

The legal approach of ecological sustainability in the  
European Environmental Law and its  
contribution as a paradigm for the Common Market of  
South America (Mercosul)

EELF Conferece 2017 - Copenhagen

Marco Túlio R. Magalhães

PhD Student

Universidade de São Paulo (Brazil) and Freie Universität Berlin (Germany)

Contact: [marucosam@yahoo.com.br](mailto:marucosam@yahoo.com.br)

- **A. Introduction**
- **B. The legal approach of sustainability (or sustainable development) as a policy / normative principle?**
- European Environmental Law (EELF)
- Constitutional level of some EU Members
- International Environmental Law
- Comments and impressions
- **C. The legal approach of sustainability (or sustainable development) in the Mercosul (Common Market of South America)**
- Political and normative basis for sustainability in Mercosul
- Constitutional level of some Members of Mercosul
- Comments and impressions
- **D. Final Remarks**

# Main questions

- Sustainability? Ecological Sustainability? Sustainable Development? How to understand those terms from a legal approach? Synonyms?
- What we have seen in the legal approach of EU and International Law?
- What we have seen in the legal approach of Mercosul and it's countries?
- Could Mercosul's perspective be improved, considering the examples of the normative approach of European Environmental Law?

- **HISTORICAL ASPECTS OF SUSTAINABILITY**

- The development of the idea of sustainability since 14th Century (Bosselmann, 2008; Mosley, 2010)

- **Some examples – Main roots (forestry)**

- **Germany**

- *Allmende system* for land use
- Idea of *sustained yield (nachhaltende Nutzung)* concerning excessive deforestation and wood exploitation (economical/comercial purposes) Hanns Carl von Carlowitz – (1763) *Sylvicultura oeconomica, oder Hauswirthliche Nachricht und Naturmässige Anweisung zur Wilden Baum-Zucht*

- **France**

- *grande réformation des forêts / Minister of Louis XIV, Jean-Baptiste Colbert / /“Ordonnance des Eaux et Forêts” (1669);*

- **England**

- John Everlyn / “*Sylva, or a Discourse of Forest-Trees and the Propagation of Timber in His Majesties Dominions*” (1664)

- **Portugal/Brazil** (José Bonifácio de Andrada e Silva)

- **CONCEPTUAL ASPECTS OF SUSTAINABILITY**

- Spread to a lot of different fields - not only forestry => natural resources (BRÜGGEMEIER, 2014))
- Challenge of an uniform comprehension (misunderstandings)
- Importance of a **ecological approach** of sustainability?
- Is there non-western point of views? Role of traditional populations and other experiences.
- **Strong** sustainability x **weak** sustainability (Bosselmann, 2008)
  - **environmental** sustainability;
  - **sustainable development** (Three pillars concept);
  - **ecological** sustainability.
- A contested concept? Different levels of comprehension/consensus (JODOIN, 2012)

# Sustainability and Sustainable Development as general concepts

## **Are they working as the Bed of Procastes?**

Should we cut off from the debate the parts of (ecological) sustainability that do not fit in the path of economic development?

## **Do they work guided by the formula *One size fits all*?**

Should we have an unique shoe (concept) to fit all our feet (expectations/sectors regarding sustainability)? Should we put everything inside it (remember Rio+20 Report and the three pillars concept)?

# Sustainability and the Development of the EEL

Two Perspectives  
(Environmental Policy and not only Environmental Law)

## **General Perspective** **3 different phases**

**1972-1987**

**1987-1992**

**From 1992**

## **Detailed perspective** **5 different phases**

**I - 1958 -1972**

**II - 1972 -1987**

**III - 1987 - 1993**

**IV - 1993 (Maastricht) - 1999**

**V - (Amsterdam und Nizza): From  
1999 (and after the Treaty of  
Lisbon**

- **General Perspective(3 phases)**

- **Phase 1: 1972-1987** – Development of the Environment Policy as part of the Economic Policy (Focus on the common market) – without expressed norms of environmental protection. (although the improvement through de Action Program of 1973)
- **Phase 2: 1987 - 1992** – With the Single European Act (SEA) starts the beginning of a specific Environmental Policy with fundamentals, principles and procedural norms.
- **Phase 3: From 1992** – No relevant changes regarding the formal prescriptions of the Environmental Policy, although the improvement of institutional action of the EU and the Member States. Mainstream (economic problems and crises)

### **Actors**

Die EU Organs / The Member States / **The EU citizens?** / **NGOs**

# European Environmental Legislation

- Main Highlights:
- SEA and specific environmental policy (ex-Art.174-176 EGV) – until today (Art. 191-Art. 193 TFEU).
- Primary Legislation (TEU and TFEU and EU Charter of fundamental rights – Objectives, Principles, protection measures, competences, decision procedures, finance aspects.
- The cross-section clause (art. 11 TFEU).
- EU Level: No individual right to environmental protection.
- Environmental protection as union's objectives – Art. 3 parags. 3 and 5 TEU / Art. 191 parag. 1 and parag. 3 TFEU.

- **Summary of the current types of rules of EEL**
- general provisions
- rules concerning to the quality of the different elements of nature
- rules regarding to specific activities and materials
- rules related to the rational use and protection of the environmental resources
- Remembering Art. 288 TFEU: regulations, directives, decisions, recommendations and opinions.
- Special attention for directives in environmental law field
- (*“la legislazioni ”per prinzipi”*, Paolo Dell`Anno, 2008, Risk for the rule of law (legal certainty))

- **Sustainability / Sustainable Development in EU Primary Legislation**

- Preamble TEU (**taking into account** the principle of sustainable development [...] within the context of environmental protection)
- Art. 3, 3 and 5 TEU (internal market shall **work for** the sustainable development of Europe based on [...] and a high level of protection and improvement of the quality of the environment.) / the Union shall contribute to [...] the sustainable development of the Earth)
- Art. 21, 2, f TEU Promote international help in order **to ensure** sustainable development
- Art. 11 TFEU (Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to **promoting sustainable development.**)
- Art. 191 TFEU (**indirectly** - Union objectives on environmental protection)
- CFREU Art. 37 (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**)

- **Introducing sustainability /sustainable development in constitutional provisions (examples of some EU Countries)**
- **Portugal** (art. 66, 2 Ensure environmental protection in the framework of sustainable development / art. 81 well-being and sustainable development as high state priority)
- **Switzerland** (art. 73 *Nachhaltigkeit and state competences*)
- **Belgium** (art. 7 sustainable development 3 pillars and intergenerational solidarity)
- **France** (*Charte de l'environnement 2004 , développement durable*, Preamble and art. 6) Similar to Brundtland approach
- **Germany** 20a Basic Law / also a Legislative Proposition for a 20b BL (Sustainable development in a wider perspective, including intergenerational equity/ *Generationengerechtigkeit* )
- Europeanization of Sustainability?
- Recognition x Implementation (enforcement)?

# Sustainability and Environmental International Law

## 4 main different phases

**I - End of the 19th Century and Begin of 20th Century**

**II - 1945 - 1950s (International Organizations )**

**III - from 1960s or from 1970s** (Declaration of Stockholm (1972) and „Brundtland Report in 1987 (World Commission on Environment and Development: Our Common Future).“ Growing concerns about environmental damages and impacts as „side effects“ of state and economic activities)

**IV - 1992-1997 and from 1997** (Rio 92, Agenda 21, [...], Rio+20 (three pillars clearly defended) / Climate Changes Agreements[...])

- **Some examples of the controversy of the legal comprehension of sustainable development in International Law**

- Policy principle?
- Soft law?
- Meta-principle?
- “Twilight” norm (BEYERLIN)?
- Normative concept (DUPUY)?
- Connective principle/*Verbundsbegriff* (KAHL);

- **Some Remarks**

- Parallel development between EEL and EIL, but with important differences;
- Potential of the EU as a „global player“ on the international level of environmental protection (KRÄMER, 2006).
- Dynamic „Multi-level system“ of the EU level and significant tendency of Europeanisation of the national environmental law and policy levels (also procedural and organization levels)
- Certain common comprehension about sustainability from a legal approach, but not necessary talking about ecological sustainability (as strong sustainability)

- Procedural environmental rights as part of an idea of sustainability?

- Procedural Environmental Rights in Europe
- 3 Elements (milestones) are already present in EU and national levels (and also international law level) (Aarhus-Convention Articles. 1, 4, 6, 9); (Principle 10 Rio-Declaration):
- **(a)** right on access to information(Art. 4);
- **(b)** right to public participation in decision-making (Art. 6);
- **(c)** right on access to justice in environmental matters (as much as necessary to enforce the two others rights) (Art. 9)

- **C. The legal approach of the idea of sustainability in the Mercosul (Southern Common Market)**
- **Mercosul:** Brazil, Argentina, Paraguay, Uruguay, d Venezuela (later inclusion) and Bolivia (later inclusion)
- Other countries are only associated (not State Members)
- Mercosul established in 1991 in Assunção (Paraguay)
- It basically aims at promoting free trade of goods, services, and production inputs.

• Source of the figure below: Portal Brasil (15/07/2017)

# MERCOSUL



- **I. Political and normative basis for sustainability in Mercosul:  
main steps**
- **Step One - Foundation Treaty: Treaty of Assunção 1991  
(Brazil, Argentina, Paraguai, Uruguay)**
- Absent of detailed prescriptions regarding environmental protection and sustainability
- A simple mention in the Preamble:
- In order to guarantee and enforce a common and integrated market towards economic development and social justice, **the best use of natural resources should be improved, as well as environmental protection**, common infrastructure, coordinative macroeconomic policies

- **Step Two - Framework Agreement of 2001 regarding environmental protection: general provisions**

- **Preamble:** relevance of cooperation on environmental protection, in order to achieve a better life quality and sustainable development
- **Arts. 1 and 2** - Reaffirms the commitment with Rio 92 Declaration principles in order to incorporate them into activities/policies of Mercosul
- **Art. 3, “a” and “b”:** declaration to enforce environmental protection as a cross-section matter to all other policies
- **Art 3, “c”:** declaration to enforce public participation\Arts. 5
- **Arts. 5 and 6** – main core regarding cooperative activities by State Members
- **Art. 8** – system for solving controversies regarding interpretation and application of the provisions.

- **Normative and political problems regarding provisions of the Treaty of Mercosul:**

- lack of normative effect (non-binding effect);
- Absent of sanctions in case of violation (non observation) of the legal provisions;
- Soft law?
- Weak directive for a common action in Mercosul;
- Priority of economical and commercial issues;
- Asymmetry and political challenges between countries;
- Absence of a effective Latin American Environmental Law;
- Is there really a common view to support sustainability?

- **Introducing sustainability /sustainable development in constitutional provisions (examples of countries integrating Mercosul)**

- **Brazil**

- art. 170, VI environmental protection as general principle of the economic order;
- art 225, intra- and intergenerational concern regarding environmental protection

- **Argentina**

- art. 41 provision similar to Brundtland's sustainable development (derecho a un ambiente sano, equilibrado, apto para el desarrollo humano y para que las actividades productivas satisfagan las necesidades presentes sin comprometer las de las generaciones futuras)

- **Venezuela**
  - Art. 128 State policies should be in accordance with the premises of sustainable development
- **Bolivia**
  - many references to sustainable use (e.g. Art. 108, 15), also sustainable development (art. 346) and principle of sustainability (art. 186)
- **Ecuador**
  - Art. 71 Rights of nature (derechos de la naturaleza) or rights of mother earth (Pacha Mama)
- Recognition x Implementation (enforcement)?

## **Aspects from EU Law that might contribute for the improvement of Mercosul Law, specially regarding sustainability**

- semantical and conceptual approach (anthoprocentric)
- effective integration with other sectorial policies
- influence from international law
- binding effect
- Sanctions
- Institutional development with different kinds of normative rules and control institutions
- Enforcement of procedural rights and environmental policies

- **Final remarks**

- Important distinguishing of semantical, historical, conceptual and normative aspects between sustainable development, ecological/environmental sustainability;
- Environmental sustainability and sustainable development (anthropocentric approaches) have been the mainstream approach in terms of legal rules, including the EU Primary law experience, which shows important legal effects (specially art. 11 TFEU and arts. 191-193 TFEU); The same can be said about Environmental International Law and domestic constitutional law (although some remarkable examples should not be denied);
- This evidence does not mean that the above mentioned approach is better than an ecological sustainability approach;
- (continues)

- The experience of Mercosul, regarding its main legislation, mentions the importance of sustainable development (and environmental sustainability), but do not establish minimum legal effects that should bind and enforce Member States to act;
- Some historical and political reasons might help understanding this situation (recent constitutionalism of South America has incorporated significant constitutional provisions regarding environmental law and sustainability/sustainable development). But they do not substitute lacks that should be development at the supranational level.
- The EU experience can contribute to point out some experiences regarding minimum legal effects that contribute for the development of an adequate legal approach of (ecological) sustainability

- THE END

- Thank you!

- Marco Túlio R. Magalhães
- PhD Student
- Universidade de São Paulo (Brazil) and Freie Universität Berlin (Germany)
- Contact: [marucosam@yahoo.com.br](mailto:marucosam@yahoo.com.br)