GOAL, LEGAL PRINCIPLE, OR LEGAL RULE?

Any modern discussion about the difference between legal rules and legal principles ought to consider the ideas of legal philosopher Ronald Dworkin. According to Dworkin, rules are “applicable in an all-or-nothing fashion”<sup>21</sup> while principles have “the dimension of weight or importance.”<sup>22</sup> Furthermore, a principle is “a standard to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality.”<sup>23</sup> Judges use legal principles to justify their reasoning when deciding a case and these principles are always weighed against other principles.<sup>24</sup> Policy, on the other hand is a “kind of standard that sets out the goals to be reached, generally an improvement in some economic, political, or social feature of the community.”<sup>25</sup> While courts use legal principals to weigh their decisions, the development of policies is the realm of legislatures and government agencies. Unfortunately, legal observers frequently intermingle principles and policies, resulting in confusion of the two terms.

Discussion about the “vagueness” of sustainable development and its inability to produce tangible results has been attributed to: 1) failure to strike a concrete balance among principles and policies when applied to actual situations, and 2) the difficulty of deriving legal norms or legal rules that create duties or obligations subject to review by courts.<sup>26</sup> Regarding the first observation, author J.B. Ruhl rejects the either-or dichotomy between developers (whom he calls “resourcists”) and environmentalists arguing that a third variable, social equity must be included in the sustainable development decision process.<sup>27</sup> Social Equity, both in its geographic (local to global) and time (intra-generational and inter-generational) dimensions This third consideration is necessary to balance development with environmental concerns.<sup>28</sup> Hans Vedder, a frequent commentator on EU environmental law, notes that while “[e]nvironmental protection and sustainable development continue to occupy a prominent place in the objectives of the European Union . . . , [a]n issue that remains unresolved is the exact weight to be given to the various objectives where they are at odds with each other.”<sup>29</sup>

Regarding the second observation, some scholars theorize that the integration of sustainable development and the legal system may result in three types of legal roles.<sup>30</sup> These roles are: 1) a standard of behavior, 2) a guiding principle that decision-makers must rely on when making decisions, and 3) a general framework under which to interpret a given law.<sup>31</sup> Most of the legislation aimed at achieving sustainable development utilizes the second and third roles. The main issue with making sustainable development a legal standard of behavior involves the difficulty of defining the parameters of legal behavior. As Ruhl observed, sustainable development is a balance of economic, environmental, and equity considerations.<sup>32</sup> However, there is no widely accepted scientific model that can formulate a

standardized equation from such a multiplicity of interconnected variables whose informational quality varies considerably.<sup>33</sup>

Another author, John Gillroy, notes that, although sustainable development is recognized as a general principle of international law, it has little relevance in the resolution of international disputes.<sup>34</sup> To resolve a legal dispute, a legal principal must be recognized and capable of generating rules.<sup>35</sup> However, the legal principal of sustainable development is not capable of generating rules because it remains a collection of competing sub-principals.<sup>36</sup> According to Gillroy, instead, the legal principle of sustainable development is a meta-principle of law comprised of four substantive and four procedural sub-principles that are sometimes at odds with each other. The four substantive principles are: 1) prevention, 2) precaution, 3) the right to equitable development, and 4) the right to use internal resources so as not to harm other states.<sup>37</sup> Gillroy’s four procedural principles are: 1) integration of environment and development, 2) concern for future generations and their welfare, 3) a common but differentiated responsibility, and 4) the polluter-pays.<sup>38</sup> Gillroy argues that the frequent conflict between and among the procedural and substantive principles inhibits the meta-principal of sustainable development from generating legal rules that courts may use to resolve legal disputes.<sup>39</sup> This is because the principles themselves are fundamentally unclear as to which should bear greater weight on a conceptual or legal scale. For instance, if precaution against environmental harm and prevention of environmental degradation are of critical importance, do these principles then place legal limits on a State’s right to develop or use its internal resources? Or, if preservation for future generations is seen as the end goal of sustainable development, should there be any limitation on the polluter-pays principle or the idea that development and environmental interests can ever be integrated? These questions simply highlight the ambiguity inherent in the current state of sustainable development’s definitional and legal evolution.

Given these ambiguous, and often conflicting, principles, is it fair to draw the same conclusion when the legal principle of sustainable development is applied to the resolution of disputes in a supranational court such as the Court of Justice of the European Union (“ECJ”)? The next section of the article considers how the ECJ has articulated the elusive principle of sustainable development when resolving disputes under various EU treaties.

### EUROPEAN UNION’S COMMITMENT TO SUSTAINABLE DEVELOPMENT

The tumultuous evolution of environmental protection within the EU began in the 1970s with the European Commission’s (“Commission”) “First Communication on Environmental Policy.”<sup>40</sup> In this policy report, the issue of whether environmental problems should be addressed at the State or community level was put forward with Member States eventually agreeing to adopt community legislative measures.<sup>41</sup> Just a year after the 1987 release of the Brundtland Report, the

European Council began to shift its focus from environmental protection alone by considering additional issues related to sustainable development.<sup>42</sup> However, almost a decade passed before the European Community incorporated sustainable development into law when the Treaty of Amsterdam promulgated the concept as an objective<sup>43</sup> by including the principle of a “balanced and sustainable development.”<sup>44</sup> However, the Treaty of Amsterdam referred to sustainable development as a “general principle” but did not provide a definition of the concept.<sup>45</sup> Despite the lack of definition, a principle of environmental protection emerged because of the Treaty’s focus on careful usage of natural resources.<sup>46</sup> The purpose was to balance the economic and environmental interests of present and future generations.<sup>47</sup> Additionally, the European Community incorporated a “high level of protection and improvement of the quality of the environment” as an objective of the Treaty.<sup>48</sup>

Pursuing the theme of sustainable development under the 1992 Rio Agenda, EU institutions commenced an aggressive legislative program<sup>49</sup> based on the Fifth Environmental Program in 1998, which aimed to “review [t]he European Community programme of policy and action in relation to the environment and sustainable development ‘towards sustainability.’”<sup>50</sup> Despite high hopes for this program, the European Commission reported that little progress had been achieved since 1992.<sup>51</sup> However, the review found that the EU did change its focus on development from “environmental protection” to “environmental sustainability” by shifting its attention from the negative environmental impacts of using natural resources to long-range planning for sustainable use of natural resources.<sup>52</sup>

Following this trend, the Commission unveiled its Sixth Environmental Action Program (“6EAP”) a few months before issuing the EU Rio+10 report, emphasizing the concept of “environmental sustainability” rather than “sustainable development.”<sup>53</sup> The 6EAP encouraged the use of the “integration principle” proposed in Article 11 of the Treaty on the Functioning of the European Union (TFEU)<sup>54</sup> to incorporate the EU’s environmental goals into the secondary legislation.<sup>55</sup> The 6EAP also emphasized transparency in its encouraging the public to participate in decisions effecting the environment and promoting access to environmental information.<sup>56</sup> However, a recent report from the European Institute for Environmental Policy draws less than optimistic conclusions on the achievements and future of the 6EAP, indicating that political forces at the Member State level may be to blame for the lack of paradigmatic changes to the legal protection of the environment since the Rio+10 report.<sup>57</sup> Most problematic is the delay in implementation of the “Thematic Strategies” that target environmental goals related to air, marine life, waste management, urban development, natural resources, pesticide usage, and soil.<sup>58</sup>

Currently, Article 3(3) of the Treaty on the European Union (“TEU”)<sup>59</sup> mandates the establishment of an internal market based on the “sustainable development of Europe” based on three objectives: 1) balanced economic growth and price stability, 2) a highly competitive social market economy aimed at achieving full employment and social progress, and 3) “a high level

of protection and improvement of the quality of the environment.”<sup>60</sup> Thus, the historical objective of the EU — the creation of an internal market — must be accomplished incorporating sustainable development’s principles of balancing economic growth in a social market economy with a high level of environmental protection. This goal marks a paradigm shift from the ordoliberal principles underlying the original Treaty of Rome.<sup>61</sup> Additionally, Article 3(3) defines sustainable development in the EU context by outlining the three objectives described above.<sup>62</sup> Article 3(3) echoes the Rio 1992 Declaration, emphasizing the conviction that a pursuit of a sustainable development strategy will work to eradicate world poverty and manage the world’s natural resources.<sup>63</sup>

However, sustainable development is not only the paradigm for the internal market. Article 3(5) of the TEU requires the EU to contribute to “the sustainable development of the Earth” through its international relationships.<sup>64</sup> Additionally, Article 21(2) of the TEU mandates EU States to “foster the sustainable economic, social, and environmental development of developing countries, with the primary aim of eradicating poverty.”<sup>65</sup> Furthermore, sustainable development must be ensured using international cooperation to “preserve and improve the quality of the environment and the sustainable management of global natural resources.”<sup>66</sup>

Article 6(1) of the TEU incorporates into law a recognition of “the rights, freedoms and principles of the Charter of Fundamental Rights of the European Union . . . which shall have the same legal value as the Treaties.”<sup>67</sup> Article 37 of the Charter provides that “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”<sup>68</sup> This principle, now integrated into EU law, is similar to Gillroy’s sub-principle mandating a high level of environmental protection.<sup>69</sup>

The integration clause of Article 11 of the TEU provides a framework under which EU institutions may pursue compliance with Gillroy’s procedural sub-principle of integration of the environment and development.<sup>70</sup> This clause requires the integration of environmental protections into EU policies and activities to promote sustainable development.<sup>71</sup> The Treaty on the Functioning of the European Union provides specific guidance on the environmental objectives of these policies and activities.<sup>72</sup> Article 191(1) of the TFEU identifies the following objectives:

preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international [sic] level to deal with regional or worldwide environmental problems, and in particular combating climate change.<sup>73</sup>

Article 192(2) TFEU establishes that “a high level of [environmental] protection” will be achieved by “taking into account the diversity of situations 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.”<sup>74</sup> Thus the “high level of protection and improvement of the quality of the environment” principle that defines the sustainable development of the EU’s internal market in accordance with Article 3(3) TEU, must incorporate the: precautionary principle,<sup>75</sup> the source principle, the polluter pays principle, the prevention principle, and the safeguard clause. Any EU policy must integrate elements that correspond to the high level protection envisioned by the protection principle as shaped by its corresponding sub-principles. Otherwise, the policy and the secondary legislation that articulates it, infringe the Treaties.

A host of secondary legislation issued as Directives to Member States has also incorporated the objective of sustainable development.<sup>76</sup> One directive, the Water Framework Directive (“WFD”), incorporates the “river basin approach” to environmental water management and attempts to integrate a multi-sided sustainable development approach in its structure.<sup>77</sup> Commentators applaud such an approach to secondary legislation, while continuing to criticize the apparent lack of political will from Member States to speedily embrace such legislation.<sup>78</sup>

The European Union’s sustainable development mandate is not only limited to the European arena; it is also part of its international agenda.<sup>79</sup> In addition to the EU efforts, individual Member States have attempted to incorporate sustainable development into their domestic legal systems. The United Kingdom, for example, has incorporated the concept into urban planning.<sup>80</sup>

Sustainable development continues to elude environmental lawyers who operate in a command-and-control regulatory system that already affords effective legal protection to the victims of environmental harms.<sup>81</sup> While sustainable development is part of the EU primary and secondary law, legal tribunals must still weigh the concept’s role when deciding disputes where the EU objectives of economic development, social development, and environmental protection clash. Thus, we must consider how the ECJ has articulated the legal principle of sustainable development in the resolution of these disputes under the Treaties.

### THE ECJ AND THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT

The ECJ has not shied from discussing sustainable development principles in its decisions.<sup>82</sup> Of all principles addressed in the ECJ, the principle of assuring a high level of environmental protection is the most integral to the implementation of sustainable development in the EU.<sup>83</sup> The ECJ has even pronounced this principle in cases where the relevant treaties were quiet on the issue. In the *Danish Bottles* case,<sup>84</sup> for example, the ECJ declared that the Member States may limit the free movement of goods under the *Cassis de Dijon*<sup>85</sup> doctrine if it is necessary to protect the environment.<sup>86</sup>

Two recent cases also demonstrate the ECJ’s approach toward the interplay between the polluter pays principle, the prevention principle, and the precautionary principle. In the Grand Chamber decision of *Raffinerie Mediterranée*,<sup>87</sup> the Court interpreted the polluter pays principle under Directive

2004/35/EC, which outlined the environmental liability surrounding the prevention and remedying of environmental damage.<sup>88</sup> There, the Italian court imposed penalties on the polluter parties that required remedial action beyond that established under the consultative process of the Directive.<sup>89</sup> The remedial action was implemented “without that authority having carried out any assessment, before imposing those measures, of the costs and advantages of the changes contemplated from an economic, environmental or health point of view.”<sup>90</sup> In addition, the Court issued preventive orders to parties whose lands were not polluted or had been decontaminated before the effective date of the Directive.<sup>91</sup> These measures afforded a higher level of environmental protection than the one required by the Directive, a stretch, but not prohibited by a literal reading of Article 193 of the TFEU.<sup>92</sup> The Court further held that the polluter pays principle could be incorporated into even more protective national measures:

Articles 7 and 11(4) of Directive 2004/35, in conjunction with Annex II to the directive, must be interpreted as permitting the competent authority to alter substantially measures for remedying environmental damage which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision, that authority:

- is required to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;
- is also required to invite, inter alia, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and
- must take account of the criteria set out in Section 1.3.1 of Annex II to Directive 2004/35 and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.<sup>93</sup>

Under this precedent, national authorities could impose a higher level of protection than originally devised under the Directive, provided they give the relevant parties the opportunity to be heard, invite the participation and comments of adjacent landowners, and the national measure is grounded in the need for urgent preventative action. The orders against the landowners whose lands were not polluted also validates the measures

under the precautionary principle and the general principle of proportionality:

Directive 2004/35 does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.”<sup>94</sup>

In a second case decided the same year, *Afton Chemical Limited*,<sup>95</sup> the ECJ affirmed the level of judicial review to be applied to institutional actions relying on complex environmental issues while further clarifying the role of the precautionary principle under European legislation. Afton, a chemical company was seeking to invalidate the limits imposed by Directive 2009/30 to the additive MMT on grounds of the precautionary principle, pending a full assessment of its health and environmental impacts.<sup>96</sup> Regarding judicial review, the ECJ affirmed that:

[I]n an area of evolving and complex technology . . . the European Union legislature has a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which it adopts, whereas review by the Community judicature has to be limited to verifying whether the exercise of such powers has been vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion. In such a context, the Community judicature cannot substitute its assessment of scientific and technical facts for that of the legislature on which the Treaty has placed that task.

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However, even though such judicial review is of limited scope, it requires that the Community institutions [that] have adopted the act in question must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate.<sup>97</sup>

Regarding the precautionary principle, the Court in *Afton* prescribed its application as follows:

A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of [Methylcyclopentadienyl manganese tricarbonyl (“MMT”)] and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research . . . [w]here it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (see *Commission v France*, paragraph 93 and case-law there cited) In those circumstances, it must be acknowledged that the European Union legislature may, under the precautionary principle, take protective measures without having to wait for the reality and the seriousness of those risks to be fully demonstrated.<sup>98</sup>

Ultimately, the Court held that the temporary restrictions on MMT additives in combustion fuels, pending a full scientific assessment, was objective and non-discriminatory and, therefore, a proper use of the precautionary principle.<sup>99</sup>

## CONCLUSION

The *acquis communautaire* demonstrates that the principle of sustainable development occupies a privileged position in the European legal order. The principle is a foundation of the EU Treaty, encompassing sub-principles — the precautionary principle, the source principle, the polluter pays principle, and the prevention principle — and promoting a balanced growth imperative via the safeguard clause of Article 192 TFEU.<sup>100</sup> European institutions have incorporated these principles in the secondary legislation of the EU and the Court of Justice of the European Union has commenced the long process of embroidering these principles into the legal fabric of the EU.

Even though the Court of Justice has embraced adjudicating European law on the principles of environmental protection, articulation of these principles as sub-tenants of sustainable development remains absent. The European legislature ought to “put flesh to the bones” of the general environmental protection principles by noting that integration of these principles in a particular act or legislation satisfies the Treaties’ objective sustainable development.<sup>101</sup> The principle of sustainable development should also see the Court of Justice continue to apply environmental sub-principles. In doing so, the Court of Justice needs to provide a coherent interpretation of these principles to clearly establish the balancing between economic development and environmental protection that sustainable development

calls for. This consistent application will ensure that sustainable development as a legal principle will continue playing a key role in the development of European environmental law and will perhaps inspire other legal systems to follow suit.<sup>102</sup> As the legal

community takes up this trend, it will guide the evolution of the European Union in its quest to create “an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”<sup>103</sup>



## Endnotes: Sustainable Development and the Legal Protection of the Environment in Europe

<sup>1</sup> See generally ROBERT L. STIVERS, *THE SUSTAINABLE SOCIETY: ETHICS AND ECONOMIC GROWTH* (1976).

<sup>2</sup> World Comm. on Env't and Dev., *Our Common Future: Report of the World Commission on Environment and Development*, ¶ 1, U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter *Our Common Future*].

<sup>3</sup> See e.g., James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425, 430 (1994) (noting that environmentalists hoped that command-and-control to limit private interests that are damaging the environment). But see, David Barnhizer, *Waking from Sustainability's "Impossible Dream": The Decision Making Realities of Business and Government*, 8 GEO. INT'L ENVTL. L. REV. 595, 588–89 (2006) (arguing that purely sustainable development is impossible to achieve because human self interest will always stand in opposition).

<sup>4</sup> Cf. Barnhizer, *supra* note 3, at 613 (discussing how environmentalists want to establish an equal balance between human needs and natural systems).

<sup>5</sup> Cf. *id.* at 670–71 (arguing that corruption is a primary reason for the failure of laws protecting the environment).

<sup>6</sup> See United Nations Conference on the Human Environment, *Declaration on the Human Environment*, ¶¶ 4–5 U.N. Doc. A/Conf.48/14/Rev. 1 (June 16, 1972) (declaring that developed and developing countries must ensure that their growth protects the interests of the environment).

<sup>7</sup> *Our Common Future*, *supra* note 2, at ¶¶ 4–15 (describing sustainable development as a means to growth in which both developed and developing countries work together to responsibly use the earth's resources so that they will continue to be available in the future).

<sup>8</sup> *Id.*

<sup>9</sup> See *id.* at ¶ 42–47 (declaring that the basic needs of the poor must be addressed including food, employment, energy, housing and sanitation).

<sup>10</sup> See *id.* at ¶ 65–71 (addressing the need for continued growth of technology that is harmonized with the needs of the developing world and also the environment).

<sup>11</sup> See generally Gen. Assembly, *Report of the United Nation Conference on Environment and Development*, U.N. Doc. A/CONF. 151/26 (June 13, 1992).

<sup>12</sup> *Id.* prin. 1.

<sup>13</sup> *Id.* prin. 2.

<sup>14</sup> *Id.* prin. 3.

<sup>15</sup> *Id.* prin. 4.

<sup>16</sup> See, Gregory A. Daneke, *Sustainable Development as Systemic Choices*, 29 POL'Y STUD. J. 514, 514–15 (2001) (arguing that the economic and environmental balancing act that underlies sustainable development has led to continual re-conceptualization which has, in turn, made the idea a “vague agenda rather than a serious set of policy mechanisms”).

<sup>17</sup> See Lawrence Wai-Chung Lai & Frank T. Lorne, *The Coase Theorem and Planning for Sustainable Development*, 77 TOWN PLAN. REV. 41, 41 (2006) (arguing that the Coase Theorem, used to model transactions costs when analyzing market failures, should be used in sustainable development planning); see also DAVID W. PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* 24 (1990) (defining sustainable development as maximizing the benefits of economic development, including all elements of social welfare, while maintaining the services and quality of natural resources in the future).

<sup>18</sup> See generally Susan E. Batty, *Planning for Sustainable Development in Britain: a Pragmatic Approach*, 77 TOWN PLAN. REV. 29, 31 (2006) (analyzing how urban planners in the U.K. have adopted sustainable development principals and looking specifically at failures of policy, institutions and politics).

<sup>19</sup> See *id.* at 39 (arguing that strong public concern for the environment is necessary before policy makers will make significant strides towards sustainable development).

<sup>20</sup> NICO SCHRIJVER & FRIEDL WEISS, *INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE* 7 (2004).

<sup>21</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24 (1978).

<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Id.* at 22.

<sup>24</sup> *Id.* at 65.

<sup>25</sup> *Id.*

<sup>26</sup> John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of "Environmental Sustainability" in International Jurisprudence*, 42 STAN. J. INT'L L. 1, 13 (2006) (discussing how the twenty-seven principles pronounced in the Rio Declaration negotiated by various conflicting interests resulting in an incoherent notion of sustainable development).

<sup>27</sup> J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 36 (1999).

<sup>28</sup> *Id.*

<sup>29</sup> Hans Vedder, *The Treaty of Lisbon and European Environmental Law and Policy*, J. ON ENVTL. L., 285, 287–288 (2010).

<sup>30</sup> Bruce Pardy, *Sustainable Development: In Search of a Legal Rule*, 28 J. BUS. ADMIN. AND POL'Y ANALYSIS 391 (2001).

<sup>31</sup> *Id.*

<sup>32</sup> Ruhl, *supra* note 27, 35–36.

<sup>33</sup> See *id.* at 61 (noting that models use to design sustainable development are poor because they rely on non-methodical judgments and expertise).

<sup>34</sup> Gillroy, *supra* note 26, at 2 (recognizing that because sustainable development remains only a principle of international jurisprudence, it plays a minimal role in resolving international disputes).

<sup>35</sup> *Id.*

<sup>36</sup> See *id.* (arguing that the reason sustainable development has not resulted in dispositive legal rules is that the concept itself is not sufficiently definitive due to competing and contradictory principles and sub-principles that dilute the clarity necessary to transform the principle into legal rules).

<sup>37</sup> *Id.* at 12.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2.

<sup>40</sup> Noah Vardi & Vincenzo Zeno-Zencovich, *From Rome to Nice: A Historical Profile of the Evolution of European Environmental Law*, 12 PENN ST. ENVTL. L. REV. 219, 221–22 (2004).

<sup>41</sup> *Id.*

<sup>42</sup> WILLIAM M. LAFFERTY & JAMES MEADOWCROFT, *IMPLEMENTING SUSTAINABLE DEVELOPMENT: STRATEGIES AND INITIATIVES IN HIGH CONSUMPTION SOCIETIES* 307 (2000).

<sup>43</sup> Treaty of Amsterdam, art. 2, Oct. 2 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56.

<sup>44</sup> Vardi & Zeno-Zencovich, *supra* note 40, at 223.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* (noting that the Treaty's language has been interpreted to govern economic and environmental interests because of its focus on careful use of natural resources).

<sup>47</sup> *Id.* at 236.

<sup>48</sup> See *id.* at 236–37 (suggesting that such language precludes the adoption of any regulatory measures by Member States that aim at only achieving a “minimum common denominator of environmental protection” because the Treaty suggests that the entire Community must attain a high level of environmental protection).

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<sup>79</sup> Central American-Dominican Republic-United States Free Trade Agreement, Article 10.4(1), Aug. 5, 2004, [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file328\\_4718.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf) (last visited Apr. 18, 2012). Article 10.4(2) contains similar language, but it applies to “covered investments” rather than “investors” as in Article 10(4)(1).

<sup>80</sup> See IISD, *supra* note 35, at 29-30.

<sup>81</sup> Emilio Augustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, (Jan. 25, 2000) 16 ICSID Rev. (2001), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565\\_En&caseId=C163](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163).

<sup>82</sup> See IISD, *supra* note 35, at 30.

<sup>83</sup> See, e.g., *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC521\\_En&caseId=C24](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC521_En&caseId=C24); *Salini Costruttori S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (Nov. 29, 2004), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC635\\_En&caseId=C218](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC635_En&caseId=C218).

<sup>84</sup> IISD, *supra* note 35, at 32.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 33.

<sup>88</sup> *Id.*

<sup>89</sup> See *Id.* at 34 (describing the variety of approaches states take to ensure their policy goals).

<sup>90</sup> See *id.* at 33 (stating that in fact states use performance requirements to gain technology).

<sup>91</sup> *Id.* at 32.

<sup>92</sup> Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Art. 2(2)(c), concluded on 14 Nov. 1991.

<sup>93</sup> Nigel Blackaby and Constantine Partasides, with Alan Redern and Martin Hunter, REDERN AND HUNTER ON INTERNATIONAL ARBITRATION 506-08 (Oxford, 5th ed. 2009).

<sup>94</sup> See *id.* at 482-83 (stating that umbrella clauses may elevate contractual rights to the level of treaty rights).

<sup>95</sup> *Id.* at 482-83.

<sup>96</sup> Andrea Shemberg, *Stabilization Clauses and Human Rights*, vii (Ma. 11, 2008) (Research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights), [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p\\_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

<sup>97</sup> See *id.* at 35-36 (discussing the use of stabilization clauses to exempt companies from regulation).

<sup>98</sup> Blackaby, *supra* note 95, at 483.

<sup>99</sup> IISD, *supra* note 35, at 68.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> IISD, *supra* note 35, at 48.

<sup>103</sup> *Id.* at 49.

<sup>104</sup> *Id.* at 50.

<sup>105</sup> IISD, *supra* note 35, at 51-52.

<sup>106</sup> See *Innovation and Collaboration for the Future We Want*, RIO+20 CORPORATE SUSTAINABILITY FORUM, <http://csf.compact4rio.org/events/rio-20-corporate-sustainability-forum/custom-125-251b87a2deaa4e56a3e00ca1d66e5bfd.aspx> (last visited Apr. 18, 2012).

## Endnotes: SUSTAINABLE DEVELOPMENT AND THE LEGAL PROTECTION OF THE ENVIRONMENT IN EUROPE

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<sup>49</sup> Under this Program, the European Union issued a series of important “framework directives” such as this Council Directive on ambient air quality assessment and management. The new regulation model called for the issuance of framework directives to revise and codify older directives and to leave the technical details of implementing such directives to a series of “daughter directives” such as Council Directive 1999/30/EC of 22 April 1999 laying down limit values for sulfur dioxide, nitrogen dioxide, nitrogen oxides, particulates, and lead in the ambient air. See Council Directive 96/62, 1996 O.J. (L 296) (EC).

<sup>50</sup> Council Decision No. 2179/98, of 24 Sept. 1998, O.J. (L 275) (EC) 1.

<sup>51</sup> *Communication from the Commission to the Council and European Parliament, Ten years after Rio: Preparing for the World Summit on Sustainable Development in 2002*, at 2, COM (2001) 53 final (June 2, 2001), [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0053en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0053en01.pdf).

<sup>52</sup> Victoria Jenkins, *Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development (Commission's Proposal to the Gothenburg European Council) COM (2001) 264 Final*, 14 J. ENVTL. L. 261, 262-263 (2002).

<sup>53</sup> *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions On the Sixth Environment Action Programme of the European Community, 'Environment 2010: Our future, Our choice' — The Sixth Environment Action Programme COM/2001/0031 final*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0031:EN:HTML>; Council Decision (EC) No. 1600/2002 of 22 July 2002, O.J. (L 242) 1.

<sup>54</sup> *Consolidated Version of the Treaty on the Functioning of the European Union*, art 11, May 9, 2008, 2008 O.J. (C 115) 53.

<sup>55</sup> *Id.*

<sup>56</sup> Jenkins, *supra* note 52, at 263-64.

<sup>57</sup> SIRINI WITHANA, ET. AL., INST. FOR ENVTL. POL'Y, STRATEGIC ORIENTATIONS OF EU ENVIRONMENTAL POLICY UNDER THE SIXTH ENVIRONMENT ACTION PROGRAMME AND IMPLICATIONS FOR THE FUTURE FINAL REPORT 2 (May 2010), [http://www.ieep.eu/assets/556/Strategic\\_Orientations\\_of\\_6EAP\\_-\\_Revised\\_report\\_-\\_May\\_2010.pdf](http://www.ieep.eu/assets/556/Strategic_Orientations_of_6EAP_-_Revised_report_-_May_2010.pdf).

<sup>58</sup> *Id.* at 95-96.

<sup>59</sup> *Consolidated Version of the Treaty on European Union* art 3(3), May 9, 2008, 2008 O.J. (C 115) 17 [hereinafter TEU].

<sup>60</sup> TEU art. 3(3).

<sup>61</sup> CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 21 (2nd ed. 2007).

<sup>62</sup> TEU art. 3(3).

<sup>63</sup> *Id.*

<sup>64</sup> TEU art. 3(5).

<sup>65</sup> TEU art. 21(2)(d).

<sup>66</sup> TEU art. 21(2)(f).

<sup>67</sup> TEU art. 6(1).

<sup>68</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/01, art. 37, 2000 O.J. (C 364) 1.

<sup>69</sup> Gillroy, *supra* note 26, at 12.

<sup>70</sup> Meaning that EU institutions will be able to rely on Article 11 framework provisions to determine how best to ensure that development activities respect and account for environmental impacts.

<sup>71</sup> TFEU art. 11.

<sup>72</sup> See TFEU art. 191 (declaring the objectives and the policy that should be followed to achieve them).

<sup>73</sup> TFEU art. 191(1).

<sup>74</sup> TFEU art. 191(2).

<sup>75</sup> See Marko Ahteensuu, *Defending the Precautionary Principle against Three Criticisms*, 11 TRAMES 366, 366 (2007) (submitting a “standard formulation of the [precautionary] principle” from the Science and Environment Health Network, which stated that “[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically”).

<sup>76</sup> The principal form of legislation issued by the EU comes in the forms of Regulations, which are directly binding on Member States through Directives. Directives must be properly transposed into the national laws of Member States within the time frame provided in the Directive. See TFEU art. 288.

<sup>77</sup> EUROPEAN COMMISSION (DG ENVIRONMENT), WATER NOTE 1: JOINING FORCES FOR EUROPE'S SHARED WATERS: COORDINATION IN INTERNATIONAL RIVER BASIN DISTRICTS, 3 (Mar. 2008), [http://ec.europa.eu/environment/water/participation/pdf/waternotes/water\\_note1\\_joining\\_forces.pdf](http://ec.europa.eu/environment/water/participation/pdf/waternotes/water_note1_joining_forces.pdf)

<sup>78</sup> See SCHRIJVER & WEISS, *supra* note 20, at 574.

<sup>79</sup> See Hans Vedder, *The Treaty of Lisbon and European Environmental Law and Policy*, J. ENVTL. L., 285, 287-288 (2010) (noting that EU environmental objectives specifically reference relations between the EU and the rest of the world, especially regarding global sustainable development focused on equity and prudent management of global natural resources).



<sup>80</sup> See Batty, *supra* note 18, at 30 (discussing sustainable development's integration into newly drafted constitutions of the British government, making the principle a fundamental aspect of urban planning decisions, "impos[ing] on the urban planning system a duty to implement the Government's strategy for sustainable development").

<sup>81</sup> TFEU art. 191(2).

<sup>82</sup> E.g. Case 302/86, *Comm'n v. Denmark*, 1988 E.C.R. 4627 [hereinafter *Danish Bottles*] (holding that the transportation of goods in commerce can be halted in order to protect the environment).

<sup>83</sup> *Id.*

<sup>84</sup> See Case 302/86, *Comm'n v. Denmark*, 1988 E.C.R. 4627 [hereinafter *Danish Bottles*].

<sup>85</sup> The *Cassis de Dijon* doctrine allowed a court to halt the free movement of goods, holding that "[o]bstacles to movement within the community resulting from disparities between the national laws relating to the marketing of products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." Case 120/78, *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 662 ¶ 8.

<sup>86</sup> *Danish Bottles*, *supra* note 82, at ¶ 21–23.

<sup>87</sup> See *Joined Cases C-379/08 & C-380/08, Raffinerie Mediterranée (ERG) SpA, ENI SpA v. Ministero Ambiente e Tutela del Territorio e del Mare*, 2010 E.C.R. I1919 [hereinafter *Raffinerie*].

<sup>88</sup> Council Directive 2004/35/EC 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, 2004 O.J. (L 143) 56.

<sup>89</sup> *Raffinerie*, *supra* note 87, at ¶¶ 79–92.

<sup>90</sup> *Id.* at ¶ 28.

<sup>91</sup> *Id.* at ¶ 92.

<sup>92</sup> See TFEU art. 193 ("The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.").

<sup>93</sup> *Raffinerie*, *supra* note 87, at ¶ 1.

<sup>94</sup> *Id.* at ¶ 2.

<sup>95</sup> Case C-343/09, *Afton Chemical Limited v. Secretary of State for Transport*, 2010 E.C.R.

<sup>96</sup> *Id.* at ¶ 1–2.

<sup>97</sup> *Id.* at ¶ 28, 34.

<sup>98</sup> *Id.* ¶¶ 60–62.

<sup>99</sup> *Id.* ¶¶ 61–64.

<sup>100</sup> TFEU art. 192(4)–(5).

<sup>101</sup> See TFEU art. 11 (stating that sustainable development is a goal of the European Union).

<sup>102</sup> See generally, James R. May, *Not at All: Environmental Sustainability in the Supreme Court*, 10 SUSTAINABLE DEV. L. & POL'Y 20 (2009) (arguing that the status of sustainable development in the United States legal system is currently threatened by the close negative scrutiny of the Roberts' Supreme Court).

<sup>103</sup> TEU art. 1.

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## Endnotes: CHINA IN AFRICA: CURING THE RESOURCE CURSE WITH INFRASTRUCTURE AND MODERNIZATION

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<sup>30</sup> *Id.* (positing that there are hardly any linkages between a modern, outward looking sector and the rest of an economy focused on traditional sectors).

<sup>31</sup> *Id.* at 31 (citing a World Bank study to conclude that "[d]ualism goes hand in hand with very high levels of income inequality" which is much higher in developing countries than in advanced economies).

<sup>32</sup> *Id.* at 79 (exemplifying J.H. Boeke's analysis of Indonesian economics to demonstrate how internal cultural and industrial characteristics can influence the continuation of traditional sectors and stagnation of modern sectors).

<sup>33</sup> See *id.* at 79–81 (detailing how investment of accumulated capital in industrial sectors can encourage entrepreneurship and lead to a sustainable progression from traditional, agrarian societies to mature, consumption drive societies (citing W.W. ROSTOW, *STAGES OF ECONOMIC GROWTH* (1960)); but see *id.* at 273–275 (explaining that, in early stages of development, increased productivity in agriculture is crucial because it assures a source of food, frees up labor for use elsewhere, encourages domestic savings of capital for investment in industry and infrastructure, and provides a market for manufactured goods, both to maintain productivity and as a new consumer base).

<sup>34</sup> *Id.* (describing that one important aspect of this type of economic analysis is that at some point, with enough investment, a state will reach the "take-off" stage where the economy changes drastically toward sustainable industry-lead growth).

<sup>35</sup> *Id.* at 564 (concluding that because traditional economic institutions do not provide sufficient incentives for growth, "countries must explicitly pursue a structural policy aimed at increasing their productive capacities and the efficiency of the production structure).

<sup>36</sup> PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 5 (2007).

<sup>37</sup> See U.N. Econ. Comm. For Africa, *Sustainable Development Report on Africa* 83 (2008), [http://www.uneca.org/eca\\_resources/publications/books/sdra/](http://www.uneca.org/eca_resources/publications/books/sdra/) (stating that many African economies are dependant on extractive industries, which constitute fifty percent of Africa's exports); *id.* at 85 ("Mineral resources are non-renewable, finite and unevenly distributed across space. The wealth that they generate is transient and vulnerable to rent seeking. In addition, their exploitation is often capital-intensive rather than labor-intensive and creates enclave economies that have little or no links with the wider national economy. The above attributes generate daunting policy challenges that are difficult to manage and overcome."); see also COLLIER, *supra* note 35, at 39 (relating that twenty-nine percent of people in the bottom billion live in countries in which resource wealth dominates the economy).

<sup>38</sup> See SZIRMAI, *supra* note 4, at 281–83 (giving examples of several ways in which primary exports can be a potential benefit to developing economy).

<sup>39</sup> *Id.* at 282.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 283 (describing how resource wealth can provide a stimulus for a market for manufactured imports and domestic industrial production).

<sup>42</sup> See, e.g., Paul Mitchell, *Taxation and Investment Issues in Mining*, in *ADVANCING THE EITI IN THE MINING SECTOR* 27, 27 (Christopher Eads et al. eds., 2009) (finding that tax revenues derived from mining activities represent an important public policy issue and examining the role of tax regimes in development generally).

<sup>43</sup> See generally COLLIER, *supra* note 35, at 38–52 (describing the natural resource trap).

<sup>44</sup> *Id.* at 39–40.

<sup>45</sup> SZIRMAI, *supra* note 4, at 282 (explaining that surplus foreign exchange can be used to "ease bottlenecks in industrial production by importing productive capital goods and intermediate goods").

<sup>46</sup> See COLLIER, *supra* note 35, at 39–40 (citing as an example Nigeria, where "[a]s oil revenues built up, the country's other exports—such as peanuts and cocoa—became unprofitable, and production rapidly collapsed").

<sup>47</sup> *Id.* at 40 (finding that Dutch disease alone was not enough to explain the problems resource-rich countries face).

<sup>48</sup> See *id.* at 40–41 (exemplifying Kenya and Nigeria as countries which have seen their resource "gravity train come to an abrupt end" and are then faced with drastically reduced revenues).

<sup>49</sup> See *id.* at 40 (positing that in times of resource wealth booms, "rational public investment is liable to go out the window" and public spending will increase dramatically).

<sup>50</sup> See *id.* at 40–41 (showing how the economic hardships resulting from the bust of Nigeria's oil boom in 1986 were easily blamed on economic reforms required by international financial institutions, diverting attention away from the misuse and corruption which was the norm when Nigeria was previously flushed with resource wealth).

<sup>51</sup> *Id.* at 42.

<sup>52</sup> See *id.* at 45 ("The tragedy is that where bribery becomes acceptable it can be effective, because using your vote to support a party offering public services rather than selling it to the patronage party is not in your individual self-interest.").

<sup>53</sup> See, e.g., *id.* ("Indeed, we find that the more ethnically diverse the society, the worse the performance of a resource-rich democracy."); Rotimi T. Suberu, *The Travails of Nigeria's Anti-Corruption Crusade*, in *CORRUPTION, GLOBAL SECURITY, AND WORLD ORDER* 260, 261 (Robert I. Rotberg, ed. 2009) (finding that a "culture of corruption is structurally rooted in the country's ethnic fragmentation" and an "attendant statism (the sweeping control of the state over the economy)" which is aggravated by massive resource wealth).

<sup>54</sup> COLLIER, *supra* note 35, at 46.